

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.

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**JOINT APPENDIX
VOLUME 6**

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

HONORABLE BARRY L. BRESLOW

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PEEK BROTHERS CONSTRUCTION,

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Plaintiff,

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vs.

Case No. CV20-01375

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SR CONSTRUCTION,

Department No. 8

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Defendant.

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TRANSCRIPT OF PROCEEDINGS

16

Hearing on motion to compel arbitration and stay litigation
January 14, 2021

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APPEARANCES:

18

For the Plaintiff:

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Emilee Hammond

Attorneys at law

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Reno, Nevada

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For the Defendant:

Noah Allison

Attorney at law

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Las Vegas, Nevada

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Reported by:

Isolde Zihn, CCR #87

1 RENO, NEVADA, THURSDAY, JANUARY 14, 2021, 11:05 A.M.

2 THE COURT: Good morning, counsel.

3 If everybody could turn on their video and audio.

4 Okay. Good morning.

5 I'm Judge Breslow, presiding judge in Department 8.

6 This is the time and place set for a hearing on

7 defendant's motion to compel arbitration and stay the

8 litigation in case number civil 20-1375, Peek Brothers

9 Construction versus SR Construction.

10 We are proceeding this morning virtually, as we have

11 for several months, on account of the global COVID-19

12 pandemic. We are allowed to have court hearings this way,

13 that is, pursuant to simultaneous audiovisual means as

14 allowed by Nevada's Supreme Court Rule Subpart 9 and various

15 administrative orders of Nevada's Second Judicial District

16 Court.

17 The hearing this morning is open to the public via a

18 link on the court's website.

19 The Court recognizes its court clerk, Ms. DeGayner,

20 and its certified shorthand reporter, Ms. Zihn, who, like the

21 Court itself, are joining from Washoe County, Nevada.

22 Starting with counsel for plaintiff, Peek Brothers.

23 And ladies first. Will you please identify yourself for the

24 record; also what county and state you're joining us from.

1 Ms. Hammond.

2 MS. HAMMOND: Good afternoon, Your Honor.

3 Emilee Hammond, on behalf of Peek Brothers

4 Construction.

5 And I am joining you from Washoe County.

6 THE COURT: Excellent. Thank you. Nice to see you.

7 Mr. Aman.

8 MR. AMAN: Nathan Aman, also joining from Washoe

9 County, on behalf of Peek Brothers.

10 THE COURT: Thank you very much.

11 Mr. Allison, on behalf of the defendant.

12 MR. ALLISON: Good morning, Your Honor.

13 Noah Allison, appearing on behalf of SR Construction;

14 joining from Clark County, Nevada.

15 THE COURT: Excellent. Thank you.

16 Well, it's defendant's motion to compel arbitration

17 and stay, so let me hear, of course, first from the defense,

18 then plaintiff, and then we'll close up with defense.

19 I, of course, reserve my right to interrupt freely

20 and often to question, debate, challenge and better

21 understand your positions.

22 And let me say as a preface to all sides that, first

23 of all, I apologize if this matter has been submitted for

24 over 60 days. I know you're waiting for an answer from this

1 Court so that you can either move forward, based on the
2 Court's decision, or if a party is sufficiently aggrieved,
3 take it to a different court for immediate appellate review.
4 But it's a product of, we had the holidays, and we've had
5 what's going on outside on many different levels.

6 So I apologize to all counsel and your respective
7 parties for the delay associated with the Court deciding that
8 a hearing would be beneficial, and then finding a date that
9 worked.

10 I also apologize that we started a few minutes late
11 because I accidentally knocked my camera off my laptop onto
12 the ground and had to put it back together quickly before the
13 hearing. But levity aside, I know this is an important
14 issue.

15 But, you know, unless I'm wrong, it really boils down
16 to the Court's view of the question of whether the dispute
17 between your clients involves an issue of fact or law which
18 the contractor is required to arbitrate with the owner under
19 the prime contract. Because it seems like the language of
20 the subcontract indicates that the contractor and the sub are
21 not obligated to arbitrate, unless both A and B or 1 and 2
22 apply; one being that the prime contract has an arbitration
23 requirement. It does. So we're really left with part
24 two: that the particular dispute between the contractor and

1 the sub involves issues of fact or law which the contractor
2 is required to arbitrate under the terms of the prime
3 contract.

4 So, I guess, by a show of hands, does anyone disagree
5 that's really what we're here to discuss? I mean, is it more
6 than that, less than that, or other than that? If you
7 disagree, please raise your hand.

8 All right. So we're on the same page on what we're
9 here to do. All right.

10 So the movant should please go forward, make argument
11 as to that point and anything else you believe would inform
12 the Court as to their view.

13 Please proceed.

14 MR. ALLISON: All right. Thank you, Your Honor.

15 I appreciate your remarks. And I'm going to try to
16 just cut to the issue that Your Honor referenced.

17 I know Your Honor understands very well the standards
18 and preferences for arbitration with respect to the case law
19 and NRS Chapter 38, so I'm not going to belabor that, but
20 that is important, I think, for the way you need to approach
21 your decision.

22 THE COURT: There's a general -- I wouldn't use the
23 word "bias," but incentive, a general acceptance of the idea
24 that the parties have decided to agree to resolve their

1 differences other than with access directly to the Court.
2 That's to be enforced and generally encouraged.

3 Now, there's a whole body of law -- not law --
4 there's a whole bunch of legal notes, law school notes,
5 papers by neutrals, litigants' counsel, who have said that
6 that's a noble idea gone astray over the last 25 years
7 because of the time and expense, savings that hasn't really
8 borne out particularly these very complex, heavy-lift,
9 three-arbitrator, JAMS arbitrations in San Francisco with
10 people from around the country and the world. It costs just
11 as much, takes just as long. But it's a noble idea, and the
12 judiciary, by and large, seems to review these in a way to
13 encourage this.

14 So that's the law, and I generally accept that as
15 guiding this Court's principle, if it's a close call.

16 MR. ALLISON: Understood. Thank you.

17 I'll set the table a little bit with just describing
18 the delivery method of the project. It's in my brief, but I
19 think it's important. I think it goes to the heart of why
20 this is required of the arbitrator under the prime contract.

21 This is for the construction of the hospital that's a
22 Sparks medical facility.

23 THE COURT: I've driven by it many times on my way to
24 the eye doctor, who offices 100 or 200 yards away from there.

1 Big, giant project. It's going to serve this community,
2 hopefully, well for many years. And the people that live
3 here should be thrilled that people are investing this in
4 this community.

5 MR. ALLISON: Yes. And thank you.

6 And as is typical for very large projects like this,
7 the delivery method is a cost-plus-GMP method.

8 And, Your Honor, I don't want to insult -- if you're
9 familiar with how a cost-plus-GMP contract differs from a
10 lump sum contract, I won't get into it too much, but that's
11 the key.

12 And that's why, when Peek Brothers makes the argument
13 that -- the way we're arguing is, that every time there's a
14 dispute between a sub and a general, it must be arbitrated,
15 that's not the case. But it is the case quite often when
16 it's a lump-sum -- when it's a cost-plus-GMP contract. And
17 I'll explain why.

18 In a cost-plus-GMP contract, the owner is obligated
19 to pay for the costs of construction, plus a fee to the
20 general contractor. It's limited to the guaranteed maximum
21 price. But the goal and the hope and prayer of the owner is
22 that, whatever the project costs, and the fee of the general
23 contractor, is going to come in below the guaranteed maximum
24 price; meaning, you know, the project could be -- the

1 guaranteed maximum price could be a million dollars, and if
2 the cost of the project comes in at \$800,000, it's great for
3 the owner. He only has ended up paying for the cost of the
4 project, plus the guaranteed maximum price.

5 The cost of the work includes everything that the
6 general contractor pays to the subcontractor. That includes
7 change orders, typically.

8 When there's a -- so let's take, for example, an
9 earthwork subcontractor like you would have for Peek
10 Brothers, and let's assume that it's -- I am going to use
11 round numbers -- there's a hundred-thousand-dollar contract
12 with them. And that's the line item for earthwork in the
13 million-dollar-guaranteed-maximum-price contract.

14 If there's change orders to the earthwork contractor,
15 that line item goes up by whatever the change order is. So
16 let's say there's a \$50,000 change order. So it's \$150,000.
17 Well, where does that come from?

18 That comes from a contingency line item that's in the
19 contract. So 50,000 in contingency comes out and goes in the
20 line item for the earthwork contractor, which the owner has
21 to pay for.

22 Then, at the end of the project, you add up all the
23 costs, and if it's below the guaranteed maximum price, the
24 contingency item, what's left of it, is crossed out, and the

1 owner doesn't have to pay that.

2 So my point is, and why this is so important to this
3 matter, is that when a subcontractor makes a change order
4 request on a guaranteed-maximum-price-lump-sum -- or
5 cost-plus project, the -- lost my thought. The -- hang on a
6 second. I've got to get my --

7 THE COURT: That's okay. I can have the court
8 reporter read back the beginning of the sentence, if you'd
9 like.

10 MR. ALLISON: No, thank you. That's not necessary.

11 So when there's -- when the subcontractor has a
12 change order on a guaranteed-maximum-price contract, and it
13 increases the line item for that work, that's extra money out
14 of the owner's pocket, no matter what. He's got to pay for
15 that.

16 So when a subcontractor's change order has merit,
17 obviously the owner is going to be happy to pay for that
18 because it's part of the cost of the work, and it should be
19 increased.

20 When the subcontractor's change order lacks merit,
21 meaning it's not based on -- it shouldn't be included as a
22 cost of the work because it was due to an error or a problem
23 caused by the subcontractor itself -- which is the
24 allegation -- our allegation in this case -- the owner should

1 not have to pay for that. And that's exactly what has
2 happened in this case.

3 Peek Brothers has made a change order demand in this
4 matter. SR Construction is a general contractor, which kind
5 of is in the middle, and it kind of acts as an advocate for
6 both the sub, when necessary. The owner is an advocate for
7 the owner and the sub. That's what a good general contractor
8 does.

9 SR looked at the change order and said, "This really
10 doesn't have any merit," and it advised the owner as such
11 that: We're being asked to give a change order to the
12 subcontractor. It's going to cost you, Mr. Owner, an extra,
13 whatever, hundred thousand dollars. What do you think? We
14 don't think it has merit.

15 Well, the owner -- and you saw the exhibit -- wrote a
16 memo and said: Absolutely not. We refuse to pay this change
17 order. SR, if you try to bring it to us, we are going to
18 tell you: Absolutely not.

19 So that now puts SR in the middle of this thing, so
20 what do we do? Peek Brothers moves forward and files --
21 proceeds to demand its change orders. And now we have to
22 either agree to proceed with litigation in this forum, or we
23 go ahead and we -- recognizing that we have exposure to the
24 owner for exactly what we have exposure to -- the owner might

1 not -- doesn't agree with it, we now have the need to bring
2 it into arbitration. So that's what we did: We demanded
3 arbitration.

4 We named the owner in the arbitration. And the
5 reason why you name the owner in the arbitration is because,
6 while we agree the owner and SR are completely on the same
7 page that it lacks merit, at the end of the day, the
8 arbitrator in this case is going to have to say, if things
9 go -- if things were to go, for example, Peek's way --

10 THE COURT: They would award against the owner, and
11 the owner would back-charge the general.

12 MR. ALLISON: Right. So we would be stuck. And if
13 this thing goes into two different forums, if we have to go
14 through this forum with Peek Brothers, the arbitrator has no
15 obligation to do what you say. If this goes through
16 arbitration with the owner, which is where we would have to
17 go on that issue, identical issue, you don't have to do what
18 the arbitrator says. So we have this complete disjunction
19 that is cured by the contract documents themselves, which is
20 why we get to the heart of the issue, why this involves
21 issues that must be arbitrated under the prime contract.

22 And then I'd refer you -- because I think there was
23 another argument made by Peek Brothers that the prime
24 contract doesn't really speak to involving the subcontractor

1 on claims.

2 Well, I'm going to point to the section in the -- in
3 a201 -- which I'll give you the exhibit number in a
4 moment -- Section 15.4.4.4 says, "Arbitration at the
5 contractor's election may include subcontractors to the
6 contractor that the contractor deems relevant to the matter
7 in dispute, and upon subcontractor's request, the arbitrator
8 shall decide all or a particular portion of a dispute between
9 the contractor and a subcontractor. And as the contractor
10 may request, the arbitrator shall speak to the extent that
11 the arbitrator's decision regarding a dispute between the
12 contractor and owner and the dispute between contractor and
13 subcontractor are interrelated."

14 That is the arbitrator's obligation. That is also
15 standard AIA language. That's the standard AIA a201
16 language.

17 So it's not anything funky here, Judge. This is
18 what's normal and typical in a general condition to a
19 contract. And that is exactly what we want -- where we go.
20 If we get into arbitration, and Peek Brothers wants to go to
21 the arbitrator and say, "I want you to speak as to how these
22 are interrelated," the contract documents allow that -- allow
23 Peek Brothers' owner, SR, to ask the arbitrator to do that.
24 But that's something that everybody contracted to do.

1 THE COURT: Well, let me ask you this, though. Not
2 to interrupt. Let's look at it for a minute from Peek
3 Brothers. They say, "Okay. First of all, our contract
4 doesn't have an arbitration agreement." And, I mean -- no.
5 Let's back up.

6 The agreement that you have with the owner is between
7 you two. Now, I realize the jurisprudence suggests that a
8 third-party sub like this can be brought in, and that's one
9 of the bases that your client is suggesting the Court should
10 look at this under.

11 But they say: The exception here -- it's rendered
12 meaningless; right? This is Peek Brothers: This doesn't
13 mean anything -- I'm pointing to my other screen here, where
14 I have a copy of Exhibit D, Section W, the subcontract
15 number, the dispute resolution -- right? -- that I went over.
16 It says you have to satisfy A and B or 1 and 2. "The
17 particular dispute between a contractor and sub involves
18 issues of fact or law which the contractor is required to
19 arbitrate under the terms of the prime contract."

20 Now, Peek Brothers says, if this Court views it the
21 way you're suggesting it should, then that's pretty much
22 everything; that the exception subsumes the rule. This
23 should be: We don't have to arbitrate, you know, unless.
24 But if you're saying that just because the general is in the

1 middle of it, they're always going to be in the middle of it,
2 or they're often going to be in the middle of it. And so if
3 you want us to agree to arbitrate all disputes, you should
4 say so. This just gobbles up almost everything in its sight.
5 So the Court is struggling with that a little bit.

6 How do you, Mr. Allison, respond to that?

7 MR. ALLISON: I have a great response, Judge, and
8 that is: The illustration I gave you was for a cost-plus-GMP
9 delivery system.

10 THE COURT: Right.

11 MR. ALLISON: There's other kinds. In fact,
12 remember, this master subcontract agreement that you're
13 referring to is intended to govern all contract relationships
14 between SR and Peek Brothers. The idea is that they enter
15 into this master agreement, and as projects come along, a
16 work order is issued, which incorporates the terms and
17 conditions of the master contract.

18 So had this marriage not been dissolved five months
19 into it, and we were -- had been doing this for years and
20 years and years, we would have lots of successful projects
21 under our belts. And some of those, many of those, would
22 involve lump-sum contract arrangements with the owner.

23 Now, a lump-sum is completely different than a
24 cost-plus contract. The owner pays -- promises to pay an

1 amount of money irregardless of whether it's -- it has no
2 bearing or relation to what it actually costs. The owner is
3 just willing to pay a sum amount of money to get his
4 construction project delivered.

5 If that's the case, and there's a dispute between.
6 SR and the subcontractor over that, over a change order, and
7 there's no -- we're not seeking -- there's no change between
8 the owner and the GC, the change order means nothing anymore.
9 It's meaningless, because the owner doesn't -- he's always
10 going to pay the lump-sum amount. So it doesn't mean
11 anything.

12 In that situation, which would be pretty common, Peek
13 Brothers would be absolutely correct to say that that would
14 be something that doesn't involve --

15 THE COURT: That's not in play here, because we have
16 a cost-plus contract.

17 MR. ALLISON: Yes, this is a cost-plus contract.

18 THE COURT: I understand. But, so, I mean -- okay.
19 But the sub -- well, I'm just trying to think out loud here.
20 The sub is then, I guess, wedded to or stuck with the fact
21 that the general contractor had a cost-plus contract with the
22 owner as opposed to a lump-sum. And if it was a lump-sum
23 contract, then the arbitration and dispute resolution
24 analysis might be different.

1 All right. Let's do this, Mr. Allison. I'm going to
2 get back to you. I'm going to make sure everyone has their
3 full opportunity to explain to the Court their view, and why
4 the Court should see it that way. But let me talk to those
5 opposing the motion.

6 Who would like to address it first?

7 MR. AMAN: Nathan Aman, on behalf of Peek Brothers.

8 THE COURT: Thank you.

9 MR. AMAN: I guess it's still morning, Your Honor.
10 Good morning.

11 First of all, I want to talk about the very issue
12 that you started with: Why not arbitration? And in our
13 experience, just as Your Honor discussed, the triple A
14 arbitration for construction cases is cumbersome. The
15 discovery rules are vague, hard to enforce. There's issues
16 throughout it. We've gone through this with my office on
17 multiple occasions, and you end up paying three different
18 arbitrators from all over the country that don't necessarily
19 understand the manner and practices of this particular
20 locale, so it gets into all sorts of issues. We do not want
21 to be involved there.

22 In many cases, arbitration is preferable, especially
23 in the Court's Arbitration Program. We like utilizing the
24 Arbitration Program because it does work out to be cheaper

1 and more effective.

2 But in our experience going through triple A, that's
3 not the case. It was born with good intentions, but it has
4 morphed into an animal unto itself that becomes expensive,
5 cumbersome, time-consuming. And this case isn't necessary
6 for it.

7 Maybe if we had a delay damages case where it was
8 very important to discuss the construction schedule and
9 everything that went wrong with the construction schedule
10 cases we've had before, then it might be important to have
11 the experienced panel to really understand that process.
12 That's not what this case is about.

13 The question then becomes: Why does SR want it?

14 It has this, I want to say, improper idea that the
15 owner is going to be required to pay for this. And as I'll
16 explain, that's not the case.

17 And as Your Honor also pointed out, one of the most
18 important issues here is the arbitration provision itself.
19 The arbitration provision here is the exception; not what is
20 mandated, but the exception. And once we discuss this a
21 little bit further, we'll talk about the language. But the
22 facts are important.

23 And in S. R.'s pleading they essentially ignore the
24 facts and focus on the contractual relationship between the

1 prime contractor, the owner, and it truly has no relevance to
2 this issue before us today.

3 THE COURT: Well, why not? Because you just heard
4 Mr. Allison say, "Judge, if you do not order arbitration
5 here, we're going to be dual-tracking this."

6 Maybe my response to Mr. Allison, then, along the
7 lines of, "Well, maybe, then hit the pause button on the
8 arbitration, if this case goes to litigation, and see what
9 happens here before you have to go to arbitration."

10 Because if Mr. Allison's client prevails, if this
11 matter goes to litigation, there's nothing to arbitrate with
12 the owner. On the other hand, if they don't prevail, well,
13 then that's a horse of a different color. So what do you
14 think of his dual-tracking argument: "Judge, let's try to
15 avoid that, if we can"?

16 MR. AMAN: Well, Your Honor, I don't think there's
17 going to be a dual-tracking issue. I want to go into the
18 facts of this case because that's important, because that's
19 the entire arbitration provision right there. It's talking
20 about the facts that give rise to the arbitration provision
21 or the law. And at this point, there is no law, there's no
22 NRS 624 provision that's mandating arbitration, so it's all
23 about the facts. And then you get into the very confusing
24 language that goes into the AIA 133 and the AIA 201.

1 Let's talk about the facts here. We have a
2 contractual relationship between the owner, which is UHS, and
3 SR Construction to build a project. Whatever their contract
4 is, it is.

5 Then you have Peek Brothers' Construction contract
6 with SR Construction, which the final contract was
7 approximately three million dollars.

8 So under that contract, our client, Peek Brothers, is
9 mass grading. So the mass grading involves essentially
10 getting all of the soils prepared, dealing with preparing the
11 building pad, dealing with preparing roadways, things along
12 those lines.

13 This issue is focused on the building pad. So when
14 Peek Brothers bids a project like this, they implied --
15 utilize their own means and methods to come to the end
16 result: It's going to cost this much because we are
17 utilizing this process to move the dirt, place the dirt, haul
18 the dirt, to store the dirt, and to do all of this work.

19 So in doing that, Peek Brothers, in relation to the
20 building pad, bid this project in this way: Per the building
21 pad, you have the mass grading. And then, before the
22 foundation, the concrete goes in, you have what's called
23 subbase roof. So Peek Brothers' plan, the way they bid this
24 is, you do the mass grading. And now you're a couple feet

1 below the subgrade elevation, below where the concrete pad is
2 going to go.

3 What Peek Brothers did is, once they trenched the
4 footings, the concrete footings, the building pad, the
5 plumbing, the electrical, they pull out those spoils, set
6 them there. The plumber comes in, electrician, concrete
7 foundation person come in, they do all of their work, and
8 then some of the spoils go back into those trenches. But
9 then you have an extra amount of stockpile, spoils.

10 Peek Brothers' means and methods of bidding this in
11 doing projects like this is to use those spoils to bring the
12 pad up to subgrade. That's where the bid came from, and
13 that's the process by which Peek Brothers bid the project.

14 Now you get into April, 2020. And these facts are
15 laid out in the Complaint, and those are to be accepted as
16 true as part of this process.

17 April, 2020, you have a meeting at the project
18 involving various subcontractors, so there's various
19 witnesses that would be able to testify to these issues.

20 You have an individual named Fred Kravetz, who is
21 a -- I believe his title was a general superintendent at the
22 time, for SR Construction.

23 Mr. Kravetz at the meeting directs and requires Peek
24 Brothers to immediately bring the pad to subgrade levels.

1 However, at that point in time, the trenching had not been
2 done, so there are no spoils.

3 THE COURT: Any of it?

4 MR. AMAN: No. At that point in time, just mass
5 graded, and they were going to go in next, do the trenching,
6 and then utilize that to bring it up to subgrade.

7 THE COURT: Well, I'm assuming you're suggesting that
8 what the evidence suggests he did, because he was in a bit of
9 hurry or wanted to move things along, he didn't want to wait;
10 right?

11 MR. AMAN: Correct, Your Honor.

12 THE COURT: Again, Mr. Allison, the fact that I'm
13 allowing this level of -- this has to do with the issue of
14 whether the issues of fact, you know, or law, are such that
15 the contractor is required to arbitrate them under the terms
16 of the prime contract. So I'm allowing this level of detail,
17 and I'm not -- you know, it's not a bench trial. I'm not
18 going to make any findings that somebody did what they
19 shouldn't have, or breached or -- I'm just -- I want to hear
20 the background point of view of those opposing the motion.
21 I'm sure you will educate the Court as to points you think
22 are important. But please continue.

23 MR. AMAN: Yes, Your Honor.

24 And these are key issues in terms -- they're also

1 | pled in our Complaint, so --

2 | THE COURT: Right to the point. Go ahead.

3 | MR. AMAN: So we have this meeting in April, 2020
4 | with Mr. Kravetz. He directs Peek Brothers. Peek Brothers
5 | at that meeting says, "This is going to cost you. It's going
6 | to be more expensive. We have to truck in these materials
7 | that we would have used."

8 | He says, "No. I need to move on this timeline. I
9 | need to get this done," and orders Peek Brothers to bring in
10 | 150,000 square feet of material, bring the pad up to
11 | subgrade. Peek Brothers has to go back and trench. So now
12 | we have extra stockpiles, extra spoils, that have to either
13 | be trucked off the project or utilized somewhere else on the
14 | project.

15 | So this is going to be a big fact-intensive case
16 | involving Mr. Kravitz's misguided decision to tell them what
17 | to do.

18 | The background is going to show that Mr. Kravetz had
19 | various issues with Peek Brothers. He didn't understand the
20 | process. He was reprimanded by superiors. There are various
21 | issues that are going to come forth to the extent that he was
22 | reprimanded for cussing at Peek Brothers' employees. There's
23 | a lot of issues; so much so that he was, my understanding,
24 | completely divested of communicating with Peek Brothers, at

1 all, after these transactions because of how sideways it got.

2 It appears that this was a demand by Mr. Kravetz not
3 understanding the process, demanding to keep some sort of
4 timeline, and that is the totality of the issue. It is a
5 misguided decision by Mr. Kravetz to order Peek Brothers to
6 do work that was unnecessary.

7 And this gets into the issue of change orders. This
8 is not your typical change order process, because your
9 typical change order process is done by the sub presenting a
10 change order. So it's something they ran into the field, and
11 saying, "This needs to be done. Can you get it approved?"
12 And then it goes to the owner.

13 This was a situation where SR Construction, through
14 Mr. Kravetz, was demanding Peek Brothers do this work. Peek
15 Brothers says, "It's going to cost you." My understanding,
16 he said he didn't care. They go forward and do the work. So
17 the change orders in this situation are a little
18 disingenuous. They're really invoices to SR Construction.

19 This gets into the issue of: Does the owner have any
20 responsibility? Under those facts, absolutely not. So the
21 owner's response is absolutely proper that this is an SR
22 Construction/Peek Brothers' issue, and has nothing to do with
23 facts or issues related to the prime contract because it was
24 a mistake, a misguided direction by SR Construction. That's

1 the totality of the issues here.

2 So then we have to move over and get into the
3 arbitration provision. Let's go back and go through exactly
4 what that says.

5 The arbitration provision out of the master
6 subcontract agreement, Exhibit D, paragraph W, states, "The
7 contractor and subcontractor shall not be obligated to
8 resolve disputes arising under this subcontract by
9 arbitration, unless" -- the Court pointed out -- "the prime
10 contract has an arbitration requirement, and a particular
11 dispute between the contractor and subcontractor involves
12 issues of facts or law which the contractor is required to
13 arbitrate under the terms of the prime contract."

14 THE COURT: Well, Mr. Allison says it does. He says,
15 this is exactly the type of dispute that his client is
16 required to arbitrate with the owner, with the hospital.

17 And you heard me say, "Well, this is supposed to be
18 an exception. And it seems like, if I view it the way you,
19 Mr. Allison, are suggesting it should, the exception is sort
20 of swallowed up by almost everything, you know, where the
21 general gets in the middle of it. Then it seems a little
22 broad."

23 On the other hand, he said, "Yeah, but, Judge,
24 that's" -- my understanding, my takeaway from the comments --

1 "Judge, this is sort of the world we're in with the cost-plus
2 contract here, as opposed to a fixed-price contract, and so
3 it is what it is. This is sort of a standard form,
4 experienced parties. This is just, unfortunately, the
5 agreement that they signed."

6 How do you respond to that?

7 MR. AMAN: Your Honor, I would say this is not a
8 standard agreement, by any means. AIA contracts aren't
9 standard by any means. This contract is not standard.

10 As we're going into dissecting this language, you get
11 to the heart of it. It's ambiguous; it's confusing; it
12 doesn't make sense. And under our rules, that is construed
13 against the drafter, and that's SR Construction. If SR
14 Construction wanted everything arbitrated, it would say so.
15 If SR Construction wanted it arbitrated if it was a cost-plus
16 or GMP or some other type of contract, the arbitration
17 provision would say so. It does not say that.

18 THE COURT: Well, again, I don't want to misstate Mr.
19 Allison's arguments. He didn't say, "Judge, everything."

20 I was just observing that it seems to me where we're
21 getting close to that, because a good-faith argument could be
22 made in the different scenarios the Court is envisioning,
23 that it would be a dispute, factual dispute, with the owner,
24 and if the sub is involved, well, we're arbitrating.

1 So, you know, that's just my interpretation. I don't
2 think Mr. Allison conceded that. But he recognized the
3 Court's concern, is the way I put it.

4 MR. AMAN: Your Honor, it is a provision. This
5 provision is confusing. It's stating that arbitration is the
6 exception, not the rule. And then it gives this vague
7 discussion about what the rules are. And then it cites to
8 the prime contract.

9 Well, the prime contract does not require, is not
10 obligating Peek Brothers to arbitrate under it. Mr.
11 Allison's very section that he cited from the AIA 201, which
12 is Exhibit 3 to our opposition to the motion to compel,
13 Section 15.4.4.4, that is all about the contractor's
14 election; he may request the subcontractor be involved. That
15 is nothing to mandate the subcontractor to be involved. That
16 is the general contractor asking the subcontractor to be
17 involved in the arbitration between the owner and the prime
18 contractor. There is nothing in AIA 133 or the AIA 201 that
19 mandates or even sheds any light on the provision that we
20 discussed on the master service agreement.

21 They don't link up; they don't make sense together,
22 at all. So we have to look at the master subcontract
23 agreement as itself to try to evaluate what the facts are.

24 And whether SR Construction wants to try to take its

1 mistake and go against the owner, that's its right. But the
2 continued representation by SR Construction throughout its
3 pleadings that the owner is absolutely going to be liable for
4 this and the owner is liable for this is false.

5 The owner is never going to be liable for this
6 because this is all stemming from an SR Construction mistake.
7 This isn't a change order type of issue in the normal sense.
8 This is a mistake by SR Construction, a misguided direction
9 by one of its employees to have Peek Brothers do
10 approximately \$140,000 worth of work that was not required.

11 THE COURT: Well, let me -- before I move on, what is
12 the amount in dispute here? I'm just talking in this case,
13 not any other issues that may exist between the general and
14 the owner, between anybody else. How much is Peek Brothers
15 seeking by way of its lawsuit here?

16 MR. AMAN: Your Honor, it was -- I'm going to call it
17 invoiced in two different change orders. One was
18 approximately 13 -- one was approximately \$4,000. That's
19 change order 13. And then you have change order 17, which
20 was the cost of the import, the cost of the trucking. That's
21 approximately \$137,000. So we're talking a little over
22 \$140,000 in this dispute.

23 So when we look at this arbitration provision, we
24 have to again focus on, it's the exception, not the rule, and

1 we have to focus on the facts. This is nothing to do about
2 the contract.

3 To me, it's telling that in none of the pleadings so
4 far about this issue, despite the fact that SR
5 continue -- or Peek Brothers continually points out the crux
6 of this case, the only facts that matter are the decision by
7 Mr. Kravetz. Nowhere in SR's pleadings do they once even
8 discuss Mr. Kravetz, at all, bring up his name; bring up a
9 meeting; bring up a discussion; bring up these allegations
10 that we are making in the Complaint that are going to be
11 supported throughout the case. That is very telling.

12 I don't know why we're going down this road of
13 GMPs. That's not addressed in the master subcontract or
14 agreement. We have the language that we have, to the extent
15 it's ambiguous and should be construed against the drafter,
16 which is SR Construction.

17 And in light of that conclusion, this notion that the
18 owner is going to be responsible for paying for these
19 invoices, that's never going to happen. Whether SR wants to
20 go through the arbitration process and its prime contractor
21 try to prove that, it's not going to go anywhere.

22 This is a separate matter that should not be subsumed
23 into the monster that is the triple A construction
24 arbitration. If SR Construction wants to get the \$140,000

1 from anybody to pay Peek Brothers, they should look to
2 Mr. Kravetz.

3 THE COURT: Okay.

4 MR. AMAN: Thank you, Your Honor.

5 THE COURT: You're welcome. I understand your
6 position.

7 Mr. Allison, there's a lot to unpack there. I'm sure
8 every time you heard a statement that you didn't agree with
9 you made a mental note: When it's my turn, I'm going to jump
10 on that. So now is your turn.

11 Tell me anything you'd like in response to what
12 you've just heard, and then we'll button up why, despite what
13 we've just heard in argument, it is the type of dispute that
14 otherwise would be required, due to the fact that the law
15 ought to be arbitrated between the general and the sub.

16 Mr. Allison.

17 MR. ALLISON: Thank you.

18 So, Your Honor, are you ready to rule on the merits
19 of the case --

20 THE COURT: You heard what I said. I mean, I'm
21 not -- this is not a bench trial. I'm not going to decide
22 whether who wins and how much. I am just trying to stay in
23 my lane here, which is to determine if this is the type of
24 dispute which the general and the sub would be required to

1 arbitrate under its contract.

2 You've heard passionately from those opposing that,
3 "It's not. It's not. It's a -- this rogue guy, this rogue
4 manager instructed something. And it's really not that type
5 of thing."

6 And I assume that you're going to say, "But it is.
7 Any way you cut it, it ends up being the same way."

8 But go ahead, Mr. Allison.

9 MR. ALLISON: Okay. Thank you.

10 Well, you know, I also want to just -- thank you,
11 Your Honor. Peek Brothers filed a Complaint, and we filed a
12 motion to compel arbitration. We haven't had a chance to
13 file an Answer or anything like that.

14 THE COURT: Right.

15 MR. ALLISON: So those facts, again, are to be
16 decided at arbitration.

17 But let me just quickly give you SR's view of the
18 world on this thing.

19 THE COURT: Sure. Because a good lawyer never wastes
20 an opportunity to begin the art of persuasion.

21 MR. ALLISON: Sure.

22 THE COURT: So go ahead.

23 MR. ALLISON: Earthwork is like working in a giant
24 sandbox. You have your site, it's like a sandbox. You have

1 to achieve elevations throughout the project, including the
2 building pad, including everything else around it, including
3 the parking lots, roads, everything that goes through there.

4 And you're given a survey at the beginning of that,
5 tells you what the existing elevations are. And a good
6 earthwork subcontractor will look at that survey and say --
7 and where it needs to go; he'll also know where they need to
8 get it to -- and he'll say to himself: I either need to
9 bring in material or I'll need to export material to achieve
10 the ultimate elevations on this project. And then, based on
11 that, a good earthwork subcontractor will get their bid.

12 Because on this project, unlike some earthwork
13 subcontracts, it was just, "I'm going to deliver you these
14 elevations for this lump-sum price. It wasn't based on
15 quantities, like if I have to bring in so much dirt, it's X
16 dollars a cubic yard. If I export this amount, it's this
17 much.

18 Well, the earthwork -- there's been disputes, and
19 there's also a dispute that is related to this, between SR
20 and Peek Brothers related to the overall elevations and
21 excavations on this project.

22 At the current time, now that Peek Brothers is off
23 the project, there are areas of this project that are three
24 feet too high, up to three feet too high. Not three inches

1 too high; three feet too high. There's an enormous amount of
2 material that SR now has to hire another earthwork
3 subcontractor to export from the project to achieve the
4 elevations that Peek was supposed to achieve.

5 Why is that important? Because if I'm building a
6 building pad, and I have a superintendent tell me to build
7 the pad to elevation first, and do the -- entrench it after
8 you've gotten it to elevation -- which is what is normal and
9 typical. We'll have experts that will say that's what you do
10 on most projects. You build a pad to elevation, then
11 excavate the trenches there.

12 If they needed to build that to elevation, why on
13 earth did they import material to get that pad elevation?
14 They could have gone somewhere else out on the site and
15 scraped up some dirt and moved it over. They imported more.

16 We're going to be able to demonstrate with
17 arbitration that Peek Brothers had absolutely no
18 comprehension of what the elevations were on this project
19 when they did the work. So that's going to be our position,
20 and that's what we're going to argue about in front of an
21 arbitrator.

22 And I want to talk about triple A for a quick moment,
23 too. We're not asking for the legendary triple A
24 construction panel to decide this, that's imported from the

1 most expensive areas of San Francisco and Los Angeles to come
2 to Reno. This is going to be a local, somebody from either
3 Reno or Nevada that's going to be a construction lawyer that
4 knows this stuff, that knows how to read surveys, that knows
5 how the earthwork business works, and they're going to be the
6 ones -- it's going to be a single arbitrator, and they're
7 going to decide this thing in a day or two.

8 If we go your route, Your Honor, the first thing I'd
9 do, if I'm Mr. Aman, is I would demand a jury trial because I
10 know I'm going to lose if I have it in front of a triple A --

11 THE COURT: You know, it's funny you mention that.
12 I'll just hit the pause for a moment.

13 An Administrative Order just went out either late
14 yesterday afternoon or this morning, you know, another
15 Administrative Order from the Second Judicial District, and
16 it just pushed everything back. Courthouse remains closed
17 till March 14th, I think, or March 4th. Every trial that was
18 set to go in February is now in March. I mean, in the
19 pecking order, criminal justice trials where somebody is in
20 custody that has invoked their right to a speedy trial, they
21 go first; after that, and way down below, unfortunately, are
22 civil jury trials.

23 I'm not in any way, shape or form trying to, you
24 know, give the impression that these -- that businesses and

1 people and entities that have bona fide disputes don't
2 deserve their day in court as promptly and safely as we
3 possibly can. But the reality is, if somebody demands a jury
4 now in a civil case, you're looking at 2023. It's just hard
5 to envision a scenario where it's other than that, even
6 though it's just January of 2021.

7 So usually what I'm seeing is, defendants in civil
8 litigation are the ones demanding the juries, not the
9 plaintiffs. Anyway, there you go.

10 Continue.

11 MR. ALLISON: Yeah. Well, in this case, I mean, I've
12 done enough trials to know, and so has everybody on this
13 screen, to know that, if I have a weak -- a case that's weak
14 on the facts, and I'm representing a local subcontractor, I'm
15 going to want to bring in a jury to have that decided against
16 a Las Vegas general contractor, not --

17 THE COURT: Well, no comment there. I'll concede we
18 have experienced, professional and reputable counsel all
19 involved. In fact, it's a pleasure to have counsel at this
20 level.

21 MR. ALLISON: Thank you.

22 So that's all I'll say about triple A.

23 And back to the idea that I think Your Honor was
24 struggling with me, that it seems like this contractual

1 arrangement between SR and Peek is going to result in
2 arbitration every time, I'm going to -- I sat down, and I
3 kind of did a diagram of that, you know, the four quadrants.
4 So you need to look at that provision, Exhibit W -- or
5 paragraph W.

6 And first off, if there's no arbitration provision in
7 the prime contract, there's no arbitration between the sub
8 and -- so there's half the contracts right there. So we
9 can't make Peek Brothers arbitrate with us if there's no
10 arbitration clause in the prime contract.

11 THE COURT: Good point.

12 MR. ALLISON: We can't make Peek Brothers arbitrate
13 with us on the lump-sum for the reason I explained on those
14 issues.

15 Now, there are issues on the lump-sum where I think
16 we could. And I did give two examples in my brief where on a
17 lump -- on a cost-plus, we would probably fail in a motion to
18 compel arbitration with a sub. And that would be if there's
19 a trade damage dispute between two subcontractors, where Peek
20 Brothers runs over the scaffolding, and we had to back-charge
21 Peek and give the scaffold guy a change order. That's a
22 back-charge, and that's not going to touch the owner. So
23 that's -- that wouldn't be decided.

24 And also, if SR is five miles into the -- over the

1 GMP, meaning we are now paying for the project, and I have
2 now a change order with a sub, that's not going to affect the
3 owner. The owner is not going to pay for that. So that
4 would be another example where we wouldn't -- I would fail in
5 a motion to compel arbitration.

6 This is the sweet spot we are talking about. This is
7 not all the time. This is kind of one of those moments when
8 it is required. And that's because, as I explained our
9 position, where all Peek Brothers had to do is go scrape up
10 some dirt somewhere else on the project instead of importing
11 a ton of it and trying to make us pay for it.

12 You know, the owner is telling us, "I'm not paying
13 for that. Why didn't they go over there and scrape up the
14 material? Now I've got to pay to take off all this
15 additional material, too."

16 So that is why it involves issues of fact and law
17 related to the prime contract.

18 THE COURT: There's no counterclaim yet. It's
19 because we're not at that point in this case. You're still
20 determining --

21 MR. ALLISON: Right.

22 THE COURT: -- the scope of the fight, but not yet
23 the merits of the case.

24 MR. ALLISON: I would characterize it -- a

1 counterclaim, I would call it as a setoff. It's a setoff
2 against their change order. It would be, you know, "We had
3 to do all these other things, so it's a setoff" argument.
4 And I think that's an appropriate thing to do anytime on a
5 project is, if you have setoffs, you claim them when there's
6 a claim.

7 So that's going to happen no matter what, and that's
8 something that we think needs to occur in arbitration, which
9 will be decided in a day or two by somebody who really knows
10 this stuff.

11 I think I don't have anything else to say, unless
12 Your Honor has any additional questions.

13 THE COURT: Well, here's what I'm going to do. I'm
14 going to give Mr. Aman two minutes to do a sur-opposition,
15 and then, since it's your motion, Mr. Allison, another minute
16 after that to respond to anything new he says.

17 Go ahead, Mr. Aman.

18 MR. AMAN: Your Honor, I'm going to take this
19 opportunity to simply say we're going to rest on where we're
20 at.

21 I think we've made it very clear that this is a
22 limited dispute involving a decision by one of SR
23 Construction's employees.

24 It's almost like the scenario counsel for SR

1 Construction said: Backing over, it was a mistake, it was a
2 misguided direction. This is the means and methods that Peek
3 Brothers chose, and thereby this dispute has nothing to do
4 with the owner. And the master subcontract agreement, I
5 believe, supports our position.

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 Mr. Allison, anything final final?

9 MR. ALLISON: No. I'm good.

10 THE COURT: Okay. Give me just a moment here to
11 gather my thoughts. I'm going to just put you on mute, but
12 I'll still be here. It will be just about a minute and a
13 half.

14 (Off the record.)

15 THE COURT: All right. We're back on the record.

16 Two things. First thing: Motion to compel
17 arbitration is denied.

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

22 The Court adopts the analysis of the opposition, and
23 plaintiff shall prepare a short order, three pages or less,
24 consistent with its argument today, the Court's observations

1 and questions, and its briefing, run it by defense counsel as
2 to form only, consistent with our local rules on how much
3 time they get, and then submit an order hopefully that
4 defendant agrees as to form -- certainly not as to substance;
5 they've been arguing passionately against it -- and submit it
6 to the Court for review and entry. Submit it by e-mail to my
7 judicial assistant, both in Word form and PDF.

8 In the event parties cannot agree that the form
9 proposed by plaintiff accurately reflects what the Court has
10 just said, defendant shall contemporaneously, with plaintiffs
11 submitting the proposed order in Word and PDF, submit its
12 proposed order in PDF and Word as well, and then the Court
13 will merge or sign one or the other. That's number one.

14 Number two, as important as number one. The Court
15 exercises its discretion under Nevada Supreme Court Rule 252
16 and Second Judicial District Court Rule 6, I'm staying this
17 case, this litigation, other than the entry of this order,
18 for 90 days. No Answer is required; no dispositive motion is
19 required; no discovery; no nothing.

20 On or before April 30, parties are ordered to a
21 settlement conference with a neutral of their choosing;
22 presumably somebody with construction background, but doesn't
23 have to be.

24 If counsel cannot agree on a neutral after good-faith

1 efforts, let the Court know by e-mail that you're at an
2 impasse even at that level, and I'll appoint someone from my
3 large Rolodex of qualified neutrals, the cost of the event to
4 be shared equally, unless you're able to convince one of my
5 colleagues or a colleague in another judicial branch to
6 preside over your settlement conference, and move forward
7 with a settlement conference.

8 I'm going to set now a status hearing for 90 days or
9 so from now and see where everything stands. If you're
10 unable to resolve it after a settlement conference, I don't
11 need to know why, I don't need to know who was the stick in
12 the mud, or which side or who -- "They offered nothing." I
13 don't care. We're just going to go from that point forward
14 rules of engagement; how much time do you need for discovery?
15 We'll do it -- we'll have a concierge judge for purposes of
16 streamlining the proceedings here; understanding that each
17 side has a different view factually of what happened and
18 legally of what the facts that can be proven as applied to
19 the law, what kind of result. I get that.

20 I want to have everyone bear in mind -- and I'm sure
21 they do -- that this Court's experience is, our system works
22 really well for \$50,000-or-below claims because of the
23 mandatory Supreme Court Arbitration Program. And our system
24 works reasonably well for claims, you know, if you add

1 another zero and above.

2 But the middle, the 50 to 250, sometimes the cost of
3 the process can eat up the amount that's being argued, even
4 if there's a fee-shifting provision to the prevailer. But,
5 you know, I'm not trying to condescend here. Everyone knows
6 that.

7 So I don't need to know if you're unsuccessful. I
8 just need to know you tried in good faith, and you couldn't
9 do it. Then we will talk about what happens next the next
10 time I see you.

11 So, you know, 90 days, even in the pandemic world,
12 should be enough time to get this settlement done, settlement
13 conference done, like I said, by April 30.

14 The case is stayed for 90 days. I'll set a status
15 hearing for, I guess, early May. And then game on.

16 MR. ALLISON: Your Honor --

17 THE COURT: So let's start with if either side has
18 any questions.

19 Let me start with counsel for plaintiffs. Any
20 questions about what I'm asking you to do with respect to
21 this order and what I'm asking you -- directing you to do
22 with respect to going through a settlement conference to try
23 really hard to work this matter out?

24 MR. AMAN: No, Your Honor. Perfectly understood.

1 THE COURT: All right. Thank you.

2 Mr. Allison, any questions from the defense?

3 MR. ALLISON: Just a timing issue, Your Honor.

4 I appreciate your order. However, it's my
5 understanding of the law that, on a motion to deny a motion
6 to compel arbitration, that is immediately appealable to the
7 appellate level.

8 THE COURT: Well, the stay doesn't apply to that.

9 MR. ALLISON: I want to make sure my 30 days isn't
10 threatened. I need -- if I need to do that, I just need to
11 know -- we could stay the entry of the order, which would
12 prevent me from having to worry about my appeal rights.

13 THE COURT: Okay. I like that option. I think
14 that's a splendid option as opposed to others.

15 We can stay entry of the order. Yeah. Since it's
16 fresh in everyone's minds, I would like the drafts on my
17 desk, you know, within a week or two.

18 And I'm not trying to have people work unnecessarily,
19 particularly when you're directed to a resolution event. On
20 the other hand, I don't want this to be something that has to
21 be dusted off and re-learned again 90 days from now if the
22 resolution is unsuccessful.

23 But, yes, for purposes of challenging for appellate
24 review this Court's decision to deny the request to order

1 arbitration, I don't want this order to affect the rights of
2 the aggrieved.

3 So, Mr. Aman, any objection if we -- the Court
4 doesn't enter this order; it's just deemed held in abeyance
5 pending the settlement conference?

6 MR. AMAN: No objection, Your Honor.

7 THE COURT: Mr. Allison, does that address your
8 concerns?

9 MR. ALLISON: Yes.

10 THE COURT: All right. So let me -- let's get some
11 dates then.

12 Settlement conference, let's say by April 15th.
13 That's 90 days from today, roughly. Tax day; right? An easy
14 day to remember.

15 And then, a week or two after that I'm going to give
16 you some proposed dates. If you can quickly at least
17 preliminarily check your calendars and see if you're
18 available; and, if not, we'll give you a new date. If you
19 say yes now, and it turns out there's a conflict you were not
20 aware of, we can pick a new date. But let me throw some
21 proposed dates out there the last two weeks of April, see if
22 that works.

23 Ms. DeGayner.

24 THE CLERK: Wednesday, April 21st, at 2:00 o'clock.

1 THE COURT: Okay. Let me start with plaintiff's
2 counsel.
3 MR. AMAN: That works for us, Your Honor.
4 THE COURT: Thank you.
5 And defense counsel.
6 MR. ALLISON: I'm open that day, yes.
7 THE COURT: Okay. That will be the order of the
8 Court. Status hearing at that time.
9 Go ahead, Mr. Allison.
10 MR. ALLISON: One more question.
11 THE COURT: Go ahead.
12 MR. ALLISON: I'm processing your -- you know,
13 remember I have an owner UHS that I have to deal with, as
14 well.
15 THE COURT: Well, they're not before me.
16 MR. ALLISON: May I involve them in the settlement
17 conference?
18 THE COURT: Sure. At their discretion. I would
19 certainly encourage it, but they're not under the Court's
20 authority. They're not parties here, so I can't order them
21 to be here.
22 Now, if you want to truthfully tell them that "Judge
23 Breslow thinks it's a very good idea if they are available
24 and could participate because there might be issues that

1 transcend this case," sure. I would think that would be a
2 very good idea. And I will not preclude them. But I'm not
3 ordering them because I don't have jurisdiction over them at
4 this time.

5 MR. ALLISON: Okay. Thank you.

6 THE COURT: You're welcome.

7 All right. Show of hands. Anybody else with a
8 question or comment that they'd like to put on the record?

9 All right. Well, thank you very much, counsel. That
10 will conclude this hearing.

11 I wish everybody a pleasant rest of the afternoon.
12 To you, your families, your staff, I hope you have a safe and
13 healthy rest of the winter.

14 The Court will be in recess.

15 Have a nice afternoon.

16 MR. ALLISON: Thank you, Your Honor.

17 MS. HAMMOND: Thank you, Your Honor.

18 THE COURT: Thank you.

19 (Recess.)

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1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3

4 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, do hereby certify:

7 That I was present in Department 8 of the
8 above-entitled court on Thursday, January 14, 2021, at the
9 hour of 11:05 a.m. of said day, and took verbatim stenotype
10 notes of the proceedings had upon the matter of PEEK BROTHERS
11 CONSTRUCTION, Plaintiff, versus SR CONSTRUCTION, Defendant,
12 Case No. CV20-01375, and thereafter reduced to writing by
13 means of computer-assisted transcription as herein appears;

14 That the foregoing transcript, consisting of pages 1
15 through 46, all inclusive, contains a full, true and complete
16 transcript of my said stenotype notes, and is a full, true
17 and correct record of the proceedings had at said time and
18 place.

19 Dated at Reno, Nevada, this 19th day of January,
20 2021.

21

22 /s/ Isolde Zihn
23 Isolde Zihn, CCR #87

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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7

IN AND FOR THE COUNTY OF WASHOE

8

HONORABLE BARRY L. BRESLOW

9

PEEK BROTHERS CONSTRUCTION,

10

Plaintiff,

11

vs.

Case No. CV20-01375

12

SR CONSTRUCTION,

Department No. 8

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Defendant.

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TRANSCRIPT OF PROCEEDINGS

16

Status hearing

April 13, 2021

(Via Zoom)

17

APPEARANCES:

18

For the Plaintiff:

Nathan Aman

19

Attorney at law

Reno, Nevada

20

For the Defendant:

Noah Allison

21

Attorney at law

Las Vegas, Nevada

22

23

24

Reported by:

Isolde Zihn, CCR #87

1 RENO, NEVADA, TUESDAY, APRIL 13, 2021, 11:00 A.M.

2 THE COURT: Okay. Good morning, everyone.

3 Let's go on the record.

4 Case number civil 20-1375, Peek Brothers Construction

5 versus SR Construction, Inc.

6 I'm Judge Breslow, presiding from Department 8 here

7 in Washoe County.

8 The hearing today is open to the public via a link on

9 the court's website.

10 I'm joined by court clerk, Ms. DeGayner, and

11 certified shorthand reporter, Ms. Zihn.

12 The Court recognizes -- well, I'll let counsel state

13 their appearance for the record.

14 For plaintiff, please.

15 And you're still on mute.

16 MR. AMAN: Good morning, Your Honor.

17 Nathan Aman, for Peek Brothers Construction.

18 THE COURT: It's 2021, Mr. Aman. We have got to move

19 past the "You're still on mute." We have all learned this,

20 haven't we?

21 Mr. Allison, for the defense.

22 MR. ALLISON: Thank you, Your Honor.

23 Noah Allison, appearing for SR Construction.

24 THE COURT: All right. Thank you.

1 Let's get right to it.

2 This is the date we had set several months ago for
3 the Court to check in after the settlement conference.

4 I saw the minutes from Judge Robb. I haven't spoken
5 to her, nor should I, nor will I, about what happened. I do
6 see that the parties attempted in good faith, but,
7 unfortunately, the matter did not resolve, and so on we go.

8 I've been holding off executing the order denying
9 defendant's motion to compel arbitration and stay litigation.
10 As we talked about, the Court would defer that until after
11 the settlement conference because certain time limits begin
12 to run from the entry of this order. So I recall indicating
13 I would wait 60 days, or so. But, as of today, I think we're
14 either at 60 or close enough.

15 So, then, you know, unless there's a reason not to,
16 the Court intends to sign that today, change the date to
17 April 13th, and off we go.

18 A couple things, though.

19 Number one is: So, what happens next? This matter
20 has already been exempted from the Nevada Supreme Court
21 mandatory arbitration for small cases, so that's not an
22 issue.

23 In the ordinary course, we have an early case
24 conference, file a report, get an order from this Court, a

1 pre-trial order, and go set it for trial.

2 Unless strategies changed, I'm understanding that the
3 defense may seek to seek appellate review of this Court's
4 decision. I'm neither encouraging nor discouraging that.
5 That's up to them.

6 But in terms of arresting the proceedings any further
7 if that occurs, I'm not inclined to do that; understanding
8 that, if appellate review results in a different
9 determination, well, you won't be litigating, you'll be
10 arbitrating.

11 That said, the Court's thinking is that, if we start
12 moving this case along and doing discovery and investigating
13 what happened and what witnesses have to say and what paper
14 evidence or electronic evidence exists, you're going to use
15 that anyway if this matter ultimately is determined to be in
16 an arbitration instead of in litigation. So it's not as
17 though time or effort would be wasted, in the Court's
18 estimation.

19 So I guess what I'm trying to do is discourage either
20 side from asking the Court to stay the litigation any further
21 while appellate review is sought, if that's the strategy
22 that's going to be invoked.

23 On the other hand, if the parties want to stipulate
24 to that, well, that's okay, too. But, absent that, I would

1 enter the order, you'll set a 16.1, and you'll move the case
2 forward.

3 Asterisk: You could also ask this Court to identify
4 this matter as complex litigation and keep it out of Rule
5 16.1. Then you have a different set of rules. But I'm not
6 sure how I would react to that.

7 All right. Those are some preliminary thoughts.

8 Mr. Aman, what do you think?

9 MR. AMAN: Your Honor, Mr. Allison and I have been
10 communicating this morning just briefly kind of about some
11 procedural issues.

12 What we need to do first: Mr. Allison was talking
13 about a stay, but I'm kind of of the belief that, no matter
14 what happens with the appeal, the information that we begin
15 to gather is going to be useful no matter the forum that
16 we're ultimately in.

17 THE COURT: That's the point I was trying to make.

18 MR. AMAN: What we need to do, in terms of a
19 housekeep issue, is get an Amended Complaint on file. Yeah.

20 THE COURT: Get an Amended Complaint on file?

21 MR. AMAN: Yes. I'm sorry. I'm having some
22 connection issues, so, apparently, I'm kind of cutting --
23 things cut in and out.

24 What we need to do is get an Amended Complaint on

1 file. There's a couple other invoices for retainage that I
2 want to address in this litigation, as well.

3 The only procedural issue is, in terms of Rule 15, we
4 haven't filed the Amended Complaint within 21 days, so do we
5 need to either get a stipulation from Mr. Allison or file a
6 motion to amend? I'm not sure, procedurally, where we are at
7 in light of the stay. I think it would be easier just to
8 file an Amended Complaint versus file a motion to amend at
9 this point in time. But I'm seeking the Court's input on
10 that issue.

11 THE COURT: All right. Well, let's hear from Mr.
12 Allison on anything the Court just said or anything plaintiff
13 counsel just said, or anything he wants to bring to the
14 Court's attention.

15 Mr. Allison.

16 MR. ALLISON: Thank you, Your Honor.

17 It is our intention to file an interlocutory notice
18 of appeal of the order denying our motion to compel
19 arbitration.

20 It's also our intention to seek a stay of the
21 proceedings pursuant to Mikohn Gaming Corporation versus
22 McCrea, where it's typically routinely given on a motion to
23 deny an order compelling arbitration.

24 So I'd like to ask the Court's permission. I've

1 heard the Court's inclination. I'm going to -- I'd like to
2 have permission to bring the motion to stay on an order
3 shortening time. I'll keep it brief. So I hear what the
4 Court is inclined to do. But I am going to take it on up to
5 the Supreme Court and seek a stay there, if it's denied here.

6 So that's the game plan on our side of it --

7 THE COURT: Well, what does the stay get you -- what
8 is the goal of the stay? To not spend time and effort
9 needlessly?

10 MR. ALLISON: My client's position is that it
11 bargained for an arbitration, and an arbitration is where it
12 should be. And if the -- and pursuant to Mikohn versus
13 McCrea, the object of the appeal would be defeated if we
14 proceed.

15 THE COURT: Well, certainly, if you proceed to trial,
16 it will be defeated. It could be defeated. If you proceed
17 to begin the investigative process, are you suggesting the
18 arbitrators won't allow any discovery if it goes to
19 arbitration?

20 MR. ALLISON: Well, it might be a different --
21 discovery might take a different form. It might be limited.
22 It might be not subject to -- it wouldn't necessarily be
23 subject to Nevada Rules of Civil Procedure. Those are the
24 things that we bargained for, and Triple A has its own

1 procedure for that. And that's where my client wants to be.

2 THE COURT: Any sense of how long it takes to get
3 appellate review of an order like this order denying the
4 motion to stay and compel arbitration?

5 MR. ALLISON: I've already suggested to Mr. Aman that
6 we can agree now that there will be -- this case should not
7 be assigned to the Supreme Court settlement conference
8 program because we've just tried. I think it would be a
9 waste of time to do that. And we could then go ahead and
10 proceed immediately with the briefing and get the -- I'd even
11 be fine with signing a joint motion with Mr. Aman, if he
12 wants to, saying that we'd like to have this expedited to
13 whatever -- in whatever way the Supreme Court can do, can
14 achieve, you know, so that the case can move forward wherever
15 it needs to be.

16 THE COURT: Well, interestingly, or, coincidentally,
17 I guess, before I took the bench here a few moments ago, I
18 just got a reminder e-mail that tomorrow, at noon Pacific
19 time, for one hour of, I think, free CLE, Chief Justice
20 Hardesty of the Nevada Supreme Court is giving a one-hour
21 seminar on the status of the Nevada Supreme Court; which I'm
22 sure may touch on things like how many cases, how long cases
23 are taking, how they're handling their role during the
24 pandemic, and new ways of doing things, and just -- we all

1 may -- for those of us that are signed up for it, may learn
2 something about how long and how many.

3 What about: You heard plaintiff counsel talk about
4 he wants to amend the Complaint to add some additional
5 amounts that he thinks are owed. Is this the first you're
6 hearing of it, or do you already have a position?

7 MR. ALLISON: Well, this morning he mentioned it to
8 me. I don't -- my view of the rule is that, if an Answer has
9 not been filed, I think they can amend as a matter of right.
10 I don't think a motion tramples that. But, again, I haven't
11 researched it.

12 I don't have an objection to filing an Amended -- him
13 doing whatever he wants to do on his side. But I would ask
14 that, if we are going to go the stay route, you know, I'm
15 going to have to go through the motion practice on the stay,
16 that I'd have to do it on the -- because I don't want to file
17 an Answer unless, you know -- unless I'm required to by
18 whatever the Supreme Court does.

19 THE COURT: Well, Mr. Aman, it should not come as a
20 shock or surprise to you that the defense is seeking -- will
21 be seeking appellate review and would like to not have this
22 case go any further until that decision is reached.

23 So, I guess, my question is: Are you prepared for
24 the Court to order briefing on shortened time?

1 I'm assuming Mr. Allison either has an appellate
2 request and a motion to stay ready, or is going to do so in
3 very short order.

4 And then the question would be: How much time do you
5 need to respond to at least the motion to stay part in this
6 court?

7 MR. AMAN: Your Honor, we could probably get a
8 response to any motion for stay within five days.

9 And, you know, I think Your Honor kind of hit on it
10 when -- I understand that Mr. Allison is saying that the
11 Triple A has their procedures, but we just don't know when an
12 interlocutory order is going to be heard and resolved, and
13 we'd like to get things regarding the trial on schedule,
14 especially with how far things are out right now.

15 And the reality is, the next couple of months in
16 these cases not a lot is going to happen in terms of
17 substantive discovery. What we want to do is start moving
18 the case along. I'm sure they're going to file a
19 counterclaim. Let's get all the cards on the table. That's
20 why presently I'm thinking I'm probably going to be opposed
21 to a stay. I need to talk to my client about it, as well.

22 We'll probably be opposed to it because in the next
23 couple of months what we are going to start learning is
24 getting witnesses, getting the case kind of set out. Whether

1 that ultimately goes to arbitration or not, the substance of
2 discovery isn't going to happen, as we all know, for months.

3 MR. ALLISON: Your Honor, with all due respect, and
4 counsel says to get the cards on the table, my client doesn't
5 think this is the right table. So that's where we are, and
6 that's why we don't want to give up anything with respect to
7 what we believe we contractually bargained for.

8 THE COURT: Well, if -- so, going from the small to
9 the large, the small is, you're going to file a motion for
10 stay. I want to streamline the proceedings to get it before
11 the Court.

12 If I grant the stay, then the case is stayed. If I
13 don't grant the stay, you're probably going to ask somebody
14 else to stay it, while the appeal of the Court's decision to
15 deny the request to stay the case for arbitration.

16 Are you sure you don't want to go back to your
17 settlement judge, Judge Robb? She's really good. I mean,
18 she works really hard. I mean, I say that tongue-in-cheek.

19 But, you know, the fight is over substance and then
20 the fight is over process. And right now we're having the
21 fight over process on steroids. We're still far away from
22 the underlying dispute over who wronged who; and, if so, in
23 what amount.

24 Now, I'll take responsibility for part of that

1 because, you know, I'm the one that directed you to a
2 settlement conference early on in the case, and put
3 everything on the proverbial hold button pending that. And
4 the first time you all could get in and she could see you was
5 end of March.

6 But, you know, in retrospect, would I have approached
7 it differently? Not really. You know, sometimes matters are
8 able to resolve at that early stage. But yet here we are.

9 So the best I can do right now is this. Number one,
10 to the extent this is an oral motion to amend the Complaint,
11 it's granted; although, frankly, the Court believes that the
12 law already provides that, so you don't need a court order
13 anyway, Mr. Aman. Promptly file your Complaint.

14 Number two, I'll hold in abeyance the time for the
15 defense to respond to the Amended Complaint, subject to a
16 ruling on the Court's order on the anticipated motion to stay
17 further proceedings in this case while appellate review is
18 taking place of the order to be entered today denying the
19 motion to stay and send to arbitration.

20 Once this Court rules on that, I'll make a decision
21 on when an Answer needs to be -- or any other response needs
22 to be made. Not the response directing it to arbitration,
23 because I've already ruled on that. But, you know, if
24 there's going to be a counterclaim, for example.

1 MR. ALLISON: Understood. I think --

2 THE COURT: So then let's talk about how much time.

3 So, you know, Mr. Allison, file whatever you're going

4 to file after this order goes live here shortly.

5 And then, Mr. Aman, within seven calendar days of the

6 motion to stay, please file the response.

7 And, Mr. Allison, within seven days of that, please

8 file the reply and request for submission.

9 I'll make it a priority. I've told you, you know,

10 when I sat down, my initial instincts are, stays are great,

11 if they're going to save time, money, expense, angst and

12 unnecessary effort.

13 If you convince the Court that a stay here might do

14 that, because the arbitration process is fundamentally

15 different, procedurally different, substantively different,

16 that you're going to be doing things here in this case that

17 cannot be extrapolated over to an arbitration if an appellate

18 court believes that this Court erred in denying the motion,

19 you convinced me that there's waste, effort that cannot --

20 you know, that has no -- a bridge to nowhere, I'll stay it.

21 If it's the type of work you're going to have to likely do

22 anyway, that's a heavier lift. To me, that's where the

23 rubber meets the road.

24 And, you know, if the motion to stay is denied, and

1 if I direct you to start moving the case forward, it doesn't
2 impair, in the Court's estimation, the defense appellate
3 rights to challenge this Court's underlying order denying the
4 request to compel arbitration. You know, you can truthfully
5 tell the appellate court that you're abiding the Court's
6 order, but you're doing so kicking and screaming because
7 that's not your view of how this case should be moving
8 forward.

9 But I'm just trying to balance the realities of
10 appellate review in the pandemic world, the impact on the
11 case, people's memories, cost of the process, with legitimate
12 concerns that we would be doing things in this litigation
13 that could not easily be allocated to an arbitration, if
14 that's what ends up happening. I'm just thinking out loud
15 here.

16 But, anyway, here's the decision. You can amend the
17 Complaint. The response is held in abeyance, pending further
18 court order. File whatever motion, Mr. Allison, you'd like
19 to with respect to staying this case. Seven days from now to
20 respond. Seven days or earlier a reply and a submission.
21 And I'll make it a priority to decide it. Then you will know
22 this Court's thinking on that issue.

23 Meanwhile, you know, until this case is stayed by
24 this court or an appellate court, on you go. That doesn't

1 mean Mr. Aman is going to serve a notice of having an early
2 case conference tomorrow. That would be improper, in the
3 Court's estimation. Work out a date that in the ordinary
4 course would happen, and stick to that. I don't want anyone
5 throwing elbows here because of this.

6 On the other hand, you know, let's not try to put it
7 off till June, because that, to me, would seem a little bit
8 pushing it out too far.

9 Okay. There. I'm done speaking for now.

10 Let me start with Mr. Allison.

11 Any comments or questions with respect to what the
12 Court just said?

13 MR. ALLISON: No, thank you, Your Honor.

14 My only -- out loud I'm thinking that the right
15 court -- the order of things to occur will be, this Court
16 issues its order --

17 THE COURT: That will happen today.

18 MR. ALLISON: -- at this point, and then I file my
19 notice of appeal. And then, within a day or two after that,
20 I file my Rule 62 motion to stay on an order -- on a
21 requested order shortening time. I'll say in my affidavit --
22 I'll recount our discussion here as the basis for the OST,
23 and then give my argument why we should do this. And then we
24 have the briefing schedule, and then we get a decision on

1 that.

2 THE COURT: But your order to shorten time is
3 granted.

4 MR. ALLISON: Okay.

5 THE COURT: I'm telling you right now it's granted
6 from whatever date you file your motion to stay.

7 MR. ALLISON: Okay.

8 THE COURT: You can put in that order, as already
9 indicated, I was inclined to go along with seven calendar
10 days from the date your motion is filed, and then seven days
11 from that for the reply.

12 MR. ALLISON: Okay. And then we go forward with
13 briefing, and wait for the Court's order on the motion to
14 stay. And then we decide -- I think at that hearing we'll
15 decide what's going to happen next, I would imagine.

16 THE COURT: Well, I may just rule, or there may be a
17 hearing like this.

18 But, in the meantime, I'm not directing Mr. Aman to
19 stand down moving the case forward. Again, he's not to set
20 things -- you know, the first deposition tomorrow. He's not
21 to set a Rule 16.1 early case conference tomorrow. He's not
22 to move to deem this case complex tomorrow. But he's to get
23 ahold of you, check calendars.

24 You know, don't try to play the long game here and

1 say, "I'll get back to you in two weeks with my availability
2 for three months from now."

3 You set it like you would any other civil case, and
4 then we will see organically what happens between now and
5 then.

6 MR. ALLISON: Very good.

7 THE COURT: Mr. Aman, any questions?

8 MR. AMAN: No, Your Honor.

9 THE COURT: All right. Gentlemen, a pleasure dealing
10 with -- a pleasure having both of you in the court. As I
11 have said before, two excellent lawyers, and apparently
12 genuinely nice fellas. And I'm glad to be able to preside
13 over this matter.

14 With that, the Court will be in recess.

15 The Court order should enter shortly.

16 And stay safe, to you and your families.

17 Bye now.

18 MR. ALLISON: Thank you.

19 MR. AMAN: Thank you.

20 THE COURT: Bye.
21
22
23
24

1 STATE OF NEVADA)

2 COUNTY OF WASHOE)

3

4 I, ISOLDE ZIHN, a Certified Shorthand Reporter of the
5 Second Judicial District Court of the State of Nevada, in and
6 for the County of Washoe, do hereby certify:

7 That I was present in Department 8 of the
8 above-entitled court on Tuesday, April 13, 2021, at the hour
9 of 11:00 a.m. of said day, and took verbatim stenotype notes
10 of the proceedings had upon the matter of PEEK BROTHERS
11 CONSTRUCTION, Plaintiff, versus SR CONSTRUCTION, Defendant,
12 Case No. CV20-01375, and thereafter reduced to writing by
13 means of computer-assisted transcription as herein appears;

14 That the foregoing transcript, consisting of pages 1
15 through 18, all inclusive, contains a full, true and complete
16 transcript of my said stenotype notes, and is a full, true
17 and correct record of the proceedings had at said time and
18 place.

19 Dated at Reno, Nevada, this 13th day of May, 2021.

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21

22 /s/ Isolde Zihn
23 Isolde Zihn, CCR #87

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