IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Tonopah Solar Energy, LLC,
Petitioner

v.

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

and

Brahma Group, Inc.,
Real Party in Interest.

REPLY IN SUPPORT OF PETITIONER'S MOTION TO STAY THE UNDERLYING DISTRICT COURT CASE PENDING RESOLUTION OF ITS PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS

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

Petitioner Tonopah Solar Energy, LLC's ("TSE") Motion to Stay ("Motion") should be granted for the five reasons stated below.

1. TSE has standing.

Brahma Group, Inc. ("Brahma") primarily argues that TSE does not have standing to maintain its writ petition or the Motion as a result of the federal injunction. It is important to note that in Brahma's answer to TSE's writ petition, Brahma primarily argued that the issues presented by the writ petition were moot as a result of the federal injunction. Now Brahma seems to want to hang its hat on a standing argument instead. But, Brahma's standing argument, like its mootness argument, fails.

Brahma contends that TSE does not have standing because the federal injunction removed TSE from the underlying Nye County proceeding. This is incorrect. TSE is still a party to the underlying Nye County proceeding. TSE's reply in support of its writ petition explains in detail why the federal injunction, by its plain terms, did not eliminate TSE's party status to the underlying proceeding. *See* Reply, 13-16. The reply further explains why the federal court could not eliminate TSE's party status to the underlying proceeding based on the narrow grounds upon which the federal court could issue the injunction. *See id.* If the federal court had gone further, and removed TSE from the underlying proceeding, it would have acted not only in violation of binding precedent, it would have acted

in contravention to principles of federalism. Accordingly, TSE, as a party to the underlying proceeding and as the "lien claimant's debtor" under NRS 108.2421, has the requisite standing to pursue its writ petition and the Motion.

2. TSE satisfied NRAP 8(a)(1)(A).

TSE requested that the district court stay the underlying proceeding pending the resolution of TSE's writ petition. Although the request was included in a brief entitled "joinder," the district court entertained the request on the merits and denied it. This reality was pointed out in the Motion. Brahma did not dispute it.

Instead, Brahma asserts that TSE only argued in its briefing that "a stay pending the outcome of the Petition is an 'additional reason' to grant Cobra's motion" and that TSE did not actually request that the district court stay the proceeding pending the outcome of TSE's writ petition. Opposition, p. 5-6. But this is not accurate. In the briefing, TSE clearly wrote:

> Finally, there is an additional reason to stay this action. This action should be stayed pending the outcome of TSE's pending writ petition. . . . This action should be stayed pending the outcome of the Federal Action, or, at a minimum, pending the resolution of TSE's writ petition.

5 PRA 300-301. There is no reason for TSE to file the same request with the district court a second time, have it entertained on the merits for a second time, and have it rejected for a second time.

3. The first consideration—whether the object of TSE's writ petition will be defeated if the stay or injunction is denied—weighs in favor of a stay.

Brahma's argument on this consideration turns purely on its standing argument. *See* Opposition, p. 6. This argument fails because, as explained above, TSE is still a party to the underlying Nye County proceeding. Brahma does nothing to address the points raised in the Motion with respect to this consideration. When you consider the procedural landscape, the goals of TSE's writ petition, and the timing of the underlying proceeding—which may be resolved prior to resolution of TSE's writ petition—there is no question that this consideration weighs in favor of the requested stay.

4. The second and third considerations—the balance of equities—weigh in favor of a stay.

Brahma argues that the equities weigh in its favor because TSE is no longer a party to the underlying proceeding and a stay would serve as a "continued delay of [Brahma's] statutory bond rights and remedies." Opposition, p. 8. The former standing argument, as explained above, is wrong. The latter argument is nothing more than a clandestine way of arguing that the stay would delay Brahma's ability to recover the money that it believes it is entitled to, which, as explained in the Motion, does not constitute "irreparable" or serious injury under Nevada law. Motion, p. 7.

Moreover, in making its equities argument, Brahma casts aspersions on TSE's litigation efforts, stating that "[t]his 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." Opposition, p. 8. One, this accusation ignores that TSE has also asserted affirmative claims against Brahma in federal court. Two, it ignores the reality that any delay of which Brahma could complain traces directly back to Brahma's forum shopping efforts. Brahma, not TSE, is the party that the federal court found engaged in forum shopping in an attempt to subvert federal removal. See 3 PRA 206-207. Now Brahma seeks to benefit from the delay it created by using it as a basis to disparage TSE and litigate the issues of its dispute with TSE in the Nye County proceeding prior to this Court having had an opportunity to remedy additional aspects of Brahma's forum shopping efforts. This should not be permitted. The equities weigh soundly in favor of TSE.

5. The fourth consideration—whether TSE's writ petition is likely to prevail on the merits—weighs in favor of a stay.

The briefing is the best evidence that TSE's writ petition is likely to prevail on the merits. The points Brahma raises in its Opposition are all refuted in TSE's reply in support of its writ petition.

Brahma's final assertion, however, that "Brahma did exactly what TSE argued should be done (as recommended in the Mead Treatise upon which TSE

relies)," Opposition, p. 10, warrants special mention because it is simply not accurate. Yes, a party can file a lien foreclosure action as a separate action and consolidate it with an already pending motion to expunge proceeding. Brahma did not do this. Brahma filed a foreclosure claim into an already pending motion to expunge proceeding, which disrupted TSE's ability to remove the lien foreclosure action, then Brahma filed a duplicative action in violation of, among others, the rule against claim-splitting, and then consolidated those actions in an effort to obscure the original prejudice and cure the original procedural defects. Nothing justifies such a course of conduct.

In addition, Brahma is silent as to TSE's argument that the alternative test for this consideration set forth by *Hansen v. Eighth Judicial Dist. Court*, 116 Nev. 650, 658, 6 P.3d 982, 986 (2000) is satisfied. See Motion, pp. 8-9. Thus, under both tests, this final consideration, like the previous three, weighs in favor of a stay. TSE's Motion to Stay should be granted.[1]

DATED: January 24, 2020

/s/ Ryan T. Gormley
Ryan T. Gormley, Esq.

[1] The Motion stated that TSE would "supplement this motion with the executed order when it becomes available." The notice of entry of order, which was received by TSE the same day that Brahma filed its opposition to the Motion, is attached to Brahma's opposition as Exhibit 3.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on January 24, 2020, I filed the foregoing REPLY IN SUPPORT OF PETITIONER'S MOTION TO STAY THE UNDERLYING DISTRICT COURT CASE PENDING RESOLUTION OF ITS PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS with the Clerk of the Nevada Supreme Court and served a copy of the same to the addresses shown below (in the manner indicated below).

VIA THE COURT'S ELECTRONIC FILING SYSTEM:

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

VIA U.S. MAIL:

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

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

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

Geoffrey Crisp, Esq.
Weil & Drage
861 Coronado Center Drive, Suite 231
Henderson, NV 89052
gcrisp@weildrage.com
Attorneys for Cobra Thermosolar Plants, Inc.

/s/ Cynthia S. Bowman