

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

v.

Brahma Group, Inc.,
Respondent

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

**APPELLANT'S APPENDIX
VOLUME 10**

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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 BRAHMA GROUP, INC., a Nevada corporation,

13 Plaintiff,

14 vs.

15 TONOPAH SOLAR ENERGY, LLC, a Delaware
16 limited liability company,

17 Defendant.

CASE NO. 2:18-cv-01747-RFB-GWF

DEFENDANT TONOPAH SOLAR
ENERGY, LLC'S ANSWER TO BRAHMA
GROUP, INC'S COMPLAINT AND
COUNTERCLAIM AGAINST BRAHMA

19 Defendant TONOPAH SOLAR ENERGY, LLC (hereinafter "TSE"), by and through
20 its attorneys of the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby
21 submits its Answer to Plaintiff's Complaint ("Complaint").

22 **GENERAL ALLEGATIONS**

23 1. Answering Paragraph 1 of the Complaint, TSE denies that Brahma Group, Inc.
24 ("BGI") is a limited liability company. As to the remaining allegations, TSE is without
25 sufficient knowledge to form a belief as to the truth of those allegations and therefore denies
26 each and every remaining allegation.

27 2. Answering Paragraph 2 of the Complaint, TSE admits each and every allegation
28 therein.

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3. Answering Paragraph 3 of the Complaint, TSE admits that BGI and TSE are parties to a Services Agreement. TSE denies the remaining allegations in this paragraph.

4. Answering Paragraph 4 of the Complaint, TSE is without sufficient knowledge to form a belief as to the truth of the allegations in said paragraph and therefore denies each and every allegation contained therein.

FIRST CAUSE OF ACTION

(Breach of Contract)

5. Answering Paragraph 5 of the Complaint, TSE repeats and incorporates herein by reference each and every response contained in Paragraphs 1 through 4, inclusive, as though fully set forth herein in their entirety.

6. Answering Paragraph 6 of the Complaint, TSE denies that BGI agreed to provide "a portion of the work, materials and/or equipment (the 'Work') for the Project, and avers that the Services Agreement speaks for itself.

7. Answering Paragraph 7 of the Complaint, TSE denies each and every allegation therein.

8. Answering Paragraph 8 of the Complaint, TSE denies each and every allegation therein.

9. Answering Paragraph 9 of the Complaint, TSE denies each and every allegation therein.

10. Answering Paragraph 10 of the Complaint, TSE denies each and every allegation therein.

11. Answering Paragraph 11 of the Complaint, TSE denies each and every allegation therein.

12. Answering Paragraph 12 of the Complaint, TSE denies each and every allegation therein.

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SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith and Fair Dealing)

13. Answering Paragraph 13 of the Complaint, TSE repeats and re-alleges and incorporates herein by reference each and every response contained in Paragraphs 1 through 12, inclusive, as though fully set forth herein in their entirety.

14. Answering Paragraph 14 of the Complaint, TSE admits each and every allegation contained therein.

15. Answering Paragraph 15 of the Complaint, TSE denies each and every allegation therein.

16. Answering Paragraph 16 of the Complaint, TSE denies each and every allegation therein.

17. Answering Paragraph 17 of the Complaint, TSE denies each and every allegation therein.

18. Answering Paragraph 18 of the Complaint, TSE denies each and every allegation therein.

THIRD CAUSE OF ACTION

(Unjust Enrichment)

19. Answering Paragraph 19 of the Complaint, TSE repeats and re-alleges and incorporates herein by reference each and every response contained in Paragraphs 1 through 18, inclusive, as though fully set forth herein in their entirety.

20. Answering Paragraph 20 of the Complaint, TSE is without sufficient knowledge to form a belief as to the truth of the allegations in said paragraph and therefore denies each and every allegation contained therein.

21. Answering Paragraph 21 of the Complaint, TSE denies each and every allegation therein.

22. Answering Paragraph 22 of the Complaint, TSE denies each and every allegation therein.

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1 23. Answering Paragraph 23 of the Complaint, TSE denies each and every allegation
2 therein.

3 24. Answering Paragraph 24 of the Complaint, TSE admits each and every allegation
4 therein.

5 25. Answering Paragraph 25 of the Complaint, TSE denies each and every allegation
6 therein.

7 26. Answering Paragraph 26 of the Complaint, TSE denies each and every allegation
8 therein.

9 27. Answering Paragraph 27 of the Complaint, TSE denies each and every allegation
10 therein.

11 **FOURTH CAUSE OF ACTION**

12 **(Violation of NRS 624)**

13 28. Answering Paragraph 28 of the Complaint, TSE repeats and re-alleges and
14 incorporates herein by reference each and every response contained in Paragraphs 1 through 27,
15 inclusive, as though fully set forth herein in their entirety.

16 29. Answering Paragraph 29 of the Complaint, TSE responds that it calls for a legal
17 conclusion and that the statutes cited speak for themselves. Therefore, TSE denies each and
18 every allegation contained therein.

19 30. Answering Paragraph 30 of the Complaint, TSE denies each and every allegation
20 therein.

21 31. Answering Paragraph 31 of the Complaint, TSE denies each and every allegation
22 therein.

23 32. Answering Paragraph 32 of the Complaint, TSE denies each and every allegation
24 therein.

25 33. TSE denies any allegation not already responded to above.

26 34. TSE denies the allegations set forth in BGI's prayer for relief.

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AFFIRMATIVE DEFENSES

1. BGI's claims are barred due to its failure to state facts sufficient to constitute a cause of action upon which relief can be granted against TSE.

2. BGI's claims are barred because BGI has failed to fulfill a condition precedent to payment on its invoices, namely, that BGI provide TSE with all supporting documentation for BGI's invoices that may be reasonably required or requested by TSE.

3. BGI's claims are barred by the doctrine of equitable estoppel. Among other things, BGI deliberately concealed the inaccuracies, irregularities and overcharges in its invoices to TSE for the purpose of causing TSE to not withhold payment on those invoices. TSE was unaware of the inaccuracies, irregularities and overcharges in the invoices that BGI submitted and relied to its detriment on said invoices when making payment. Thus, BGI cannot now prevent TSE from challenging the substance of those invoices by arguing that TSE did not follow the procedures set forth in NRS 624 for withholding payment to a general contractor.

4. BGI's claims are barred by its fraudulent actions. Among other things, BGI submitted fraudulent invoices to TSE for the purpose of causing TSE to not withhold payment on those invoices. TSE was unaware until recently of the fraudulent nature of the invoices that BGI submitted and relied to its detriment on said invoices when making payment. Thus, BGI cannot now prevent TSE from challenging the substance of those invoices by arguing that TSE did not follow the procedures set forth in NRS 624 for withholding payment to a general contractor.

5. BGI's claims are barred by its negligent misrepresentations. Among other things, BGI knew or should have known that its invoices contained false and misleading information and failed to provide TSE with sufficient information to evaluate the reasonableness of the claimed services performed and incidental expenses incurred. TSE was unaware until recently of the misleading nature of the invoices that BGI submitted and relied to its detriment on said invoices when making payment. Thus, BGI cannot now prevent TSE from challenging the substance of those invoices by arguing that TSE did not follow the



1 procedures set forth in NRS 624 for withholding payment to a general contractor.

2 6. Pursuant to Paragraph 2 of the Services Agreement, BGI agreed to only render
3 to TSE "such services as are reasonably necessary to perform the work" ordered by TSE. BGI
4 breached the contract and breached the covenant of good faith and fair dealing by incurring
5 and billing unreasonable and inflated claims for labor and incidental expenses which were not
6 reasonably necessary to perform the work ordered by TSE.

7 7. Pursuant to Paragraph 4(d) of the Services Agreement, TSE agreed to
8 reimburse BGI for its "reasonable out-of-pocket expenses that are necessary for the
9 performance of the Services." The term "services" means "such services as are reasonably
10 necessary to perform the work" ordered by TSE. BGI breached the contract and breached the
11 covenant of good faith and fair dealing by incurring and billing unreasonable and inflated
12 claims for out-of-pocket expenses that were both unreasonable and not reasonably necessary
13 to perform the services ordered by TSE.

14 8. BGI breached the Services Agreement and the covenant of good faith and fair
15 dealing by assigning work to related entities so that it could bill additional fees and charges in
16 excess of the contract rates for labor and incidental expenses.

17 9. The Services Agreement contemplated BGI performing the work for a period of
18 over one year and work was performed for more than one year. Therefore, the statute of
19 frauds bars evidence of any oral agreements allegedly promising any payment or performance
20 not expressly required by the written contract.

21 10. Pursuant to Paragraph 19 of the Services Agreement, the obligations of the
22 Services Agreement can only be amended by a writing signed by the party to be charged.
23 Accordingly, any claimed oral work orders, waivers or modifications to the terms of the
24 written instrument are void and unenforceable.

25 11. Pursuant to Exhibit A of the Services Agreement, TSE has no obligation to pay
26 for any services or incidental expenses not expressly authorized by a written Work Order
27 issued in writing by TSE.

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WEINBERG WHEELER
HUDGINS GUNN & DIAL



1 12. To the extent BGI induced TSE's employees or other representatives to
2 authorize or approve unnecessary or unreasonable services or expenses, such work was
3 beyond the scope of the Services Agreement and TSE's employees had no actual or apparent
4 authority to approve such work.

5 13. Requiring TSE to pay for intentionally inflated, unnecessary or unreasonable
6 charges would be both procedurally and substantively unconscionable regardless of any
7 knowledge or consent of an employee of TSE.

8 14. BGI's claims are barred due to its unclean hands and inequitable conduct as
9 Plaintiff has submitted fraudulent invoices to TSE and engaged in other fraudulent practices on
10 the Project.

11 15. TSE promised to pay BGI promptly for any and all services and expenses that
12 BGI could prove were reasonably and necessarily incurred under the terms of the Services
13 Agreement. To the extent BGI ultimately proves it is entitled to additional payment under the
14 Services Agreement, Plaintiff has failed to mitigate its alleged damages by, among other
15 things, being stubbornly litigious and failing and refusing to provide adequate and complete
16 documentation for its claims without the necessity of litigation.

17 16. Pursuant to Paragraph 4(a) and Exhibit A of the Services Agreement, TSE has
18 no obligation to pay for services or incidental expenses in excess of the not-to-exceed
19 ("NTE") amount of \$5 million. TSE has paid in excess of \$5 million and has no further
20 obligations under the Services Agreement.

21 17. Pursuant to Paragraph 18 of the Services Agreement, TSE's delay in exercising
22 any of its rights under the Services Agreement, including but not limited to its right to demand
23 documentation and proof of services rendered and expenses incurred, cannot be deemed a
24 waiver of TSE's rights under the Services Agreement or Nevada law.

25 18. BGI's claims are barred by the equitable doctrines of laches, waiver, consent, and
26 release.

27 19. BGI's damages, if any, were caused by BGI's own negligence.

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20. All possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this Answer. TSE has repeatedly requested backup documentation from BGI but BGI has generally refused to provide the requested documentation sufficient to justify and validate its invoices. Therefore, TSE reserves the right to amend this Answer to allege additional defenses if information obtained during discovery warrants doing so.

TSE'S COUNTERCLAIM

Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through its attorneys of record, the law firm of **WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC**, hereby counterclaims, alleging as follows:

JURISDICTION AND PARTIES

1. Plaintiff **Brahma Group, Inc.** (hereinafter "BGI"), is a Nevada corporation with its principal place of business in Salt Lake City, Utah, making BGI a citizen of Nevada and Utah for purposes of diversity jurisdiction.

2. Defendant/Counterclaimant TSE is a limited liability company. Tonopah Solar Energy Holdings II, LLC ("TSEH II") is the sole member of TSE. TSEH II's members are Capital One, National Association ("Capital One") and Tonopah Solar Energy Holdings I, LLC ("TSEH I"). Capital One is a national banking association with its main office located in McLean, Virginia, making it a citizen of Virginia. TSEH I's members are Tonopah Solar I, LLC and Tonopah Solar Investments, LLC. Tonopah Solar I, LLC's members are Banco Santander, S.A and Inversiones Capital Global, S.A. Banco Santander, S.A. is an international banking institution with its headquarters and principal place of business in Madrid, Spain, making it a citizen of Spain. Inversiones Capital Global, S.A. is a subsidiary of Banco Santander, S.A. with its principal place of business also in Spain, making it a citizen of Spain. Tonopah Solar Investments, LLC's members are SolarReserve CSP Holdings, LLC and Cobra Energy Investment, LLC. SolarReserve CSP Holdings, LLC's sole member is SolarReserve CSP Finance, LLC. SolarReserve CSP Finance, LLC's sole member is SolarReserve, LLC.





1 The sole member of SolarReserve, LLC is SolarReserve, Inc, which is a corporation formed in
2 Delaware with its principal place of business in Santa Monica, California, making it a citizen
3 of Delaware and California. Cobra Energy Investment, LLC's sole member is Cobra Energy
4 Investment Finance, LLC. Cobra Energy Investment Finance, LLC's sole member is Cobra
5 Industrial Services, Inc., which is a Delaware corporation with its principal place of business in
6 Texas, making it a citizen of Delaware and Texas. In sum, TSE is a citizen of Spain,
7 Delaware, California, Texas and Virginia for purposes of diversity jurisdiction.

8 3. Jurisdiction is proper in this Court under 28 U.S.C. § 1332(a) and 28 U.S.C. §
9 1441 because there is complete diversity of citizenship between Plaintiff and Defendant, and
10 the amount in controversy, exclusive of interest, costs, and attorneys' fees, exceeds the sum of
11 \$75,000.00.

12 4. Venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because a
13 substantial part of the events giving rise to this action occurred in Nevada.

14 GENERAL ALLEGATIONS

15 5. TSE is the project developer for the Crescent Dunes Solar Energy Facility
16 located outside Tonopah, Nevada, a solar energy project designed to produce 110 megawatts
17 of electricity ("Project").

18 6. While TSE is the project developer and oversees construction efforts, the
19 approximately 1,600 acres of land on which the Project is located is leased from the Bureau of
20 Land Management, of the United States Department of the Interior ("BLM").

21 7. The Project consists of, among other things, over 10,000 tracking mirrors called
22 heliostats that follow the sun throughout the day and reflect and concentrate sunlight onto a
23 large receiver on top of a concrete tower. The receiver is filled with molten salt that absorbs
24 the heat from the concentrated sunlight and ultimately passes through a steam generation
25 system to heat water and produce high pressure steam which in turn is used to drive a
26 conventional power turbine, which generates electricity.

27 8. The Project is a public-private project that was financed by both private
28 investors as well as by a significant loan guaranteed by the United States Department of

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1 Energy.

2 9. TSE signed an engineering, procurement and construction ("EPC") contract
3 with Cobra Thermosolar Plants, Inc. ("EPC Contractor"), an affiliate of Cobra Energy
4 Investment, LLC, to construct the Project.

5 10. Construction of the Project began in or about September 2011, and in or about
6 December 2015, the Project reached provisional acceptance ("PA") and began supplying
7 energy to NV Energy.

8 11. Soon after reaching PA, the Project began experiencing a high rate of defects.

9 12. Despite the requests of TSE, the EPC Contractor ultimately failed to correct
10 and/or refused to correct many of the defects on the Project.

11 13. To rectify the numerous defects, TSE hired BGI, who previously served as a
12 subcontractor to the EPC Contractor on the Project, to complete warranty work on the Project.

13 14. TSE and BGI entered into a contract as of February 1, 2017, to accomplish the
14 above purpose ("Services Agreement").

15 15. The Services Agreement provides, among other things, that TSE will issue
16 work orders to BGI describing the work BGI is to perform and also provides the hourly rates
17 that BGI may charge for labor.

18 16. The Services Agreement also provides that for each invoice submitted by BGI
19 to TSE for payment, BGI must provide, among other things, "such supporting documentation
20 as may be reasonably required or requested by TSE."

21 17. Many of the invoices submitted by BGI were difficult to decipher and contained
22 confusing information regarding the work allegedly done by BGI. However, after expending a
23 significant amount of time, effort and resources analyzing BGI's invoices, TSE has identified
24 numerous significant inaccuracies, irregularities and overcharges in BGI's invoices.

25 18. The following are among the improprieties that TSE has identified in respect of
26 BGI's invoices:

27 19. BGI allowing individuals to bill excess, improper and/or unauthorized amounts
28 of time to the Project.

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1 20. BGI charging a 10 percent mark up to TSE for work performed on the project
2 by sister companies to BGI that were, therefore, not true third party subcontractors and, thus,
3 not entitled to an otherwise contractually permitted 10 percent mark-up.

4 21. BGI billing TSE for work performed by its sub-contractors, which was not
5 supported by corresponding, supporting invoices.

6 22. BGI billing for amounts with respect to which it had miscalculated its margin.

7 23. BGI billing TSE for improper equipment charges.

8 24. BGI billing TSE for 100 percent of the time BGI and its subcontractors' were
9 onsite rather than taking into consideration lunch breaks and other breaks.

10 25. BGI billing against work orders that were already closed/completed.

11 26. Upon becoming aware of the serious inaccuracies, irregularities, and
12 overcharges in BGI's invoices, TSE requested additional invoice backup documentation from
13 BGI.

14 27. TSE was entitled to request additional invoice backup documentation from BGI
15 under the Services Agreement.

16 28. The purpose of these requests was to enable TSE to determine/confirm whether
17 the charges reflected on the invoices were appropriate or whether they were improper
18 overcharges.

19 29. While BGI did provide some additional invoice backup documentation in
20 response to TSE's requests for additional documentation, BGI generally refused to provide the
21 information requested by TSE, indicating that TSE was either not entitled to the documentation
22 or that the documentation that it did provide was clear on its face.

23 30. Standing alone, without further backup documentation in sufficient detail to
24 justify the charges on BGI's invoices to TSE, the invoices are inaccurate, improper, and seek
25 to force TSE to pay BGI amounts to which it is not entitled.

26 31. TSE is currently disputing the validity of more than \$11 million of charges
27 invoiced by BGI out of a total invoiced amount of approximately \$25 million.

28 32. A portion of this amount relates to invoices for which BGI has already received

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1 payment that contain many of the same inaccuracies, irregularities, and improprieties that TSE
2 has identified in the invoices it is now disputing and remain unpaid. These issues only came
3 to light after TSE allocated an inordinate amount of resources, resources that TSE can ill
4 afford, to review the charges that it is now disputing. TSE has paid BGI approximately \$13
5 million with respect to these prior invoices.

6 33. TSE is entitled to a declaration from the Court that it is not required to pay BGI
7 for the amounts in the unpaid invoices that are inaccurate, irregular, and constitute improper
8 overcharges by BGI.

9 34. BGI is liable to TSE for the amounts BGI has overcharged TSE on invoices that
10 were previously paid by TSE as well as all other direct and consequential damages flowing
11 from BGI's improper overcharges, including, attorneys' fees and costs.

12 **FIRST CLAIM FOR RELIEF**

13 **(Breach of Contract)**

14 35. TSE repeats and realleges the allegations contained in the preceding paragraphs
15 of this Counterclaim as though fully set forth herein.

16 36. On February 1, 2017, TSE and BGI entered into the Services Agreement, which
17 is a valid contract.

18 37. TSE has satisfied all of its obligations under the Services Agreement.

19 38. BGI breached the Services Agreement by, among other things, submitting
20 invoices to TSE that were replete with inaccuracies, irregularities and overcharges.

21 39. BGI breached the Services Agreement by, among other things, refusing to
22 provide TSE with reasonable supporting documentation for the invoices which BGI submitted
23 for payment and which TSE determined contain inaccuracies, irregularities and overcharges.

24 40. As a direct and proximate result of BGI's breaches, TSE has been damaged in
25 an amount in excess of \$75,000.00, plus any costs, fees, or interest associated with pursuing
26 this claim.

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SECOND CLAIM FOR RELIEF

(Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing)

41. TSE repeats and realleges the allegations contained in the preceding paragraphs of this Counterclaim as though fully set forth herein.

42. Implied in the Services Agreement is an obligation of good faith and fair dealing.

43. BGI breached the implied covenant of good faith and fair dealing by, among other things, submitting invoices to TSE that were filled with inaccuracies, irregularities and overcharges.

44. BGI breached the implied covenant of good faith and fair dealing by, among other things, refusing to provide TSE with reasonable supporting documentation for the invoices which BGI submitted for payment and which TSE determined contain inaccuracies, irregularities and overcharges.

45. BGI breached the implied covenant of good faith and fair dealing by, among other things, supplying alleged supporting information for its invoices that was confusing and indecipherable and likely provided for the purpose of disguising the inaccuracies, irregularities and overcharges in the invoices.

46. TSE's justified expectation that it was receiving accurate invoices from BGI that could be supported by reasonable backup documentation has been denied.

47. As a direct and proximate result of BGI's breach, TSE has been damaged in an amount in excess of \$75,000.00, plus any costs, fees, or interest associated with pursuing this claim.

THIRD CLAIM FOR RELIEF

(Declaratory Relief)

48. TSE repeats and realleges the allegations contained in the preceding paragraphs of this Counterclaim as though fully set forth herein.

49. BGI is not entitled to any payment on the current outstanding unpaid invoices as those invoices are replete with inaccuracies, irregularities and overcharges and include



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1 charges that are not supported by backup documentation.

2 50. The actions of BGI are unilateral and unauthorized.

3 51. TSE is entitled to declaratory relief concerning its rights under the Services
4 Agreement, namely that no further payment is due to BGI.

5 52. The interests of TSE and BGI are adverse regarding this justiciable controversy.

6 53. The issues are ripe for judicial determination because they present an existing
7 controversy and harm is likely to occur in the future without the Court's adjudication of the
8 Parties' rights.

9 **FOURTH CLAIM FOR RELIEF**

10 **(Unjust Enrichment/Quantum Meruit)**

11 54. TSE repeats and realleges the allegations contained in the preceding paragraphs
12 of this Counterclaim as though fully set forth herein.

13 55. This cause of action is being pled in the alternative.

14 56. BGI submitted invoices to TSE that were replete with inaccuracies,
15 irregularities and overcharges.

16 57. TSE, in reliance on BGI's representations that these invoices were accurate,
17 paid BGI the amounts requested in the invoices, and thereby conferred a benefit on BGI.

18 58. BGI accepted, appreciated and retained the benefit of TSE's payments on these
19 inaccurate, irregular and inflated invoices.

20 59. BGI knew or should have known that TSE would never have paid the invoices
21 had it been aware that the invoices were replete with inaccuracies, irregularities and
22 overcharges.

23 60. It would be inequitable and against the fundamental principles of justice to
24 allow BGI to retain the benefit of TSE's payments on the aforementioned invoices

25 61. BGI has been unjustly enriched to the detriment of TSE.

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FIFTH CLAIM FOR RELIEF

(Fraudulent/Intentional Misrepresentation)

62. TSE repeats and realleges the allegations contained in the preceding paragraphs of this Counterclaim as though fully set forth herein.

63. BGI has submitted numerous invoices that contain fraudulent misrepresentations regarding the amount of money BGI was due from TSE for work BGI performed on the Project.

64. For example, the Services Agreement provides that BGI may add a 10 percent mark up for work done by third parties.

65. BGI falsely represented to TSE that its sister companies, Liberty Industrial ("LI") and JT Thorpe ("JTT"), were true third parties when BGI submitted invoices seeking a 10 percent markup for LI and JTT. The invoices for LI appeared on BGI invoices beginning March 24, 2017, and continued to appear on BGI invoices until May 18, 2018. In total, LI invoices appeared on 50 BGI invoices. The timecards for LI were signed by Clay Stanaland or Tiffanie Owen, BGI employees. The invoice for JTT appeared on the BGI invoice dated April 11, 2018. The invoice for JTT did not appear to be signed by a TSE or BGI representative. All of the referenced BGI invoices were signed by David Zimmerman, BGI Vice President and General Counsel.

66. BGI knew the invoices for LI and JTT were false when it submitted them because, among other things, BGI was aware of the Services Agreement's language only permitting a 10 percent mark-up for true third parties and because BGI was aware that LI and JTT were its sister companies and not true third parties.

67. As another example, upon information and belief, BGI falsely represented that certain work billed against Work Order 18811 pertained to the work contemplated by that work order.

68. Upon information and belief, the work contemplated by Work Order 18811 was completed on December 13, 2017, yet BGI continued to fraudulently bill against that work order until late January 2018.





69. BGI knew that its representations that its work fell under Work Order 18811 were false because BGI had informed TSE that the work order was complete prior to continuing to bill additional work to that work order.

70. In addition, BGI falsely represented to TSE that BGI personnel time and subcontractor personnel time was within the scope of Work Order 10131 by submitting invoices billing personnel time to that work order despite knowing that Work Order 10131 was to be used exclusively for BGI's morning safety meetings. BGI billed TSE against Work Order 10131 on BGI invoices dated March 31, 2017, July 25, 2017, November 17, 2017, December 6, 2017 and December 7, 2017. The BGI timecards were signed by Clay Stanaland, a BGI employee, and all BGI invoices were signed by David Zimmerman, BGI Vice President and General Counsel.

71. BGI knew that its representations that it was appropriate to bill time relating to BGI personnel and subcontractor personnel to Work Order 10131 were false because BGI knew that Work Order 10131 was to be used only for the morning safety meetings.

72. BGI made the above described false representations in order to induce TSE to pay BGI amounts to which BGI knew it was not entitled.

73. TSE justifiably relied on BGI's false representations in making payments to BGI.

74. TSE has been damaged by BGI's fraudulent misrepresentations in an amount in excess of \$75,000.00, plus any costs, fees, or interest associated with pursuing this claim.

75. In making these fraudulent misrepresentations to TSE, BGI acted with malice/implied malice and conscious disregard for TSE's rights. As such, TSE is entitled to an award of punitive damages pursuant to NRS 42.005.

76. While TSE believes it has meet the pleading standard under Nev. R. Civ. P. 9(b), TSE avers, that, in the alternative, the relaxed pleading standard set forth in *Rocker v. KPMG LLP*, 122 Nev. 1185, 1195, 148 P.3d 703, 709 (2006), overruled on other grounds by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008), applies.

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1 77. TSE cannot plead fraud with more particularity because the required back up
2 information for BGI's invoices is solely in BGI's possession and cannot be secured without
3 formal legal discovery.

4 78. BGI has refused, despite repeated requests from TSE, to produce the
5 information that would allow TSE to plead fraud with more particularity.

6 **SIXTH CLAIM FOR RELIEF**

7 **(Negligent Misrepresentation)**

8 79. TSE repeats and realleges the allegations contained in the preceding paragraphs
9 of this Counterclaim as though fully set forth herein.

10 80. BGI supplied false information to TSE and made false representations to TSE,
11 as detailed more fully in the above paragraphs of this Counterclaim.

12 81. BGI supplied this false information and made these false representations to TSE
13 because BGI had a pecuniary interest in inducing TSE to pay BGI amounts to which BGI was
14 not entitled.

15 82. TSE justifiably relied on BGI's false representations in making payments to
16 BGI.

17 83. BGI failed to exercise reasonable care or competence in obtaining and/or
18 communicating the aforementioned false information to TSE.

19 84. TSE has been damaged by BGI's negligent misrepresentations in an amount in
20 excess of \$75,000.00, plus any costs, fees, or interest associated with pursuing this claim.

21 WHEREFORE, TSE prays for relief as follows:

- 22 1. Dismissal of Plaintiff's Complaint with prejudice;
23 2. For judgment in favor of TSE and against BGI on all claims asserted herein;
24 3. For actual, compensatory, and consequential damages in an amount in excess
25 of \$75,000.00;
26 4. For pre- and post-judgment interest on any money judgment;
27 5. For an award of attorneys' fees and court costs incurred herein;
28 6. For punitive damages under NRS 42.005 for BGI's malice/implied malice and

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conscious disregard of TSE's rights; and

7. For such further relief as the Court may grant.

DATED this 17th day of September 2018.

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118

*Attorneys for Defendant/COUNTERCLAIMANT
Tonopah Solar Energy, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2018, a true and correct copy of the foregoing **DEFENDANT TONOPAH SOLAR ENERGY, LLC'S ANSWER TO BRAHMA GROUP, INC'S COMPLAINT AND COUNTERCLAIM AGAINST BRAHMA** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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EXHIBIT 10

EXHIBIT 10

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Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Defendant.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Counterclaimant/Lien Claimant,

19 vs.

20 TONOPAH SOLAR ENERGY LLC, a Delaware
21 limited liability company; BOE BONDING
22 COMPANIES I through X; DOES I through X;
23 ROE CORPORATIONS I through X; and TOE
24 TENANTS I through X, inclusive,

25 Counterdefendant,
26
27
28

CASE NO. : CV 39348
DEPT. NO. : 2

BRAHMA GROUP, INC.'S
MECHANIC'S LIEN FORECLOSURE
COMPLAINT

[Arbitration Exemption: Action
Concerning Title to Real Estate]

1 Counterclaimant/Lien Claimant, BRAHMA GROUP, INC. ("Brahma"), by and through its
2 attorneys of record, the law firm of PEEL BRIMLEY LLP, as and for its Complaint in this action
3 (the "Action") against the above-named Counterdefendants, complains, avers and alleges as
4 follows:

5 **THE PARTIES**

6 1. Brahma is and was at all times relevant to this Action:

7 a. A Nevada corporation, duly authorized and qualified to do business in the
8 State of Nevada; and

9 b. A duly licensed contractor holding a Nevada State Contractor's License,
10 which license is in good standing.

11 2. Brahma is informed and believes and therefore alleges that the U.S.
12 DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT ("BLM"), is and
13 was at all times relevant to this Action, an owner or reputed owner of the fee simple title to all or
14 portions of real property located in Nye County, Nevada, and more particularly described as Nye
15 County Parcel Numbers 012-141-01 and 012-151-01 (the "BLM Parcels").¹

16 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY, LLC,
17 a Delaware limited liability company ("Liberty"), is and was at all times relevant to this Action, an
18 owner or reputed owner of the fee simple title to all or portions of real property located in Nye
19 County, Nevada, and more particularly described as Nye County Parcel Number 012-431-06 (the
20 "Liberty Parcel").²

21 4. Counterdefendant TONOPAH SOLAR ENERGY, LLC ("TSE") is and was at all
22 times relevant to this Action:

23 a. A Delaware limited liability company authorized to do business in Nye
24 County, Nevada;

25 ///

26
27 ¹ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of
the BLM Parcels by way of this Action.

28 ² Liberty is not a party to this Action and Brahma is not making a claim against Liberty or the fee simple title of the
Liberty Parcel by way of this Action.

b. An owner or reputed owner of the fee simple title to all or portions of real property located in Nye County, Nevada, and more particularly described as Nye County Parcel Numbers 012-031-04, 012-131-03, 012-131-04, 012-140-01, 012-150-01 and 612-141-01 (collectively, the "TSE Parcels");

c. The lessee, tenant or the person, individual and/or entity who claims a license or leasehold estate with respect to the BLM Parcels and the Liberty Parcels; and

d. The owner of those certain improvements and/or leasehold estate (the "Project"):

i. Commonly known as the *Crescent Dunes Solar Energy Project*; and

ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty Parcels.³

5. The TSE Parcels, along with the Project, are collectively referred to herein as the "Work of Improvement," and include all leasehold estates, easements, rights-of-way, common areas and appurtenances related thereto, and the surrounding space as may be required for the convenient use and occupation of the Work of Improvement.

6. Brahma does not know the true names of the individuals, corporations, partnerships and entities identified and named as Counterdefendants by the fictitious names of (collectively, the "Doe Defendants"), (i) DOES I through X, (ii) ROE CORPORATIONS I through X, (iii) BOE BONDING COMPANIES I through X, and (iv) TOE TENANTS I through X. Brahma alleges that such Doe Defendants claim an interest in or to the TSE Parcels and/or the Work of Improvement as more fully discussed under the claims for relief set forth below. Brahma will request leave of this Honorable Court to amend this Complaint to show the true names and capacities of each such fictitious Defendant when Brahma discovers such information.

7. TSE and the Doe Defendants are collectively referred to in this Complaint as the "Counterdefendants."

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³ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels and the Liberty Parcels.

FIRST CAUSE OF ACTION
(Foreclosure of Notice of Lien)

8. Brahma repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

9. On or about February 1, 2017, Brahma entered a Services Agreement (the "Agreement") with TSE wherein Brahma agreed to provide certain construction related work, materials and/or equipment (the "Work") for the Work of Improvement.

10. As provided in NRS 108.245, Brahma gave or served a copy of its Notice of Right to Lien on:

a. The BLM; and

b. TSE, even though it had no statutory duty to do so.

11. The Work was provided for the whole of the Work of Improvement, at the special instance and/or request of TSE.

12. On or about April 09, 2018, Brahma timely recorded a Notice of Lien in the Official Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of \$6,982,186.24.

13. On or about April 16, 2018 and as allowed by NRS 108.229(1), Brahma recorded a Notice of First Amended and Restated Lien in the Official Records of Nye County, Nevada, as Document 891073 and as re-recorded by Brahma in the Official Records of Nye County, Nevada on April 18, 2018, as Document No. 891507, in the amount of \$7,178,376.94 (the "First Amended Lien").

14. On or about April 24, 2018 and allowed by NRS 108.229(1), Brahma recorded a Notice of Second Amended and Restated Lien in the Official Records of Nye County, Nevada, as Document 891766, in the amount of \$7,178,376.94 (the "Second Amended Lien").

15. On or about July 19, 2018 and as allowed by NRS 108.229(1), Brahma recorded a Third Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada, as Document 896269, in the amount of \$11,902,474.75 (the "Third Amended Lien").

///

1. 16. On or about September 14, 2018, Brahma recorded a Fourth Amended and/or
2 Restated Notice of Lien in the Official Records of Nye County, Nevada, as Document 899351 in
3 the amount of \$12,859,577.74 (the "Fourth Amended Lien").

4 17. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
5 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, the "Lien," were:

- 6 a. In writing;
7 b. Recorded against the Work of Improvement; and
8 c. Were given or served on the authorized agents of the BLM and TSE, or the
9 BLM and/or TSE knew of the existence of the Lien.

10 18. The Lien is in the amount Twelve Million Eight Hundred and Fifty-Nine Thousand,
11 Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents. (\$12,859,577.74), which is the
12 amount due and owing Brahma as of the date of this Complaint (the "Outstanding Balance").

13 19. In addition to an award of the Outstanding Balance, Brahma is entitled to an award
14 of its attorney's fees, costs, and interest, as provided in Chapter 108 of the Nevada Revised Statutes.

15 **WHEREFORE**, Brahma prays that this Honorable Court:

16 1. Enters judgment against the Counterdefendants, and each of them, jointly and
17 severally and to the extent of their interest in the Work of Improvement, in the amount of the
18 Outstanding Balance;

19 2. Enters a judgment against the Counterdefendants, and each of them, jointly and
20 severally and to the extent of their interest in the Work of Improvement, for Brahma's reasonable
21 costs and attorney's fees incurred in the collection of the Outstanding Balance, as well as an award
22 of interest thereon;

23 3. Enters judgment declaring that Brahma has a valid and enforceable notice of lien
24 against the Work of Improvement, in the amount of the Outstanding Balance together with costs,
25 attorneys' fees and interest in accordance with NRS Chapter 108;

26 4. Adjudge a lien upon the Work of Improvement for the Outstanding Balance, plus
27 reasonable attorneys' fees, costs and interest thereon, and that this Honorable Court enter an Order
28 that the Work of Improvement, and improvements, such as may be necessary, be sold pursuant to

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1 the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of
2 sums due Brahma herein;

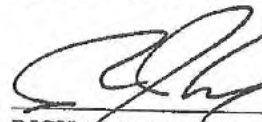
3 5. For such other and further relief as this Honorable Court deems just and proper in
4 the premises.

5 **AFFIRMATION PURSUANT TO NRS 239B.030**

6 The undersigned does hereby affirm that the proceeding document does not contain the
7 social security number of any persons.

8 Dated this 20th day of September 2018.

10 **PEEL BRIMLEY LLP**

11 

12 RICHARD L. PEEL, ESQ.

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Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

CASE NO. : CV 39348
DEPT. NO. : 2

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

CERTIFICATE OF SERVICE

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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 21st day of September, 2018, I caused following documents:

1. **BRAHMA GROUP, INC.'S MECHANIC'S LIEN FORECLOSURE;**
2. **NOTICE OF FORECLOSURE; and**
3. **NOTICE OF *LIS PENDENS***

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 *email transmission*

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

D. Lee Roberts, Jr., Esq. (NV Bar No. 8877)
Colby L. Balkenbush, Esq. (NV Bar No. 13066)
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Attorneys for Defendant
Tonopah Solar Energy, LLC



An employee of PEEL BRIMLEY, LLP

EXHIBIT 11

EXHIBIT 11

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7 *Attorneys for Plaintiff*
BRAHMA GROUP, INC.

8
9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 **BRAHMA GROUP, INC., a Nevada Corporation,**

CASE NO.: 2:18-CV-01747-RFB-GWF

12 **Plaintiff,**

13 **vs.**

14 **TONOPAH SOLAR ENERGY, LLC, a Delaware**
15 **Limited Liability Company; DOES I through X; and**
16 **ROE CORPORATIONS I through X,**

FIRST AMENDED COMPLAINT

17 **Defendants.**

18 **TONOPAH SOLAR ENERGY, LLC a Delaware**
19 **limited liability company; DOES I through X; and**
20 **ROE CORPORATIONS I through X,**

21 **Counterclaimant,**

22 **vs.**

23 **BRAHMA GROUP, INC., a Nevada corporation**

24 **Counterdefendant.**

25 Plaintiff, BRAHMA GROUP, INC. ("BGI"), by and through its attorneys of record, the
26 law firm of PEEL BRIMLEY LLP, as and for its First Amended Complaint ("Amended
27 Complaint") against the above-named Defendants complains, avers and alleges as follows:
28

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THE PARTIES

1
2 1. BGI is and was at all times relevant to this action (i) a Nevada limited liability
3 company, duly authorized and qualified to do business in the state of Nevada, and (ii) a contractor,
4 holding a Nevada State Contractor's license, which license is in good standing.

5 2. BGI is informed, believes and therefore alleges that Defendant Tonopah Solar
6 Energy, LLC ("TSE") is and was at all times relevant to this action a foreign limited liability
7 corporation, duly authorized to conduct business in Nevada.

8 3. BGI does not know the true names of the individuals, corporations, partnerships
9 and entities sued and identified in fictitious names as DOES I through X and ROE
10 CORPORATIONS I through X (collectively, "Doe Defendants"). BGI alleges that such Doe
11 Defendants are responsible for damages suffered by BGI as more fully discussed under the claims
12 for relief set forth below. BGI will request leave of this Honorable Court to amend this Complaint
13 to show the true names and capacities of each such fictitious Doe Defendant when BGI discovers
14 such information.

FIRST CAUSE OF ACTION
(Unjust Enrichment)

15
16 4. BGI repeats and realleges each and every allegation contained in the preceding
17 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
18 follows:

19 5. BGI provided a portion of the work, materials and/or equipment (the "Work") for
20 or relating to the Crescent Dunes Solar Power Plant (the "Work of Improvement") located in or
21 near Tonopah, Nevada.

22 6. BGI furnished the Work for the benefit of and/or at the specific instance and request
23 of TSE.

24 7. TSE accepted, used and enjoyed the benefit of the Work.

25 8. TSE knew or should have known that BGI expected to be paid for the Work.

26 9. BGI is owed an amount in excess of Twelve Million Eight Hundred Thousand and
27 No/100 Dollars (\$12,800,000-- the "Outstanding Balance") from TSE for the Work.

28 10. BGI has demanded payment of the Outstanding Balance.

11. To date, TSE has failed, neglected, and/or refused to pay the Outstanding Balance.

12. TSE has been unjustly enriched, to the detriment of BGI.

13. BGI has been required to engage the services of an attorney to collect the Outstanding Balance, and BGI is entitled to recover its reasonable costs, attorney's fees and interest therefor.

WHEREFORE, BGI prays that this Honorable Court:

1. Enters judgment against TSE in the amount of the Outstanding Balance;

2. Enters a judgment against TSE for BGI's reasonable costs and attorney's fees incurred in the collection of the Outstanding Balance, as well as an award of interest thereon;

3. For such other and further relief as this Honorable Court deems just and proper in the premises.

Dated this 25 day of September, 2018.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of PEEL BRIMLEY LLP, I am over the age of eighteen years, and not a party to the within action. My business address is 3333 E. Serene Ave, Suite 200, Henderson, NV 89074. On September 25, 2018, I served the within document(s):

FIRST AMENDED COMPLAINT

to be served as follows:

- X By CM/ECF Filing – with the United States District Court of Nevada. I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the attorney(s) and/or party(ies) listed below.
- ☐ By Facsimile Transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the persons) served as set forth below.
- ☐ By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, NV, addressed as set forth below.

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

D. Lee Roberts, Jr., Esq. (NV Bar No. 8877)
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Tonopah Solar Energy, LLC



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EXHIBIT 12

EXHIBIT 12

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11 *Attorneys for Brahma Group, Inc.*

12 **FIFTH JUDICIAL DISTRICT COURT**
13 **NYE COUNTY, NEVADA**

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.

19 BRAHMA GROUP, INC., a Nevada corporation,

20 Counterclaimant/Lien Claimant,

21 vs.

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

27 Counterdefendant,
28

FILED
FIFTH JUDICIAL DISTRICT

SEP 25 2010

Terri Pemberton
Clerk
Deputy

CASE NO. : CV 39348
DEPT. NO. : 2

BRAHMA GROUP, INC.'S:
(I) FIRST AMENDED COUNTER-
COMPLAINT; AND
(II) THIRD-PARTY COMPLAINT.

[Arbitration Exemption: Action
Concerning Title to Real Estate]

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

4 COBRA THERMOSOLAR PLANTS, INC., a
5 Nevada corporation; AMERICAN HOME
6 ASSURANCE COMPANY, a surety; BOE
7 BONDING COMPANIES I through X; DOES I
8 through X; ROE CORPORATIONS I through X,
9 inclusive,

10 Third-Party Defendants.

11 **FIRST AMENDED COUNTER-COMPLAINT**

12 Counterclaimant/Lien Claimant/Third-Party Claimant, BRAHMA GROUP, INC.
13 ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, hereby
14 amends in this action (the "Action"), that certain Mechanic's Lien Foreclosure Complaint
15 ("Original Counter-Complaint") by way of this First Amended Counter-Complaint ("Amended
16 Counter-Complaint"), which is brought against the above-named Counterdefendants. Brahma
17 complains, avers and alleges as follows:

18 **THE PARTIES**

19 1. Brahma is and was at all times relevant to this Action:

- 20 a. A Nevada corporation, duly authorized and qualified to do business in the
21 State of Nevada; and
22 b. A duly licensed contractor holding a Nevada State Contractor's License,
23 which license is in good standing.

24 ///

25 ///

26 ///

2. Brahma is informed and believes and therefore alleges that the U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT ("BLM"), is and was at all times relevant to this Action, an owner or reputed owner of the fee simple title to all or portions of real property located in Nye County, Nevada, and more particularly described as Nye County Parcel Numbers 012-141-01 and 012-151-01 (the "BLM Parcels").¹

3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY, LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this Action, an owner or reputed owner of the fee simple title to all or portions of real property located in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-06 (the "Liberty Parcel").²

4. Counterdefendant TONOPAH SOLAR ENERGY, LLC ("TSE") is and was at all times relevant to this Action:

a. A Delaware limited liability company authorized to do business in Nye County, Nevada;

b. An owner or reputed owner of the fee simple title to all or portions of real property located in Nye County, Nevada, and more particularly described as Nye County Parcel Numbers 012-031-04, 012-131-03, 012-131-04, 012-140-01, 012-150-01 and 612-141-01 (collectively, the "TSE Parcels");

c. The lessee, tenant or the person, individual and/or entity who claims a license or leasehold estate with respect to the BLM Parcels and the Liberty Parcels; and

d. The owner of those certain improvements and/or leasehold estate (the "Project"):

i. Commonly known as the *Crescent Dunes Solar Energy Project*; and
ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty Parcels.³

¹ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of the BLM Parcels by way of this Action.

² Liberty is not a party to this Action and Brahma is not making a claim against Liberty or the fee simple title of the Liberty Parcel by way of this Action.

³ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels and the Liberty Parcels.

5. The TSE Parcels, along with the Project, are collectively referred to herein as the "Work of Improvement," and include all leasehold estates, easements, rights-of-way, common areas and appurtenances related thereto, and the surrounding space as may be required for the convenient use and occupation of the Work of Improvement.

14 7. TSE and the Doe Defendants are collectively referred to in this Amended Counter-
15 Complaint as the "Counterdefendants."

18 8. Brahma repeats and realleges each and every allegation contained in the preceding
19 paragraphs of this Amended Counter-Complaint, incorporates them by reference, and further
20 alleges as follows:

10. BGI furnished the Work for the benefit of and/or at the specific instance and request of TSE and the Work of Improvement and has otherwise performed its duties and obligations as required by the Agreement.

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1 11. As required by the Agreement, BGI has, and in the form and manner required by
2 the Agreement, provided monthly invoices or payment applications (collectively, "Payment
3 Applications") to TSE for the Work in an amount totaling more than Twenty-Six Million U.S.
4 Dollars (\$26,000,000.00).

5 12. Pursuant to the Agreement and Nevada law, TSE agreed to and is obligated to pay
6 BGI for its Work within no more than 45 days after TSE's receipt of BGI's Payment Applications.

7 13. TSE breached the Agreement by, among other things:

8 a. Failing and/or refusing to pay monies owed to BGI for the Work; and

9 b. Otherwise failing and/or refusing to comply with the Agreement and
10 Nevada law.

11 14. BGI is owed Twelve Million Eight Hundred Fifty-Nine Thousand Five Hundred
12 Seventy-Seven and 74/100 Dollars (\$12,859,577.74—"Outstanding Balance") from TSE for the
13 Work.

14 15. BGI has been required to engage the services of an attorney to collect the
15 Outstanding Balance, and BGI is entitled to recover its reasonable costs, attorney's fees and
16 interest therefor.

17 SECOND CAUSE OF ACTION

18 (Breach of Implied Covenant of Good Faith & Fair Dealing)

19 16. Brahma repeats and realleges each and every allegation contained in the preceding
20 paragraphs of the Amended Counter-Complaint, incorporates them by reference, and further
21 alleges as follows:

22 17. There is a covenant of good faith and fair dealing implied in every agreement,
23 including the Agreement between BGI and TSE.

24 18. TSE breached its duty to act in good faith by performing the Agreement in a manner
25 that was unfaithful to the purpose of the Agreement, thereby denying BGI's justified expectations.

26 ///

27 ///

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1 19. Specifically, but without limitation, TSE breached its duty to act in good faith by:

2 a. Asserting pre-textual, extra-contractual and inaccurate reasons for
3 withholding payment long after the time required by the Agreement and Nevada law had elapsed.

4 b. TSE has improperly withheld moneys totaling more than One Million U.S.
5 Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1). While that statutory
6 provision permits withholding (on a payment-by-payment basis) a retention amount, not to exceed
7 five percent (5%), such retention must be authorized pursuant to the Agreement, which it is not.

8 c. Furthermore, and even if the Agreement allowed TSE to withhold retention
9 from monthly payments (which it does not), TSE's withholding of retention amounts retroactively
10 aggregated from Payment Applications issued (and, in some cases, payments previously made)
11 long ago constitutes extreme bad faith.

12 20. Due to the actions of TSE, BGI suffered damages in the amount of or exceeding
13 the Outstanding Balance for which BGI is entitled to judgment in an amount to be determined at
14 trial.

15 21. BGI has been required to engage the services of an attorney to collect the
16 Outstanding Balance, and BGI is entitled to recover its reasonable costs, attorney's fees and
17 interest therefor.

18 **THIRD CAUSE OF ACTION**
19 **(Foreclosure of Notice of Lien)**

20 22. Brahma repeats and realleges each allegation contained in the preceding paragraphs
21 of this Amended Counter-Complaint, incorporates them by reference, and further alleges as
22 follows:

23 23. Brahma provided the Work for the Work of Improvement and is owed the
24 Outstanding Balance for the Work.

25 24. As provided in NRS 108.245, Brahma gave or served a copy of its Notice of Right
26 to Lien on:

27 a. The BLM; and

28 b. TSE, even though it had no statutory duty to do so.

1 25. The Work was provided for the whole of the Work of Improvement, at the special
2 instance and/or request of TSE.

3 26. On or about April 09, 2018, Brahma timely recorded a Notice of Lien in the Official
4 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
5 \$6,982,186.24.

6 27. On or about April 16, 2018 and as allowed by NRS 108.229(1), Brahma recorded
7 a Notice of First Amended and Restated Lien in the Official Records of Nye County, Nevada, as
8 Document 891073 and as re-recorded by Brahma in the Official Records of Nye County, Nevada
9 on April 18, 2018, as Document No. 891507, in the amount of \$7,178,376.94 (the "First Amended
10 Lien").

11 28. On or about April 24, 2018 and allowed by NRS 108.229(1), Brahma recorded a
12 Notice of Second Amended and Restated Lien in the Official Records of Nye County, Nevada, as
13 Document 891766, in the amount of \$7,178,376.94 (the "Second Amended Lien").

14 29. On or about July 19, 2018 and as allowed by NRS 108.229(1), Brahma recorded a
15 Third Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada,
16 as Document 896269, in the amount of \$11,902,474.75 (the "Third Amended Lien").

17 30. On or about September 14, 2018, Brahma recorded a Fourth Amended and/or
18 Restated Notice of Lien in the Official Records of Nye County, Nevada, as Document 899351 in
19 the amount of \$12,859,577.74 (the "Fourth Amended Lien").

20 31. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
21 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, the "Lien," were:

- 22 a. In writing;
- 23 b. Recorded against the Work of Improvement; and
- 24 c. Were given or served on the authorized agents of the BLM and TSE, or the
25 BLM and/or TSE knew of the existence of the Lien.

26 32. The Lien is in the amount of the Outstanding Balance, which is the amount due and
27 owing Brahma as of the date of this Amended Counter-Complaint.

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1 33. In addition to an award of the Outstanding Balance, Brahma is entitled to an award
2 of its attorney's fees, costs, and interest, as provided in Chapter 108 of the Nevada Revised
3 Statutes.

4 **FOURTH CAUSE OF ACTION**
5 **(Violation of NRS 624)**

6 34. Brahma repeats and realleges each allegation contained in the preceding paragraphs
7 of this Amended Counter-Complaint, incorporates them by reference, and further alleges as
8 follows:

9 35. NRS 624.609 and NRS 624.610 (the "Statute") requires owners (such as TSE as
10 defined by the Statute) to, among other things, (i) timely pay their prime contractors (such as BGI
11 as defined by the Statute), and (ii) respond to payment applications and change order requests, as
12 provided in the Statute.

13 36. TSE violated the Statute by failing or refusing to comply with the requirements set
14 forth therein.

15 37. By reason of the foregoing, BGI is entitled to a judgment against TSE in the amount
16 of the Outstanding Balance as well as other remedies as defined by the applicable statutes.

17 38. BGI has been required to engage the services of an attorney to collect the
18 Outstanding Balance due and owing for the Work, and BGI is entitled to recover its reasonable
19 costs, attorney's fees and interest therefore.

20 **WHEREFORE**, Brahma prays that this Honorable Court:

21 1. Enters judgment against the Counterdefendants, and each of them, jointly and
22 severally and to the extent of their interest in the Work of Improvement, in the amount of the
23 Outstanding Balance;

24 2. Enters a judgment against the Counterdefendants, and each of them, jointly and
25 severally and to the extent of their interest in the Work of Improvement, for Brahma's reasonable
26 costs and attorney's fees incurred in the collection of the Outstanding Balance, as well as an award
27 of interest thereon;

28

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1 3. Enters judgment declaring that Brahma has a valid and enforceable notice of lien
2 against the Work of Improvement, in the amount of the Outstanding Balance together with costs,
3 attorneys' fees and interest in accordance with NRS Chapter 108;

4 4. Adjudge a lien upon the Work of Improvement for the Outstanding Balance, plus
5 reasonable attorneys' fees, costs and interest thereon, and that this Honorable Court enter an Order
6 that the Work of Improvement, and improvements, such as may be necessary, be sold pursuant to
7 the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of
8 sums due Brahma herein;

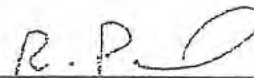
9 5. For such other and further relief as this Honorable Court deems just and proper in
10 the premises.

11 **AFFIRMATION PURSUANT TO NRS 239B.030**

12 The undersigned does hereby affirm that the proceeding document does not contain the
13 social security number of any persons.

14 Dated this 24th day of September 2018.

15 **PEEL BRIMLEY LLP**

16
17 

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19 Nevada Bar No. 4359
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BRAHMA GROUP, INC.'S THIRD-PARTY COMPLAINT

Third-Party Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, brings this Third-Party Complaint ("Third-Party Complaint") in the action (the "Action") against the above-named Third-Party Defendants. Brahma complains, avers and alleges as follows:

THE PARTIES

1. Brahma is and was at all times relevant to this Third-Party Action:

- a. A Nevada corporation, duly authorized and qualified to do business in the State of Nevada; and
- b. A duly licensed contractor holding a Nevada State Contractor's License, which license is in good standing.

2. Brahma is informed and believes and therefore alleges that the U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT ("BLM"), is and was at all times relevant to this Third-Party Action, an owner or reputed owner of the fee simple title to all or portions of real property located in Nye County, Nevada, and more particularly described as Nye County Parcel Numbers 012-141-01 and 012-151-01 (the "BLM Parcels").⁴

3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY, LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this Third-Party Action, an owner or reputed owner of the fee simple title to all or portions of real property located in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-06 (the "Liberty Parcel").⁵

4. TONOPAH SOLAR ENERGY, LLC ("TSE")⁶ is and was at all times relevant to this Third-Party Action:

- a. A Delaware limited liability company authorized to do business in Nye County, Nevada;

⁴ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of the BLM Parcels by way of this Action.

⁵ Liberty is not a party to this Action and Brahma is not making a claim against Liberty or the fee simple title of the Liberty Parcel by way of this Action.

⁶ While TSE is a party to Brahma's Counterclaim, TSE is not a party to the Third-Party Action.

1 b. An owner or reputed owner of the fee simple title to all or portions of real
2 property located in Nye County, Nevada, and more particularly described as Nye County Parcel
3 Numbers 012-031-04, 012-131-03, 012-131-04, 012-140-01, 012-150-01 and 612-141-01
4 (collectively, the "TSE Parcels");

5 c. The lessee, tenant or the person, individual and/or entity who claims a
6 license or leasehold estate with respect to the BLM Parcels and the Liberty Parcels; and

7 d. The owner of those certain improvements and/or leasehold estate (the
8 "Project");

9 i. Commonly known as the *Crescent Dunes Solar Energy Project*; and

10 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
11 Parcels.⁷

12 5. The TSE Parcels, along with the Project, are collectively referred to herein as the
13 "Work of Improvement," and include all leasehold estates, easements, rights-of-way, common
14 areas and appurtenances related thereto, and the surrounding space as may be required for the
15 convenient use and occupation of the Work of Improvement.

16 6. Brahma is informed, believes and therefore alleges that Third-Party Defendant
17 AMERICAN HOME ASSURANCE COMPANY ("AHAC"):

18 a. Is and was at all times relevant to this Third-Party Action a bonding
19 company duly licensed and qualified to do business as a surety in Nevada; and

20 b. Issued Bond No. 854481 ("Surety Bond") pursuant to NRS 108.2413 as
21 discussed more fully below.

22 7. Brahma is informed, believes and therefore alleges that Third-Party Defendant
23 COBRA THERMOSOLAR PLANTS, INC. ("Cobra"):

24 a. Is and was at all times relevant to this Third-Party Action a Nevada
25 corporation; and

26 b. Is the principal on the Surety Bond.

27
28 ⁷ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels
and the Liberty Parcels.

8. Brahma does not know the true names of the individuals, corporations, partnerships and entities identified and named as Third-Party Defendants by the fictitious names of (collectively, the "Doe Defendants"), (i) BOE BONDING COMPANIES I through X, (ii) DOES I through X, and (iii) ROE CORPORATIONS I through X. Brahma alleges that such Doe Defendants claim damages (as an offset) arising from the construction of the Work of Improvement, as more fully discussed under the claims for relief set forth below. Brahma will request leave of this Honorable Court to amend this Third-Party Complaint to show the true names and capacities of each such fictitious Doe Defendants when Brahma discovers such information.

FIRST CAUSE OF ACTION

13 10. Brahma repeats and realleges each and every allegation contained in the preceding
14 paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

18 12. As provided in NRS 108.245, Brahma gave or served a copy of its Notice of Right
to Lien on:

13. The Work was provided for the whole of the Work of Improvement, at the special instance and/or request of TSE.

15. On or about April 16, 2018 and as allowed by NRS 108.229(1), Brahma recorded a Notice of First Amended and Restated Lien in the Official Records of Nye County, Nevada, as

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1 Document 891073 and as re-recorded by Brahma in the Official Records of Nye County, Nevada
2 on April 18, 2018, as Document No. 891507, in the amount of \$7,178,376.94 (the "First Amended
3 Lien").

4 16. On or about April 24, 2018 and allowed by NRS 108.229(1), Brahma recorded a
5 Notice of Second Amended and Restated Lien in the Official Records of Nye County, Nevada, as
6 Document 891766, in the amount of \$7,178,376.94 (the "Second Amended Lien").

7 17. On or about July 19, 2018 and as allowed by NRS 108.229(1), Brahma recorded a
8 Third Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada,
9 as Document 896269, in the amount of \$11,902,474.75 (the "Third Amended Lien").

10 18. On or about September 14, 2018, Brahma recorded a Fourth Amended and/or
11 Restated Notice of Lien in the Official Records of Nye County, Nevada, as Document 899351 in
12 the amount of \$12,859,577.74 (the "Fourth Amended Lien").

13 19. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
14 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, the "Lien," were:

- 15 c. In writing;
16 d. Recorded against the Work of Improvement; and
17 e. Were given or served on the authorized agents of the BLM and TSE, or the
18 BLM and/or TSE knew of the existence of the Lien.

19 20. The Lien is in the amount Twelve Million Eight Hundred and Fifty-Nine Thousand,
20 Five Hundred and Seventy-Seven Dollars and Seventy-Four-Cents. (\$12,859,577.74), which is the
21 amount due and owing Brahma as of the date of this Third-Party Complaint (the "Outstanding
22 Balance").

23 39. On or about September 6, 2018, pursuant to NRS 108.2413, Cobra (as principal)
24 and AHAC (as surety) caused a Surety Bond to be recorded in the Official Records of Nye County,
25 Nevada as Document No. 898975.

26 40. The Surety Bond fails to meet the requirements of NRS 108.2415(1), because it is
27 not in an amount that is 1 ½ times the amount of Brahma's Lien.
28

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41. NRS 108.2421 authorizes Brahma, as lien claimant, to bring an action against the principal (Cobra) and the surety (AHAC) on the Surety Bond within this Court.

42. Brahma makes claim against and Cobra and AHAC are obligated to Brahma for the Outstanding Balance plus interest, costs and attorney's fees up to the penal sum⁸ of the Surety Bond as provided in Chapter 108 of the Nevada Revised Statutes.

WHEREFORE, Brahma prays that this Honorable Court:

6. Enters judgment against the Third-Party Defendants, and each of them, jointly and severally in the amount of the Outstanding Balance;

7. Enters a judgment against the Third-Party Defendants and each of them, jointly and severally, for Brahma's reasonable costs and attorney's fees incurred in the collection of the Outstanding Balance, as well as an award of interest thereon;

8. Enters judgment against AHAC up to the penal sum of the Surety Bond.

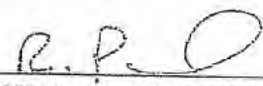
9. For such other and further relief as this Honorable Court deems just and proper in the premises.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the proceeding document does not contain the social security number of any persons.

Dated this 2nd day of September 2018.

PEEL BRIMLEY LLP


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ERIC ZIMBELMAN, ESQ.
Nevada Bar No. 9407
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Attorneys for Brahma Group, Inc.

⁸ Brahma has separately excepted to the sufficiency of the penal sum of the Surety Bond under NRS 108.2425. Nothing herein shall be deemed a waiver of any rights and claims that Brahma may possess under contract, at law or in equity.

EXHIBIT 13

EXHIBIT 13

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Attorneys for Plaintiff
7 **BRAHMA GROUP, INC.**

8
9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 **BRAHMA GROUP, INC., a Nevada**
corporation,

CASE NO.: 2:18-CV-01747-RFB-GWF

12 Plaintiff,

13 vs.

14 **TONOPAH SOLAR ENERGY, LLC, a**
Delaware limited liability company; DOES
15 I through X; and ROE CORPORATIONS I
through X,

**BRAHMA GROUP, INC.'S ANSWER TO
TONOPAH SOLAR ENERGY, LLC'S
COUNTERCLAIM [ECF NO. 4]**

16 Defendants.

17 **TONOPAH SOLAR ENERGY, LLC a**
Delaware limited liability company; DOES
18 I through X; and ROE CORPORATIONS I
19 through X,

20 Counterclaimant,

21 vs.

22 **BRAHMA GROUP, INC., a Nevada**
corporation

23 Counterdefendant.
24

25 ///

26 ///

27 ///

28

**BRAHMA GROUP, INC.'S ANSWER TO TONOPAH
SOLAR ENERGY, LLC'S COUNTERCLAIM [ECF NO. 4]**

Plaintiff/Counter-Defendants, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of the law firm PEEL BRIMLEY LLP, Answer Defendant/Counter-Claimant's ("Defendants") Counterclaim ("Counterclaim") [ECF No. 4] on file herein, and admit, deny and allege as follows:

COUNTERCLAIM

JURISDICTION AND PARTIES

1. Answering Paragraph 1 of the Counterclaim, Brahma admits that (i) it is a Nevada corporation, and (ii) its principal place of business is in Salt Lake City, Utah. The balance of the allegations set forth in this Paragraph call for a legal conclusion and on this basis, Brahma denies the remainder of the allegations set forth.

2. Answering Paragraphs 2, 3 and 4 of the Counterclaim, Brahma denies the same because (i) Brahma lacks sufficient information to form a belief as to the truth of the allegations contained therein, and (ii) these Paragraphs call for a legal conclusion and do not require a response.

GENERAL ALLEGATIONS

3. Answering Paragraphs 5, 6, 7, 9, 10, 11, 12, 28 and 31 of the Counterclaim, Brahma lacks sufficient information to form a belief as to the truth of the allegations contained therein and therefore deny the same.

4. Answering Paragraph 13 of the Counterclaim, Brahma admits that (i) it previously served as a subcontractor to Cobra Thermosolar Plants, Inc. on the Project, and (ii) subsequently, TSE retained Brahma to perform work on the Project. Brahma denies the remaining allegations contained in Paragraph 13.

5. Answering Paragraphs 14, 15, 16 and 27 of the Counterclaim, Brahma admits that TSE and Brahma entered a Services Agreement ("Services Agreement"). Because the Services Agreement more accurately reflect the parties' rights, duties and obligations, Braham denies the remainder of the allegations set forth in these Paragraphs.

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6. Answering Paragraphs 8, 17, 18, 19, 20, 21, 22, 23, 24, 25, 30, 33 and 34 of the Counterclaim, Brahma denies the allegations contained therein.

7. Answering Paragraph 26 of the Counterclaim, Brahma admits that TSE requested additional information concerning certain of the invoices, but denies the remaining allegations set forth in this Paragraph.

8. Answering Paragraph 29 of the Counterclaim, Brahma admits that it provided invoice back up, but denies the remaining allegations contained therein.

9. Answering Paragraph 32 of the Counterclaim, Brahma admits that TSE has paid Brahma \$13 million, but denies the remaining allegations contained therein.

FIRST CAUSE OF ACTION

(Breach of Contract)

10. Answering Paragraph 35 of the Counterclaim, Brahma repeats and re-alleges each and every response contained in the preceding Paragraphs and incorporates the same by reference.

11. Answering Paragraph 36 of the Counterclaim, Brahma admits that TSE and Brahma entered a Services Agreement. Because the Services Agreement more accurately reflect the parties' rights, duties and obligations, Brahma denies the remainder of the allegations set forth in these Paragraphs.

12. Answering Paragraphs 37, 38, 39 and 40 of the Counterclaim, Brahma denies the allegations contained therein.

SECOND CAUSE OF ACTION

(Contractual Breach of the Implied Covenant of Good Faith & Fair Dealing)

13. Answering Paragraph 41 of the Counterclaim, Brahma repeats and re-alleges each and every response contained in the preceding Paragraphs and incorporates the same by reference.

14. Answering Paragraph 42 of the Counterclaim, this Paragraph calls for a legal conclusion and does not require a response. To the extent a response is required, Brahma denies the same.

///

///

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1 15. Answering Paragraphs 43, 44, 45, 46 and 47 of the Counterclaim, Brahma denies
2 the allegations contained therein.

3 **THIRD CAUSE OF ACTION**

4 *(Declaratory Relief)*

5 16. Answering Paragraph 48 of the Counterclaim, Brahma repeats and re-alleges each
6 and every response contained in the preceding Paragraphs and incorporates the same by reference.

7 17. Answering Paragraphs 49, 50, 51, 52 and 53 of the Counterclaim, Brahma denies
8 the allegations contained therein.

9 **FOURTH CAUSE OF ACTION**

10 *(Unjust Enrichment/Quantum Meruit)*

11 18. Answering Paragraph 54 of the Counterclaim, Brahma repeats and re-alleges each
12 and every response contained in the preceding Paragraphs and incorporates the same by reference.

13 19. Answering Paragraph 55 of the Counterclaim, Brahma lacks sufficient information
14 to form a belief as to the truth of the allegations contained therein and therefore deny the same.

15 20. Answering Paragraphs 56, 57, 58, 59, 60 and 61 of the Counterclaim, Brahma
16 denies the allegations contained therein.

17 **FIFTH CLAIM FOR RELIEF**

18 *(Fraudulent/Intentional Misrepresentation)*

19 21. Answering Paragraph 62 of the Counterclaim, Brahma repeats and re-alleges each
20 and every response contained in the preceding Paragraphs and incorporates the same by reference.

21 22. Answering Paragraphs 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77 and 78 of
22 the Counterclaim, Brahma denies the allegations contained therein.

23 23. Answering Paragraph 64 of the Counterclaim, Brahma admits that TSE and
24 Brahma entered a Services Agreement. Because the Services Agreement more accurately reflect
25 the parties' rights, duties and obligations, Brahma denies the remainder of the allegations set forth
26 in these Paragraphs.

27 ///

28 ///

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9. Defendant's claims are barred based upon principles of waiver, release, accord, satisfaction and modification.

10. Defendant's claims are barred as a result of fraud and/or illegality.

11. Defendant's claims sounding in equity, if any, are barred inasmuch as Defendants had an adequate remedy at law available to it, if any remedy exists.

12. Defendant's claims are barred by the doctrine of laches.

13. Defendant's claims are barred under the terms of the Services Agreement.

14. The damages, which are alleged to have been incurred in Defendant's Counterclaim, if any, were the direct result in whole or in part, of Defendant's own intentional, willful and/or negligent acts and deeds and by Defendant's breaches of the Contract.

15. Defendant's claims as alleged in the Counterclaim, and the loss and damage, if any in fact exist, are the direct and proximate result of the acts, deeds, omissions or failure to act, or the conduct of third parties whose names are presently unknown, over whom Brahma had no control, nor the right, duty or obligation to control.

16. Defendant's Counterclaim fails to mitigate the damages incurred, if any, and therefore, any recovery awarded to Defendant against Brahma, if any, should be reduced by that amount not mitigated.

17. At all times relevant herein, Brahma acted diligently and with due care in its performance of any duty owed to Defendant, if any.

18. Defendant's claims are barred by the applicable limitations period.

19. Nothing herein shall be deemed to be a waiver of Brahma's right to mediate and/or arbitrate its dispute with Defendants, if applicable.

20. All possible affirmative defenses may not have been alleged herein insofar as insufficient facts were not available after reasonable inquiry upon the filing of Defendant's Counterclaim, and therefore, Brahma reserves the right to assert any additional affirmative defenses and matters in avoidance as may be disclosed during the course of additional investigation and discovery. Brahma reserve the right to amend its Answers to allege additional affirmative defenses if so warranted.

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1 **WHEREFORE**, Brahma pray for relief as follows:

- 2 1. That the Counterclaim be denied;
- 3 2. That the Court award Brahma its costs;
- 4 3. That the Court award Brahma all of its reasonable attorneys' fees; and
- 5 4. For such other and further relief as the Court deems appropriate in the
- 6 circumstances.

7 Dated this 4 day of October, 2018.

8 **PEEL BRIMLEY LLP**

9 

10 _____
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14 Nevada Bar No. 9407
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18 rpeel@peelbrimley.com
19 ezimbelman@peelbrimley.com
20 Attorneys for Plaintiff
21 BRAHMA GROUP, INC.

22
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24
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28

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of PEEL BRIMLEY LLP, I am over the age of eighteen years, and not a party to the within action. My business address is 3333 E. Serene Ave, Suite 200, Henderson, NV 89074. On October ⁵~~4~~, 2018, I served the within document(s):

BRAHMA GROUP, INC.'S ANSWER TO TONOPAH SOLAR ENERGY, LLC'S COUNTERCLAIM [ECF NO. 4]

to be served as follows:

- ☒ By CM/ECF Filing – with the United States District Court of Nevada. I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the attorney(s) and/or party(ies) listed below.
- ☐ By Facsimile Transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the persons) served as set forth below.
- ☐ By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, NV, addressed as set forth below.

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

D. Lee Roberts, Jr., Esq. (NV Bar No. 8877)
Colby L. Balkenbush, Esq. (NV Bar No. 13066)
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
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Attorneys for Defendant
Tonopah Solar Energy, LLC



An employee of PEEL BRIMLEY LLP

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EXHIBIT 14

EXHIBIT 14

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8 *Attorneys for Plaintiff*
9 *BRAHMA GROUP, INC.*

10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 BRAHMA GROUP, INC., a Nevada Corporation,

13 Plaintiff,

14 vs.

15 TONOPAH SOLAR ENERGY, LLC, a Delaware
Limited Liability Company; DOES I through X; and
16 ROE CORPORATIONS I through X,

17 Defendants.

18 TONOPAH SOLAR ENERGY, LLC a Delaware
limited liability company; DOES I through X; and
19 ROE CORPORATIONS I through X,

20 Counterclaimant,

21 vs.

22 BRAHMA GROUP, INC., a Nevada corporation

23 Counterdefendant.

CASE NO.: 2:18-CV-01747-RFB-GWF

**BRAHMA GROUP, INC.'S MOTION
FOR STAY, OR IN THE
ALTERNATIVE, MOTION TO
AMEND COMPLAINT**

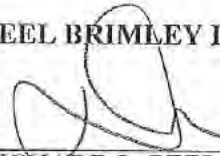
24 Plaintiff, BRAHMA GROUP, INC. ("Brahma"), a Nevada corporation, by and through its
25 attorneys, the law firm of Peel Brimley LLP, hereby submits its Motion for Stay, or in the
26 Alternative Motion to Amend Complaint ("Motion").
27
28

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1 This Motion is made and based on the following Memorandum of Points and Authorities,
2 the pleadings, declarations and papers on file in this case (the "Case"), and any argument that the
3 Court may entertain in this matter.

4 Dated this 16 day of October, 2018.

5 **PEEL BRIMLEY LLP**



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13 Attorneys for Plaintiff
14 BRAHMA GROUP, INC.

15 **MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR**
16 **STAY, OR IN THE ALTERNATIVE, MOTION TO AMEND COMPLAINT**

17 **I. INTRODUCTION**

18 This Case presents the Court with one of those rare instances where all factors for a
19 *Colorado River* stay are satisfied, allowing the Court to stay this Case to promote "wise judicial
20 administration and conserve judicial resources and a comprehensive disposition of litigation."

21 This Case represents a duplication of a case TSE first commenced (as Plaintiff) against
22 Brahma on June 1, 2018 in the Fifth Judicial District Court of Nye County (the "Nye County
23 Court") when it sought to expunge the Brahma Lien (defined below) recorded against TSE's Work
24 of Improvement (defined below). Indeed, the Nye County Court Judge has already ruled on
25 dispositive issues that pertain to the subject matter of this Case and the Nye County Court is in the
26 best position to proceed with the adjudication of all disputed matters that pertain to this Case, none
27 of which present federal questions for the Court to resolve.

28 *///*

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1 Accordingly, the Court should grant this Motion and stay this Case pending the outcome of
2 the Action TSE commenced (as Plaintiff) before the Nye County Court. In the alternative, should
3 this Court be inclined to deny the Motion, Brahma respectfully requests that it be permitted to
4 amend its Complaint.

5 **II. STATEMENT OF FACTS**

6 **A. The Work of Improvement.**

7 TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company ("TSE"), is the
8 owner of the Crescent Dunes Solar Energy Project constructed on certain real property located in
9 Nye County, Nevada (the "Work of Improvement").
10

11 On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with
12 Brahma,¹ whereby Brahma agreed to provide on a time and material basis, certain work, materials,
13 and equipment (collectively, the "Work") for the Work of Improvement. Brahma provided the
14 Work for the Work of Improvement and TSE has failed to fully pay Brahma for such Work.

15 **B. The Brahma Lien and the Brahma Surety Bond.**

16 Because of TSE's failure to fully pay Brahma for its Work, Brahma caused a notice of lien
17 ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as Document No.
18 890822 against the Work of Improvement.²

19 Thereafter, the Original Lien was amended and/or restated on several occasions and
20 ultimately increased to \$12,859,577.74, when Brahma caused its Fourth Amended Notice of Lien
21 ("Fourth Amended Lien") to be recorded on September 14, 2018 with the Nye County Recorder
22 as Document No. 899351.³ Brahma's Original Lien and the amendments and restatements thereto,
23 including the Fourth Amended Lien are referred to collectively herein as the "Brahma Lien."

24 In an attempt to replace the Work of Improvement as security for the Brahma Lien with a
25 surety bond, Cobra Thermosolar Plant, Inc., a Nevada corporation ("Cobra")⁴ and the original
26 general contractor that TSE hired to construct the Work of Improvement, caused a surety bond to

27 ¹ A copy of the Agreement is attached hereto as Exhibit 1.

² A copy of the Original Lien is attached hereto as Exhibit 2.

28 ³ True and correct copies of Brahma's First Amended Lien, Second Amended Lien, Third Amended Lien and Fourth Amended Lien are attached hereto as Exhibits 3, 4, 5 and 6, respectively.

⁴ An affiliate of Cobra possesses an indirect ownership interest in TSE.

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1 be recorded with the Nye County Recorder's Office on September 6, 2018, as Document No.
2 898974 (the "Brahma Surety Bond"). The Brahma Surety Bond (i) was issued by American Home
3 Assurance Company, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal
4 ("Principal"), and (iii) was in the amount of \$10,767,580.00.⁵

5 At Brahma's request and in compliance with Nevada law, Cobra caused the Penal Sum of
6 the Surety Bond to be increased to \$19,289,366.61 or 1.5 times the amount of Brahma's Fourth
7 Amended Lien by causing a Rider to the Surety Bond (the "Brahma Surety Bond Rider") to be
8 recorded on October 9, 2018 with the Nye County Recorder's Office as Document No. 900303.⁶
9 The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as
10 the "Brahma Surety Bond."

11 **C. The H&E Lien and the H&E Surety Bond.**

12 On May 15, 2018, H & E Equipment Services Inc., a Delaware Corporation and one of
13 Brahma's suppliers for the Work of Improvement, caused a notice of lien to be recorded with the
14 Nye County Recorder as Document No. 892768 in the amount of \$477,831.40 (the "H&E Lien").

15 To replace the Work of Improvement as security for the H&E Lien, on September 6, 2018,
16 Cobra caused a surety bond to be recorded with the Nye County Recorder's Office as Document
17 No. 898975 (the "H&E Surety Bond"). The H&E Surety Bond (i) was issued by American Home
18 Assurance Company, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal
19 ("Principal"), and (iii) is in the amount of \$716,741.10.⁷

20 Because TSE has failed to fully pay Brahma, H&E has not been fully paid and Brahma
21 understands that H&E intends to pursue claims against Brahma.

22 ///

23 ///

24 ///

26 ⁵ A true and correct copy of the Brahma Surety Bond is attached hereto as Exhibit 7.

27 ⁶ A true and correct copy of the Brahma Surety Bond Rider is attached hereto as Exhibit 8.

28 ⁷ A true and correct copy of the H&E Surety Bond is attached hereto as Exhibit 9. It should also be noted that (i) American Home Assurance Company is the surety on both the Brahma Surety Bond and the H&E Surety Bond and is referred to herein as the "Surety," and (ii) Cobra is identified as the principal on both the Brahma Surety Bond and the H&E Surety Bond and is referred to herein as the "Principal."

1 **D. To Expunge the Brahma Lien, TSE, as the Plaintiff, First Commenced an**
2 **Action in Nye County Against Brahma, the Defendant.**

3 On June 1, 2018, TSE, as plaintiff, commenced an action in Nye County as Case No. CV
4 39348 (the "Nye County Action"), seeking to expunge the Brahma Lien from the Work of
5 Improvement by filing a Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien (the "Motion
6 to Expunge").⁸ The Nye County Action was assigned to the Honorable Steven Elliot, a senior Judge
7 with Washoe County, who (i) previously presided over extensive litigation involving the
8 construction of the Work of Improvement, and (ii) is very familiar with the Work of Improvement.
9 see [Case No. CV-36323 titled *Helix Electric of Nevada, LLC v. Cobra Thermosolar Plants, Inc.*;
10 *Tonopah Solar Energy LLC et. al.*; see also, Case No. 35217 titled *Merlin Hall dba Mt. Grant*
11 *Electric v. Cobra Thermosolar Plants, Inc.; Tonopah Solar Energy, LLC, et. al.*]

12 At a hearing held on September 12, 2018 (the "September 12 Hearing"), Judge Elliot denied
13 TSE's Motion to Expunge. Following the September 12 Hearing, the parties submitted competing
14 orders for the Nye County Court to sign and enter. Since Brahma was the prevailing party at the
15 September 12 Hearing, Brahma intends to file a motion for an award of attorney's fees and costs
16 pursuant to NRS 108.2275(6), once an order denying the TSE Application is entered.⁹ The motion
17 for attorney's fees and costs must necessarily be heard by the Nye County Court.

18 **E. Based on a Mistaken Interpretation of the Agreement, Brahma Filed an Action**
19 **Against TSE in Clark County Nevada, Which TSE Removed to Federal Court**
20 **Based on Diversity Jurisdiction Only.**

21 Based on a mistaken belief that Section 24 of the TSE/Brahma Agreement required it to
22 pursue its contract-based claims in Clark County, Nevada, Brahma filed a Complaint on July 17,
23 2018, against TSE for breach of contract, unjust enrichment, and violation of NRS Chapter 624 in
24 the Eighth Judicial District Court of Nevada (the "Clark County Action").¹⁰

25 ///

26 ///

27 ⁸ A true and correct copy of TSE's Motion to Expunge is attached hereto as Exhibit 10.

28 ⁹ When the court finds a prevailing lien claimant's notice of lien is not frivolous and was made with reasonable cause, the court must award to such prevailing lien claimant the costs and reasonable attorney's fees it incurred to defend the motion. See, NRS 108.2275(6)(c).

¹⁰ A true and correct copy of Brahma's Complaint filed in the Clark County Action is attached hereto as Exhibit 11.

1 Notably, Section 24 of the Agreement reads, “[Brahma] submits to the jurisdiction of the
2 courts in such state, with a venue in Las Vegas, Nevada, for any action or proceeding directly or
3 indirectly arising out of this Agreement.”

4 In *Am. First Federal Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P. 3d 105 (Nev.
5 2015), the Nevada Supreme Court found that:

6 Clauses in which a party agrees to submit to jurisdiction are not necessarily
7 mandatory. Such language means that the party agrees to be subject to that
8 forum’s jurisdiction if sued there. It does not prevent the party from bringing suit
9 in another forum. The language of a mandatory clause shows more than that
10 jurisdiction is appropriate in a designated forum; it unequivocally mandates
11 exclusive jurisdiction. Absent specific language of exclusion, an agreement
12 conferring jurisdiction in one forum will not be interpreted as excluding
13 jurisdiction elsewhere.

14 Based on the reasoning of the *Am. First Federal Credit Union* Court, the forum selection
15 clause contained in Section 24 of the parties’ Agreement is “permissive” and “does not require” the
16 parties to resolve their contract claims in Las Vegas, Nevada. Rather, Section 24 allows Brahma to
17 bring such claims in the Nye County Action along with Brahma’s mechanic’s lien foreclosure
18 complaint (discussed below).

19 On September 10, 2018, TSE removed the Clark County Action to Federal Court based on
20 diversity jurisdiction only (the “Federal Action”).

21 On September 17, 2018, TSE filed its Answer and Counterclaim against Brahma in the
22 Federal Action alleging the following state law causes of action: (i) Breach of Contract; (ii) Breach
23 of the Implied Covenant of Good Faith and Fair Dealing; (iii) Declaratory Relief; (iv) Unjust
24 Enrichment; (v) Fraudulent/Intentional Misrepresentation; and (vi) Negligent Misrepresentation.

25 On September 25, 2018, Brahma filed its First Amended Complaint in the Federal Action
26 wherein it removed all causes of action against TSE except for its Unjust Enrichment claim.

27 On October 5, 2018, Brahma filed its Answer to TSE’s Counterclaim in the Federal Action.

28 On October 9, 2018, TSE filed its Answer to Brahma’s First Amended Complaint in the
Federal Action.

Finally, on October 10, 2018, the Parties filed a Joint Status Report in the Federal Action.

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1 With the exception of TSE's improper Jury Demand (which TSE has agreed to withdraw)
2 and its Removal Statement, no other filings have taken place in the Federal Action.

3 **F. Brahma Filed an Action to Foreclose on the Brahma Lien in the Nye County**
4 **Action.**

5 Because the Nye County Court had already ruled on the validity of the Brahma Lien and
6 was well acquainted with the facts of the case, Brahma (as the defendant in Case No. CV 39348)
7 filed its Mechanic's Lien Foreclosure Complaint in the Nye County Action on September 21,
8 2018,¹¹ as required by NRS 108.239(1).¹²

9 Also, on September 21, 2018, because the amount of the Brahma Surety Bond did not
10 comply with NRS 108.2415, Brahma filed (in the Nye County Action) its (i) Petition to Except to
11 the Sufficiency of the Bond, and (ii) Petition to Compel Increase of the Amount of the Bond (the
12 "Petition"). Assuming the Surety Bond Rider Cobra recently recorded complies with NRS
13 108.2415, Brahma intends to withdraw its Petition.

14 On September 25, 2018, Brahma filed in the Nye County Action its (i) First Amended
15 Counter-Complaint and included therein its contract-based claims against TSE, and (ii) Third-
16 Party Complaint asserting a claim against the Surety, the Brahma Surety Bond and Cobra, as
17 Principal.¹³

18 Brahma also understands that H&E intends to bring in the Nye County Action, (i) contract-
19 based claims against Brahma, and (ii) claims against the Surety, the H&E Surety Bond and Cobra,
20 as Principal.

21 **III. LEGAL ARGUMENT**

22 **A. The Court Should Stay this Action Under the *Colorado River Abstention***
23 **Doctrine.**

24 Because the Parties are proceeding with parallel litigation in the Nye County Action, the
25 Court should stay this removed civil action under the *Colorado River Abstention* Doctrine, thereby
26 allowing the Nye County Court and the Nye County Action to efficiently resolve this duplicative

27 ¹¹ A true and correct copy of the Mechanic's Lien Foreclosure Complaint is attached hereto as Exhibit 12.

28 ¹² In pertinent part, NRS 108.239(1) states, "A notice of lien may be enforced by an action in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located"

¹³ A true and correct copy of the First Amended Counter-Complaint and Third-Party Complaint is attached hereto as Exhibit 13.

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1 dispute. The *Colorado River* doctrine requires a federal court to abstain in favor of a concurrent
 2 state court proceeding where necessary to promote “wise judicial administration, conservation of
 3 judicial resources, and comprehensive disposition of litigation.” *Southwest Circle Group, Inc. v.*
 4 *Perini Building Company*, 2010 WL 2667335 *2 (D. Nev. June 29, 2010) (citing *Nakash v.*
 5 *Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989). The doctrine is designed to avoid piecemeal
 6 litigation and to prevent inconsistent results. *Colorado River Water Conservation Dist. v. United*
 7 *States*, 424 U.S. 800, 817 (1976). For the federal court to abstain, there must be a parallel or
 8 substantially similar proceeding in state court. *Commercial Cas. Ins. Co. v. Swarts, Manning &*
 9 *Associates, Inc.*, 616 F.Supp.2d 1027, 1032-33 (D. Nev. 2007)(citing *Security Farms v. Int’l Broth*
 10 *of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1009 (9th Cir. 1997)(“Inherent
 11 in the concept of abstention is the presence of a pendent state action in favor of which the federal
 12 court must, or may abstain”).

13 However, exact parallelism in the litigation is not required, only that the two proceedings be
 14 “substantially similar.” *Nakash*, 882 F.2d at 1411. “Suits are parallel if substantially the same
 15 parties litigate substantially the same issues in different forums.” *Security Farms*, 124 F.3d at 1033
 16 (citing *New Beckley Min. Corp. v. Int’l Union, United Mine Workers of America*, 946 F.2d 1072
 17 (4th Cir. 1991).

18 To determine whether the state court and federal court cases are “substantially similar,” the
 19 court’s emphasis has been on substantial party identity, transactional identity, and substantial
 20 similarity of claims. See, e.g., *Jesus Garcia v. County of Contra Costa*, 2015 WL 1548928, at *2
 21 (N.D. Cal. 2015) (“both actions seek relief based on the same event and are alleged against the
 22 same defendants”); *Southwest Circle Group Inc.*, 2010 WL 2667335 at *2 (concluding proceedings
 23 were “substantially similar” where they arose “from the same underlying dispute”); *Commercial*
 24 *Cas. Ins. Co.*, 616 F.Supp.2d at 1033 (deeming cases to be substantially similar where they “arise
 25 out of the conduct of the respective parties” and “called into question the same conduct”). To
 26 determine whether contemporaneous, concurrent state and federal litigation exists, the Court must
 27 look to the point in time when the party moved for its stay under *Colorado River*. *FDIC v. Nichols*,
 28 885 F.2d 633, 638 (9th Cir. 1989).

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This case satisfies the standards for a *Colorado River* stay to promote “wise judicial administration and conserve judicial resources and comprehensive disposition of litigation.” The Nye County Action and Federal Action are substantially similar, contemporaneous, concurrent state and federal cases. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 845 (9th Cir. 2017). Here, the pending Nye County Action (State Action) and District of Nevada Action (Federal Action) fulfill the substantial similarity requirement. Both cases involve the same parties and arise out of the same events—the Agreement, its performance, TSE’s failure to pay Brahma for its Work and TSE’s claims that Brahma over charged it for its Work. Both cases assert contractual and quasi-contractual claims and should be decided by the same trier of fact who will decide the Lien litigation—i.e., the Nye County Court. There is concurrent jurisdiction over all claims in these two cases; neither case asserts a claim within the exclusive subject-matter jurisdiction of a federal court. In other words, the federal court’s expertise on federal law is not required in this Case.

In *Colorado River*, the US Supreme Court described four factors federal courts should consider in determining whether abstention is appropriate: (1) whether the state or federal court has exercised jurisdiction over the res, (2) the order in which the forums obtained jurisdiction, (3) the desirability of avoiding piecemeal litigation, and (4) the inconvenience of the federal forum. *Colorado River*, 424 U.S. at 800. Subsequent decisions have added three more factors: (5) whether federal or state law controls the decision on the merits, (6) whether the state court can adequately protect the rights of the parties,¹⁴ and (7) whether the exercise of federal jurisdiction will promote forum shopping.¹⁵

“These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a mechanical checklist,” *40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992). “As part of this flexible approach, it may be important to consider additional factors not spelled out in the *Colorado River* opinion.” *Commercial Casualty Ins. Co.*, 616 F.Supp.2d at 1033 (citing *Moses Cone*, 460 U.S. at 26, 103 S.Ct. 927).

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¹⁴ For factors (5) and (6), see, *Moses H. Cone Memorial Hosp.*, 460 U.S. 1 at 23-25.

¹⁵ For factor (7), see *Nakash*, 882 F.2d at 1411.

1 *I. The Nye County Court First Assumed Jurisdiction Over the Res.*

2 Here, Judge Elliot first assumed jurisdiction over the *Res* when TSE, as plaintiff, knowingly
 3 and intentionally availed itself of the jurisdiction of the Nye County Court and filed the Nye County
 4 Action seeking to expunge The Brahma Lien. Which court first obtains in rem or quasi in rem
 5 jurisdiction over property is a dispositive factor that trumps all other *Colorado River* factors when
 6 established. *See, e.g., Washington Street Corp. v. Lusardi*, 976 F.2d 587, 589 (9th Cir. 1992)
 7 (staying federal court was required where state court obtained in rem jurisdiction over property in
 8 a quiet title action). This is so because “the mere fact that state and federal courts are initially vested
 9 with coequal authority does not mean that more than one court can actually adjudicate—much less
 10 administer—decrees over the same res.” *State Engineer of Nevada v. South Fork Band of Te-Moak*,
 11 339 F.3d 804, 813 (9th Cir. 2003). The jurisdiction over “property” refers to an interest in tangible
 12 physical property. *American Intern. Underwriters v. Continental Ins.*, 843 F.2d 1253, 1258 (9th
 13 Cir. 1988). In the District of Nevada, U.S. District Court Judge Roger Hunt concluded that the filing
 14 of a lien against a work of improvement established jurisdiction over the res. *Southwest Circle*
 15 *Group Inc.*, 2010 WL 2667335 at *2.

16 Here, the Nye County Court first assumed jurisdiction over the *Res* that is the subject of this
 17 dispute (i) when Brahma recorded the Brahma Lien against the Work of Improvement on April 9,
 18 2018, and (ii) subsequently, when TSE filed the Nye County Action to Expunge the Brahma Lien
 19 on June 1, 2018.

20 Notably, that Action was brought under NRS 108.2275 which requires a “party in interest in
 21 the property subject to the notice of lien who believes the notice of lien is frivolous and was made
 22 without reasonable cause...[to] apply by motion to the district court for the county where the
 23 property...is located for an order directing the lien claimant to appear before the court to show
 24 cause why the relief requested should not be granted.” Upon filing the Nye County Action, the Nye
 25 County Court assumed jurisdiction over the Brahma Lien recorded against the Work of
 26 Improvement.

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28 ///

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1 On September 10, 2018, the Federal Action was removed from Clark County to federal court.
2 Therefore, the Nye County Court first establish jurisdiction over the *Res*. Moreover, Brahma has
3 since filed its mechanic's lien foreclosure action and claim against the Brahma Surety Bond in the
4 Nye County Action, providing the Nye County Court with additional jurisdiction over the *Res*.
5 Accordingly, jurisdiction over the *Res* was first asserted in the Nye County Court which factor
6 trumps all other factors set forth below and heavily favors abstention.

7 **2. *The Nye County Court Obtained Jurisdiction First.***

8 This factor concerns not only the dates on which jurisdiction was established in the Nye
9 County Action vs. the Federal Action, but also the relative progress made between the two cases.
10 *American Intern. Underwriters*, 843 F.2d at 1258. Because the Nye County Court obtained
11 Jurisdiction over the Parties and the *Res* first, and because Judge Elliot has already held hearings
12 and ruled on heavily contested motions in the Nye County Court, including the merits and validity
13 of the Brahma Lien, this factor weighs substantially in favor of abstention for purposes of judicial
14 economy.

15 While both cases are relatively young, because the Nye County Court obtained jurisdiction
16 over the *Res* and the Brahma Lien first, the Nye County Action has progressed further along than
17 the Federal Action. Moreover, because Judge Elliot previously presided over extensive lien
18 litigation regarding the Work of Improvement, he is already knowledgeable about the Work of
19 Improvement and many of the unique issues the Parties encountered before, during and after
20 construction. As such, Nye County is the proper forum to hear all issues relating to the *Res*, just as
21 TSE determined when it commenced the Nye County Action.

22 **3. *The Inconvenience of the Federal Forum.***

23 This factor concerns the inconvenience of the forum to the party who did not invoke the
24 federal forum and is typically discussed in the context of distant witnesses. *American Intern.*
25 *Underwriters*, 843 F.2d at 1258. However, inconvenience of a federal forum is deemed to be
26 irrelevant when a federal action and state action are located in the same general geographic area.
27 *Jesus Garcia*, 2015 WL 1548928 at *3. Here, while the Work of Improvement is located in
28 Tonopah, Nevada, all hearings have been and will continue to be held at the Nye County courthouse

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1 located in Pahrump, Nevada, less than an hours' drive from Las Vegas.

2 Moreover, because the Brahma Surety Bond now stands as the collateral for the Brahma Lien,
3 Brahma intends to file a Demand for Preferential Trial Setting under NRS 108.237(9), which
4 requires the Court to clear its docket of all matters and proceed to trial within 60 days of Brahma
5 filing its Demand.

6 The Nevada Legislature has afforded mechanic's lien claimants special rights to a just and
7 speedy trial because of the value they add to real property and to the economy in general, as well
8 as the vulnerable position they can find themselves in when an owner fails to pay for work,
9 materials and equipment furnished to a construction project. In 2003 and 2005, and in response to
10 the Venetian lien litigation, the Nevada Legislature substantially revised the mechanic's lien
11 statutes with the intent to facilitate payments to lien claimants in an expeditious manner. *Hardy*
12 *Companies, Inc. v. SNMARK, LLC*, 126 Nev. 245 P.3d 1149, 1156 (2010). One of those revisions
13 was to arm lien claimants with the right to petition the Court for a summary trial on their mechanic's
14 lien claims.

15 Specifically, NRS 108.239(8) provides:

16 Upon petition by a lien claimant for a preferential trial setting:

- 17 (a) the court **shall give preference** in setting a date for the trial **of an**
18 **action brought pursuant to this section**; and
19 (b) if a lien action is designated as complex by the court, the court
20 may take into account the rights and claims of all lien claimants in
21 setting a date for the preferential trial.

22 NRS 108.239(7) provides:

23 The **court shall** enter judgment according to the right of the parties,
24 and shall, by decree, **proceed to hear and determine the claims in**
25 **a summary way, or may, if it be the district court, refer the claims**
26 **to a special master to ascertain and report upon the liens and the**
27 **amount justly due thereon**...

28 The Nevada Supreme Court has recognized the Legislature's intent to provide lien claimants
with special rights designed to provide them with a speedy remedy on their lien claims. See
California Commercial v. Amedeo Vegas I, Inc., 119 Nev. 143, 67 P.3d 328 (2003); See also, *Lehrer*
McGovern Bovis, Inc. v. Bullock Insulation, Inc., 197 P.3d 1032 (Nev. 2008)(acknowledging that

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1 the object of the lien statutes is to secure payment to those who perform work or furnish material
2 to improve the property of the owner). Among the protections afforded lien claimants is the
3 statutory right to a preferential trial setting. By enacting Nevada's mechanic's lien statutes, the
4 Nevada Legislature has created a means to provide contractors with secured payment for their work,
5 materials and equipment furnished to construction projects in Nevada inasmuch as "contractors are
6 generally in a vulnerable position because they extend large blocks of credit; invest significant time,
7 labor and materials into a project; and have any number of works vitally depend upon them for
8 eventual payment." *Wilmington Trust FSB v. AI Concrete Cutting & Demolition, LLC (In re*
9 *Fontainebleau Las Vegas Holdings, LLC)*, 289 P.3d 1199, 1210 (Nev. 2012).

10 Brahma, as a lien claimant, is entitled to a preferential trial setting pursuant to NRS 108.239
11 against the Brahma Surety Bond. Preferential trial rights in the Nye County Action mean this case
12 will be handled expeditiously, thereby reducing delay where Brahma has fronted money for work,
13 materials, and equipment. By contrast, in federal court, there is no preferential trial mechanism.
14 Moreover, even if there was a right to a preferential trial in Federal Court, because Judge Elliot is
15 on Senior status, he only handles a few cases at a time and would be in a much better position than
16 this Court to proceed with a lengthy trial within 60 days after Brahma files the Demand.

17 Further, because (i) the Brahma Surety Bond claim, and (ii) the H&E Lien claim, the H&E
18 Surety Bond claim and H&E's claims against Brahma (claims that are derivative of Brahma's
19 claims against TSE), will be litigated in the Nye County Action, H&E's claims will also be litigated
20 in the same action.

21 Finally, because TSE (as the Plaintiff) cannot remove the Nye County Action to Federal
22 Court, and because Cobra is of the same domicile as Brahma (i.e., both Nevada corporations) and
23 H&E is of the same domicile as TSE (i.e., both Delaware entities), there is no basis for diversity
24 jurisdiction. Hence, if the Court does not stay this Case, Brahma will be forced to litigate claims
25 arising from the same transaction and occurrence in two separate forums.

26 Thus, there is no question that the Nye County Court is a reasonable and convenient forum
27 in which to try the parties' dispute.

28 ///

1 4. *Desirability of Avoiding Piecemeal Litigation*

2 This factor concerns whether there are *special concerns* about inconsistent adjudication, as
3 there will always be an issue with duplicative state court-federal court litigation. *Seneca*, at 843,
4 “Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating
5 efforts and possibly reaching different results.” *Commercial Cas. Ins. Co.*, 616 F.Supp.2d at 1035
6 (citing *American Int’l Underwriters*, 843 F.2d at 1258). For instance, in *Colorado River*, the Court
7 found there to be a concern where water rights were in dispute and there was a real danger of
8 inconsistent adjudication.

9 Central to the dispute between Brahma and TSE is the amount of Work Brahma performed
10 on the Work of Improvement, the amount that TSE owes Brahma for that Work, and the lienable
11 amount for such Work. To determine Brahma’s lienable amount, the Nye County Court will
12 necessarily need to determine (i) the agreed upon contract value of said Work (NRS 108.222(a)),
13 or (ii) in cases where there may not have been an agreed upon price, the fair market value of said
14 Work (NRS 108.222(b)). A mechanic’s lien is a charge on real estate, created by law, in the nature
15 of a mortgage, to secure the payment of money due for work done thereon, or materials furnished
16 therefor. *Rosina v. Trowbridge*, 20 Nev. 105, 113, 17 P. 751 (Nev. 1888).

17 The Brahma Lien (recorded against the Work of Improvement and now secured by the
18 Brahma Surety Bond) creates a property interest which cannot be adjudicated by two different
19 courts. Inconsistent adjudication regarding Brahma’s lien rights (or claim against the Brahma
20 Surety Bond) would lead to chaos if one court determines that TSE owes Brahma one amount and
21 a different court determines that TSE owes Brahma a different amount. To resolve those two
22 inconsistent judgments, it would require further litigation.

23 Because the Nye County Court has already ruled on TSE’s attempt to expunge the Brahma
24 Lien, the Nye County Court is more familiar with many of the disputed issues between the Parties.
25 If this Court were to exercise jurisdiction, it would likely “be required to decide these matters anew,
26 requiring duplicative effort and creating a significant possibility of inconsistent results.” *See*
27 *Commercial Cas. Ins. Co.*, 616 F.Supp.2d at 1035 (citing *Ryder Truck Rental, Inc. v. Acton*
28 *Foodservices Corp.*, 554 F.Supp. 227, 281 (C.D.Cal 1983)(district court abstains because

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1 “exercising federal jurisdiction in this case would not only require duplication of time and effort
2 on the part of the litigants and the Court, but would also create the possibility of inconsistent
3 results”).

4 Finally, acknowledging the possibility of inconsistent rulings being issued by the Nye County
5 Court and this Court, by letter dated October 15, 2018, TSE advised the Nye County Court, that it
6 was concerned that orders issued in the Nye County Action may adversely impact this Case.¹⁶

7 Hence, this factor weighs substantially in favor of abstention.

8 **5. *Whether state or federal law provides rule of decision on the merits.***

9 Here, as a threshold matter, all the claims asserted by Brahma and counterclaimed by TSE
10 are state law claims. There are no federal questions involved in this Case where this Court’s
11 expertise on federal law is needed to resolve a dispute.

12 In *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160 (9th Cir. 2017), the Court reversed a
13 district court that had declined to stay an action that involved state law eminent domain
14 proceedings, which raised questions of statutory interpretation. *Id.* at 1168. In *Southwest Circle*
15 *Group Inc.*, the District of Nevada noted the special competence of Nevada state courts in complex
16 construction litigation and granted a stay. *Southwest Circle Group Inc.*, 2010 WL 2667335 at *3.
17 In fact, that court went on to state that “it would be a misuse of judicial resources to occupy this
18 courts time in a duplicative proceeding when it is clear that the state court is well-prepared to
19 proceed.” *Id.*

20 Here again, Judge Elliot having already ruled on substantive matters, is well-prepared to
21 proceed with presiding over the entire Case. Moreover, state courts are better equipped to handle
22 complex lien litigation utilizing expedited proceedings since such cases are much more frequently
23 filed in state court as opposed to federal court.

24 This factor also weighs heavily in favor of abstention for purposes of judicial economy.

25 ///

26 ///

27 ///

28 ¹⁶ A true and correct copy of TSE’s October 15, 2018 Letter is attached hereto as Exhibit 14.

1 **6. The Proceedings in the Nye County Action are Adequate to Protect TSE's**
2 **Rights.**

3 This factor concerns whether the State Action would adequately protect federal rights.
4 *Travelers Indemnity Co. v. Madonna*, 914 F.2d 1364, 1370 (9th Cir. 1990). A lack of concurrent
5 jurisdiction would suggest state court is inadequate. *American Intern. Underwriters*, 843 F.2d at
6 1259. There, however, is “no question that the state court has authority to address the rights and
7 remedies at issue” in a case about breach of contract. *R.R. Street & Co. Inc. v. Transport Ins. Co.*,
8 656 F.3d 966, 9821 (9th Cir. 2011)

9 Here, as none of the claims pending before this Court assert federal questions, let alone ones
10 exclusively in a federal court’s jurisdiction, there is no concern that the state court proceeding
11 would be inadequate. Moreover, NRCP 15 is available to TSE should it wish to amend its pleadings
12 in the Nye County Action to add its contract claims and the fraudulent and negligent
13 misrepresentation claims.

14 Because there is no question that the Nye County Action is adequate to protect TSE’s rights,
15 this factor cuts in favor of abstention.

16 **7. Exercising Federal Court Jurisdiction Would Promote Forum Shopping.**

17 This factor concerns whether affirmatively exercising federal court jurisdiction would
18 promote forum shopping. This is especially true where “the party opposing the stay seeks to avoid
19 adverse rulings made by the state court or to gain a tactical advantage from the application of federal
20 court rules.” *Travelers Indemnity Co.*, 914 F.2d at 1371. Here, TSE filed its Motion to Expunge the
21 Brahma Lien in the Nye County Court, when it could have filed that same Motion before this Court.
22 TSE’s removal of the Clark County Action is nothing more than an effort to engage in forum
23 shopping to avoid the effects of the adverse ruling by Judge Elliott.

24 **B. In the Alternative, if the Court Does Not Stay this Case, the Court Should**
25 **Allow Brahma to Amend its Complaint.**

26 In the event the Court is inclined to deny the Motion for Stay, Brahma requests that it be
27 permitted to amend its Complaint to reassert its contract claims against TSE which are currently
28 being litigated in the Nye County Action.

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1 In light of the parallel state court claims asserted in the Nye County Action, and because
2 "justice so requires," Brahma should be permitted to amend its complaint under the liberal standard
3 of FRCP 15(a)(2).

4 Federal Rule of Civil Procedure 15(a) states in relevant part:

- 5 (1) A party may amend its pleading once as a matter of course
6 within (A) 21 days after serving it; or (B) if the pleading is
7 one to which a responsive pleading is required, 21 days after
8 service of a motion under Rule 12(b), (e) or (f), whichever is
9 earlier.
10 (2) In all other cases, a party may amend its pleading only with
11 the opposing party's written consent or the court's leave. The
12 *court should freely give leave when justice so requires.*
13 (emphasis added).

14 "The Supreme Court has interpreted Rule 15(a) and confirmed the liberal standard district
15 courts must apply when granting such leave." *Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.
16 2d 1214, 1221 (D. Nev. 2013). In *Foman v. Davis*, the U.S. Supreme Court explained: "In the
17 absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on
18 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
19 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
20 amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*,
21 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "If the underlying facts or circumstances relied
22 upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test
23 his claim on the merits." *Id.* "Of course, the grant or denial of an opportunity to amend is within
24 the discretion of the District Court, but outright refusal to grant the leave without any justifying
25 reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion
26 and inconsistent with the spirit of the Federal Rules." *Id.*

27 I. No Undue Delay

28 There has been no undue delay on the part of Brahma. Brahma initially included its breach
of contract claims as part of this Action but removed those claims and asserted them in the Nye
County Action along with its Lien claim and now its claim against the Brahma Surety Bond.
Brahma believes the Nye County Court is the appropriate court to hear all matters in this Case.

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1 However, to the extent the Court is unwilling to stay this Case, Brahma seeks leave of Court to
2 amend its Complaint to re-add its contract-based causes of action against TSE.

3 2. *TSE will Not Be Prejudiced if Brahma is Permitted to Amend its*
4 *Complaint.*

5 Given the infancy of this Case, TSE will suffer no prejudice if Brahma is permitted to
6 Amend its Complaint to add its contract-based claims. In fact, it is Brahma who would be
7 prejudiced if this Court does not stay this Case and does not allow Brahma to amend its Complaint.

8 **IV. CONCLUSION**

9 Based on the foregoing, this Court should stay this Case pending the outcome of the Nye
10 County Action which has been progressing for several months now. In the alternative, should the
11 Court be inclined to deny the Motion for Stay, this Court should permit Brahma to amend its
12 Complaint to add its contract-based causes of action against TSE.

13 Dated this 16 day of October, 2018.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of PEEL BRIMLEY LLP, I am over the age of eighteen years, and not a party to the within action. My business address is 3333 E. Serene Ave, Suite 200, Henderson, NV 89074. On October 16, 2018, I served the within document(s):

MOTION FOR STAY, OR IN THE ALTERNATIVE, MOTION TO AMEND COMPLAINT

to be served as follows:

- X By CM/ECF Filing – with the United States District Court of Nevada. I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the attorney(s) and/or party(ies) listed below.
- ☐ By Facsimile Transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the persons served as set forth below.
- ☐ By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, NV, addressed as set forth below.

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

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