

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

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**Supreme Court Case No. 78256**

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**TONOPAH SOLAR ENERGY, LLC,**

Appellant,

v.

**BRAHMA GROUP, INC.,**

Respondent.

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Petition for Writ of Prohibition, or, Alternatively, Mandamus  
Fifth Judicial District Court  
The Honorable Steven Elliott, District Court Judge  
District Court Case No. **CV 39348**

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**REPLY TO PETITIONER'S OPPOSITION TO  
MOTION TO STAY BRIEFING**

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## **I. SUMMARY OF REPLY**

Petitioner Tonopah Solar Energy, LLC's ("TSE") Writ Petition seeks review, in part, of the Nye County District Court's Order that granted TSE's Motion to Stay proceedings against it on substantially similar jurisdictional grounds that TSE asserted to the United States District Court for the District of Nevada (the "Federal Court") in support of its Motion for Injunction (as more fully described in the pending Motion). If granted, TSE's Motion for Injunction would permanently stay (but not dismiss) proceedings against TSE in Nye County. Nonetheless, and while a decision on TSE's Motion for Injunction is imminent, TSE insists that this Court decide the impact of the Federal Court's removal jurisdiction and consider two issues that are moot, blatantly incorrect and/or subject to factual dispute.

More to the point of Brahma's Motion to Stay Briefing, the as-yet unknown outcome of the pending Federal Court Motions<sup>1</sup> and, importantly, the Federal Court's reasoning for whatever decisions it makes, is likely to heavily impact this Court's analysis of the issues presented by the Writ Petition. It simply makes no sense for the parties to present, and this Court to consider, briefing that may be rendered inapposite and/or moot by the Federal Court's rulings. For this reason, Brahma respectfully requests that the Court stay briefing and consideration of the Writ Petition until such time as the Federal Court Motions are decided.

## **II. REPLY ARGUMENT**

### **A. The Writ Petition And The Federal Court Motions Substantially Overlap.**

Notwithstanding TSE's argument to the contrary, TSE's Opposition admits that at least one issue presented in its Writ Petition is substantially identical to a key

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<sup>1</sup> As more fully described in the Motion to Stay Briefing, the Federal Court Motions include TSE's Motion for Injunction and Brahma's *Colorado River* Abstention Motion.

issue presented to the Federal Court by its Motion for Injunction. Specifically, TSE identifies the following issues:

Presented in the Writ Petition: Whether the District Court erred by exercising subject matter jurisdiction over Brahma's claims that are still subject to the Federal Court's removal jurisdiction under 28 U.S.C. § 1446(d); and

Presented in the Motion for Injunction: Whether the Federal Court should strike Brahma's First Amended Complaint because it constitutes an attempt to deprive the Court of jurisdiction over a removed action.

*See* Opposition, p.3. TSE's other issue presented in the Motion for Injunction is also closely related, if not indistinguishable, as it asks the Federal Court to conclude Brahma's state court claims were filed "for the purposes of subverting federal removal jurisdiction." *See id.* Simply stated, TSE is asking this Court to conclude that Brahma's (currently stayed) claims against TSE in the Nye County Action<sup>2</sup> have "subverted" or "deprived" the Federal Court of its removal jurisdiction. As argued in the Motion to Stay Briefing, these are fundamentally issues of Federal Court jurisdiction that the Federal Court should consider in the first instance.<sup>3</sup> To the extent the Federal Court's decision on these issues leaves anything for this Court to decide,

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<sup>2</sup> The Nye County Action is defined in the Motion to Stay Briefing as consolidated Case Nos. CV39348 and CV39799 in the Fifth Judicial District Court of Nevada.

<sup>3</sup> Similarly, TSE's argument that the Nye County Court should have applied the "first-to-file" rule to stay the Nye County Action in its entirety (i.e., including Brahma's claim against a surety bond posted by a different party, Cobra), is impacted by TSE's Motion for Injunction. *See Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997) (federal injunctions may only issue against state cases that are, among other things, "later filed"). Further, and because Brahma filed this claim in the NRS 108.2275 Special Proceeding, it was not "later filed."

the parties should then be given the opportunity to brief such remaining issues before this Court wades in.

**B. TSE's Opposition Is Hypocritical.**

As noted in Brahma's Motion to Stay Briefing, TSE itself requested (and received) from the Nye County Court a stay of proceedings against it (but not as to other parties and claims) "until such time as the Federal Court rules on the [Federal Court Motions]." *See* Motion, pp. 5-6 and Exhibit 11, p. 3. TSE nonetheless argues here that its clearly contradictory position (i.e., that no stay should now issue) "is a red herring" because the stay it requested and received from the Nye County Court "prevents the state trial court from deciding issues of law and fact that should be decided by the federal court." *See* Opposition, p. 4 n. 2. Yet in filing its Writ Petition and opposing Brahma's Motion to Stay Briefing, TSE asks this Court to decide these very same "issues of law and fact that should be decided by the federal court." Simply stated, TSE's contradictory positions cannot be reconciled and this Court should await the Federal Court's decision as to the reach and effect of its own removal jurisdiction before considering the very same issues TSE relied on in asking the Nye County Court to stay proceedings against it.<sup>4</sup>

**C. The Federal Court May Render The Writ Petition Moot.**

TSE incorrectly argues that a Federal Court ruling in TSE's favor would "not impact the legal question posed by [the] second issue in the writ petition." *See* Opposition, p. 5. To the contrary, if the Federal Court enjoins Brahma from litigating its claims against TSE for breach of contract, breach of the implied covenant and

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<sup>4</sup> TSE's argument that a decision on the Federal Motions, rather than the Writ Petition, should be stayed should (if intended seriously, which it was not) be made to the Federal Court, which TSE has not done. In any event, and as the Nye County Court has correctly ruled, Brahma had every right to bring its foreclosure complaint in the NRS 108.2275 Special Proceeding. *See e.g.*, Motion to Stay Briefing, pp. 3-5.

violation of NRS 624 in the Nye County Court on the grounds asserted (i.e., that TSE's removal of such claims from the Clark County Action deprives the Nye County Court of jurisdiction), the net effect of such a decision may well be to deprive this Court of any meaningful role in this dispute at this time.

A writ of mandamus is available to compel the performance of an act that the law requires ... or to control an arbitrary or capricious exercise of discretion,” *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). If the Nye County Court has no jurisdiction to consider certain claims between TSE and Brahma, no relief is required of this Court to mandate or compel the Nye County Court to refrain from consideration of such claims. Unless the Nye County Court were to ignore a Federal Court injunction (an unlikely scenario, at best) there is nothing for this Court to do to preclude Brahma from pursuing such claims in Nye County. Even then, TSE's remedy would lie with the Federal Court, which is capable of enforcing its own injunction. Stated differently, by way of its Motion for Injunction, TSE has a “plain, speedy and adequate remedy in the ordinary course of law,” a circumstance under which this Court will generally not consider petitions for extraordinary relief.” *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 497, 306 P.3d 369, 373 (2013).

**D. TSE's Remaining Contentions Are Already Moot And/Or Unworthy Of A Writ Petition.**

Finally, TSE's argument that Brahma's claim for lien foreclosure/claim on surety bond (as amended) was improperly filed in the NRS 108.2275 Special Proceeding is already moot. As Brahma demonstrated in its Motion to Stay Briefing, Brahma did precisely what TSE argued it should do: Brahma filed a stand-alone claim for lien foreclosure/claim on surety bond (as amended) in the Separate Action and successfully moved to consolidate the Separate Action with the NRS 108.2275

Special Proceeding. *See e.g.*, Motion to Stay Briefing, pp. 3-5. Thus, and even if the Nye County Court erred (which it did not) in concluding that Brahma's Complaint in the NRS 108.2275 Special Proceeding was proper, the impact of the allegedly improper filing is entirely mooted by the commencement of the Separate Action. *See id.*<sup>5</sup>

### **III. CONCLUSION**

Based on the foregoing, Brahma again respectfully requests that the Court stay briefing for, and subsequent consideration of the Petition, until no earlier than 30 days after the Federal Court issues a written decision on the Federal Court Motions. Alternatively, and to the extent the Court denies the present Motion, Brahma again respectfully requests that it be granted an extension of 30 days after any such denial in which to file its Answer to the Petition.

Respectfully submitted this 9th day of August, 2019.

**PEEL BRIMLEY LLP**

*/s/ Eric B. Zimbelman*

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<sup>5</sup> To the extent that the foregoing analysis goes to the merits of the Writ Petition, this only serves to illustrate the importance of exercising judicial restraint and "avoiding legal and constitutional issues if unnecessary to resolve the case at hand." *W. Cab Co. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 390 P.3d 662, 666–67 (Nev. 2017).

### CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFCR 9(f), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 9th day of August, 2019, I caused the above and foregoing document, **REPLY TO PETITIONER'S OPPOSITION TO MOTION TO STAY BRIEFING**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Nevada Supreme Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other \_\_\_\_\_

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

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