

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2   PROIMTU MMI LLC, a Nevada  
3   limited liability company,

4                   Appellant,

5                   vs.

6   TRP INTERNATIONAL, INC., a  
7   foreign corporation,

8                   Respondent.

Case No. 70056

District Ct Case No. CV-2016-47

Electronically Filed  
Sep 13 2016 11:38 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

9                   **RESPONSE TO ORDER**

10           Proimtu MMI LLC ("Proimtu") files this Response to this Court's  
11   Order of September 12, 2016. In its prior response, Proimtu advised the  
12   Court that the Order granting Proimtu's Motion to Amend Judgment or  
13   Alternatively Motion for Reconsideration was circulated to counsel for  
14   signature. That Order was forwarded to Judge Elliott for signature on  
15   August 10, 2016. On September 12, 2016, Judge Elliott signed the Order  
16   and filed it. Attached as **Exhibit "1"** is a copy of the filed Order

17   ///

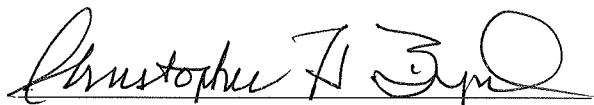
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1 granting Proimtu's Motion to Amend Judgment or Alternatively Motion for  
2 Reconsideration. The district court's order renders Proimtu's appeal  
3 premature because the court ordered TRP to answer the Complaint and the  
4 case will now proceed on the merits.

5 DATED this <sup>th</sup>13 day of September, 2016.

6 **FENNEMORE CRAIG, P.C.**

7 

8 Christopher H. Byrd, Esq. (No. 1633)

9 Brenoch Wirthlin (No. 10282)

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11 Las Vegas, Nevada 89101

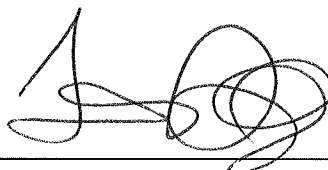
12 *Attorneys for Proimtu MMI LLC*

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**CERTIFICATE OF SERVICE**

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 13<sup>th</sup> day of September, 2016 and was served electronically in accordance with the Master Service List and via the United States Mail, first class, postage prepaid, addressed as follows:

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*Attorneys for Respondent*  
*TRP International, Inc.*



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An employee of Fennemore Craig P.C.

# **Exhibit 1**

1 **ORDG**

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FILED

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AMY DOWERS

CLERK  
DEPUTY

7 **FIFTH JUDICIAL DISTRICT COURT**

8 **NYE COUNTY, NEVADA**

9 PROIMTU MMI LLC, a Nevada limited liability  
10 company,

11 Plaintiff,

12 v.

13 TRP INTERNATIONAL, INC., a Delaware  
14 corporation; TONOPAH SOLAR ENERGY,  
15 LLC, a Delaware limited liability company;  
16 COBRA THERMOSOLAR PLANTS, INC., a  
17 Nevada corporation; STATE OF NEVADA ex  
18 rel. the NEVADA STATE CONTRACTORS  
19 BOARD; THE INSURANCE COMPANY OF  
20 THE STATE OF PENNSYLVANIA, a  
21 Pennsylvania corporation; DOES I-X; and  
22 ROE COMPANIES I-X,

23 Defendants.

24 COBRA THERMOSOLAR PLANTS, INC. a  
25 Nevada corporation; and TONOPAH SOLAR  
26 ENERGY, LLC, a Nevada limited liability  
27 company,

28 Crossclaimants,

29 v.

30 TRP INTERNATIONAL, INC., a foreign  
31 corporation; DOES 1 through 50, inclusive, and  
32 ROE CORPORATIONS 51 through 101,  
33 inclusive,

34 Crossdefendants

CASE NO.: CV36747

DEPT. NO.: 1

**ORDER GRANTING PROIMTU MMI,  
LLC'S MOTION TO AMEND  
JUDGMENT OR, ALTERNATIVELY,  
MOTION FOR RECONSIDERATION**

Date of Hearing: June 21, 2016

Time of Hearing: 11:00 a.m.

35 This matter came before the Court on Proimtu MMI, LLC's ("Proimtu") Motion to Amend  
36 Judgment or, Alternatively, Motion for Reconsideration ("Motion"); the Court having heard oral  
37 argument on the Motion on June 21, 2016; Brenoch R. Wirthlin, Esq., having appeared at the  
38 hearing on behalf of Proimtu; Becky Pintar, Esq., having appeared at the hearing on behalf of TRP

1 International, Inc. ("TRP") ; Donna Dimaggio, Esq., having appeared at the hearing on behalf of  
2 Cobra Thermosolar Plants, Inc., whom did not file a response to the Motion or present oral  
3 argument regarding the Motion at the hearing; the Court having reviewed all pleadings on file with  
4 respect to the Motion; good cause appearing, the Court hereby makes the following findings of fact  
5 and conclusions of law<sup>1</sup>:

6 **I. FINDINGS OF FACT**

7 1. TRP filed its Motion to Dismiss Proimtu's Complaint ("Motion to Dismiss"). The  
8 Court granted the Motion to Dismiss and entered Findings of Fact, Conclusions of Law and Order  
9 on Motion to Dismiss Complaint and Final Judgment Pursuant to NRCP 54(b) ("Judgment") on  
10 February 16, 2016. Proimtu filed its Motion to amend the Judgment or in the alternative for  
11 reconsideration.

12 2. This Court previously found that the Motion was timely filed. An Order  
13 Certifying Intent to Grant Proimtu MMI LLC's Motion to Amend Judgment or Alternatively,  
14 Motion for Reconsideration was entered on July 28, 2016.

15 3. Proimtu served its Motion on TRP on March 11, 2016. TRP received the Motion,  
16 but did not file its Opposition to the Motion ("Opposition") until April 21, 2016, only after  
17 Proimtu advised the Court in writing that the Motion was unopposed and requested the Court to  
18 grant the Motion.

19 4. Proimtu argues that the Opposition is untimely under DCR 13(3). *See* DCR 13(3)  
20 ("Within 10 days after the service of the motion, the opposing party shall serve and file his written  
21 opposition thereto, together with a memorandum of points and authorities and supporting  
22 affidavits, if any, stating facts showing why the motion should be denied.").

23 5. TRP argues that the Opposition is timely under NRCP 6(d). *See* NRCP 6(d) ("A  
24 written motion . . . and notice of hearing shall be served **not later than** five days before the time  
25 specified for the hearing . . . ." (emphasis added)). NRCP 6(d) does not extend the time for filing  
26 an opposition and no extension was granted by Proimtu.

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<sup>1</sup> If a finding of fact is more appropriately deemed a conclusion of law or vice versa, it is so deemed.  
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1           6.       Proimtu further argues that TRP's "delay alone [is] sufficient grounds" for this  
2 Court to deem Proimtu's Motion "unopposed and thus meritorious." *King v. Cartilage*, 121 Nev.  
3 926, 928, 124 P.3d 1161, 1162 (2005).

4           7.       The Court takes judicial notice of the Supreme Court's Order, entered July 20,  
5 2016, which indicates that this Court may grant the Motion without a remand of jurisdiction  
6 because it found the Motion was timely filed.

7           **II.       CONCLUSIONS OF LAW**

8           1.       Proimtu was not required to serve a notice of hearing with the Motion in order for  
9 the applicable deadlines under DCR 13 to begin running. *See Grouse Creek Ranches v. Budget*  
10 *Fin. Corp.*, 87 Nev. 419, 426, 488 P.2d 917, 922 (1971) ("NRCF 52(b) refers only to service of the  
11 motion to amend and requires service within ten days of service of notice of entry of judgment.  
12 NRCF 6(d) simply adds the requirement that such a motion, as well as the notice of hearing of  
13 such motion, be served at least five days before the hearing. There is not such an overlapping as  
14 would require service of both the motion and notice of hearing thereof within ten days of service  
15 of notice of entry of judgment.").

16          2.       Based upon the Motion, Opposition and Reply, and oral argument heard by the  
17 Court from counsel for the parties, as well as the Nevada Supreme Court's decision in *Grouse*  
18 *Creek Ranches, supra*, the Court finds that TRP's Opposition to the Motion is untimely under  
19 DCR 13(3).

20          3.       Because TRP's Opposition was untimely the Court further finds that Proimtu's  
21 Motion shall be deemed "unopposed and thus meritorious." *King v. Cartilage*, 121 Nev. 926, 928,  
22 124 P.3d 1161, 1162 (2005).

23          4.       The Judgment is vacated and TRP's Motion to Dismiss is hereby denied because  
24 TRP invoked the jurisdiction of this court and obtained a judgment on the merits on Proimtu's  
25 Second and Seventh Claims for Relief, which conduct is inconsistent with assertion of the forum  
26 selection clause and is a waiver of the forum selection clause.

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1 NOW THEREFORE, based on the foregoing, good cause appearing.

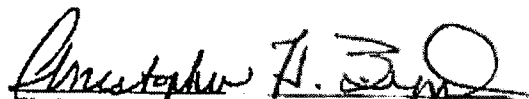
2 IT IS ORDERED, ADJUDGED AND DECREED that the Motion is granted. TRP's  
3 Motion to Dismiss is denied on the basis that TRP waived the forum selection clause and the  
4 Judgment is vacated as to all claims and the case shall proceed on the merits. TRP shall have 20  
5 days from written notice of entry of this Order to answer the First Amended Complaint.

6 DATED this 13 day of September, 2016.

7  
8   
9 District Court Judge

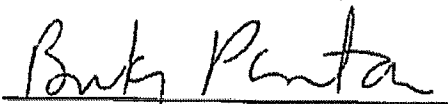
10 Submitted by:

11 **FENNEMORE CRAIG, P.C.**

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20 Approved as to Form and Content by:

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