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IN THE SUPREME COURT OF THE STATE OF NEVADA

SR CONSTRUCTION, INC., A  
NEVADA DOMESTIC CORPORATION,

Appellant,

vs.

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

Respondent.

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**RESPONDENT PEEK BROTHERS CONSTRUCTION INC.'S**  
**ANSWERING BRIEF**

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**RESPONDENT PEEK BROTHERS**  
**CONSTRUCTION, INC.'S NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a):

Peek Brothers Construction, Inc. ("Peek Brothers") does not have a parent corporation and no publicly held company owns more than 10% of the stock of Peek Brothers.

Viloria, Oliphant, Oster & Aman L.L.P. is the only law firm which has appeared for Peek Brothers in the underlying litigation and is the only law firm representing Peek Brothers in this appeal.

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## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. SUMMARY OF THE ARGUMENT**

This matter involves a dispute between a subcontractor, Peek Brothers, and a general contractor, SR Construction, Inc. ("SR"), with whom Peek Brothers contracted to perform earthwork related to the construction of the Northern Nevada Sierra Medical Center ("Project"). During the course of construction on the Project, SR made an unnecessary demand to change the means and methods by which Peek Brothers performed its work, a change which necessitated additional labor and material and, accordingly, increased the cost of work on the Project. As further explained herein, despite making this demand with full knowledge of the increase in cost, SR refuses to pay Peek Brothers for the additional work performed, which has required Peek Brothers to file the underlying litigation.

SR now seeks to arbitrate this dispute pursuant to the terms of the Master Subcontract Agreement ("Subcontract") entered into between Peek Brothers and SR. SR is attempting to additionally bind Peek Brothers to the arbitration provision contained in the Prime Contract between itself and the Project owner, Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS"), despite the fact that Peek Brothers is not a party to the Prime Contract and nothing within the terms of the Prime

1 Contract require this dispute to be arbitrated. The rationale behind SR's  
2 demand to arbitrate is SR's insistence that UHS is liable for the increase in  
3 cost. However, SR's argument is a blatant red herring, as the instant dispute  
4 has nothing to do with UHS, UHS did not make the erroneous decision at  
5 issue, and UHS is not responsible to pay for SR's erroneous and unwarranted  
6 decision. In fact, under the express terms of the Subcontract, arbitration is the  
7 *exception*, not the rule, and the facts of this case absolutely do not trigger that  
8 very narrow arbitration exception.

9  
10  
11  
12 SR's criticisms of the District Court's decision denying its Motion to  
13 Compel Arbitration are similarly misguided and unsupported. As even a  
14 cursory review of the transcripts of proceedings and the District Court's order  
15 denying SR's Motion to Compel will reveal, the District Court engaged in  
16 thorough questioning of the parties, provided an oral ruling expressly adopting  
17 Peek Brothers' arguments opposing arbitration, and entered a written order  
18 clearly delineating the basis for its decision. Thus, SR's contentions that the  
19 District Court failed to adequately support the reasoning behind its decision  
20 and demonstrated a "bias" against arbitration should be rejected outright.<sup>1</sup>

21  
22  
23  
24  
25 <sup>1</sup> Given SR's criticisms of the District Court, it is worth noting that the District  
26 Court judge, the Honorable Barry L. Breslow, is an experienced arbiter, served as  
27 the Second Judicial District Court's Arbitration Judge from 2018 to 2021, and also  
28 served as an arbitrator for the Nevada Supreme Court-annexed arbitration program  
prior to taking the bench in 2018. Judge Breslow's extensive record as an arbiter

1 In sum, Peek Brothers respectfully requests this Court affirm the  
2 District Court's denial of SR's Motion to Compel Arbitration and find that this  
3 dispute is not subject to arbitration pursuant to the terms of the Subcontract or  
4 Prime Contract.  
5

6 **II. STATEMENT OF THE CASE AND RELEVANT FACTS**  
7

8 On October 8, 2019, Peek Brothers entered into a Subcontract with  
9 SR—and subsequent Work Order on January 8, 2020 ("Work Order")—in  
10 which Peek Brothers agreed to perform earthwork related to the construction  
11 of the Project. JA0290-370. Included in Peek Brothers' scope of work on the  
12 Project was site mass grading, sub and base grade for the building pad, and  
13 footing excavation ("Scope of Work"). JA0206-261. In consideration for  
14 Peek Brothers' performance, SR agreed to pay Peek Brothers the sum of Three  
15 Million Sixty-Two Thousand and No/100 Dollars (\$3,062,000.00). Id. For  
16 this bid price, Peek Brothers planned to utilize the extra material from  
17 excavation of the building footings and plumbing trenches ("spoils") to  
18 backfill the building footings and bring the building pad to subgrade elevation.  
19  
20  
21  
22 JA001-8. In other words, Peek Brothers would use the dirt it had dug up in  
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25

26 absolutely belies SR's accusations that Judge Breslow is biased against arbitration.  
27 See Second Judicial District Court Judge Barry L. Breslow Biography, available at  
28 <https://www.washoecourts.com/Judges/Biography/D8>.

1 the process of creating trenches and footings to build up the footings and  
2 building pad. Id.

3  
4 During the course of construction on the Project, SR, through its  
5 employee, Fred Kravetz, expressly directed Peek Brothers to import  
6 approximately 150,000 square feet of structural fill to the Project site to bring  
7 the building pad to subgrade elevation rather than utilize the material  
8 excavated from the building footings and plumbing trenches ("spoils") to do  
9 so. Id. Simply put, SR did not want to wait for Peek Brothers to dig the  
10 footings and trenches before bringing the building pad to subgrade elevation.  
11 Id. Peek Brothers informed Mr. Kravetz, in no uncertain terms, that the  
12 importation of structural fill was entirely unnecessary and would require the  
13 eventual removal of the excess material dug up from the building footings and  
14 plumbing trenches. Id. Despite Peek Brothers' warnings, Mr. Kravetz  
15 demanded Peek Brothers change the means and methods by which Peek  
16 Brothers bid and performed its work and import the additional material at the  
17 additional cost. Id.

18  
19 In accordance with Mr. Kravetz' demand, Peek Brothers purchased the  
20 additional material and had the material trucked in to the Project site. Id.  
21 Peek Brothers performed the earthwork to bring the building pad to subgrade  
22 elevation between April 9, 2020 and April 13, 2020. Id. Subsequently, the  
23  
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1 building footings and plumbing trenches were dug, and the spoils were  
2 stockpiled on site. Id.

3  
4 Despite performance and substantial costs incurred by Peek Brothers,  
5 SR refused to accept two Change Orders for the additional material and labor  
6 that Peek Brothers expended in order to comply with Mr. Kravetz' demands.  
7  
8 Id. Accordingly, Peek Brothers filed a Complaint against SR for Breach of  
9 Contract, Attorneys' Fees, Unjust Enrichment, and a Violation of NRS  
10 Chapter 624.<sup>2</sup> Id.

11  
12 After counsel for SR accepted service of the Summons and Complaint,  
13 SR filed a Demand for Arbitration with the American Arbitration Association  
14 ("AAA") on September 11, 2020. JA0462-466. SR then filed a Motion to  
15 Compel Arbitration and Stay Litigation ("Motion to Compel") on October 7,  
16 2020, requesting this Court compel Peek Brothers to arbitrate its dispute based  
17 upon the fact that UHS refuses to pay for SR's mistake. JA0011-22. The  
18 applicable arbitration provision is contained in Exhibit D, § W of the  
19 Subcontract, and states as follows:

20  
21 Contractor and Subcontractor shall **not** be obligated to resolve  
22 disputes arising under this Subcontract by arbitration, unless: (i) the  
23 prime contract has an arbitration requirement; **and** (ii) a particular  
24 dispute between Contractor and Subcontractor **involves issues of fact**  
25

26 <sup>2</sup> Peek Brothers has since amended its Complaint to include a claim for  
27 violation of Nevada's Prompt Payment Act based on SR's wrongful  
28 withholding of retainage due to Peek Brothers.

1       **or law which the Contractor is required to arbitrate under the**  
2       **terms of the prime contract.**

3       JA0324-325 (emphasis added). The foregoing provision is clear that  
4       arbitration is an exception to litigation, only arising under very limited  
5       situations. What's more, the Prime Contract does not include any language  
6       whatsoever regarding "issues of fact or law" which require SR to arbitrate  
7       disputes with its subcontractors. See AIA Document A133 – 2009 and AIA  
8       Document A201 – 2017, JA0371-461 (collectively, "Prime Contract").<sup>3</sup>

9       Based on the express terms of the Subcontract and the Prime Contract,  
10      Peek Brothers opposed the Motion to Compel, and maintained that the instant  
11      dispute *does not* involves issues of fact or law that SR is required to arbitrate  
12      pursuant to its Prime Contract with UHS. JA0278-289.

13      The District Court entered an Order Setting Hearing on December 17,  
14      2020, and the parties subsequently appeared before the District Court on  
15      January 14, 2020, to argue the merits of the Motion to Compel. Throughout  
16      the hearing, the District Court engaged in thorough and substantial  
17      questioning of counsel during the parties' respective arguments and entered an  
18      oral ruling denying the Motion to Compel. JA1038-1082. The District Court

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25      <sup>3</sup> It is worth noting that, unlike the Prime Contract, the Subcontract is *not* an AIA  
26      contract. As a result, the Subcontract and the Prime Contract, and the arbitration  
27      provisions contained therein, do not have any logical relation to one another and  
28      cannot be read together in any cohesive way.

1 "specifically [found] that the dispute which underlies the Complaint here does  
2 not involve an issue of fact or law which the contractor is required to arbitrate  
3 under the terms of the prime contract." JA1075 at lns. 18-21.  
4

5 In addition, the District Court expressly adopted the analysis outlined in  
6 Peek Brothers' Opposition to Motion to Compel and directed Peek Brothers to  
7 prepare an order "consistent with its argument today, the Court's observations  
8 and questions, and its briefing." JA1075-1076 at lns. 22-1. Counsel for Peek  
9 Brothers prepared the proposed order and provided the same to counsel for SR  
10 for review and approval. The District Court entered said Order Denying  
11 Defendant's Motion to Compel Arbitration and Stay Litigation ("Order  
12 Denying Motion to Compel") on April 13, 2021.<sup>4</sup> JA0474-476.  
13  
14  
15

16 That same day, prior to entry of the Order, the District Court held a  
17 status hearing in which the District Court discussed the outcome of the  
18 settlement conference and lifted its temporary stay of this case. JA1084-1101.  
19 Immediately thereafter, SR filed its Notice of Appeal with this Honorable  
20 Court, seeking review of the District Court's denial of its Motion to Compel.  
21  
22 JA0477-479.  
23

---

24 <sup>4</sup> At the January 14, 2021 hearing, the District Court exercised its discretion  
25 to stay the litigation for ninety days, including entry of the Order, pending the  
26 outcome of a settlement conference between the parties. JA1076-1079. That  
27 settlement conference was held on March 31, 2021. The settlement  
28 conference was ultimately unsuccessful and the District Court entered the  
Order thereafter.

1 SR also sought a stay of the District Court proceedings pending the  
2 determination of its appeal and was granted a stay by this Court on June 28,  
3 2021. Appellant then filed Appellants' Opening Brief ("AOB") with this  
4 Court on August 11, 2021, and the instant Answering Brief follows.  
5

### 6 III. STANDARD OF REVIEW

7 Under Section 38.219 of the Nevada Revised Statutes, "[a]n agreement  
8 contained in a record to submit to arbitration any existing or subsequent  
9 controversy arising between the parties to the agreement is valid, enforceable  
10 and irrevocable except as otherwise provided in NRS 597.995 or upon a  
11 ground that exists at law or in equity for the revision of a contract." NRS  
12 38.219. In Nevada, the district court has the authority to determine whether  
13 an agreement to arbitrate exists or a controversy is subject to an arbitration  
14 agreement. See NRS 38.221; NRS 38.219(2); Philips v. Parker, 106 Nev.  
15 415, 417, 794 P.2d 716 (1990). There must be an agreement to arbitrate for  
16 there to be a presumption of arbitrability. Philips, 106 Nev. at 417, 794 P.2d  
17 at 716.  
18  
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22 Moreover, "arbitrability is usually a question of contractual  
23 construction," which is, in turn, a question of law for the court's  
24 determination. State ex rel. Masto v. Second Judicial Dist. Court ex rel.  
25 County of Washoe, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (citing  
26  
27  
28

1 Kennedy & Mitchell, Inc. v. Anadarko Prod. Co., 243 Kan. 130, 754 P.2d  
2 803, 805-06 (1988)).  
3

4 While "Nevada courts resolve all doubts concerning the arbitrability of  
5 the subject matter of a dispute in favor of arbitration." Int'l Assoc. Firefighters  
6 v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988), it is well-  
7 established that "arbitration is a matter of contract and a party cannot be  
8 required to submit to arbitration any dispute which he has not agreed so to  
9 submit." AT&T Technologies, Inc. v. Communication Workers of America,  
10 475 U.S. 643, 648 (1986). "This axiom recognizes the fact that arbitrators  
11 derive their authority to resolve disputes only because the parties have agreed  
12 in advance to submit such grievances to arbitration." Id. at 648-49.  
13  
14  
15

16 Lastly, NRS 38.247 permits a party to appeal a district court's order  
17 denying a motion to compel arbitration. NRCP 38.247(1)(a).  
18

#### 19 IV. LEGAL ARGUMENT

##### 20 A. The District Court Correctly Found that the Dispute 21 Between Peek Brothers and SR is Not Subject to 22 Arbitration.

23 SR admittedly waits until the end of its Opening Brief to "tackle[] the  
24 heart of [its] appeal," resorting first to baseless and unsubstantiated arguments  
25 regarding the District Court's lack of findings and alleged bias against  
26 arbitration. However, Peek Brothers believes it more appropriate to first  
27  
28

1 address the substance of SR's appeal—namely its assertion that the parties are  
2 required to arbitrate their dispute pursuant to the Prime Contract.

3  
4 Peek Brothers reiterates that Exhibit D, § W of the Subcontract contains  
5 a "Dispute Resolution" provision, which provides as follows:

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

12 JA0324-325 (emphasis added). This provision makes clear that SR and Peek  
13 Brothers *are not* required to arbitrate unless certain conditions are met. If SR  
14 had intended to arbitrate all disputes with its subcontractor, SR was free to  
15 draft an arbitration provision requiring just that, or use an AIA or AAA form  
16 arbitration provision.

17 Consequently, based on the express terms of the Subcontract, Peek  
18 Brothers and SR are not obligated to resolve disputes under the Subcontract  
19 *unless* the Prime Contract both includes an arbitration requirement—which it  
20 does—*and* the dispute between Peek Brothers and SR involves issues of fact  
21 or law that the Prime Contract requires SR to arbitrate—which it does not.  
22 Thus, under the express terms of the Subcontract's Dispute Resolution  
23 provision, arbitration is the exception, not the rule.  
24  
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26

27 ///

1 In looking to the Prime Contract to determine whether such "issues of  
2 fact or law exist," it becomes immediately clear that the same does not  
3  
4 necessitate arbitration in this case. The Prime Contract, entered into between  
5 SR and UHS, is comprised of two separate documents: AIA Document A133  
6 – 9009, and AIA Document A201 – 2017. JA0371-461. Upon review of the  
7  
8 relevant provisions of the Prime Contract, the Prime Contract requires that  
9 "any Claim between the **Owner** and **Construction Manager** shall be resolved  
10 in accordance with the provisions set forth in this Article 9 and Article 15 of  
11 A201 – 2017." JA0389, § 9.1 (emphasis added). Notably, this does not  
12 encompass disputes between the construction manager (i.e., SR) and its  
13 subcontractors. Article 15 of A201 – 2017 goes on to provide, in relevant  
14  
15 part, as follows:  
16

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

23 JA0446, § 15.4.1. The "Agreement" referenced therein is the Prime Contract,  
24 not the Subcontract, and Peek Brothers is not a party to the Prime Contract.  
25 Further, "claim" is defined as "a demand or assertion by one of the parties  
26 seeking, as a matter of right, a change in the Contract Time, or other relief  
27 with respect to the terms of the Contract," as well as "other disputes and  
28

1 matters in question between the **Owner** and **Contractor** arising out of or  
2 relating to the **Contract**." JA0443-444, § 15.1.1 (emphasis added). The  
3  
4 Prime Contract unequivocally *does not include* any language whatsoever  
5 regarding "issues of fact or law" requiring SR to arbitrate disputes with its  
6 subcontractors. This is one of many areas where the Subcontract and the  
7  
8 Prime contract do not logically coincide.

9 *i. The Fact that the Prime Contract is a GMP*  
10 *does Not Give Rise to Issues of Fact or Law*  
11 *that Must Be Arbitrated Pursuant to the*  
12 *Prime Contract.*

13 Despite the foregoing, SR maintains the completely irrelevant argument  
14 that because the Prime Contract is a cost-plus arrangement with a guaranteed  
15 maximum price ("GMP"), "[r]eimbursable costs 'necessarily incurred' by SR  
16 up to the GMP are payable by UHS." AOB, p. 5, citing JA0046. As such,  
17 SR contends that UHS will be liable for the amount of Peek Brothers' change  
18 orders and thus, this dispute involves issues of fact or law that must be  
19 arbitrated pursuant to the Prime Contract. *Id.*, generally.  
20  
21

22 However, as noted by the District Court, SR's focus on the "cost plus  
23 with GMP" nature of the Prime Contract is entirely misguided and leads to the  
24 absurd conclusion that *all* disputes between SR and its subcontractors be  
25 arbitrated despite language to the contrary in the Subcontract itself. It is SR's  
26 view that, no matter if the extra costs were a result of SR personnel's mistake,  
27  
28



1 UHS will always be paying for the work performed. Thus, SR is effectively  
2 "off the hook" for any unnecessary demands and misguided directives it  
3 places on its subcontractors that result in additional expenses. SR's view is  
4 entirely incorrect, and is not supported by a plain reading of either the  
5 Subcontract or the Prime Contract. Had SR truly intended that any dispute  
6 between itself and Peek Brothers be arbitrated, it should have clearly stated as  
7 such in the arbitration provision.  
8

10 Furthermore, SR's GMP argument is belied by the very provision that  
11 that argument rests upon. As SR explains, UHS agreed to pay SR for the  
12 "Cost of Work" on the Project, plus SR's fee. AOB, p. 19. The Prime  
13 Contract defines "Cost of Work" as follows:  
14

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

22 JA0382, § 6.1.1. (emphasis added). SR then goes on to paint a complex and  
23 exceedingly ambiguous and hypothetical scenario where, once the amount of  
24 the GMP has been exceeded for reasons "unrelated to the disputed change  
25 orders," the dispute is no longer subject to arbitration because UHS no longer  
26 has "skin in the game." AOB, pp. 19-20.

27 ///

1 First, this creates an absurd scenario where a subcontractor can never  
2 know whether its disputes with the prime contractor are subject to arbitration  
3 because it does not know whether the GMP has been exceeded at any given  
4 point during the course of a project. This is a far cry from the "unambiguous"  
5 arbitration provision that SR attempts to depict. To the extent that the  
6 arbitration is truly as ambiguous as SR has portrayed, this ambiguity must be  
7 construed against it as the drafter of the Subcontract. See Anvui, LLC v. G.L.  
8 Dragon, LLC, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007) (Where a  
9 contract is ambiguous, "[a]ny ambiguity...should be construed against the  
10 drafter").

11  
12 Second, the plain language of the above provision actually indicates  
13 that UHS is *not obligated* to reimburse SR for the cost of the Change Orders  
14 given that SR itself contends such costs were not "necessarily incurred." Peek  
15 Brothers agrees that those costs were incurred as a result of SR's mistake—a  
16 mistake which Peek Brothers expressly informed SR would result in  
17 additional expenses as set forth in the underlying Complaint.

18  
19 What's more, the Prime Contract explicitly states that the Cost of Work  
20 does *not* include costs due to the negligence or failure of SR or costs not  
21 included in change orders approved by the owner. JA0385, § 6.8.1.

22  
23 Therefore, SR construction is absolutely responsible for payment of Peek  
24  
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1 Brothers' Change Orders regardless of whether UHS chooses to pay. If UHS  
2 refuses to pay for said additional work as an "unnecessary expense," SR may  
3 seek recourse against UHS, or vice versa, through arbitration pursuant to the  
4 Prime Contract once the issue of SR's liability for those Change Orders has  
5 been litigated and resolved through the courts. This is separate and apart from  
6 any dispute with Peek Brothers.  
7  
8

9 **B. The Dispute Between Peek Brothers and SR does Not**  
10 **Involve UHS.**

11 Despite the fact that Peek Brothers' dispute with SR does *not* involve  
12 UHS, SR argues that Peek Brothers is "artfully pleading" itself out of  
13 arbitration by filing suit against SR only and not including UHS as a party to  
14 the underlying litigation. SR even goes so far as to state that "[t]his Court  
15 frowns upon attempts to erase contractual obligations through artful  
16 pleading." AOB, p. 15. However, as this Court is exceedingly aware, *Peek*  
17 *Brothers is not in privity of contract with UHS*. Peek Brothers has only  
18 contracted *with SR*, SR's personnel made the mistake at issue, and Peek  
19 Brothers' only recourse for SR's nonpayment is bringing suit *against SR*. In  
20 fact, had Peek Brothers included UHS as a party to the instant litigation, UHS  
21 would have certainly succeeded on a motion to dismiss because UHS is not a  
22 party to the Subcontract and clearly has no contractual liability to Peek  
23 Brothers thereunder.  
24  
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1 Peek Brothers once again reiterates that SR, not UHS, contracted with  
2 Peek Brothers to perform earthwork on the Project, and SR, not UHS, made  
3 the misguided demand that Peek Brothers import structural fill to bring the  
4 building pad to subgrade elevation rather than utilize the spoils from the  
5 building footings and trenches. Therefore, Peek Brothers' claim is against SR  
6 and SR alone, and SR cannot hide behind UHS to avoid liability for its costly  
7 mistake.  
8

9  
10 SR further claims that, if this Court affirms the District Court's Order  
11 Denying Motion to Compel, it will assert a third-party action against UHS,  
12 and UHS will move for an order compelling arbitration, and this whole  
13 exercise will be for naught. AOB, pp. 15-16. Not only does this amount to  
14 blatant forum shopping, but Peek Brothers is unclear what claims—if any—  
15 SR can legitimately bring against UHS at this juncture that are ripe for  
16 adjudication, given that SR has admitted that no dispute between SR and UHS  
17 currently exists, the legitimacy of the Change Orders has not been finally  
18 adjudicated, and SR is not maintaining that those amounts were "necessarily"  
19 incurred under the Subcontract. AOB, p. 21 ("...UHS reviewed the change  
20 order, **concurred with SR's assessment**, and then directed SR in writing to  
21 reject it and initiate dispute resolution pursuant to the GMP Agreement)  
22 (emphasis added). Accordingly, this Court must reject SR's illegitimate  
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1 argument that it will force Peek Brothers to arbitrate its claims no matter this  
2 Court's decision.

3  
4 In sum, Peek Brothers respectfully requests that this Court affirm the  
5 District Court's decision and decline to require Peek Brothers to arbitrate a  
6 dispute based upon a contract to which it is not a party and which clearly does  
7 not govern its claims.  
8

9 **C. The District Court Did *Not* "Disregard" the**  
10 **Presumption in Favor of Arbitration and Adequately**  
11 **Supported its Decision.**

12 One of SR's more puzzling positions is that the District Court's Order  
13 Denying Motion to Compel is "devoid of analysis" and thus, is clearly  
14 erroneous and not supported by substantial evidence. However, contrary to  
15 SR's contentions, the District Court engaged in thorough questioning and  
16 discussion of the parties' respective positions during oral argument on the  
17 underlying Motion to Compel. JA1038-1082. The District Court then ruled  
18 from the bench that "the dispute which underlies the Complaint here does not  
19 involve an issue of fact or law which the contractor is required to arbitrate  
20 under the terms of the prime contract." JA1075 at lns. 18-21. In addition, the  
21 District Court expressly adopted the analysis outlined in Peek Brothers'  
22 Opposition to Motion to Compel and directed Peek Brothers to prepare an  
23 order "consistent with its argument today, the Court's observations and  
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1 questions, and its briefing." JA1075-1076 at Ins. 22-1. Thus, the undersigned  
2 candidly cannot fathom how counsel for SR could be uncertain as to the basis  
3  
4 for the District Court's decision, and SR provides no authority in support of its  
5 contention that said decision is legally insufficient.

6  
7 Moreover, SR's statement that the District Court "disregarded this  
8 Court's presumption in favor of arbitration" is completely unsupported. Peek  
9 Brothers reiterates that while "disputes concerning the arbitrability of a  
10 subject matter are resolved under a presumption in favor of arbitration," Clark  
11 County Pub. Emps. Ass'n v. Pearson, 106 Nev. 587, 591, 798 P.2d 136, 138  
12 (1990), "a party cannot be required to submit to arbitration any dispute which  
13 he has not agreed so to submit." AT&T Techs., Inc. v. Communications  
14 Workers of America, 475 U.S. 643, 648 (1986) (internal quotations omitted).  
15  
16

17 Because the District Court expressly found that the instant dispute does not  
18 involve issues of fact or law that are required to be arbitrated pursuant to the  
19 terms of the Prime Contract, the District Court *could not order the parties to*  
20 *arbitrate.*

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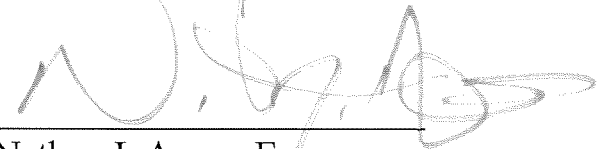
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1           **V.     CONCLUSION**

2           Based on the foregoing, Peek Brothers respectfully requests this Court  
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4 affirm the District Court's Order Denying Motion to Compel Arbitration and  
5 find that Peek Brothers' claims do not involve issues of fact or law which are  
6 required to be arbitrated pursuant to the terms of the Prime Contract between  
7  
8 SR and UHS.

9     **DATED** this 23<sup>rd</sup> day of September, 2021.

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**CERTIFICATE OF COMPLIANCE WITH RULE 28.2**

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 Times New Roman in font size 14 point.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains less than 14,000 words as set forth in NRAP 32(a)(7)(A)(ii) by having 4,161 total words.

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 a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I

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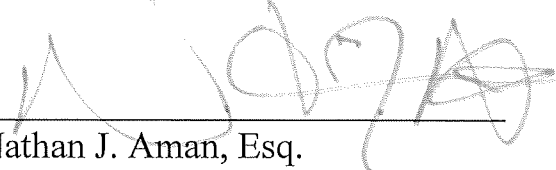
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1 understand that I may be subject to sanctions in the event that the  
2 accompanying brief is not in conformity with the requirements of the Nevada  
3 Rules of Appellate Procedure.  
4

5 **DATED** this 23<sup>rd</sup> day of September, 2021.  
6  
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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law firm of VILORIA, OLIPHANT, OSTER, & AMAN L.L.P., and that on the date shown below, I caused service of a true and correct copy of the attached **RESPONDENT PEEK BROTHERS CONSTRUCTION INC.'S ANSWERING BRIEF** was electronically served on the following parties via the Nevada Supreme Court's electronic filing system:

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