

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78256

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Jan 17 2020 03:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

TONOPAH SOLAR ENERGY, LLC,

Appellant,

v.

BRAHMA GROUP, INC.,

Respondent.

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

**REAL PARTY IN INTEREST'S RESPONSE TO PETITIONER'S
MOTION TO STAY DISTRICT COURT PROCEEDINGS**

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I. INTRODUCTION/SUMMARY OF RESPONSE

Petitioner Tonopah Solar Energy, LLC's ("TSE") Motion to Stay the Underlying District Court Case Pending Resolution of its Petition for Writ of Prohibition, or, Alternatively, Mandamus (the "Motion") should be denied. First, TSE failed to move the District Court to consider the substance of the present Motion, as required by NRAP 8(a)(1)(A), or demonstrate why doing so would be impracticable, as required by NRAP 8(a)(2)(A)(i).

More fundamentally, TSE has no standing to seek a stay of the Nye County Court's proceedings because TSE is no longer a party to that action as a result of a Federal Court injunction and the Federal Court's exercise of jurisdiction over the only claims/causes of action to which TSE was a party. The injunction also means that TSE cannot demonstrate that it will succeed on the merits of its Writ Petition (the "Petition"), or that the object of the Petition will be defeated if the Motion is denied, because the claims for which TSE seeks relief by way of the Petition now reside in Federal Court. For the same reasons, the injunction also renders moot any relief TSE could obtain by way of the Petition. TSE is also unlikely to succeed on the underlying substance of the Petition because Brahma properly and timely perfected its claim against the applicable surety bond posted by Cobra Thermosolar Plants, Inc. and its surety (the "Cobra Parties") in the consolidated, Nye County actions.

II. BACKGROUND FACTS

As more fully explained in Brahma's Answer to Writ Petition (the "Answer"), the procedural history of this action is lengthy. In the interest of brevity, Brahma incorporates, and respectfully requests that the Court to review and consider, the facts set forth in the Answer. Briefly, the Petition relates to:

- (1) Nye County District Court Case No. CV39348 (the "NRS 108.2275 Special Proceeding") commenced by TSE seeking to discharge Brahma's

- notice of lien by way of a Motion to Expunge (which was denied) and in which Brahma filed an affirmative claim against the Cobra Parties and the surety bond they recorded to release Brahma's Notice of Lien (the "Lien") from TSE's property and work of improvement (the "Surety Bond")¹;
- (2) Nye County District Court Case No. CV39799 (the "Separate Action"), subsequently consolidated with Case No. CV39348, in which Brahma filed a standalone claim against the Cobra Parties and the Surety Bond (the "Claim on Surety Bond");
- (3) Claims against TSE in the United States District Court (the "Federal Court") that TSE removed from the Clark County District Court (the "Removed Claims"), which (on TSE's motion) the Federal Court enjoined Brahma from litigating in any Nevada state court;² and
- (4) Supreme Court Case No. 78092, in which TSE has appealed the District Court's denial of its Motion to Expunge.

In October 2018, TSE filed a Motion to Strike [Brahma's First Amended Complaint], or, in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court. *See* 1 PA³ 84. The District Court's denial (in part) of that motion, entered on January 24, 2019 (8 PA 870-877 - the "Underlying Order"), forms the basis of the Petition, filed on March 6, 2019. *See e.g.*, Petition p. 1. However, as part of the Underlying Order, the Nye County Court granted TSE a stay of the Removed

¹ Pursuant to 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."

² Arguably, the Injunction also means the Removed Claims (from which this Petition arises) cannot be litigated in this Court.

³ For ease of reference, Brahma cites to the appendices, volume and page numbers supplied by TSE ("PA" and "RPA") with the Writ Petition and Reply and by Brahma, as Real Party in Interest, ("RPIA"), with its Answer.

Claims while TSE sought an injunction from the Federal Court precluding Brahma from pursuing such claims in the Nye County Court. 8 PA 877.

In September 2019 the Federal Court enjoined Brahma from litigating the very claims (i.e., the Removed Claims) that form the basis of the Petition (the “Injunction”). 1 RPIA 128-136. *See e.g.*, RPIA000136 (enjoining 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.”). The Federal Court also reinstated Brahma’s original (Clark County) Complaint “as the operative complaint in this matter” such that the Removed Claims now firmly reside in the Federal Court and no longer reside in the Nye County Court. 1 RPIA 136. Brahma’s Claim on Surety Bond (against the Cobra Parties and the Surety Bond) was not enjoined by the Injunction and continues to reside in the Nye County Court. *See e.g.* RPIA000133 (Injunction noting that, because of the Surety Bond, the Federal 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.”).⁴

In October 2019, the Cobra Parties filed a motion in the Federal Court, seeking to intervene there (the “Motion to Intervene”) and effectively remove Brahma’s Claim on Surety Bond to Federal Court, even though Cobra and Brahma are not diverse. 4 PRA 223. Brahma opposed that motion, which remains pending. 4 PRA 280. Cobra then filed a motion in the Nye County District Court asking it to stay the proceedings *pending a decision from the Federal Court on the Cobra Parties’ Motion to Intervene*, *see Exhibit A* hereto,⁵ which Brahma opposed. *See Exhibit B*

⁴ *See also* RPIA000153 (TSE brief arguing: “Brahma’s bond claim is not against TSE—it is against [the Cobra Parties]. Further, Brahma’s bond claim will remain in state court as Cobra has the same domicile as Brahma.”).

⁵ Brahma respectfully requests that the Court take judicial notice of this motion, as filed by the Cobra Parties on October 15, 2019.

hereto, exhibits omitted for brevity).⁶ The Nye County Court denied that motion on January 13, 2020. *See Exhibit C* hereto.⁷ Over Brahma's objection TSE filed a Joinder to the Cobra Parties' Motion. *See Order Denying Stay*, p. 2.⁸ On January 10, 2020 (i.e., *before* the Order Denying Stay was signed) TSE filed the present Motion to Stay proceedings *pending the outcome of the Writ Petition*.

III. ARGUMENT

A. TSE Lacks Standing.

Brahma and TSE agree on one thing: Brahma's claims against TSE in all state courts of Nevada have been enjoined and now reside in the Federal Court. TSE is therefore no longer a party to the Nye County Court proceedings⁹ and has no standing to demand a stay of proceedings in which it has no stake. *See Mona v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 132 Nev. 719, 725, 380 P.3d 836, 840 (2016) (one who was not a party to the litigation below has no standing to appeal) citing *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011). For the same reasons, as Brahma has argued in its Answer, TSE has no standing to maintain the Petition.

⁶ Brahma respectfully requests that the Court take judicial notice of Brahma's Opposition, as filed on October 31, 2019.

⁷ Brahma respectfully requests that the Court take judicial notice of the Nye County District Court Order Denying [the Cobra Parties'] Motion to Stay, filed on January 13, 2020 ("Order Denying Stay").

⁸ Brahma objected to TSE's participation on the grounds (among others) that TSE requested and received from the Federal Court an Order enjoining Plaintiff from litigating its claims against TSE in the state courts of Nevada.

⁹ See e.g., Order Denying Stay, p. 5 ("... the Consolidated Action can proceed even though *TSE is not a party.*"). [Emphasis added].

The Injunction, in its specifics and when read as a whole,¹⁰ plainly precludes all Nevada state courts from considering the Removed Claims and “reinstates” those specific claims in the Federal Court Action.¹¹ Indeed, TSE argues that the District Court “does not possess subject matter jurisdiction” over the Removed Claims [Petition p. 31] because “[t]he removal of an action to Federal Court necessarily divests state and local courts of their jurisdiction over a particular dispute.” [Petition p. 32 citing *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000)]. In any event, and because there are presently no claims pending against TSE in Nye County (and, therefore, no claims against TSE to stay), TSE has no standing to maintain its Petition.

B. TSE Failed to Seek a Stay from the District Court.

NRAP 8(a) requires a party who seeks to stay district court proceedings pending the resolution of a petition for an extraordinary writ in the Supreme Court to “move first in the district court” for such relief. By way of its Motion, TSE asks this Court to stay the Nye County proceeding “*pending resolution of the writ.*” See Motion p. 1 (emphasis added). Yet while TSE did join in Cobra’s motion to stay, Cobra’s motion sought a stay pending resolution of its Motion to Intervene in Federal Court. Although TSE’s joinder does briefly argue that a stay pending the outcome of the Petition is an “additional reason” to grant Cobra’s motion (*see*

¹⁰ To give effect to the intent of the court issuing the injunction, an injunction should be reasonably construed and read as a whole. *Norwest Mortgage, Inc. v. Ozuna*, 706 N.E.2d 984, 989 (Ill.App.Ct.1998).

¹¹ “‘To ascertain the meaning of any part of an injunction, the entire injunction must be looked to; and its language, like that of all other instruments, must have a reasonable construction with reference to the subject about which it is employed.’ ” *Old Homestead Bread Co. v. Marx Baking Co.*, 117 P.2d 1007, 1009–10 (Colo.1941) (quoting 32 CJ 370, § 624).

PRA000300), TSE seeks a different remedy (stay pending outcome of the Petition), which requires proper notice and opportunity to respond. *See* D.C.R. 13.

C. The Motion is Substantively Flawed.

In deciding whether to issue a stay, this Court generally considers the following factors:

- (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied;
- (2) Whether the parties will suffer irreparable or serious injury if the stay is granted or denied; and
- (3) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000). TSE fails to meet this burden.

1. The object of the writ petition will not be defeated.

TSE argues that object of its Petition will be defeated unless a stay is granted because it will “likely have to litigate its dispute with Brahma in the underlying Nye County proceeding as a party thereto.” *See* Motion p. 5. This statement is incorrect. Because TSE is not a party to the Nye County Action, it has no duty, obligation or right to litigate anything in the Nye County Action. The Federal Court not only enjoined Brahma from litigating its claims against TSE in the Nye County Action, it “reinstated” Brahma’s original (removed) Complaint as “the operative complaint in this [the Federal Court Action].” 1 RPIA 136.

With or without a stay, TSE plainly cannot “litigate its dispute with Brahma” in the Nye County Action because such litigation has been expressly enjoined as to TSE and the Removed Claims. As to TSE’s concern that Cobra (not Brahma) served requests for production on TSE, TSE is subject to third-party discovery in the same

way that any third-party is subject to discovery in an action – i.e., by way of subpoena. As such, the first factor weighs heavily against TSE.

2. TSE will not suffer any, much less irreparable or serious, injury.

As this Court has held, “[a]lthough irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004). Accordingly, and while TSE suggests that Brahma will not be harmed by a stay, neither can TSE demonstrate any harm to itself.

In reliance on the Injunction, TSE argues that the Federal Court has already ruled that TSE would suffer immediate and irreparable injury if the injunction TSE requested there was not issued. *See* Motion p. 7. Yet precisely because of the Injunction there are no claims or causes of action now pending against TSE in the Nye County Court. Stated differently, TSE cannot possibly be irreparably or seriously harmed by the continuation of an action that (at TSE’s express request) no longer involves TSE. There is simply no “reasonable probability that [any] injury will occur” if a stay is not granted. *See Hansen*, 116 Nev. at 658, 6 P.3d at 986-87.

By contrast, if a stay is issued by this Court, Brahma will be precluded from pursuing its only remaining non-enjoined claim – Brahma’s Claim on Surety Bond pursuant to NRS 108.2415(1) – against parties other than TSE (Cobra and AHAC), which claims cannot be adjudicated in Federal Court. As Judge Elliot ruled, Brahma has every right to proceed with its “independent cause of action” against the surety and bond principal (Cobra, not TSE). *See* Order Denying Stay, p. 3. Brahma’s lien now attaches to the Surety Bond, by which the Cobra Parties “submitted themselves to the jurisdiction of [the Nye County Court].” *See id.* p. 4.

In recognizing “instances in which contractors have become insolvent or otherwise judgment proof and, like here, their bonding companies were required to stand in their shoes and defend claims against the contractors in the forum ‘where

the property upon which the work of improvement is located,” Judge Elliot correctly concluded that the Nye County Action “can proceed even though TSE is not a party.” *See id.* p. 5. Given these facts, and Judge Elliot’s well-reasoned conclusions, the irreparable or serious harm to Brahma – continued delay of its statutory bond rights and remedies - is obvious. This Motion, like Cobra’s, is nothing more than a continuation of TSE’s dilatory tactics designed to delay and obstruct Brahma’s efforts to collect the nearly \$13 million it is owed (not including attorney’s fees, costs and statutory interest). As a Nevada contractor and lien claimant Brahma is entitled to the full protections of Nevada’s mechanic’s lien statute. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008) (Nevada public policy favors “preserving laws that provide contractors secured payment for their work and materials.”). To the extent the Court considers the harm resulting from a grant or denial of the Motion, the “balance of the equities” plainly favors Brahma, not TSE. *See* Motion p. 9 citing *Hansen*, 116 Nev. at 659, 6 P.3d at 987.

3. TSE is not likely to prevail on the merits.

Because TSE waited until the Petition was fully briefed to request a stay, which is unusual at best, the Court has the benefit of complete briefings by the parties. Brahma respectfully incorporates its Answer and requests that the Court consider the same when evaluating TSE’s likelihood of prevailing on the merits. Among the grounds presented for denying the Petition, Brahma briefly reiterates the following, without limitation:

a. The Nye County Court is not obligated to, and cannot, dismiss claims that are no longer before it.

In exercising its discretion, this Court should only consider writ petitions where “pursuant to clear authority under a statute or rule, the district court is

obligated to dismiss an action ... or an important issue of law requires clarification.” *W. Cab Co. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 390 P.3d 662, 666–67 (Nev. 2017). Here, the Injunction precludes further litigation of the Removed Claims, takes them out of the Nye County Court entirely, and thereby eliminates the Nye County Court’s obligation (or ability) to dismiss such claims. In the interest of judicial economy, the Court should decline to consider, much less grant, the Petition. *See W. Cab Co.*, 390 P.3d at 666–67.

b. The Federal Court has given TSE a plain, speedy and adequate remedy.

Even if the Injunction does not otherwise preclude TSE’s participation in the Nye County Action and deny it standing here, the Injunction undoubtedly provided TSE a “plain, speedy and adequate remedy in the ordinary course of law” by permanently precluding litigation of the Removed Claims in any state court. This Court generally will not consider petitions for extraordinary relief when such a remedy is available. *A.J. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 394 P.3d 1209, 1212 (Nev. 2017), reh’g denied (July 27, 2017), reconsideration *en banc* denied (Dec. 19, 2017).

c. TSE’s Petition is Substantively Moot.

Substantively, TSE’s Petition argues that the Nye County Court improperly allowed Brahma to file an affirmative pleading (containing the Removed Claims) in the NRS 108.2275 Special Proceeding. As more fully argued in the Answer, Judge Elliott correctly concluded that “NRS 108.2275(5) establishes the Nevada Legislature’s intent to combine mechanic’s lien foreclosure actions with motions to expunge liens,” 8 PA 876, such that TSE’s objection places form over function. Filing such a pleading in the NRS 108.2275 Special Proceeding puts the parties in the same procedural posture that would have existed had the Counter-Complaint

been filed first, followed by the Motion to Expunge. 1 RPIA 90 (“the Parties would be in the same position they currently find themselves in.”).

Even if that filing was improper, which it was not, Brahma did exactly what TSE argued should be done (as recommended in the Meade Treatise¹² upon which TSE relies) and filed the Separate Action, thereby perfecting its Claim on Surety Bond (which, in the interim, removed and replaced Brahma’s Lien). Further, and because these pleadings have now been consolidated and amended, 1 RPIA 105-36, TSE’s continued reliance on such a meaningless technicality is absurd.

IV. CONCLUSION

Based on the foregoing, Brahma respectfully requests that the Court deny TSE’s Motion to Stay the District Court Proceedings.

Respectfully submitted this 17th day of January, 2020.

PEEL BRIMLEY LLP

/s/ Eric Zimbelman

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¹² See LEON F. MEAD II, CONSTRUCTION LAW 286 (2016 Ed.),

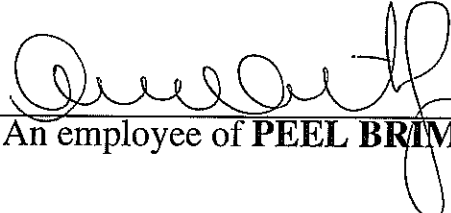
CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFCR 9(f), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 17th day of January, 2020, I caused the above and foregoing document, **REAL PARTY IN INTEREST'S RESPONSE TO PETITIONER'S MOTION TO STAY DISTRICT COURT PROCEEDINGS**, to be served as follows:

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

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

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EXHIBIT A

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9 *AMERICAN HOME ASSURANCE COMPANY*

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

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

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

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

15 vs.)

16 BRAHMA GROUP, INC., a Nevada)
17 corporation,)
18 Defendant.)

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

[ORAL ARGUMENT REQUESTED]

19)
20 BRAHMA GROUP, INC., a Nevada)
21 corporation,)
22 Lien/Bond Claimant,)

23 vs.)

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

Date of Hearing: _____

Time of Hearing: _____

28 Counter-defendants.)

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

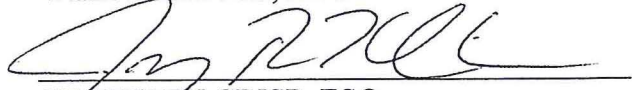
11 **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE**
12 **COMPANY'S MOTION TO STAY**

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

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

21 DATED this 15th day of October, 2019.

22 WEIL & DRAGE, APC

23 

24 GEOFFREY CRISP, ESQ.

25 Nevada Bar No. 2104

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DATED this 15th day of October, 2019.

WEIL & DRAGL, APC

 JEFFREY CRISP, ESQ.

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

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **PRELIMINARY STATEMENT**

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

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

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

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

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

12 II.

13 FACTS¹

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

18 Because of TSE's alleged failure to fully pay Brahma for its Work, Brahma caused a notice
19 of lien ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as
20 Document No. 890822. Thereafter, the Original Lien was amended on several occasions. On
21 September 14, 2018, Brahma recorded its Fourth Amended Notice of Lien ("Fourth Amended
22 Lien") with the Nye County Recorder, as Document No. 899351.3, increasing the amount to
23 \$12,859,577.74. Brahma's Original Lien and the amendments and restatements thereto, including
24 the Fourth Amended Lien, are referred to collectively as the "Brahma Lien."

25 Cobra caused a surety bond to be recorded with the Nye County Recorder's Office on
26 September 6, 2018, as Document No. 898974 (the "Brahma Surety Bond"), reserving its rights
27

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

1 against TSE. The Brahma Surety Bond (i) was issued by AHAC, as surety ("Surety") on August
2 15, 2018, (ii) identifies Cobra, as principal ("Principal"), and (iii) was in the amount of
3 \$10,767,580.00.

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

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

18 Section 24 of the TSE/Brahma Agreement required Brahma to pursue any contract-based
19 claims it had against TSE in Clark County, Nevada. As a result, Brahma filed a Complaint on July
20 17, 2018, against TSE alleging breach of contract, unjust enrichment, and violation of NRS
21 Chapter 624 in the Eighth Judicial District Court of Nevada (the "Clark County Action"). On
22 September 10, 2018, TSE removed the Clark County Action to the United States District Court,
23 District of Nevada (the "Federal Action"). TSE's removal petition cited 28 U.S.C. § 1332,
24 diversity of citizenship, as the basis subject matter jurisdiction. Brahma did not move to remand
25 the case and has not otherwise raised an objection to the Court's subject matter jurisdiction.

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

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

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

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

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

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

18 III.

19 LEGAL ARGUMENT

20 Nevada state courts have cited the United States Supreme Court's *Landis* framework when
21 analyzing a motion to stay. "The power to stay proceedings is incidental to the power inherent in
22 every court to control the disposition of the causes of its docket with economy of time and effort
23 for itself, for counsel, and for litigants. How this can best be done calls for the exercise of
24 judgment which must weigh competing interests and maintain an even balance." *Maheu v. Eighth*
25 *Judicial Dist. Court In & For Clark Cty., Dep't No. 6*, 89 Nev. 214, 217 (1973) (quoting *Landis v.*
26 *N. Am. Co.*, 299 U.S. 248, 254-55 (1936)); see also *Jordan v. State ex rel. DMV and Public Safety*,
27 110 P.3d 30, 41 (2005).

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

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

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

14 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005). Courts should also consider “the
15 judicial resources that would be saved by avoiding duplicative litigation.” *Pate v. Depuy*
16 *Orthopaedics, Inc.*, No. 2:12-cv-01168-MMD-CWH, 2012 WL 3532780, at *2 (D. Nev. Aug. 14,
17 2012).

18 **A. NO POSSIBLE DAMAGE WILL RESULT FROM GRANTING A STAY**

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

26 For example, courts have found that a stay is appropriate when the non-moving party’s
27 damage was only a delay in recovering money damages. *See, e.g., CMAX, Inc. v. Hall*, 300 F.2d
28 265, 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.”

1 *Lockyer*, 398 F.3d at 1110 (recognizing “[d]elay of CMAX’s suit would result, at worst, in a delay
2 in its monetary recovery”).

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

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

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

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

1 Courts in Nevada and elsewhere have stayed proceedings pending resolution of a related,
2 underlying claim.² For example, in *Specrite Design, LLC v. Elli N.Y. Design Corp.*, No. 16 Civ.
3 6154 (ER), 2017 WL 3105859 (S.D.N.Y. July 20, 2017), a subcontractor sued, in federal court, the
4 prime contractor and lien fund holder on a project, alleging that the contractor did not pay for labor
5 performed and materials the subcontractor furnished. In addition to the federal case, there was a
6 related state court lawsuit for breach of the subcontract. *Id.* at *1. The contractor moved to stay
7 the federal case pending resolution of the state court action because that court would determine if
8 the contractor had defaulted. *Id.* at *2. The court granted the motion to stay, finding “the right to a
9 lien can only be enforced to the extent of the amount due or to become due to the contractor or
10 subcontractor on whose credit the labor or materials are furnished under his contract.” *Id.* at *4.
11 The court went on to find that “even though the Lien was discharged by the issuance of [the surety
12 bond] the same test for the validity of the lien and the amount of the lien fund applies.” *Id.* Thus,
13 because “an action to enforce a discharged lien is in substance an action to test the validity of the
14 lien and to enforce the lien to the extent it is valid”, the court first needed to determine in state
15 court whether the contractor defaulted. *Id.* As a result, the court found that granting the stay
16 would balance the interests and prejudice that would result if it had not been granted, as well as
17 promote judicial efficiency and minimized the possibility of conflicts between different courts;
18 indeed, not granting a stay “would lead to unnecessary litigation that is time-consuming for this
19 Court and for the parties.” *Id.* at *5.

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21
22
23 ² See, e.g., *Kopicko v. Young*, 114 Nev. 1333, 1338 n.3 (Nev. 1998) (staying a legal malpractice case pending
24 the resolution of the underlying action); see *Allstate Prop. & Cas. Ins. Co. v. Talda*, No. No. 2:14-CV-00050-
25 APG-CWH, 2015 WL 1344517, at *5 (D. Nev. Mar. 20, 2015) (granting defendant’s motion to stay
26 regarding defendant’s duty to indemnify when the underlying tort cause has not been resolved and there were
27 underlying relevant factual disputes); see also *Colony Ins. Co. v. Vantaggio Farming Corp.*, 1:17-cv-00714-
28 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).

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

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

18 In determining whether to grant a stay, the court considers "the orderly course of justice
19 measures in terms of the simplifying or complicating of issues, proof, and questions of law which
20 could be expected to result from a stay." *CMAX*, 300 F.2d. at 268 (citing *Landis*, 299 U.S. at 254-
21 55). For example, courts have granted stays when there is a pending decision which would narrow
22 the issues in a case. *See, e.g., Brown v. Credit One Bank, N.A.*, No.: 2:17-cv-00786-JAD-VCF,
23 2018 WL 1697801, at *4 (D. Nev. Apr. 6, 2018) (granting motion to stay pending decision from
24 the D.C. Circuit's decision would help to "simplify and streamline the proceedings and promote
25 the efficient use of the parties' and the court's resources"); *Bank of N.Y. Mellon v. 4655*
26 *Gracemont Ave. Trust*, No. 2:17-cv-00063-JAD-PAL, 2018 WL 1697800, at *3 (D. Nev. Apr. 5,
27 2018) (granting a motion to stay pending the Nevada Supreme Court's acceptance of a certified
28 question a statutory interpretation which will "prevent unnecessary briefing and the expenditures

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

4 Courts have granted motions to stay pending a motion to intervene in a related case which
5 bears upon the case. *See, e.g., Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2009 WL
6 5184357, at *2 (D. Conn. Dec. 23, 2009) (granting plaintiff's motion to stay when plaintiff filed a
7 motion to intervene in a related case; thus, "[i]n light of the uncertainty regarding in which case
8 [plaintiff's] claims will be heard, if at all, it is prudent to stay the bulk of discovery until
9 [plaintiff's] motion to intervene" is decided). Similarly, proceedings may be stayed "pending
10 resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of*
11 *California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Where a stay is sought pending the resolution
12 of another action, the court need not find that two cases possess identical issues; a finding that the
13 issues are substantially similar is sufficient to support a stay. *See Landis*, 299 U.S. at 254. Courts
14 should weigh the competing interests of the parties. *See id.* at 254-55. The issues involved in the
15 pending proceedings need not be "controlling of the action before the court" for a stay to be
16 ordered. *See Leyva*, 593 F.2d at 864.

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

27 ///

28 ///

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

3 Moreover, the claims against Cobra should be stayed to avoid unnecessary duplicative
4 discovery and the risk of conflicting decisions. *See, e.g. Knepper v. Equifax Info. Servs.*, No. 2:17-
5 CV-02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2, 2017) (granting a motion to stay
6 the action, which would “limit hardship or inequity to [defendant] from unnecessary proceedings,
7 inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple
8 jurisdictions.”); *Tobler v. DePuy Orthopedics, Inc.*, No. 2:12-cv-01167-LDG (RJJ), 2012 WL
9 3598291, at *2-3 (D. Nev. Aug. 17, 2012) (granting a stay pending an multi-district litigation
10 transfer order to avoid duplicative discovery and pretrial management efforts). In *Knepper*, the
11 court granted a stay when plaintiffs in related cases filed a motion for consolidation and transfer.
12 The court granted the stay, finding that doing so would limit hardship and inequity to defendants
13 from “unnecessary proceedings, inconsistent rules, duplicative discovery, and having to re-litigate
14 claims in multiple jurisdictions.” *Id.* at *3. Courts have similarly stayed cases when doing so “is
15 the most efficient way to allow [] uncertainties to resolve”, especially when the parties face
16 “duplicative discovery” where there was a potential to need to “re-open discovery and coordinate
17 two or more cases.” *Honghui Deng v. Nevada ex rel. Bd. of Regents*, No. 2:17-cv-03019-APG-
18 VCF, 2019 U.S. Dist. LEXIS 36716, at *6 (D. Nev. Mar. 7, 2019) (granting a motion to stay when
19 a state court case contained a federal claim and removal was possible, and there were already
20 similar state cases).

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

28 ///

IV.

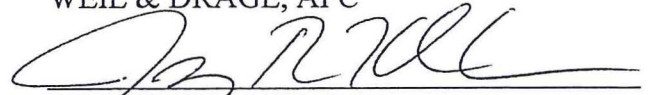
CONCLUSION

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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Nevada Bar No. 10643

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Attorneys for COBRA THERMOSOLAR

PLANTS, INC. and AMERICAN HOME

ASSURANCE COMPANY

1 CERTIFICATE OF SERVICE

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

7
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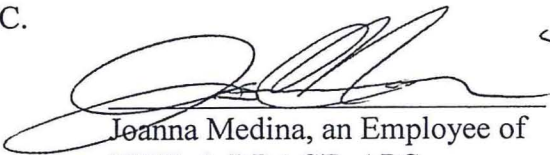
19 
20 Joanna Medina, an Employee of
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EXHIBIT B

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FILED
FIFTH JUDICIAL DISTRICT

NOV - 1 2019

Nye County Clerk

Deputy

Sarah Westfall

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

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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,

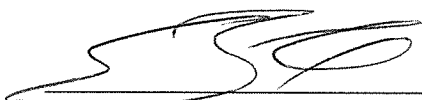
Third-Party Defendants.

**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.

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.”

1 (the “NRS 108.2275 Proceeding”) seeking to expunge Brahma’s lien.

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

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

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

24 ⁶ See Exhibit 3.

25 ⁷ See Exhibit 4.

26 ⁸ See Exhibit 5.

27 ⁹ See Exhibit 6 (Order Granting Countermotion to File Consolidated Amended Pleading)

28 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).

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

11 Although it now seeks a stay, Cobra answered Brahma's consolidated amended pleading
12 in May 2019.²⁰ Similarly, in June 2019 and September 2019 respectively, Cobra answered the
13 Complaint in Intervention and Amended Complaint in Intervention of H&E Equipment Services,
14 Inc. ("H&E"), whose lien Cobra and AHAC also bonded (again, for unknown reasons).²¹ Cobra
15 also participated in an Early Case Conference and joined in the Joint Case Conference Report filed
16 on June 26, 2019.²²

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

23 ¹⁵ See Motion pp. 11-12.

24 ¹⁶ See Exhibit 9, p. 6, ll.17-21.

25 ¹⁷ See *id.*, p. 9, ll. 5-6 (emphasis added).

¹⁸ See *id.*, p. 9, ll. 14-16.

¹⁹ See *id.*

26 ²⁰ See Exhibit 10.

27 ²¹ See Exhibit 11 and Exhibit 12.

²² See Exhibit 13.

²³ See Exhibit 14 (exhibits omitted for brevity).

28 ²⁴ See *id.*, pp. 3-5

²⁵ See *id.*

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.

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

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

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

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

20 NRS 108.2421(1) provides:

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

25 ///

26 ///

27 ³⁰ See Exhibit 7, *supra*.

28 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.

1 By posting the Surety Bond, the Cobra Parties caused Brahma's Notice of Lien against the
2 Work of Improvement to be released.³³ Brahma's lien now attaches to the Surety Bond,³⁴ which
3 entitles³⁵ Brahma to bring its action against the Surety Bond in this Court. This is a statutory right,
4 not merely a privilege.³⁶

5 Further, by posting the Surety Bond, the Cobra Parties have submitted themselves to the
6 jurisdiction of this Court and appointed the Clerk of the Court as their agent pursuant to NRS
7 108.2423 which provides in part:

8 By entering into a surety bond given pursuant to NRS 108.2415, the principal and
9 surety submit themselves to the jurisdiction of the court in which an action or suit
10 is pending on a notice of lien on the property described in the surety bond, and the
11 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
12 liability of the principal may be established by the court in the pending action.

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

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

24 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.").

25 ³⁴ See NRS 108.2415(6)(a) ("the surety bond shall be deemed to replace the property as security for the lien.").

26 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.").

27 ³⁶ Black's Law Dictionary provides: "to entitle is to give a right or title." See <https://thelawdictionary.org/entitle/>
(emphasis added).

28 ³⁷ See NRS 108.2421(6).

³⁸ See NRS 108.237(1).

³⁹ See NRS 108.22136.

1 NRS 108.222(1) provides:

2 Except as otherwise provided in subsection 2, a lien claimant has a lien upon the
3 property, any improvements for which the work, materials and equipment were
4 furnished or to be furnished, and any construction disbursement account
established pursuant to NRS 108.2403, for:

5 (a) If the parties agreed, by contract or otherwise, upon a specific price or
6 method for determining a specific price for some or all of the work, material and
7 equipment furnished or to be furnished by or through the lien claimant, the unpaid
8 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

9 (b) If the parties did not agree, by contract or otherwise, upon a specific price
10 or method for determining a specific price for some or all of the work, material and
11 equipment furnished or to be furnished by or through the lien claimant, including,
12 without limitation, any additional or changed work, material or equipment, an
13 amount equal to the fair market value of such work, material or equipment, as the
14 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

15 Stated differently, NRS 108.2421 permits a lien claimant, such as Brahma, to prove up its
16 lienable amount, be awarded the same plus interest, costs and reasonable attorney's fees and to
17 have a judgment against the Surety Bond up to its "penal sum." Such a judgment "is immediately
18 enforceable and may be appealed regardless of whether any other claims asserted or consolidated
19 actions or suits have been resolved by a final judgment."⁴¹ The Cobra Parties' arguments
20 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

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

25 ⁴⁰ See NRS 108.222(1) (emphasis added).

26 ⁴¹ See NRS 108.2421(6) (emphasis added).

27 ⁴² See e.g., Motion pp. 10-11.

28 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.

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

3 **D. The Hardships Favor Brahma.**

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

11 A mechanic’s lien is a statutory creature established to help ensure payment of work or
12 materials provided for the construction or improvements on real property. *In re Fontainebleau Las*
13 *Vegas Holdings*, 289 p.3D 1199, 1210 (Nev. 2012). The Nevada Supreme Court has consistently
14 held that “the mechanic’s lien statutes are remedial in character and should be liberally construed.”
15 *Id.* In fact, the Nevada Supreme Court in *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528
16 (2010), cited the legislative record wherein it states that Nevada’s “lien law should be liberally
17 construed in favor of lien claimants.” *Id.* at 538 (citing Hearing on S.B. 343 Before the Assembly
18 Comm. On Judiciary, 73d Leg. (Nev., May 13, 2005)) (emphasis added). Nevada’s public policy
19 favors securing payment for labor and material contractors; “[u]nderlying the policy in favor of
20 preserving laws that provide contractors secured payment for their work and materials is the notion
21 that contractors are generally in a vulnerable position because they extend large blocks of credit;
22 invest significant time, labor, and materials into a project; and have any number of workers vitally
23 depend upon them for eventual payment.” *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*,
24 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008).

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

27 ///

28 _____
⁴⁵ See Motion, p. 9.

1 There is no guaranty that Brahma's case against TSE will go to trial anytime soon, much less go
2 to judgment. Even a temporary stay while the Federal Court considers Cobra's Motion to
3 Intervene⁴⁶ is likely to delay the case by as much as a year. By way of the most relevant example,
4 TSE filed its injunction motion in October 2018 and Judge Boulware's decision was issued in
5 September 2019.

6 In this regard also, the Cobra Parties' Motion must be seen as nothing more than a delaying
7 tactic. The Nevada Courts do not look favorably upon dilatory tactics. *See e.g., Burnett v. C.B.A.*
8 *Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) (delay, bad faith, or a dilatory motive
9 are all sufficient reasons to deny a motion to amend a pleading); *Mikohn Gaming Corp. v. McCrea*,
10 120 Nev. 248, 253, 89 P.3d 36, 40 (2004) (while stay pending appeal of an order denying
11 arbitration is generally granted, the court should deny the stay if the appellant apparently filed the
12 stay motion for dilatory purposes); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d
13 705, 713 (2011) (district court did not abuse its discretion in refusing to permit defendant to
14 withdraw his invocation of the Fifth Amendment privilege or in denying his request to reopen
15 discovery because such tactics had already resulted in unnecessary expense and probable delay in
16 obtaining discovery documents). This court also should reject Cobra's dilatory conduct designed
17 only to obstruct and delay Brahma's pursuit of the very rights provided to it when Cobra recorded
18 the Surety Bond.

19 **E. Brahma is Entitled to a Preferential Trial.**

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

22 *At any time after the filing of a joint case conference report* pursuant to Rule 16.1
23 of the Nevada Rules of Civil Procedure or, if the case is designated by the court as
24 complex litigation, after the approval of the initial case management order by the
25 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

26 ⁴⁶ It is entirely unclear what claim the Cobra Parties are asking the Federal Court to allow it to intervene with. Indeed,
27 the pleading Cobra proposes to file in the Federal Court is titled "[Proposed] Answer in Intervention to Plaintiff's
28 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.

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.

PEEL BRIMLEY LLP



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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).

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 14th 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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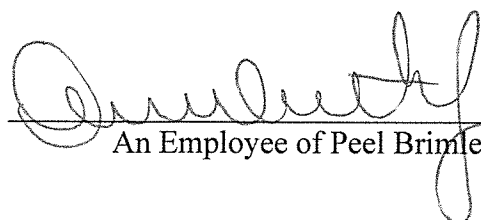

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EXHIBIT C

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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.

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

NOTICE OF ENTRY OF ORDER

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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.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Cobra Thermosolar Plants, Inc. and
American Home Assurance Company's Motion to Stay was filed on January 13, 2020, a copy of
which is attached as Exhibit 1.

Respectfully submitted this 14th of January 2020

PEEL BRIMLEY LLP


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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 January, 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** 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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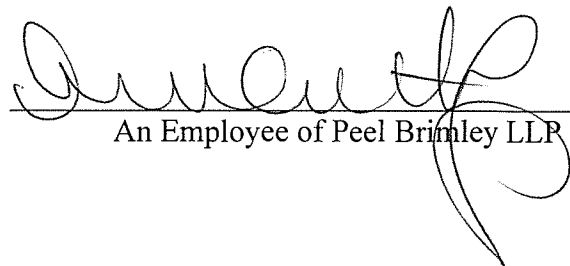

An Employee of Peel Brimley LLP

Exhibit 1

JAN 13 2020

Nye County Clerk
Terri Pemberton
Deputy

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17 **FIFTH JUDICIAL DISTRICT COURT**

18 **NYE COUNTY, NEVADA**

19 TONOPAH SOLAR ENERGY, LLC, a Delaware
20 limited liability company,

21 Plaintiff,

22 vs.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Defendant.

25 BRAHMA GROUP, INC., a Nevada corporation,

26 Lien/Bond Claimant,

27 vs.

28 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., of the law firm of Kelley Drye & Warren LLP, admitted *pro hac vice*,
2 appeared on behalf of Defendants/Third Party Defendants Cobra and AHAC; Eric B. Zimbelman,
3 Esq. of Peel Brimley LLP appeared on behalf of Defendant/Counterclaim Plaintiff Brahma Group,
4 Inc. ("Brahma"), and Colby L. Balkenbush, Esq. of Weinberg, Wheeler, Hudgins, Gunn & Dial,
5 LLC appeared on behalf of Plaintiff Tonopah Solar Energy, LLC ("TSE"), who was permitted to
6 submit a Joinder and argue at the Hearing over 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 on October 16, 2019, and (ii) a
18 Motion to Intervene in the Federal Court Action on October 18, 2019, seeking to require Brahma
19 to pursue its Surety 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.

6. 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 7. 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 8. 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 9. 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 10 day ^{January}~~December~~ 2019.

19
20 
21 Senior Judge Steven Elliott

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

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25 ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
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