IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
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Supreme Court Case No. 78256
District Court Case No. CV 39348

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 IV

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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
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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
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11/15/2019	Brahma Group, Inc.'s Response to Motion to Intervene (without exhibits)	PRA 280-296	IV
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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
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
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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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IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

TONOPAH SOLOR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	Case No.: CV39348 *Consolidated With* Case No.: CV39799 Dept. No.: 2 **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** **[ORAL ARGUMENT REQUESTED]**
BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant, vs. TONOPAH SOLOR ENERGY, LLC, a Delaware limited liability company; BOE BONDING COMPANIES I through X; DOES I through X; ROE CORPORATIONS I through X; and TOE TENANTS I through X, inclusive, Counter-defendants.	Date of Hearing: _____ Time of Hearing: _____

BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant and Third-Party 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, Third-Party Defendants.	)

COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY

COMES NOW Third-Party Defendants, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN HOME ASSURANCE COMPANY (collectively, for purposes of this response, "COBRA"), by and through their attorneys of record, the law firm of WEIL & DRAGE, APC, and hereby moves this Court for a stay of BRAHMA GROUP, INC.'s Third-Party action against COBRA.

This Motion is based on the Memorandum of Points and Authorities submitted herein, all pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this Honorable Court will entertain.

DATED this 15th day of October, 2019.

WEIL & DRAGE, APC

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** will be heard before the above-entitled Court located at 1520 E. Basin Avenue, Pahrump, Nevada 89060, in Department 2, on the _____ day of _____, 2019, at _____ a.m./p.m., or as soon thereafter as counsel may be heard.

Oral argument is requested.

DATED this 15th day of October, 2019.

WEIL & DRAGE, APC

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

Tonopah Solar Energy, LLC ("TSE") is the project developer and owner of the Crescent Dunes Solar Energy Facility located outside Tonopah, Nevada (the "Plant"). Cobra Thermosolar Plants, Inc. ("Cobra"), is a Nevada company that specializes in large infrastructure projects and negotiated an Engineering Procurement and Construction ("EPC") Contract with TSE to build the Plant. In 2017, TSE contracted with Brahma Group, Inc. ("Brahma") to perform work at the Plant. TSE disputes the sufficiency of certain invoices Brahma submitted to TSE for payment. Brahma claims that TSE owes it additional money for work Brahma performed at the Plant. In the course of this dispute, Brahma filed a third-party complaint against Cobra, as principal, and American Home Assurance Company ("AHAC"), as surety, on bonds that guarantee the liabilities, if any, that TSE may have to Brahma. There are no substantive claims against Cobra or AHAC – Brahma will have to prove its case against TSE before it may foreclose against the bond. Further, Brahma's claims against TSE are pending in another court.

Indeed, this case has a complicated procedural history. Brahma first filed an action in Clark County Nevada, which TSE removed to the United States District Court, District of Nevada. Unhappy with being in federal court, Brahma then dismissed most of its federal claims and tried to improperly re-file them here. Given that the federal action was first filed, and the similarity of the claims, this Court granted TSE's motion to stay Brahma's claims against it. Brahma and TSE engaged in extensive motion practice before the federal court, with Brahma moving to stay the federal proceedings and TSE seeking to enjoin Brahma's claims in this court. Ultimately, the federal court enjoined Brahma from litigating its claims against TSE in this court. The federal court found that Brahma's claims in this court were "fraudulently filed in an attempt to subvert the removal of a prior case." (Case No. 2:18-cv-01747, Dkt. 55 at 8-9.)

As a result, TSE is not a party to this action and is not participating in discovery. TSE's injunction is directly relevant to Cobra's defenses, given how inter-connected the claims against TSE are with the claims against Cobra – the claim against Cobra is simply as principal on a bond

that Brahma alleges TSE owes. Thus, if Brahma's claim against TSE fails, its claim against Cobra similarly fails. Because the claim against Cobra is wholly dependent on the claims against TSE, and those claims have been enjoined by the federal court, the surety claim against Cobra and AHAC should similarly be stayed pending the outcome of the federal court action between Brahma and TSE.

Cobra will be filing a petition to intervene in the related federal case. If that motion were to be granted, which it should be, Brahma will have near identical claims against Cobra and AHAC in state and federal court. The federal court recognized as much when it enjoined Brahma from litigating its contract claims against TSE in this matter. Thus, at the very least, this Court should stay the proceedings as to Cobra and AHAC pending the federal court's decision on Cobra and AHAC's motion to intervene.

II.

FACTS[1]

On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with Brahma Group Inc., whereby Brahma agreed to provide TSE, on a time and material basis, work, materials, and equipment (collectively, the "Work") at Crescent Dunes. Brahma alleges that it provided the Work at Crescent Dunes and TSE failed to fully pay Brahma for such Work.

Because of TSE's alleged failure to fully pay Brahma for its Work, Brahma caused a notice of lien ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as Document No. 890822. Thereafter, the Original Lien was amended on several occasions. On September 14, 2018, Brahma recorded its Fourth Amended Notice of Lien ("Fourth Amended Lien") with the Nye County Recorder, as Document No. 899351.3, increasing the amount to $12,859,577.74. Brahma's Original Lien and the amendments and restatements thereto, including the Fourth Amended Lien, are referred to collectively as the "Brahma Lien."

Cobra caused a surety bond to be recorded with the Nye County Recorder's Office on September 6, 2018, as Document No. 898974 (the "Brahma Surety Bond"), reserving its rights

[1] These facts have been taken from the Complaint and are assumed to be true for the purposes of this motion only.

against TSE. The Brahma Surety Bond (i) was issued by AHAC, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal ("Principal"), and (iii) was in the amount of $10,767,580.00.

Cobra increased the amount of the Surety Bond to $19,289,366.61, or 1.5 times the amount of Brahma's Fourth Amended Lien. Cobra did so by recording a Rider, that amended the Surety Bond (the "Brahma Surety Bond Rider"), on October 9, 2018 with the Nye County Recorder's Office as Document No. 900303. The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as the "Brahma Surety Bond." The Braham Surety Bond released the Brahma Lien.

On May 15, 2018, H&E Equipment Services Inc., a Delaware Corporation and one of Brahma's suppliers for Crescent Dunes, caused a notice of lien to be recorded with the Nye County Recorder as Document No. 892768 in the amount of $477,831.40 (the "H&E Lien"). On September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County Recorder's Office as Document No. 898975 (the "H&E Surety Bond"). The H&E Surety Bond (i) was issued by AHAC, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal ("Principal"), and (iii) is in the amount of $716,741.10. The H&E Surety Bond released the H&E Lien.

Section 24 of the TSE/Brahma Agreement required Brahma to pursue any contract-based claims it had against TSE in Clark County, Nevada. As a result, Brahma filed a Complaint on July 17, 2018, against TSE alleging breach of contract, unjust enrichment, and violation of NRS Chapter 624 in the Eighth Judicial District Court of Nevada (the "Clark County Action"). On September 10, 2018, TSE removed the Clark County Action to the United States District Court, District of Nevada (the "Federal Action"). TSE's removal petition cited 28 U.S.C. § 1332, diversity of citizenship, as the basis subject matter jurisdiction. Brahma did not move to remand the case and has not otherwise raised an objection to the Court's subject matter jurisdiction.

On September 21, 2018, Brahma (as the defendant in Case No. CV 39348, the "Nye County Action") filed its Mechanic's Lien Foreclosure Complaint, as required by NRS 108.239(1). On September 25, 2018, Brahma filed in the Nye County Action its (i) First Amended Counter-

Complaint and included therein its contract-based claims against TSE, and (ii) Third-Party Complaint asserting a claim against the Surety, the Brahma Surety Bond and Cobra, as Principal.

On October 18, 2018, TSE moved to stay this action until the Federal Action was complete. On January 24, 2019, this Court granted TSE's motion to stay the only three remaining causes of action in this case: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing, and (3) violations of NRS 624 until such time as the federal court rules on Brahma's and TSE's pending motions filed in the Federal Action.

On April 19, 2019, Brahma filed a Second Amended Complaint and First-Amended Third Party Complaint. The only claim against Cobra is the surety bond claim.

On April 30, 2019, this Court granted H&E's motion to intervene, permitting H&E to join this lawsuit as a lien claimant pursuant to NRS 108.239(3). H&E's claims are derivative of Brahma's claims against TSE.

On September 25, 2019, the court in the Federal Action enjoined Brahma from litigating its contract claims in this Court, finding that Brahma "fraudulently filed [in this court] in an attempt to subvert the removal of a prior case." (Case No. 2:18-cv-01747, Dkt. 55 at 8-9.) As such, Brahma is currently enjoined from litigating its contract claims against TSE. As a result of the federal court's injunction, TSE has naturally refused to participate in discovery.

III.

LEGAL ARGUMENT

Nevada state courts have cited the United States Supreme Court's *Landis* framework when analyzing a motion to stay. "The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Maheu v. Eighth Judicial Dist. Court In & For Clark Cty., Dep't No. 6*, 89 Nev. 214, 217 (1973) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)); *see also Jordan v. State ex rel. DMV and Public Safety*, 110 P.3d 30, 41 (2005).

Courts have "broad" discretionary power to stay proceedings that are "incidental to the power in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Clinton v. Jones*, 520 U.S. 681, 706 (1997); *Landis*, 299 U.S. at 254.

Courts have set out the following framework for a *Landis* stay:

> Where it is proposed that a pending proceeding be stayed, the competing interests which will be affected by the granting or refusal to grant a stay must be weighed. Among those competing interests are the possible damages which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating issues, proof, and questions of law which could be expected to result from a stay.

Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005). Courts should also consider "the judicial resources that would be saved by avoiding duplicative litigation." *Pate v. Depuy Orthopaedics, Inc.*, No. 2:12-cv-01168-MMD-CWH, 2012 WL 3532780, at *2 (D. Nev. Aug. 14, 2012).

A. NO POSSIBLE DAMAGE WILL RESULT FROM GRANTING A STAY

Brahma will not be prejudiced by a stay because a stay will not significantly delay any relief to which Brahma may be entitled – and even such delay would not be grounds for refusing a stay. In weighing the competing interests, a court should consider the possible damage to the non-moving party. *Lockyer*, 398 F.3d at 1110; *see In re Am. Apparel, Inc. Shareholder Derivative Litig.*, No. CV 10-06576 MMM, 2012 WL 9506072, at *43 (C.D. Cal. July 31, 2012) (noting "courts generally consider whether doing so would cause undue prejudice or present a clear tactical disadvantage to the non-moving party") (citation omitted).

For example, courts have found that a stay is appropriate when the non-moving party's damage was only a delay in recovering money damages. *See, e.g.*, *CMAX, Inc. v. Hall*, 300 F.2d 265, 268-69 (9th Cir. 1962); *see also Lockyer*, 398 F.3d at 1110. In *CMAX*, the non-moving party sought to recover $12,696.09 for its services as an air freight forwarder. *Id.* at 266. Because the non-moving party sought an exact damage amount, the Ninth Circuit affirmed the stay noting that the non-moving party "alleged no continuing harm and sought no injunctive or declaratory relief."

Lockyer, 398 F.3d at 1110 (recognizing "[d]elay of CMAX's suit would result, at worst, in a delay in its monetary recovery").

Similarly here, Brahma will not be damaged if this Court grants Cobra's stay because Brahma is only seeking monetary relief – it seeks an alleged outstanding balance, or leinable amount, in the amount of $12,859,577,74. (Second Am. Compl. at 12.) As a result, a limited stay would not result in any continuing harm.

Moreover, Brahma will not be damaged or prejudiced by a stay given that discovery is in its infancy. Courts have found that no clear prejudice exists from the granting of a stay when a case is still in its earliest stages, and significant discovery has not yet begun. *See, e.g.*, *Schwartz v. Nugent*, No. 17-9133 (FLW) (TJB), 2018 WL 3069220, at *6 (D.N.J. June 21, 2018); *Knapp v. Reid*, No. C15-1769-RSM, 2016 WL 561734, at *2 (W.D. Wash. Feb. 12, 2016); *Card Activation Techs., Inc. v. 7-Eleven, Inc.*, No. 1:10-cv-4984, 2011 WL 663960, at *3 (N.D. Ill. Feb. 10, 2011). Here, discovery is in its infancy; no depositions have taken place, and the parties have yet to exchange significant documentation.

B. COBRA WILL FACE HARDSHIP AND INEQUITY IF FORCED TO PROCEED WITH LITIGATION WHILE THE CASE IS ENJOINED AS TO TSE

Moreover, although a stay will not cause Brahma any harm, allowing this case to move forward will cause hardship and inequity to Cobra. Given how inextricably linked Cobra's defenses are to the claims against TSE, which are currently being litigated in federal court, this Court should similarly stay the proceedings against Cobra. Brahma's claim against Cobra is intrinsically tied to its claim against TSE; if Brahma is unable to show that TSE owes it money, then Cobra is not liable under the bond. Inasmuch as Brahma will have to prove its case against TSE before it may proceed against the bond, it would make little sense to proceed against Cobra in isolation before Brahma's related claims against TSE are decided. If Brahma were to be allowed to proceed against Cobra in respect to the bond while the federal court ruling is pending, there would be significant risk of conflicting decisions and unjust results against the orderly course of justice.

Courts in Nevada and elsewhere have stayed proceedings pending resolution of a related, underlying claim.[2] For example, in *Specrite Design, LLC v. Elli N.Y. Design Corp.*, No. 16 Civ. 6154 (ER), 2017 WL 3105859 (S.D.N.Y. July 20, 2017), a subcontractor sued, in federal court, the prime contractor and lien fund holder on a project, alleging that the contractor did not pay for labor performed and materials the subcontractor furnished. In addition to the federal case, there was a related state court lawsuit for breach of the subcontract. *Id.* at *1. The contractor moved to stay the federal case pending resolution of the state court action because that court would determine if the contractor had defaulted. *Id.* at *2. The court granted the motion to stay, finding "the right to a lien can only be enforced to the extent of the amount due or to become due to the contractor or subcontractor on whose credit the labor or materials are furnished under his contract." *Id.* at *4. The court went on to find that "even though the Lien was discharged by the issuance of [the surety bond] the same test for the validity of the lien and the amount of the lien fund applies." *Id.* Thus, because "an action to enforce a discharged lien is in substance an action to test the validity of the lien and to enforce the lien to the extent it is valid", the court first needed to determine in state court whether the contractor defaulted. *Id.* As a result, the court found that granting the stay would balance the interests and prejudice that would result if it had not been granted, as well as promote judicial efficiency and minimized the possibility of conflicts between different courts; indeed, not granting a stay "would lead to unnecessary litigation that is time-consuming for this Court and for the parties." *Id.* at *5.

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[2] *See, e.g.*, *Kopicko v. Young*, 114 Nev. 1333, 1338 n.3 (Nev. 1998) (staying a legal malpractice case pending the resolution of the underlying action); *see Allstate Prop. & Cas. Ins. Co. v. Talda*, No. No. 2:14-CV-00050-APG-CWH, 2015 WL 1344517, at *5 (D. Nev. Mar. 20, 2015) (granting defendant's motion to stay regarding defendant's duty to indemnify when the underlying tort cause has not been resolved and there were underlying relevant factual disputes); *see also Colony Ins. Co. v. Vantaggio Farming Corp.*, 1:17-cv-00714-LJO-SKO, 2017 WL 3478998, at *8 (E.D. Cal. Aug. 14, 2017) (granting defendant's motion to stay the insurance proceedings after finding that there were significant unresolved factual issues in the underlying suit that would implicate the question of coverage liability); *State Nat'l Ins. Co., Inc. v. US-SINO Inv., Inc.*, No. 5:13-CV-05240-EJD, 2015 WL 5590842, at *5 (N.D. Cal. Sept. 23, 2015) (granting stay pending resolution of underlying actions and rejecting insurer's argument that it would be prejudiced by advancing defense costs during the stay); *Zurich Am. Ins. Co. v. Omnicell, Inc.*, No. 18-CV-05345-LHK, 2019 WL 570760, at *6 (N.D. Cal. Feb. 12, 2019) (finding that the stay was necessary when the dispute was related to claims in another action).

Similarly here, the federal court must first determine whether TSE is liable for the payments to Brahma prior to Brahma being able to foreclose on the lien against Cobra's bond. If the federal court determines that TSE is not liable for the payments to Brahma, then Brahma cannot foreclose on the lien against Cobra's bond. The federal court recently enjoined Brahma from litigating its contract claims against TSE in this Court. In making this determination, the federal court found that this action was "fraudulently filed in an attempt to subvert the removal of a prior case." (Case No. 2:18-cv-01747, Dkt. 55 at 8-9) (citing *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987)). Further, the federal court found that "there would be immediate and irreparable injury to TSE for which there would not be an adequate remedy at law if Brahma's behavior is rewarded." *Id.* Thus, the federal court enjoined Brahma from litigating the breach of contract, breach of implied covenant of good faith and fair dealing, and violation of NRS 624 claims against TSE. *Id.* Given that the underlying claims against TSE are enjoined, resulting in TSE's lack of participation in discovery, Cobra will be inherently harmed if it is forced to continue litigation without TSE.

C. A STAY WILL PROMOTE THE ORDERLY COURSE OF JUSTICE WHILE COBRA'S MOTION TO INTERVENE IN THE FEDERAL ACTION IS PENDING

In determining whether to grant a stay, the court considers "the orderly course of justice measures in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *CMAX*, 300 F.2d. at 268 (citing *Landis*, 299 U.S. at 254-55). For example, courts have granted stays when there is a pending decision which would narrow the issues in a case. *See, e.g.*, *Brown v. Credit One Bank, N.A.*, No.: 2:17-cv-00786-JAD-VCF, 2018 WL 1697801, at *4 (D. Nev. Apr. 6, 2018) (granting motion to stay pending decision from the D.C. Circuit's decision would help to "simplify and streamline the proceedings and promote the efficient use of the parties' and the court's resources"); *Bank of N.Y. Mellon v. 4655 Gracemont Ave. Trust*, No. 2:17-cv-00063-JAD-PAL, 2018 WL 1697800, at *3 (D. Nev. Apr. 5, 2018) (granting a motion to stay pending the Nevada Supreme Court's acceptance of a certified question a statutory interpretation which will "prevent unnecessary briefing and the expenditures

of time, attorney's fees, and resources that could be wasted"). Staying the claims as to Cobra will promote the orderly course of justice and simplify issues because Cobra will be filing a motion to intervene in the Federal Action, where Brahma and TSE's claims are currently being heard.

Courts have granted motions to stay pending a motion to intervene in a related case which bears upon the case. *See, e.g.*, *Briscoe v. City of New* Haven, No. 3:09-cv-1642 (CSH), 2009 WL 5184357, at *2 (D. Conn. Dec. 23, 2009) (granting plaintiff's motion to stay when plaintiff filed a motion to intervene in a related case; thus, "[i]n light of the uncertainty regarding in which case [plaintiff's] claims will be heard, if at all, it is prudent to stay the bulk of discovery until [plaintiff's] motion to intervene" is decided). Similarly, proceedings may be stayed "pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Where a stay is sought pending the resolution of another action, the court need not find that two cases possess identical issues; a finding that the issues are substantially similar is sufficient to support a stay. *See Landis*, 299 U.S. at 254. Courts should weigh the competing interests of the parties. *See id.* at 254-55. The issues involved in the pending proceedings need not be "controlling of the action before the court" for a stay to be ordered. *See Leyva*, 593 F.2d at 864.

Given that Cobra will be moving to intervene in the Federal Action, upon which identical claims are being litigated, this Court should grant Cobra's motion to stay. Because the Federal Action is the more appropriate forum and that court should have jurisdiction over these claims, as the federal court recognized when it enjoined Brahma from litigating its contract claims against TSE in this matter, this Court should similarly stay the claims against Cobra. In doing so, granting a stay pending the federal court's decision on Cobra's motion to intervene will simplify the issues and promote efficiency because all parties and claims will be in the same court, before the same judge. Thus, the claims against Cobra should be stayed, as the federal court's decision on Cobra's motion to intervene will promote the orderly course of justice by simplifying, or removing, the issues in this case.

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D. JUDICIAL RESOURCES WOULD BE SAVED BY AVOIDING DUPLICATIVE LITIGATION AND THE RISK OF CONFLICTING DECISIONS

Moreover, the claims against Cobra should be stayed to avoid unnecessary duplicative discovery and the risk of conflicting decisions. *See, e.g. Knepper v. Equifax Info. Servs.*, No. 2:17-CV-02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2, 2017) (granting a motion to stay the action, which would "limit hardship or inequity to [defendant] from unnecessary proceedings, inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple jurisdictions."); *Tobler v. DePuy Orthopedics, Inc.*, No. 2:12-cv-01167-LDG (RJJ), 2012 WL 3598291, at *2-3 (D. Nev. Aug. 17, 2012) (granting a stay pending an multi-district litigation transfer order to avoid duplicative discovery and pretrial management efforts). In *Knepper*, the court granted a stay when plaintiffs in related cases filed a motion for consolidation and transfer. The court granted the stay, finding that doing so would limit hardship and inequity to defendants from "unnecessary proceedings, inconsistent rules, duplicative discovery, and having to re-litigate claims in multiple jurisdictions." *Id.* at *3. Courts have similarly stayed cases when doing so "is the most efficient way to allow [] uncertainties to resolve", especially when the parties face "duplicative discovery" where there was a potential to need to "re-open discovery and coordinate two or more cases." *Honghui Deng v. Nevada ex rel. Bd. of Regents*, No. 2:17-cv-03019-APG-VCF, 2019 U.S. Dist. LEXIS 36716, at *6 (D. Nev. Mar. 7, 2019) (granting a motion to stay when a state court case contained a federal claim and removal was possible, and there were already similar state cases).

Currently, Brahma is noticing depositions of Cobra in this Court in its effort to support its claims against TSE. However, Brahma's claims against TSE are being litigated in federal court. If this Court does not stay the claims against Cobra, Cobra faces the real possibility of duplicative discovery down the road. Moreover, if Brahma's claims against Cobra proceed in this matter, while Brahma's claims against TSE simultaneously proceed in federal court, the parties face the risk of inconsistent and conflicting rulings. Because such cost is unnecessary, and in order to promote fairness and efficiency, this Court should stay the proceedings against Cobra.

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IV.

CONCLUSION

Based upon the foregoing, Cobra respectfully request that the Court grant this Motion and stay the claims against it and grant such other relief as the Court deems just and proper.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that this document does not contain personal information as defined in NRS 603A.040 about any person.

DATED this 15th day of October, 2019.

WEIL & DRAGE, APC

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CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 15th day of October, 2019, service of the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** was made this date by mailing a true and correct copy of the same, via first-class mail, at Henderson, Nevada, addressed to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada Corporation, Plaintiff, vs. TONOPAH SOLAR ENERGY, LLC, a Delaware Limited Liability Company; DOES I through X; and ROE CORPORATIONS I through X, Defendants.	Case No. 2:18-cv-01747-RFB-GWF **MOTION TO INTERVENE AS DEFENDANTS**
TONOPAH SOLAR ENERGY, LLC a Delaware limited liability company; DOES I through X; and ROE CORPORATIONS I through X, Counter-claimants, vs. BRAHMA GROUP, INC., a Nevada corporation, Counter-defendant.	

MOTION TO INTERVENE AS DEFENDANTS

COMES NOW the Proposed Defendants-Intervenors, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN HOME ASSURANCE COMPANY, by and through their attorneys of record, at the law firm of WEIL & DRAGE, APC, and for the reasons set forth herein, hereby move this Court pursuant to Fed. R. Civ. P. 24, to Intervene as Defendants in this action. The Proposed Defendants-Intervenors seek to intervene in this matter as of right under Fed. R. Civ. P. 24(a) or in the alternative, permissively, pursuant to Fed. R. Civ. P. 24(b).

This Motion is based upon the Pleadings and Papers on file, the attached Points and Authorities, the accompanying proposed Answer in Intervention[1], and oral argument to be made by counsel at any Hearing of this matter.

DATED this 18th day of October, 2019.

WEIL & DRAGE, APC

By: /s/ *Jeremy R. Kilber*

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[1] Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Proposed Answer in Intervention is attached hereto as ***Exhibit 1***.

I. INTRODUCTION

A. THE PROPOSED DEFENDANTS-INTERVENORS.

The Proposed Defendant-Intervenor, Cobra Thermosolar Plant, Inc., a Nevada corporation ("Cobra") is a member of the Cobra Group of companies. The Cobra Group, which is active in projects in Spain and in many other countries globally, specializes in large infrastructure projects, including both conventional energy (e.g., coal, natural gas) and renewable energy (e.g., solar, wind, hydropower) projects.

Defendant Tonopah Solar Energy, LLC, a Delaware limited liability company ("TSE"), is the owner of the Crescent Dunes Solar Energy Project constructed by Cobra in Tonopah, Nevada ("Crescent Dunes"). Cobra engineered and constructed Crescent Dunes—a cutting edge concentrating solar power plant—that generates electricity without any fossil fuel at all. Cobra and TSE negotiated a complex EPC contract over the course of a year and executed it on September 22, 2011. The EPC Contract (including its exhibits) consists of over 2,200 pages, including a statement of work detailing the work to be performed by Cobra.

As detailed below in Section I.B., Cobra and American Home Assurance Company ("AHAC"), an insurance company incorporated under the laws of the State of New York, also a Proposed Defendant-Intervenor, issued a surety bond that guarantees the liabilities, if any, that are at issue in this action.

B. THE FACTS ALLEGED IN THIS ACTION.

On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with Plaintiff, Brahma Group Inc., under which Brahma agreed to provide TSE, on a time and material basis, work, materials, and equipment (collectively, the "Work") at Crescent Dunes. Brahma alleges that it provided the Work at Crescent Dunes and TSE failed to fully pay Brahma for such Work.

Because of TSE's alleged failure to fully pay Brahma for its Work, Brahma recorded a notice of lien against Crescent Dunes with the Nye County Recorder on April 9, 2018.

Thereafter, the lien was amended on several occasions and ultimately increased to $12,859,577.74 by Brahma in the Fourth Amended Notice of Lien ("Fourth Amended Lien"),

recorded with the Nye County Recorder on September 14, 2018. Brahma's lien and the amendments and restatements thereto, including the Fourth Amended Lien, are referred to collectively herein as the "Brahma Lien."

To replace Crescent Dunes with a surety bond as security for the Brahma Lien, Cobra recorded a surety bond with the Nye County Recorder's Office on September 6, 2018, reserving its rights against TSE. The bond was issued by AHAC on August 15, 2018 in the amount of $10,767,580.00. Cobra is the principal on the bond; AHAC is the surety.

Cobra increased the amount of the bond to $19,289,366.61 or 1.5 times the amount of Brahma's Fourth Amended Lien, by recording a rider that amended the bond, on October 9, 2018. The bond and rider that amended the bond are collectively referred to herein as the "Cobra Surety Bond."

Section 24 of the TSE/Brahma Agreement required Brahma to pursue any contract-based claims it had against TSE in Clark County, Nevada. Accordingly, on July 17, 2018, Brahma filed a Complaint against TSE in the Eighth Judicial District Court of Nevada, alleging breach of contract, unjust enrichment, and violation of NRS Chapter 624 (the "Clark County Action"). On September 10, 2018, TSE removed the Clark County Action to this Court. TSE's removal petition cited 28 U.S.C. § 1332, diversity of citizenship, as the basis for subject matter jurisdiction. Brahma did not move to remand the case and has not otherwise raised an objection to the Court's subject matter jurisdiction.

On September 17, 2018, TSE filed its Answer and Counterclaim. TSE's counterclaim alleges several state law claims against Brahma: breach of contract, breach of implied covenant of good faith and fair dealing, declaratory relief, unjust enrichment, fraudulent/intentional misrepresentation, and negligence misrepresentation.

In its counterclaims, among other things, TSE alleged that Brahma had submitted numerous invoices that contained fraudulent misrepresentations regarding the amount of money Brahma was due from TSE for the Work on Crescent Dunes. TSE alleged that it relied on Brahma's false representations and made payments to Brahma it would not have otherwise. TSE also alleged that Brahma supplied false information and made false representations to TSE

because Brahma had a pecuniary interest in inducing TSE to pay Brahma amounts to which Brahma was not entitled. TSE alleged that it relied on Brahma's false representations in making payments to Brahma and was, therefore, damaged by Brahma's negligent misrepresentations.

On September 25, 2018, Brahma filed its First Amended Complaint. The First Amended Complaint purported to remove all causes of action against TSE except for Brahma's unjust enrichment claim.

At the same time, Brahma filed a first amended counter-complaint and third-party complaint in state court, asserting the three claims it had just dropped in this action (Case No. CV 39348, consolidated with Case No. CV39799, the "Nye County Action"). The third-party complaint asserted one claim against Cobra and AHAC: claim on the surety bond.

On October 5, 2018, Brahma filed its Answer to TSE's counterclaim. On October 9, 2018, TSE filed its Answer to Brahma's First Amended Complaint. On October 16, 2018, Brahma filed its Motion to Stay the Case and on October 18, 2018, TSE files a Motion for an Injunction. This Court heard oral arguments regarding Brahma's Motion to Stay and TSE's Motion for an Injunction on June 25, 2019.

On September 25, 2019, this Court denied Brahma's Motion to Stay and granted TSE's Motion for an Injunction, finding that "the state court action was fraudulently filed [by Brahma] in an attempt to subvert the removal of a prior case." (Dkt. No. 55 at 8-9.). This Court further struck Brahma's Amended Complaint (Dkt. No. 8), and reinstated Brahma's Original Complaint (Dkt. No. 1-1.) Brahma is currently enjoined from litigating its contract claims against TSE in the Nye County Action. As a result, Cobra and AHAC have moved to stay Brahma's claims against them in the Nye County Action.

Discovery is at a very early stage. No depositions have taken place and fact discovery is not set to close until January 23, 2020. (Dkt. No. 54). Additionally, TSE has objected to Cobra participating in discovery in this action because it is adverse to Cobra in a separate arbitration under the Rules of Arbitration of the International Chamber of Commerce International Court of Arbitration (ICC Case No. 23247/MK) and does not want to risk Cobra having the benefit of any discovery here that might be useful in the arbitration. Despite TSE's objection, Cobra and AHAC

should be able to take part in this action to protect and guard their rights directly.

C. THE PROPOSED DEFENDANTS-INTERVENORS' INTEREST IN THE FEDERAL ACTION

Although Brahma's claims are against TSE, the Cobra Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE. While TSE has raised affirmative defenses and counter-claims that sound in fraud in response to Brahma's claims, Cobra and AHAC still bear all the downside risk and the ultimate cost of TSE's defenses. There is a significant risk that TSE has little incentive to oppose Brahma's claims, or that TSE will be mindful of its dispute against Cobra in picking and choosing which arguments to use in its case against Brahma, conscious that it could undermine the credibility of its position in the arbitration against Cobra. Or, at the very least, TSE has nowhere near the incentive to oppose Brahma's claims that Cobra and AHAC have in this action. Therefore, Cobra and AHAC should be able to take part in this action to protect and guard their rights directly. They should not have to rely on TSE to do so for them.

Because of the loss that the Cobra and AHAC will suffer should Brahma prevail, Cobra and AHAC seek leave to intervene in action as of right pursuant to Fed. R. Civ. P. 24(a). Or, in the alternative, seek leave to intervene pursuant to Fed. R. Civ. P. 24(b).

II. ARGUMENT

A. COBRA AND AHAC ARE ENTITLED TO INTERVENE AS OF RIGHT UNDER FRCP 24(a).

Under Federal Rule of Civil Procedure 24(a), a court must permit any party to intervene in a lawsuit who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2).

The rule is broadly construed in favor of intervention. *See Cabazon Band of Mission Indians ., Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997); *see Sw. Ctr. for Biological, Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("In general, we construe Rule 24(a) liberally in favor of potential Intervenors."). "Courts are to take all well-pleaded, nonconclusory allegations in the

motion to intervene, the proposed complaint or answer in intervention, and declarations supporting the motion as true absent sham, frivolity or other objections." *Id.* at 820. The Court follows the guidance of Rule 24 advisory committee notes that state that "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Id.* at 822 (*citing* Fed. R. Civ. P. 24 advisory committee's notes); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) (Courts considering Rule 24(a) motions are "guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention").

The Ninth Circuit employs four criteria to determine whether intervention under Rule 24(a) is appropriate: (1) the motion to intervene must be timely; (2) the applicant must have a significantly protectable interest related to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties. *See Arakaki v. Cavetano*, 324 F.3d 1078, 1083 (9th Cir. 2003). The burden falls on the applicant to show that all of the requirements for intervention have been met. *See Alisal Water Corp.*, 370 F.3d at 919.

1. This Motion to Intervene is Timely.

The determination as to whether a motion to intervene is timely is left to the court's discretion. *See Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981). Courts weigh three factors in determining whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Cal. Dep't. of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (internal quotation marks omitted). The most important consideration in evaluating the timeliness of a motion to intervene is whether any delay in moving for intervention may prejudice existing parties; as long as prejudice is not likely to result from the timing of the motion, courts interpret the timeliness requirement liberally. *See, e.g., Cummings v. United States*, 704 F.2d 437, 439 (9th Cir. 1983) (motion to intervene timely even though made

after interrogatories and two weeks before date set for close of discovery). This motion to intervene is timely and will not prejudice any existing party. This action is at a very early stage. Due to motion practice engaged in by TSE and Brahma, the case is barely beyond the pleading stage. No depositions have taken place. Fact discovery is not set to close until January 23, 2020. (Dkt. No. 54.) Therefore, the Court should find this Motion is timely and Cobra and AHAC's intervention will not prejudice the other parties.

2. Cobra and AHAC Have a Significantly Protectable Interest in this Action.

"An applicant has a significant protectable interest in an action if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claims." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (internal quotation marks omitted). This is "not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. Instead, the interest test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]" *Id.* It is construed "broadly in favor of proposed intervenors," *See Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). An applicant demonstrates a "significantly protectable interest" when the relief in the action will have "direct, immediate, and harmful effects" on the applicant's "legally protectable interests." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 118.

As principal and surety of the bond, Cobra and AHAC have a direct, substantial, and legally protectable interest in Brahma's claims against TSE. Indeed, Cobra and AHAC bear all the risk and the ultimate cost of TSE's defenses. Although Brahma's claims are against TSE, the Cobra Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE. As such, Cobra and AHAC have a significantly protectable interest in this action.

3. The Disposition of this Action May Impair or Impede Cobra and AHAC's Ability to Protect this Interest.

"If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological*

Diversity, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee notes) (alteration omitted). But, there is no requirement that the party seeking to intervene show to "an absolute certainty" that its interests will be impaired. *Citizens for Balanced Use v. Mont, Wilderness Ass'n*, 647 F.3d 893, 900 (9th Cir. 2011).

Cobra and AHAC will be substantially affected more than just in a practical sense. Cobra and AHAC face the loss of millions of dollars if TSE is found liable to Brahma for work at Crescent Dunes. Cobra and AHAC should be able to take part in this action to protect their interests in the first instance and without reliance on TSE to do so for them. Although TSE has thus far raised defenses and counterclaims against Brahma, the reality is that Cobra and AHAC – not TSE – bear all the risk. Moreover, there is a significant risk that TSE has little incentive to oppose Brahma's claims, or that TSE will be mindful of its dispute against Cobra in picking and choosing which arguments to use in its case against Brahma, conscious that it could undermine the credibility of its position in the arbitration against Cobra. There is at least the possibility that TSE may simply go through the motions of making a defense since it knows, at the end of the day, Cobra and AHAC will be responsible for any amounts awarded to Brahma. As such, disposition of the Brahma's action without Cobra and AHAC's participation would impede their ability to protect their interests.

4. Cobra and AHAC's Interest Will Not Be Adequately Represented by TSE.

In determining whether a would-be intervener's interests will be adequately represented by an existing party, courts consider: (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822. The prospective intervenor bears the burden of demonstrating that the existing parties may not adequately represent its interest. *Id.* at 822-23 (*citing Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). However, the burden of showing inadequacy is "minimal" and the applicant need only show that representation of its interests by

existing parties "may be" inadequate. *Citizens for Balanced Use*, 647 F.3d at 898.

In assessing the adequacy of representation, the focus should be on the "subject of the action," not just the particular issues before the court at the time of the motion. *Sagebrush*,713 F.2d at 528. "The 'most important factor' in assessing the adequacy of representation is 'how the interest compares with the interests of existing parties.'" *Citizens for Balances Use*, 647 F.3d at 898 (*quoting Arakaki*, 324 F.3d at 1086).

"If an applicant for intervention and an existing party share the same ultimate objective, a presumption of adequacy of representation arises[,]" which can be rebutted by "a 'compelling showing' of inadequacy of representation." *Citizens for Balances Use*, 647 F.3d at 898 (quoting *Arakaki*, 324 F.3d at 1086). The Ninth Circuit has held the presumption of adequacy may be overcome where the intervenors have "more narrow, parochial interests" than the existing party. *Forest Conservation Council v. United States Forest Secy.*, 66 F.3d 1489, 1499 (9th Cir. 1995).

Cobra and AHAC have "more narrow, parochial interests" than TSE. Although Brahma's claims are against TSE, the Cobra Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE. Although TSE has thus far raised defenses and counterclaims against Brahma, the reality is that Cobra and AHAC – not TSE – bear all the risk. TSE has little incentive to make sure it wins because if it loses, Cobra and AHAC bear the cost. Indeed, Cobra and AHAC face the loss of millions of dollars if TSE is found liable to Brahma for work at Crescent Dunes. Cobra and AHAC should be able to take part in this action to protect their interests in the first instance and without reliance on TSE to do so for them.

B. IN THE ALTERNATIVE, COBRA AND AHAC SHOULD BE ENTITLED TO INTERVENE UNDER RULE 24(b).

Under Federal Rule of Civil Procedure 24(b), a court may grant permissive intervention where (1) the applicant shows independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense and the main action share a common question of law of fact. *See Freedom from Religion Foundation, Inc. v. Geitliner*, 644 F.3d 836, 843 (9th Cir. 2011). In exercising its discretion on an application for permissive intervention, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties'

rights." Fed. R. Civ. P. 24(b)(3). Permissive intervention is committed to the broad discretion of the district court. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (*citing to Orange v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986); *Spangler v. Pasadena City Board of Ethic.*, 552 F.2d 1326, 1329 (9th Cir. 1977) (identifying nonexclusive discretionary factors that the district court may consider when deciding whether to grant permissive intervention). In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties. *Donnelly*, 159 F.3d at 412; See Fed. R. Civ. P. 24(b)(2) (so providing). Courts give Rule 24(b) a liberal construction in favor intervention. *See Arakaki*, 324 F.3d at 1083.

First, in assessing independent jurisdiction, courts first look at whether a party's intervention would destroy diversity jurisdiction. Crucially, the Supreme Court has established that "diversity of citizenship is assessed at the time the action is filed . . . if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). The *Freeport-McMoRan* Court stressed that diversity jurisdiction is not "defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties." *Id.* (quoting *Wichita R.R. & Light Co. v. Public Utils. Comm'n of Kansas*, 260 U.S. 48, 54 (1922)). Thus, whether diversity jurisdiction is defeated by the addition of a nondiverse party to the action depends on whether the nondiverse party is "indispensable." *Id.*; *see also Mattel Inc. v. Bryant*, 446 F.3d 1011, 1013-14 (9th Cir. 2006) ("Intervention destroys diversity if the intervening party is indispensable.") (internal quotation omitted).

Federal Rule of Civil Procedure 19(b) instructs that the question of whether a party is indispensable requires that a determination be made "in equity and good conscience." Fed. R. Civ. P. 19(b). Indispensable parties under Rule 19(b) are "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005). To determine whether a person is indispensable, Rule 19(b)

requires that the court consider: (1) the extent to which its judgment may prejudice the absent party or the parties already before the court, (2) the extent to which such prejudice may be lessened or avoided by protective provisions in the judgment, or other measures, (3) whether a judgment rendered in such person's absence will provide an adequate remedy to the parties before the court, and (4) whether, if the action is dismissed for nonjoinder, plaintiff will have an adequate remedy elsewhere. *See* Fed. R. Civ. P. 19(b). For example, courts have found that a nonparty to a commercial contract ordinarily is not necessary or indispensable to the adjudication of rights under the contract. *See TPOV Entrs. 16, LLC v. Paris Las Vegas Operating Co.*, No. 2:17-CV-346, 2017 WL 2871070, at *7 (D. Nev. July 3, 2017). Further, "a defendant intervenor's declaration that it is not indispensable satisfies any concern that a decision in its absence would have prejudiced it." *Mattel*, 446 F.3d at 1013.

Further, 28 U.S.C. § 1367, the supplemental jurisdiction statute, extends supplemental jurisdiction to "persons . . . seeking to intervene as plaintiffs under Rule 24" in a diversity case as long as the exercise of supplemental jurisdiction is not inconsistent with the diversity jurisdiction statute. *See* 28 U.S.C. § 1367(b). The Court may extend supplemental jurisdiction here. The Supreme Court, along with circuit courts, recognize the well-established rule that the exercise of jurisdiction over the addition of a nondiverse party is not inconsistent with the requirements of diversity jurisdiction as long as the party is not indispensable. *See Freeport-McMoRan, Inc.*, 498 U.S. at 428 (holding that diversity jurisdiction survived the addition of a nondiverse plaintiff when complete diversity existed at the time the federal action arose); *see also Mattel, Inc. v. Bryant*, 446 F.3d at 1014 (holding that "[n]either § 1332 nor § 1367 upset the long-established judge-made rule that the presence of a nondiverse and not indispensable defendant intervenor does not destroy complete diversity.")

Here, while AHAC is from New York, Cobra is not a diverse party – it is a Nevada company. However, diversity jurisdiction is not defeated by the intervention of Cobra and AHAC because neither company is an indispensable party to the controversy between Brahma and TSE. This lawsuit is Brahma's attempt to enforce its rights against TSE for unpaid work at Crescent Dunes. While Cobra has a strong interest in this case, and should be granted intervention based on

that strong interest, it is not an indispensable party. Therefore, Cobra's presence does not destroy subject-matter jurisdiction.

Second, this motion to intervene is timely. This action is at a very early stage. Due to motion practice engaged in by TSE and Brahma, the case is barely beyond the pleading stage. No depositions have taken place. Fact discovery is not set to close until January 23, 2020. (Dkt. No. 54.) Therefore, the Court should find this Motion is timely.

Lastly, Cobra and AHAC's defenses and the main action share a common question of law of fact. Although the claims in the main action arise out of the TSE-Brahma relationship, Cobra and AHAC are the principal and surety of the Cobra Surety Bond. Additionally, Cobra and AHAC's defenses have a question of law and fact in common with the main action: whether and to what extent TSE is obligated to Brahma will determine Brahma's right to collect against the Cobra Surety Bond. Therefore, Cobra and AHAC should be able to take part in this action to protect and guard their rights directly.

Since courts favor intervention, the Court should permit Cobra and AHAC to intervene under Rule 24(b).

III. CONCLUSION

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

Respectfully submitted this 18th day of October, 2019.

WEIL & DRAGE, APC

By: /s/ *Jeremy R. Kilber*

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2019, a true and correct copy of the foregoing **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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Exhibit 1

Exhibit 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada Corporation, Plaintiff, vs. TONOPAH SOLAR ENERGY, LLC, a Delaware Limited Liability Company; DOES I through X; and ROE CORPORATIONS I through X, Defendants.	Case No. 2:18-cv-01747-RFB-GWF **[PROPOSED] ANSWER IN INTERVENTION TO PLAINTIFF'S COMPLAINT**
TONOPAH SOLAR ENERGY, LLC a Delaware limited liability company; DOES I through X; and ROE CORPORATIONS I through X, Counter-claimants, vs. BRAHMA GROUP, INC., a Nevada corporation, Counter-defendant.	

[PROPOSED] ANSWER IN INTERVENTION TO PLAINTIFF'S COMPLAINT

Defendants-Intervenors, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN HOME ASSURANCE COMPANY (collectively, for purposes of this Answer, "Cobra"), by and through their attorneys of record, the law firm of WEIL & DRAGE, APC, hereby answer Plaintiff BRAHMA GROUP, INC.'S ("BRAHMA") Complaint (Dkt. No. 1-1) on file herein, by admitting, denying, and alleging as follows:

THE PARTIES

1. Answering Paragraph 1 of the Complaint, Cobra is without sufficient information or knowledge as to form a belief as to the truth of those allegations contained in said Paragraph and, therefore, denies the same.

2. Answering Paragraph 2 of the Complaint, Cobra is without sufficient information or knowledge as to form a belief as to the truth of those allegations contained in said Paragraph and, therefore, denies the same.

3. Answering Paragraph 3 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the alleged Services Agreement for a full and complete statement of its contents.

4. Answering Paragraph 4 of the Complaint, Cobra is without sufficient information or knowledge as to form a belief as to the truth of those allegations contained in said Paragraph and, therefore, denies the same.

FIRST CAUSE OF ACTION

(Breach of Contract)

5. Answering Paragraph 5 of the Complaint, Cobra repeats and realleges its answers to Paragraphs 1 through 4 as though fully set forth herein.

6. Answering Paragraph 6 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the alleged Services Agreement for a full and complete statement of its contents.

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7. Answering Paragraph 7 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the referenced requests for a full and complete statement of its contents.

8. Answering Paragraph 8 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the referenced invoices for a full and complete statement of its contents.

9. Answering Paragraph 9 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the alleged Services Agreement for a full and complete statement of its contents.

10. Answering Paragraph 10 of the Complaint, said Paragraph states a legal conclusion to which no response is required. However, to the extent a response is deemed necessary, Cobra denies the allegations contained in said Paragraph.

11. Answering Paragraph 11 of the Complaint, Cobra denies each and every allegation therein.

12. Answering Paragraph 12 of the Complaint, Cobra denies each and every allegation therein.

SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith & Fair Dealing)

13. Answering Paragraph 13 of the Complaint, Cobra repeats and realleges its answers to Paragraphs 1 through 12 as though fully set forth herein.

14. Answering Paragraph 14 of the Complaint, said Paragraph states a legal conclusion to which no response is required. However, to the extent a response is deemed necessary, Cobra denies the allegations contained in said Paragraph.

15. Answering Paragraph 15 of the Complaint, Cobra denies each and every allegation therein.

16. Answering Paragraph 16 of the Complaint, Cobra denies the allegations in the first two sentences. As to the allegations contained in the third and fourth sentences of Paragraph 16, these allegations state legal conclusions to which no response is required. However, to the extent a

response is deemed necessary, Cobra denies the allegations contained in the third and fourth sentences of said Paragraph and respectfully refers the Court to the alleged Services Agreement for a full and complete statement of its contents.

17. Answering Paragraph 17 of the Complaint, Cobra denies each and every allegation therein.

18. Answering Paragraph 18 of the Complaint, Cobra denies each and every allegation therein.

THIRD CAUSE OF ACTION

(Unjust Enrichment)

19. Answering Paragraph 19 of the Complaint, Cobra repeats and realleges its answers to Paragraphs 1 through 18 as though fully set forth herein.

20. Answering Paragraph 20 of the Complaint, said Paragraph states a characterization of Brahma's claim to which no response is required. However, to the extent a response is deemed necessary, Cobra denies the allegations contained in said Paragraph.

21. Answering Paragraph 21 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the referenced requests for a full and complete statement of its contents.

22. Answering Paragraph 22 of the Complaint, Cobra is without sufficient information or knowledge as to form a belief as to the truth of those allegations contained in said Paragraph and, therefore, denies the same.

23. Answering Paragraph 23 of the Complaint, Cobra is without sufficient information or knowledge as to form a belief as to the truth of those allegations contained in said Paragraph and, therefore, denies the same.

24. Answering Paragraph 24 of the Complaint, Cobra denies the allegations contained in said Paragraph and respectfully refers the Court to the referenced demands for a full and complete statement of its contents.

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25. Answering Paragraph 25 of the Complaint, Cobra admits that certain of Brahma's invoices have not been paid. As to the remainder of the allegations contained in Paragraph 25, Cobra denies each and every remaining allegation.

26. Answering Paragraph 26 of the Complaint, Cobra denies each and every allegation therein.

27. Answering Paragraph 27 of the Complaint, Cobra denies each and every allegation therein.

FOURTH CAUSE OF ACTION

(Violation of NRS 624)

28. Answering Paragraph 28 of the Complaint, Cobra repeats and realleges its answers to Paragraphs 1 through 27 as though fully set forth herein.

29. Answering Paragraph 29 of the Complaint, said Paragraph states a legal conclusion to which no response is required. However, to the extent a response is deemed necessary, Cobra denies the allegations contained in said Paragraph.

30. Answering Paragraph 30 of the Complaint, said Paragraph states a legal conclusion to which no response is required. However, to the extent a response is deemed necessary, Cobra denies the allegations contained in said Paragraph.

31. Answering Paragraph 31 of the Complaint, Cobra denies each and every allegation therein.

32. Answering Paragraph 32 of the Complaint, Cobra denies each and every allegation therein.

33. Cobra denies any allegation not already responded to above.

34. Cobra denies the allegations set forth in Brahma's prayer for relief.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. Brahma's Complaint on file herein fails to state a claim upon which relief can be granted.

///

SECOND AFFIRMATIVE DEFENSE

2. Brahma's alleged damages, if any, were and are, wholly or partially, contributed to and proximately caused by Brahma's negligence, thus barring or diminishing Brahma's recovery herein according to principles of comparative negligence.

THIRD AFFIRMATIVE DEFENSE

3. Brahma is barred from recovering on its claims due to its fraud and fraudulent billing for the work allegedly at issue in this action.

FOURTH AFFIRMATIVE DEFENSE

4. The claims of Brahma are reduced, modified, and/or barred by the Doctrine of Unclean Hands.

FIFTH AFFIRMATIVE DEFENSE

5. Cobra is informed and believes and thereon alleges that Brahma's claims for damages are barred as a result of the failure to satisfy conditions precedent to bring the claim(s) at issue.

SIXTH AFFIRMATIVE DEFENSE

6. Cobra performed no acts, deeds, omissions or failures to act relevant to the subject matter of Brahma's Complaint such as would create any liability or duty whatsoever on the part of Cobra to Brahma.

SEVENTH AFFIRMATIVE DEFENSE

7. Cobra's alleged acts are not the proximate cause of the alleged damages, if any, sustained by Brahma.

EIGHTH AFFIRMATIVE DEFENSE

8. Cobra has appropriately, completely and fully performed and discharged any and all of its obligations and legal duties arising out of the matters alleged in Brahma's Complaint and any recovery by Brahma would be unjust and inequitable under these circumstances.

NINTH AFFIRMATIVE DEFENSE

9. At all times relevant herein, Cobra acted diligently and with due care in the performance of any duty owed to Brahma.

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TENTH AFFIRMATIVE DEFENSE

10. Cobra has no duty to post a bond related to Brahma's lien claim, thus, the release of the bond, or any proceeds, to Brahma will result in unjust enrichment to Brahma. Cobra reserves the right to recover any/all funds released to Brahma in this matter.

ELEVENTH AFFIRMATIVE DEFENSE

11. Cobra denies that it breached any contract and/or agreement whatsoever with respect to any service that it provided for this matter.

TWELFTH AFFIRMATIVE DEFENSE

12. Cobra has appropriately, completely, and fully performed and discharged all of the respective obligations and legal duties, if any, arising out of the matters alleged in Brahma's Complaint and any recovery by Brahma would be unjust and inequitable under these circumstances.

THIRTEENTH AFFIRMATIVE DEFENSE

13. The liability of Cobra for all damages is limited pursuant to the express terms of its contract(s) with TSE, thus, Brahma's recovery on the bond is limited to only what is recoverable from Cobra under its contract(s) with TSE, if anything.

FOURTEENTH AFFIRMATIVE DEFENSE

14. All or part of the claims alleged did not arise from a construction contract and/or are otherwise improper pursuant to NRS Chapter 624, and therefore said claims are not properly asserted against the bond.

FIFTEENTH AFFIRMATIVE DEFENSE

15. Cobra is informed and believes and thereon alleges that Brahma's action is barred by the voluntary agreement to submit any disputes to binding and/or independent arbitration.

SIXTEENTH AFFIRMATIVE DEFENSE

16. Cobra reserves the right to dispute the applicability and recoverability of all damages claimed in Brahma's prayer for relief as the pleadings and facts are insufficient to create recovery against Cobra for such damages.

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SEVENTEENTH AFFIRMATIVE DEFENSE

17. All possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Cobra's Answer to Brahma's Complaint and, therefore, Cobra reserves their right to amend their Answer to allege additional affirmative defenses if subsequent investigation so warrants.

Respectfully submitted this _____ day of _____, 2019.

WEIL & DRAGE, APC

By: /s/ *Jeremy R. Kilber*

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2019, a true and correct copy of the foregoing **[PROPOSED] ANSWER IN INTERVENTION TO PLAINTIFF'S COMPLAINT** 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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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	CASE NO. : CV 39348 *Consolidated with*: Case No. CV39799 DEPT. NO. : 2
BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant, vs. TONOPAH SOLAR ENERGY LLC, a Delaware limited liability company; BOE BONDING COMPANIES I through X; DOES I through X; ROE CORPORATIONS I through X; and TOE TENANTS I through X, inclusive, Counter-Defendants,	

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BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant and Third-Party 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,

Third-Party Defendants.

BRAHMA GROUP, INC.'S OPPOSITON TO COBRA THERMOSOLAR PLANTS, INC AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY

Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, hereby submits the following Opposition to the Motion to Stay ("Motion") filed by Third-Party Defendants Cobra Thermosolar Plants, Inc.' ("Cobra") and American Home Assurance Company's ("AHAC"), collectively, the "Cobra Parties." This Opposition is made and based upon the papers and documents on file in this matter and the accompanying points and authorities and exhibits and the arguments of counsel on the hearing of the Motion.

Respectfully submitted this 31st of October 2019.

PEEL BRIMLEY LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Approximately nine months ago this Court stayed Brahma's claims against Tonopah Solar Energy, LLC ("TSE") but ***did not*** stay Brahma's claim against the Cobra Parties or the surety bond (the "Surety Bond") they caused to be posted to release Brahma's Notice of Lien. More recently, the United States District Court for the District of Nevada (the "Federal Court") enjoined Brahma from proceeding in this Court on its claims against TSE ("TSE Claims"),[1] but again ***did not*** enjoin Brahma's claims against the Cobra Parties and the Surety Bond (the "Surety Bond Claim"). The Cobra Parties now ask this Court to stay Brahma's claim against them and the Surety Bond. The Court should deny the Motion for the following reasons.

As discussed more fully below, the Surety Bond Claim is an independent cause of action, pursuant to NRS 108.2421(1), that Brahma is entitled to assert and prosecute "in the county upon where the property upon which the work of improvement is located," irrespective of any other claims or causes of action against any other party. The Motion is nothing more than a dilatory tactic designed to continue to delay and obstruct Brahma's efforts to collect the nearly $13 million it is owed and has now been outstanding for over 15 months (not including attorney's fees, costs and statutory interest that must be awarded pursuant to NRS 108.234). As a Nevada contractor and lien claimant Brahma is entitled to the full protections of Nevada's mechanic's lien statute (NRS 108.221 to 108.246). Moreover, NRS 108.2421(3) entitles Brahma to demand a preferential trial setting and for the preferential trial to be held within 60 days of the date the demand was made in "the county where the property upon which the work of improvement is located." Because of this, Cobra's requested stay seeks to deprive Brahma of this important statutory right, further prolonging the delays that Brahma has experienced to date.

Finally, where the Cobra Parties voluntarily chose to post the Surety Bond in Nye County (i.e., the county where the property upon which the work of improvement is located), Brahma was afforded these important statutory rights (and other statutory rights were eliminated, such as the right to foreclose on its Notice of Lien recorded against the work of improvement), the Cobra

[1] The "TSE Claims" include Brahma's claims against TSE for (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624.

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Parties should not be heard to complain that Brahma seeks to exercise the very rights that the Cobra Parties created.

II. STATEMENT OF PERTINENT FACTS.

As the Court is aware, Brahma commenced this action more than a year ago seeking to recover payment for the labor, materials and equipment (the "Work") Brahma performed at the direction of TSE at the Crescent Dunes Solar Energy Project (the "Work of Improvement"), including the foreclosure of its Notice of Lien in the amount of $12,859,577.74. The procedural history of this case is lengthy, complex and well known to the Court. As such, Brahma will dispense with a detailed recitation of the same.

Nonetheless, it is important to note that after Brahma initially sought to foreclose on its Notice of Lien against the Work of Improvement, Cobra and AHAC voluntarily posted a Surety Bond as amended by Rider (collectively the "Surety Bond")[2] pursuant to NRS 108.2415 to release Brahma's lien from the Work of Improvement and attach the same to the Surety Bond.[3] As the Court is aware, Cobra is not a party to the contract between Brahma and TSE, nor an owner of the Work of Improvement, and it therefore remains unclear why Cobra, for its own reasons and purposes, chose to post the Surety Bond.

By way of consolidation and amendments, Brahma's current consolidated pleading (filed on April 22, 2019)[4] asserts (among others) a Third-Party Claim against Cobra, AHAC and the Surety Bond pursuant to NRS 108.2421, seeking recovery against these parties and the Surety Bond for the lienable amount due and owing to Brahma.[5]

As the Court will also recall, TSE removed a companion action from the Clark County District Court (the "Clark County Action") to federal court. Brahma then amended its Clark County Complaint and removed the TSE Claims and filed them in this Court by way of its pleading in Case No. CV 39348 (which TSE commenced by way of an NRS 108.2275 special proceeding

[2] *See* **Exhibit 1**.

[3] NRS 108.2415(6)(a) provides that (upon proper execution and recording) the Surety Bond "releases the property described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien."

[4] *See* **Exhibit 2**.

[5] NRS 108.2421(1) provides that a "lien claimant is entitled to bring an action against the principal and surety on the surety bond and the lien claimant's debtor in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located."

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(the "NRS 108.2275 Proceeding") seeking to expunge Brahma's lien.

Brahma, also by amendment, asserted a third-party claim on the Surety Bond and against Cobra and AHAC (as the bond principal and surety, respectively).[6] Out of an abundance of caution, and because TSE threatened to seek review of this Court's decision that Brahma properly asserted affirmative claims in the NRS 108.2275 Proceeding, Brahma also filed a standalone action, Case No. CV 39799 (the "Standalone Action") in which it asserted a claim on the Surety Bond and against Cobra and AHAC.[7] In March 2019, this Court granted Brahma's Motion to Consolidate the NRS 108.2275 Special Proceeding and the Standalone Action,[8] after which Brahma filed (with the court's express authorization)[9] its current amended and consolidated pleading.[10]

In January 2019, this Court also granted TSE's Motion to Stay while denying its Motion to Strike and Dismiss.[11] By way of that Order, the Court granted TSE a temporary stay (until such time as the federal court ruled on then-pending jurisdictional and venue motions) "only as to the following three Causes of Action which TSE initially removed to federal court: (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624."[12] This Court did ***not*** stay Brahma's claims against the Cobra Parties or the Surety Bond, even though such claims were then pending in the NRS 108.2275 Proceeding.[13]

While the foregoing proceedings in this Court were underway, Brahma and TSE filed related motions in the Federal Court in which Brahma argued, on the one hand, that the Federal Court should abstain and stay proceedings pursuant to the *Colorado River* Doctrine, while TSE argued that the Federal Court should enjoin Brahma from prosecuting its claims in the Nye County Action. Brahma argued in favor of abstention, and against an injunction, because a "substantial factor in the *Colorado River* analysis is whether there are special concerns associated with resolving the issues in piecemeal fashion via parallel proceedings."[14] Not surprisingly, and as more

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[6] *See* **Exhibit 3**.
[7] *See* **Exhibit 4**.
[8] *See* **Exhibit 5**.
[9] See **Exhibit 6** (Order Granting Countermotion to File Consolidated Amended Pleading)
[10] *See* Exhibit 2, *supra*.
[11] See **Exhibit 7**.
[12] See *id.*
[13] *See* Exhibit 4, *supra*
[14] *See* **Exhibit 8**, Reply in Support of Motion for Stay, p. 9 citing *Seneca Ins. Co. Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017).

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fully discussed below, Cobra's present motion relies heavily on the notion that a stay should be granted to "avoid duplication."[15] However, the Federal Court was "unconvinced" by this authority and found no "special or important rationale or legislative preference for having these issues be resolved in a single proceeding."[16] As a result, the Federal Court denied Brahma's motion, granted TSE's motion and "enjoin[ed] Brahma from litigating its ***contract*** claims in the Nye County Action."[17] More specifically, the Federal Court enjoined Brahma "from litigating the following claims alleged against [TSE] in any state court action: 1) breach of contract, 2) breach of implied covenant of good faith and fair dealing and 3) violation of NRS 624."[18] The Federal Court ***did not*** enjoin Brahma from proceeding on its remaining claims in this Court-- specifically, Brahma's claims against the Cobra Parties and the Surety Bond.[19]

Although it now seeks a stay, Cobra answered Brahma's consolidated amended pleading in May 2019.[20] Similarly, in June 2019 and September 2019 respectively, Cobra answered the Complaint in Intervention and Amended Complaint in Intervention of H&E Equipment Services, Inc. ("H&E"), whose lien Cobra and AHAC also bonded (again, for unknown reasons).[21] Cobra also participated in an Early Case Conference and joined in the Joint Case Conference Report filed on June 26, 2019.[22]

As more fully described in Brahma's pending and separate Motion to Compel Deposition of Cobra's Person Most Knowledgeable ("PMK"),[23] Brahma began requesting a deposition of Cobra's PMK in August 2019 and Cobra's counsel repeatedly promised to provide available dates for that deposition for his client's witness.[24] After Cobra repeatedly failed to provide available dates for its witness, Brahma noticed the deposition for October 16, 2019, to which Cobra objected on pretextual grounds.[25] Counsel for Brahma and Cobra held a meet and confer pursuant to NRCP

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[15] *See* Motion pp. 11-12.
[16] *See* **Exhibit 9**, p. 6, ll.17-21.
[17] *See id.*, p. 9, ll. 5-6 (emphasis added).
[18] *See id.*, p. 9, ll. 14-16.
[19] *See id.*
[20] *See* **Exhibit 10**.
[21] *See* **Exhibit 11** and **Exhibit 12**.
[22] See **Exhibit 13**.
[23] See **Exhibit 14** (exhibits omitted for brevity).
[24] *See id.*, pp. 3-5
[25] *See id.*

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37 on October 14, 2019,[26] and Cobra submitted is Motion to Stay the next day.[27]

III. ARGUMENT AND AUTHORITY.

A. Cobra Chose This Forum.

It is important to remember that the Cobra Parties' involvement in this action is purely voluntary. Brahma's claim of lien arose from its unpaid work for ***TSE***, not Cobra. Nonetheless, the Cobra Parties elected to obtain and post the Surety Bond. Having done so, the Cobra Parties subjected themselves to Brahma's NRS 108.2415 through 108.2425 cause of action, which claim must be heard in the county where the property upon which the work of improvement is located.[28] Cobra makes no argument (nor could it) that Brahma's action against the Cobra Parties and the Surety Bond are somehow improperly sited in this Court.

Similarly, following months of motion practice for which Cobra was provided notice and a full opportunity to participate, the Cobra Parties voluntarily answered Brahma's amended consolidated complaint on April 22, 2019. The Cobra Parties also voluntarily obtained and posted a surety bond to release H&E's notice of lien and they voluntarily answered H&E's Complaint in Intervention.

Subsequently, the Cobra Parties participated in the Early Case Conference and in presentation of the Joint Case Conference Report, and until filing the present Motion, acknowledged its willingness to engage in discovery and to present its PMK for deposition. All of these events occurred months after TSE obtained an Order from this Court staying the proceedings as to TSE.[29] In short, The fact that Cobra only now seeks a stay is a clear demonstration that its primary strategy is delay, which this Court should not reward by granting this Motion.

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[26] *See id.*

[27] *See* Motion and Certificate of Service p. 15. Cobra served the Motion by regular mail only.

[28] *See* discussion, *infra.*

[29] Despite its involvement in these proceedings for more than a year, including while TSE's Motion to Stay was pending, Cobra's motion is its first and only effort to seek a stay. Similarly, Cobra made no effort to intervene in the Federal Court Action until ***after*** it filed the current Motion to Stay.

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B. This Court and the Federal Court have Declined to Stay Proceedings Against Cobra.

When considering TSE's motion to stay (filed and heard earlier this year), this Court could have stayed this action in its entirety, but chose not to do so.[30] Similarly, the Federal Court could have enjoined Brahma from proceeding on any claim (including its claim against the Cobra Parties and the Surety Bond) arising out of or relating to the acts and occurrences giving rise to Brahma's claims against TSE. Again, however, the Federal Court did not do so, choosing only to enjoin Brahma from proceeding in state court on the TSE Claims. Brahma respectfully submits that these were conscious and deliberate decisions by experienced and knowledgeable judges.

As noted above, for example, Judge Boulware expressly rejected the very arguments on which Cobra heavily relies—i.e., the avoidance of piecemeal litigation, potential duplication and the possibility of inconsistent results. Cobra specifically argues that "the claims against Cobra should be stayed to avoid unnecessary duplicative discovery and the risk of conflicting decisions."[31] In rejecting this very issue, Judge Boulware cited the lack of any "special or important rationale or legislative preference for having these issues be resolved in a single proceeding."[32] This Court should therefore follow Judge Boulware's lead and reject Cobra's concerns of duplication and the possibility of inconsistent results. What is good for the goose is good for the gander.

C. Brahma Asserts an Independent Statutory Claim on the Surety Bond.

NRS 108.2421(1) provides:

> A lien claimant is entitled to bring an action against the principal and surety ***on the surety bond*** and the lien claimant's debtor in any court of competent jurisdiction that is located ***within the county where the property upon which the work of improvement is located***.

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[30] *See* Exhibit 7, *supra*.

[31] See Motion p. 13, ll. 3-4, citing *Knepper v. Equifax Info. Servs.*, No.2: 17- CV -02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2,2017) (granting a motion to stay the action, which would "limit hardship or inequity to [defendant] from unnecessary proceedings, inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple jurisdictions.");

[32] *See* Exhibit 9, p. 6, ll. 19-20.

By posting the Surety Bond, the Cobra Parties caused Brahma's Notice of Lien against the Work of Improvement to be released.[33] Brahma's lien now attaches to the Surety Bond,[34] which ***entitles***[35] Brahma to bring its action against the Surety Bond in this Court. This is a ***statutory right***, not merely a privilege.[36]

Further, by posting the Surety Bond, the Cobra Parties have submitted themselves to the jurisdiction of this Court and appointed the Clerk of the Court as their agent pursuant to NRS 108.2423 which provides in part:

> By entering into a surety bond given pursuant to NRS 108.2415, the ***principal and surety submit themselves to the jurisdiction of the court*** in which an action or suit is pending on a notice of lien on the property described in the surety bond, and the ***principal and surety irrevocably appoint the clerk of that court as their agent*** upon whom any papers affecting the liability on the surety bond may be served. ***The liability of the principal may be established by the court in the pending action.***

Accordingly, ***Cobra*** (not TSE) is the Surety Bond principal against whom Brahma has a claim and against whom it seeks to obtain a judgment, along with the surety (AHAC) and the Surety Bond, in the county in which the Work of Improvement is located. While Brahma also has claims against TSE, those contract-based claims now reside in the Federal Court.

By contrast, Brahma's claim against the Surety Bond seeks an award of "the lienable amount plus the total amount that may be awarded by the court pursuant to NRS 108.237, so long as the liability of the surety is limited to the penal sum of the surety bond."[37] NRS 108.237 requires the Court to "award a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due by the court" plus costs of repairing and recording the notice of lien, interest, and costs of the proceedings including reasonable attorney's fees."[38] "Lienable amount" means "the principal amount of a lien to which a lien claimant is entitled pursuant to subsection 1 of NRS 108.222."[39]

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[33] *See* NRS 108.2413 ("A lien claimant's lien rights or notice of lien may be released upon the posting of a surety bond in the manner provided in NRS 108.2415 to 108.2425, inclusive.").
[34] *See* NRS 108.2415(6)(a) ("the surety bond shall be deemed to replace the property as security for the lien.").
[35] *See* Savage v. *Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) ("When examining a statute, a purely legal inquiry, this court should ascribe to its words their plain meaning, unless this meaning was clearly not intended.").
[36] Black's Law Dictionary provides: "to entitle is to **give a right** or title." *See* https://thelawdictionary.org/entitle/ (emphasis added).
[37] *See* NRS 108.2421(6).
[38] *See* NRS 108.237(1).
[39] *See* NRS 108.22136.

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NRS 108.222(1) provides:

> Except as otherwise provided in subsection 2, a ***lien claimant has a lien upon the property, any improvements for which the work, materials and equipment were furnished or to be furnished***, and any construction disbursement account established pursuant to NRS 108.2403, for:
>
> (a) If the parties agreed, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of the work, material and equipment furnished or to be furnished by or through the lien claimant, ***the unpaid balance of the price agreed upon for such work, material or equipment***, as the case may be, whether performed, furnished or to be performed or furnished at the instance of the owner or the owner's agent; ***and***
>
> (b) If the parties did not agree, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of the work, material and equipment furnished or to be furnished by or through the lien claimant, including, without limitation, any additional or changed work, material or equipment, ***an amount equal to the fair market value of such work, material or equipment, as the case may be, including a reasonable allowance for overhead and a profit***, whether performed, furnished or to be performed or furnished at the instance of the owner or at the instance of the owner's agent.[40]

Stated differently, NRS 108.2421 permits a lien claimant, such as Brahma, to prove up its lienable amount, be awarded the same plus interest, costs and reasonable attorney's fees and to have a judgment ***against the Surety Bond*** up to its "penal sum." Such a judgment "is ***immediately enforceable*** and may be appealed regardless of whether any other claims asserted or consolidated actions or suits have been resolved by a final judgment."[41] The Cobra Parties' arguments notwithstanding, Brahma's Claim Against the Surety Bond is not derivative of or dependent upon its breach of contract claim against TSE;[42] rather it is a separate and distinct cause of action with separate and distinct elements of proof.[43]

While Brahma has now been required to pursue the TSE Claims in Federal Court, there is nothing in Nevada's Lien Statute that obligates Brahma to pursue its claim against the Surety Bond in the Federal Court.[44] Similarly, nothing in Nevada's Lien Statute requires Brahma to wait to proceed on its claim against the Surety Bond and the Cobra Parties while it pursues the TSE Claims

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[40] *See* NRS 108.222(1) (emphasis added).
[41] *See* NRS 108.2421(6) (emphasis added).
[42] *See e.g.*, Motion pp. 10-11.
[43] Similarly, H&E's Claim on Surety Bond is not "derivative of Brahma's claims against TSE." *See* Motion p. 7. Rather, H&E's claim must stand or fail on its own merits and H&E is similarly entitled to an award and judgment against the (separate) surety bond Cobra posted to release H&E's lien.
[44] Because Brahma and Cobra are not diverse, Cobra also cannot remove the action to Federal Court.

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against TSE in Federal Court. Because Cobra's Motion seeks just that, the Court should deny the Motion.

D. The Hardships Favor Brahma.

The Cobra Parties argue that they "will face hardship and inequity" if forced to defend the very Surety Bond they posted (in Nye County) to release Brahma's lien (also recorded in Nye County).[45] Such sophistry is particularly galling where the Cobra Parties volunteered to be bound to the jurisdiction of this Court when they posted the Surety Bond. To the contrary, a stay will cause extreme hardship to Brahma, who first recorded its Notice of Lien more than 19 months ago yet continues to defend against procedural motions designed to delay its pursuit of important statutory rights and remedies.

A mechanic's lien is a statutory creature established to help ensure payment of work or materials provided for the construction or improvements on real property. *In re Fontainebleau Las Vegas Holdings,* 289 p.3D 1199, 1210 (Nev. 2012). The Nevada Supreme Court has consistently held that "the mechanic's lien statutes are remedial in character and should be liberally construed." *Id.* In fact, the Nevada Supreme Court in *Hardy Companies, Inc. v. SNMARK, LLC,* 126 Nev. 528 (2010), cited the legislative record wherein it states that Nevada's "lien law should be liberally construed ***in favor of lien claimants***." *Id.* at 538 (citing Hearing on S.B. 343 Before the Assembly Comm. On Judiciary, 73d Leg. (Nev., May 13, 2005)) (emphasis added). Nevada's public policy favors securing payment for labor and material contractors; "[u]nderlying the policy in favor of preserving laws that provide contractors secured payment for their work and materials is the notion that contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008).

Cobra's Motion seeks to subvert the policies underlying Nevada's Lien Statute by forcing Brahma to await the outcome of a different case, against a different defendant, in a different forum.

/ / /

[45] *See* Motion, p. 9.

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There is no guaranty that Brahma's case against TSE will go to trial anytime soon, much less go to judgment. Even a temporary stay while the Federal Court considers Cobra's Motion to Intervene[46] is likely to delay the case by as much as a year. By way of the most relevant example, TSE filed its injunction motion in October 2018 and Judge Boulware's decision was issued in September 2019.

In this regard also, the Cobra Parties' Motion must be seen as nothing more than a delaying tactic. The Nevada Courts do not look favorably upon dilatory tactics. *See e.g., Burnett v. C.B.A. Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) (delay, bad faith, or a dilatory motive are all sufficient reasons to deny a motion to amend a pleading); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 40 (2004) (while stay pending appeal of an order denying arbitration is generally granted, the court should deny the stay if the appellant apparently filed the stay motion for dilatory purposes); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d 705, 713 (2011) (district court did not abuse its discretion in refusing to permit defendant to withdraw his invocation of the Fifth Amendment privilege or in denying his request to reopen discovery because such tactics had already resulted in unnecessary expense and probable delay in obtaining discovery documents). This court also should reject Cobra's dilatory conduct designed only to obstruct and delay Brahma's pursuit of the very rights provided to it when Cobra recorded the Surety Bond.

E. Brahma is Entitled to a Preferential Trial.

Among the many statutory rights and remedies that Cobra seeks to delay, obstruct and preclude by way of the Motion, NRS 108.2421(3) entitles Brahma to seek a preferential trial:

> ***At any time after the filing of a joint case conference report*** pursuant to Rule 16.1 of the Nevada Rules of Civil Procedure or, if the case is designated by the court as complex litigation, after the approval of the initial case management order by the court, ***each lien claimant in the action may serve*** upon the adverse party ***a "demand for preferential trial setting"*** and file the demand with the clerk of the court. Upon filing, the clerk of the court shall, before the Friday after the demand is filed, vacate

[46] It is entirely unclear what claim the Cobra Parties are asking the Federal Court to allow it to intervene with. Indeed, the pleading Cobra proposes to file in the Federal Court is titled "[Proposed] Answer in Intervention to Plaintiff's Complaint." The only means by which Cobra may voluntarily join the Federal Court Action is to remove Brahma's claim against the Surety Bond and move to consolidate it with the existing Federal Court Action. However, as noted above, Cobra cannot remove Brahma's claim on Surety Bond because Cobra and Brahma are not diverse. *See* 28 U.S.C. 1332, 1441 and/or 1446.

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a case or cases in a department of the court and set the lien claimant's case for hearing, on a day or days certain, ***to be heard within 60 days after the filing of the "demand*** for preferential trial setting."[47]

Importantly, this right arose ***only*** because the Cobra Parties posted the Surety Bond. No such right to a preferential trial arises from an action to foreclose on a notice of lien.[48]

Here, Brahma's exercise of this important right may be its only shield against the delays, endless procedural motions and other dilatory tactics employed against its efforts to collect the nearly $13 million (exclusive of attorney's fees, costs and statutory interest) it has been owed since at least April 2018. This right exists because of Nevada's policy of securing payment to contractors like Brahma, who is "in a vulnerable position" having extended "large blocks of credit," invested "significant time, labor, and materials into a project," and having "any number of workers vitally depend upon them for eventual payment." *See Bullock*, 124 Nev. at 1117-18. Brahma has carried more than $12.9 million on its books for nearly two years (and some of it longer) and should not be forced to wait even a day longer to prove up its claim. The Court should deny the Motion.

IV. CONCLUSION

Based on the foregoing, the Court should deny Cobra's Motion.

Respectfully submitted this 31st day of October, 2019.

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[47] *See* NRS 108.2421(3).

[48] See e.g., NRS 108.233 (requiring commencement of an action to enforce a notice of lien within six months of recording but otherwise offering no trial preference).

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 14 day of November, 2019, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S OPPOSITON TO COBRA THERMOSOLAR PLANTS, INC AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** 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
- ☐ Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile;**
- ☐ to be hand-delivered; and/or
- ☒ other – electronic mail

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

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada corporation, Plaintiff, vs. TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Defendant.	CASE NO. 2:18-cv-01747-RFB-GWF **TONOPAH SOLAR ENERGY, LLC'S JOINDER, OR, ALTERNATIVELY, RESPONSE TO COBRA'S AND AHAC'S MOTION TO INTERVENE AS DEFENDANTS**
TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company; DOES I through X; and ROE CORPORATIONS I through X, Counterclaimant, vs. BRAHMA GROUP, INC., a Nevada corporation, Counterdefendant.	

Proposed Defendants-Intervenors Cobra Thermosolar Plants, Inc. ("Cobra") and American Home Assurance Company ("AHAC") filed a Motion to Intervene as Defendants on October 18, 2019 ("Motion"). *See* ECF No. 56. Tonopah Solar Energy, LLC ("TSE") joins the Motion, or, alternatively, responds to the Motion, as set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The Motion contends that Cobra and AHAC should be permitted to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a) or permissively under Fed. R. Civ. P. 24(b). *See generally* ECF No. 56. The Motion also contends that allowing Cobra and AHAC to intervene would not destroy diversity jurisdiction, as they are not indispensable parties under Fed. R. Civ. P. 19(b). *See id.* at pp. 9-11.

While TSE does not necessarily agree with all of the Motion's characterizations and arguments, it does not oppose Cobra's and AHAC's requests to intervene under either Rule 24(a) or (b), so long as their intervention does not destroy diversity jurisdiction, which it should not.

TSE agrees with Cobra's argument that its intervention does not destroy diversity jurisdiction because Cobra is not an indispensable party to this action. *See* ECF No. 56, pp. 9-10. Indeed, this is the result that TSE envisioned when it first filed its now granted Motion for an Injunction and to Strike.[1]

In addition, it is all the more clear that Cobra's intervention does not destroy diversity jurisdiction because Cobra was not an indispensable party to this action when the complaint giving rise to this action was first filed. *See Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1014 (9th Cir. 2006) (concluding that MGA's intervention as a non-diverse defendant under Rule 24 did not

[1] *See* ECF No. 28 (Reply in Support of TSE's Motion for an Injunction and to Strike), p. 12 (noting that "Brahma's bond claim against Cobra and the surety could proceed in Nye County, but, more likely, that action would be stayed and Cobra and the surety could interplead as non-diverse defendants in this action, as interested parties. *See Mattel, Inv. v. Bryant*, 441 F. Supp. 2d 1081, 1095 (C.D. Cal. 2005) aff'd, 446 F.3d 1011 (9th Cir. 2006) (providing that intervention by a non-diverse non-indispensable party in an action removed on the basis of diversity does not destroy diversity and that a party can intervene as a defendant even if there is no claim against it); *see also* ECF No. 55 (Order granting TSE's Motion for an Injunction and to Strike).

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destroy diversity jurisdiction because MGA was not indispensable); *Hill v. Blind Indus. & Servs. of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999), opinion amended on denial of reh'g on inapposite grounds, 201 F.3d 1186 (9th Cir. 1999) (providing that "diversity jurisdiction is determined at the time the action commences") (citing to *Freeport-McMoRan Inc. v. K N energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam)); *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1096 (10th Cir. 2003) (concluding that the joinder of a non-diverse defendant did not destroy diversity jurisdiction because the party was not indispensable "at the time the original complaint was filed"); *Am. Nat. Bank & Tr. Co. of Chicago v. Bailey*, 750 F.2d 577, 582 (7th Cir. 1984) (providing that "the rule that there must be complete diversity to sustain diversity jurisdiction is not absolute. A pertinent exception is that if the nondiverse party comes into the case by intervening in it, his presence will not deprive the court of jurisdiction unless the intervenor was an indispensable party when the complaint was filed.") (citing *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 549 (1824); *Smith v. Sperling*, 354 U.S. 91, 93, n. 1 (1957)); *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 483 (D.C. Cir. 1996) ("The only potential caveat alluded to in *Freeport-McMoRan* is that a Rule 25(c) addition of a non-diverse party may destroy diversity jurisdiction (and hence, in a case removed from state court, require remand) if the added party was *indispensable at the time the action began*.") (emphasis in original).

The complaint giving rise to this action was first filed on July 17, 2018, when Brahma filed suit against TSE in state court. *See* ECF No. 55, p. 2 (citing ECF No. 1-1). Cobra first recorded the surety bond issued by AHAC, the basis upon which Cobra premises its intervention, on September 6, 2018.[2] *See* ECF No. 16-11 (the surety bond recorded on September 6, 2018).

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[2] While unnecessary based on the current facts, there is also an argument to be made that Cobra did not actually have any interest in this action until a surety bond was issued that released Brahma's lien pursuant to NRS 108.2415, which was not until October 9, 2018. Under NRS 108.2413(1), "[t]o obtain the release of a lien for which notice of lien has been recorded against the property, the principal and a surety must execute a surety bond in an amount equal to 1.5 times the lienable amount in the notice of lien. . . .". The surety bond that Cobra recorded on September 6, 2018 was for $10,767,580. *See* ECF No. 16-11, p. 9. At the time, however, Brahma was on its Third Amended and/or Restated Notice of Lien, which was recorded on July 19, 2018 in the amount of $11,902,474.75. *See* ECF No. 16-10. Cobra did not record a surety bond that was 1.5 times the lienable amount in Brahma's notice of lien, until it recorded a rider to its surety bond on October 9, 2018, thereby increasing its bond's amount to $19,289,366.61 or 1.5 times the amount of Brahma's Fourth Amended Lien. *See* ECF No. 20-15.

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Prior to the recording of the surety bond, Cobra had no interest in what was otherwise a contractual dispute between Brahma and TSE—Brahma's claims against TSE were for breach of contract, breach of the implied covenant, unjust enrichment, and violation of NRS 624. *See* ECF No. 1-1. Thus, on July 17, 2018, the date the complaint giving rise to this action was first filed, Cobra was not an indispensable party to this action.

To the extent that this Court disagrees and finds that Cobra's intervention destroys diversity jurisdiction (which should not be found), TSE submits that Cobra and AHAC's Motion should be denied. *See Medchoice Risk Retention Grp., Inc. v. Rand*, No. 316CV00418MMDVPC, 2017 WL 1025173, at *2 (D. Nev. Mar. 16, 2017) (finding that permissive intervention should be denied because it "would unnecessarily encumber the litigation and impede judicial economy"); *Pharm. Research & Manufacturers of Am. v. Sandoval*, No. 217CV02315JCMCWH, 2017 WL 5158714, at *2 (D. Nev. Nov. 7, 2017).

DATED: November 1, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2019, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S JOINDER, OR, ALTERNATIVELY, RESPONSE TO COBRA'S AND AHAC'S MOTION TO INTERVENE AS DEFENDANTS** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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COBRA THERMOSOLAR PLANTS, INC.,
and AMERICAN HOME ASSURANCE COMPANY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

BRAHMA GROUP, INC., a Nevada Corporation, Plaintiff, vs. TONOPAH SOLAR ENERGY, LLC, a Delaware Limited Liability Company; DOES I through X; and ROE CORPORATIONS I through X, Defendants.	Case No.: CV39348 Consolidated With Case No.: CV39799 Dept. No.: 2 **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF MOTION TO STAY**
TONOPAH SOLAR ENERGY, LLC a Delaware limited liability company; DOES I through X; and ROE CORPORATIONS I through X, Counter-claimants, vs. BRAHMA GROUP, INC., a Nevada corporation, Counter-defendant.	

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant and
Third-Party 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,

Third-Party Defendants

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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

Brahma Group, Inc.'s ("Brahma") claims against Third-Party Defendants Cobra Thermosolar Plants, Inc. ("Cobra") and American Home Assurance Company ("AHAC") concern the Surety Bond that Cobra and AHAC posted to guarantee the liabilities, if any, that Tonopah Solar Energy, LLC ("TSE") may have to Brahma for Work performed at the Crescent Dunes Solar Energy Facility (the "Plant"). There are no substantive claims against Cobra or AHAC in this action – Brahma will have to prove its case against TSE before it may foreclose against the Surety Bond. Brahma's claims against TSE are proceeding in federal court (the "Federal Action") because the federal prohibited Brahma from litigating them here. Cobra has moved to intervene in the Federal Action—a motion that TSE has joined. (*See* Exhibit A (Federal Action, Dkt. No. 59).)[1]

Cobra and AHAC's Motion sensibly seeks a stay of this case pending the outcome of the Federal Action. Cobra and AHAC's defenses to Brahma's claims on the Surety Bond mirror TSE's defenses in the Federal Action. The requested stay will, therefore, simplify discovery for all parties and conserve judicial resources that would otherwise be wasted through duplicative litigation.

Indeed, if the Court allows Brahma's claims against Cobra and AHAC to go ahead in isolation, while the federal court addresses Brahma's primary claims against TSE, there would be a significant risk of conflicting decisions and unjust results. In a different procedural posture, Brahma conceded exactly this, warning of the "chaos" that would erupt if all the parties—Brahma, TSE, and Cobra—were not in front of the same court:

> The Brahma Lien (recorded against the Work of Improvement and now secured by the Brahma Surety Bond) creates a property interest which cannot be adjudicated by two different courts. Inconsistent adjudication regarding Brahma's lien rights (or claim against the Brahma Surety Bond) would lead to chaos if one court determines that TSE owes Brahma one amount and a different court determines

[1] *Brahma Group, Inc. v. Tonopah Solar Energy*, LLC et al., No. 2:18-cv-01747-RFB-EJY, (D. Nev. Sep. 17, 2018), hereinafter referred to and cited as the "Federal Action." Capitalized terms in this Reply have the same meaning set forth in Cobra and AHAC's October 15, 2019 Motion.

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> that TSE owes Brahma a different amount. To resolve those two inconsistent judgments, it would require further litigation.

(Exhibit C (Federal Action, Dkt. No. 13, at 14).)

Brahma's Opposition to Cobra and AHAC's Motion does not meaningfully dispute these essential facts. Rather, Brahma now complains of purported delay and asserts its "statutory right" to proceed on its Surety Bond claims in this venue. Among other things, Brahma is ignoring that its own forum shopping is directly responsible for the present posture of the case and its complicated procedural history. To the extent there has been any delay, Brahma can only blame itself. Moreover, Nevada's lien law does not grant Brahma any right to a windfall claim for the full amount the Surety Bond before it succeeds on its claims against TSE in the Federal Action. While Brahma's Opposition argues that its claim against the Surety Bond is "a separate and distinct cause of action with separate and distinct elements of proof," (Opp. Br. 10), it told the court in the Federal Action the opposite:

> [W]e're going to make the same arguments there that we make here. And [Cobra] may make some of the same arguments that TSE is going to make here in defense of our lien claim. But, you know, fundamentally the causes -- the claims, the dispute, is the same. The facts are the same. And some facts maybe would not be elucidated over there that might be here and vice versa, but by in large the facts are going to be the same.

(Exhibit B (Federal Action, June 25, 2019 Tr., at 22:20-23:2).)

The Court should, therefore, enter a stay to allow for the resolution of Federal Action that will determine the amount—in anything—that Brahma is owed for its Work.

II.

ARGUMENT

A. BRAHMA'S FORUM SHOPPING CAUSED DELAY AND NECESSITATED THIS MOTION

Brahma argues that Cobra and AHAC "chose this forum" and inaccurately complains that

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the "primary strategy [of the instant Motion] is delay." (Opp. Br. 7.)[1] The Opposition's characterization of the procedural history in this case ignores that it is Brahma's own forum shopping that caused delay and required Cobra and AHAC's request for a stay at this time.

Brahma tried, but failed, to keep its claims against TSE in state court. Under its Agreement with TSE, Brahma first filed suit in Clark County, Nevada. After TSE removed the Clark County Action to the United States District Court for the District of Nevada, Brahma amended its complaint to remove all causes of action against TSE except for unjust enrichment. Brahma then filed a first amended counter-complaint and third-party complaint in this Court, asserting the same claims against TSE that it had just dropped in the Federal Action, as well as its claim on the Surety Bond against Cobra and AHAC. Brahma then moved to stay the Federal Action, and defended against TSE's motion in the Federal Action to enjoin Brahma from proceeding with its claims against TSE in this Court.

On September 25, 2019, the court in the Federal Action denied TSE's motion to stay and enjoined Brahma from litigating its contract claims in this Court. The federal court's decision was a direct response to Brahma's gamesmanship:

> The Court finds that there is considerable evidence of forum shopping on the part of Brahma here. Brahma filed its complaint asserting its contact claims against TSE in Clark County Court. It was only after receiving a favorable ruling on its motion to expunge in Nye County that Brahma then sought to amend its complaint in this case and reassert those same claims before Judge Elliot in Nye County.

(Exhibit D (Federal Action, Dkt. 55, at 8).) Still further, the court in the Federal Action found that Brahma "fraudulently filed [in this Court] in an attempt to subvert the removal of a prior case." (*Id*., at 8-9.)

Cobra and AHAC did not waste any time in bringing their motion to stay, which was filed on October 15, 2019. (Cobra and AHAC filed their motion to intervene in the Federal Action on

[1] Brahma's allegation that Cobra "chose this forum" and "voluntarily chose to post the Surety Bond" (Mot. 1) is not accurate. Under a separate contract between TSE and Cobra, Cobra was required to "bond over" or otherwise obtain a discharge of the liens. While this was done under protest and with full reservation of rights, including all rights to recover the financial costs related to the Bond, this dispute between TSE and Cobra is not before this court.

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October 18, 2019.) These motions were made necessary by Brahma's efforts to subvert the federal court's jurisdiction, which only ended with the September 25, 2019 order in the Federal Action. As a result of the September 25, 2019 order, Brahma is now enjoined from litigating its contract claims against TSE in this Court, and there is now a risk of inconsistent decisions on the same principal issue: the lienable amount, if anything, to which Brahma is entitled. Cobra and AHAC's rights were significantly prejudiced by this development. Cobra and AHAC did not file their Motion to Stay to delay this case. It was made necessary by the procedural mess Brahma created.

B. THE FEDERAL COURT HAS NOT "REJECTED" A STAY OF BRAHMA'S SURETY BOND CLAIMS

The September 25, 2019, order in the Federal Action did not, as Brahma claims, "expressly reject[]" the arguments in Cobra and AHAC's Motion to Stay concerning the avoidance of piecemeal litigation, potential duplication, and the possibility of inconsistent results. (*See* Opp. Br 8.) No order (by the federal court or this Court) forecloses a stay of this case or Cobra and AHAC's participation in the Federal Action.

Brahma requested that the court in the Federal Action abstain from the exercise of federal jurisdiction in favor of this proceeding by application of the *Colorado River* doctrine. "'Abstention from the exercise of federal jurisdiction is the exception, not the rule'" and is granted only under "'exceptional circumstances.'" (Exhibit D (Federal Action, Dkt. No. 55, at 4) (quoting *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 813 (1976)).) The *Colorado River* doctrine is a multi-part test for determining whether a federal court should exercise jurisdiction, not whether it should enter a stay. It consists of eight factors relevant to "the appropriateness of a *Colorado River* stay," with "a strong presumption against federal abstention." (Exhibit D (Federal Action, Dkt. No. 55, at 4).) The "avoidance of piecemeal litigation" is just one of the eight factors considered under the *Colorado River* doctrine. Contrary to Brahma's characterization of that analysis, the court in the Federal Action suggested that it was capable of asserting jurisdiction over the Surety Bond claims proceeding in this Court:

> Brahma argues that this factor favors abstention because the Nye County Court will necessarily need to determine issues pertinent to the contract claims, such as the agreed upon contract value of the

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> work. The Court is unconvinced by this argument. **Multiple defendants, claims, and cross-claims are routine in diversity cases**. . . . Brahma fails to identify any special or important rationale or legislative preference for having these issues be resolved in a single proceeding, and so the Court finds that this factor does not favor abstention.

(Exhibit D (Federal Action, Dkt. No. 55, at 6) (emphasis added).) The federal court found that all the factors considered were "neutral or favor the district court's exercise of jurisdiction," and that "[i]n light of the strong presumption against abstention, [it would] not grant federal abstention pursuant to *Colorado River*." (*Id.* at 8.) Key to this determination was the "considerable evidence of forum shopping on the part of Brahma," which the federal court also found justified enjoining Brahma from litigating its claims against TSE in this Court. (*Id.* at 8-9.)

This Court's framework for deciding Cobra and AHAC's Motion to Stay under *Landis* is very different. Sufficient duplication of effort and a risk of inconsistent decisions necessary to justify a stay here is uncomplicated by the other factors and considerations faced by the court in the Federal Action. As discussed in Cobra and AHAC's moving brief, courts routinely grant a *Landis* stay where a related case has the potential to simplify issues, proof, and questions of law. (Mov. Br. 7.) Brahma has already conceded that the issues, proof, and questions of law in the two actions are inextricably connected:

> [T]he claims, the dispute, is the same. The facts are the same. And some facts maybe would not be elucidated over here that might be here and vice versa, but by in large the facts are going to be the same. The issues are going to be the same.

(Exhibit B (Federal Action, June 25, 2019 Tr., at 22:23-23:2).)

At oral argument, the federal court acknowledged that it did not have the authority to "force" this action into the Federal Action. (*Id.* at 30:1-16.) In response to Brahma's argument that there was a very real possibility that "one court is going to rule one way and the other court is going to possibly rule that way or possibly another way," the federal court responded that there was another option: "Or wait. One of us is going to have to wait." (*Id.* at 22:6-23:5.) Cobra and AHAC now have pending a motion to intervene in the Federal Action so that they may participate and protect their rights while the federal court resolves the dispute over what, if anything, Brahma

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is owed for its Work at the Plant. In these circumstances, and against the backdrop of Brahma's gamesmanship, the Court should exercise its discretion to "wait" while the Federal Action decides the amount, if anything, Brahma is entitled to.

C. BRAHMA CANNOT COLLECT ON THE BOND WITHOUT RESOLUTION OF THE SAME ISSUES BEING CONSIDERED IN THE FEDERAL ACTION

The merits of Brahma's claim to compensation for Work performed at the Plant—and TSE's counterclaims, including fraud—will be resolved in the Federal Action. Brahma's "statutory right" to pursue its claim on the Surety Bond in this venue does not, as Brahma suggests, allow it to collect without resolution of the amount, if anything, to which it is entitled through litigation of TSE's defenses and counterclaims in the Federal action. A stay is proper, despite Brahma's protests about its right to proceed in this venue.

NRS § 108.2421 provides that Brahma, as a lien claimant for Work performed in this county, is "entitled to bring an action against the principal and surety on the surety bond **and the lien claimant's debtor**" in this Court. NRS § 108.2421 (emphasis added). At oral argument in the Federal Action, Brahma confirmed that the "lien claim's debtor in this case is TSE." (Exhibit B (Federal Action, June 25, 2019 Tr., at 19:18-19:19).) However, Brahma's claims against TSE are no longer before this Court because of Brahma's attempt to forum shop. Brahma acknowledged that because it agreed to subject itself to jurisdiction in Clark County and filed a separate action, this Court is not the exclusive venue to resolve the dispute:

> THE COURT: . . . Does [NRS § 108.2421] say it can't be brought elsewhere? And can you point me to Nevada law that says that that means that it can only be brought there?
>
> MR. ZIMBELMAN: Yes, a lien claim can only be brought in the county in which . . .
>
> THE COURT: Right, except -- except you've agreed to subject yourself to Clark County and you filed a separate action.
>
> MR. ZIMBELMAN: True.

(Exhibit B (Federal Action, June 25, 2019 Tr., at 19:21-20:4).) Cobra and AHAC are not challenging this Court's jurisdiction to hear Brahma's claim against the Surety Bond. Instead, a

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stay is justified because the amount that Brahma is entitled to collect will now be litigated in the Federal Action because of Brahma's tactics.

Further, Brahma's proffered interpretation of NRS § 108.222 and NRS § 108.2421 improperly suggests that it may sue for the full amount of the Surety Bond, and seek a preferential trial on it, without reaching the merits of its claim to the money in the Federal Action. (*See* Opp. Br. 8-13.) This is not a case falling under NRS § 108.222(1)(a), where a contract provides for a "specific price," there is no dispute about performance, and the lien claimant is simply seeking the "balance of the price agreed upon for such work, material or equipment." *See* NRS § 108.222(1)(a). Amounts in excess of any price specifically agreed to in a contract or written change orders "fall[] outside [this subsection] of the mechanic's lien statute." *See SMC Constr. Co. v. Rex Moore Grp., Inc.*, No. 317CV00470LRHVPC, 2017 WL 4227940, at *4 (D. Nev. Sept. 21, 2017). In such actions, the contractor's "speedy remedy to secure payment" is limited to the contract price. *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 146, 67 P.3d 328, 330–31 (2003) (citing NRS §§ 108.222, 108.235(1), 108.239(5)). The speed of such a proceeding is necessarily frustrated where the court is "required to hear evidence regarding the disputed costs of materials, labor, overhead and profit beyond the contract price." *Id.* at 331.

Because there is no set contract price for the Work performed, Brahma must seek recovery under NRS § 108.222(1)(b), which only permits Brahma to collect an "amount equal to the fair market value of such work, material or equipment . . . including a reasonable allowance for overhead and a profit." *See* NRS § 108.222(1)(b); *Cal. Commercial*, 67 P.3d at 331–32. The only way to determine the fair market value of Brahma's work on the project is through litigation of the dispute between Brahma and TSE, including TSE's claims that Brahma engaged in fraud.

The "fair market value" of Brahma's Work at the Plant is heavily disputed. Brahma tacitly acknowledges that it must "prove up its lienable amount," (Opp. Br. 10), but tellingly omits how it will be able to do so without resolution of TSE's counterclaims. TSE's counterclaims in the Federal Action allege several state law claims against Brahma: breach of contract, breach of implied covenant of good faith and fair dealing, declaratory relief, unjust enrichment, fraudulent/intentional misrepresentation, and negligence misrepresentation. (Exhibit E (Federal

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Action, Dkt. No. 4).) In its fraud counterclaim, among other things, TSE alleges that Brahma submitted numerous invoices that contained fraudulent misrepresentations regarding the amount of money Brahma was due from TSE for the Work on Crescent Dunes. TSE alleged that it relied on Brahma's false representations and made payments to Brahma it would not have made otherwise. TSE also alleged that Brahma supplied false information and made false representations to TSE because Brahma had a pecuniary interest in inducing TSE to pay Brahma amounts to which Brahma was not entitled. TSE alleged that it relied on Brahma's false representations in making payments to Brahma and was, therefore, damaged by Brahma's negligent misrepresentations.

Brahma cannot now argue that its claim against the Surety Bond, which requires a determination of the "fair market value" of its Work, "is not derivative of or dependent upon" its dispute with TSE in the Federal Action. (Opp. Br. 10.) Brahma emphasizes in its Opposition that the case before this Court involves "a separate and distinct cause of action with separate and distinct elements of proof." (Opp. Br. 10.) But Brahma argued *the opposite* when it sought a stay of the Federal Action: "Brahma argues that . . . the Nye County Court will necessarily need to determine issues pertinent to the contract claims [against TSE], such as the agreed upon contract value of the work." (Exhibit D (Federal Action, Dkt. No. 55, at 6).) Indeed, Brahma argued that questions "[c]entral to the dispute" could not be decided by two different courts:

> Central to the dispute between Brahma and TSE is the amount of Work Brahma performed on the Work of Improvement, the amount that TSE owes Brahma for that Work, and the lienable amount for such Work. To determine Brahma's lienable amount, the Nye County Court will necessarily need to determine (i) the agreed upon contract value of said Work (NRS 108.222(a)), or (ii) in cases where there may not have been an agreed upon price, the fair market value of said Work (NRS 108.222(b)). A mechanic's lien is a charge on real estate, created by law, in the nature of a mortgage, to secure the payment of money due for work done thereon, or materials furnished therefor. *Rosina v. Trowbridge*, 20 Nev. 105, 113, 17 P. 751 (Nev. 1888).
>
> The Brahma Lien (recorded against the Work of Improvement and now secured by the Brahma Surety Bond) creates a property interest which cannot be adjudicated by two different courts. Inconsistent adjudication regarding Brahma's lien rights (or claim against the Brahma Surety Bond) would lead to chaos if one court determines that TSE owes Brahma one amount and a different court determines

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> that TSE owes Brahma a different amount. To resolve those two inconsistent judgments, it would require further litigation.

(Exhibit C (Federal Action, Dkt. No. 13, at 14).) The Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE, if anything, and nothing more. Nothing in the Nevada lien law expands Brahma's rights in this regard—Brahma is simply changing its arguments now to invite the duplicative litigation and inconsistent results it previously resisted.

The Court should therefore stay this case while the court in the Federal Action resolves the disputed issue of the fair market value of Brahma's Work, preferably with Cobra and AHAC as intervening parties.

D. THE BALANCE OF HARDSHIPS FAVORS A STAY

Cobra and AHAC's moving brief detailed the significant inequity and hardship they would face in the absence of a stay. (Mov. Br. 8-10.) Cobra faces a risk of duplicative discovery down the road, and both parties face a risk of inconsistent and conflicting rulings.

While Brahma may not care about imposing added cost on Cobra and AHAC, Brahma agrees that there is an "extraordinary chance" of inconsistent results presented by the now-competing Federal Action it initiated. When Brahma sought a stay of the Federal Action, it emphatically argued that the issues presented in this case "cannot" be determined by two different courts, and "[i]nconsistent adjudication regarding Brahma's lien rights (or claim against the Brahma Surety Bond) would lead to chaos if one court determines that TSE owes Brahma one amount and a different court determines that TSE owes Brahma a different amount." (Exhibit C (Federal Action, Dkt. No. 13, at 14) (emphasis added).) At oral argument, Brahma reiterated these arguments:

> What we're asking you to do is to abstain under the *Colorado River* doctrine. We're asking you to say, "Yeah, I do have jurisdiction. I can proceed. I can deny your motion and proceed and let you bring your contract and N.R.S. 624 claims back here." And we'll proceed on that while whatever happens in Nye County happens in Nye County. We can do that.
>
> But if we do that, we are going to have a very – an extraordinary chance to see inconsistent rulings, to have parallel and very non-efficient proceedings. It will be expensive. It will not honor judicial

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> economy. And it, again, could result in inconsistent rulings because we're going to proceed in Nye County and we're going to pursue the surety bond. And we're going to pursue those claims and Cobra, not TSE, but Cobra is going to have to defend that along with their surety.
>
> And we're going to make the same arguments there that we make here. And they may make some of the same arguments that TSE is going to make here in defense of our lien claim. But, you know, fundamentally the causes -- the claims, the dispute, is the same. The facts are the same. And some facts maybe would not be elucidated over here that might be here and vice versa, but by in large the facts are going to be the same. The issues are going to be the same.
>
> And one court is going to rule one way and the other court is going to possibly rule that way or possibly another way.

(Exhibit B (Federal Action, June 25, 2019 Tr., at 22:6-23:5).)

Brahma's present arguments concerning the balance of hardships ignore, in stark contrast with Brahma's previous arguments, the realities of its claims and its ongoing dispute with TSE, and rely exclusively on policies the purportedly underlie Nevada's lien law. (Opp. Br. 11-12.) While the Nevada legislature may have enacted the lien law with the intention of protecting contractors with secured payment for their work and materials, it does not grant Brahma entitlement to a windfall while it defends claims of fraud relating to the Work covered by the Surety Bond. Brahma's threat to seek a preferential trial setting for this case signals that it hopes to advance this case before those issues are decided in the Federal Action.

Cobra and AHAC's request for a stay is not a "delaying tactic" designed to obstruct Brahma's pursuit of its statutory rights. Cobra and AHAC seek to prevent the hardship and inequity that will result if Brahma is permitted to push this case forward before resolution of its entitlement to collect for the Work in the Federal Action.

E. BRAHMA'S THREAT TO SEEK A PREFERENTIAL TRIAL SETTING SHOULD BE REJECTED

Brahma's Opposition concludes with a threat of more procedural gamesmanship: "Brahma's exercise of this important right [to seek a preferential trial setting under NRS § 108.2421(3)] may be its only shield against the delays, endless procedural motions and other

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dilatory tactics employed against its efforts to collect" what it is owed for Work at the Plant. (Opp. Br. 12-13.) But, Brahma has not satisfied the preconditions that it must before it may seek a preferential trial setting. Indeed, NRS § 108.2421 provides that Brahma, as a lien claimant for Work performed in this county, is "entitled to bring an action against the principal and surety on the surety bond **and the lien claimant's debtor**" in this Court. NRS § 108.2421(1) (emphasis added). Brahma has confirmed that the "lien claim's debtor in this case is TSE." (Exhibit B (Federal Action, June 25, 2019 Tr., at 19:18-19:19).) Given that Brahma's claims against TSE are no longer before this Court, Brahma cannot meet the requirements of NRS § 108.2421, and thus should not be entitled to a preferential trial setting. *See also* Section C, *supra*.

Moreover, as set forth above, any delay in this case is due to Brahma's forum-shopping campaign. Cobra and AHAC's Motion to Stay is the necessary result of the procedural posture that *Brahma created*. Further, and more importantly, Brahma cannot rush this case to trial before resolution of the issues pending in the Federal Action.

III.

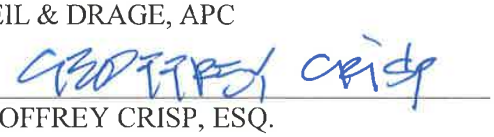
CONCLUSION

For the foregoing reasons, and those discussed in their Moving Brief, Cobra and AHAC respectfully request that the Court grant their Motion and stay the claims against them and grant such other relief as the Court deems just and proper.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that this document does not contain personal information as defined in NRS 603A.040 about any person.

DATED this 7th day of November, 2019.

WEIL & DRAGE, APC



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CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 8th day of November, 2019, service of the foregoing, **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF MOTION TO STAY**, was made this date by mailing a true and correct copy of the same, *via* first-class mail, at Henderson, Nevada, addressed to the following:

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada Corporation, Plaintiff, vs. TONOPAH SOLAR ENERGY, LLC, a Delaware Limited Liability Company; DOES I through X; and ROE CORPORATIONS I through X, Defendants.	CASE NO.: 2:18-CV-01747-RFB-GWF **BRAHMA GROUP, INC.'S RESPONSE TO MOTION TO INTERVENE [ECF 56]**
AND ALL RELATED MATTERS	

BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm of Peel Brimley LLP, hereby submits its Response to the Motion to Intervene [ECF No. 56] ("Response") filed by Cobra Thermosolar Plants, Inc. and American Home Assurance Company (collectively, "Cobra") and the Joinder [ECF 59] filed by Tonopah Solar Energy, LLC ("TSE").

This Response is based on the following Memorandum of Points and Authorities, the pleadings, declarations and papers on file in this case (the "Case"), and any argument that the Court may entertain in this matter.

Dated this 15th day of November, 2019.

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/s/ Eric Zimbelman

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION.

Although apparently content to participate as named defendants in a state court action for nearly one year (and more than a year since Brahma's claims against TSE were removed to this Court), Cobra now moves this court to allow it to defensively intervene in the removed action while it simultaneously asks the Nye County Court to stay such proceedings against it.[1] Cobra did not seek to intervene when TSE moved this Court for an Order enjoining Brahma from pursuing its claims against TSE in state court [*see* ECF 16], but rather waited until the Court granted that motion nearly one year later. [*See* ECF 55[2]]. Cobra also did not move to intervene when Brahma moved this Court to stay the proceedings pursuant to the *Colorado River* doctrine [*see* ECF 13] even though it now seeks a stay from the Nye County Court on grounds of avoiding "unnecessary duplicative discovery and the risk of conflicting decisions" [3] that this Court expressly rejected in denying Brahma's motion and granting TSE's.[4] As more fully discussed below, Brahma respectfully submits that this Court has already ruled that Cobra is a an indispensable party and, therefore its intervention in this action cannot occur without destroying diversity. As such, the Court should deny the motion.

II. STATEMENT OF FACTS

TSE owns the Crescent Dunes Solar Energy Project constructed on real property located in Nye County, Nevada (the "Work of Improvement"). On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with Brahma,[5] where Brahma agreed to provide (on a time and material basis), work, materials, and equipment (collectively, the "Work") for the Work of Improvement. Even though Brahma provided the Work for the Work of Improvement, TSE failed to fully pay Brahma for its Work.

When TSE failed to fully pay Brahma, Brahma caused a notice of lien ("Original Lien") to be

[1] Cobra's Motion to Stay, filed in the Nye County Court, is attached. **Exhibit 1**.
[2] This Court's Order [ECF 55] is attached. **Exhibit 2**.
[3] See Exhibit 1, *supra*, p. 13, ll. 3-4, citing *Knepper v. Equifax Info. Servs.*, No.2: 17- CV -02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2, 2017) (granting motion to stay the action, which would "limit hardship or inequity to [defendant] from unnecessary proceedings, inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple jurisdictions.").
[4] See ECF 55 pp. 5.26-6.4 ("this Court has only ever had contractual and quasi-contractual claims before it, so there is no possibility that the parallel proceedings will result in inconsistent dispositions of a single res."); 6.11-21 (the Court was "unconvinced" by the argument that the Nye County Court will necessarily need to determine issues pertinent to the contract claims).
[5] The Agreement is attached. **Exhibit 3**.

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recorded on April 9, 2018 with the Nye County Recorder as Document No. 890822 against the Work of Improvement.[6] The Original Lien was amended and/or restated on several occasions and ultimately increased to $12,859,577.74 when Brahma caused its Fourth Amended Notice of Lien ("Fourth Amended Lien") to be recorded on September 14, 2018 with the Nye County Recorder as Document No. 899351.[7]

To replace the Work of Improvement as security for the Brahma Lien, TSE apparently demanded that Cobra, the original general contractor for the Work of Improvement,[8] bond around the Brahma Lien. Irrespective of the reason, Cobra, caused a surety bond to be recorded with the Nye County Recorder's Office on September 6, 2018, as Document No. 898974 (the "Brahma Surety Bond"). The Brahma Surety Bond (i) was issued by American Home Assurance Company ("AHAC" or "Surety") on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) was in the amount of $10,767,580.00.[9]

At Brahma's request and in compliance with Nevada law, Cobra later caused the Penal Sum of the Brahma Surety Bond to be increased by AHAC to $19,289,366.61 (or 1.5 times the amount of the Brahma Lien) by causing a Rider to the Brahma Surety Bond (the "Brahma Surety Bond Rider") to be recorded on October 9, 2018 with the Nye County Recorder's Office as Document No. 900303.[10]

On June 1, 2018, TSE commenced a special proceeding in Nye County as Case No. CV 39348 under NRS 108.2275 (the "NRS 108.2275 Special Proceeding"), seeking to remove or expunge the Brahma Lien from the Work of Improvement (the "Motion to Expunge").[11] At a September 12, 2018 hearing, the Nye County Court denied TSE's Motion to Expunge and entered a written order on October 29, 2018.[12]

The Nye County Court subsequently awarded Brahma attorney's fees and costs under NRS 108.2275(6)(c).[13] Under NRS 108.2275(8), TSE appealed both Orders to the Nevada Supreme Court,

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[6] The Original Lien is attached. **Exhibit 4**.
[7] Brahma's Fourth Amended Lien is attached. **Exhibit 5**. Brahma's Original Lien and the amendments and restatements, including the Fourth Amended Lien, are referred to collectively as the "Brahma Lien."
[8] Further, TSE advised Brahma and its counsel that Cobra is contractually responsible to TSE to pay for the Work that TSE contracted with Brahma to perform.
[9] The Brahma Surety Bond is attached. **Exhibit 6**.
[10] The Brahma Surety Bond Rider is attached. **Exhibit 7.** The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to as the "Brahma Surety Bond."
[11] TSE's Motion to Expunge the Brahma Lien (exhibits omitted for brevity) is attached as **Exhibit 8.**
[12] The Nye County Court's Order Denying TSE's Motion to Expunge the Brahma Lien is attached. **Exhibit 9**.
[13] Judge Elliot's Order Granting Brahma's Motion for Attorney's Fees and Costs is attached. **Exhibit 10**.

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where briefing is currently underway.[14]

Based on the mistaken belief that Section 24 of the Agreement required it to pursue its contract-based claims in Clark County, Nevada, Brahma filed a complaint on July 17, 2018 in the Eighth Judicial District Court of Nevada (the "Clark County Action"), against TSE for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and violation of NRS Chapter 624.[15] On September 10, 2018, TSE removed the Clark County Action to this Court based on diversity jurisdiction only (the "Federal Action"). On September 17, 2018, TSE filed its Answer and Counterclaim against Brahma in the Federal Action alleging the following state law causes of action, (i) Breach of Contract, (ii) Breach of the Implied Covenant of Good Faith and Fair Dealing, (iii) Declaratory Relief, (iv) Unjust Enrichment, (v) Fraudulent/Intentional Misrepresentation, and (vi) Negligent Misrepresentation. [See ECF 4].

Brahma then amended its Complaint [see ECF 8] to remove from its pleading all causes of action against TSE except for its Unjust Enrichment claim so that those claims could be pursued in the Nye County Action in conjunction with Brahma's then-pending claim against Cobra, AHAC, the Brahma Surety Bond and TSE pursuant to NRS 108.2421(1).[16]

Specifically, in addition to a claim for Foreclosure of Notice of Lien,[17] Brahma asserted the following claims against TSE in the Nye County Action: (1) Breach of Contract, (2) Breach of Implied Covenant of Good Faith and Fair Dealing, and (3) Violation of NRS 624. (hereinafter "the Removed Claims")[18] TSE responded to Brahma's First Amended Counter-Complaint and Third-Party Complaint by filing a Motion to Dismiss or for Stay with the Nye County Court in which it asserted, among other things, that TSE's removal of the Clark County Action deprived the Nye County Court of jurisdiction over the Removed Claims.[19]

Although the Nye County Court denied TSE's Motion to Dismiss, it stayed all proceedings on the

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[14] TSE's Notice of Appeal is attached. **Exhibit 11.**
[15] Brahma's Complaint filed in the Clark County Action is attached. **Exhibit 12.**
[16] Brahma's First Amended Counter-Complaint and Third-Party Complaint is attached. **Exhibit 13.**
[17] Even though Cobra had by that time recorded a Surety Bond (which would have otherwise released Brahma's Notice of Lien against the work of Improvement), it failed to comply with the requirements of NRS 108.2415(1) because it was not in an amount that was 1 ½ times the amount of Brahma's lien. By a subsequent amended (consolidated) pleading, Brahma no longer asserts a claim for lien foreclosure against the Work of Improvement. *See infra*.
[18] See Exhibit 13, *supra*.
[19] TSE's Motion to Dismiss is attached. **Exhibit 14.**

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Removed Claims pending this Court's decision on competing jurisdiction and venue motions filed by Brahma [ECF 13] and TSE [ECF 16] ("the Venue Motions").[20] TSE then filed a Petition for Writ of Mandamus with the Nevada Supreme Court seeking review of the Nye County Order Denying TSE's Motion to Dismiss.[21]

Out of an abundance of caution, and because TSE threatened to seek review of the Nye County Order Denying TSE's Motion to Dismiss, Brahma also filed a standalone action in Nye County, Case No. CV 39799 (the "Standalone Action") in which it asserted a claim on the Surety Bond and against Cobra and AHAC (the "Surety Bond Claim").[22] By way of the present Motion to Intervene, Cobra seeks to bring the Surety Bond Claim, and Cobra's defenses thereto, into this Court.

In March 2019, the Nye County Court granted Brahma's Motion to Consolidate the NRS 108.2275 Special Proceeding and the Standalone Action,[23] after which Brahma filed (with the Nye County Court's express authorization)[24] its current amended and consolidated pleading.[25] Since that time, Cobra has actively, and without objection, participated in the Nye County Action, including participating in an Early Case Conference and joining in the Joint Case Conference Report filed on June 26, 2019.[26] In addition, and as part of a stipulation resolving a separate and unrelated dispute between Brahma and Cobra, Cobra agreed that (i) Brahma "shall be entitled to file (without Cobra contesting, disputing or opposing) BGI's Consolidated Amended Pleading," (ii) "Cobra's counsel shall accept service of [Brahma's] Consolidated Amended Pleading," and (iii) Cobra shall file an Answer to the Consolidated Amended Pleading within 20 days …"[27]

On September 25, 2019, this Court issued an Order resolving the Venue Motions. Specifically, the Court (1) denied Brahma's Motion to Abstain and Stay Proceedings pursuant to the *Colorado River* Doctrine, (2) granted TSE's Motion to permanently enjoin Brahma from pursuing the Removed Claims in state court, and (3) reinstated Brahma' original complaint [ECF 1-1], containing the Removed Claims, as

[20] The Nye County Court's Order Denying Motion to Dismiss is attached. **Exhibit 15**.
[21] TSE's Writ Petition (exhibits omitted) is attached. **Exhibit 16**.
[22] Brahma's Standalone Complaint is attached. **Exhibit 17**.
[23] The Nye County Order Granting Motion to Consolidate is attached. **Exhibit 18.**
[24] The Nye County Order Granting Countermotion to File Consolidated Amended Pleading is attached. **Exhibit 19**.
[25] The current Consolidated Amended Pleading in the Nye County Action is attached. **Exhibit 20.**
[26] The Joint Case Conference Report filed in the Nye County Action is attached. **Exhibit 21**.
[27] The Nye County Stipulation and Order is attached. **Exhibit 22**.

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"the operative complaint in this matter." The Court ***did not*** enjoin Brahma's the Surety Bond Claim against Cobra.[28] In rejecting Brahma's contention that abstention was warranted to avoid duplication and the possibility of inconsistent rulings, the Court ruled that there was no "special or important rationale or legislative preference for having these issues be resolved in a single proceeding."[29] Noting that (because of the Surety Bond) there is now no lien against TSE's property (or the Work of Improvement), this Court also ruled that there is no possibility that the parallel proceedings will result in inconsistent dispositions of a single res"[30] and pp. 5.26-6.4 ("this Court has only ever had contractual and quasi-contractual claims before it.").[31]

Most recently, Brahma has learned of a lawsuit in Delaware between TSE and its parent company, SolarReserve (the "SolarReserve/TSE Lawsuit"), in which SolarReserve alleges that TSE is insolvent and for which SolarReserve seeks the appointment of a receiver.[32] As more fully discussed below, the danger of inadequacy of a judgment rendered in Cobra's absence - one of the recognized factors this Court must consider in evaluating Cobra's Motion to Intervene – is substantially heightened by the allegations of insolvency being asserted by TSE's parent company.

III. LEGAL ARGUMENT

A. IF COBRA IS INDISPENSABLE, ITS INTERVENTION UNDER RULE 24 IS DISALLOWED BECAUSE IT WOULD DESTROY COMPLETE DIVERSITY REQUIRED BY 28 U.S.C. § 1332

Congress authorizes federal diversity subject-matter jurisdiction under 28 U.S.C. § 1332 only when the plaintiff and defendants hold completely diverse state citizenships. Strawbridge v. Curtiss, 7 U.S. 267, 267–68 (1806). The formalistic jurisdictional rule is that the complete diversity requirement is determined at the time federal jurisdiction is invoked. *Compare Hill v. Blind Indus. & Servs of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999) (determining complete diversity at time of filing in civil actions originally commenced in federal court under § 1332) *with Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985) (determining removal jurisdiction predicated on complete diversity at time removal is effected under 28

[28] Under NRS 108.2421(1), the Surety Bond Claim is an independent cause of action that Brahma may assert and prosecute "in the county where the property upon which the work of improvement is located," irrespective of any other claims or causes of action against any other party.
[29] Exhibit 2, *supra*, Order [ECF 55] p. 6.17-21.
[30] *Id.*, pp. 5.26-6.4.
[31] *Id.* 6.11-21.
[32] The Amended Complaint in the SolarReserve/TSE lawsuit, dated November 5, 2019, is attached. **Exhibit 23.**

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U.S.C. § 1441). Minimal diversity between the parties is insufficient, except where statutorily authorized. *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31 (1967). Nonetheless, under *Mattel, Inc. v. Bryant*, 446 F.3d 1011 (9th Cir. 2006), where there had otherwise previously been complete diversity, the Ninth Circuit authorized the subsequent presence of a nondiverse, defendant-intervenor. *Id.* at 1014. *Mattel*, however, qualified that allowance. There **must** be complete diversity in federal court prior to intervention *and*, importantly, the nondiverse, proposed defendant-intervenor **must** *not* have been indispensable under Federal Rule of Civil Procedure 19(b) when complete diversity was to be determined.

The Ninth Circuit, then, *prohibits* a court from granting intervention to a nondiverse, indispensable party. "Intervention destroys diversity if the intervening party is indispensable." *Mattel*, 446 F.3d. at 1013 (citing *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir.1985)). Complete diversity is destroyed because a court that allows later intervention by a non-diverse, indispensable party would "provide an easy means to evade diversity jurisdictional requirements" in a case that otherwise "in equity and good conscience" should not have proceeded when the federal court's jurisdiction was invoked. WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1917 (2007). Thus, a party that is a nondiverse, jurisdictional spoiler *and* indispensable cannot intervene.

The parties agree that Cobra is a nondiverse, jurisdictional spoiler, unless it is dispensable, i.e. *not* indispensable. A corporation is a citizen of the states where it has its principal place of business and it is incorporated. 28 U.S.C. § 1332(c). Proposed defendant-intervenor Cobra acknowledges it is a Nevada corporation (Mot. Intervene at 3) and a Nevada citizen for diversity purposes. Similarly, Plaintiff Brahma Group Inc., a corporation, is also a Nevada citizen based on its place of incorporation. When federal court jurisdiction was initially invoked, there appeared to be complete diversity. But if Cobra was not indispensable under FRCP 19(b) at the time federal jurisdiction was invoked and should have "in equity and good conscience" been a party, then Cobra's subsequent intervention would pit a Nevada plaintiff against what should have been an indispensable Nevada defendant. Complete diversity would be destroyed.

B. THE NINTH CIRCUIT DISALLOWS COBRA'S INTERVENTION AS A NONDIVERSE DEFENDANT-INTERVENOR BECAUSE IT WAS AN "INDISPENSABLE" PARTY AT TIME OF REMOVAL

1. In this removal case, Cobra's indispensability is properly determined as of September 10, 2018, when the federal court's removal jurisdiction was invoked.

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In removal cases, a party's indispensability is determined based on the state of facts existing when a party first invokes the federal court's jurisdiction by removing the case under 28 U.S.C. § 1441. A defendant invokes removal jurisdiction by filing a notice of removal, including its short and plain statement of the grounds for federal court jurisdiction, with a federal district court. 28 U.S.C. § 1446(a). Removal jurisdiction based on diversity "is determined (and must exist) as of the time the complaint is filed ***and removal is effected***." *Strotek Corp. v. Air Transport Ass'n. of America*, 300 F.3d 1129, 1131 (9th Cir. 2002) (emphasis added). Removal jurisdiction based on diversity is invoked by a defendant and looks to the time removal is effected, which occurs with the filing of a notice of removal. *Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985). "The rule requiring diversity *at the time removal is sought* parallels the rule in federal question cases where a federal question must exist at the time the petition for removal is filed." *Id.* (emphasis added). *Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815 (9th Cir. 1985) implicitly followed this approach by determining whether jurisdiction was proper at time of removal and then considering the indispensability of the absent party. *Id.* at 819. By contrast, diversity cases filed by a plaintiff in federal court under § 1332 invoke its original jurisdiction from the outset and the complete diversity of parties is determined from the start, that is, when the complaint is filed. *Hill*, 179 F.3d at 757.

Here, Cobra's indispensability is considered *as of the time TSE invoked this Court's jurisdiction by removing this case*. The rationale of the indispensability inquiry is to avoid gaming of the complete diversity requirement by a nondiverse party trying to intervene after the complete diversity determination. WRIGHT § 1917. Accordingly, the indispensability inquiry properly focuses on the determination of federal court jurisdiction when first invoked by a party. In removal cases under 28 U.S.C. § 1441, jurisdiction based on diversity looks to the existence of "diversity *at the time removal is sought*…" *Miller*, 763 F.2d at 373 (emphasis added).

On September 10, 2018, TSE removed this case to this Court by filing its notice of removal that stated the basis for this Court's jurisdiction. Four days prior, on September 6, 2018, Cobra recorded a surety bond issued by AHAC that served as the substituted security for the lien Brahma placed against TSE's real property. On that date and as elaborated below, Cobra became indispensable to this case.

In its Joinder [ECF 59], TSE erroneously claims that Cobra's indispensability is to be determined at an earlier date, i.e. when Cobra was not yet a bond surety, on July 17, 2018, when Brahma's complaint

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was originally filed in Nevada's Clark County Court (TSE Joinder at 2-3).

First, as a threshold matter, the Ninth Circuit in *Mattel* did not specify the point in time at which the indispensability inquiry is directed. 446 F.3d 1011, 1014 (9th Cir. 2006). Second, Cobra's and TSE's position that the indispensability inquiry is at the time of filing relies exclusively upon actions that were *originally* in federal court where federal court jurisdiction was invoked at the outset, not removal cases where federal court jurisdiction was determined only at the point of removal. *Freeport-McMoRan, Inc. v. K N Energy, Inc*., 498 U.S. 426, 428 (1991) (case invoking original § 1332 jurisdiction); *Salt Lake Tribune Pub. Co., LLC v. AT&T Corp*., 320 F.3d 1081, 1096 (10th Cir. 2003) (same); *Nat. Bank & Tr. Co. of Chicago v. Bailey*, 750 F.2d 577, 582 (7th Cir. 1984) (same). Third, *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 483 (D.C. Cir. 1996), a removal case which adopted an inquiry focusing on "indispensab[ility] at the time the action began," relied on language from *Freeport-McMoRan, Inc.*, 498 U.S. at 428 (a case involving *original* diversity jurisdiction) without considering when federal court jurisdiction was actually being invoked in a removal case. Finally, the *Hill* case (cited by TSE) did not concern any analysis of a party's indispensability and stands only for the uncontroversial proposition that complete diversity is determined in original § 1332 cases when the complaint is filed with a federal court. 179 F.3d at 757. The timeframe for the indispensability inquiry depends on context: whether (i) a plaintiff is invoking original diversity jurisdiction from the outset at the time of filing under § 1332, or (ii) a defendant is invoking removal jurisdiction based on diversity at time of removal and filing of the notice of removal under §§ 1441 and 1446.

2. Cobra admits it is a necessary party under Rule 19(a).

To constitute an indispensable party, a party must first be one required to be joined if feasible under FRCP 19(a). Fed. R. Civ. P. 19(b); *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee*, 662 F.2d 534, 537 (9th Cir. 1981). Rule 19(a) status is a necessary condition for indispensable status. Under 19(a), a party is required to be joined if feasible where it has "an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may…as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

Here, Cobra claims an interest relating to the subject of the action by virtue of the surety bond.

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Nonetheless, and as a currently absent party, it faces a predicament that a ruling in its absence may "(i) as a practical matter impair ***or impede*** the person's ability to protect ***the interest***." Fed. R. Civ. P. 19(a)(1)(B)(i) (emphasis added). Cobra unequivocally admits its interest. "Cobra and AHAC have a ***significantly protectable interest*** in this action." (Mot. Intervene as Defendants, at 6) (emphasis added). Similarly, Cobra admits its ability to protect that interest may be impeded. "Cobra and AHAC—not TSE—bear all the risk…there is a significant risk that TSE has little incentive to oppose Brahma's claims…disposition of [sic] the Brahma's action without Cobra and AHAC's participation ***would impede their ability to protect their interests.***" (Mot. Intervene as Defendants, at 7) (emphasis added). These two representations in a motion presented to this Court, Fed. R. Civ. P. 11(b), satisfy the requirement that Cobra is required to be joined to this removed civil action if feasible under FRCP 19(a)(1)(B)(i).

3. Cobra is an indispensable party under Rule 19(b).

If a party is one who is required to be joined (if feasible) under Rule 19(a), then the Court determines whether a party is indispensable "in equity and good conscience" by weighing four non-exhaustive equitable factors set forth in 19(b). *Mattel*, 446 F.3d. at 1013 (citing Fed. R. Civ. P. 19(b)); WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1608 (2001) (noting factors do "not exhaust the possible considerations the court may take into account"). The current version of 19(b) no longer references "indispensable" parties, but the standard substantively remains unchanged.[33] The standard is applied by looking to the actual practical effects a judgment may have upon absent parties and those who are present as parties. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F.Supp. 92, 104-05 (C.D.Cal.1971), *aff'd* 461 F.2d 1261 (9th Cir. 1972). Unlike cases where a party already in the case bears the burden of establishing indispensability in a 12(b)(7) motion, *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990), the equitable burden of establishing ***non-indispensability*** falls on the absent, non-diverse party that seeks to intervene, here, Cobra. *Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836 (9th Cir. 2011) (placing burden on FRCP 24 movant). Each of the four standard equitable factors favor the conclusion that Cobra is indispensable.

a. Factor 1: Prejudice to Cobra and existing parties

[33] In 2007, the Advisory Committee on Rules eliminated the label "indispensable," as it "was used only to express a conclusion reached by applying the tests of Rule 19(b). It has been discarded as redundant." Fed. R. Civ. P. 19, 2007 Cmte. Notes.

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The first enumerated factor concerns "the extent to which a judgment rendered in the person's absence might prejudice ***that person or the existing parties***." Fed. R. Civ. P. 19(b)(1) (emphasis added). Prejudice to the absent party favors indispensable status. This prejudice test under Rule 19(b) is essentially the same as the inquiry under 19(a). *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999). *See also Dawavendewa v. Salt River Project Agr. Imp. and Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (finding that same impairment of legal interest under Rule 19(a) inquiry constituted prejudice for 19(b) purposes). Prejudice to Cobra may result in several ways, especially with respect to existing parties having divergent interests that would not secure the rights of absent non-parties. In *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427 (4th Cir. 2014), the court found a high probability of prejudice to nonparty home builders if a federal case advanced without them where home warranty companies had sued to compel a homeowner to arbitrate rather than litigate against the homebuilders in state court. *Id.* at 435. If the warranty companies failed to establish the validity of the arbitration clauses, then prejudice would result to the home builders who might be exposed to significantly more liability. *Id.* at 434. Similarly, *Glancy v. Taubman Centers, Inc.*, 373 F.3d 656 (6th Cir. 2004), found prejudice to an absent partnership where there was not a complete identity of interests and a difference in intensity of those interests between the represented parties in the case and the absent partnership. *Id.* at 672. Parties enjoy procedural rights that nonparties do not; those rights might be lost if existing parties fail to vindicate them. For example, in *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997), the Court found prejudice to an absent Indian tribe's interests where the U.S. Department of Interior, though having taken the same position in the action, might elect not to appeal an adverse decision. *Id.* at 1497. Finally, prejudice may result to an absent party where resolution of claims would require the court to determine the rights and obligations of the absent purchaser. *Berkeley Acquisitions, LLC v. Mallow, Konstam & Hager, P.C.*, 262 F.R.D. 269, 273 (S.D.N.Y. 2009).

Here, Cobra acknowledged to this Court that its ability to protect its interests may be impeded: "Cobra and AHAC—not TSE—bear all the risk…there is a significant risk that TSE has little incentive to oppose Brahma's claims…disposition of [sic] the Brahma's action without Cobra and AHAC's participation ***would impede their ability to protect their interests***." (Mot. Intervene as Defendants, at 7) (emphasis added). This recognition of a moral hazard due to the existence of the Brahma Surety Bond and Rider means that Cobra, like the homebuilders in *Home Buyers* or absent partnership in *Glancy*, has

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interests that are likely to be prejudiced by TSE.[34] Moreover, like the absent tribe in *Cherokee Nation*, TSE might not exercise procedural rights that take account of Cobra's interests. In fact, Cobra's motion to intervene explains at length why TSE's representation of its interests would be inadequate. (Mot. Intervene as Defendants, at 7-8). Finally, Cobra is akin to the absent purchaser in *Berkeley Acquisitions* prejudiced by the possible resolution of claims (against TSE) that will entail its rights and obligations. Decidedly unlike *TPOV Entrs. 16, LLC v. Paris Las Vegas Operating Co.*, No. 2:17-CV-346, 2017 WL 2871070, at *5 (D. Nev. July 3, 2017) and absent party celebrity chef Gordon Ramsay, Cobra as bond surety, by its own confession, ***is*** financially on the hook for Brahma's contractual claims asserted against TSE. (Mot. Intervene as Defendants, at 4) ("the Cobra Surety Bond ***guarantees payment of whatever amount Brahma may prove it is owed by TSE***… Cobra and AHAC still bear all the downside risk and the ultimate cost of TSE's defenses.") (emphasis added). By contrast, chef Ramsay was not responsible for liabilities in TPOV's commercial contractual suit.

Cobra has taken the position in the Nye County Court that Cobra's defenses and Brahma's claims against TSE in state and federal court are "inextricably linked" and therefore the state court proceedings should be stayed against Cobra too. (Cobra Mot. Stay at 9). Yet, notwithstanding that "inextricabl[e] link," nondiverse Cobra, aware that its intervention motion presents federal jurisdictional difficulties for this Court, maintains that "neither [Cobra nor AHAC] is an indispensable party to the controversy between Brahma and TSE" (Mot. Intervene at 10). As support for this self-serving assertion, Cobra presses a case where a defendant-intervenor declared it was not indispensable and where the panel found the declaration "satisfie[d] any concern that a decision in its absence would have prejudiced it." *Mattel*, 446 F.3d at 1013. Cobra's clear suggestion is this Court should likewise credit its say-so.

However, unlike *Mattel* where the defendant-intervenor declared it would *not* be prejudiced if a decision were made in its absence, fork-tongued Cobra actually *did* represent to this Court at some length that it, in fact, *would be prejudiced* by a decision in its absence. Its intervention motion, filed subject to Rule 11(b)(3), admitted to having a "significantly protectable interest" in the matter (Mot. Intervene at 4, 6-7); that deciding the case "without Cobra and AHAC's participation would impede their ability to protect

[34] Indeed, a recently filed civil action in the U.S. District Court for the District of Delaware, a favorite bankruptcy venue, raises the looming possibility of an equitable dissolution at the Crescent Dunes Solar Energy Plant, thereby heightening Cobra's risk of being left holding the financial bag for TSE. *See SolarReserve CSP Holdings, LLC v. Tonopah Solar Energy, LLC*, No. 1:19-cv-01930 (D. Del. Oct. 11, 2019).

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their interests" (Mot. Intervene at 7); and that Cobra would not adequately represent its interests (Mot. Intervene at 7-8). This is a significant demonstration of prejudice to Cobra that is entirely at odds with Cobra's conclusory claim that it is dispensable. Representations made in filings to this Court must estop simple deferral to a jurisdictionally self-serving disavowal of dispensability.

Finally, Cobra's apparent willingness to consent to being deemed "not indispensable" to allow diversity jurisdiction for a nondiverse party amounts to an impermissible attempt to consent to federal subject-matter jurisdiction. *See Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir.1988) ("parties have no power to confer jurisdiction on the district court by agreement or consent").

b. Factor 2: Shaping relief to lessen prejudice

Under Rule 19(b), the second enumerated factor concerns "the extent to which any prejudice could be lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the relief; or (C) other measures." This factor concerns whether relief can be granted other than that requested by parties that "would not be merely partial or hollow but would minimize or eliminate any prejudicial effect of going forward without the absentees." WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1608 (2001). If prejudice cannot be lessened or avoided, then the factor favors characterizing the party as indispensable (and also favors dismissal under FRCP 12(b)(7)). This factor is "closely related" to the fourth factor, i.e. whether plaintiff Brahma will be left without an adequate remedy in the event of dismissal for nonjoinder. *Id. Picciotto v. Continental Cas. Co.*, 512 F.3d 9 (1st Cir. 2008), found that prejudice to the absent party could not be avoided, but concluded state court provided an adequate remedy. *Id.* at 18. In that case, similar claims against insurers were asserted in federal court and against the insured attorney in state court. *Id.* at 18-19. That similarity demonstrated the availability of an alternative forum and the efficiency of litigating the entire case in state court. *Id.*

In this case, Brahma, TSE, and Cobra were all litigating in Nevada's state courts of general subject-matter jurisdiction. Unlike federal courts with their limited grounds for jurisdiction, state courts enjoy broad jurisdiction to hear a variety of claims without the limitations imposed by Article III and limited congressional authorizations of complete diversity. That flexibility is what motivated Brahma to ask the Court to exercise its discretion under the *Colorado River* doctrine to stay the duplicative federal court

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litigation. Instead, the Court's stay of the state court litigation between Brahma and TSE and Cobra's desire to now litigate in federal court—as well as attempt to stay its separate state court litigation—means this Court will continue to struggle with constitutionally and statutorily imposed jurisdictional limitations. The best relief to lessen prejudice, then, is to halt this federal litigation with a stay and terminate its injunction against litigation in state court in light of Cobra's motion to intervene and probable prejudice to it. Given the availability of relief in state court (see factor 4 below), this factor concerning shaping relief favors the conclusion that Cobra was an indispensable party at the time of its removal.

c. Factor 3: (in)adequacy of judgment without the absent party

The third enumerated factor under Rule 19(b) addresses "whether a judgment rendered in the person's absence would be adequate." This factor promotes judicial economy by asking whether the Court would render hollow or incomplete relief because of its inability to bind an absent party, here, Cobra. This factor asks whether there could be a "viable, effective judgment" without the absent party. *Ronson Corp. v. First Stamford Corp.*, 48 F.R.D. 374, 378 (D.Conn. 1970). A judgment granting relief that would almost certainly result in a new lawsuit with the absent party is inadequate relief. *Id.* at 377-78. If the federal court's relief would be inadequate, it favors a finding that the absent party is indispensable.

Here, Brahma seeks monetary relief, but that relief cannot adequately be provided without the joinder of nondiverse Cobra, and its bond surety, AHAC. Cobra, as bond principal, and AHAC, as surety, bonded off the liens on TSE's real property and work of improvement, such that the Brahma Surety Bond and Rider guarantee the liabilities that debtor TSE has to obligee Brahma. Without Cobra and AHAC, any judgment against TSE by this Court would provide Brahma with only incomplete relief. Brahma would need to bring (or, as here, maintain) a further judicial action in state court to foreclose on the Brahma Surety Bond and Rider bonds to satisfy TSE's debt to Brahma. As in *Ronson Corp.*, hollow or incomplete relief is inadequate relief.

Recently, the reality of Cobra's indispensability became still more clear. On November 5, 2019, TSE's parent company SolarReserve sued TSE for equitable dissolution (the "SolarReserve/TSE Lawsuit"). The Court may take judicial notice of SolarReserve's Amended Complaint with the U.S. District Court for the District of Delaware.[35] SolarReserve alleges that it "is informed that [TSE] is effectively

[35] *See* Exhibit 23, supra.

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insolvent, with no realistic prospect of generating revenues, and incapable of repaying its indebtedness."[36] Indeed, parent SolarReserve seeks equitable dissolution of [TSE] based on several factors, including::

> (i) [TSE] is insolvent, according to several tests for insolvency, including,
> (a) it has debt of over $440 million, and assets of much less value;
> (b) the plant is moribund—neither generating energy nor revenue; and
> (c) [TSE] is unable to pay its debts as they become due…[37]

These allegations of insolvency—asserted by TSE's parent company no less—substantially heightens the danger that any possible judgment rendered against TSE in Cobra's absence will prove inadequate. Because TSE is in all probability judgment-proof, Brahma would end up relitigating with nonparty and bond surety Cobra. In short, viewed through the prism of remedial adequacy, Cobra once more appears indispensable.

d. Factor 4: adequacy of plaintiff's remedy if action were dismissed

Finally, Rule 19(b)(4) concerns whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder. If the plaintiff would have an adequate remedy were the matter dismissed for nonjoinder, this factor would favor a conclusion the absent party is indispensable. *Takeda*, 765 F.2d at 821. Like factor 2, this factor considers the availability of state court as an alternative forum for relief that would protect the absent party's interests. In *Takeda*, the Ninth Circuit found this factor favored indispensable party status where a state court provided plaintiff with an adequate alternative forum where all parties who should be joined could be joined and the state court was the forum originally chose by plaintiffs. *Id.* Similarly, *Underpinning & Foundation Skanska, Inc. v. Berkeley Regional Ins. Co.*, 262 F.R.D. 196 (E.D.N.Y. 2009), concluded that, were the matter dismissed, an adequate remedy existed in state court. A state court was geographically accessible to the parties, one where related litigation was already pending, and where statutes of limitations presented no concerns about court access. *Id.* at 202.

Here, like in *Takeda* and *Underpinning*, Nevada state courts are open to the litigants. They are geographically proximate for the parties (or at least relatively not much less so). Similarly, as in *Underpinning*, parallel claims in dispute between Brahma, Cobra and TSE were already filed and pending in Nye County and could be heard there once more. Finally, litigating the matter in state court is not foreclosed because of any statute of limitations. The only restriction on the parties proceeding in state court

[36] Exhibit 23, para. 45.
[37] *Id.*, para. 66.

is this Court's own injunction against Brahma and TSE, which the Court could dissolve upon finding that Cobra is indispensable.

IV. CONCLUSION

Based on the foregoing, this Court should deny Cobra's Motion to Intervene.

Dated this 15th day of November, 2019.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of PEEL BRIMLEY LLP, I am over the age of eighteen years, and not a party to the within action. My business address is 3333 E. Serene Ave, Suite 200, Henderson, NV 89074. On November 15, 2019, I served the within document(s):

BRAHMA GROUP, INC.'S RESPONSE TO MOTION TO INTERVENE [ECF 56]

to be served as follows:

X By CM/ECF Filing – with the United States District Court of Nevada. I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the attorney(s) and/or party(ies) listed below.

□ By Facsimile Transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the persons) served as set forth below.

□ By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, NV, addressed as set forth below.

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