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.	Electronically Filed Nov 08 2021 01:23 p.m. Elizabeth A. Brown Clerk of Supreme Court **Supreme Court No.: 82786**

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

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

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

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

Dated this 8th day of November, 2021.

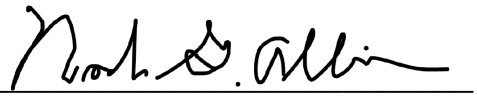

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Table of Contents

Table of Authorities

Cases

I. ARGUMENT IN REPLY

A. This Appeal Addresses the Arbitrability of the Dispute; Not the Merit of the Dispute.

SR Construction, Inc. ("SR") properly framed this appeal as a question of contract interpretation. *Opening Brief*, pp. 4-9. Without discovery, without context, and without support, Respondent Peek Brothers Construction, Inc. ("Peek Bros.") improperly framed this appeal as a one-sided referendum on the merit of its disputed change order. *Responding Brief*, pp. 3-5. The merit of the disputed change order will be decided in arbitration, not here, and not in the district court. In this appeal, the contract language and a *critical factual trigger* answers the question of whether the dispute involves an issue of fact or law that SR must arbitrate under the prime contract between SR and Sparks Family Medical Center, Inc. c/o Universal Health Services of Delaware ("UHS") (the "Prime Contract"). The trigger, largely ignored in Peek Bros.' brief, was pulled when UHS rejected the disputed change order and directed SR to proceed with arbitration. JA0263.

B. The District Court Judge's Bias Against Arbitration Is Pertinent to this Appeal; His Aptitude Is Not.

SR highlighted the District Court's comments from the bench about the economy of arbitration of disputes in the range of 50-250 thousand dollars because the Court's comments demonstrated a mindset that is at odds with governing

standards. *Opening Brief*, p. 3. Peek Bros. responded with endorsements of the District Judge as "an experienced arbiter." *Responding Brief*, p. 2, n. 1. The District Court Judge's *words* matter here, not his experience. The District Court Judge's *words* conflict with the standards he was supposed to follow. The standards, which overwhelmingly support arbitration regardless of the value of the case, are as follows:

(1) There is "a strong preference in favor of arbitration and upholding arbitration clauses." *Direct Grading & Paving, LLC v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 31 (July 9, 2021)

(2) "As a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration." *Tallman v. Eighth Jud. Dist Ct.*, 131 Nev. Adv. Op. 71, 359 P.3d 113, 119 (2015).

(3) Unless it can be stated with "positive assurance" that the arbitration clause in a contract does not cover the dispute, then arbitration is mandated. *Clark County Pub. Employees Ass'n v Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 138 (1990).

C. The Prime Contract and the Master Subcontract Agreement Are Easily Read in Harmony.

Peek Bros. flailed throughout its brief attempting to disconnect the Master Subcontract Agreement ("MSA") from the Prime Contract. Most of its points lacked both legal and evidentiary support.

Peek Bros. noted that the Prime Contract was an AIA document and the MSA was not, and on that basis, it concluded "the Subcontract and the Prime Contract, and the arbitration provisions contained therein, do not have any logical relation to one another and cannot be read together in any cohesive way." *Respondent's Brief*, p. 6, n. 3. Peek Bros. failed to offer any support for its contention, or in fact, any cogent reason why two contracts may not be read together.

The MSA expressly ties itself to the dispute resolution mechanisms in all forthcoming prime contracts on all forthcoming projects regardless of the form of the prime contract. JA0159-60. If the prime contract, regardless of its form, contains an arbitration requirement, and the dispute between SR and Peek Bros. involves an issue of law or fact that SR is "required to arbitrate under the terms of the prime contract," then Peek Bros. must arbitrate. JA0159-60.

The Prime Contract mandates the arbitration of "Claims." JA0109. A "Claim" is defined as "a demand or assertion by one of the parties seeking as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract." JA0106. A "Claim" also "includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract." JA0106-07.

The "Claim" between UHS and SR in this matter is the disputed change order sought by Peek Bros. As one of SR's subcontractors, Peek Bros. seeks the payment

of additional money from SR in accordance with its rights under the subcontract. UHS is obligated to reimburse SR for payments it makes to subcontractors in accordance with the requirements of the subcontracts. JA0047. UHS's reimbursement obligation is capped by the Prime Contract's guaranteed maximum price (GMP). JA0046. Unless the GMP has been exceeded, the payment of additional money from SR to Peek Bros. means the payment of additional money from UHS to SR. JA0047.

D. Ambiguity in Arbitration Provisions Are Construed in Favor of Arbitration.

For the first time – this argument was never made to the District Court – Peek Bros. challenges the arbitration provision in the MSA as "ambiguous" claiming "it does not know whether the GMP has been exceeded at any given point during the course of the project." *Respondent's Brief*, p. 14. Had Peek Bros. articulated its concern before the District Court over a year ago, it would have been very simple for SR to present an affidavit confirming that the GMP had not been exceeded.[1] Peek Bros. did not raise the issue, it did not request limited discovery, and it did not request an abbreviated evidentiary proceeding. The right to an evidentiary hearing

[1] Peek Bros. was the earthwork contractor, one of the first subcontractors on the Project. When the dispute arose, the structure had not yet even come out of the ground. There is no possible way the GMP was exceeded at the time. Today, the Project is almost complete, and it is still within the GMP.

can be waived by failure to request the hearing. *Desage v. Aw Fin. Group*, 2020 Nev. Unpub. LEXIS 432, p.18, 461 P.3d 162 (2020) *citing Diversified Capital Corp. v. City of N. Las Vegas*, 95 Nev. 15, 21, 590 P.2d 146, 149 (1979). Additionally, Peek Bros. cannot bring this argument for the first time on appeal because it did not urge the point in the lower court. *Old Aztec Mine v. Brown*, 97 Nev. 49, 52-53, 623 P.2d 981, 983-84 (1981).

Peek Bros. also misapplied the general rule that ambiguity in a contract should be construed against the drafter versus the rule governing alleged ambiguity in an arbitration provision. *Respondent's Brief*, p. 14. If there is ambiguity in the arbitration provision, most courts construe the contract in favor of arbitration. The United States Supreme Court has held:

> [W]here the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [an] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. ***Doubts should be resolved in favor of coverage.***

AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 650 (1986) (*internal quotations omitted*)(*emphasis added*). Nevada courts have confirmed this rule. *See State ex rel. Masto v. Second Judicial Dist. Court of State*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) (holding that "[as] a matter of public policy, Nevada courts encourage arbitration and liberally construe arbitration clauses in favor of granting arbitration"). SR rejects the notion that there is ambiguity in the arbitration

requirement in the MSA, but even if there was, this Court should resolve the ambiguity in favor of arbitration.

E. UHS's Directive to Arbitrate the Dispute Is the Elephant in the Room.

The questions that Peek Bros. steadfastly avoided throughout its response are:

> If UHS had no interest in the outcome of the disputed change order, then ***why did it expressly reject the change order and direct SR to initiate dispute resolution?*** JA0263.

> If UHS had no interest in the outcome of the disputed change order, then ***why did it instruct SR that it "shall not settle or otherwise authorize payment of all or any portion of the disputed change order request under the terms of the Prime Contract without written authorization from UHS"?*** JA0263.

The simple answers are the correct answers. UHS understood that it would have to reimburse SR for the change order pursuant to the Prime Contract if it was determined that Peek Bros. was entitled to payment in accordance with the requirements of the subcontract. JA0047. UHS believed the change order lacked merit *because SR told UHS the change order lacked merit*. JA0263. If UHS believed the dispute was between SR and Peek Bros. only, it would not have instructed SR to initiate dispute resolution.

Contrary to Peek Bros.' assertion that the nature of a cost-plus GMP contract "leads to the absurd conclusion that all disputes between SR and its subcontractors be arbitrated," there are situations when UHS would not have cared about the outcome of the dispute. *Respondent's Brief*, p. 12. For example:

- If the GMP was exceeded, the payment of a change order by SR to a subcontractor would not be reimbursable by UHS.
- If the dispute involved trade damage,[2] then UHS would have no stake in the outcome.

Neither of these situations exist here.

Moreover, Peek Bros.' assertion that SR "is effectively 'off the hook' for any misguided directives it places on its subcontractors that result in additional expenses" is false and hopelessly premature. *Respondent's Brief*, p. 13. The merit of the change order, *and the circumstances of the change order*, are the issues for the arbitration. There can be three outcomes:

> (1) The arbitrator decides Peek Bros.' change order lacks merit, as SR and UHS primarily assert;
>
> (2) The arbitrator decides Peek Bros.' change order has merit (in whole or in part) and the change order was caused by SR's mismanagement (in whole or in part), as Peek Bros. asserts and UHS will alternatively assert; or

[2] Trade damage is a common occurrence on construction projects where one subcontractor caused damage to another subcontractor's work necessitating a change order by subcontractor whose work was damaged. The additional costs are resolved by deducting the corrective costs from one subcontract and adding them to the other.

(3) The arbitrator decides Peek Bros.' change order has merit (in whole or in part) and the change order was the result of proper trade coordination and management decisions by SR, directions from UHS's design team, schedule considerations, scope gap, changed conditions in the field, etc. (in whole or in part), as SR will alternatively assert.

The first outcome will vindicate SR and UHS. The second outcome will vindicate Peek Bros. at SR's expense. The third outcome will vindicate Peek Bros. at UHS's expense.[3] ***SR named UHS as a respondent in the arbitration for this very purpose.*** JA0264-69. SR and UHS are in complete alignment over the lack of merit of Peek Bros.' change order, but they will be at odds with each other if it is determined that the change order has merit.

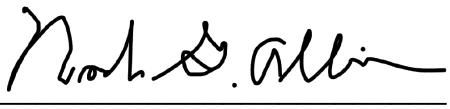
II. CONCLUSION

The District Court should have compelled the parties to arbitrate in accordance with the covenants set forth in the contract documents. The dispute between SR and Peek Bros. involves issues of fact or law which SR has been

[3] Peek Bros. should not be permitted to hamstring SR's defense by trying to keep UHS out of the dispute over its change order. It is ironic that Peek Bros. has accused SR of "blatant forum shopping" in response to SR's point that it will assert a third-party action against UHS if it is forced to litigate in District Court. *Respondent's Brief*, p. 16. The truth is that Peek Bros. is trying to artfully plead away SR's right to try to pass the change order on to UHS in the very unlikely event the change order is determined to have merit.

instructed by UHS to arbitrate under the terms of the Prime Contract. Peek Bros. cannot artfully plead itself out of its contractual promise to arbitrate by omitting UHS from its complaint – the decision to include UHS in the dispute belongs to SR. Finally, the District Court failed to adhere to the standards favoring arbitration when it ruled against SR. Based on the foregoing, SR requests this Court reverse the District Court's Order denying SR's motion to compel arbitration and direct the District Court to send SR, Peek Bros., *and UHS* to arbitration.

Dated this 8th day of November, 2021

By: 

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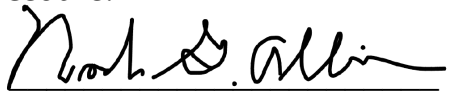
CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

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

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, using the computation guidelines in NRAP 32(a)(7)(C), it contains 2,196 words.

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

Dated: November 8th, 2021



Noah G. Allison

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Allison Law Firm Chtd. and that on this date the foregoing **APPELLANT'S REPLY BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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

DATED this 8th of November, 2021.

/s/ Nita MacFawn
An employee of The Allison Law Firm Chtd.