

In the
Supreme Court
of the
State of Nevada

Electronically Filed
Feb 28 2020 04:02 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

COBRA THERMOSOLAR PLANTS, INC.
and AMERICAN HOME ASSURANCE COMPANY,
Petitioners and Third-Party Defendants,

v.

THE FIFTH JUDICIAL DISTRICT COURT, STATE OF NEVADA
NYE COUNTY, and THE HONORABLE STEVEN P. ELLIOTT, SENIOR JUDGE,
Respondent,

BRAHMA GROUP, INC.,
Real Party in Interest.

FROM A DECISION OF THE FIFTH JUDICIAL DISTRICT COURT,
NYE COUNTY, NEVADA · CASE NO. CV 39348 c/w CV 39799
HONORABLE STEVEN ELLIOTT · DEPARTMENT 2 · PHONE: (775) 751-4213

**COBRA THERMOSOLAR PLANTS, INC. AND AMERICAN HOME
ASSURANCE COMPANY'S PETITION FOR WRIT OF MANDAMUS,
OR, ALTERNATIVELY, PROHIBITION**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following is an entity as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Cobra Thermosolar Plants, Inc. (“Cobra”) is a privately held company, incorporated under the laws of Nevada. It is a wholly-owned subsidiary of Cobra Instalaciones y Servicios, S.A., a global company headquartered in Madrid, Spain. Cobra is also an indirect subsidiary of ACS, Actividades de Construcción y Servicios, S.A., a publicly traded company that owns ten (10) percent or more of Cobra’s stock. American Home Assurance Company (“AHAC”) is a subsidiary of AIG, a publicly held company that owns ten percent or more of its stock. Weil & Drage, APC and Kelley Drye & Warren LLP are the only two law firms that have appeared on behalf of Cobra and AHAC in this case and are the only two law firms expected to appear on behalf of Cobra and AHAC in this Court.

Dated: February 28, 2020

/s/ GEOFFREY CRISP

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ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Court of Appeals because the issues presented arise out of a statutory lien matter under NRS Chapter 108. *See* NRAP 17(b)(8).

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I. ISSUES PRESENTED AND RELIEF SOUGHT

Petitioners and Third-Party Defendants Cobra Thermosolar Plants, Inc. (“Cobra”) and American Home Assurance Company (“AHAC”) (collectively, for purposes of this Petition, “Cobra”) posted a surety bond to guarantee the liabilities, if any, that Tonopah Solar Energy, LLC (“TSE”) may have to Brahma Group, Inc. (“Brahma”) for work performed by Brahma at the request of TSE at the Crescent Dunes Solar Energy Facility in Tonopah, Nevada (the “Plant”). Brahma and TSE have asserted competing claims against each other arising out of work performed by Brahma at the Plant, with Brahma contending that TSE owes it millions of dollars, and TSE contending that it does not owe any additional money and that much of the money that it had already paid to Brahma was based on fraudulent invoices.

Through a tortured procedural history replete with gamesmanship and forum shopping—which the United States District Court for the District of Nevada has already ruled was “fraudulent[] . . . in an attempt to subvert the removal of a prior case”—Brahma has greatly prejudiced Cobra in its defense of Brahma’s claims against the surety bond. There are no substantive claims against Cobra or AHAC in this action. Brahma will have to prove its case against TSE before it may foreclose against the surety bond. Brahma’s claims against TSE are proceeding in federal

court (the “Federal Action” or “Federal Court”)¹ because the Federal Court enjoined Brahma from litigating them in state court (the “Nye County Action” or “Nye County Court”).² Nevertheless, Brahma is continuing to litigate its lien claims (which are non-substantive claims) against Cobra in the Nye County Action. As a result of the Federal Court’s injunction, TSE refuses to participate in discovery in the Nye County Action. TSE, however, is a critical party and documents within its possession are directly relevant to Cobra’s defenses. Brahma’s substantive claims are against TSE. Its claims against Cobra are simply as principal on a bond that Brahma alleges TSE owes. *Thus, if Brahma’s claims against TSE fail, its claims against Cobra similarly fail.* Because the claim against Cobra is wholly dependent on the claims against TSE, and those claims have been enjoined from proceeding in the Nye County Action by the Federal Court, the surety claim against Cobra should similarly be stayed pending the outcome of the Federal Action.

For these reasons, on October 15, 2019, Cobra filed a Motion to Stay with the Nye County Court, arguing that: (1) Brahma will not be prejudiced by a stay because a stay will not significantly delay any relief to which Brahma may be entitled; (2) any unnecessary delay has been the result of Brahma’s forum shopping efforts, as

¹ *Brahma Group, Inc. v. Tonopah Solar Energy, LLC et al.*, No. 2:18-cv-01747-RFB-EJY (D. Nev.). Cobra has moved to intervene in this action.

² Consolidated Case Nos. CV 39348 and CV 39799 in the Fifth Judicial District Court of Nevada.

found by the Federal Court; (3) a stay will promote the orderly course of justice; (4) Cobra faces the real possibility of duplicative discovery and the risk of conflicting decisions and unjust results if the Nye County Action proceeds simultaneously with the Federal Action; and (5) Cobra will face hardship and inequity if forced to proceed with the defense of Brahma's non-substantive claims against Cobra in the Nye County Action while the case is enjoined as to TSE (*i.e.*, the only party against which Brahma has any substantive claims). (Vol. I PA 364).

The Nye County Court improperly denied this Motion, finding that (1) NRS 108.2421 does not require a party proceeding on a surety bond to litigate its dispute with the debtor (in this case, TSE) in the same forum, and that (2) even though the court in the Federal Action would determine “what, if anything . . . TSE owes to Brahma,” a stay of the Nye County Action was not warranted. Cobra therefore seeks a writ of mandamus, or alternatively, prohibition, compelling the Nye County Court to vacate its order and stay the entire Nye County Action pending resolution of the Federal Action.³ (Vol. III PA 706).

³ The procedural mess created by Brahma and continued by virtue of the Nye County Court's denial has led to a separate but related and pending writ filed by TSE, Court of Appeals Case No. 78256.

II. STATEMENT OF PERTINENT FACTS

A. Brahma's Lien on the Crescent Dunes Solar Energy Facility

On or about February 1, 2017, TSE entered a Services Agreement (“Agreement”) with Brahma whereby Brahma agreed to provide TSE, on a time and material basis, work, materials, and equipment (collectively, the “Work”) at Crescent Dunes. (Vol. I PA 137) Brahma alleges that it provided the Work at Crescent Dunes and TSE failed to fully pay Brahma for such Work.

Because of TSE's alleged failure to fully pay Brahma for its Work, Brahma caused a notice of lien (“Original Lien”) to be recorded on April 9, 2018 with the Nye County Recorder as Document No. 890822. (Vol. I PA 1). Thereafter, the Original Lien was amended on several occasions. On September 14, 2018, Brahma recorded its Fourth Amended Notice of Lien with the Nye County Recorder, as Document No. 899351, increasing the amount to \$12,859,577.74. (Vol. I PA 34). Brahma's Original Lien and the amendments and restatements thereto, including the Fourth Amended Lien, are referred to collectively as the “Brahma Lien”.

B. Cobra Records a Surety Bond to Release Brahma's Lien

Cobra caused a surety bond to be recorded with the Nye County Recorder's Office on September 6, 2018, as Document No. 898974 (the “Brahma Surety Bond”), reserving its rights against TSE.⁴ (Vol. I PA 18). The Brahma Surety Bond

⁴ Under a Cobra-TSE contract not at issue in this litigation, Cobra is required to bond over certain liens under certain circumstances. However, Cobra disputes it

(i) was issued by AHAC, as surety (“Surety”) on August 15, 2018, (ii) identifies Cobra, as principal (“Principal”), and (iii) was in the amount of \$10,767,580.00.

Cobra increased the amount of the Surety Bond to \$19,289,366.61, or 1.5 times the amount of Brahma’s Fourth Amended Lien. Cobra did so by recording a Rider, that amended the Surety Bond (the “Brahma Surety Bond Rider”), on October 9, 2018 with the Nye County Recorder’s Office as Document No. 900303. (Vol. I PA 78). The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as the “Brahma Surety Bond.” The Brahma Surety Bond released the Brahma Lien.

On May 15, 2018, H&E Equipment Services Inc., a Delaware Corporation and one of Brahma’s suppliers for Crescent Dunes, caused a notice of lien to be recorded with the Nye County Recorder as Document No. 892768 in the amount of \$477,831.40 (the “H&E Lien”). (Vol. I PA 9). On September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County Recorder’s Office as Document No. 898975 (the “H&E Surety Bond”)⁵. The H&E Surety Bond (i) was issued by AHAC, as surety (“Surety”) on August 15, 2018, (ii) identifies Cobra, as principal

had an obligation under that contract to bond over the liens at issue here. The dispute between TSE and Cobra on this issue remains unresolved. However, this dispute is not before this Court.

⁵ The H&E Surety Bond is not at issue and thus not included in the Petitioner’s Appendix.

(“Principal”), and (iii) is in the amount of \$716,741.10. The H&E Surety Bond released the H&E Lien.

C. Nye County Procedural History and Related Cases

Section 24 of the TSE/Brahma Agreement required Brahma to pursue any contract-based claims it had against TSE in Clark County, Nevada. As a result, Brahma filed a Complaint on July 17, 2018, against TSE alleging breach of contract, unjust enrichment, and violation of NRS Chapter 624 in the Eighth Judicial District Court of Nevada (the “Clark County Action”). (Vol. I PA 12). On September 10, 2018, TSE removed the Clark County Action to the United States District Court, in the now pending Federal Action. (Vol. I PA 28). TSE’s removal petition cited 28 U.S.C. § 1332, diversity of citizenship, as the basis for subject matter jurisdiction. Brahma did not move to remand the case and has not otherwise raised an objection to the Federal Court’s subject matter jurisdiction.

On September 21, 2018, Brahma filed its Mechanic’s Lien Foreclosure Complaint, as required by NRS 108.239(1). (Vol. I PA 109). On September 25, 2018, Brahma filed in the Nye County Action its (i) First Amended Counter-Complaint and included therein its contract-based claims against TSE, and (ii) Third-Party Complaint asserting a claim against AHAC, as Surety, and Cobra, as Principal, on the Brahma Surety Bond. (Vol. I PA 116).

On October 18, 2018, TSE moved to stay the Nye County Action until its pending motions in the Federal Action were complete. (Vol. I PA 83). On January 24, 2019, the Nye County Court granted TSE's motion to stay the three remaining causes of action against TSE in the Nye County Action: (1) breach of contract; (2) breach of implied covenant of good faith and fair dealing, and (3) violations of NRS 624, until such time as the Federal Court rules on Brahma's and TSE's pending motions filed in the Federal Action. (Vol. II PA 265).

On April 19, 2019, Brahma filed a Second Amended Complaint and First-Amended Third Party Complaint. (Vol. II PA 274). The only claim against Cobra is the surety bond claim.

On April 30, 2019, the Nye County Court granted H&E's motion to intervene, permitting H&E to join this lawsuit as a lien claimant pursuant to NRS 108.239(3). H&E's claims are derivative of Brahma's claims against TSE. (Vol. II PA 288)

On September 25, 2019, the court in the Federal Action enjoined Brahma from litigating its contract claims in the Nye County Action, finding that Brahma "fraudulently filed [in the Nye County Court] in an attempt to subvert the removal of a prior case." (Vol. II PA 354; 362-63). As such, Brahma is currently enjoined from litigating its contract claims against TSE in the Nye County Action. As a result of the Federal Court's injunction, TSE has refused to participate in discovery.

D. Cobra's Motion to Stay and Motion to Intervene

TSE's injunction preventing Brahma from pursuing its claims against TSE in the Nye County Action directly affects Cobra's ability to defend itself. Brahma's claim against Cobra is simply as principal on a bond that Brahma alleges TSE owes. Brahma may not collect on that bond without proving its claims. Thus, if Brahma's claim against TSE fails, its claim against Cobra similarly fails. In its counterclaims, TSE alleged that Brahma had submitted numerous invoices that contained fraudulent misrepresentations regarding the amount of money Brahma was due from TSE for the work on the Plant. TSE alleged that it relied on Brahma's false representations in making payments to Brahma and was, therefore, damaged by Brahma's misrepresentations.

Because the claim against Cobra is wholly dependent on the claims against TSE, and those claims have been enjoined by the Federal Action, the wholly dependent surety claim against Cobra should similarly be stayed. Therefore, on October 18, 2019, Cobra moved for a stay of the Nye County Action pending the outcome of the Federal Action between Brahma and TSE. (Vol. I PA 364; Vol. III PA 617). Cobra set forth facts and argument establishing that a stay was justified because: (1) Brahma will not be prejudiced by a stay because a stay will not significantly delay any relief to which Brahma may be entitled; (2) any unnecessary delay has been the result of Brahma's forum shopping efforts, as found by the

Federal Court; (3) a stay will promote the orderly course of justice; (4) Cobra faces the real possibility of duplicative discovery and the risk of conflicting decisions and unjust results if the Nye County Action proceeds simultaneously with the Federal Action; and (5) Cobra will face hardship and inequity if forced to proceed with the defense of Brahma's non-substantive claims against Cobra in the Nye County Action while the case is enjoined as to TSE (*i.e.*, the only party against which Brahma has any substantive claims).

Contemporaneous with the filing of the Motion to Stay in the Nye County Action, on October 18, 2019, Cobra also moved to intervene in the Federal Action. (Vol. II PA 381). Although Brahma's claims are against TSE, the Cobra Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE. While TSE has raised affirmative defenses and counter-claims that sound in fraud in response to Brahma's claims in the Federal Action, Cobra still bears all the downside risk. Cobra's motion to intervene remains pending.

E. The Nye County Court's Decision Denying Cobra's Motion to Stay

On January 10, 2020, the Nye County Court denied Cobra's Motion to Stay. (Vol. III PA 706). The Court found that Cobra (not TSE) was the surety bond principal against whom Brahma had a claim and against whom Brahma was seeking a judgment. (*Id.* ¶ 4.) The Court found that although Brahma also had claims against TSE, and those contract-based claims were removed to the Federal Action and

resided there exclusively by virtue of the Federal Court's injunction, there was nothing in Nevada's lien statute that obligated Brahma to pursue its claim on the surety bond in the Federal Action. (*Id.* ¶ 5.) Accordingly, the Nye County Court did not find that TSE was a necessary or indispensable party as it related to Brahma's claims on the surety bond and denied Cobra's Motion to Stay.

III. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

The Nye County Court erred in its interpretation of Nevada lien law and abused its discretion by denying Cobra's Motion to Stay. The Nye County Court incorrectly found that the Nye County Action could proceed without TSE as a party. In so doing, the Nye County Court overlooked the resulting inefficiency and prejudice to Cobra, and the unjustifiable risk of conflicting decisions in the Federal Action and Nye County Action. Indeed, that prejudice has already manifested itself, with TSE refusing to respond to discovery requests and Cobra thereby unable to obtain essential evidence relevant to its defenses. If allowed to continue, prejudice to Cobra will only increase as it is subjected to duplicative litigation and discovery, and a significant risk of inconsistent judgments. This Court should therefore entertain this petition on the merits and issue a writ of mandamus or prohibition directing the Nye County Action to be stayed pending resolution of the proceedings in the Federal Action.

A. This Writ Petition Should Be Entertained on the Merits

“A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.” *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citing NRS 34.160). This Court has discretion whether to entertain a writ petition on its merits and issue a writ of mandamus or prohibition. *See Okada v. Eighth Judicial Dist. Court*, 408 P.3d 566, 569 (Nev. 2018). Nevada courts must entertain writ petitions when a plain, speedy, and adequate remedy in the ordinary course of law does not exist. *See* NRS 34.170; NRS 34.330. Writ petitions are entertained where all or some of the following considerations are present: (i) there are no factual disputes, (ii) the district court acted contrary to clear authority, (iii) an important issue of law needs clarification, (iv) the petition gives the Court an opportunity to define the parameters of a statute, (v) public policy will be served by the Court’s invocation of its original jurisdiction, and (vi) sound judicial economy and administration favor entertaining the petition. *See, e.g., Okada*, 408 P.3d at 569; *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 383 P.3d 246, 248 (Nev. 2016); *Int’l Game Tech.*, 124 Nev. at 197, 179 P.3d at 559. Under certain circumstances, the Nevada Supreme Court has held that “the availability of a direct appeal from a final judgment may not always be an adequate and speedy remedy.” *Okada*, 408 P.3d at 569.

“Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings’ status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented.” *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 475, 168 P.3d 731, 736 (2007).

The present petition meets these criteria. There are no factual disputes concerning the status of the Nye County Action and the related Federal Action. The Nye County Court acted contrary to clear authority meriting a stay and created a scenario which is repugnant to the principles of justice, due process, and procedural economy. Cobra’s Motion to Stay, by its very nature, cannot wait until a future appeal. Cobra is presently subjected to prejudice and will continue to suffer prejudice so long as it is forced to litigate the claim on the surety bond without access to evidence from TSE, and while the principal issues in dispute are being resolved in the Federal Action. If the Nye County Action proceeds, without the benefits of discovery by TSE, there is a very real possibility that Brahma obtains a favorable judgment against Cobra and obtains access to the bond, without first proving that TSE owes it any money. If the Federal Court later determines that Brahma is not entitled to these funds, Cobra will have already wasted judicial resources litigating against Brahma in the Nye County Action, and be forced to further litigate against Brahma to return the funds. Thus, sound judicial economy favors entertaining the

petition at this time, and granting a stay of the Nye County Action pending resolution of the Federal Action.

B. The Court Should Issue a Writ of Mandamus or Prohibition Staying the Nye County Action

1. Standard of Review

The Nevada Supreme Court has long held that in the context of a writ petition, a district court order is generally reviewed “for an arbitrary or capricious abuse of discretion,” while questions of law, such as questions of statutory interpretation and subject matter jurisdiction, are reviewed de novo. *See Helfstein v. Eighth Judicial Dist. Court*, 362 P.3d 91, 94 (2015) (statutory interpretation); *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (subject matter jurisdiction); *see also* NRAP 21. Here, the Nye County Court’s interpretation of NRS 108.2421 is reviewed de novo, and its denial of Cobra’s Motion to Stay is reviewed for abuse of discretion.

2. The Nye County Court Erred by Concluding that Brahma’s Action Against The Surety Bond Did Not Require TSE To Be Joined

NRS § 108.2421 provides that Brahma, as a lien claimant for Work performed in this county, is “entitled to bring an action against the principal and surety on the surety bond **and the lien claimant’s debtor**” in this Court. NRS § 108.2421 (emphasis added). At oral argument in the Federal Action, Brahma confirmed that the “lien claim’s debtor in this case is TSE.” (Vol. II PA 328 at 19:18-19:19). However, Brahma’s claims against TSE are no longer before the Nye County Court

because of Brahma's attempt to forum shop. The Federal Court's injunction decision was a direct response to Brahma's gamesmanship:

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

(Vol. II PA 362). Still further, the Federal Court found that Brahma "fraudulently filed [in the Nye County Court] in an attempt to subvert the removal of a prior case." (*Id.*, at 362-63)

The Nye County Court improperly interpreted NRS 108.2421, concluding that Brahma's action against the surety bond did not require TSE to be joined. The Nye County Court improperly credited Brahma's proffered interpretation of the Nevada lien statute, allowing Brahma to sue for the full amount of the Surety Bond without reaching the merits of its claim to the money in the Federal Action. (Vol. II PA 404-09). This is not a case falling under NRS § 108.222(1)(a), where (1) a contract provides for a "specific price"; (2) there is no dispute about performance; and (3) the lien claimant is simply seeking the "balance of the price agreed upon for such work, material or equipment." *See* NRS § 108.222(1)(a). In such actions, the contractor's "speedy remedy to secure payment" is limited to the contract price. *See California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 146, 67 P.3d 328, 330-31 (2003)

(citing NRS §§ 108.222, 108.235(1), 108.239(5)). The speed of such a proceeding is necessarily frustrated where the Nye County Court is “required to hear evidence regarding the disputed costs of materials, labor, overhead and profit beyond the contract price.” *Id.* at 331. Indeed, this is why amounts in excess of any price specifically agreed to in a contract or written change orders “fall[] outside [this subsection] of the mechanic’s lien statute.” *See SMC Constr. Co. v. Rex Moore Grp., Inc.*, No. 317CV00470LRHVPC, 2017 WL 4227940, at *4 (D. Nev. Sept. 21, 2017).

Because there is no set contract price for the Work performed, Brahma must seek recovery under NRS § 108.222(1)(b), which only permits Brahma to collect an “amount equal to the fair market value of such work, material or equipment . . . including a reasonable allowance for overhead and a profit.” *See* NRS § 108.222(1)(b); *Cal. Commercial*, 67 P.3d at 331–32. The only way to determine the fair market value of Brahma’s Work for TSE is through litigation of the dispute between Brahma and TSE, including TSE’s claims that Brahma engaged in fraud (*i.e.*, the scope of the litigation currently pending in the *Federal Action*). The “fair market value” of Brahma’s Work for TSE is heavily disputed. TSE’s counterclaims in the Federal Action allege several state law claims against Brahma: breach of contract, breach of implied covenant of good faith and fair dealing, declaratory relief, unjust enrichment, fraudulent/intentional misrepresentation, and negligent misrepresentation. (Vol. I PA 43). In its fraud counterclaim, among other things,

TSE alleges that Brahma submitted numerous invoices that contained fraudulent misrepresentations regarding the amount of money Brahma was due from TSE for the Work at the Plant. TSE alleged that it relied on Brahma's false representations and made payments to Brahma it would not have made otherwise. TSE also alleged that Brahma supplied false information and made false representations to TSE because Brahma had a pecuniary interest in inducing TSE to pay Brahma amounts to which Brahma was not entitled. TSE alleged that it relied on Brahma's false representations in making payments to Brahma and was, therefore, damaged by Brahma's negligent misrepresentations. The Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE, if anything, and nothing more.

The Nye County Court's erroneous interpretation of the statute overlooked these considerations. Its conclusion was based on the anecdotal personal experience of Judge Elliott, who recalled that back during the 2007-2009 financial crisis, he presided over many actions against surety bonds involving contractor-debtors that were insolvent or otherwise ceased to exist. (Vol. III PA 687-88, 706 at ¶ 7). That is not the case here, where Brahma is litigating its claims against the debtor (TSE) involving the same subject matter in an entirely different litigation – the Federal Action. The Federal Action will resolve what amount, if any, Brahma is entitled to

collect. As such, Brahma's claims against Cobra in the Nye County Action cannot proceed until the underlying claims in the Federal Action are determined.

3. The Nye County Court Abused its Discretion by Denying the Motion to Stay

The Nye County Court abused its discretion by ignoring Cobra's arguments that: (1) Brahma will not be prejudiced by a stay because a stay will not significantly delay any relief to which Brahma may be entitled; (2) any unnecessary delay has been the result of Brahma's forum shopping efforts, as found by the Federal Court; (3) a stay will promote the orderly course of justice; (4) Cobra faces the real possibility of duplicative discovery and the risk of conflicting decisions and unjust results if the Nye County Action proceeds simultaneously with the Federal Action; and (5) Cobra will face hardship and inequity if forced to proceed with the defense of Brahma's non-substantive claims against Cobra in the Nye County Action while the case is enjoined as to TSE (*i.e.*, the only party against which Brahma has any substantive claims). (Vol. II PA 364; Vol. III PA 681, 706). The Nye County Court provided no explanation for why it chose to ignore these factors in its analysis, *see id.*, which renders the decision arbitrary and capricious. *See Ramos v. Ramos*, No. 73398-COA, 2019 WL 1581429, at *1 (Nev. App. Apr. 11, 2019) (explaining that a decision without explanation hampers appellate review and stating "[b]ased on these summary conclusions and the record on appeal, this court cannot conclude that the district court's decision was made for the appropriate reasons"); *Nunnery v. State*,

127 Nev. 749, 766, 263 P.3d 235, 247 (2011) (providing that an “abuse of discretion occurs if the district court’s decision is arbitrary or capricious”).

(i) A Stay Will Preserve Judicial Economy and Prevent Inconsistent Decisions Because the Federal Action Will Determine What, If Anything, Brahma is Entitled to Recover

In determining whether to grant a stay, the Nye County Court should have considered “the orderly course of justice measures in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). The Nye County Court however did not address this factor either at oral argument or anywhere in its Order. (Vol. III PA 681, 706). Courts in the United States District Court of Nevada have granted stays when there is a pending decision which would narrow the issues in a case. *See, e.g., Brown v. Credit One Bank, N.A.*, No.: 2:17-cv-00786-JAD-VCF, 2018 WL 1697801, at *4 (D. Nev. Apr. 6, 2018) (granting motion to stay pending decision from the D.C. Circuit would help to “simplify and streamline the proceedings and promote the efficient use of the parties’ and the court’s resources”); *Bank of N.Y. Mellon v. 4655 Gracemont Ave. Trust*, No. 2:17-cv-00063-JAD-PAL, 2018 WL 1697800, at *3 (D. Nev. Apr. 5, 2018) (granting a motion to stay pending the Nevada Supreme Court’s acceptance of a certified question of statutory interpretation which will “prevent unnecessary briefing and the expenditures of time, attorney’s fees, and resources that

could be wasted”). Staying the claims as to Cobra will promote the orderly course of justice and simplify issues because the underlying issues to the Nye County Action—whether Brahma is owed any money from TSE, including whether Brahma fraudulently invoiced for its Work at the Plant—are currently being litigated in the Federal Action. Thus, the amount that Cobra owes Brahma, if any, is directly tied to TSE’s claims in the Federal Action and entirely dependent on those claims. If TSE succeeds on its fraud claims, then Cobra is not liable under the bond. Thus, if Brahma were allowed to proceed against Cobra in respect to the bond in the Nye County Action while the Federal Action is pending, there would be significant risk of conflicting decisions and unjust results. As such, allowing Brahma’s lien claim against Cobra to proceed before the underlying claim is litigated in the Federal Action would be inefficient and contrary to the orderly course of justice.

Moreover, the claims against Cobra should be stayed to avoid unnecessary duplicative discovery and the risk of conflicting decisions. *See, e.g. Knepper v. Equifax Info. Servs.*, No. 2:17-CV-02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2, 2017) (granting a motion to stay the action, which would “limit hardship or inequity to [defendant] from unnecessary proceedings, inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple jurisdictions.”); *Tobler v. DePuy Orthopedics, Inc.*, No. 2:12-cv-01167-LDG (RJJ), 2012 WL 3598291, at *2-3 (D. Nev. Aug. 17, 2012) (granting a stay pending a multi-district

litigation transfer order to avoid duplicative discovery and pretrial management efforts). In *Knepper*, the court granted a stay when plaintiffs in related cases filed a motion for consolidation and transfer. The court granted the stay, finding that doing so would limit hardship and inequity to defendants from “unnecessary proceedings, inconsistent rules, duplicative discovery, and having to re-litigate claims in multiple jurisdictions.” *Id.* at *3. Courts have similarly stayed cases when doing so “is the most efficient way to allow [] uncertainties to resolve”, especially when the parties face “duplicative discovery” where there was a potential to need to “re-open discovery and coordinate two or more cases.” *Honghui Deng v. Nevada ex rel. Bd of Regents*, No. 2:17-cv-03019-APG-VCF, 2019 U.S. Dist. LEXIS 36716, at *6 (D. Nev. Mar. 7, 2019) (granting a motion to stay when a state court case contained a federal claim and removal was possible, and there were already similar state cases).

Currently, Brahma is noticing depositions and seeking discovery from Cobra in the Nye County Action in its effort to support its claims against TSE. However, Brahma’s claims against TSE are being litigated in the Federal Action. If this Court does not stay the claims against Cobra in the Nye County Action, Cobra faces the real possibility of duplicative discovery down the road. Moreover, if Brahma’s claims against Cobra proceed in the Nye County Action, while Brahma’s claims against TSE simultaneously proceed in the Federal Action, the parties face the risk of inconsistent and conflicting rulings. Such cost is unnecessary and contrary to

judicial fairness and efficiency. Thus, the Nye County Court abused its discretion when it did not address or consider the redundant discovery and the risk of conflicting decisions that would result from a denial of Cobra's Motion to Stay.

Lastly, on October 18, 2019, Cobra filed a motion to intervene in the Federal Action, where Brahma and TSE's claims are currently being heard. (Vol. II 381). This motion is currently pending. Courts have granted motions to stay pending a motion to intervene in a related case which bears upon the case. *See, e.g., Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2009 WL 5184357, at *2 (D. Conn. Dec. 23, 2009) (granting plaintiff's motion to stay when plaintiff filed a motion to intervene in a related case; thus, "[i]n light of the uncertainty regarding in which case [plaintiff's] claims will be heard, if at all, it is prudent to stay the bulk of discovery until [plaintiff's] motion to intervene" is decided). Similarly, proceedings may be stayed "pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Where a stay is sought pending the resolution of another action, the court need not find that two cases possess identical issues; a finding that the issues are substantially similar is sufficient to support a stay. *See Landis*, 299 U.S. at 254. Courts should weigh the competing interests of the parties. *See id.* at 254-55. The issues involved in the pending proceedings need not be "controlling of the action before the court" for a stay to be ordered. *See Leyva*, 593 F.2d at 864.

The claims in the Federal Action are directly and inextricably tied to and impact the claims in the Nye County Action. By denying Cobra's motion to stay without considering or addressing this issue, the Nye County Court abused its discretion. As the Federal Court recognized when it enjoined Brahma from litigating its contract claims against TSE in the Nye County Action, the Federal Action is the more appropriate forum for this dispute. Currently, the underlying substantive claims—what money, if any, Brahma is owed for the work it performed for TSE—is being litigated in the Federal Action. Separately, Brahma is suing Cobra as principal on the related bond in the Nye County Action. It necessarily follows that the Federal Action must first determine the monetary amount Brahma is owed before Brahma can move to collect on the bond from Cobra. By not considering the procedural mess that Brahma has created, the Nye County Court abused its discretion. The claims against Cobra should be stayed pending the outcome of the Federal Action, as this will promote the orderly course of justice by simplifying, or removing, the issues in the Nye County Action.

(ii) The Balance of Hardships Favors a Stay

Moreover, the Nye County Court abused its discretion when it failed to consider the hardship that Cobra faces if the Nye County Action proceeds. Although a stay will not cause Brahma any harm, allowing this case to move forward will cause hardship and inequity to Cobra. The Nye County Court abused its discretion

when it did not analyze this factor in its Order. Given how inextricably linked Cobra's defenses are to the claims against TSE, which are currently being litigated in Federal Court, the Nye County Court erred when it did not stay the proceedings against Cobra. Brahma's claim against Cobra is intrinsically tied to its claim against TSE; if Brahma is unable to show that TSE owes it money, then Cobra is not liable under the bond. Inasmuch as Brahma will have to prove its case against TSE before it may proceed against the bond, it would make little sense to proceed against Cobra in isolation before Brahma's related claims against TSE are decided. If Brahma were to be allowed to proceed against Cobra in respect to the bond while the Federal Court ruling is pending, there would be significant risk of conflicting decisions and unjust results against the orderly course of justice.

Courts in Nevada and elsewhere have stayed proceedings pending resolution of a related, underlying claim.⁶ For example, in *Specrite Design, LLC v. Elli N.Y.*

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

Design Corp., No. 16 Civ. 6154 (ER), 2017 WL 3105859 (S.D.N.Y. July 20, 2017), a subcontractor sued, in federal court, the prime contractor and lien fund holder on a project, alleging that the contractor did not pay for labor performed and materials the subcontractor furnished. In addition to the federal case, there was a related state court lawsuit for breach of the subcontract. *Id.* at *1. The contractor moved to stay the federal case pending resolution of the state court action because that court would determine if the contractor had defaulted. *Id.* at *2. The court granted the motion to stay, finding “the right to a lien can only be enforced to the extent of the amount due or to become due to the contractor or subcontractor on whose credit the labor or materials are furnished under his contract.” *Id.* at *4. The court went on to find that “even though the Lien was discharged by the issuance of [the surety bond] the same test for the validity of the lien and the amount of the lien fund applies.” *Id.* Thus, because “an action to enforce a discharged lien is in substance an action to test the validity of the lien and to enforce the lien to the extent it is valid”, the court first needed to determine in state court whether the contractor defaulted. *Id.* As a result, the court found that granting the stay would balance the interests and prejudice that would result if it had not been granted, as well as promote judicial efficiency and

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).

minimized the possibility of conflicts between different courts; indeed, not granting a stay “would lead to unnecessary litigation that is time-consuming for this Court and for the parties.” *Id.* at *5.

Similarly here, the Federal Court must *first* determine whether TSE is liable for the payments to Brahma prior to Brahma being able to foreclose on the lien against Cobra’s bond. If the Federal Court determines that TSE is not liable for the payments to Brahma, then Brahma cannot foreclose on the lien against Cobra’s bond. In enjoining Brahma from litigating its contract claims against TSE in the Nye County Action, the Federal Court found that this action was “fraudulently filed in an attempt to subvert the removal of a prior case.” (Vol. II PA 354; 362-63) (citing *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987)). Further, the Federal Court found that “there would be immediate and irreparable injury to TSE for which there would not be an adequate remedy at law if Brahma’s behavior is rewarded.” *Id.* Given that the underlying claims against TSE are enjoined, resulting in TSE’s refusal to participate in discovery, Cobra will be inherently harmed if it is forced to continue litigation without TSE’s participation, including discovery, in the Nye County Action, resulting in a significant risk of conflicting decisions and unjust results against the orderly course of justice. Because the Nye County Court did not take this hardship into consideration, it abused its discretion when it denied Cobra’s Motion to Stay.

IV. CONCLUSION

For the foregoing reasons, and the reasons stated in Cobra's Motion to Stay and subsequent Reply, Cobra's Writ of Mandamus, or, Alternatively, Prohibition, should be granted and the Nye County Action should be stayed as to all defendants pending resolution of the Federal Action.

Dated: February 28, 2020

/s/ GEOFFREY CRISP

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VERIFICATION

1. I, the undersigned, declare as follows:
2. I am a lawyer duly admitted to practice before the courts of this State and I represent Petitioners Cobra Thermosolar Plants, Inc. and American Home Assurance Company in this proceeding.
3. I verify that I have read the foregoing Petition for Writ of Mandamus, or, Alternatively, Prohibition and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated: February 28, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft WORD 2016 in 14-point Times New Roman typeface.

I further certify that this Petition complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Petition exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read this **Petition for Writ of Mandamus, or, Alternatively, Prohibition**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I

understand that I may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: February 28, 2020

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 28th day of February, 2020, the foregoing **Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Petition for Writ of Mandamus, or, Alternatively, Prohibition and Exhibits in Support of Petition for Writ of Mandate, Prohibition and/or Other Appropriate Relief, Vols. I, II, and III**, were e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

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