

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

**Tonopah Solar Energy, LLC,
*Petitioner***

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Elizabeth A. Brown
Clerk of Supreme Court

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 MOTION TO STAY THE UNDERLYING DISTRICT
COURT CASE PENDING RESOLUTION OF ITS
PETITION FOR WRIT OF PROHIBITION, OR,
ALTERNATIVELY, MANDAMUS**

D. LEE ROBERTS, JR., ESQ.
Nevada Bar No. 8877
COLBY L. BALKENBUSH, ESQ.
Nevada Bar No. 13066
RYAN T. GORMLEY, ESQ.
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
rgormley@wwhgd.com
Attorneys for Petitioner
Tonopah Solar Energy, LLC

I. INTRODUCTION AND FACTUAL OVERVIEW

The Nye County proceeding underlying Petitioner Tonopah Solar Energy, LLC's (TSE's) writ petition should be stayed pending resolution of the writ. All four criteria for determining whether a district court case should be stayed pending resolution of a writ petition weigh in favor of issuing a stay here. TSE previously moved for such a stay in the district court and was denied. *See* 5 PRA 300-301¹; Order (Ex.1)²; NRAP 8(a)(1). Although TSE's writ petition and reply thereto chronicles this case's complicated procedural history, certain pertinent events are addressed below for the sake of clarity.

On March 6, 2019, TSE filed a writ petition with this Court ("Writ Petition"). It arises out of the district court's partial denial of TSE's motion to dismiss, strike, or stay in the underlying Nye County proceeding. TSE's Writ

¹ For ease of reference, TSE cites to the appendices supplied with its Writ Petition and the reply in support thereof. "PA", Petitioner's Appendix, refers to the appendix supplied with the Writ Petition. "PRA", Petitioner's Reply Appendix, refers to the appendix supplied with the reply. The number preceding each acronym refers to the volume.

² The order, drafted by Brahma's counsel, does not directly address TSE's request to stay the proceeding in light of its pending writ petition. As reflected by footnote 2 to the order, however, the district court entertained TSE's request on the merits at the hearing and rejected it, thus, failing to afford TSE the relief it requested. *See* NRAP 8(a)(2)(A)(ii). Moreover, TSE recognizes that the attached order is not signed by the district court. Yet, Brahma has represented that it submitted the order to the court on December 18, 2019. It is unclear when the district court will sign the order. TSE fully anticipates, without necessarily agreeing with the representations therein, that the district court will sign the order as submitted by Brahma. TSE will supplement this motion with the executed order when it becomes available.

Petition presents three issues: (1) whether the district court erred by concluding that NRS 108.2275(5) permitted Real Party in Interest Brahma Group, Inc. (“Brahma”) to initiate a civil action by filing its lien foreclosure complaint into the special proceeding created by TSE’s motion to expunge, (2) whether the district court erred by exercising subject matter jurisdiction over Brahma’s claims that had been previously removed to federal court pursuant to 28 U.S.C. § 1446(d) and were never remanded, and (3) whether the district court abused its discretion by failing to stay the entire state court proceeding under the first-to-file rule. On a more holistic basis, TSE seeks to undo the procedural forum shopping efforts that Brahma undertook in order to evade federal jurisdiction and undermine a foreign defendant’s constitutional right to removal.

After the Writ Petition was filed, the Honorable Richard F. Boulware, in a parallel proceeding in federal court, enjoined a certain aspect of the underlying district court proceedings. 3 PRA 199-207. TSE filed a copy of this injunction with this Court on October 4, 2019. The injunction specifically enjoins Brahma from litigating the following claims against TSE in the underlying Nye County proceeding: (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing, and (iii) violation of NRS 624. In reaching this conclusion, the federal district court stated, in pertinent part, the following:

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

...

By amending its complaint in this case and reasserting identical claims in the Nye County action, the Court finds that Brahma was attempting to subvert removal of this case. The Court also finds 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. The Court therefore grants TSE's motion and enjoins Brahma from litigating its contract claims in the Nye County Action.

...

IT IS FURTHER ORDERED that Plaintiff [Brahma] is enjoined from litigating the following claims alleged against Defendant [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.

3 PRA 206-207.

The dispute between Brahma and TSE is currently comprised of TSE's Writ Petition, the underlying Nye County proceeding, an appeal to this Court pursuant to NRS 108.2275(8) (Supreme Court Case No. 78092), and the aforementioned parallel federal action.

There are two recent events that warrant mention. First, Cobra Thermosolar Plants, Inc. ("Cobra") and its Surety, parties to the underlying Nye County proceeding, have moved to intervene into the federal action. TSE joined the motion. The motion is fully briefed. *See* 4 PRA 223 (motion), 4 PRA 261 (TSE's joinder to motion), 4 PRA 280 (Brahma's response), 5 PRA 303 (reply). TSE

anticipates that the federal court will grant the motion to intervene. Second, in the underlying Nye County proceeding, Cobra has served TSE with a set of Nev. R. Civ. P. 34 requests for production. 5 PRA 312.

II. ARGUMENT

Nevada Rule of Appellate Procedure 8 sets forth the four criteria for determining whether to stay a district court proceeding pending resolution of a writ petition: (1) whether the object of the writ petition will be defeated if the stay or injunction is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether the petitioner is likely to prevail on the merits in the writ petition. *See Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986 (2000). Here, all four criteria weigh in favor of staying the underlying Nye County proceeding pending the outcome of TSE's Writ Petition. Further, the timing of this motion is appropriate.

A. The object of TSE's Writ Petition will be defeated if the stay or injunction is denied.

The overall object of TSE's Writ Petition is simple: enforce its proper implementation of its right to removal by having its dispute with Brahma litigated in the proper forum—federal court. Brahma has engaged in an extensive and systematic effort to undermine TSE's right to removal and litigate their dispute in Nye County. The federal court recognized this when it issued its injunction,

stating: “there is considerable evidence of forum shopping on the part of Brahma here,” and “[b]y amending its complaint in this case and reasserting identical claims in the Nye County action, the Court finds that Brahma was attempting to subvert removal of this case.” 3 PRA 206-207.

The federal court injunction was one piece of the puzzle to undo Brahma’s forum shopping efforts. TSE’s Writ Petition is another piece. Despite the federal court’s injunction, TSE is still a party to the underlying Nye County proceeding. *See* Reply in Support of Writ Petition (“Reply”), pp. 13-16. TSE’s Writ Petition seeks to eliminate TSE from the Nye County proceeding and/or compel Brahma to litigate its dispute with TSE in federal court.

But, if this stay is not granted, TSE will likely have to litigate its dispute with Brahma in the underlying Nye County proceeding as a party thereto.³ Indeed, Cobra has already served Rule 34 requests for production upon TSE in that matter. While TSE anticipates that it will move for a protective order to eliminate the need to respond to the requests while this motion, the Writ Petition, and Cobra’s motion

³ TSE recognizes that Brahma, in its answer to TSE’s Writ Petition, takes the position that TSE is no longer a party to the underlying Nye County proceeding. But Brahma’s position is inconsistent with the federal injunction and its own actions. Brahma still opposed the dismissal sought by TSE’s Writ Petition. If TSE would gain nothing (above and beyond the federal injunction) from dismissal, why would Brahma continue to oppose it?

to intervene in the federal action are pending, there is a possibility that the motion for protective order will be denied and the case will go forward. Moreover, although Brahma is enjoined from prosecuting its claims against TSE in Nye County, all of the issues presented by those claims and all of the issues presented in the federal action will necessarily have to be litigated as part of Brahma's surety bond claim against Cobra in Nye County. *See* Reply, pp. 29-36. Brahma has admitted as much. *Id.* Further, TSE's party status to the Nye County proceeding will complicate the inevitable claim and issue preclusion questions that will arise in the future out of the parallel proceedings (i.e., the underlying Nye County proceeding and the federal action).

Depending on how long this Court takes to resolve TSE's Writ Petition, the underlying Nye County proceeding might be fully litigated prior to the writ's resolution. Indeed, Brahma in its briefings has consistently alluded to the fact that it might call upon NRS 108.2421(3) to litigate its surety bond claim on an expedited basis. If this occurs, the Nye County proceeding will *likely* be resolved prior to the resolution of TSE's Writ Petition. If the underlying proceeding is resolved first, the object of TSE's Writ Petition will be completely defeated—TSE would have been forced to either literally or effectively litigate its dispute with Brahma in a state court forum in direct contravention of its right to removal. Thus, this first factor weighs in favor of a stay.

B. TSE will suffer irreparable or serious injury if the stay is denied.

To confirm that TSE will suffer irreparable or serious injury if this stay is denied, this Court need not look any further than the federal court's injunction order. There, the federal court stated that if TSE was forced to litigate its dispute with Brahma in state court, TSE would suffer "immediate and irreparable injury . . . for which there would not be an adequate remedy at law if Brahma's behavior is rewarded." 3 PRA 207. Thus, this second factor weighs in favor of a stay.

C. Brahma, the real party in interest, will not suffer any irreparable or serious injury if this stay is granted.

Brahma's only arguable harm if this stay is granted is that the stay would delay Brahma's ability to recover the money that it believes it is entitled to. Yet, a delay in recovering money damages does not constitute "irreparable" or serious injury. See *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) (providing that "a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm" for the purposes of a stay pending an appeal or writ); *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 353, 351 P.3d 720, 724 (2015) ("Irreparable harm is an injury for which compensatory damage is an inadequate remedy," which means that the delayed recovery of money damages generally does not constitute irreparable harm).

In response to this simple truth, Brahma will surely complain of undue delay and interference with its right to a preferential trial under NRS 108.2421(3). These

complaints should fall flat. The federal district court was not persuaded by the same complaints, and this Court should not be either. The reality is that the slow pace with which this case has trudged along is due to one thing: Brahma's forum shopping efforts. Thus, this third factor weighs in favor of a stay.

D. TSE's Writ Petition is likely to prevail on the merits.

Finally, TSE's Writ Petition is likely to prevail on the merits. Contrary to Brahma's protestations, the issues presented by the writ are not moot—TSE is still a party to the underlying Nye County proceeding, TSE still has an interest in the outcome of the underlying Nye County proceeding, and the resolution of the issues will affect the matter before this Court and the district court moving forward. *See* Reply, pp. 5-17. The writ should be entertained on the merits—the writ features all of the considerations that have previously motivated this Court to entertain writ petitions under similar circumstances. *Id.* at 17-20. Lastly, the relief sought by the writ should be issued—the both legally correct and appropriate result is for the underlying Nye County proceeding to be dismissed, or, alternatively, stayed pursuant to the first-to-file rule until resolution of the previously filed federal court action. *Id.* at 20-36.

In addition, although TSE's Writ Petition is likely to prevail on the merits, this analysis is not entirely necessary for the purposes of evaluating the fourth factor. In Nevada, “when moving for a stay pending an appeal or writ proceedings,

a movant does not always have to show a probability of success on the merits, the movant must present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.” *Hansen*, 116 Nev. at 659, 6 P.3d at 987.

TSE’s Writ Petition also satisfies this alternative test. The writ presents three serious legal questions: (1) an important issue to Nevada’s significant construction industry: whether a lien claimant can file a lien foreclosure complaint directly into a special proceeding created by a motion to expunge; (2) an important issue regarding subject matter jurisdiction and federal removal: whether a district court loses subject matter jurisdiction over claims once they have been removed to federal court; and (3) an important issue regarding parallel proceedings: whether the first-to-file rule should be recognized in Nevada and whether it applies here.

Moreover, the balance of equities weighs heavily in favor of granting this stay. The federal court injunction confirms what TSE has written in many briefs—Brahma engaged in forum shopping in order to litigate its dispute with TSE in Nye County instead of federal court. TSE’s Writ Petition seeks to further undo the consequences of Brahma’s forum shopping efforts. Consequently, this fourth factor also weighs in favor of a stay.

E. The timing of this motion is appropriate.

This Court might question why this motion was not filed earlier, considering that TSE's Writ Petition was originally filed on March 6, 2019. This was primarily for two reasons. One, the parties had essentially agreed to an informal stay of the Nye County proceeding pending resolution of the briefing that eventually resulted in the federal court's injunction. Two, following the federal court's injunction, the parties had essentially engaged in a mutual stay of litigation pending settlement discussions. As this Court is likely aware, the parties stipulated to and obtained multiple extensions related to TSE's Writ Petition and TSE's appeal (Supreme Court Case No. 78092) as a result of these settlement discussion. Accordingly, now was the appropriate time to bring this motion, as those times have passed and TSE's Writ Petition is fully briefed.

III. CONCLUSION

Based on the foregoing, this motion to stay should be granted. All four applicable factors weigh in favor of staying the underlying Nye County proceeding pending resolution of TSE's Writ Petition.

DATED: January 10, 2020

/s/ Ryan T. Gormley

D. Lee Roberts, Jr., Esq.

Colby L. Balkenbush, Esq.

Ryan T. Gormley, Esq.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on January 10, 2020, I filed the foregoing PETITIONER'S MOTION TO STAY THE UNDERLYING DISTRICT COURT CASE PENDING RESOLUTION OF ITS PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS with the Clerk of the Nevada Supreme Court and served a copy of the same to the addresses shown below (in the manner indicated below).

VIA THE COURT'S ELECTRONIC FILING SYSTEM:

Richard L. Peel, Esq.
Eric B. Zimbelman, Esq.
Cary B. Domina, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
cdomina@peelbrimley.com
rcox@peelbrimley.com

VIA U.S. MAIL:

The Honorable Judge Steven B. Elliott
Fifth Judicial District Court, Department No. 2
1520 E. Basin Ave. #105
Pahrump, Nevada 89060

Richard E. Haskin, Esq.
Daniel M. Hansen, Esq.
Gibbs Giden Locher Turner

Senet & Wittbrodt LLP
1140 N. Town Center Drive, Suite 300
Las Vegas, Nevada 89144
rhaskin@gibbsgiden.com
dhansen@gibbsgiden.com
Attorneys for H&E Equipment Services, Inc.

Geoffrey Crisp, Esq.
Weil & Drage
2500 Anthem Village Drive
Henderson, NV 89052
gcrisp@weildrage.com
Attorneys for Cobra Thermosolar Plants, Inc.

Cynthia S. Bannan

EXHIBIT 1

EXHIBIT 1

ORDR

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

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.

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,

CASE NO. : CV 39348

Consolidated with:
Case No. CV39799

DEPT. NO. : 2

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

On November 21, 2019, Cobra Thermosolar Plants, Inc.'s ("Cobra") and American Home Assurance Company's ("AHAC")¹ Motion to Stay ("Motion") was heard by the Honorable Senior Judge Steven Elliott (the "Hearing"). Jeremy Kilber, Esq. of the law firm of Weil & Drage, APC

¹ Cobra and AHAC are referred to herein collectively as the "Cobra Parties."

1 and Philip D. Robben, Esq., admitted *pro hac vice*, appeared on behalf of Defendants/Third Party
2 Defendants Cobra and AHAC; Eric B. Zimbelman, Esq. of Peel Brimley LLP appeared on behalf
3 of Defendant/Counterclaim Plaintiff Brahma Group, Inc. (“Brahma”), and Colby L. Balkenbush,
4 Esq. of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC appeared on behalf of Plaintiff Tonopah
5 Solar Energy, LLC (“TSE”), who was permitted to submit a Joinder and argue at the Hearing over
6 Brahma’s objection.²

7 The Court, having considered the Motion, Brahma’s Opposition to the Motion
8 (“Opposition”), TSE’s Joinder to the Motion, and the Cobra Parties’ Reply, and having heard
9 argument of counsel at the Hearing, hereby ORDERS as follows, having rendered its oral decision
10 from the bench on November 21, 2019.

11 **II. FINDINGS OF FACT AND CONCLUSIONS.**

12 **A. FINDINGS OF FACT.**

13 1. This case has a lengthy history, the entirety of which need not be repeated here.
14 Brahma recorded a Notice of Lien (“Lien”) against the Tonopah Solar Facility (the “Work of
15 Improvement”)³ in the amount of \$12,859,577.74, as amended, and sought to enforce the Lien
16 against the Work of Improvement by way of a Foreclosure of Lien Claim in Case No. CV 39348.
17 Brahma also asserted various additional claims against TSE, including breach of contract, breach
18 of the duty of good faith and fair dealing, and violations of NRS 624 (the “TSE Claims”).

19 2. Subsequently, the Cobra Parties recorded a surety bond pursuant to NRS 108.2415
20 (the “Surety Bond”) to replace and release the Work of Improvement as security for the Lien. Upon
21 the recordation of the Surety Bond, the Lien attached to the Surety Bond.

22 3. On April 17, 2019, this Court entered a Stipulation and Order in Case No. CV39348
23 (“April 17 Stipulation”), whereby Cobra agreed that (i) Brahma “shall be entitled to file (without
24 Cobra contesting, disputing or opposing) BGI’s Consolidated Amended Pleading,” (ii) “Cobra’s

25 ² Brahma objected to TSE’s participation in the proceedings on the grounds that (1) TSE requested and received from
26 this Court an Order staying all claims against TSE pending the outcome of certain motions then pending in the United
27 States District Court for the District of Nevada (the “Federal Court”) in Case No. 2:18-CV-01747-RFB-GWF (the
28 “Federal Court Action”), (2) TSE requested and received from the Federal Court an Order enjoining Plaintiff from
litigating its claims against TSE in the state courts of Nevada and (3) TSE has refused to participate in (i) the Early
Case Conference, (ii) preparation of the Joint Case Conference Report and (iii) discovery in this action.

³ Brahma’s Notice of Lien had also attached to some, but not all, of the real property on which the Work of Improvement
sits.

1 counsel shall accept service of [Brahma's] Consolidated Amended Pleading," and (iii) Cobra shall
2 file an Answer to the Consolidated Amended Pleading within 20 days ...".

3 4. This Court subsequently consolidated Case No. CV39799 with Case No. CV 39348
4 ("Consolidated Action"), and Cobra filed an answer in the Consolidated Action.

5 5. Brahma seeks recovery against the Cobra Parties and the Surety Bond for the
6 lienable amount due and owing to Brahma (the "Claim on Surety Bond") pursuant to NRS 108.221
7 to 108.246, et. seq.

8 6. On September 29, 2019, the Federal Court enjoined Brahma "from litigating [only]
9 the following claims alleged against [TSE] in any state court action: 1) breach of contract, 2) breach
10 of implied covenant of good faith and fair dealing and 3) violation of NRS 624" (collectively, the
11 "Enjoined Claims").

12 7. While the Federal Court enjoined Brahma from prosecuting the Enjoined Claims in
13 the Consolidated Action (the "Federal Court Injunction"), it did not enjoin Brahma from
14 prosecuting the Claim against Surety Bond in the Consolidated Action.

15 8. Although the Claim on Surety Bond has been pending in this Court since September
16 25, 2018 (and the Cobra Parties have fully participated in the Consolidated Action, as parties, since
17 then), the Cobra Parties filed (i) the instant Motion with this Court, and (ii) a Motion to Intervene
18 in the Federal Court Action on October 18, 2019, seeking to require Brahma to pursue its Surety
19 Bond Claim in that forum. The Cobra Parties' Motion to Intervene is pending.

20 9. Cobra now asks this Court to stay Brahma's Claim on Surety Bond indefinitely, or
21 at a minimum, until the Federal Court rules on the Motion to Intervene in the Federal Court Action.
22 For the reasons set forth below, this Court denies the Motion.

23 10. Any finding of fact herein that is more appropriately deemed a conclusion of law
24 shall be treated as such.

25 **B. CONCLUSIONS OF LAW.**

26 1. NRS 108.213 to 108.2425 (the "Bonding Statute") creates an independent cause of
27 action against a surety bond, the bond principal and the surety. Specifically, NRS 108.2421
28 provides:

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

5 2. By posting the Surety Bond pursuant to NRS 108.2415(1), the Cobra Parties caused
6 Brahma's Lien (recorded against the Work of Improvement) to be released.⁴ Brahma's Lien now
7 attaches to the Surety Bond, which (i) replaces the Work of Improvement as security for Brahma's
8 Lien,⁵ and (ii) entitles Brahma to bring its action against the Surety Bond in this Court.

9 3. Further, by (i) posting the Surety Bond, (ii) entering the April 17 Stipulation and
10 (iii) filing its Answer the Cobra Parties have submitted themselves to the jurisdiction of this Court
11 and appointed the Clerk of the Court as their agent pursuant to NRS 108.2423 which provides in
12 part:

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

19 4. Cobra (not TSE) is the Surety Bond principal against whom Brahma has a claim
20 and against whom Brahma seeks a judgment, along with the surety (AHAC) and the Surety Bond,
21 in the county in which the Work of Improvement is located. While Brahma also has claims against
22 TSE, those contract-based claims were removed to the Federal Court and now reside there
23 exclusively by virtue of the Federal Court Injunction.

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

11. The Cobra Parties argue that NRS 108.2421 requires a lien claimant (such as
Brahma) to bring an action against its debtor (here, TSE) in the same action as it brings its Claim

⁴ 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.").

⁵ See NRS 108.2415(6)(a) ("the surety bond shall be deemed to replace the property as security for the lien.").

1 on Surety Bond against the Surety Bond, the bond principal (Cobra) and the surety (AHAC). The
2 Court does not find this argument to be persuasive. Nothing in NRS 108.2421 mandates that a lien
3 claimant must bring an action against its debtor in the same action as the principal and surety who
4 caused a surety bond to be issued. To the contrary, NRS 108.2421 simply confirms that a lien
5 claimant is "entitled to bring an action against ... the lien claimant's debtor in any court of
6 competent jurisdiction that is located within the county where the property upon which the work of
7 improvement is located."

8 12. The Court is personally aware of instances in which contractors have become
9 insolvent or otherwise judgment proof and, like here, their bonding companies were required to
10 stand in their shoes and defend claims against the contractors in the forum "where the property upon
11 which the work of improvement is located."

12 13. Accordingly, the Court does not find that TSE is a necessary or indispensable party
13 and finds that the Consolidated Action can proceed even though TSE is not a party.

14 14. Any conclusion of law herein that is more appropriately deemed a finding of fact
15 shall be treated as such.

16 **NOW THEREFORE, IT IS HEREBY ORDERED** that the Cobra Parties' Motion to Stay
17 is ***DENIED***.

18 Dated this _____ day December 2019.

19
20 _____
21 **Senior Judge Steven Elliott**

22 Submitted by:
23 **PEEL BRIMLEY LLP**

24 _____
25 RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
26 ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
27 RONALD J. COX, ESQ. (NV Bar No. 12723)
28 3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Brahma Group, Inc.