

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

v.

Brahma Group, Inc.,
Respondent

Electronically Filed
Oct 03 2019 04:22 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Appeal
Fifth Judicial District Court
The Honorable Steven P. Elliott
Case No. CV 39348

**APPELLANT'S APPENDIX
VOLUME 8**

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FILED
FIFTH JUDICIAL DISTRICT

NOV 26 2018

Nye County Clerk
Deputy

Veronica Aguilar

10
11 **IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA**
12 **IN AND FOR THE COUNTY OF NYE**

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.
19
20

Case No. CV 39348
Dept. No. 2

**TONOPAH SOLAR ENERGY, LLC'S
OPPOSITION TO BRAHMA GROUP,
INC.'S MOTION FOR ATTORNEY FEES
AND COSTS PURSUANT TO NRS
108.2275(6)(C)**

21 On October 31, 2018, Brahma Group, Inc. ("Brahma") served its Motion for Attorney
22 Fees and Costs Pursuant to NRS 108.2275(6)(c) ("Motion for Attorney Fees"). Tonopah Solar
23 Energy, LLC ("TSE"), by and through its undersigned counsel, hereby opposes the Motion for
24 Attorney Fees. As explained below, the fees sought by Brahma should be significantly reduced
25 and the costs sought by Brahma should be denied.
26
27
28



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Brahma has moved to recover \$77,937.50 in attorney fees and \$479.84 in costs for opposing a single motion—the motion to expunge filed by TSE. While Brahma may recover fees and costs for defending against the motion, the fees sought must be reasonable and the costs sought must be supported. The fees sought by Brahma are unreasonable. The costs sought by Brahma are not supported. Thus, the fees must be reduced and the costs denied.

The hourly associate rate charged by Brahma's counsel should be reduced. Courts in Nevada generally find that parties cannot recover attorney fees in excess of \$250 an hour for an experienced associate. Brahma's counsel charged \$350 an hour for an experienced associate. In addition, Brahma's counsel identified an attorney on the case as a partner, even though he is listed as an associate on its firm's website. Brahma should not be able to recover more than \$250 an hour for associates' work.

The amount of hours charged by Brahma's counsel should be reduced. Brahma's invoice features all of the hallmarks of excessive billing: block billing, overstaffing, duplicative time entries, excessive time, and vague entries. For instance, Brahma's counsel has allegedly billed 206.90 hours, 122.40 of which are partner hours, to prepare an opposition to TSE's motion to expunge, prepare for and attend a hearing on the motion, draft a proposed order, and draft a form motion for attorney fees. In contrast, TSE's counsel billed 27 partner hours on work pertaining to the same motion. Indeed, Brahma's counsel appears to have billed 59.50 hours preparing for and attending the hearing on the motion and 28.70 hours drafting its motion for attorney fees, most of which is duplicative of motions for attorney fees previously filed by Brahma's counsel. The defects with Brahma's counsel's time entries are countless.

Taking into account these defects, this Court should apply an across the board 70 percent reduction to the fees sought by Brahma. Under the circumstances, this would be reasonable, generous, and supported by the *Brunzell* factors. Accordingly, this Court should award Brahma no more than \$23,381.25 in attorney fees.



1 The costs sought by Brahma should be denied. In Nevada, costs must be supported.
2 Brahma provides no documentation or argument to support the costs it seeks to recover. Thus,
3 Brahma's Motion for Attorney Fees should be granted in part and denied in part.

4 II. STATEMENT OF PERTINENT FACTS

5 Brahma alleges that its counsel billed 206.90 hours between June 13, 2018 and October
6 31, 2018 on work pertaining to opposing the motion to expunge filed by TSE ("Motion to
7 Expunge"). See Annotated Billing Entries, attached hereto as **Exhibit 1** (referred to herein as
8 Billing Entry Nos.).¹ Brahma's counsel billed 122.4 partner hours (three partners), 75.7
9 associate hours, and 8.8 staff hours on opposing a single motion. As a point of comparison,
10 TSE's counsel billed merely 27 partner hours on the same scope of work. See Declaration of
11 Ryan T. Gormley with invoice, attached hereto as **Exhibit 2**. As depicted below, the work
12 performed by Brahma's counsel splits into three time periods: preparing the opposition,
13 preparing for the hearing, and post-hearing work.

14 A. Brahma's counsel bills 82.4 hours preparing an opposition to TSE's Motion to 15 Expunge.

16 From June 13, 2018 to July 24, 2018, Brahma worked on preparing an opposition to
17 TSE's Motion to Expunge. On June 11, 2018, TSE filed its Motion to Expunge the Mechanic's
18 Lien Recorded by Brahma ("Motion to Expunge"). See Motion to Expunge, attached hereto as
19 **Exhibit 3**. The motion focused on legal arguments pertaining to notice and recording
20 requirements. *Id.* Notably, the motion did not contest the amount of the lien. *Id.* The motion
21 contained approximately 9 pages of content and seven exhibits. *Id.*

22 On July 24, 2018, Brahma filed an opposition to TSE's Motion to Expunge. See
23 Brahma's Opposition to TSE's Motion to Expunge, attached hereto as **Exhibit 4**. The opposition
24 featured 19 pages of content, approximately five pages of which consisted of merely block-
25 quotes. *Id.* Eleven exhibits were attached to the opposition. *Id.* The exhibits consisted of easily

26
27 ¹ This exhibit consists of the invoice submitted by Brahma's counsel in support of its motion for
28 attorney fees with numbers written next to each time entry, so that it is easier to reference specific time
entries.



1 ascertainable documents and public filings, most of which were included with TSE's Motion to
2 Expunge: a grant deed (Exhibit 1), a Nye County Assessor's Parcel printout (Exhibit 2), a right-
3 of-way lease/grant (Exhibit 3), a deed of trust (Exhibit 4), the Agreement between Brahma and
4 TSE (Exhibit 5-included with Motion to Expunge), Brahma's original lien (Exhibit 6-included
5 with Motion to Expunge), first amended lien (Exhibit 7-included with Motion to Expunge), re-
6 recorded first amended lien (Exhibit 8-included with Motion to Expunge), second amended lien
7 (Exhibit 9-included with Motion to Expunge), and third amended lien (Exhibit 10), and a website
8 printout from the Nye County Assessor's Website (Exhibit 11). *Id.*

9 For this period, Brahma alleges that its counsel billed 82.4 hours on work pertaining to
10 TSE's Motion to Expunge. *See* Billing Entry Nos. 1-49. It appears that Brahma's counsel billed
11 41 hours on purely drafting and revising the opposition (i.e., not including factual investigation
12 or legal research). *See* Billing Entry Nos. 29-33, 36, 37, 39-41, 44, 46-48.² Partners Mr. Peel,
13 Mr. Zimbelman, and Mr. Boswell billed 19.8, 14.4, and 8.1 hours, respectively, on work
14 allegedly pertaining to TSE's Motion to Expunge during this period.

15 **B. Brahma's counsel bills 79.6 hours between filing the opposition and attending the**
16 **hearing on TSE's Motion to Expunge.**

17 From July 25, 2018, the day after Brahma filed its opposition, to September 12, 2018, the
18 day of the hearing on TSE's Motion to Expunge, Brahma primarily worked on and assessed a
19 few miscellaneous filings and prepared for and attended the hearing on TSE's Motion to
20 Expunge.

21 TSE filed a 12 page reply in support of its Motion to Expunge on July 31, 2018. Brahma
22 filed a three page supplement in support of its opposition on August 3, 2018. TSE filed a half
23 page errata to its reply on August 14, 2018. Brahma filed a three page long statement of
24 supplemental authorities in support of its opposition, which consisted of block quotes from six

25
26 ² Brahma will likely contend that these entries did not entirely consist of time for drafting and
27 revising the opposition. But, it is impossible to tell how much time was spent on drafting and revising
28 because Brahma uses block billing time entries. This issue exemplifies a significant defect with block
billing, it makes it impossible to tell how much time was spent on specific tasks, which is why courts, as
discussed below, recognize it as a means to pad bills and disguise excessive billing.



1 cases on August 15, 2018. On September 6, 2018, TSE filed a four and a half page response to
2 the statement of supplemental authorities filed by Brahma. On September 11, 2018, Brahma
3 filed a three page affidavit from Mr. Peel requesting discovery related to TSE's Motion to
4 Expunge. On September 12, 2018, the Court heard arguments on TSE's Motion to Expunge.
5 Three attorneys prepared for and attended the hearing on Brahma's behalf. The Court denied the
6 motion and directed Brahma to prepare the order.

7 For this period, Brahma alleges that its counsel billed 79.60 hours on work pertaining to
8 TSE's Motion to Expunge. *See* Billing Entry Nos. 50-95. Brahma's counsel billed 59.50 hours
9 preparing for and attending the hearing. *See* Billing Entry Nos. 57, 58, 61, 64-66, 88, 91, 93-95.
10 Partners Mr. Peel and Mr. Zimbelman billed 17.80 and 39.20 hours, respectively, on work
11 allegedly pertaining to TSE's Motion to Expunge during this period.

12 **C. Brahma's counsel bills 44.9 hours after the hearing.**

13 From September 13, 2018, the day after the hearing, to October 31, 2018, the day Brahma
14 filed its motion for attorney fees, Brahma primarily prepared a proposed order denying TSE's
15 Motion to Expunge and drafted its Motion for Attorney Fees. Brahma submitted its proposed
16 order on October 12, 2018. It was six pages long. Brahma filed its Motion for Attorney Fees on
17 October 31, 2018. It features about 11 pages of routine content, which is mostly duplicative of
18 motions for attorney fees previously filed by Peel Brimley. *See* Motion for Attorney Fees filed
19 by Peel Brimley in Case No. A571228, attached hereto as **Exhibit 5**.

20 For this period, Brahma alleges that its counsel billed 44.90 hours on work pertaining to
21 TSE's Motion to Expunge. *See* Billing Entry Nos. 96-129. Brahma's counsel billed 13.60 hours
22 drafting, revising, and discussing the proposed order. *See* Billing Entry Nos. 96, 97, 100, 104-
23 109, 112, 116-120, 122, 123. Brahma's counsel billed 28.7 hours related to drafting and revising
24 its Motion for Attorney Fees. *See* Billing Entry Nos. 98, 99, 102, 103, 111, 115, 125-129.
25 Partners Mr. Peel and Mr. Zimbelman billed 14 and 9.10 hours, respectively, on work allegedly
26 pertaining to TSE's Motion to Expunge during this period.

D. During this same time period, there were extensive proceedings that did not relate to TSE's Motion to Expunge.

From June to October 2018, the parties engaged in extensive litigation that did not pertain to TSE's Motion to Expunge. On July 17, 2018, Brahma filed a complaint against TSE in the Eighth Judicial District Court in Clark County, Nevada. *See* Complaint, attached hereto as **Exhibit 6**. TSE removed the complaint to federal court. *See* Notice of Removal, attached hereto as **Exhibit 7**. In September, Brahma filed a fourth amended mechanic's lien. *See* Lien, attached hereto as **Exhibit 8**. On September 17, 2018, TSE answered the complaint and filed a counterclaim against Brahma. *See* Answer, attached hereto as **Exhibit 9**. On September 21, 2018, Brahma filed a lien foreclosure complaint in Nye County. *See* Complaint, attached hereto as **Exhibit 10**. On September 25, 2018, Brahma filed an amended complaint in federal court, *see* Amended Complaint, attached hereto as **Exhibit 11**, and an amended counter-complaint and third-party complaint in Nye County, *see* Counter-Complaint, attached hereto as **Exhibit 12**. On October 5, 2018, Brahma answered TSE's counterclaim. *See* Answer, attached hereto as **Exhibit 13**. On October 16, 2018, Brahma filed a motion for stay, or alternatively to amend the complaint in federal court. *See* Motion, attached hereto as **Exhibit 14**. On October 18, 2018 TSE filed a Motion to Strike and Dismiss in Nye County and a Motion for Injunction and to Strike in federal court. *See* Motions, attached hereto as **Exhibit 15**.

III. LEGAL ARGUMENT

As explained below, this Court should significantly reduce the attorney fees sought by Brahma because they are unreasonable. Further, this Court should not award the costs sought by Brahma because they are not supported.

A. The attorney fees sought by Brahma must be significantly reduced because they are unreasonable.

Courts must only award "reasonable" attorney fees. *See O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7 at *6 (Nev. App. 2018); *see also* NRS 108.2275 (6)(c) ("... the court shall make an order awarding costs and reasonable attorney's fees . . ."). To determine the amount of attorney fees to award, courts may use a "lodestar" or a contingency calculation method. *See Hsu v. County of Clark*, 123 Nev. 625, 636, 173 P.3d 724, 732 (2007); *Shuette v.*



Beazer Homes Holdings Corp., 121 Nev. 837, 864, 124 P.3d 530, 548 (2005). A contingency calculation is not at issue. The “lodestar” method involves multiplying “the number of hours reasonably spent on the case by a reasonable hourly rate.” *Herbst v. Humana Health Ins. of Nevada, Inc.*, 105 Nev. 586, 590, 781 P.2d 762, 764 (1989).

Courts need not authorize an award of attorney fees exclusively from “billing records or hourly statements.” See *O’Connell*, 134 Nev. Adv. Op. 7 at *7. In determining the reasonableness of fees sought, courts should consider the following *Brunzell* factors:

(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the important of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.

Brunzell v. Golden Gate Nat. Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (Nev. 1969). The party moving for attorney fees must carry the burden of showing the reasonableness of the fees sought. See *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986).

Here, the attorney fees sought by Brahma are unreasonable for multiple reasons. First, the associate rates exceed what has been found reasonable by courts in Nevada. Second, the amount of hours billed is unreasonable in light of the character of the work, the work actually performed, and the benefits derived from the work.

1. The associate rates charged by Brahma’s counsel must be reduced.

Courts in Nevada generally find that parties cannot recover attorney fees in excess of \$250 an hour for an experienced associate. *Chemeon Surface Tech., LLC v. Metalast Int’l, Inc.*, No. 315CV00294MMDVPC, 2017 WL 2434296, at *1 (D. Nev. June 5, 2017) (“The court therefore surveys recent orders awarding attorney’s fees and finds that the following are reasonable hourly rates: \$375 for a partner; \$250 for an associate; and \$125 for a paralegal.”); *CH2E Nevada LLC v. Mahjoob*, No. 215CV00694JCMNJK, 2017 WL 1228405, at *3 (D. Nev. Mar. 31, 2017); *Crusher Designs, LLC v. Atlas Copco Powercrusher GmbH*, 2015 WL 6163443, *2 (D.Nev. Oct. 20, 2015) (“Rate determinations in other cases in the District of Nevada have



1 found hourly rates as much as \$450 for partners and \$250 for an experienced associate to be the
2 prevailing market rate in this forum.”)

3 Here, the associate rates charged by Brahma’s counsel should be reduced. Brahma is
4 seeking to recover \$350 an hour for the work performed by Mr. Ronald Cox, an experienced
5 associate. Mr. Cox’s hourly rate should be reduced to \$250. This also aligns with the associate
6 rates charged by Brahma’s counsel in another matter in which it moved for attorney fees this
7 year. See **Exhibit 5** (seeking approximately \$250 an hour for the work of Mr. Cox). The fees
8 sought by Brahma feature 75.7 hours of entries from Mr. Cox. As a result of this rate reduction,
9 the fees sought by Brahma should be reduced by \$7,570.

10 In addition, the fees sought by Brahma feature 8.1 hours of entries from Mr. Jefferson
11 Boswell. Mr. Boswell charged \$375 an hour. Mr. Peel’s affidavit identifies Mr. Boswell as a
12 partner. But Peel Brimley’s website identifies Mr. Boswell as an associate. See Website
13 Printout, attached hereto as **Exhibit 16**.³ As a result, Mr. Boswell’s rate should also be reduced
14 to \$250 an hour, which would result in a \$1,012.50 reduction to the fees sought by Brahma.

15 **2. The hours billed by Brahma’s counsel must be reduced.**

16 In determining the amount of attorney fees to award, courts reduce hours due to block
17 billing, overstaffing, duplication of efforts, excessive time spent on certain tasks, the filing of
18 non-permitted briefs, and vague work descriptions. See *Welch v. Metro. Life Ins. Co.*, 480 F.3d
19 942, 948 (9th Cir. 2007); *Marrocco v. Hill*, 291 F.R.D. 586, 588 (D. Nev. 2013); *Chalmers*, 796
20 F.2d at 1210; *McKesson Corp. v. Islamic Republic of Iran*, 935 F. Supp. 2d 34, 45 (D.D.C.
21 2013), supplemented (Aug. 2, 2013), vacated in part, 753 F.3d 239 (D.C. Cir. 2014); *Cox v.*
22 *Council for Developmental Disabilities, Inc.*, CIV-12-0183-HE, 2013 WL 1915066 (W.D. Okla.
23 May 8, 2013).

24 Here, the hours charged by Brahma’s counsel should be reduced for block billing,
25 overstaffing, duplication of efforts, excessive time spent on certain tasks, the filing of non-
26 permitted briefs, and vague work descriptions.

27
28 ³ See also <http://www.peelbrimley.com/attorneys/jefferson-w-boswell/> (last visited November 20, 2018).



1 **a. The hours should be reduced for block billing.**

2 Block billing is the practice of lumping together multiple work descriptions under one
3 time entry. *Welch*, 480 F.3d at 948. Block billing makes it impossible to determine how much
4 time was spent on a certain activity, which prevents a court from being able to determine if the
5 time spent was reasonable. *Id.* Courts have recognized that block billing generally increases
6 time by 10 to 30 percent. *Id.* (citing a study by the California State Bar's Committee on
7 Mandatory Fee Arbitration). As a result, courts routinely reduce time for block billing by 20 to
8 30 percent, if not more. *Id.* (applying an across-the-board reduction of 20 percent for block
9 billing); see *Banas v. Volcano Corp.*, 47 F. Supp. 3d 957, 968 (N.D. Cal. 2014) (rebuking block
10 billing practices and reducing hours by 20 percent); *Congregation Rabbinical Coll. of Tartikov,*
11 *Inc. v. Vill. of Pomona*, 188 F. Supp. 3d 333, 345 (S.D.N.Y. 2016) (applying a 30 percent
12 reduction for block billing); *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1326, 81
13 Cal. Rptr. 3d 866, 874 (2008) ("An attorney's chief asset in submitting a fee request is his or her
14 credibility, and where vague, blockbilled time entries inflated with noncompensable hours
15 destroy an attorney's credibility with the trial court, we have no power on appeal to restore it.").

16 Here, the amount of hours sought by Brahma should be reduced for block billing.
17 Brahma's counsel allegedly billed 206.90 hours opposing a single motion—TSE's Motion to
18 Expunge. Over 80 percent of these entries rely on block billing. For instance, Billing Entry No.
19 36 is for 3.30 hours and contains four separate tasks; Billing Entry No. 94 is for 8.50 hours and
20 contains four separate tasks; and Billing Entry No. 125 is for 4.20 hours and contains 8 separate
21 tasks. It is impossible to tell how much time was spent on each task, and thus, it is impossible to
22 determine the reasonableness of the entries or the reasonableness of the amount of time spent on
23 certain overarching tasks, such as drafting the opposition or preparing for oral argument. Thus,
24 Brahma's counsel's billing entries warrant an across-the-board 30 percent reduction.

25 **b. The hours should be reduced for overstaffing.**

26 Attorneys engage in overstaffing where too many attorneys performed legal work or
27 where attorneys performed unnecessary legal work. See *Marrocco*, 291 F.R.D. at 589 (reducing
28 attorney fees after finding overstaffing because "having two partners and a senior associate



work[] on a relatively straightforward discovery motion create[s] unnecessary duplication of efforts"); *see also Walker v. N. Las Vegas Police Dep't*, 214CV01475JADNJK, 2016 WL 3536172, at *3 (D. Nev. June 27, 2016) (finding that plaintiffs overstaffed a motion to compel by dedicating 47.7 hours to the motion, and "by having work performed by three different attorneys and a paralegal"); *Aevoe Corp. v. AE Tech. Co.*, No. 2:12-cv-0053, 2013 WL 5324787, at *5-6 (D. Nev. Sept. 20, 2013) (finding billing excessive when five attorneys worked on a motion to compel); *Rose v. Bank of Am. Corp.*, 5:11-CV-02390-EJD, 2014 WL 4273358, at *10, 13 (N.D. Cal. Aug. 29, 2014) (reducing \$8 million in attorney fees to \$2.4 million when counsel completed redundant work as a part of the litigation strategy, billed roughly 65 percent of the time using attorneys with higher rates, and had multiple attorneys present during settlement negotiations and mediation).

Here, the amount of hours sought by Brahma should be reduced for overstaffing. Brahma seeks to recover fees billed by Mr. Peel (managing partner), Mr. Zimbelman (partner), Mr. Boswell (allegedly a partner), Mr. Cox (associate), Mr. Grondel (law clerk), Ms. Hansen (paralegal), and Ms. Armstrong (project assistant). The majority of this time pertains to Mr. Peel, Mr. Zimbelman, and Mr. Cox, 51.60, 62.70, and 75.70 hours, respectively. The fact that Brahma's counsel had two partners bill over 50 hours each on opposing a single motion is absurd, especially considering that TSE's counsel only had a single partner bill less than 30 hours on the same scope of work. Even worse, Mr. Peel and Mr. Zimbelman performed the exact same scope of work—both drafted and revised the opposition to TSE's Motion to Expunge, prepared and attended the hearing, drafted the proposed order, and prepared the motion for attorney fees. As a result, this Court should eliminate either the hours billed by Mr. Peel (51.60) or the hours billed by Mr. Zimbelman (62.70) in their entirety.

c. The hours should be reduced for duplication of efforts.

Even after eliminating either the hours billed by Mr. Peel or Mr. Zimbelman, the amount of hours sought by Brahma should be reduced for duplication of efforts. Brahma's counsel's invoice is replete with duplicative charges:

1 • Mr. Peel, Mr. Zimbelman, and Mr. Cox all prepared for and attended the hearing
2 on TSE's Motion to Expunge. Brahma contends that this was necessary because Mr. Peel and
3 Mr. Zimbelman did not have the same knowledge of the briefs as Mr. Cox and that Mr.
4 Zimbelman and Mr. Cox did not understand the laws at issue like Mr. Peel. *See* Motion for
5 Attorney Fees, p. 4, n. 7. But at the time of the September 12, 2018 hearing, Mr. Peel had billed
6 37.6 hours and Mr. Zimbelman had billed 53.6 hours allegedly pertaining to opposing TSE's
7 Motion to Expunge. That is more than enough time to have grasped the relatively
8 straightforward legal arguments in TSE's Motion to Expunge. Brahma should be not able to
9 recover fees for the time spent by Mr. Cox preparing for and attending the hearing (Billing Entry
10 Nos. 66 and 95; 10.8 hours), especially considering that Mr. Cox did not even argue at the
11 hearing.

12 • Mr. Peel and Mr. Zimbelman simultaneously reviewed and revised the opposition
13 drafted by Mr. Cox. *See* Billing Entry Nos. 31 (Mr. Cox sends draft to Mr. Peel and Mr.
14 Zimbelman), 32-47 (Mr. Peel and Mr. Zimbelman simultaneously spent 9.7 and 11.6 hours,
15 respectively, over the course of two weeks revising the draft). This time spent revising should be
16 reduced as duplicative and further reduced for excess, as discussed below.

17 • Three attorneys and a paralegal billed for reviewing an errata filed by TSE. *See*
18 Billing Entry Nos. 80-83 (.3, .4, and .3). This time should be reduced to .3.

19 • Three attorneys billed for reviewing a four and a half page supplement filed by
20 TSE. *See* Billing Entry Nos. 87-89 (.8, 6.5, 1.10). This time should be reduced as duplicative
21 and further reduced for excess, as discussed below.

22 **d. The hours should be reduced for excessive time.**

23 The amount of hours sought by Brahma should be further reduced for excessive time.
24 For instance:

25 • Brahma's counsel has five time entries pertaining to the rescheduling of a hearing,
26 totaling 1.7 hours. *See* Billing Entry Nos. 67, 70, 71, 73, and 75. These entries should be
27 reduced to .4.

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1 • Brahma's counsel billed approximately 41 hours on purely drafting and revising
2 the opposition (i.e., not including factual investigation or legal research). Billing Entry Nos. 29-
3 33, 36, 37, 39-41, 44, 46-48. These entries should be reduced to no more than 14 hours, or,
4 about one hour per page of content.

5 • Brahma's counsel billed 59.50 hours to prepare for and attend the hearing.
6 Billing Entry Nos. 57, 58, 61, 64-66, 88, 91, 93-95. See *Copeland v. Marshall*, 641 F.2d 880,
7 891 (D.C. Cir. 1980) ("[W]here three attorneys are present at a hearing when one would suffice,
8 compensation should be denied for the excess time."). This time should be reduced to no more
9 than 15 hours.

10 • Brahma's counsel billed 13.60 hours drafting, revising, and discussing the
11 relatively short proposed order. Billing Entry Nos. 96, 97, 100, 104-109, 112, 116-120, 122,
12 123. This time should be reduced to no more than 4 hours.

13 • Brahma's counsel billed 28.70 hours related to drafting and revising its Motion
14 for Attorney Fees. Billing Entry Nos. 98, 99, 102, 103, 111, 115, 125-129. This motion is
15 essentially a form motion and most of it is completely duplicative of motions for attorney fees
16 that Brahma's counsel has filed in the past. See **Exhibit 5**. This time should be reduced to no
17 more than 5 hours.

18 Instead of reducing items on an entry by entry basis, because all of the time spent by
19 Brahma's counsel appears excessive, a 20 percent reduction across the board is warranted.

20 **e. The hours should be reduced for non-permitted briefs.**

21 The amount of hours sought by Brahma for non-permitted filings should be eliminated.

22 • Brahma's counsel spent 2.4 hours preparing its statement of supplemental
23 authorities. See Billing Entry Nos. 67-69, 72, 76-77. This time should be eliminated.

24 • Brahma's counsel spent 9 hours on the Affidavit and Request for Discovery. See
25 Billing Entry Nos. 90-92. This time should be eliminated.

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f. The hours should be reduced for inadequate documentation and descriptions.

The amount of hours sought by Brahma should be reduced for inadequate documentation and vague descriptions. *See McKesson*, 935 F. Supp. 2d at 45 (reducing the amount of hours sought in an attorney fees motion because the time entries contained vague and generalized descriptions such as "work on appeal brief").

- Entries discuss email correspondence but do not describe whom the emails are between or what they concern. *See* Billing Entry Nos. 52, 54, 73, 75. This time should be eliminated.

- Other entries contain vague descriptions, such as "Work on motion for award of attorney's fees," and "Work on Order Denying Motion to Expunge Notice of Lien." *See* Billing Entry Nos. 30, 33, 37, 39, 41, 44, 91, 96, 97, 115, 125, 126, 128. This time should be reduced.

- Brahma's counsel has countless entries related to internal correspondence and conferencing regarding "things to do." Billing Entry Nos. 1, 3, 6, 8, 10, 12, 14, 17-19, 21, 26, 36, 43, 51, 53, 64, 66, 87, 90, 92, 94, 95, 98, 116, 121, 123, and 127. This time should be eliminated, especially because it is unclear if it even pertains to TSE's Motion to Expunge or the many other issues that were being litigated at the same time.

- Brahma's counsel has billed for multiple conversations and correspondence with the client without adequate descriptions. *See* Billing Entry Nos. 2, 3, 11, 18-20, 23-26, 31, 51, and 54. The conversations and correspondence could have pertained to matters other than TSE's Motion to Expunge. This time should be reduced.

Because the vague descriptions pervade the entire invoice, a 20 percent reduction across the board is warranted.

B. This Court should apply a 70 percent reduction to the amount of attorney fees sought by Brahma.

Courts may apply an overall across the board reduction of fees sought by a motion for attorney fees. *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 982 (9th Cir. 2008). Such a reduction must be supported with clear and concise reasons. *Id.*; *see Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549 (2005) (providing that courts are not



1 limited to any one specific approach in calculating a reasonable amount of fees). To avoid
2 reversal, a district court need only consider the *Brunzell* factors and the award must be supported
3 by substantial evidence. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv.
4 Op. 31, 416 P.3d 249, 259 (2018) (citing *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143
5 (2015)).

6 Here, a 70 percent reduction to the \$77,937.50 in fees sought by Brahma is warranted.
7 As detailed above, there are countless issues with the amount of hours charged by Brahma's
8 counsel, which make it impossible to decipher the amount of time spent by Brahma on certain
9 tasks. This is not surprising, as Brahma is attempting to bill 206.90 hours on opposing a single
10 straightforward motion. The amount is staggering and is indicative of the type of bill padding
11 criticized in *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1326, 81 Cal. Rptr. 3d
12 866, 874 (2008). Brahma has evidently treated its Motion for Attorney Fees as a negotiation,
13 starting with a high number and hoping to land somewhere in the middle. Yet, even a 50 percent
14 reduction would be unjust, as that would still equate to almost \$40,000 in recoverable fees for
15 opposing a single motion.

16 A 70 percent reduction would equate to \$23,381.25, which constitutes a reasonable and
17 generous amount of attorney fees considering the "the work actually performed." *Brunzell*, 85
18 Nev. at 349, 455 P.2d at 33 (third factor). This amount would equate to about 45 associate hours
19 at \$250 an hour and 30 partner hours at \$400 an hour. For the first period of time described
20 above—the time period for preparing the opposition to TSE's Motion to Expunge, which would
21 include factual investigation, legal research, drafting, and revising the opposition—this amount
22 would equate to 35 hours (25 associate hours at \$250 an hour and 10 partner hours at \$400 an
23 hour). For the second period of time described above—the time period for a few minor filings
24 and preparing for and attending the hearing—this amount would equate to 25 hours (10 associate
25 hours at \$250 an hour and 15 partner hours at \$400 an hour). Finally, for the third period of time
26 described above—the time period for preparing the proposed order and the mostly form motion
27 for attorney fees—this amount would equate to 15 hours (10 associate hours at \$250 an hour and
28



1 5 partner hours at \$400 an hour). Consequently, this Court should award Brahma \$23,381.25 in
2 attorney fees.

3 **C. The costs sought by Brahma should not be awarded because they are unsupported.**

4 To recover costs, a party must "demonstrate how such [claimed costs] were necessary to
5 and incurred in the present action." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of*
6 *Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998). "Without evidence to determine
7 whether a cost was reasonable and necessary, a district court may not award costs." *Cadle Co. v.*
8 *Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015).

9 Here, Brahma has not provided any evidence or explanation as to whether the costs its
10 counsel incurred were reasonable or necessary. The costs are simply identified by copies, e-
11 filing fees, federal express, postage, and courier/delivery, which is insufficient under Nevada
12 law. Thus, the costs sought by Brahma should be denied.

13 **IV. CONCLUSION**

14 Based on the foregoing, Brahma's Motion for Attorney Fees should be granted in part
15 and denied in part. This Court should award Brahma no more than \$23,381.25 in attorney fees
16 and should not award costs to Brahma.

17 DATED this 20th day of November, 2018.

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D. Lee Roberts, Jr., Esq.
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GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Attorneys for Tonopah Solar Energy, LLC



CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of November, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S OPPOSITION TO BRAHMA GROUP, INC.'S MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO NRS 108.2275(6)(C)** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

Richard L. Peel, Esq.
Eric B. Zimbelman, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
Attorneys for Brahma Group, Inc.

Cynthia S. Bauman
An employee of WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC

EXHIBIT 1

EXHIBIT 1

PEEL BRIMLEY, LLP
3333 E Serene Avenue, Suite 200
Henderson, Nevada 89074
(702) 990-7272

Brahma Group Inc.
1132 South 500 West
Salt Lake City, Utah 84101

October 31, 2018

Invoice #: 0630-003a154367

Attention: David Zimmerman

RE: File No. 0630-003a adv. Tonopah Solar Energy, LLC's Motion to Expunge

DATE	DESCRIPTION	HOURS	AMOUNT	LAWYER
Jun-13-18	Review correspondence from Ronnie regarding Motion to Expunge; conference with Ronnie regarding same;	0.40	170.00	RLP 1
	Phone conversation with David regarding facts of the case; receive and review email from David with previously recorded Mechanic's Lien; receive and review Motion to Expunge and prepare and send email to Richard; phone conversation with David and Kevin Helm; send out calendar invite for conference call; download, print and review other liens recorded against the project in anticipation of conference call; review liens recorded by Brahma and all amendments thereto; research Nye County Assessor's website and print off information for various parcels;	4.20	1,470.00	RON 2
Jun-14-18	Prepare for and participate in telephone call among Kevin Helm and David Zimmerman to discuss facts of the case; conference with Ronnie regarding things to do;	1.40	595.00	RLP 3
	Prepare for and participate in Conference call; prepare and send email to David;	1.50	525.00	RON 4
Jun-15-18	Receive, review and respond to email from attorney Balkenbush; receive and review emails exchanged between Kevin Helm and Nicole Lovelock; phone conversation with Kevin Helm; phone conversation with attorney Balkenbush; prepare and send confirming	0.50	175.00	RON 5

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email to attorney Balkenbush; give instruction to Rosey as to things to do; receive, review and respond to email from attorney Roberts;

Jun-18-18	Receipt, review correspondence exchanged between Ronnie and opposing counsel regarding continuation of hearing date; Conference with Ronnie regarding most recent events and things to do;	0.50	212.50	RLP 6
	Receive and review Mechanic's Lien Information Form; discussion with Rosey regarding her conversation with Court; phone conversation with David and send out on calendar invite for conference call	0.90	315.00	RON 7
Jun-19-18	Telephone conference with David and Kevin regarding additional facts of the case and things to do; conference with Ronnie and Jefferson to assign tasks to do; exchange correspondence with Kevin Helm;	0.80	340.00	RLP 8
	In depth review of Services Agreement and interlineation of comments and arguments to support Lien;	2.90	1,087.50	JEF 9
	Participate in conference call with Richard and David; discussion with Richard regarding things to do;	0.80	280.00	RON 10
Jun-20-18	Receipt, review memo from Jefferson regarding outcome of his review of contract; prepare for and participate in conference call with David and Kevin to discuss analysis of contract and options;	1.50	637.50	RLP 11
	Conduct legal research regarding susceptibility of land owned by federal government but leased for a long-term, private purpose to mechanic's liens; compare various case law and prior disputes on same project; emails with team regarding same; office conference with R. Peel and R. Cox to discuss strategy and things to do; participate in telephone conference with R. Peel, R. Cox. and David to discuss matter and contractual and statutory arguments;	2.90	1,087.50	JEF 12

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	Participate in call with Richard and David; exchange various emails with David;	0.80	280.00	RON 13
Jun-21-18	Telephone call with David regarding various matters relating to lien, motion to expunge; conference call with Ronnie, then Eric regarding things to do; receipt and summarily review documents from Loreto; forward same to Ronnie for his review;	0.80	340.00	RLP 14
	Phone conversation with attorney Balkenbush regarding items needed to move hearing.	0.10	35.00	RON 15
Jun-25-18	Prepare and send email to attorney Balkenbush to follow-up on status of Stipulation to Move Hearing; phone conversation with David and Loreto regarding legal description on Lien as compared to Construction Deed of Trust; prepare and send email to David with copies of printouts from Nye County Assessor's office; receive, review and revise Stipulation and Order to move Hearing; send back to attorney Balkenbush; sign final Stipulation and Order; give instruction to staff as to things to do; exchange emails with David regarding legal descriptions;	1.90	665.00	RON 16
Jun-26-18	Office Conference with Jefferson and Richard regarding motion to expunge and response to same; participate in conference call with Richard and David regarding same;	2.50	875.00	RON 17
Jun-28-18	Receive and review correspondence from David and forward the same to Richard; phone conversation with Eric; discussion with Richard; receive, review and respond to email from Loreto at the Court;	0.50	175.00	RON 18
Jul-02-18	Participate in conference call with Ronnie to prepare for call with David; give him direction as to things to do; participate in call with David to discuss status of the case; exchange a number of correspondence with attorney Lee Roberts regarding possible conference call;	1.40	595.00	RLP 19
	Exchange emails with attorney Balkenbush regarding status of Stip and Order; follow-up with Eric regarding status of his conversation with Lee Roberts; participate in call with Richard and David to discuss status of case;	1.00	350.00	RON 20

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Jul-03-18	Telephone call with Lee Roberts concerning (i) extension to Oppose motion and (ii) possibility of flipping case to Clark County; give direction to Ronnie regarding things to do; receipt, review Ronnie's email to David; conference with Jefferson regarding same and things to do;	1.40	595.00	RLP 21
Jul-06-18	Receive and review various property documents;	1.20	420.00	RON 22
Jul-09-18	Phone conversation with David regarding various items; prepare and send email to Richard; prepare and send email to attorney Balkenbush to follow-up on date for hearing;	0.30	105.00	RON 23
Jul-10-18	Telephone conference with David Zimmerman regarding status of court action and other issues; receipt, review correspondence exchanged between Ronnie and David concerning the court order rescheduling the hearing;	0.50	212.50	RLP 24
	Receive, review and respond to email from attorney Balkenbush regarding hearing; instruct Rosey to call court to see if date has been set for hearing; participate in conference call with Richard and David regarding status; phone conversation with David regarding parcels;	0.80	280.00	RON 25
Jul-11-18	Receipt, review correspondence from Lee Roberts; send correspondence to David Zimmerman regarding same; exchange correspondence with David regarding conference call; send calendar event for call; follow-up with Jefferson regarding status of legal research; conference with Eric to prepare for call with client; participate in call with David Zimmerman and Sean Davis to discuss options;	1.40	595.00	RLP 26
	Multiple teleconferences and emails regarding Tonopah Solar's Petition to Discharge Lien, strategy for response to same; Prepare for and participate in conference call with David Zimmerman and Sean Davis regarding same and direction to proceed; Analyze motion to	2.80	1,120.00	EBZ 27

PLEASE NOTE: (I) Payments May Be Made By Telephone, In-Person, By Check Or Credit Card. (Please Contact Afton George At 702/990-7272 For More Detail Concerning Payment By Credit Card); (II) Payments Will Be Applied To The Oldest Outstanding Balance; (III) When Payments Are Made By Check A) The Check Should Be Made Payable To "Peel Brimley LLP"; And B) You Authorize Us To Either Use Information From Your Check To Make A One-Time Electronic Fund Transfer From Your Account Or To Process The Payment As A Check.

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	expunge and exchange emails regarding outline of arguments in response to same			
	File review; Research Nye County Recorder's Office records;	0.50	72.50	TH 28
Jul-12-18	Review Motion to Expunge and cases cited therein; prepare outline for Opposition and begin drafting the same;	4.20	1,470.00	RON 29
Jul-13-18	Continue working on draft Opposition	2.00	700.00	RON 30
Jul-16-18	Exchange emails with David and Kevin Helmer; Association of Counsel; receive and review Notice of Hearing with new date; continue drafting Opposition and send draft to Richard and Eric for review and comment;	7.60	2,660.00	RON 31
Jul-17-18	Work on changes to draft of opposition; receipt, review correspondence exchanged between Ronnie and Eric;	0.70	297.50	RLP 32
	Work on Opposition to Motion to Expunge Lien;	4.80	1,920.00	EBZ 33
	Exchange emails with Eric regarding factual assertions in Opposition and support for the same;	0.70	245.00	RON 34
	Receive and process Notice of Hearing on Tonopah's Motion to Expunge Brahma's Mechanic's Lien;	0.20	29.00	TH 35
Jul-18-18	Continue working on revisions to Opposition to Motion to Expunge; conference with Eric regarding further changes to same; exchange correspondence with Lee Roberts regarding extension; exchange correspondence with David concerning same;	3.30	1,402.50	RLP 36
	Continue work on opposition to motion to expunge lien; Receive and incorporate Richard's revisions in same; Conduct additional legal research for same	1.50	600.00	EBZ 37
	Conduct online legal research to identify case law that permits a non-fee-simple lien to attach to property owned by federal government; review and markup various cases, including Freedom Mortg. v. Las Vegas Dev. Group	1.80	675.00	JEF 38

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LLC, Red Mtn. Mach. Co. v. Grace Inv. Co., as well as secondary legal resources regarding quasi public/quasi private construction projects; prepare email memorandum to E. Zimbelman for his review; discuss case strategy and things to do with team;

	Review past TSE Filings in an effort to find certain judicial admissions; review various documents to find further evidence that TSE is the owner of Project and provide Eric findings for the same; work with Richard on revisions to Opposition;	3.80	1,330.00	RON 39
Jul-19-18	Review Eric's revisions to Opposition; work on further revisions to the same;	2.00	850.00	RLP 40
	Continue work on Opposition to Motion to Expunge Lien and revisions to same	2.50	1,000.00	EBZ 41
	Office conference with R. Peel and R. Cox regarding research related to susceptibility of federal lands to mechanic's liens when property is put to private, commercial use and such liens attach to less than fee-simple estate in land (i.e., to leasehold estate or on such improvements); emails regarding same;	0.50	187.50	JEF 42
	Discussion with Jefferson regarding his legal research; receive and review cases found by Jefferson;	0.70	245.00	RON 43
Jul-20-18	Continue working on changes to Eric's revisions;	2.40	1,020.00	RLP 44
Jul-23-18	Teleconferences and emails regarding opposition to motion to expunge lien and revisions to same	0.60	240.00	EBZ 45
Jul-24-18	Receipt, review several emails from David concerning changes David made to Opposition; work on changes to Opposition; give direction to staff regarding things to do;	1.30	552.50	RLP 46
	Receive and review client's revisions to Opposition to Motion to Expunge; Carefully review and edit same, including legal descriptions; Exchange email regarding same, finalizing and submitting same;	2.20	880.00	EBZ 47

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	Assist Richard in reviewing draft Opposition; finalize Opposition and attach Exhibits and instruct Staff to file and serve the same; prepare and send email to TSE's attorneys with electronic copy of Opposition;	2.70	945.00	RON 48
	Prepare Certificate of Service for Opposition to Motion to Expunge; served the same on all interested parties; contact Nye County Clerk regarding fees for filing of the Opposition; Prepare Federal Express and sent to Nye County Clerk for filing;	0.70	87.50	AEA 49
Jul-26-18	Receipt, review correspondence from David and Eric's response to same; prepare and send David additional thoughts;	0.30	127.50	RLP 50
Jul-27-18	Receipt, review and respond to correspondence exchanged between Ronnie and Eric; receipt, review correspondence exchanged between David and Ronnie and Jefferson and David; receipt, review and respond to correspondence from Ronnie concerning TSE's request for an extension to file its Reply;	0.20	85.00	RLP 51
	Exchange multiple emails regarding hearing preparations regarding motion to expunge; Receive and review Ronnie's research regarding location of parcels; Exchange email with team regarding same	1.00	400.00	EBZ 52
	Exchange emails with attorney Balkenbush; further research regarding location of parcels and prepare and send email to Richard and Eric regarding findings in the same;	1.70	595.00	RON 53
Jul-30-18	Prepare and send email to David;	0.20	70.00	RON 54
Aug-01-18	Receipt, review and respond to Ronnie's email concerning his review of TSE's Reply; follow up with Ronnie to see if he sent a copy of the Reply to David; telephone call with David regarding arguments to be made and participation in 8/2 meeting;	0.60	255.00	RLP 55
	Receive and review TSE's Reply; prepare and send email to Richard and Eric with thoughts on the same; discussion with Eric and Richard regarding thoughts;	1.50	525.00	RON 56

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Aug-02-18	Prepare for and attend meeting with Eric and Ronnie (with David on the telephone) to discuss strategy and arguments to be made at upcoming hearing;	1.30	552.50	RLP 57
	Review and analyze TSE's Reply Brief regarding Motion to Expunge; Begin outline of oral argument and preparation for hearing; Office conference with Richard, Ronnie and David regarding same	3.50	1,400.00	EBZ 58
	Conduct additional legal research regarding: Federal Land & Liens;	1.60	560.00	RON 59
	Assist EBZ in preparing for upcoming Hearing;	0.80	100.00	AEA 60
Aug-03-18	Work on outline and preparation for oral argument regarding Motion to Expunge Lien; Receive and review Notice of Right to Lien and mailing certificates regarding same; Exchange multiple emails regarding same, preparation of Supplement to Opposition; Review and approve same	4.50	1,800.00	EBZ 61
	Exchange several emails with Eric regarding Supplement and phone conversation with Eric regarding the same; prepare Supplement and give instructions to Terri regarding the same;	1.40	490.00	RON 62
	Conversation with Nye County Clerk regarding SUPP to OPP & 1st Appearance fee;	0.20	25.00	AEA 63
Aug-06-18	Review Eric's oral argument and provide comments/suggestions concerning same; prepare for, travel to and attend hearing in Pahrump; conference with David to obtain his approval to stipulate to removal of Judge Lane for Judge Elliott; conference with staff regarding things to do; conference with Eric and Ronnie regarding case law to look at;	5.10	2,167.50	RLP 64
	Prepare for, drive to Pahrump and appear for hearing on motion to expunge lien; Case transferred to senior judge; Work on supplemental statement of authorities and analysis of same	6.20	2,480.00	EBZ 65
	Prepare for, travel to and attend hearing on	4.50	1,575.00	RON 66

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	Motion to Expunge; discussions with Richard and Eric regarding case law and things to do;			
Aug-07-18	Receipt, review and revise draft of Statement of Supplemental Authorities; telephone call with David regarding procedural issues and scheduling of hearing;	0.80	340.00	RLP 67
	Revise and finalize supplemental statement of authorities; Exchange email with David regarding same	0.40	160.00	EBZ 68
	Receive, review and provide comments to Supplement;	0.50	175.00	RON 69
Aug-08-18	Receipt, review and send correspondence to Eric regarding coordinating hearing dates with attorney Roberts;	0.30	127.50	RLP 70
	Receive and review notice of re-assignment to Senior Judge Elliot; Exchange multiple emails with clerk, opposing counsel and team regarding same and re-scheduling hearing on Motion to Expunge	0.20	80.00	EBZ 71
	Compile Supplemental Brief, sign the same and give instruction to Rosey as to things to do;	0.30	105.00	RON 72
Aug-09-18	Exchange multiple emails regarding rescheduling the Hearing on Motion to Expunge Lien	0.20	80.00	EBZ 73
	Receive and review Memorandum of Temporary Assignment;	0.10	14.50	TH 74
Aug-10-18	Exchange multiple emails regarding new date for hearing on Motion to Expunge.	0.20	80.00	EBZ 75
Aug-14-18	Exchange emails regarding supplemental authorities and strategy	0.20	80.00	EBZ 76
Aug-15-18	Receive and process file-stamped copy of Brahma's Supplement to its Opposition to Tonopah's Motion to Expunge Brahma's Mechanic's Lien; Receive and process invoice from LPS;	0.20	29.00	TH 77
Aug-23-18	Receipt, review and respond to correspondence from Loreto requesting copies of documents;	0.20	85.00	RLP 78

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Aug-27-18	Receipt, review correspondence from Loreto; give direction to staff regarding things to do;	0.20	85.00	RLP 79
Aug-28-18	Receipt, review TSE's Errata; send same to David with correspondence; give direction to Eric and Ronnie regarding things to do;	0.30	127.50	RLP 80
	Receive and review TSE's Errata regarding Motion to Expunge; Review and analyze deed of trust and exchange email with team and client regarding same	0.40	160.00	EBZ 81
	Receive and review Errata to TSE's Reply Brief;	0.30	105.00	RON 82
	Receive and review Tonopah's Errata to its Reply to Brahma's Opposition to Motion to Expunge;	0.20	29.00	TH 83
Aug-29-18	Receipt, review emails exchanged between David and Eric concerning TSE's Errata;	0.20	85.00	RLP 84
Sep-06-18	Receipt, review correspondence from David; conference with Eric regarding PNC Bank's Deed of Trust; review PNC Bank's Deed of Trust; telephone call to David to discuss same; telephone call with David regarding PNC Bank's Deed of Trust;	0.70	297.50	RLP 85
	Receive and review email from David Zimmerman regarding deed of trust issues. Prepare for and participate in telephone calls and emails with David Zimmerman and Richard Peel regarding same.	0.60	240.00	EBZ 86
Sep-10-18	Receipt, review TSE's Supplemental Reply; give direction to staff regarding same; receipt, review correspondence from attorney Roberts regarding same; review Eric's analysis of TSE's Supplemental Reply and case law in support thereof; receipt, review correspondence from David; give direction to staff regarding same;	0.80	340.00	RLP 87
	Receive and review TSE's supplemental brief. Conduct additional legal research and prepare analysis and outline of same and response to same for oral argument.	6.50	2,600.00	EBZ 88
	Receive and review TSE's Supplement and forward the same to Richard and Eric; receive	1.10	385.00	RON 89

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	and review Eric's analysis of Supplement; review pages of Loan Guarantee Agreement attached to Supplement and prepare and send email to Richard and Eric regarding thoughts on the same;			
Sep-11-18	Receipt, review Ronnie's thoughts concerning documents that TSE provided; exchange correspondence with David regarding whether the hearing will proceed; give direction to staff regarding things to do; conference with Eric and Ronnie regarding need for Affidavit; sign Affidavit;	0.50	212.50	RLP 90
	Work on Affidavit and Request for Discovery. Review and approve revisions to same. Work on preparations for oral argument for hearing on Motion to Expunge.	6.80	2,720.00	EBZ 91
	Discussion with Richard regarding things to do; call and leave message for attorney Roberts; receive, review, revise and finalize Affidavit and give instruction to staff as to things to do;	1.70	595.00	RON 92
Sep-12-18	Prepare for, travel to and attend hearing in Pahrump; conference with client regarding same and things to do;	6.30	2,677.50	RLP 93
	Continue preparations for oral arguments regarding TSE Motion to Expunge. Travel to Pahrump and participate in same. Meeting with client regarding decision, status and things to do. Office conference with Richard and Ronnie regarding same.	8.50	3,400.00	EBZ 94
	Discussions with Richard and Eric regarding hearing; travel to and attend hearing and discussion with Richard and Eric regarding things to do;	6.30	2,205.00	RON 95
Sep-13-18	Begin work on Order Denying Motion to Expunge	0.50	200.00	EBZ 96
Sep-14-18	Work on Order Denying Motion to Expunge Notice of Lien.	5.00	2,000.00	EBZ 97
	Discussion with Blayne regarding Motion For Fees;	0.30	105.00	RON 98

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	Draft Motion for Fees and Costs;	3.60	630.00	BNG 99
Sep-17-18	Receipt, review and revise draft of Order Denying Motion to Expunge; review Eric's and David's additional changes to draft of Order, incorporate same and send to attorney Roberts for his consideration; receipt and review response from attorney Roberts	1.70	722.50	RLP 100
	Work on revisions to Order Denying Motion to Expunge and exchange email with team regarding same.	0.60	240.00	EBZ 101
	Review and edit draft Motion for Fees and Costs; provide same to Ronnie;	1.10	192.50	BNG 102
Sep-18-18	Discussion with Blayne regarding Motion For Fees;	0.20	70.00	RON 103
Sep-19-18	Receive and review email from attorney Balkenbush with redline revisions to proposed Order; prepare and send email to Richard and Eric regarding thoughts on the same;	0.40	140.00	RON 104
Sep-20-18	Receipt, review and respond to correspondence received from attorney Roberts' office concerning changes to form of Order; send several correspondence to David concerning attorney Roberts' requested changes to form of Order;	0.60	255.00	RLP 105
	Receive and review TSE's proposed edits to Order Denying Motion to Expunge;	0.30	120.00	EBZ 106
Sep-21-18	Review attorney Roberts' requested changes to form of Order; telephone call with David regarding the same; revise draft of Order and send to David, Eric and Ronnie for their review and comment; receipt, review Ronnie's suggested changes; make same to form of Order	1.10	467.50	RLP 107
	Review revisions to proposed Order Denying Motion to Expunge	0.20	80.00	EBZ 108
	Review and further revise proposed Order; send the same to Richard and Eric;	0.50	175.00	RON 109

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October 31, 2018

Sep-27-18	Review and substantially revise draft Motion for Attorney's Fees and Costs pursuant to NRS 108.2275; provide the same to Richard and Eric;	4.90	1,715.00	RON 110
	Correct certain formatting issues on Motion for Attorney's Fees and Costs;	0.30	43.50	TH 111
Oct-03-18	Review and revise draft of Order Denying Motion to Expunge; send same to attorneys Roberts and Balkenbush for their consideration;	0.50	212.50	RLP 112
	Work with Richard on revisions to draft Order	0.50	175.00	RON 113
	Left message for Louise in Dept. 2 advising Brahma will be submitting its proposed Order to the Motion to Expunge; Telephone call with Louise in Dept. 2 advising she has not received a proposed Order from Tonopah and acknowledging Brahma will be submitting a proposed Order;	0.20	29.00	TH 114
Oct-04-18	Work on motion for award of attorney's fees.	2.50	1,000.00	EBZ 115
Oct-10-18	Send correspondence to attorney Roberts concerning final draft of Order Denying Motion to Expunge; give directions to Ronnie regarding things to do;	0.20	85.00	RLP 116
Oct-12-18	Exchange correspondence with Ronnie regarding Order regarding Motion to Expunge and letter to attorney Roberts;	0.30	127.50	RLP 117
	Exchange correspondence with Richard regarding Order and letter to Court; prepare letter to Court with proposed Order and instruct staff to serve letter and proposed Order on attorney Roberts;	0.80	280.00	RON 118
	Receive instructions from Attorney Cox regarding letter to Nye County Court - Dept. 2; Make arrangements Nationwide Legal for letter and Order to be delivered to same; Instruct Project Assistant Armstrong to serve same on Attorney D. Lee Roberts via e-mail;	0.30	43.50	TH 119
	Compare revised Order Denying Tonopah Solar Energy, LLC's Motion to Expunge	0.40	70.00	BNG 120

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	Brahama Group, Inc.s Mechanic's Lien with redline correction made by Richard Peel;			
Oct-13-18	Receipt, review correspondence from attorney Balkenbush; give direction to Cary and Ronnie regarding things to do;	0.40	170.00	RLP 121
	Receive, review and respond to email from attorney Balkenbush regarding Order and correspondence to the Court	0.20	70.00	RON 122
Oct-15-18	Exchange correspondence with David regarding status of our submission of Order concerning Motion to Expunge; forward to David correspondence from attorney Balkenbush to the Court; exchange correspondence with Cary and Ronnie regarding things to do with respect to same;	0.60	255.00	RLP 123
Oct-16-18	Work on comparison for proposed order denying expungement motion; send same to David with detailed email; review and revise draft of letter to Judge Elliott concerning TSE's proposed Order; sign letter and cause same to be filed with the court and emailed to counsel;	0.90	382.50	RLP 124
Oct-29-18	Receipt, review several correspondence exchanged among Ronnie, Cary and Eric regarding form of Order executed by Judge Elliott; work on revisions to Motion for Attorney's Fees and Costs; participate in several telephone calls with Cary to discuss same; work with Ronnie on several issues affecting same; prepare and send correspondence to David concerning Judge Elliott's Order and draft of Motion for Attorney's Fees and Costs; telephone call with David regarding same; receipt, review David's requested changes to Motion for Attorney's Fees/Costs; make same and send correspondence back to David regarding same;	4.20	1,785.00	RLP 125
	Receive and review correspondence from the Court with filed Order and forward the same to Richard and Eric; work with Richard on Motion for Fees;	0.80	280.00	RON 126
Oct-30-18	Discussions with Richard regarding Motion for Fees and things to do; prepare Declaration of Richard L. Peel in Support of Motion for Fees;	4.80	1,680.00	RON 127

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make further revisions to Motion for Fees and
send the same to Richard;

Oct-31-18	Work on further changes to Motion for Fees; work on revisions to Declaration; telephone call with David regarding various issue affecting Motion for Fees;	3.50	1,487.50	RLP (28
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Conferences with Richard and Afton regarding Motions for Fees; discussions with staff regarding various costs incurred in defending against Motion and prepare and send email to Richard regarding the same; further revise Motion and Declaration;	2.50	875.00	RON (29
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Totals	206.90	\$77,937.50
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Other**Costs****Receipts**

Copies	12.00
E Filing Fees	281.60
Federal express	30.49
Postage	5.75
Courier/Delivery	150.00

Totals	\$479.84	\$0.00
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Total Fees & Costs		\$78,417.34
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Previous Balance		\$0.00
------------------	--	--------

Previous Payments		\$0.00
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Balance Due Now		\$78,417.34
Retainer Balance	\$0.00	

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EXHIBIT 2

EXHIBIT 2



1 D. Lee Roberts, Jr., Esq.
2 Nevada Bar No. 8877
3 *lroberts@wwhgd.com*
4 Colby L. Balkenbush, Esq.
5 Nevada Bar No. 13066
6 *cbalkenbush@wwhgd.com*
7 Ryan T. Gormley, Esq.
8 Nevada Bar No. 13494
9 *rgormley@wwhgd.com*
10 WEINBERG, WHEELER, HUDGINS,
11 GUNN & DIAL, LLC
12 6385 South Rainbow Blvd., Suite 400
13 Las Vegas, Nevada 89118
14 Telephone: (702) 938-3838
15 Facsimile: (702) 938-3864
16
17 *Attorneys for Tonopah Solar Energy, LLC*

11 **IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA**
12 **IN AND FOR THE COUNTY OF NYE**

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

15 Plaintiff,

16 vs.

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

Case No. CV 39348
Dept. No. 2

**DECLARATION OF RYAN T.
GORMLEY, ESQ.**

19
20 I, RYAN T. GORMLEY, declare under penalty of perjury as follows:

21 1. I am over the age of 18, have personal knowledge of the matters set forth herein
22 and, unless otherwise stated, am competent to testify to the same if called upon to do so. I am an
23 attorney at Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, counsel for Tonopah Solar Energy,
24 LLC ("TSE") in the above-captioned matter. I make this declaration in support of TSE's
25 Opposition to Brahma Group, Inc.'s Motion for Attorney Fees and Costs Pursuant to NRS
26 108.2275(6)(C) ("Opposition").

27 2. Attached hereto as **Exhibit A** is a true and correct copy of a spreadsheet of the
28 time that D. Lee Roberts, Jr. billed to TSE in this matter, which would have arguably been



1 recoverable had the Court granted TSE's Motion to Expunge, dated June 11, 2018. The entries
2 amount to 27 hours. The entries were identified by reviewing the invoices submitted to TSE in
3 this matter and a spreadsheet reflecting the time that Mr. Roberts has billed in this matter.

4 3. Attached to the Opposition as Exhibit 16 is a true and correct copy of a printout
5 from Peel Brimley's website, printed on November 20, 2018.

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

8 Dated this 20th day of November, 2018

9
10 
RYAN T. GORMLEY

EXHIBIT A

EXHIBIT A

AA000561

Time Report

Billed L. Roberts

Tonopah Solar Energy, LLC / Dispute with Brahma Group, Inc. (4063-1)

04/20/2018	Roberts, Jr., D. Lee	Partner	1.50 Billed	Begin drafting motion to expunge and supporting brief
04/23/2018	Roberts, Jr., D. Lee	Partner	1.10 Billed	Review motion to expunge and supporting affidavit.
04/24/2018	Roberts, Jr., D. Lee	Partner	0.70 Billed	Final review of motion, supporting brief and declaration.
07/05/2018	Roberts, Jr., D. Lee	Partner	0.70 Billed	Call from counsel for BGI to discuss lien and motion to expunge.
07/27/2018	Roberts, Jr., D. Lee	Partner	3.00 Billed	Analyze opposition to motion to expunge lien and case law cited by BGI. Strategize on substance of Reply brief.
07/31/2018	Roberts, Jr., D. Lee	Partner	1.00 Billed	Review and approve Reply in support of motion to expunge lien.
07/31/2018	Roberts, Jr., D. Lee	Partner	0.40 Billed	Review draft affidavit and changes proposed by J. Pugh. Suggest revisions.
08/06/2018	Roberts, Jr., D. Lee	Partner	5.30 Billed	Attend hearing on motion to expunge lien in Pahrump.
09/11/2018	Roberts, Jr., D. Lee	Partner	4.00 Billed	Study new cases cited in supplemental briefing. Prepare oral argument for hearing on motion to expunge.
09/12/2018	Roberts, Jr., D. Lee	Partner	1.90 Billed	Research regarding Brahma late supplement requesting discovery and burden of proof. Supplement argument.
09/12/2018	Roberts, Jr., D. Lee	Partner	6.40 Billed	Attend hearing on motion to expunge lien in Pahrump.
09/12/2018	Roberts, Jr., D. Lee	Partner	0.50 Billed	Prepare for hearing with Colby and Justin Pugh.
09/17/2018	Roberts, Jr., D. Lee	Partner	0.50 Billed	Review proposed order from Brahma denying motion to expunge.
			27.00	

AA000562

EXHIBIT 3

EXHIBIT 3

WEINBERG WHEELER
HUDGINS GUNN & DIAL



1 D. Lee Roberts, Jr., Esq.
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2 Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
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4 GUNN & DIAL, LLC
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5 Las Vegas, Nevada 89118
Telephone: (702) 938-3838
6 Facsimile: (702) 938-3864

7 *Attorneys for Plaintiff*
8 *Tonopah Solar Energy, LLC*

FILED
FIFTH JUDICIAL DISTRICT

JUN -14 2018

Nye County Clerk
DEBRA BENNETT Deputy

10 IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA
11 IN AND FOR THE COUNTY OF NYE

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

Case No. CV 39348
Dept. No. 2

TONOPAH SOLAR ENERGY, LLC'S
MOTION TO EXPUNGE BRAHMA
GROUP, INC.'S MECHANIC'S LIEN

19 Defendant TONOPAH SOLAR ENERGY, LLC (hereinafter "TSE" or "Plaintiff"), by
20 and through its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN &
21 DIAL, LLC, hereby requests that the Court expunge the mechanic's lien recorded against certain
22 real property and improvements in Tonopah, Nevada by Brahma Group, Inc. (hereinafter "BGI"
23 or "Defendant"). The mechanic's lien is invalid because BGI has failed to follow Nevada's
24 statutory scheme by not giving proper notice to the owner of the land (the BLM). In addition, or
25 in the alternative, the lien is invalid because a lien that attempts to attach federally owned land is
26 invalid on its face and cannot be saved by a later amendment.



1 This Motion is made and based upon the following Memorandum of Points and
2 Authorities, the exhibits attached hereto, the pleadings and papers on file herein, and any
3 argument presented at the time of hearing on this matter.

4 DATED this 1st day of June, 2018.

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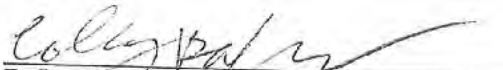
6 D. Lee Roberts, Jr., Esq.
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10 *Attorneys for Plaintiff*
11 *Tonopah Solar Energy, LLC*

12 **NOTICE OF MOTION**

13 PLEASE TAKE NOTICE that TONOPAH SOLAR ENERGY, LLC'S MOTION TO
14 EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN will come on for hearing in
15 Department No. 2 of the above-entitled Court on the 23rd day of July 2018,
16 at 9:00 a.m./p.m.

17 DATED this 1st day of June, 2018.

18 

19 D. Lee Roberts, Esq.
20 Colby L. Balkenbush, Esq.
21 WEINBERG, WHEELER, HUDGINS,
22 GUNN & DIAL, LLC
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23 *Attorneys for Plaintiff*
24 *Tonopah Solar Energy, LLC*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

TSE is the project developer for the Crescent Dunes Solar Energy Facility located outside Tonopah, Nevada ("Project"). The Project is significant, employing over 1,000 construction workers at one point (most from Nevada) and creating over 4,000 direct and indirect jobs in the region. The Project is designed to have a 110 megawatt output, which is enough renewable clean energy to power 75,000 homes in Nevada. While TSE is the project developer and oversees construction efforts, the land the Project is located on belongs to the Bureau of Land Management ("BLM").

In February 2017, TSE contracted with BGI to perform certain warranty work on the Project. The Parties are currently in the midst of a dispute over the sufficiency of certain invoices BGI has submitted to TSE for payment. TSE has informed BGI that it needs additional backup documentation to assess the validity of the invoices before they can be paid. Rather than provide the documentation, BGI has become belligerent, recording a mechanic's lien against the real property on which the Project is located, filing a lawsuit and recording a lis pendens against the property in an improper attempt to pressure TSE to make payment before TSE has verified the expenses BGI claims to have incurred in performing the work.

As a result of BGI's actions, TSE sent BGI a letter pointing out that BGI's lawsuit, lis pendens and mechanic's lien were all improper under Nevada's mechanic's lien statute and requesting that they be dismissed/released. In response, BGI dismissed its lawsuit and released the lis pendens. However, BGI continues to refuse to release the mechanic's lien and has instead attempted to fix the errors in the lien via amendment.

Through this Motion, TSE asks the Court to expunge the mechanic's lien recorded by BGI. First, BGI's mechanic's lien is invalid because BGI failed to give the BLM notice of its right to lien the land before recording the lien, as required by NRS 108.245. BGI also failed to give the BLM notice of its amendments to the lien, as required by NRS 108.229(1).

Second, TSE's original lien and the first two amendments to that lien improperly attach to real property owned by the BLM. Extensive case law holds that mechanic's liens may not be

1 recorded against federally owned land thus making the original lien invalid. BGI has attempted
2 to remedy this error by recording a third amendment that purports to only attach TSE's interest in
3 the Project rather than the BLM land. However, a void lien cannot be amended. Thus, BGI's
4 lien must be expunged.

5 Finally, TSE requests that the Court require BGI to reimburse TSE for the reasonable
6 fees and costs it has incurred in bringing this Motion. Under NRS 108.2275, the Court must
7 award fees and costs if it expunges a mechanic's lien. Unlike with most attorneys' fees statutes,
8 the Court does not have discretion to deny a request for fees if it finds that a mechanic's lien is
9 invalid.

10 II. STATEMENT OF FACTS

11 A. Background on the Project and the Parties' Dispute

12 On February 1, 2017, TSE and BGI entered into a Services Agreement ("Agreement")
13 whereby BGI agreed to perform work on the Project for TSE. **Exhibit 1** (Agreement). The
14 Agreement provides that BGI's work will be defined in Work Orders issued by TSE and that
15 BGI will be paid on a time and materials basis, subject to certain additional conditions. *Id.* at pp.
16 1-2, 10.

17 Importantly for purposes of this Motion, TSE is the project developer and oversees BGI's
18 work on the Project but the land the Project is located on belongs to the BLM (hereinafter the
19 "Property").¹ A dispute has now broken out between the Parties over the sufficiency of certain
20 invoices BGI has submitted and TSE's refusal to pay those invoices without first receiving and
21 considering additional backup documentation from BGI. As a result of the dispute, BGI has
22 recently recorded a mechanic's lien and three separate amendments to that lien.

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27 ¹ The Property on which the Project is located consists of the following parcels: 012-031-04,
28 012-131-03, 012-131-04, 012-140-01, 012-141-01, 012-150-01, 012-151-01, 012-431-06, 612-
141-01.



1 **B. BGI Did Not Give the BLM Notice of BGI's Alleged Right to Lien the Project**
2 **Before Recording its Mechanic's Lien Against the Property**

3 NRS 108.245 requires that lien claimants give notice of their right to lien to the owner of
4 the real property prior to recording any mechanic's liens against the property. It is undisputed
5 that BGI never gave the BLM notice of its alleged right to lien the BLM's Property. Indeed, BGI
6 has never made any attempt to put the BLM on notice that the BLM's rights to the Property the
7 Project sits on could be impaired due to TSE's alleged withholding of payment to BGI.

8 Despite not giving the BLM any notice of BGI's alleged lien rights, BGI has now
9 recorded a mechanic's lien against the Property on which the Project is located, as well as three
10 amendments to that lien, as set forth below:

- 11 • On April 9, 2018, BGI recorded a notice of lien against the Property in the amount of
12 \$6,982,186.24. **Exhibit 2.**
- 13 • On April 16, 2018, BGI recorded a first amended and restated lien against the Property in
14 the amount of \$7,178,376.94. **Exhibit 3.**
- 15 • On April 18, 2018, BGI recorded a first amended and restated lien to correct its failure to
16 attach an exhibit that describes the Property on which the Project is located. **Exhibit 4.**
- 17 • On April 24, 2018, BGI record a second amended and restated lien (in actuality, this was
18 the third time BGI attempted to amend the original lien). This lien changed the
19 description of the property attached by the lien by stating that the lien only attached to
20 TSE's interest in the Project and did not attach to any BLM owned property. **Exhibit 5.**

21 BGI's failure to give notice to the BLM prior to recording the above lien and lien amendments²
22 should result in the liens being expunged.

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27 ² NRS 108.229 requires that lien claimant give notice to the "owner of the property" of any
28 amendments to the lien within 30 days after recording the amended notice of lien. BGI failed to
 give the BLM notice of the original lien and the amendments to the original lien.



1 **C. Upon Learning of the Mechanic's Lien, TSE Sent BGI a Letter Demanding**
2 **the Lien be Released. TSE Responded by Seeking to Cure Errors in its Lien**
3 **Via an Amendment.**

4 Upon receiving notice of BGI's mechanic's lien, TSE sent BGI a letter requesting that,
5 among other things,³ the lien be released. TSE pointed out that the lien was invalid because BGI
6 had failed to give notice to the BLM as required by NRS 108.245 and had illegally recorded the
7 lien against federally owned land. Rather than release the lien, BGI recorded a third amendment
8 on April 24, 2018 in an attempt to cure the lien's deficiencies. **Exhibit 5.** Since that date, TSE
9 has repeatedly requested that BGI withdraw the invalid lien to no avail, thus making this Motion
10 necessary.

11 **D. The Mechanic's Lien is an Improper Attempt by BGI to Maximize its**
12 **Leverage in Advance of an Upcoming Contractually Required Mediation**

13 Under NRS 108.226(1), BGI has 90 days from the date it last performed work on the
14 Project to record a mechanic's lien. Given that BGI was still working on the Project within the
15 last month, there was no need for BGI to immediately record the lien. The real reason behind
16 BGI's expedited recording of the lien is that it is seeking to exert leverage over TSE to force
17 payment of the disputed invoices. While BGI's attempt to use the lien as leverage is
18 unfortunately quite common in the construction industry, it is an abuse that this Court need not
19 permit to continue since BGI has failed to comply with Nevada's statutory scheme.

20 In addition to being legally insufficient, BGI's recording of the mechanic's lien is a
21 breach of the Parties' Agreement. The Agreement requires that mediation occur prior to
22 litigation. **Exhibit 1** at p. 8. BGI has now breached this condition by recording the mechanic's
23 lien.

24 ³ TSE also requested that BGI dismiss the lien foreclosure lawsuit and release a lis pendens
25 related to that suit that BGI had recorded against the Property. The lawsuit was improper as
26 NRS 108.244 requires a lien claimant wait 30 days after recording a lien before filing a lien
27 foreclosure suit and BGI had only waited 8 days to file its lawsuit. The lis pendens was
28 improper as it was based on an invalid lawsuit and being used to harass TSE. On April 24, 2018,
BGI tacitly acknowledged the impropriety of its actions and complied with this aspect of TSE's
request. *See Exhibit 6* (notice of voluntary dismissal and release of lis pendens). Although not
directly relevant to the instant Motion, BGI's now withdrawn lien foreclosure suit and lis
pendens illustrate the cavalier way in which BGI has approached the Nevada mechanic's lien
statutes. BGI has violated the statute at every turn.



III. BGI'S MECHANIC'S LIEN SHOULD BE EXPUNGED

A. Nevada Law Provides a Process for Expunging Improper Liens Via Motion and Requires that Attorneys' Fees and Costs be Awarded to the Prevailing Party

Under NRS 108.2275, the debtor of a mechanic's lien claimant may bring a motion to remove the lien on the property. The only requirements for such a motion are (1) that it set forth in detail the legal and factual grounds upon which the relief is requested and (2) that it include a notarized affidavit signed by the applicant setting forth a concise statement of the facts upon which the motion is based. NRS 108.2275(2). The required affidavit is attached hereto as **Exhibit 7**. Once the motion to expunge the lien is filed, the court must conduct a hearing within not less than 15 days or more than 30 days after the court issues the order for a hearing. NRS 108.2275(4).

"After a hearing [on the motion to expunge], the district court shall make one of three determinations: (1) that the notice of lien is frivolous and made without reasonable cause, (2) that the lien amount is excessive, or (3) that the notice of lien is not frivolous or excessive and made with reasonable cause." *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 372, 240 P.3d 1033, 1038 (2010); *see also* NRS 108.2275(6).

In contrast to most statutes which give the district court discretion to award or deny requests for attorneys' fees and costs,⁴ NRS 108.2275 requires that the losing party on any motion to expunge be forced to pay the winning party's fees and costs. *One Trop LLC v. Verma*, No. 68756, 2016 WL 3896347, at *2 (Nev. App. July 13, 2016). In *One Trop*, the district court granted a motion to expunge a mechanic's lien but denied the movant's request for attorneys' fees and costs. *Id.* at *1. In denying the motion for fees, the district court reasoned that, although it was expunging the lien, it had not found the lien to be frivolous. The Court of Appeals reversed and remanded for an award of fees because, under NRS 108.2275(6), frivolity

⁴ *See e.g.*, Nev. R. Civ. P. 37(a)(4) (providing that even if a motion to compel is granted, the court does not have to award fees if it finds that the non-moving party's conduct was "substantially justified."). In contrast, NRS 108.2275(6) requires that fees and costs be awarded even in close cases where the person recording the mechanic's lien acted in good faith.



1 is the only permissible reason to expunge a lien. Stated another way, if a mechanic's lien is
2 found to have been improperly asserted, it is by definition frivolous under NRS 108.2275(6) and
3 requires an award of fees and costs to the project owner.

4 **B. BGI's Lien Must be Expunged Because BGI Failed to Give the BLM Notice**
5 **of its Right to Lien**

6 NRS 108.245(1) requires that lien claimants deliver a written notice of right to lien to the
7 "owner of the property" after they first perform work on a project. The form of the notice is
8 specifically set forth in the statute. This notice can be delivered in person or by certified mail.
9 NRS 108.245(1). The statute further provides that a lien may not be "perfected" or "enforced"
10 unless the written notice of right to lien has been given. NRS 108.245(3). NRS 108.226 defines
11 "perfection" of a lien as, among other things, the recording of the lien with the county recorder.

12 If a lien claimant substantially complies with NRS 108.245(1), the recorded lien will still
13 be valid. *Iliescu v. Steppan*, 394 P.3d 930, 934 (Nev. 2017). "However, failure to either fully or
14 substantially comply with the mechanic's lien statute will render a mechanic's lien invalid as a
15 matter of law." *Id.* (internal citations and quotations omitted) (emphasis added). Indeed, the
16 Nevada Supreme Court recently reiterated that "[n]o lien for materials or labor can be perfected
17 or enforced unless the claimant gives the property owner the required notice." *Id.* (emphasis
18 added).

19 Here, it is undisputed that BGI failed to give the BLM (the property owner) written notice
20 of BGI's alleged right to lien the Property as required by NRS 108.245(1). Upon information
21 and belief, the BLM also did not have actual notice that BGI was performing work on the Project
22 for TSE as BGI did not have a contract with the BLM. Thus, BGI has not actually or
23 substantially complied with NRS 108.245's notice requirements and its lien should be expunged.

24 BGI may argue that its failure to serve a pre-lien notice on the property owner should be
25 excused as BGI's April 24, 2018 third amendment to its lien (**Exhibit 5**) seeks to only attach
26 TSE's interest in the improvements on the land rather than the land itself. This argument fails.
27 First, BGI's amendments are invalid for failure to comply with NRS 108.229's requirement that
28 notice of any lien amendment be given to the property owner within 30 days.



1 Second, even assuming, *arguendo*, that notice of the lien amendment was given to the
2 BLM, this would still not save BGI's lien. Not giving notice to the real property owner flies in
3 the face of NRS 108.245's clear language requiring a pre-lien notice to the "owner of the
4 property" regardless of the particular property interest on the land that the claimant seeks to
5 affect. Nevada's mechanic's lien statutes are designed to ensure that property owners are made
6 aware that their property rights could be affected, whether directly or indirectly, due to work
7 being performed by contractors on their property. BGI's failure to give the required pre-lien
8 notice to the BLM frustrates the statute's intent and requires that its lien be expunged.⁵

9 **C. BGI's Original Lien Impermissibly Liened Federally Owned Land**

10 The United States Federal Government enjoys sovereign immunity from lawsuits unless
11 it has expressly waived that immunity via a federal statute. *Price v. United States*, 174 U.S. 373,
12 376, 19 S. Ct. 765, 766, 43 L. Ed. 1011 (1899) ("It matters not what may seem to this court
13 equitable, or what obligation we may deem ought to be assumed by the government . . . it is an
14 axiom of our jurisprudence [that] [t]he government is not liable to suit unless it consent thereto,
15 and its liability in suit cannot be extended beyond the plain language of the statute authorizing
16 it.").

17 Since there is no federal law that waives the government's immunity from mechanic's
18 liens and lien foreclosure actions, courts have universally held that federally owned land is not
19 subject to mechanic's liens that arise under state statutes. *F. D. Rich Co., Inc. v. U. S. for Use of*
20 *Indus. Lumber Co., Inc.*, 417 U.S. 116 (1974) ("Ordinarily, a supplier of labor or materials on a
21 private construction project can secure a mechanic's lien against the improved property under
22 state law. But a lien cannot attach to Government property . . ."); *United States v. Lewis Cty.*, 175
23 F.3d 671, 678 (9th Cir. 1999) ("Foreclosure against federally-owned property is a suit against the
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26 ⁵ Importantly, granting TSE's Motion would not necessarily bring about a harsh result. BGI
27 continues to have the option to (1) release the current mechanic's lien, (2) give the statutorily
28 required pre-lien notice to the BLM and then (3) record a new mechanic's lien. However, to
date, BGI has failed to take this path and instead continues to defend a lien that has been invalid
from the start.



United States, which cannot be prosecuted without its consent.”); *Guild Mortg. Co. v. Prestwick Court Tr.*, No. 215CV258JCMVCF, 2018 WL 894609, at *9 (D. Nev. Feb. 14, 2018) (“Foreclosure on federal property is prohibited where it interferes with the statutory mission of a federal agency.”); *Best Assets, Inc. v. Dep’t of Hous. & Urban Dev.*, No. 09 C 4259, 2009 WL 3719212, at *3 (N.D. Ill. Nov. 5, 2009) (Sovereign immunity, however, bars the imposition of liens on federally owned property.”); *U.S. for the Use & Benefit of Daniel H. Hill v. Am. Sur. Co.*, 200 U.S. 197, 203, 26 S. Ct. 168, 170, 50 L. Ed. 437 (1906) (“As against the United States, no lien can be provided upon its public buildings or grounds.”).⁶

Here, this is no dispute that BGI’s original April 9, 2018 lien (**Exhibit 2**) attached to real property owned by the BLM and is thus invalid. The first two amendments to that lien also attached to BLM Land (**Exhibits 3-4**) and are also invalid. The third amendment (**Exhibit 5**) attempts to only attach TSE’s improvements to the land, but, as discussed below, this also fails because a lien on federal land is void and cannot be saved via amendment.

D. BGI’s Lien Must be Expunged Because a Lien that Improperly Attaches to Federally Owned Land Cannot be Cured by Amendment.

Nevada law generally permits minor errors in mechanic’s liens to be remedied via amendment so long as they are not “material.” NRS 108.229; *see also Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 712, 800 P.2d 719, 723 (1990) (“A minor error in a lien claim does not invalidate the lien.”). However, an error that goes to the heart of the original lien cannot be corrected with an amendment. *Sequatchie Concrete Serv., Inc. v. Cutter Labs.*, 616 S.W.2d 162,

⁶ *See also United States v. Munsey Tr. Co. of Washington, D.C.*, 332 U.S. 234, 241, 67 S. Ct. 1599, 1602, 91 L. Ed. 2022 (1947) (“[N]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation. They cannot acquire a lien on public buildings, and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment.”) (internal citations omitted); *Equitable Sur. Co. v. U.S., to Use of W. McMillan & Son*, 234 U.S. 448, 456, 34 S. Ct. 803, 805–06, 58 L. Ed. 1394 (1914) (stating that without the federal laws requiring performance and payment bonds on federal projects, “laborers and materialmen (being without the benefit of a mechanic’s lien in the case of public buildings) would . . . be subject to great losses.”).



165 (Tenn. Ct. App. 1980) (“[W]here there is a positive or unambiguous description of the wrong piece of property and not of property which the lien may properly attach, the description is obviously insufficient to create or preserve a lien.”).

Importantly, the case law cited in the previous section shows that BGI’s original April 9, 2018 lien was invalid on its face because it attempted to attach federally owned land. Realizing its error, BGI attempted to amend the lien on April 24, 2018 so that it would only attach to TSE owned improvements on the federal land. However, Nevada law and logic dictates that one cannot amend a lien that never existed in the first place. Thus, Brahma’s lien remains fatally flawed since it attempted to attach federal land and must be expunged.⁷

E. TSE is Entitled to Recover its Reasonable Attorneys’ Fees and Costs

As explained above, if the Court expunges BGI’s mechanic’s lien it must also require BGI to pay TSE’s reasonable attorney’s fees and costs incurred in bringing this Motion. The Court does not have discretion to expunge BGI’s lien and not award fees and costs to TSE under NRS 108.2275(6). This is so even if the Court believes that BGI and its attorneys acted in good faith when recording the mechanic’s lien and attempting to amend it. If this Motion is granted, TSE will submit a redacted memorandum of fees and costs for the Court’s review to enable the Court to determine the reasonableness of TSE’s fees under *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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⁷ Again, BGI is free to release the invalid lien and record a new lien that does not attach to any federal land. However, BGI has failed to do so.



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V. CONCLUSION

For the foregoing reasons, TSE requests that the Court enter an order granting TSE the following relief:

- 1.) Expunge the mechanic's lien attached hereto as **Exhibits 2-5**;
- 2.) Require BGI to reimburse TSE for the reasonable fees and costs it has incurred in bringing this Motion.

DATED this 1st day of June, 2018.

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Tonopah Solar Energy, LLC*



CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2018, a true and correct copy of the foregoing
TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP,
INC.'S MECHANIC'S LIEN was served by mailing a copy of the foregoing document in the
United States Mail, postage fully prepaid, to the following:

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EXHIBIT 4

EXHIBIT 4

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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.

CASE NO. : CV 39348

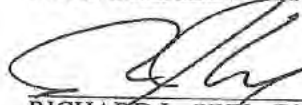
DEPT. NO. : 2

**BRAHMA GROUP, INC.'S
OPPOSITION TO TONOPAH
SOLAR ENERGY, LLC'S MOTION
TO EXPUNGE BRAHMA GROUP,
INC.'S MECHANIC'S LIEN**

25 Defendant, BRAHMA GROUP, INC. ("Brahma"), by and through its counsel of record, the
26 law firm of Peel Brimley LLP, hereby files its Opposition to the Motion to Expunge ("Motion") filed
27 by Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE"). This Opposition is supported by the papers
28 and pleadings on file herein, the following memorandum of points and authorities, and any oral
argument this Court may entertain.

Dated this 24th day of July, 2018.

PEEL BRIMLEY LLP



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Without providing any evidence that the Bureau of Land Management ("BLM") owns the real property upon which TSE has caused the Crescent Dunes Solar Energy Facility ("Work of Improvement" or "Project") to be constructed, TSE asks this Honorable Court to expunge Brahma's Notice of Lien ("Lien") in its Motion.

In support of the foregoing argument, TSE claims (at footnote 1 on Page 4 of the Motion) that the "Property on which the Project [or Work of Improvement] is located consists of the following parcels: 012-031-04, 012-131-03, 012-131-04, 012-140-01, 012-141-01, 012-150-01, 012-151-01, 012-431-06, 612-141-01." However, TSE is the record owner of at least four of these parcels. As such, Brahma's Lien was properly recorded and has attached to these parcels.

In its Motion, TSE also claims that the Work of Improvement cannot be encumbered because it is federally owned. However, on October 26, 2011, TSE, as Grantor, permitted a Construction and Permanent Deed of Trust With Assignment of Rents, Security Agreement, and Fixture Filing ("Deed of Trust") to be recorded against the very same parcels of land (that are the subject of Brahma's Lien), to secure financing for the construction and operation of the Work of Improvement.

Assuming *arguendo* that all the real property (upon which the Work of Improvement was constructed) is owned by the BLM (which Brahma will demonstrate is not the case), Nevada law allows a lien claimant (such as Brahma) to lien the improvements made to such real property.

For the foregoing reasons, TSE's Motion must be denied.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

On or about May 24, 2011, TSE acquired APNs 012-031-04, 012-131-03 and 012-131-04 and 612-141-01 (collectively, the "TSE Parcels"). APNs 012-031-04, 012-131-03 and 012-131-04 were acquired on that date by TSE by way of a Grant, Bargain and Sale Deed (the "Grant Deed"),¹ and the Nye County Assessor's Office identifies APN 612-141-01 as being acquired by TSE on this same date.² The Grant Deed identifies the property being conveyed to TSE as follows (collectively, the "Grant Deed Legal Description"):

¹ A copy of the Grant Deed is attached hereto as Exhibit 1.

² A copy of the Nye County Assessor's Parcel Detail printout for APN 612-141-01 is attached hereto as Exhibit 2.

All that land situated in the County of Nye, State of Nevada, more particularly described as follows:

PARCEL 1:

The North One-Half (N1/2) of the Southeast Quarter (SE 1/4) and the Southeast Quarter (SE 1/4) of the Southeast Quarter (SE 1/4) of Section 12 in Township 6 North, Range 40 East, M.D.B.&M., according to the Official Plat of said Land on file in the office of the Bureau of Land Management. Said land is also known as Parcel Four (4) of Parcel Map recorded July 25, 1980 as File No. 26731, Nye County, Nevada records.

PARCEL 2:

Lots One (1) and Two (2) in the Northwest Quarter (NW 1/4) of Section 18, Township 6 North, Range 41 East, M.D.B.&M., according to the Official Plat of said land on file in the Office of the Bureau of Land Management. Said land is also known as Parcel Two (2) of Parcel Map recorded July 25, 1980 as File No. 26731, Nye County, Nevada records.

Together with an easement for the purpose of installing and maintaining an irrigation well, more particularly described as follows:

Commencing at the Northeast corner of Section 13, Township 6 North, Range 40 East, M.D.B.&M., thence South 200 feet at the true point of beginning; continuing South for 50 feet; thence Westerly for 20 feet, thence Northerly for 50 feet, thence Easterly for 20 feet, at the true point of beginning.

PARCEL 3:

East Half (E 1/2) of the Northwest Quarter (NW 1/4) of Section 18, Township 6 North, Range 41 East, M.D.B.&M., according to the Official Plat of said land on file in the Office of the Bureau of Land Management. Said land is also known as Parcel One (1) of Parcel Map recorded July 25, 1980 as File No. 26731, Nye County, Nevada records.

On or about September 23, 2011, TSE caused a Right-of-Way Lease/Grant ("Ground Lease") to be recorded.³ By way of the Ground Lease, the BLM leased APNs 012-151-01 and 012-141-01 (collectively, the "BLM Parcels") to TSE allowing it to "construct, operate, maintain, and terminate one 110 MW Concentrated Solar Power (CSP) plant with storage capacity, including associated facilities...". The Ground Lease identifies the following real property (collectively, the "Ground Lease Legal Description"):

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///

///

³ A copy of the Right-of-Way Lease/Grant is attached hereto as Exhibit 3.

T. 5 N., R. 41 E.,
Sec. 33, SE1/4, E1/2SW1/4, E1/2SW1/4SW1/4, E1/2SE1/4NW1/4,
S1/2NE1/4, NE1/4NE1/4, SE1/4NW1/4NE1/4;
Sec. 34, W1/2, SE1/4, W1/2NE1/4, SE1/4NE1/4, SW1/4NE1/4NE1/4;
Sec. 35, SW1/4SW1/4NW1/4, SW1/4SW1/4, SE1/4NW1/4SW1/4,
W1/2NW1/4SW1/4.

T. 4 N., R. 41 E.,
Sec. 2, LOT 4, W1/2SW1/4NW1/4;
Sec. 3, N1/2, NW1/4SE1/4, N1/2NE1/4SE1/4, SW1/4NE1/4SE1/4,
NW1/4SW1/4SE1/4, N1/2SW1/4, N1/2S1/2SW1/4,
SW1/4SW1/4SW1/4;
Sec. 4, NE1/4, N1/2SE1/4, E1/2SE1/4SE1/4, NW1/4SE1/4SE1/4,
NE1/4SW1/4SE1/4, NE1/4NE1/4SW1/4, E1/2NW1/4,
E1/2 LOT 4, NE1/4SW1/4NW1/4.

On October 26, 2011, TSE caused a Deed of Trust⁴ to be recorded with the Nye County Recorder's Office against most of the parcels upon which the Work of Improvement was constructed,⁵ to secure approximately \$790 Million in financing for the construction and operation of the Work of Improvement. By way of the Deed of Trust, TSE granted a security interest in and to "[a]ll the estate, right, title, and interest of [TSE] now or hereafter acquired in the real property described in Exhibit A-1 attached hereto...". Exhibit A-1 to the Deed of Trust identifies the Deed Legal Description, the Ground Lease Legal Description, and the following property (collectively, the "Deed of Trust Legal Description"):

PARCEL 1:

GEN-TIE LINE (NVN-087933)

All that property lying within Township 5 North, Range 41 East, M.D.B. & M., in the County of Nye, State of Nevada, according to the Official Plat thereof, described as follows:

Section 2: The SW1/4NE1/4 and the W1/2SE1/4;
Section 11: The W1/2NE1/4, the W1/2SE1/4 and the
E1/2SW1/4;
Section 14: The NE1/4NW1/4, the W1/2NW1/4 and the
NW1/4SW1/4;
Section 15: The E1/2SE1/4 and the SW1/4SE1/4;

⁴ A copy of the Deed of Trust is attached hereto as Exhibit 4.

⁵ At footnote 1 of its Motion, TSE claims the "Property on which the Project [or Work or Improvement] is located consists of the following parcels: 012-031-04, 012-131-03, 012-131-04, 012-140-01, 012-141-01, 012-150-01, 012-151-01, 012-431-06, 612-141-01." By TSE's own admission, these parcels are the TSE Parcels, the BLM Parcels and three other parcels owned by third parties (the "Third-Party Parcels") which, according to TSE, make up the Work of Improvement. Out of the Third-Party Parcels, only APN 112-431-06 was included in the Deed of Trust Legal Description.

Section 22: The NE1/4NE1/4, the W1/2NE1/4, the SE1/4NW1/4, the E1/2SW1/4, the SW1/4SW1/4 and the NW1/4SE1/4;
Section 27: The NE1/4NW1/4, and the W1/2NW1/4;
Section 28: The SE1/4NE1/4, the E1/2SE1/4 and the SW1/4SE1/4;
Section 33: The NW1/4NE1/4.

PARCEL 2:

SOLAR ENERGY PROJECT (NVN-086292)
[Ground Lease Legal Description]

PARCEL 3:

ANACONDA-MOLY SUBSTATION EXPANSION (NVN-089273)

All that property lying within Township 5 North, Range 41 East, M.D.B. & M., in the County of Nye, State of Nevada, according to the Official Plat thereof, described as follows:

Section 2: The E1/2NE1/4SW1/4NE1/4.
And

A TRACT OF LAND SITUATED IN LOT 2 OF SECTION 2, TOWNSHIP 5 SOUTH, RANGE 41 EAST, M.D.M., BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SOUTHEAST CORNER OF SAID LOT 2; THENCE ALONG THE SOUTH LINE THEREOF, NORTH 88°34'27" WEST, 331.44 FEET TO THE NORTHWEST CORNER OF THE EAST HALF (E1/2) OF THE NORTHEAST QUARTER (NE1/4) OF THE SOUTHWEST QUARTER (SW1/4) OF THE NORTHEAST QUARTER (NE1/4) OF SAID SECTION 2; THENCE ALONG THE NORTHERLY PROLONGATION OF THE WEST LINE THEREOF NORTH 00°20'22" EAST, 663.03 FEET; THENCE SOUTH 88°42'55" EAST, 331.39 FEET TO THE EAST LINE OF SAID LOT 2; THENCE ALONG SAID EAST LINE, SOUTH 00°20'11" WEST, 663.85 FEET TO THE POINT OF BEGINNING.

PARCEL 4:

[Deed Legal Description]

PARCEL 5:

All land defined as "Servient Property", described and depicted in that certain document entitled "Grant of Generation-Tie Easement" recorded September 14, 2011 as Document No. 772385, Official Records, Nye County, Nevada, being a portion of the Southeast Quarter (SE1/4) of the Northeast Quarter (NE1/4) of Section 2, Township 5 North, Range 41 East, M.D.B. & M., according to the Official Plat thereof, EXCEPTING THEREFROM any portion conveyed to Sierra Pacific Power Company by a Deed recorded January 1, 1981 in Book 295, Page 553 as File No. 36411 of Official Records, Nye County, Nevada.

Subsequently, TSE, as owner of the Project, began construction of the Work of Improvement (i.e., the Crescent Dunes Solar Energy Facility).

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1 On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with
2 Brahma,⁶ whereby Brahma agreed to provide on a time and material basis, certain work, materials and
3 equipment (collectively, the "Work") for the Work of Improvement. By way of Section 10 of the
4 Agreement, TSE clearly recognized that the Work of Improvement would be subject to mechanic's
5 liens. In pertinent part, Section 10 states:

6
7 10. No Liens.

8 (a) Brahma] shall not voluntarily permit any laborer's, materialmen's,
9 mechanic's or other similar lien, claim or encumbrance (collectively,
10 "Lien") to be filed or otherwise imposed on any part of the Services, the
11 materials and equipment necessary for the performance of the Services, or
12 the Crescent Dunes plant site (except to the extent that such Lien arises
13 from TSE wrongfully withholding payment from [Brahma]). If any such
14 Lien or claim therefor is filed or otherwise imposed, then, in such event,
15 [Brahma] shall, at the requires of TSE, cause such Lien promptly to be
16 released and otherwise discharged. If any Lien is filed and [Brahma] does
17 not promptly cause such Lien to be released, discharged, or if a bond is not
18 filed to indemnify against or release such lien, then, TSE shall have the right
19 to pay all sums necessary to obtain such release and discharge and to deduct
20 all amounts so paid by it from any payment owing to [Brahma]. [Brahma]
21 shall indemnify and hold harmless TSE from all claims, losses, demands,
22 causes of action or suits of whatever nature arising out of any Lien or claim
23 therefor (except to the extent that such Lien arises from TSE wrongfully
24 withholding payment from [Brahma]).

25 (b) Upon TSE's request at any time, [Brahma] agrees promptly to furnish
26 such statements, certificates and documents in form and substance
27 satisfactory to TSE, in its sole discretion, which statement, certificates
28 and/or other documents shall include, without limitation, names of
[Brahma's] any permitted subcontractors and suppliers, their addresses,
amounts due or to become due or previously paid to such subcontractors and
suppliers, information concerning any Lien claims, Lien releases and/or
Lien waivers or receipted bills evidencing payment, estimates of the costs
of the Services performed to the date of such certificate, and estimates of the
cost of completing such Services. [Emphasis added].

23 Brahma provided the Work for the Work of Improvement and TSE has failed to fully pay
24 Brahma for such Work.

25 ///

26 ///

27
28 ⁶ A copy of the Agreement is attached hereto as Exhibit 5.

1 On or about April 9, 2018, Brahma recorded its original Notice of Lien ("Original Lien"), in
2 the amount of \$6,982,186.24,⁷ against the Crescent Dunes Solar Energy Project or the Work of
3 Improvement.

4 On or about April 16, 2018, Brahma recorded its Notice of First Amended and Restated Lien
5 ("First Amended Lien")⁸ against the Crescent Dunes Solar Energy Project or Work of Improvement.
6 The First Amended Lien increased the amount of the Original Lien from \$6,982,186.24 to
7 \$7,178,376.94, as the result of additional Work provided.⁹
8

9 On or about April 24, 2018, Brahma recorded a Notice of Second Amended and Restated Lien
10 ("Second Amended Lien")¹⁰ against the Crescent Dunes Solar Energy Project or Work of
11 Improvement. The Second Amended Lien (i) increased the amount of the First Amended Lien from
12 \$7,178,376.94 to \$13,818,882.29, and (ii) clarified that the Second Amended Lien was intended to
13 attach to the "Tonopah Solar Energy, LLC's interest in the Crescent Dunes Solar Energy Project" or
14 Work of Improvement, and that "the real property owned by the Bureau of Land Management [was
15 not being] charged with this lien."
16

17 On or about July 19, 2018, Brahma caused its Third Amended and/or Restated Notice of Lien
18 ("Third Amended Lien") to be recorded against the Crescent Dunes Solar Energy Project or Work of
19 Improvement.¹¹ By way of its Third Amended Lien, Brahma, among other things, (i) adjusted the
20 amount of its Lien to \$11,902,474.75, and (ii) further clarified that Brahma's claim of lien, a) extends
21 to the real property and improvements constructed thereon that comprise the TSE Parcels, and b) did
22 not extend to the real property that was the subject of the BLM Parcels or certain of the Third-Party
23

24 ⁷ A copy of the Original Lien is attached hereto as Exhibit 6.

25 ⁸ A copy of the First Amended Lien is attached hereto as Exhibit 7.

26 ⁹ Brahma failed to attach Exhibit A to the First Amended Lien and therefor it caused the First Amended Lien to be re-
27 recorded on or about April 18, 2018 and included Exhibit A thereto. Exhibit A to the re-recorded First Amended Lien
28 identifies the real property that is the subject of the First Amended Lien to be the same as that identified in Exhibit A
to the Original Lien. A copy of the re-recorded First Amended Lien is attached hereto as Exhibit 8.

¹⁰ A copy of the Second Amended Lien is attached hereto as Exhibit 9.

¹¹ A copy of the Third Amended Lien is attached hereto as Exhibit 10. The Original Lien, the First Amended Lien, the
Second Amended Lien and the Third Amended Lien are collectively referred to herein as the "Lien."

1 Parcels, but did extend to the improvements constructed thereon.¹²

2 As discussed above, (i) TSE is the record owner of the TSE Parcels,¹³ and (ii) by way of the
3 Ground Lease, the BLM granted to TSE less than a fee simple estate in the BLM Parcels.¹⁴
4

5 **III. LEGAL ARGUMENT.**

6 **A. Nevada's Mechanic's Liens.**

7 The Nevada Supreme Court:

8 • Has long held that a mechanic's lien is a statutory creature established to help ensure
9 payment of work, materials and/or equipment provided for the construction or improvements on real
10 property (*In re Fontainebleau Las Vegas Holdings*, 289 p.3D 1199, 1210 (Nev. 2012));

11 • Has confirmed that Nevada's public policy is to secure payment for those who provide
12 work, material or equipment for a work of improvement. *Lehrer McGovern Bovis, Inc. v. Bullock*
13 *Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008) ([u]nderlying the policy in
14 favor of preserving laws that provide contractors secured payment for their work and materials is the
15 notion that contractors are generally in a vulnerable position because they extend large blocks of credit;
16 invest significant time, labor, and materials into a project; and have any number of workers vitally
17 depend upon them for eventual payment"); and

18 • Has consistently held that the lien statutes (NRS 108.222 to 108.246—the "Lien
19 Statute") are remedial in character and should be liberally construed in favor of lien claimants. *Id.* See
20 also, *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528 and 538 (2010) (citing Hearing on S.B.
21 343 Before the Assembly Comm. On Judiciary, 73d Leg. (Nev., May 13, 2005)) (emphasis added).
22

23 ///

24 ///

25 ///

26
27 ¹² See, Exhibit 10.

28 ¹³ See, Exhibit 1. See also, Parcel Detail printouts from the Nye County Assessor's Website attached hereto as Exhibit
11.

¹⁴ See, Exhibit 3.

1 Due to the remedial nature of Nevada's lien laws, Nevada's public policy, and the
2 interpretations ascribed to such laws by the Nevada Supreme Court and the Nevada Legislature, along
3 with the reasons provided below, TSE's Motion must be denied as Brahma has a valid and enforceable
4 Lien.

5 Without providing any evidence in support of its position, TSE argues in its Motion that
6 Brahma's Lien must be expunged because it was recorded against real property owned by the BLM.
7 Contrary to TSE's assertions otherwise and as demonstrated in Section II above and in this Section
8 below, Brahma's Lien was validly recorded against (i) the TSE Parcels, and (ii) improvements owned
9 by TSE that were constructed on the BLM Parcels and real property owned by others.
10

11 Despite the foregoing, TSE does not dispute – and appears to agree – that Brahma may lien
12 improvements owned by TSE, even if such improvements exist, in whole or in part, on federally owned
13 land. [See TSE Motion p. 11].¹⁵ TSE's only contention (which is incorrect) is that Brahma's Lien
14 attaches to federal land (it does not) and may not be amended. [See *Id.*].¹⁶ TSE is wrong on both
15 accounts.
16

17 **B. The Lien Statute Plainly Permits Mechanics Liens on the Property and**
18 **Improvements of this Work of Improvement.**

19 Since at least 1970 (well before the Lien Statute was substantially amended in 2003 and 2005,
20 at which time the Nevada Legislature provided definitions for key terms used throughout the Statute,
21 including the word "improvements"), the Nevada Supreme Court has recognized that the Lien Statute
22 gives a lien claimant a lien against improvements constructed upon publicly owned land.

23 ///

24 ///

25 ///

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27 ¹⁵ See, Discussion, *infra* and NRS 108.222. See also, *Red Mountain Machinery Co. v. Grace Inv. Co.*, 29 F.3d 1408
(acknowledging right of state mechanic's liens to attach to improvements on federal land).

28 ¹⁶ TSE nonetheless acknowledges, as it must, that Brahma's Lien could be released and re-recorded provided it does
not attach to federal land. [*Id.* n. 7]. Furthermore, because the Work of Improvement is not complete, Brahma has up
to 90 days after the completion of the Work of Improvement to record a new notice of lien. See NRS 108.226(1)(a).

1 In *Young Electric Sign Co. v. Erwin Electric Co.*, 477 P.2d 864 (1970), the Nevada Supreme
2 Court held that a sign securely attached to real property owned by a state agency could be liened
3 pursuant to the then-current version of NRS 108.222 allowing a lien on "any other structure ... upon
4 such premises and the buildings, structures and improvements thereon". *Id.* The Nevada Supreme
5 Court provided even more clarification by stating:

6 The appellant's contention that one who supplies labor or materials for an
7 improvement or structure cannot lien the appurtenance without liening the
8 real property upon which it is located is unsupported in the law. NRS
9 108.222 specifically authorizes a lien upon the structure as well as the
premises.

10 And in *Western Electric Co. v. Cooley*, 79 Cal.App. 770, 251 P. 331
11 (1926), that court held that an electrical power line was a 'structure' within
12 their mechanic's lien statutes, and one who furnished material to such
13 power line was entitled to a lien against it, although the real property
14 upon which the line was located was a public highway owned and
15 controlled by the state. In *English v. Olympic Auditorium*, 217 Cal. 631,
16 20 p.2d 946, 87 A.L.R. 1281 (1933), the California Supreme Court quoting
17 with approval from *Western Electric Co. v. Cooley*, *supra*, said: 'Under
18 these statutory provisions, the lien on the building, or other structure, is
19 the primary thing, and the lien in the land is merely an incident to it. No
20 lien can be acquired on the land, if none is acquired on the building, but a
21 lien may exist on the building without attaching to the land. Hence it is
22 not essential to the existence of a mechanic's lien on a building that the
23 person causing its erection should have owned or had any interest in the
24 real property on which it is located.' [Emphasis added].

25 *Id.* at 868.

26 Thus, by 1970, the Nevada Supreme Court interpreted the Nevada Lien statute consistent with its
27 remedial purpose and recognized the rights of lien claimants to lien works of improvements despite the fact
28 that the work of improvement was constructed on publicly owned land. Moreover, the following statutory
modifications (after the ruling issued by the Nevada Supreme Court in *Young Electric Sign* have
continued to confirm the rights of lien claimants to lien improvements constructed on publicly owned
land. See, NRS 108.22148. For example:

NRS 108.222 states that "a lien claimant has a lien upon the property" and "any improvements
for which the work, materials and equipment were furnished or to be furnished..."

1 NRS 108.2214 defines "lien claimant" as:

2 [A]ny person who provides work, material or equipment with a value of
3 \$500 or more to be used in or for the construction, alteration or repair of
4 any improvement, property or work of improvement. [Emphasis added].

5 NRS 108.22128 defines "Improvement" as:

6 [T]he development, enhancement or addition to property, by the provision
7 of work, materials or equipment. [Emphasis added].

8 NRS 108.22128 defines "Property" as:

9 [T]he land, real property or mining claim of an owner for which a work
10 of improvement was provided, including all buildings, improvements and
11 fixtures thereon, and a convenient space on, around and about the same,
12 or so much as may be required for the convenient use and occupation
13 thereof. [Emphasis added].

14 NRS 108.22148 defines "Owner" to include, among other things:

15 (a) The record owner or owners of the property or an improvement to the
16 property as evidenced by a conveyance or other instrument which
17 transfers that interest to the record owner or owners and is recorded in the
18 office of the county recorder in which the improvement or property is
19 located.

20 (b) The reputed owner or owners of the property or an improvement to
21 the property;

22 (c) The owner or owners of the property or an improvement to the
23 property, as shown on the records of the county assessor for the county
24 where the property or improvement is located;

25 (d) A person who claims an interest in or possesses less than a fee simple
26 estate in the property. [Emphasis added].

27 NRS 108.22188 defines "Work of Improvement" as:

28 [T]he entire structure or scheme of improvement as a whole, including,
without limitation, all work, materials and equipment to be used in or for
the construction, alteration or repair of the property or any improvement
thereon, whether under multiple prime contracts or a single prime contract.
[Emphasis added].

Despite TSE's claims otherwise, a lien will attach to improvements constructed on real property owned by a government agency. Therefore, Brahma's Lien is not invalid simply because some of the real property upon which the improvements were constructed are located on the BLM Parcels. Instead, Braham's Lien extends to all improvements that make up the Work of Improvement, including the improvements owned by TSE and constructed on the BLM Parcels

1 and the TSE Parcels.

2 **C. TSE is a Statutory “Owner” by way of the Grant Deed, the Ground Lease and**
3 **Other Public and Recorded Documents.**

4 Multiple public records (recorded by or at the behest of TSE) demonstrate unequivocally that
5 TSE is an “owner” as defined by the Statute whose “property” and “improvements” (as those terms
6 are defined in the Statute), are subject to Brahma’s Lien. This list includes, without limitation, the
7 Grant Deed, the Ground Lease, and the Deed of Trust.

8 **1. The Grant Deed makes TSE an “owner.”**

9 As demonstrated by the Grant Deed alone, TSE is an “owner” pursuant to NRS 108.22148(1).¹⁷
10 Specifically, but without limitation, the Grant Deed proves that TSE acquired the TSE Parcels by way
11 of the Grant Deed and is, therefore a “record owner” of the property “as evidenced by a conveyance or
12 other instrument.” See NRS 108.22148(1)(a). In addition, by way of the Grant Deed’s recording, TSE
13 is an owner as “shown on the records of the [Nye] county assessor” for the TSE Parcels. See NRS
14 108.22148(1)(c).¹⁸

15 **2. The Ground Lease makes TSE an “owner.”**

16 The Ground Lease also demonstrates that TSE is an owner pursuant to NRS 108.22148(1). As
17 discussed more fully above, the Ground Lease reflects BLM’s lease of the BLM Parcels to TSE to
18 “construct, operate, maintain, and terminate one 110 MW Concentrated Solar Power (CSP) plant with
19 storage capacity, including associated facilities...”¹⁹ Specifically, but without limitation, the Ground
20 Lease proves that TSE:
21

- 22 • Is the owner of the Project, which is “an improvement to the property” “as evidenced
23 by a conveyance or other instrument.” See NRS 108.22148(1)(a);
- 24 • Is the owner or reputed owner of an improvement to the property. See NRS
25 108.22148(1)(b); and
26

27 ¹⁷ See, Exhibit 1.

28 ¹⁸ See, Exhibit 11.

¹⁹ See, Exhibit 3.

1 • "[C]laims an interest in or possesses less than a fee simple estate" in the BLM Parcels.
2 See NRS 108.22148(1)(d).

3 **3. The Deed of Trust makes TSE an "owner."**

4 TSE received approximately \$790 Million to finance the construction and operation of the
5 Project, which financing is secured by the Deed of Trust. In the Deed of Trust, TSE granted to a third-
6 party security interest in and to "[a]ll the estate, right, title, and interest of [TSE] now or hereafter
7 acquired" to the TSE Parcels, the BLM Parcels and one of the Third-Party Parcels, all of which are
8 identified in the Deed of Trust Legal Description. The legal description in the Deed of Trust Legal
9 Description is the same legal description identified in the Lien. By way of the Deed of Trust, TSE
10 acknowledged to the world that it has (i) rights in and to the improvements, the Work of Improvement
11 and the TSE Parcels, the BLM Parcels and one of the Third-Party Parcels, and (ii) granted a security
12 interest to its lender.
13

14 By allowing the Deed of Trust to be recorded against and granting a security interest in TSE's
15 interest in the improvements constructed on the BLM Parcels (that were leased to TSE by the BLM
16 and which were the subject of the Ground Lease), both TSE and BLM acknowledge that TSE has the
17 right to encumber such BLM Parcels (at least the improvements to be constructed thereon as part of
18 the Work of Improvement). To the extent the court finds that Brahma does not possess lien rights with
19 respect to the BLM Parcels, it must necessarily find that (i) Brahma possesses lien rights with respect
20 to the improvements constructed on the BLM Parcels, or (ii) the Deed of Trust was also improperly
21 recorded against BLM Parcels and the improvements constructed thereon.
22

23 **D. TSE Acknowledged Brahma's Right to Lien its Property and Improvements.**

24 The Agreement itself is an instrument and evidences TSE's position as owner or reputed owner
25 of the Work of Improvement, whether owned in whole or in part by TSE, the BLM or other Third-
26 Parties. The Agreement also evidences TSE's acknowledgement, contemplation and agreement that
27 Brahma, and Brahma's subcontractors and suppliers, possessed lien rights for the Work furnished or
28

1 to be furnished for the Project. For example, TSE and Brahma agreed that Brahma would not allow a
2 lien to be recorded or otherwise imposed on any part of the Work or the Work of Improvement,
3 “(except to the extent that such lien arises from TSE wrongfully withholding payment from
4 [Brahma].”²⁰

5
6 By recording its Lien (based on TSE’s failure to pay it more than \$11 Million,²¹ Brahma did
7 precisely what the Agreement expressly contemplated and permitted.²²

8 TSE also required Brahma to submit to TSE “information concerning any Lien claims, Lien
9 releases and/or Lien Waivers...”²³ By way of this provision, and because TSE owns the Work of
10 Improvement, including the TSE Parcels, TSE sought to protect itself from lien claims by requiring
11 lien releases and/or waivers. Had TSE believed that the Work of Improvement (including the real
12 property upon which it was constructed) was not susceptible to mechanic’s liens (because such real
13 property was the subject of the BLM Parcels and was owned by the BLM or otherwise), there would
14 be no reason for this provision to be included in the Agreement.

15 Additionally, TSE required Brahma to provide TSE with its payment applications, “a duly
16 executed Waiver/Release of Mechanic’s Lien from [Brahma] and each of [Brahma’s] Subcontractors
17 and Suppliers for whom payment is sought...”²⁴ Consistent with the Statute, the Agreement requires
18 Brahma to provide such lien releases conditionally and unconditionally for both progress and final
19 payments.²⁵ See e.g., NRS 108.2457 (setting forth the only enforceable forms for waiver and release
20 of liens for progress payments and final payment).

21
22 ///

23 ///

24
25 ²⁰ See, Exhibit 5, ¶ 10(a) (emphasis added).

26 ²¹ As of this writing, TSE has now wrongfully withheld payments from Brahma exceeding \$11,900,000.00.

27 ²² As discussed more fully below, the Agreement’s attempt to restrict Brahma’s right to lien contrary to Nevada law is
void and unenforceable. See Discussion *infra* and, without limitation, NRS 108.2453(2).

28 ²³ See, Exhibit 5, ¶ 10(b).

²⁴ See, Exhibit 5, Ex. D ¶¶2-5.

²⁵ See, *Id.*

1 Finally, but importantly, the Agreement adopts and applies Nevada law. Paragraph 24 of the
2 Agreement states that "[t]his Agreement shall be governed by the laws of the State of Nevada".²⁶

3 Pursuant to Nevada law:

- 4
- 5 • NRS 108.2457(1): "Any term of a contract that attempts to waive or impair the
6 lien rights of a contractor, subcontractor or supplier is void";
 - 7 • NRS 108.2453(1): "A person may not waive or modify a right, obligation or
8 liability set forth in the provisions of [the Statute]";
 - 9 • NRS 108.2453(2): "A condition stipulation or provision in a contract or other
10 agreement for the improvement of property or for the construction, alteration or
11 repair of a work of improvement in this State that attempts to do any of the
12 following is contrary to public policy and is void and unenforceable:
 - 13 (a) Require a lien claimant to waive rights provided by law to lien claimants or to
14 limit the rights provided to lien claimants, other than as expressly provided in
15 [the Statute], inclusive;
 - 16 (b) Relieve a person of an obligation or liability imposed by the provisions of [the
17 Statute];
 - 18 (c) Make the contract or other agreement subject to the laws of a state other than
19 this State;
 - 20 (d) Require any litigation, arbitration or other process for dispute resolution on
21 disputes arising out of the contract or other agreement to occur in a state other
22 than this State; or
 - 23 (e) Require a prime contractor or subcontractor to waive, release or extinguish a
24 claim or right that the prime contractor or subcontractor may otherwise possess
25 or acquire for delay, acceleration, disruption or impact damages or an
26 extension of time for delays incurred, for any delay, acceleration, disruption
27 or impact event which was unreasonable under the circumstances, not within
28 the contemplation of the parties at the time the contract was entered into, or
for which the prime contractor or subcontractor is not responsible."

20 In other words, if a condition, stipulation, or provision in the Agreement is inconsistent with
21 the Statute, such condition, stipulation, or provision is void and unenforceable. Because the Statute
22 governs all work, materials and equipment provided for a work of improvement in this State, Brahma's
23 Lien is valid and enforceable.

24 Therefore, pursuant to the Agreement, and for the benefit of TSE, Brahma provided the Work
25 to the Project, and therefore has a Lien against (i) the TSE Parcels and the improvements constructed
26 thereon, (ii) the Work of Improvement owned by TSE (which is the Project itself), and (iii) TSE's
27

28 ²⁶ See, Exhibit 5, ¶24.

1 interest in the BLM Parcels and the Third Party Parcels, or improvements constructed thereon. See
2 *Young Electric Sign Co.*, 477 P.2d at 868 (“a lien may exist on the building without attaching to the
3 land”).

4 Despite TSE’s claims otherwise, while a lien may not attach to real property owned by a
5 government agency, a lien will still attach to improvements constructed on such government owned
6 land. Therefore, Brahma’s Lien is not invalid simply because some of the real property upon which
7 the improvements were constructed are located on the BLM Parcels. Instead, Brahma’s Lien extends
8 to all improvements that make up the Work of Improvement, including the improvements constructed
9 on the BLM Parcels and the real property and improvements owned by TSE.
10

11 **E. Brahma’s Lien Has Been Properly Amended to Confirm That it is Limited to the**
12 **TSE Property and the Improvements to the Work of Improvement.**

13 The Lien has now been amended multiple times to adjust the amount of the Lien and to make
14 abundantly clear that it does not attach to the real property that comprises the BLM Parcels.²⁷ TSE
15 asserts, incorrectly and without any support, that the Lien cannot be so amended. [See Motion p. 11].
16 To the contrary, even if the Original Lien or First Amended Lien could be interpreted to attach to the
17 BLM Parcels, NRS 108.229(1) expressly allows Brahma to amend its Lien “[a]t any time before or
18 during the trial of any action to foreclose a lien to correct or clarify the lien claimant’s notice of lien.”
19 In fact, under NRS 108.229(1), “[a] variance between a notice of lien and an amended notice of lien
20 does not defeat the lien and shall not be deemed material unless the variance: (a) Results from fraud or
21 is made intentionally; or (b) Misleads an adverse party to the party’s prejudice, but then only with
22 respect to the adverse party who was prejudiced.” Because neither of these conditions exist, Brahma’s
23 amendments to its Lien are valid and proper.
24

25 Moreover, the Lien (even in the Original Lien and the First Amended Lien) identifies and
26 attaches to those parcels and legal description identified in the Deed of Trust Legal Description. As
27 noted above, if the legal description of the Deed of Trust attaches to the real property that comprises
28

²⁷ See, e.g., Exhibit 9, Second Amended Lien and Exhibit 10, Third Amended Lien.

1 the BLM Parcels, TSE would not have been able to convey a secured interest to its lender in that same
2 land by way of the Deed of Trust Legal Description.

3 Furthermore, the Third Amended Lien declares that:

4 To the extent allowed by law and to the extent the statutory period to
5 record a notice of lien against the Work of Improvement (defined below)
6 has not expired, [the Third Amended Lien] shall act as a newly recorded
notice of lien, which replaces and supersedes [all prior liens].²⁸

7 Accordingly, and even if Brahma's prior notices of lien were somehow defective (which they
8 were not), and because the period for recording a new notice of lien has not expired, the Third Amended
9 Lien acts as a newly recorded lien, irrespective of any amendments. For this additional reason, the Lien
10 is valid.

11 **F. Brahma Was Not Required to Give a Notice of Right to Lien.**

12 TSE claims that Brahma's Lien is invalid because Brahma failed to give the BLM a Notice of
13 Right to Lien.²⁹ In making this argument, TSE ignores the first part of NRS 108.245(1) which provides,
14 "[e]xcept as otherwise provided in subsection 5..." NRS 108.245(5) provides that a "prime contractor
15 or other person who contracts directly with an owner or sells materials directly to an owner is not
16 required to give notice pursuant to this section." As discussed above, the term "owner," as defined in
17 NRS 108.22148(1), includes:³⁰

- 18
- 19 • "The record owner or owners of the property or an improvement to the property
20 ...". See, NRS 108.22148(1)(a).
 - 21 • "The reputed owner or owners of the property or an improvement to the property."
22 See, NRS 108.22148(1)(b).
 - 23 • "The owner or owners of the property or an improvement to the property, as shown
24 on the records of the county assessor ..." (i.e., the "assessor owner"). See, NRS
25 108.22148(1)(c).
 - 26 • "A person who claims an interest in or possesses less than a fee simple estate in
27 the property" (i.e., a "lessee"). See, NRS 108.22148(1)(c).

28 See, **Exhibit 10**.

29 TSE does not claim that Brahma failed to give TSE a Notice of Right to Lien, presumably because it knows that Nevada law does not require such notice for the reasons discussed below.

30 It is also important to note that under NRS 108.22148(1), TSE is "an owner" and not "the owner." The reason for this distinction is that NRS 108 has different definitions for "owner" which are not confined to the owner of a fee simple interest in real property.

1 Because TSE is the record owner, reputed owner and assessor owner of the TSE Parcels and
2 contracted directly with Brahma for the Work, a notice of right to lien was not required to be given
3 pursuant to NRS 108.245(5).

4 Because TSE is (i) the ground lessee of the BLM Parcels under the Ground Lease (possessing
5 less than a fee simple estate), and (ii) is the reputed owner of the improvements constructed on the BLM
6 Parcels, a notice of right to lien was not required to be given pursuant to NRS 108.245(5).

7 Further, because Brahma's Lien only attaches to the improvements constructed on the BLM
8 Parcels and not the BLM's fee simple interest in such real property that comprises the BLM Parcels,
9 Brahma had no obligation to provide a notice of right to lien to the BLM under NRS 108.245(1), nor
10 does the BLM have any cause to complain about the same.

11 In addition, and to the extent the Court determines that NRS 108.245(1) applies and required a
12 notice of right to lien to be served on the BLM, the Nevada Supreme Court has repeatedly held that an
13 owner's "actual knowledge of potential lien claims on the property" constitutes substantial compliance
14 with NRS 108.245(1). See *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 539, 245 P.3d
15 1149, 1157 (2010) citing *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 709, 800 P.2d 719 (1990) ("a
16 property owner who negotiates a lease with knowledge that substantial improvements need to be made
17 to the property has actual knowledge of potential lien claims on the property"). Further, if an owner
18 fails to file a notice of non-responsibility after knowledge of the construction, "the statute provides that
19 the construction is at the instance of the owner." Id. quoting *Matter of Stanfield*, 6 B.R. 265, 268
20 (Bankr.D.Nev.1980). Here, by way of the Ground Lease, the BLM acknowledged and agreed that TSE
21 would "construct, operate, maintain and terminate one 110 MW Concentrated Solar Power (CSP) plant
22 with storage capacity, including associated facilities."³¹ This is the reason the BLM has not objected
23 to the recordation of the Deed of Trust in favor of TSE's lender.
24
25
26
27
28

³¹ See, Exhibit 3.

1 **G. TSE Failed to Meet Its Burden Under NRS 108.2275.**

2 Notably, TSE has filed its Motion seeking to expunge Brahma's Lien, not to simply reduce the
3 same. This is important because the Nevada Supreme Court has held that where a party seeks to
4 expunge a lien, the moving party (i.e., TSE) bears the burden of establishing that Brahma's Lien is
5 frivolous and recorded without reasonable cause. *J.D. Const., Inc. v. IBEX Int'l Group, LLC*, 240 P.3d
6 1033, 1042-43 (Nev. 2010) (The plain language of NRS 108.2275(6) is clear that if the district court
7 determines that a mechanic's lien was made "without reasonable cause," then the lien is frivolous and
8 the district court may expunge the lien").³²

9 As such, TSE, not Brahma, bears the burden of proving that the Lien is frivolous and there is
10 "**absolutely no basis for a claim.**" Given the fact that (i) NRS 108 permits a lien claimant to have a
11 lien against real property, improvements, the work of improvement, etc., and (ii) Brahma's Lien is
12 properly recorded against a) the TSE Parcels and the improvements constructed thereon, and b) only
13 the improvements constructed on the BLM Parcels, Brahma had/has a reasonable basis for recording
14 its Lien. As such, TSE has failed to meet its burden and its Motion must be denied.

15 **H. Brahma Is Entitled To Recover Its Attorney's Fees And Costs.**

16 NRS 108.2275(6)(c) provides that if a court determines the "notice of lien is not frivolous and
17 was made with reasonable cause or that the amount of the notice of lien is not excessive, the court shall
18 make an order awarding costs and reasonable attorney's fees to the lien claimant for defending the
19 motion."

20 As provided herein, Brahma's Lien is valid and has properly attached to the whole of the Work
21 of Improvement, including the real property and improvements constructed thereon by TSE, and the
22 improvements that TSE owns which were constructed on real property owned by the BLM. As such it
23 is not frivolous. Therefore, TSE's Motion must be denied and Brahma is entitled to be awarded its
24

25
26
27 ³² While interpreting the legislative history of NRS 108.2275, the *J.D. Const., Inc.* Court found:
28 The minutes also note that "[l]ooking to the level of proof required to show the claim is frivolous, Senator Adler pointed out the burden is such that the plaintiff must show there is absolutely no basis for a claim. If there is any showing of good faith, the court will not dismiss the lien." Hearing on S.B. 434 Before the Assembly Comm. On Judiciary, 68th Leg (Nev., June 26, 1995). *Id.* (emphasis added).

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1 reasonable attorney's fees and costs in defending against TSE's Motion. Brahma reserves its right to
2 file with this Court a motion for attorney's fees and costs after the hearing on TSE's Motion.

3 **IV. CONCLUSION.**

4 For the foregoing reasons, Brahma respectfully requests the Court to:

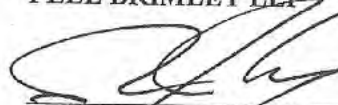
- 5
- 6 • Deny TSE's Motion;
 - 7 • Rule that Brahma is entitled to an award of reasonable attorney's fees pursuant to NRS
 - 8 108.2275(6)(c), and
 - 9 • Grant Brahma leave to submit an application for fees by way of a separate motion.

10 **AFFIRMATION**

11 The undersigned does hereby affirm that the preceding document, filed in the Fifth Judicial
12 Court of the State of Nevada, Nye County, does not contain the social security number of any person.

13 Dated this 21st day of July, 2018.

14 **PEEL BRIMLEY LLP**

15 

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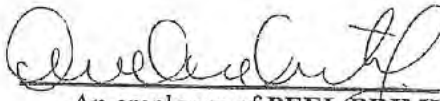
CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 24 day of July, 2018, I caused the above and foregoing document, **BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO EXPUNGE BRAHMA GROUP, INC.'S MECHANIC'S LIEN** 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 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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