

IN THE SUPREME COURT OF THE STATE OF NEVADA

**Supreme Court Case No. 78256
District Court Case No. CV 39348**

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Jan 06 2020 12:40 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Tonopah Solar Energy, LLC,
Petitioner

v.

The Fifth Judicial District Court, State of Nevada, Nye County, and
the Honorable Steven P. Elliott, Senior Judge,
Respondent

and

Brahma Group, Inc.,
Real Party in Interest.

**PETITIONER'S REPLY APPENDIX
VOLUME V**

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CHRONOLOGICAL INDEX

Date Filed	Description	Bates Number	Volume(s)
12/21/2018	Brahma Mechanic's Lien Foreclosure Complaint Against Surety Bond and Summons	PRA 1-12	I
12/21/2018	Brahma Group, Inc.'s Motion to Consolidate Case CV39799 with Case CV39348	PRA 13-22	I
01/07/2019	TSE's Opposition to Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 23-31	I
01/14/2019	Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Opposition to Motion to Consolidate Case No. CV39799 with Case No. CV39348 (without exhibits)	PRA 32-42	I
02/21/2019	Defendants Cobra Thermosolar Plants, Inc.'s and American Home Assurance Company's Motion to Dismiss Plaintiff Brahma Group, Inc.'s First Amended Complaint in Case No. CV39799	PRA 43-81	II
03/13/2019	Notice of entry of Order Granting Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 82-89	II
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11/01/2019	Tonopah Solar Energy, LLC’s Joinder, or Alternatively, Response to Cobra’s and AHAC’s Motion to Intervene and Defendants	PRA 261-265	IV
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12/11/2019	Cobra Thermosolar Plants, Inc.'s and American Home Assurance Company's First Set of Requests for Production to Plaintiff and Counter-Defendants Tonopah Solar Energy, LLC	PRA 312-323	V

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03/25/2019	Brahma Group, Inc.'s Opposition to Cobra Thermosolar Plants, Inc.'s Motion to Dismiss and Countermotion for leave to File a single Consolidated Amended Complaint (without exhibits)	PRA 90-104	II
11/01/2019	Brahma Group, Inc.'s Opposition to Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Motion to Stay (without exhibits)	PRA 247-260	IV
01/14/2019	Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Opposition to Motion to Consolidate Case No. CV39799 with Case No. CV39348 (without exhibits)	PRA 32-42	I
11/15/2019	Brahma Group, Inc.'s Response to Motion to Intervene (without exhibits)	PRA 280-296	IV
04/22/2019	Brahma Group, Inc.'s (1) Second Amended Complaint; and (2) First Amended Third Party Complaint	PRA 124-136	III
12/21/2018	Brahma Group, Inc.'s Motion to Consolidate Case CV39799 with Case CV39348	PRA 13-22	I
04/15/2019	Brahma Group, Inc.'s Reply to Tonopah Solar Energy's Opposition to Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint	PRA 117-123	III
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10/18/2019	Motion to Intervene as Defendants	PRA 223-246	IV
03/13/2019	Notice of entry of Order Granting Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 82-89	II
09/25/2019	Order	PRA 199-207	III
04/22/2019	Order Granting Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint	PRA 137-154	III
12/09/2019	Reply in further Support of Motion to Intervene as Defendants	PRA 303-311	V
11/01/2019	Tonopah Solar Energy, LLC's Joinder,	PRA 261-265	IV

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	or Alternatively, Response to Cobra's and AHAC's Motion to Intervene and Defendants		
06/25/2019	Transcript from Hearing on 06/25/2019	PRA 155-198	III
11/18/2019	TSE's Joinder to Cobra's and AHAC's Motion to Stay	PRA 297-302	V
04/10/2019	TSE's Opposition to Brahma's Countermotion for Leave to File a Single Consolidated Complaint	PRA 105-116	II
01/07/2019	TSE's Opposition to Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 23-31	I

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FILED
FIFTH JUDICIAL DISTRICT

NOV 18 2019

Nye County Clerk

 JLT Deputy

10 **IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF NYE**

12 TONOPAH SOLAR ENERGY, LLC, a
13 Delaware limited liability company,

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada
17 corporation,

18 Defendant.

19 BRAHMA GROUP, INC., a Nevada
20 corporation,

21 Counterclaimant/Lien Claimant,

22 vs.

23 TONOPAH SOLAR ENERGY LLC, a
24 Delaware limited liability company; BOE
25 BONDING COMPANIES I through X; DOES
I through X; ROE CORPORATIONS I
through X; and TOE TENANTS I through X,
inclusive,

26 Counterdefendant.

27 BRAHMA GROUP, INC., a Nevada
28 corporation,

Third-Party Plaintiff,

Case No. CV 39348

Consolidated with

Case No. CV 39799

Dept. No. 2

**TSE'S JOINDER TO COBRA'S AND
AHAC'S MOTION TO STAY**



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vs.

COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES I through X; DOES
I through X; ROE CORPORATIONS I
through X, inclusive,

Third-Party Defendants.

H&E EQUIPMENT SERVICES, INC., a
Delaware corporation,

Plaintiff-In-Intervention,

vs.

BRAHMA GROUP, INC., a Nevada
corporation, TONOPAH SOLAR ENERGY
LLC, a Delaware limited liability company,
COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES I through X; DOES
I through X; ROE CORPORATIONS I
through X, and TOE TENANTS I through X,
inclusive,

Defendants-In-Intervention.

BRAHMA GROUP, INC., a Nevada
corporation,

Plaintiff,

vs.

COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES I through X; DOES
I through X; ROE CORPORATIONS I
through X, inclusive,

Defendants.



1 Third-Party Defendants Cobra Thermosolar Plants, Inc. ("Cobra") and American Home
2 Assurance Company ("AHAC") filed a Motion to Stay on October 15, 2019 ("Motion to Stay").
3 Tonopah Solar Energy, LLC ("TSE") hereby joins the Motion to Stay based on the following
4 Memorandum of Points and Authorities, the pleadings and papers on file herein, and any
5 argument allowed on this matter.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 Although Brahma Group, Inc. ("Brahma") is enjoined from prosecuting its claims against
8 TSE in this action, TSE files this joinder in order to protect its rights and the injunction entered
9 by the federal district court. This action should be stayed for the reasons stated below.

10 First, this action should be stayed pending the outcome of the Federal Action for the
11 reasons stated in Cobra's and AHAC's Motion to Stay and reply in support thereof ("Reply").

12 Second, this action should be stayed pending the outcome of the Federal Action because,
13 if not, Brahma will likely have to undermine the injunction entered by the federal district court.
14 As this Court has been made aware, on September 25, 2019, the United States District Court,
15 District of Nevada entered an injunction enjoining Brahma from litigating its claims for breach
16 of contract, breach of the implied covenant of good faith and fair dealing, and violation of NRS
17 624 against TSE in this Court. *See* Ex. D to the Reply. In doing so, the federal district court
18 concluded the following:

19
20 The Court finds that there is considerable evidence of forum
shopping on the part of Brahma here.

21 ...

22 By amending its complaint in this case and reasserting identical
23 claims in the Nye Court action, the Court finds that Brahma was
24 attempting to subvert removal of this case. The Court also finds
25 that there would be immediate and irreparable injury to TSE for
26 which there would not be an adequate remedy at law if Brahma's
behavior is rewarded. The Court therefore grants TSE's motion
and enjoins Brahma from litigating its contract claims in the Nye
County Action.

27 Ex. D to the Reply, p. 8, ll. 11-12, p. 9, ll. 2-6.
28



1 Yet, by indicating its intent to pursue its surety bond claim against Cobra and AHAC
2 while the Federal Action is still pending, Brahma appears poised to undermine the spirit,
3 purpose, and intent of the injunction. There is no question that the issues presented by Brahma's
4 surety bond claim against Cobra and AHAC are subsumed by the issues presented by Brahma's
5 and TSE's competing claims in the Federal Action. Cobra's and AHAC's Motion to Stay and
6 Reply show this. Moreover, Brahma's own arguments and briefs up until its opposition to the
7 Motion to Stay admit this. *See* Reply, pp. 3, 4, 7, 10, 11-12 (pointing out instances in the past
8 where Brahma took positions in briefs and during oral arguments that precisely contradict the
9 basis upon which it now opposes the Motion to Stay).

10 There is no logical means by which Brahma could litigate its surety bond claim against
11 Cobra and AHAC in this Court without dragging TSE into this action through, at a minimum,
12 depositions and document subpoenas (efforts that TSE will oppose). Brahma would in effect be
13 litigating its contractual claims against TSE in this Court, which would amount to the same
14 forum-shopping that the federal district court rebuffed with the injunction.

15 Third, this action should be stayed pending the outcome of the Federal Action because
16 Cobra and AHAC will likely become parties to the Federal Action. As stated in their Motion to
17 Stay, Cobra and AHAC have moved to intervene into the Federal Action. Their motion to
18 intervene will likely be granted, as it is both logical and supported by binding Ninth Circuit
19 precedent.

20 Finally, there is an additional reason to stay this action. This action should be stayed
21 pending the outcome of TSE's pending writ petition. TSE filed a writ petition with the Nevada
22 Supreme Court on March 6, 2019 pertaining to this Court's denial of TSE's motion to dismiss,
23 strike, or stay the First Amended Counter-Complaint filed by Brahma. On May 16, 2019, the
24 Nevada Supreme Court ordered Brahma to file an answer to the writ petition. Brahma has yet to
25 file an answer due to various extensions and by filing a motion to stay briefing on the writ
26 petition, which was eventually denied.

27 Nevada Rule of Appellate Procedure 8 sets forth the four criteria for determining
28 whether to stay a district court proceeding pending resolution of a writ petition: (1) whether the

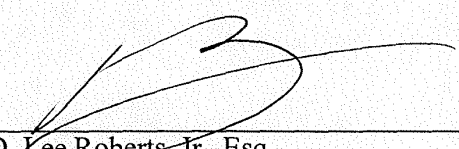


1 object of the writ petition will be defeated if the stay or injunction is denied; (2) whether the
2 petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the real party
3 in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether the
4 petitioner is likely to prevail on the merits in the writ petition. *See Hansen v. Eighth Judicial*
5 *Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986 (2000).

6 Here, the four criteria weigh in favor of staying this action pending the outcome of the
7 writ petition. The object of the writ petition, which is to dismiss Brahma's pleadings in this
8 action for material defects, or stay this action pursuant to the first-to-file rule would not be
9 defeated if the stay is denied. But, if the stay is denied, Brahma will likely drag TSE into this
10 action, as described above, which would amount to the same irreparable harm that the federal
11 district court found warranted the injunction. *See Ex. D to the Reply*, p. 9, ll. 3-4 ("The Court
12 also finds that there would be immediate and irreparable injury to TSE for which there would not
13 be an adequate remedy at law if Brahma's behavior is rewarded."). Conversely, Brahma will not
14 suffer any irreparable harm or serious injury if the stay is granted for the reasons set forth on
15 pages 8-9 of Cobra's and AHAC's Motion to Stay. Finally, TSE respectfully submits that it is
16 likely to prevail on the writ petition's merits. Brahma could not initiate a civil action by filing its
17 lien foreclosure complaint into the special proceeding created by TSE's motion to expunge and,
18 alternatively, a stay of this proceeding under the first-to-file rule was appropriate.

19 Thus, Cobra's and AHAC's Motion to Stay should be granted. This action should be
20 stayed pending the outcome of the Federal Action, or, at a minimum, pending the resolution of
21 TSE's writ petition.

22 DATED: November 15, 2019.


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CERTIFICATE OF SERVICE

I hereby certify that on the 15 day of November, 2019, a true and correct copy of the foregoing **TSE'S JOINDER TO COBRA'S AND AHAC'S MOTION TO STAY** was served by mailing a copy of the foregoing document, to the following:

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10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 BRAHMA GROUP, INC., a Nevada
Corporation,

13 Plaintiff,

14 vs.

15 TONOPAH SOLAR ENERGY, LLC, a
16 Delaware Limited Liability Company; DOES I
17 through X; and ROE CORPORATIONS I
through X,

18 Defendants.

19
20 TONOPAH SOLAR ENERGY, LLC a
21 Delaware limited liability company; DOES I
through X; and ROE CORPORATIONS I
through X,

22 Counter-claimants,

23 vs.
24

25 BRAHMA GROUP, INC., a Nevada
corporation,

26 Counter-defendant.
27
28

Case No. 2:18-cv-01747-RFB-EJY

**REPLY IN FURTHER SUPPORT OF
MOTION TO INTERVENE AS
DEFENDANTS**

REPLY IN FURTHER SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

COMES NOW the Proposed Defendants-Intervenors, COBRA THERMOSOLAR PLANTS, INC. (“Cobra”) and AMERICAN HOME ASSURANCE COMPANY (“AHAC”), by and through their attorneys of record, the law firm of WEIL & DRAGE, APC, and for the reasons set forth herein, hereby submit their Reply in further support of their Motion to Intervene as Defendants [ECF No. 56].

This Motion is based upon the Pleadings and Papers on file, the attached Points and Authorities, the accompanying proposed Answer in Intervention, and oral argument to be made by counsel at any Hearing of this matter.

DATED this 9th day of December, 2019.

WEIL & DRAGE, APC

/s/ Jeremy R. Kilber

By: _____

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MEMORANDUM OF POINTS & AUTHORITIES

I. PRELIMINARY STATEMENT¹

In their moving papers in support of their Motion to Intervene (the “Motion”), Cobra and AHAC demonstrated that they meet the requirements necessary to intervene as a right under Fed. R. Civ. P. 24(a). Indeed, because the Cobra Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE, Cobra and AHAC bear all the downside risk. So, there is a substantial danger that TSE, which is locked in a contentious arbitration with Cobra, will either lack the incentive to oppose Brahma’s claims, or will protect its litigation position in the arbitration at the expense of its defense against Brahma’s claims. At the very least, TSE has nowhere near the incentive to aggressively oppose Brahma’s claims that Cobra and AHAC have in this action.

Brahma’s opposition does not contest any of this. It cannot. Instead, Brahma bizarrely asks that the Court deny the motion based on a theory that Cobra, a Nevada company, cannot intervene without destroying diversity because it is an indispensable party. This notion is fundamentally flawed. The Court should reject it.

This is not the first case where a non-diverse party sought to join a diversity case to protect its vital interests. Not surprisingly, there is a rule for this. In *Mattel, Inc. v. Bryant*, 446 F.3d 1011 (9th Cir. 2006), the Ninth Circuit held that a non-diverse party can intervene in a diversity case if they were not an indispensable party at the time the plaintiff filed the case. The rule is meant to discourage collusive non-joinder by which a plaintiff might illegitimately obtain access to federal court. Here, Cobra was not an indispensable party when Brahma filed this action. Rather, Cobra (and AHAC) had no interest in the case at all at that point because the Cobra Surety Bond did not yet exist.

Faced with this dispositive temporal obstacle, Brahma urges the Court to ignore the filing date and focus on the date of removal because by that point the Cobra Surety Bond, albeit in a lower amount, did exist. There is no basis for a “date-of-removal” rule, and Brahma points to none. The date of removal is not relevant to the goal of the rule—*i.e.*, to prevent a plaintiff’s

¹ Capitalized terms not otherwise defined in this Reply have the definition given them in Cobra and AHAC’s October 18, 2019 Motion. (Dkt. No. 56.)

1 collusive non-joinder to illegitimately gain access to federal court. Of course, collusive non-
2 joinder will rarely, likely never, be an issue in removed cases because those cases, by definition,
3 start out in state court. And cases that have analyzed the intervention of non-diverse parties in
4 removed, diversity cases do not support the notion that indispensability should be determined as of
5 the date of removal. Rather, the date of filing controls no matter how the case came to rest in
6 federal court. The Court should do likewise and assess Cobra's status as of the date Brahma
7 originally filed this action, not the day TSE removed it.

8 Moreover, Brahma's newly-contrived contrived indispensability argument should be
9 rejected as an attempt to once again undermine the court's jurisdiction. If Brahma believed that
10 Cobra and AHAC were indispensable parties, it could have – and should have – made that
11 argument in September 2018 when TSE removed the case to federal court. Brahma did not. At
12 best, Brahma's new position that Cobra and AHAC are indispensable parties is merely another
13 senseless run at getting this case remanded to state court. The Court should—again—put an end
14 to Brahma's gamesmanship and permit Cobra and AHAC to intervene.

15 Therefore, as summarized above and discussed at greater length below, Brahma's
16 opposition to Cobra and AHAC's motion does not withstand scrutiny. The Court should,
17 therefore, grant the Motion so that Cobra and AHAC may participate in this action and directly
18 protect their significant interests without having to rely on TSE to do it for them.

19 II. ARGUMENT

20 A. COBRA AND AHAC WERE NOT INDISPENSIBLE AT THE TIME BRAHMA 21 FILED THE COMPLAINT

22 The Ninth Circuit has held that indispensability is determined at the time of filing. Brahma
23 improperly claims that a party's indispensability is determined at the time of removal. (Mot. 8-9.)
24 Brahma has no support for this contention. Indeed, Brahma does not cite to a single case where a
25 nondiverse party seeks to intervene after the case has already been removed under diversity.
26 Instead, Brahma cites only to the law that *removal* based on diversity jurisdiction is determined at
27
28

1 the time of removal. (Opp. at 8.)² However, a court's analysis for removal is different from
 2 determining whether to recognize a nondiverse party's right to intervene.

3 Contrary to Brahma's incorrect contention, the *Mattel* decision specifies that the
 4 indispensability inquiry looks *at the time of filing*. In *Mattel, Inc. v. Bryant*, Mattel sued its former
 5 employee, Bryant, in state court for breach of an employment agreement. Bryant removed the
 6 action to federal court under diversity jurisdiction. *See* 441 F. Supp. 2d 1081, 1091-94 (C.D. Cal.
 7 2005). In assessing whether removal was proper, the district court analyzed its jurisdiction at the
 8 time of removal. *Id.* at 1093. Afterwards, a competitor (and Bryant's new employer), sought to
 9 intervene as a non-diverse defendant. After finding that the competitor's intervention was proper
 10 under Rule 24(a)(2), the district court held that "unless it was 'indispensable' under Rule 19(b) *at*
 11 *the time Mattel filed the Complaint*, [the competitor] did not destroy diversity by intervening." *Id.*
 12 at 1095 (emphasis added). Because the competitor was not indispensable at the time Mattel filed
 13 the complaint, the court found that "the post-removal intervention of a non-diverse, non-
 14 indispensable defendant" would not destroy diversity. *Id.* at 1098. The Ninth Circuit affirmed. *See*
 15 *Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1014 (9th Cir. 2006). The Ninth Circuit rule is consistent
 16 with that applied in the other circuits. *See, e.g.*, 15 Moore's Federal Practice § 102.16(2)(b)(ii)
 17 ("The addition of a dispensable, nondiverse party who did not have an interest in the original
 18 complaint at the time it was filed does not destroy diversity jurisdiction.").

19 Other courts have similarly found, in situations such as this one, that intervention of a non-
 20 diverse party in a removed, diversity jurisdiction case does not defeat the court's jurisdiction so
 21 long as the non-diverse party was dispensable at the filing of the complaint. *See, e.g., McCormick*
 22 *v. McCrary*, No. 3:09-cv-0034-HRH, 2010 U.S. Dist. LEXIS 152197, at *8 (D. Alaska May 11,
 23 2010) (in a diversity removal proceeding, analyzing whether a non-diverse party was
 24 indispensable to the action at the time it was commenced); *JMA Energy Co., LLC v. BJ Servs. Co.*
 25 *USA*, No. CIV-08-738-M, 2009 WL 1856216, at *3 (W.D. Ok. June 26, 2009) (analyzing, in a
 26

27
 28 ² *See Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985) (analyzing an action for removal based on diversity jurisdiction); *Strotek Corp. v. Air Transport Ass'n. of America*, 300 F.3d 1129, 1131 (9th Cir. 2002) (same); *Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815 (9th Cir. 1985) (same).

1 diversity removal case, whether a non-diverse party was indispensable at the time the action
2 commenced); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1996 U.S.
3 Dist. LEXIS 18818, at *13-15 (N.D. Ill. Dec. 16, 1996) (finding that, after removal, the
4 intervenors were not indispensable parties at the time the suit was filed, and thus should not
5 deprive the court of diversity jurisdiction).

6 Here, as in *Mattel*, Cobra and AHAC were dispensable—not indispensable—parties at the
7 time Brahma filed its original complaint in state court on July 17, 2018. *See* ECF No. 55, p. 2
8 (citing ECF No. 1-1). Cobra first recorded the Cobra Surety Bond issued by AHAC, the basis
9 upon which Cobra and AHAC premise their intervention, on September 6, 2018. *See* ECF No. 16-
10 11. Prior to recording the Cobra Surety Bond, Cobra and AHAC had no interest in this case.
11 Brahma’s claims against TSE were for breach of contract, breach of the implied covenant, unjust
12 enrichment, and violation of NRS 624. *See* ECF No. 1-1. Thus, on July 17, 2018, the date the
13 complaint was filed, Cobra and AHAC were dispensable parties to this action. Brahma does not
14 contest this fact. And the Court should, accordingly, grant the Motion.

15 **B. ANALYZING INDISPENSABILITY AT THE TIME OF REMOVAL WOULD NOT**
16 **PREVENT GAMESMANSHIP**

17 Analyzing indispensability at the filing of the complaint, rather than the time of removal,
18 makes sense because it prevents parties from gaming the system, a deterrent that would not exist if
19 analyzed from the time of removal. Rather, examining whether the intervenor was
20 “indispensable” when the action was filed “prevent[s] collusion between parties to avoid
21 jurisdictional requirements.” *Mut. Fire, Marine & Inland Ins. Co.*, 726 F. Supp. at 481. “If the
22 rule were otherwise, the requirement of complete diversity could be avoided by having one party
23 bring an action while the indispensable party waits and then intervenes as of right under the
24 court’s ancillary jurisdiction.” *Id.* For example, in *Mattel*, the Ninth Circuit noted that “collusion
25 with the plaintiff is manifestly absent”, and as such, the “diversity required by 28 U.S.C. § 1332 is
26 satisfied together with the judge-made rule of complete diversity and the judge-made exception
27 for a non-indispensable defendant-intervenor.” 446 F.3d at 1013.

28 ///

1 Here, there is no allegation that the parties colluded to avoid the requirement of complete
2 diversity to obtain access to federal court. Nor would such a suggestion make sense given that
3 Brahma initiated the case in state court. Indeed, because the case was removed from state court,
4 there is a “*prima facie* absence of effort by the plaintiff to circumvent the complete diversity
5 requirement.” *Mattel*, 441 F. Supp. 2d at 1096 (citing Joan Steinman, *Supplemental Jurisdiction in*
6 *§ 1441 Removed Cases: An Unsurveyed Frontier of Congress’ Handiwork*, 35 Ariz. L. Rev. 305,
7 347 (1993)).

8 Moreover, Brahma’s argument for assessing indispensability as of removal should be
9 rejected because looking at the time of removal makes no sense. The date of removal is not
10 relevant to the goal of the rule—*i.e.*, to prevent a plaintiff’s collusive non-joinder to illegitimately
11 gain access to federal court. Of course, collusive non-joinder will rarely, likely never, be an issue
12 in removed cases because those cases, by definition, start out in state court. And cases that have
13 analyzed the intervention of non-diverse parties in removed, diversity cases do not support the
14 notion that indispensability should be determined as of the date of removal. Rather, the date of
15 filing controls no matter how the case came to rest in federal court. The Court should do likewise
16 and assess Cobra’s status as of the date Brahma originally filed this action, not the day TSE
17 removed it.

18 **C. BRAHMA’S NEWLY-CONTRIVED INDISPENSABILITY ARGUMENT SHOULD**
19 **BE REJECTED AS AN ATTEMPT TO ONCE AGAIN UNDERMINE THE**
20 **COURT’S JURISDICTION**

21 Brahma’s claim that Cobra is an indispensable party has no basis. Brahma’s prior
22 arguments in this case confirm as much. If Brahma believed that Cobra and AHAC were
23 indispensable parties, it could have – and should have – made that argument in September 2018
24 when TSE removed the case to federal court. Brahma did not. Nor did Brahma allege that Cobra
25 and AHAC are indispensable in its affirmative defenses to TSE’s counterclaims. (*See* Dkt. 10 at
26 5-6.) Brahma surely would have argued this point before, when it was trying to legitimize its
27 forum shopping, if it felt there was any validity to it since the failure to join an indispensable party
28 would have required the Court to dismiss this case. *See, e.g., Takeda v. Northwestern Nat’l Life*

{01649938;1}

1 *Ins. Co.*, 765 F.2d 815, 821 (9th Cir. 1985).

2 At best, Brahma's new position that Cobra and AHAC are indispensable parties is merely
3 another senseless run at getting this case remanded to state court. If the Court were to find that
4 Cobra and AHAC are indispensable, Brahma's next step will likely be to make a motion to
5 remand the case back to state court based on un-joined "indispensable" parties. The Court already
6 found that Brahma's forum shopping was an attempt to subvert the Court's jurisdiction over this
7 case. (Dkt. 55 at 8.) The Court should—again—put an end to Brahma's gamesmanship and
8 permit Cobra and AHAC, which Brahma admits are necessary parties to this action, to intervene
9 to protect their vital interests.

10 **III. CONCLUSION**

11 For the foregoing reasons, and those discussed in their Moving Brief, Cobra and AHAC
12 respectfully request that the Court grant their Motion to Intervene in this action as of right under
13 Fed. R. Civ. P. 24(a), or the alternative, under to Fed. R. Civ. P. 24(b), and to grant them such
14 other relief as the Court deems just and proper.

15 DATED this 9th day of December, 2019.

16 WEIL & DRAGE, APC

17 */s/ Jeremy R. Kilber*

18 By: _____
19 Geoffrey Crisp, Esq.
20 Nevada Bar No. 2104
21 Jeremy R. Kilber, Esq.
22 Nevada Bar No. 10643
23 861 Coronado Center Dr., Ste. 231
24 Henderson, NV 89052
25 *Attorneys for Proposed Defendants-Intervenors,*
26 *COBRA THERMOSOLAR PLANTS, INC.,*
27 *and AMERICAN HOME ASSURANCE*
28 *COMPANY*

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2019, a true and correct copy of the foregoing **REPLY IN FURTHER SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS** was made this date by electronically filing through the CM/ECF Filing System and therefore served upon all counsel of record via ECF Notification:

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14 *Attorneys for COBRA THERMOSOLAR PLANTS, INC. and*
AMERICAN HOME ASSURANCE COMPANY

15 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

16 **IN AND FOR THE COUNTY OF NYE**

17 TONOPAH SOLAR ENERGY, LLC, a
18 Delaware limited liability company,
19 Plaintiff,

20 vs.

21 BRAHMA GROUP, INC., a Nevada
22 corporation,

23 Defendant.

24 BRAHMA GROUP, INC., a Nevada
25 corporation,

26 Lien/Bond Claimant,

27 vs.

28 TONOPAH SOLAR ENERGY, LLC, a
Delaware limited liability company; BOE

) Case No.: CV39348
) Consolidated With
) Case No.: CV39799
) Dept. No.: 2

) **COBRA THERMOSOLAR PLANTS, INC.'S**
) **AND AMERICAN HOME ASSURANCE**
) **COMPANY'S FIRST SET OF REQUESTS**
) **FOR PRODUCTION TO PLAINTIFF AND**
) **COUNTER-DEFENDANTS TONOPAH**
) **SOLAR ENERGY, LLC**

1 BONDING COMPANIES I through X;)
 2 DOES I through X; ROE CORPORATIONS)
 3 I through X; and TOE TENANTS I through)
 4 X, inclusive,)
 5 Counter-defendants.)
 6 BRAHMA GROUP, INC., a Nevada)
 7 corporation,)
 8 Lien/Bond Claimant and)
 9 Third-Party Plaintiff,)
 10 vs.)
 11 COBRA THERMOSOLAR PLANTS, INC.,)
 12 a Nevada corporation; AMERICAN HOME)
 13 ASSURANCE COMPANY, a surety; BOE)
 14 BONDING COMPANIES I through X;)
 15 DOES I through X; ROE CORPORATIONS)
 16 I through X, inclusive,)
 17 Third-Party Defendants.)
 18

19 **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE**
 20 **COMPANY'S FIRST SET OF REQUESTS FOR PRODUCTION TO PLAINTIFF AND**
 21 **COUNTER-DEFENDANTS TONOPAH SOLAR ENERGY, LLC**

22 TO: TONOPAH SOLAR ENERGY, LLC, Plaintiff and Counter-defendants;
 23 TO: D. Lee Roberts, Jr., Esq., Colby L. Balkenbush, Esq., and Ryan T. Gormley, Esq. of
 24 WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, its attorneys.
 25 Third-Party Defendants, COBRA THERMOSOLAR PLANTS, INC. ("Cobra") and
 26 AMERICAN HOME ASSURANCE COMPANY ("AHAC") hereby request that Plaintiff and
 27 Counter-defendants Tonopah Solar Energy, LLC ("TSE") produce the documents and things
 28 requested below (the "Requests") at the office of WEIL & DRAGE, APC, 861 Coronado Center
 Drive, Suite 231, Henderson, Nevada 89052, **within 30 days of the date of service of this Request,**
 in accordance with Nevada Rules of Civil Procedure 34.
 ///

DEFINITIONS

1. The term "Action" means the action *Brahma Group Inc. v. Cobra Thermosolar Plants Inc, et. al.*, pending in the Fifth Judicial District Court of the State of Nevada, Nye County, Case No. CV39348, consolidated with CV39799.

2. The term "AHAC" means Third-Party Defendant American Home Assurance Company, its current and former officers, directors, employees, agents and representatives.

3. The term "Cobra" means Third-Party Defendant Cobra Thermosolar Plants, Inc., its current and former officers, directors, employees, agents and representatives.

4. The term "Brahma" means Third-Party Plaintiff Brahma Group Inc., its current and former officers, directors, employees, agents and representatives.

5. The term "Brahma Claims" means Brahma's claims against TSE arising from or relating to the Project.

6. The term "Brahma Invoices" means invoices presented by Brahma to TSE regarding work Brahma allegedly performed for TSE.

7. The term "Brahma Lien" means Brahma's Notice of Lien related to the Project, as amended.

8. The term "Brahma Work Orders" means any work or maintenance orders assigned by TSE to Brahma with respect to the Contract.

9. The term "Brahma Work" means the work, materials, maintenance, and equipment furnished by Brahma regarding or relating to the any Brahma work allegedly performed for TSE.

10. The term "Communication(s)" means every manner or means of disclosure, transfer, transmission, or exchange of information whether person-to-person, in a group, by telephone, by letter, facsimile, electronic or computer mail, voicemail, text message, instant message, telex or telecopy, or by any other process, electric, electronic or otherwise.

11. The term "Complaint" means the Second Amended Complaint and Amended Third-Party Complaint filed in the Action on April 22, 2019.

12. The term "Contract" means the Services Agreement entered into between TSE and Brahma on or about February 1, 2017.

1 13. The term “Concerning” means in connection with, constituting, analyzing,
2 connecting, containing, describing, discussing, embodying, evidencing, reporting or commenting
3 on, inquiring about, setting forth, explaining, identifying, stating, considering, referring to, relating
4 to, mentioning, alluding to, or in any way pertaining to, in whole or in part or having any logical or
5 factual connection whatsoever with the subject matter in question.

6 14. The term “Document(s)” is synonymous in meaning and equal in scope to the usage
7 of the term “document” or “electronically stored information” in Rule 34 of the Nevada Rules of
8 Civil Procedure. By way of illustration, and without limitation, Documents include at least the
9 following: text messages, originals, drafts and all non-identical copies of memoranda, reports, notes,
10 graphs, laboratory notebooks, correspondence, interoffice communications, letters, diaries,
11 calendars, photographs, motion pictures, sketches, drawings, promotional material, technical papers,
12 printed publications, patents, and all other writings, as well as all non-paper information storage
13 means such as sound reproductions, computer inputs and outputs, tape, film and computer memory
14 devices, as well as tangible things such as models, modules, prototypes, and commercially saleable
15 products.

16 15. The term “Person(s)” means any natural person or any business, legal or
17 governmental entity or association.

18 16. The term “Project” means the Crescent Dunes Solar Energy Project.

19 17. The term “Relating to” means in whole or in part constituting, containing,
20 concerning, embodying, identifying, stating, consisting of, pertaining to, referring to, dealing with,
21 discussing, describing or having any local or factual connection with the matter at issue.

22 18. The term “Subject Matter of this Action” means the facts and claims alleged in the
23 Complaint and the defenses asserted by Cobra or AHAC, and generally refers to any of the claims
24 and defenses asserted by either party in this Action.

25 19. The term “TSE” means Plaintiff and Counter-Defendant Tonopah Solar Energy,
26 LLC, its current and former officers, directors, employees, agents and representatives.

27 ///

28 ///

20. The terms “You,” “Your” or “Yourself” means Plaintiff and Counter-defendant TSE and any employees, agents, representatives and attorneys, or anyone else acting on behalf of TSE, including but not limited to any attorneys or employees at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC.

INSTRUCTIONS

1. The provisions of Rules 26 and 34 of the Nevada Rules of Civil Procedure are incorporated by reference.

2. These Requests cover all information in Your possession, custody, or control, including, but not limited to, information in the possession of Your principals, owners, employees, agents, servants, representatives, attorneys, or other persons directly or indirectly employed or retained by You, or anyone else acting on Your behalf or otherwise subject to Your control.

3. If any Request cannot be complied with in full, it should be complied with to the extent possible, and an explanation should be provided as to why full compliance is not possible.

4. These Requests shall be interpreted to be inclusive rather than exclusive.

5. In the event that You contend that any of these Requests are objectionable, in whole or in part, You shall state with particularity each such objection and the basis therefor, and shall produce documents and materials responsive to the remainder of the Request to the extent that You are not objecting to it.

6. If objection is made to producing any Document, or any portion thereof, or to disclosing any information contained therein, in response to any Request on the basis of any claim of privilege, You shall provide a statement setting forth the information required by Rule 26 of the Nevada Rules of Civil Procedure.

7. A complete original or copy of each Document or thing must be produced, even though only a portion of such document or thing is responsive to one of the numbered requests contained herein. Documents shall not be edited, cut, redacted (except where a claim of privilege is asserted with respect to a portion of a document) or expunged and shall include all attachments, appendices, tables and exhibits and all covering memoranda, letters or documents.

///

8. With respect to each Document otherwise responsive to this request that has been lost, discarded or destroyed, identify (a) each author; (b) each addressee; (c) the date, title and subject matter of the Document; (d) the date of the disposal; (e) the manner of the disposal; (f) the reason for the disposal; (g) each person who authorized the disposal; (h) each person who carried out the disposal; and (i) each person with any knowledge concerning the disposal.

9. The terms “and” and “or” as used herein shall include each other within their meaning, whether both are referenced or otherwise.

10. The use of the singular form of any word includes the plural and vice versa.

11. The masculine gender of any word used herein includes the feminine.

12. The past tense of a verb used herein includes the present tense, and the present tense includes the past tense.

13. In accordance with Rule 26 of the Nevada Rules of Civil Procedure, these Requests are continuing in nature and requires that You serve a supplemental production in a timely manner in the event that You obtain or discover additional information or documents after the documents requested herein are produced.

14. Unless otherwise stated, the time period applicable to these Requests is the five years preceding the filing of the Complaint in this Action.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

Produce all Documents Relating to the Contract and Brahma Work, including, but not limited to, all Brahma Work Orders, maintenance, contracts, change orders, bids, requests for quotations, commercial price comparisons, and payments.

REQUEST FOR PRODUCTION NO. 2:

Produce all Documentation in Your possession regarding any alleged inaccuracies, irregularities, and overcharges in Brahma's invoices, including, but not limited to Documents regarding the allegations that:

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- 1 • Brahma allowed individuals to bill excess, improper, and/or unauthorized
2 amounts of time to the Project;
3 • Brahma charging a 10 percent mark up to TSE for work performed on the Project
4 by sister companies;
5 • Brahma billing TSE for work performed by its subcontractors, which was not
6 supported by corresponding, supporting invoices;
7 • Brahma billing for amounts with respect to which it had miscalculated its margin
8 • Brahma billing TSE for improper and/or not supported equipment charges;
9 • Brahma billing TSE for 100 percent of the time Brahma and its subcontractors'
10 were onsite rather than taking into consideration lunch breaks and other breaks;
11 • Brahma billing against work orders that were already closed/completed.

12 **REQUEST FOR PRODUCTION NO. 3:**

13 Produce all Documents Concerning any review of Brahma's invoices.

14 **REQUEST FOR PRODUCTION NO. 4:**

15 Produce all supporting Documentation concerning any payment by TSE to Brahma for the
16 Brahma Work.

17 **REQUEST FOR PRODUCTION NO. 5:**

18 Produce all supporting Documentation concerning Your decision to hire Brahma for the
19 Brahma Work.

20 **REQUEST FOR PRODUCTION NO. 6:**

21 Produce all Documents Concerning the negotiations and Communications regarding the
22 Contract.

23 **REQUEST FOR PRODUCTION NO. 7:**

24 Produce all Documents Concerning the services that Brahma provided You, or that
25 otherwise You provided to Brahma, including root cause analysis, maintenance works, quality
26 records, etc., and fell outside the scope of the Contract.

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1 **REQUEST FOR PRODUCTION NO. 8:**

2 Produce all Documents Relating to Communications between You and any persons and/or
3 entities concerning the Brahma Work, and concerning the services Brahma provided to You whether
4 within or outside the scope of the Contract.

5 **REQUEST FOR PRODUCTION NO. 9:**

6 Produce all bids You received that pertain to the Brahma Work.

7 **REQUEST FOR PRODUCTION NO. 10:**

8 Produce all price comparisons You created or analyzed pertaining to the bids You received
9 for the Brahma Work.

10 **REQUEST FOR PRODUCTION NO. 11:**

11 Produce all Documents relating to Your procedure regarding analyzing price comparisons
12 and requests for quotations.

13 **REQUEST FOR PRODUCTION NO. 12:**

14 Produce all Documents and Communications, including but not limited to emails, text
15 messages, or other messages, between You and Brahma regarding the Brahma Work.

16 **REQUEST FOR PRODUCTION NO. 13:**

17 Produce all Documents and Communications, including but not limited to emails, text
18 messages, or other messages, between Rob Howe, Russ Meacham, Kevin Smith, Justin Pugh, Chris
19 LeWand and Sean Davis, Ted Ahlin, Clay Stanaland, Karen Morris regarding the Brahma Work.

20 **REQUEST FOR PRODUCTION NO. 14:**

21 Produce all Documents and Communications, including emails and notices, Relating to
22 maintenance that Brahma provided regarding the Brahma Work.

23 **REQUEST FOR PRODUCTION NO. 15:**

24 Produce all Documents Relating to Your procedure or instructions for Brahma regarding
25 performance of the Brahma Work.

26 **REQUEST FOR PRODUCTION NO. 16:**

27 Produce all Documents showing that You agreed to pay Brahma employees and
28 subcontractors' employees for lunch breaks or other breaks while on site at the Project.

1 **REQUEST FOR PRODUCTION NO. 17:**

2 Produce all Documents showing that You authorized Brahma to bill overtime or standby
3 hours to any work on the Project.

4 **REQUEST FOR PRODUCTION NO. 18:**

5 Produce all Documents Relating to how and when overtime crews were organized and
6 deployed.

7 **REQUEST FOR PRODUCTION NO. 19:**

8 Produce all Documents showing that You authorized or paid Brahma through the submittal
9 of a quotation, rather than an invoice.

10 **REQUEST FOR PRODUCTION NO. 20:**

11 Produce all Documents showing that You authorized Brahma to bill hours to any work on
12 the Project.

13 **REQUEST FOR PRODUCTION NO. 21:**

14 Produce all Documents showing that You authorized Brahma to bill hours for employees
15 who did not provide timesheets.

16 **REQUEST FOR PRODUCTION NO. 22:**

17 Produce all Documents Relating to sign-in sheets, whether electronic or manual, to enter
18 onto the Plant facility.

19 **REQUEST FOR PRODUCTION NO. 23:**

20 Produce all Documents, including excel documents, charts, or summary sheets, created by
21 Justin Pugh or any other agent or employee of TSE, showing any analysis You performed regarding
22 checking or authorizing Brahma's invoices or timesheets.

23 **REQUEST FOR PRODUCTION NO. 24:**

24 Produce all supporting Documentation You received from Brahma regarding the Brahma
25 Work, including, but not limited to, quality records, maintenance records, root cause analysis,
26 photographs, or reports.

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1 **REQUEST FOR PRODUCTION NO. 25:**

2 Produce all Documents or organizational chart(s) which reflect your corporate structure.

3 **REQUEST FOR PRODUCTION NO. 26:**

4 Produce any employee roster(s) or other similarly purposed Documents, which identifies
5 employees that provided services or Communications under the Contract.

6 **REQUEST FOR PRODUCTION NO. 27:**

7 Produce all Documents, including Communications, between You and any persons and/or
8 entities concerning the Brahma Lien.

9 **REQUEST FOR PRODUCTION NO. 28:**

10 Produce all Documents reflecting your policy or practice with respect to the retention or
11 destruction of Documents that may be responsive to any of the Requests set forth herein.

12 **REQUEST FOR PRODUCTION NO. 29:**

13 Produce all Documents Concerning any damages or injuries You have or will suffer due to
14 misconduct that You attribute to Cobra or AHAC in the Counterclaim.

15 **REQUEST FOR PRODUCTION NO. 30:**

16 Produce the current curriculum vitae of each Person that You expect to provide expert
17 testimony in any proceeding in this Action.

18 **REQUEST FOR PRODUCTION NO. 31:**

19 Produce all Documents that You intend to use in this Action to support Your factual
20 allegations and claims in the Counterclaim.

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1 **REQUEST FOR PRODUCTION NO. 32:**

2 Produce all Documents exchanged between You, or anyone acting on Your behalf, and any
3 Person Concerning (1) the Subject Matter of this Action; (2) Cobra or any Person who You claim
4 represented or was acting under the authority or direction of Cobra; or (3) Brahma or any Person
5 who You claim represented or was acting under the authority or direction of Brahma.

6 **NOTE: THESE REQUESTS FOR PRODUCTION SHALL BE DEEMED**
7 **CONTINUING SO AS TO REQUIRE SUPPLEMENTAL ANSWERS IF YOU OR**
8 **YOUR ATTORNEYS OBTAIN FURTHER INFORMATION BETWEEN THE**
9 **TIME THAT THESE ANSWERS ARE SERVED AND THE TIME OF TRIAL.**

DATED this 11th day of December, 2019.

10 WEIL & DRAGE, APC

11 

12 Geoffrey Crisp, Esq.

13 Nevada Bar No. 2104

14 Jeremy R. Kilber, Esq.

15 Nevada Bar No. 10643

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*Attorneys for COBRA THERMOSOLAR PLANTS,
INC. and AMERICAN HOME ASSURANCE
COMPANY*


1 CERTIFICATE OF SERVICE

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 11th day of
3 December, 2019, service of the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND**
4 **AMERICAN HOME ASSURANCE COMPANY'S FIRST SET OF REQUESTS FOR**
5 **PRODUCTION TO PLAINTIFF AND COUNTER-DEFENDANTS TONOPAH SOLAR**
6 **ENERGY, LLC** was made this date by mailing a true and correct copy of the same, via first-class
7 mail, at Henderson, Nevada, addressed to the following:

8 D. Lee Roberts, Jr., Esq.
9 Colby Balkenbush, Esq.
10 Ryan T. Gormley, Esq.
11 WEINBERG, WHEELER, HUDGINS,
12 GUNN & DIAL, LLC
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14 Las Vegas, NV 89118
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22 
23 Joanna Medina, an Employee of
24 WEIL & DRAGE, APC
25
26
27
28