

EXHIBIT 1

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FILED

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AMY DOWERS

NYE COUNTY CLERK
 BY [Signature]

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

PROIMTU MMI LLC, a Nevada limited liability
 company

Plaintiff,

v.

TRP INTERNATIONAL, INC., a Delaware
 corporation; TONOPAH SOLAR ENERGY, LLC,
 a Delaware limited liability company; COBRA
 THERMOSOLAR PLANTS, INC., a Nevada
 Corporation; STATE OF NEVADA ex rel. the
 NEVADA STATE CONTRACTORS BOARD,
 THE INSURANCE COMPANY OF THE STATE
 OF PENNSYLVANIA, a Pennsylvania
 corporation, DOES I-X, ROE COMPANIES I-X;

Defendants.

CASE NO. CV36747
DEPT. NO.: 1

**NOTICE OF ENTRY OF FINDINGS OF
 FACT, CONCLUSIONS OF LAW AND
 ORDER ON MOTION TO DISMISS
 COMPLAINT AND FINAL JUDGMENT
 PURSUANT TO NRCP 54 (b)**

PLEASE TAKE NOTICE that on February 16, 2016, FINDINGS OF FACT,
 CONCLUSIONS OF LAW AND ORDER ON MOTION TO DISMISS COMPLAINT AND
 FINAL JUDGMENT PURSUANT TO NRCP 54 (b) was entered in the above-referenced matter. A
 true and correct copy is attached hereto.

DATED: February , 2016 PINTAR ALBISTON LLP

By: Becky A. Pinter

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7 Attorneys for Defendant
 TRP INTERNATIONAL, INC.

8 **FIFTH JUDICIAL DISTRICT COURT**
 9 **NYE COUNTY, NEVADA**

10 PROIMTU MMI LLC, a Nevada limited liability
 11 company

12 Plaintiff,

13 v.

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

19 Defendants.

CASE NO. CV36747
DEPT. NO.: 1

**FINDINGS OF FACT, CONCLUSIONS OF
 LAW AND ORDER ON MOTION TO
 DISMISS COMPLAINT AND FINAL
 JUDGMENT PURSUANT TO NRCP 54 (b)**

20 The Court having considered Defendant TRP INTERNATIONAL, INC.'s ("TRP") Motion
 21 to Dismiss Complaint, as against Plaintiff PROIMTU MMI LLC ("Proimtu") and all pleadings on
 22 file, and after hearing oral argument from the parties on November 12, 2015, the Court makes the
 23 following Findings of Fact, Conclusions of Law and Order.

24 **FINDINGS OF FACT**

- 25 1. TRP is a foreign corporation in Nevada based in Spain that constructs solar projects.
- 26 2. Proimtu is a Nevada limited liability company that is a subsidiary of Grupo Mara, a
- 27 company with its main headquarters in Spain.
- 28

1 3. TRP and Proimtu entered into a contract for heliostat assembly and field erection
2 ("Contract") on a solar project in Tonopah, Nevada, known as the Crescent Dunes Thermosolar
3 Plant (the "Project").

4 4. Proimtu alleged that TRP breached the Contract by failing to render payment for certain
5 amounts that Proimtu claims TRP owes to it for performance under the Contract.

6 5. Proimtu filed a First Amended Complaint with the following claims against TRP
7 including: breach of contract, breach of good faith and fair dealing, negligent misrepresentation,
8 unjust enrichment, quantum meruit/cardinal change (collectively "Contract and Tort Claims"), and
9 violation of NRS 624 and a claim on the license bond posted with the Nevada State Contractor's
10 Board (collectively "Statutory Claims").

11 6. TRP filed a Motion to Dismiss Proimtu's Contract and Tort Claims based on a
12 forum-selection clause in the Contract and the doctrine of forum non conveniens.

13 7. TRP also sought dismissal of Proimtu's Statutory Claims pursuant to NRCP 12(b)(5) for
14 failure to state a claim upon which relief can be granted.

15 8. The Contract provides the following forum selection clause:

16 The CONTRACT throughout its scope of application shall be governed by
17 Spanish law and be interpreted in accordance therewith. On a subsidiary basis to
18 the arbitration arrangements established, the CONTRACTOR and the
19 SUBCONTRACTOR expressly agree to be bound by the jurisdiction of the
20 Courts of Madrid, expressly waiving any other legal forum or domicile to which
21 they might have been entitled.

22 9. The Court determined that both TRP and Proimtu are subsidiaries of Spanish companies,
23 with the Contract being executed in Spain, subject to Spanish law, with a majority of the payments
24 on the Contract being made in Spain.

25 10. TRP filed this Motion to Dismiss and Tonopah Solar Energy, LLC, Cobra
26 Thermosolar Plants, Inc. ("Cobra") and The Insurance Company of the State of Pennsylvania filed a
27 Motion for Summary Judgment (collectively the "Motions"). This Court's ruling on the Motions
28 resolved all of the claims asserted by Proimtu.

 11. The Court finds that Proimtu would be prejudiced by having to wait to appeal and
that the decision on appeal will not affect the outcome of the cross claims asserted by Cobra against

1 TRP. The Court also finds there would be no prejudice to either TRP or Cobra from an immediate
2 appeal. Thus, there is no just reason to delay entry of final judgment on the claims asserted by
3 Proimtu against TRP so that an appeal may proceed.

4 12. Proimtu made an oral motion to stay the litigation at the conclusion of the hearing to
5 prevent proceedings in Spain while Proimtu appeals the expungement of the lien and the ruling on
6 the Motions. The Court denied the motion to stay because the Court ruled that Proimtu's claims
7 should be resolved in Spain under the terms of the Contract.

8 CONCLUSIONS OF LAW

9 1. The Supreme Court has established a strong policy in favor of the enforcement of forum
10 selection clauses." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 992 (9th Cir.2006)

11 2. A forum-selection clause should be "given controlling weight in all but the most
12 exceptional cases." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33, 108 S. Ct. 2239, 101 L. Ed. 2d
13 22 (1988).

14 3. "[T]he party seeking to avoid a forum selection clause bears a 'heavy burden' to establish a
15 ground upon which ... the clause is unenforceable." *Doe I v. AOL LLC*, 552 F.3d 1077, 1083 (9th
16 Cir.2009).

17 4. The Nevada Supreme Court has recognized the freedom parties have in drafting agreements
18 that contain forum selection clauses when they are entered into freely and voluntarily. *Tuxedo*
19 *International Inc. v. Rosenberg*, 127 Nev. Adv. Op. 2, 251 P.3d 690, 697 (2011); *Tandy Computer*
20 *Leasing v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989).

21 5. Forum selection clauses will be enforced as written when the terms are "clear, unambiguous,
22 and complete." *Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004).

23 6. Forum selection clauses come in two varieties: permissive and mandatory.

24 7. A mandatory forum selection clause is presumed valid and is to be strictly enforced. *Bremen*
25 *v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

26 8. The forum selection clause in the Contract is mandatory as it provides that the Courts of
27 Madrid shall have exclusive jurisdiction over disputes arising from the Contract and that both TRP
28 and Proimtu have *expressly waived* any other legal forum to which they might have been entitled.

1
2 9. The forum selection clause in the Contract was the product of a freely negotiated agreement
3 between the parties, and “where such forum-selection provisions have been obtained through “freely
4 negotiated” agreements and are not “unreasonable and unjust, their enforcement does not offend due
5 process.” *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed.2d 513
6 (1972).

7 10. Proimtu argues that enforcement of the forum selection clause would contravene Nevada’s
8 strong public policy of barring application of forum-selection clauses set forth in NRS 108.2453(2)(d)
9 which prohibits any “litigation, arbitration or other process for dispute resolution on disputes arising
10 out of the contract or other agreement to occur in a state other than this State.”

11 11. The plain meaning of the words used in NRS 108.2453(2)(d), when “examining the context
12 and the spirit of the law,” and “the causes which induced the legislature to enact [NRS 108.2453]”
13 are consistent with an interpretation that conditions enforcement of its provisions on the validity of a
14 lien claimant having lien rights. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007)). NRS
15 §§108.2453(2)(a) and (b) specifically address a valid lien claimant’s rights, obligations, and
16 liabilities set forth in NRS §§108.221 to 108.246.

17 12. “When construing an ambiguous statutory provision, “this court determines the meaning of
18 the words used in a statute by examining the context and the spirit of the law or the causes which
19 induced the legislature to enact it.” *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

20 13. The Legislative purpose in amending Nevada’s mechanic’s lien laws, specifically the
21 addition of NRS 108.2453, was “to assist lien claimants” by “facilitat[ing] payments to lien claimants.”
22 *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. Adv. Op. 49, 245 P.3d 1149, 1153 (2010)
23 (quoting Hearing on S.B. 343 Before the Assembly Comm. on Judiciary, 73d Leg. (Nev., May 13,
24 2005)).

25 14. The Court finds that the statutory rights provided to lien claimants set forth in NRS Chapter
26 108 require a valid lien claim.

27 15. The Court rejects Proimtu’s argument that TRP waived the forum selection clause and
28 subjected itself to the jurisdiction of this Court by litigating with Proimtu in Nevada in the Fifth

1 Judicial District Court, Nye County, case CV-36431, ('Lien Litigation"). The Court granted TRP's
2 motion to expunge Proimtu's lien in the Lien Litigation case. TRP argued that it had not waived the
3 forum selection clause in this case either because it filed a motion to dismiss instead of answering
4 and litigating on the merits.

5 16. Therefore, based upon the Court's decision in the Lien Litigation, the Court finds that
6 Proimtu is not a valid lien claimant and this Court's enforcement of the forum-selection clause does
7 not contravene NRS 108.2453(2)(c) and (d) that provides that any condition, stipulation or provision
8 in a contract that (i) makes the contract subject to the laws of a state other than Nevada; or (ii)
9 requires any litigation or arbitration or other dispute resolution to occur in a state other than Nevada,
10 is void and unenforceable 18. The Court finds unpersuasive Proimtu's argument that NRS
11 108.2453(2)(c) and (d) preclude the enforcement of the forum selection clause in the Contract
12 because Proimtu's argument contradicts the legislative history and purpose of adding NRS 108.2453
13 to Nevada's mechanics' lien laws, which is to facilitate payment to lien claimants.

14 17. Therefore, "the interest of justice" would be served by holding Proimtu to its original
15 bargain of being expressly bound by the jurisdiction of the Courts of Madrid, and would not contravene
16 the strong judicial policy in favor of enforcing the parties forum selection clause.

17 18. Whatever "inconvenience" Proimtu would suffer by being forced to litigate in the
18 contractual forum as they agreed to do was clearly foreseeable at the time of contracting.

19 19. NRS 624.031(8) states in pertinent part: "The Provisions of this chapter do not apply
20 to: The construction, alteration, improvement or repair financed in whole or in part by the Federal
21 Government and conducted within the limits and boundaries of a site or reservation, the title of
22 which rests in the Federal Government."

23 20. In the Fourth Claim for Relief, Proimtu stated that the "Project was financed with a
24 loan guaranteed by the Department of Energy". See Complaint, ¶51.

25 21. Therefore, pursuant to NRS 624.031(8), the Court finds that both TRP and Proimtu
26 were exempt from the provisions of NRS Chapter 624 because the Project was federally funded in part
27 by the Federal Government.

28 22. The Court further finds that Proimtu has not asserted a legally sufficient claim upon

1 which relief may be granted in either the Second Claim for Relief (Violation of NRS Chapter 624) or
2 the Seventh Claim for Relief (Recovery of Bond Amount against the Board) as NRS Chapter 624
3 applies to neither Proimtu, nor TRP, because the Project was partially funded by the Federal
4 Government.

5 23. Accordingly, Proimtu's Second Claim for Relief regarding TRP's alleged violation of
6 NRS Chapter 624 and Seventh Claim for Relief for recovery against the \$100,000 cash bond posted
7 pursuant to NRS Chapter 624 are dismissed as a matter of law for failure to state a claim pursuant to
8 NRCP 12(b)(5) IT IS THEREFORE ORDERED that the Motion to Dismiss is granted; and

9 IT IS FURTHER ORDERED that a Judgment is hereby entered and certified as final
10 pursuant to NRCP 54(b) as to all claims brought by Proimtu against TRP in the First, Second, Third,
11 Fourth, Fifth, Sixth and Seventh Claims for Relief in the First Amended Complaint; and ///

12 IT FURTHER ORDERED that Proimtu's motion to stay this order is denied.

13
14 Dated: FEB. 16, 2016

15 Steven Elliott
16 JUDGE OF THE DISTRICT COURT

17 Respectfully submitted by:
18 PINTAR ALBISTON LLP

19 By: Becky A. Pintar
20 Becky A. Pintar, Esq., NSB # 7867
21 Attorney for Petitioner TRP INTERNATIONAL, INC.

22 Reviewed by:
23 FENNEMORE CRAIG JONES VARGAS

24 By: Brenoch R. Wirthlin
25 Brenoch R. Wirthlin, Esq.
26 Attorney for Petitioner PROIMTU MMI LLC
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28

EXHIBIT 2

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FILED

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KELLY SIDMAN

NYE COUNTY CLERK
BY DEPUTY

7 **FIFTH JUDICIAL DISTRICT COURT**

8 **NYE COUNTY, NEVADA**

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

Plaintiff,

11 v.

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

17 Defendants.

18 COBRA THERMOSOLAR PLANTS, INC. a
Nevada corporation; and TONOPAH SOLAR
19 ENERGY, LLC, a Nevada limited liability
company,

20 Crossclaimants,

21 v.

22 TRP INTERNATIONAL, INC., a foreign
corporation; DOES 1 through 50, inclusive, and
23 ROE CORPORATIONS 51 through 101,
inclusive,

24 Crossdefendants

CASE NO.: CV36747

DEPT. NO.: 1

**NOTICE OF ENTRY OF 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.

28 ///

1 **NOTICE OF ENTRY OF ORDER GRANTING PROIMTU MMI, LLC'S**
2 **MOTION TO AMEND JUDGMENT OR, ALTERNATIVELY,**
3 **MOTION FOR RECONSIDERATION**

4 TO: ALL INTERESTED PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

5 PLEASE TAKE NOTICE that an Order Granting Proimtu MMI, LLC's Motion to Amend
6 Judgment or, Alternatively, Motion for Reconsideration, was entered on the 12th day of
7 September, 2016, copy of which is attached hereto.

8 DATED this 12th day of September, 2016.

9 FENNEMORE CRAIG, P.C.

10 By: 

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17 Attorneys for Proimtu MMI LLC

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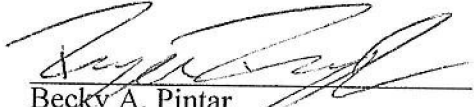
RECEIPT OF COPY

RECEIPT OF COPY of the Notice of Entry of Order Granting Proimtu MMI, LLC's Motion to Amend Judgment or, Alternatively, Motion for Reconsideration, is hereby acknowledged on the 12th day of September, 2016.

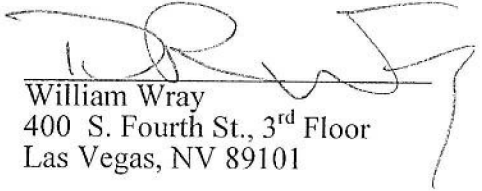
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*Attorneys for Defendant
TRP International, Inc.*

*Attorneys for Tonopah Solar
Energy, LLC; Cobra
Thermosolar Plants, Inc.; and
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State of Pennsylvania*

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2016 SEP 12 A 9:51

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,

v.

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

33 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.

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

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 law¹:

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.

27
28

¹ 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) ("NRCPP 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 NRCPP 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.

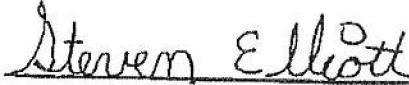
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1 NOW THEREFORE, based on the foregoing, good cause appearing.

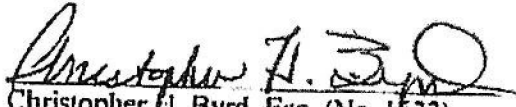
2 IT IS ORDERED, ADJUDGED AND DECREED that the Motion is granted. TRP's
3 Motion to Dismiss is denied on the basis that TRP waived the forum selection clause and the
4 Judgment is vacated as to all claims and the case shall proceed on the merits. TRP shall have 20
5 days from written notice of entry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

6 DATED this 13 day of September, 2016.

7
8 
9 District Court Judge

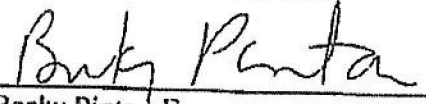
10 Submitted by:

11 FENNEMORE CRAIG, P.C.

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19 Attorneys for Plaintiff MMI LLC

20 Approved as to Form and Content by:

21 PINTAR ALBISTON LLP

22 
23 Becky Pintar, Esq.
24 Nevada Bar No. 7867
25 6053 S. Fort Apache Road, #120
26 Las Vegas, NV
27 Attorneys for TRP International, Inc.

IN THE SUPREME COURT OF THE STATE OF NEVADA

TRP INTERNATIONAL, INC., a Delaware
corporation

Appellant,

v.

PROIMTU MMI LLC, a Nevada limited
liability company,

Respondent.

Sup. Ct. Docket No. 71398
Electronically Filed
Dist. Ct. Case No. CV13-2076 10:27 a.m.
November 16, 2016
Elizabeth A. Brown
Clerk of Supreme Court

Response to Order to Show Cause

Establishing that the Supreme Court has Jurisdiction

- 1. The challenged order is appealable pursuant to NRAP 3A(b)(8) as a special order after final judgment.**

On February 16, 2016, an order was entered that granted TRP's Motion to Dismiss Proimtu's First Amended Complaint based on the district court finding that a forum selection clause contained in the contract was valid and binding, mandating that all disputes between the parties be litigated in the Courts of Madrid, Spain, and thereby dismissed the underlying action ("Order Granting Dismissal"). The district court certified the judgment as final pursuant to NRCP 54(b):

IT IS THEREFORE ORDERED that the Motion to Dismiss is granted; and IT IS FURTHER ORDERED that a Judgment is hereby entered and certified as final pursuant to NRCP 54(b) as to all claims brought by Proimtu against TRP[.]¹

¹ See Notice of Entry of Findings of Fact, Conclusions of Law and Order on Motion to Dismiss Complaint and Final Judgment Pursuant to NRCP 54(b), attached hereto as **Exhibit 1**.

A final judgment has been described as one "that disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court."² In this case, the Order Granting Dismissal disposed of all issues and the order was deemed a final judgment.

a. The instant order is appealable pursuant to NRAP 3A.

The Nevada Rules of Appellate Procedure (NRAP) 3A provides a list of district court orders and judgments in a civil action from which an appeal may be taken, which includes "a special order entered after final judgment[.]" The district court certified its Order Granting Dismissal as final pursuant to NRCP 54, which defines a final "judgment" as including "a decree and any order from which an appeal lies."³

Thereafter, the district court reversed itself on purely procedural grounds, finding that TRP filed an untimely opposition, and granted Proimtu's motion to amend judgment or motion for reconsideration, with an order entered on September 14, 2016, which is the subject of this instant appeal and order to show cause ("Challenged Order").⁴ TRP argues that the Supreme Court has jurisdiction over the Appealed Order as it is considered a "special order" pursuant to NRAP 3A(b)(8).

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² *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

³ NRCP 54(a).

⁴ See Notice of Entry of Order Granting Proimtu MMI, LLC's Motion to Amend Judgment, or, Alternatively, Motion for Reconsideration, attached hereto as **Exhibit 2**.

b. *Gumm* is applicable and clarifies what factors establish that a special order made after final judgment is appealable.

This Court has clarified what factors establishes a special order made after final judgment and appealable under NRAP 3A(b)(8):

[T]o be appealable under NRAP 3A[(b)(8)], a special order made after final judgment must be an order affecting the rights of some party to the action, growing out of the final judgment previously entered. It must be an order affecting rights incorporated in the judgment.⁵

In that case, this Court ruled that a post-judgment order, to be appealable, must “affect some parties’ rights growing out of the judgment.”⁶ Moreover, it must affect the rights “growing out of the judgment previously entered.”⁷

In the instant case, the Challenged Order is from the district court’s ruling which granted Proimtu’s Motion to Amend Judgment or, alternatively, Motion for Reconsideration. The Challenged Order was entered *after* the district court ordered a final judgment in the case, demonstrating that it is a “special order entered after final judgment. This is the exact language reflected in NRAP 3A(b)(8).

The Order Granting Dismissal was based solely on the district court finding that TRP had a right to enforce the mandatory forum selection clause, freely negotiated by the parties, mandating that the Courts of Madrid, Spain retain exclusive jurisdiction over any dispute between the TRP and Proimtu arising from the contract. The Challenged Order

⁵ *Gumm v. Mainor*, 118 Nev. at 914, 59 P.3d at 1221 (2002)

⁶ *Id.* at 912, 1221.

⁷ *Id.* at 913, 1221.

effectively reverses the district court's previous ruling and denies TRP's right to enforce the parties' forum selection clause, which was incorporated in the Order Dismissing Appeal. It substantively affects the rights of TRP to litigate in a forum that both parties had agreed to and forces the jurisdiction of Nevada on TRP.

The Order Granting Dismissal, based on the mandatory forum selection clause, was a final judgment, evidenced by the district court's certification of the judgment as final pursuant to NRCP 54(b). The Order Granting Dismissal adjudicated the parties' rights with respect to all claims brought by Proimtu against TRP, finding that Nevada was not the correct forum, rendering it a final judgment and Challenged Order. In its' Motion to Dismiss, TRP sought to carry out its' right to enforce the forum selection clause, and this right was established the Order Granting Dismissal.

The Challenged Order effectively and unequivocally was a final judgment, dismissing the case and ordering that TRP had an absolute right to enforce a forum selection clause and litigate its dispute with Proimtu in Spain. The Challenged Order, effectively and unequivocally affected TRP's substantive and procedural rights as it now requires TRP to submit to the jurisdiction of Nevada to litigate its dispute with Proimtu.

Accordingly, the Challenged Order is a "special order entered after final judgment" pursuant to NRAP 3A(b)(8) because the order stripped TRP's right to enforce the parties' contract's mandatory forum selection clause and thus, affects TRP's rights "growing out

of the judgment previously entered.”⁸ Therefore, this Court has jurisdiction to consider the instant appeal.

2. *Reno Hilton Resort Corp. v. Verderber*, 121 Nev. 1, 106 P.3d 134 (2005) is not applicable.

In its Order to Show Cause, this Court cites to *Reno Hilton Resort Corp. v. Verderber*,⁹ stating that an order granting a new trial cannot be a special order. However, *Verderber* is clearly distinguishable from the instant case. In *Verderber*, this Court was faced with the issue as to whether an appeal from a district court order denying a new trial as to the first phase of a bifurcated class action was substantively appealable pursuant to NRAP 3(A)(b)(2). The Respondent moved to dismiss the appeal for lack of jurisdiction, contending that an order denying a new trial is not appealable when it is interlocutory and does not follow the final judgment. Appellants opposed the motion and argued that the language in the rule permitting an order granting or denying a new trial is unqualified, and so jurisdiction was proper. This Court ultimately dismissed the appeal.

Pertinent to the *Verderber* Court’s decision to dismiss the appeal for lack of jurisdiction was the fact the district court’s order denying a motion for a new trial was only to Phase I of a bifurcated class action, and thus, was interlocutory in nature because a final judgment had not been rendered in the case. “NRAP 3A(b)(2) does not permit an appeal from an order granting or denying a new trial motion addressed to an

⁸ *Id.* at 912, 1221

⁹ 121 Nev. 1, 106 P.3d 134 (2005)

interlocutory order or judgment.”¹⁰ A final judgment has been described as “one that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court....”¹¹ The *Verderber* Court additionally noted that the final judgment rule “is not merely technical, but is a crucial part of an efficient justice system.”¹²

The Order Granting Dismissal was unquestionably a final judgment. It disposed of all the issues presented in the case, and left nothing for the future consideration of the court. Therefore, the decision in *Verderber* is distinguishable from this case and the district court’s Challenged Order is a special order after final judgment, pursuant to *Gumm*. The Challenged Order meets the requirements of a “special order after final judgment” under NRAP 3A(b)(8) as discussed *infra*, and as such is substantively appealable.

The circumstances surrounding the Challenged Order establish that it remains substantively appealable as an order granting a new trial pursuant to NRAP 3A(b)(2). The Challenged Order is a final judgment. Moreover, the effect of the Challenged Order is to reinstate a case in which final judgment had been rendered fully resolving the underlying

¹⁰ *Id.* at 6,137.

¹¹ *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000).

¹² *Verderber*, 121 Nev. 1, 5, 106 P.3d 134, 137 (2005).

case, and thus, cannot be considered interlocutory. Therefore, this Court has jurisdiction over the challenged appeal pursuant to NRAP 3A(b)(8).

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CERTIFICATE OF COMPLIANCE

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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Time New Roman 14 point font.

2. 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 is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 1,431 words.

3. Finally, I hereby certify that I have read this Response 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 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 11, 2016

PINTAR ALBISTON LLP

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CERTIFICATE OF SERVICE

I certify that on the 11th day of November, 2016, I served a copy of the Response to Order to Show Cause Establishing that the Supreme Court has Jurisdiction:

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LIST OF EXHIBITS

No.	Description	# of Pages
1	Notice of Entry of Findings of Fact, Conclusions of Law and Order on Motion to Dismiss Complaint and Final Judgment Pursuant to NRCP 54(b) (“Order Granting Dismissal”) (2/16/16)	7
2	Notice of Entry of Order Granting Proimtu MMI, LLC’s Motion to Amend Judgment, or, Alternatively, Motion for Reconsideration (“Challenged Order”) (9/14/16)	7