

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 11**

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CHRONOLOGICAL INDEX

Date Filed	Description	Bates Number	Volume(s)
06/11/2018	TSE's Motion to Expunge	AA0001-0013	1
	Exhibit 1 – Services Agreement	AA0014-0035	1
	Exhibit 2 – Notice of Lien	AA0036-0043	1
	Exhibit 3 – Notice of First Amended and Restated Lien	AA0044-0047	1
	Exhibit 4 – Notice of First Amended and Restated Lien	AA0048-0057	1
	Exhibit 5 – Notice of Second Amended and Restated Lien	AA0058-0067	1
	Exhibit 6 – Notice of Voluntary Dismissal Without Prejudice	AA0068-0078	1
	Exhibit 7 – Affidavit of Justin Pugh	AA0079-0083	1
07/24/2018	Brahma Group, Inc.'s Opposition to TSE's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien	AA0084-0104	1
	Exhibit 1 – Grant, Bargain and Sale Deed	AA0105-0110	2
	Exhibit 2 – Nye County Parcel Detail	AA0111-0112	2
	Exhibit 3 – Right-Of-Way Grant	AA0113-0136	2
	Exhibit 4 – Deed of Trust	AA0137-0167	2
	Exhibit 5 – Services Agreement	AA0168-0189	2
	Exhibit 6 – Original Lien	AA0190-00197	2
	Exhibit 7 – First Amended Lien	AA0198-0201	2
	Exhibit 8 – Re-recorded First Amended Lien	AA0202-0211	2

CHRONOLOGICAL INDEX

	Exhibit 9 – Second Amended Lien	AA0212-0221	2
	Exhibit 10 – Third Amended Lien	AA0222-0230	2
	Exhibit 11 – Parcel Detail printouts from Nye County Assessor’s website	AA0231-0235	2
07/31/2018	TSE’s Reply to Brahma Group, Inc.’s Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0236-00249	3
	Exhibit A – Nye County Parcel Detail for parcels 012-141-01 & 012-151-01	AA0250-00252	3
	Exhibit B – Nye County Parcel Detail for parcels 012-31-04, 012-131-03, 012-131-04	AA0253-0256	3
	Exhibit C – Nye County Parcel Detail for parcels 612-141-01, 012-141-01	AA0257-0259	3
	Exhibit D – Nye County Real Property Inquiry	AA0260-0262	3
	Exhibit E – Nye County Parcel Detail for parcel 012-431-06	AA0263-0264	3
	Exhibit F – Article from Department of Energy dated 09/28/2011	AA0265-0267	3
	Exhibit G – Affidavit of Justin Pugh	AA0268-0271	3
08/03/2018	Brahma Group, Inc.’s Supplement to its Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0272-0274	3
	Exhibit A – Notice of Right to Lien	AA0275-0276	3
	Exhibit B – USPS Tracking	AA0277-0279	3

CHRONOLOGICAL INDEX

08/15/2018	Brahma Group, Inc.’s Statement of Supplemental Authorities in Support of its Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0280-0284	4
	Appendix A – <i>Basic Refractories, Inc. v. Bright</i> , 72 Nev 183 (1956)	AA0285-0294	4
	Appendix B – <i>Schultz v. King</i> , 68 Nev 207 (1951)	AA0295-0300	4
	Appendix C – <i>Byrd Underground, LLC v. Angaur, LLC</i> , 332 P.3d 273 (2014)	AA0301-0309	4
	Appendix D – <i>Crutcher v. Block</i> , 19 Okla. 246 (1907)	AA0310-0314	4
	Appendix E – <i>Tropic Builders, Ltd., v. US</i> , 52 Haw. 298 (1970)	AA0315-0321	4
	Appendix F – <i>Dow Chemical Co. v. Bruce-Rogers Co.</i> , 255 Ark 448 (1973)	AA0322-0328	4
08/15/2018	TSE’s Errata to its Reply to Brahma Group, Inc.’s Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0329-0331	4
09/07/2018	TSE’s Response to Brahma Group, Inc.’s Statement of Supplemental Authorities in Support of its Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0332-0339	4
	Exhibit 1 – Loan Guarantee Agreement	AA0340-0344	4

CHRONOLOGICAL INDEX

09/12/2018	Hearing Transcript	AA0345-0471	5, 6
11/01/2018	Notice of Entry of Order Denying TSE's Motion to Expunge	AA0472-0481	6
11/01/2018	Brahma Group, Inc.'s Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(C)	AA0482-0495	7
	Exhibit 1 – Declaration of R. Peel	AA0496-0502	7
	Exhibit 2 – Order	AA0503-0509	7
	Exhibit 3 – Peel Brimley's invoices	AA0510-0525	7
11/26/2018	TSE's Opposition to Brahma Group, Inc.'s Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(C)	AA0526-0541	8
	Exhibit 1 – Peel Brimley Invoice	AA0542-0557	8
	Exhibit 2 – Declaration of R. Gormley	AA0558-0562	8
	Exhibit 3 – TSE Motion to Expunge Brahma Group, Inc.'s Mechanic's lien	AA0563-0576	8
	Exhibit 4 – Brahma Group, Inc.'s Opposition to TSE's Motion to Expunge Mechanic's Lien	AA0577-0598	8
	Exhibit 5 – Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	AA0599-0663	9
	Exhibit 6 – Complaint	AA0664-0669	9
	Exhibit 7 – Notice of Removal to Federal Court	AA0670-0673	9
	Exhibit 8 – Fourth Amended and/or Restated Notice of Lien	AA0674-0684	9

CHRONOLOGICAL INDEX

	Exhibit 9 – TSE Answer to Brahma Group, Inc.’s Complaint and Counterclaim against Brahma	AA0685-0704	10
	Exhibit 10 – Braham Group, Inc.’s Mechanic’s Lien Foreclosure Complaint	AA0705-0713	10
	Exhibit 11 – First Amended Complaint	AA0714-0718	10
	Exhibit 12 – Brahma Group, Inc.’s First Amended Counter-Complaint; and Third-Party Complaint	AA719-0733	10
	Exhibit 13 – Brahma Group, Inc.’s Answer to TSE Counterclaim	AA0734-0742	10
	Exhibit 14 – Brahma Group, Inc.’s Motion for Stay, or in the Alternative, Motion to Amend Complaint	AA0743-0762	10
	Exhibit 15 – TSE Motion to Strike Brahma Group, Inc.’s First Amended Counter-Complaint, or in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court	AA0763-0803	11
	Exhibit 16 – Peel Brimley firm information	AA0804-0807	11
12/04/2018	Brahma Group, Inc.’s Reply to TSE’s Opposition to Brahma Group, Inc.’s Motion for Attorney’s Fees and Costs Pursuant to NRS 108.2275(6)(C)	AA0808-0822	11
12/11/2018	Hearing Transcript	AA0823-1005	12, 13, 14

CHRONOLOGICAL INDEX

01/09/2019	Notice of Entry of Order Granting Brahma Group, Inc.'s Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(C)	AA1006-1018	14
02/15/2019	Notice of Appeal	AA1019-1022	14
	Exhibit 1 – Notice of Entry of Order	AA1023-1033	14
	Exhibit 2 – Notice of Entry of Order	AA1034-1047	14

ALPHBETICAL INDEX

Date Filed	Description	Bates Number	Volume(s)
11/01/2018	Brahma Group, Inc.'s Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(C)	AA0482-0495	7
	Exhibit 1 – Declaration of R. Peel	AA0496-0502	7
	Exhibit 2 – Order	AA0503-0509	7
	Exhibit 3 – Peel Brimley's invoices	AA0510-0525	7
07/24/2018	Brahma Group, Inc.'s Opposition to TSE's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien	AA0084-0104	1
	Exhibit 1 – Grant, Bargain and Sale Deed	AA0105-0110	2
	Exhibit 2 – Nye County Parcel Detail	AA0111-0112	2
	Exhibit 3 – Right-Of-Way Grant	AA0113-0136	2
	Exhibit 4 – Deed of Trust	AA0137-0167	2
	Exhibit 5 – Services Agreement	AA0168-0189	2
	Exhibit 6 – Original Lien	AA0190-00197	2
	Exhibit 7 – First Amended Lien	AA0198-0201	2
	Exhibit 8 – Re-recorded First Amended Lien	AA0202-0211	2
	Exhibit 9 – Second Amended Lien	AA0212-0221	2
	Exhibit 10 – Third Amended Lien	AA0222-0230	2
	Exhibit 11 – Parcel Detail printouts from Nye County Assessor's website	AA0231-0235	2
12/04/2018	Brahma Group, Inc.'s Reply to TSE's Opposition to Brahma	AA0808-0822	11

ALPHBETICAL INDEX

	Group, Inc.’s Motion for Attorney’s Fees and Costs Pursuant to NRS 108.2275(6)(C)		
08/15/2018	Brahma Group, Inc.’s Statement of Supplemental Authorities in Support of its Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0280-0284	4
	Appendix A – <i>Basic Refractories, Inc. v. Bright</i> , 72 Nev 183 (1956)	AA0285-0294	4
	Appendix B – <i>Schultz v. King</i> , 68 Nev 207 (1951)	AA0295-0300	4
	Appendix C – <i>Byrd Underground, LLC v. Angaur, LLC</i> , 332 P.3d 273 (2014)	AA0301-0309	4
	Appendix D – <i>Crutcher v. Block</i> , 19 Okla. 246 (1907)	AA0310-0314	4
	Appendix E – <i>Tropic Builders, Ltd., v. US</i> , 52 Haw. 298 (1970)	AA0315-0321	4
	Appendix F – <i>Dow Chemical Co. v. Bruce-Rogers Co.</i> , 255 Ark 448 (1973)	AA0322-0328	4
08/03/2018	Brahma Group, Inc.’s Supplement to its Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0272-0274	3
	Exhibit A – Notice of Right to Lien	AA0275-0276	3
	Exhibit B – USPS Tracking	AA0277-0279	3
09/12/2018	Hearing Transcript	AA0345-0471	5, 6
12/11/2018	Hearing Transcript	AA0823-1005	12, 13, 14

ALPHBETICAL INDEX

02/15/2019	Notice of Appeal	AA1019-1022	14
	Exhibit 1 – Notice of Entry of Order	AA1023-1033	14
	Exhibit 2 – Notice of Entry of Order	AA1034-1047	14
11/01/2018	Notice of Entry of Order Denying TSE’s Motion to Expunge	AA0472-0481	6
01/09/2019	Notice of Entry of Order Granting Brahma Group, Inc.’s Motion for Attorney’s Fees and Costs Pursuant to NRS 108.2275(6)(C)	AA1006-1018	14
08/15/2018	TSE’s Errata to its Reply to Brahma Group, Inc.’s Opposition to TSE’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Lien	AA0329-0331	4
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	Exhibit 1 – Services Agreement	AA0014-0035	1
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	Exhibit 6 – Notice of Voluntary Dismissal Without Prejudice	AA0068-0078	1
	Exhibit 7 – Affidavit of Justin Pugh	AA0079-0083	1
11/26/2018	TSE’s Opposition to Brahma Group, Inc.’s Motion for Attorney’s Fees and Costs Pursuant to NRS	AA0526-0541	8

ALPHBETICAL INDEX

	108.2275(6)(C)		
	Exhibit 1 – Peel Brimley Invoice	AA0542-0557	8
	Exhibit 2 – Declaration of R. Gormley	AA0558-0562	8
	Exhibit 3 – TSE Motion to Expunge Brahma Group, Inc.’s Mechanic’s lien	AA0563-0576	8
	Exhibit 4 – Brahma Group, Inc.’s Opposition to TSE’s Motion to Expunge Mechanic’s Lien	AA0577-0598	8
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	Exhibit 6 – Complaint	AA0664-0669	9
	Exhibit 7 – Notice of Removal to Federal Court	AA0670-0673	9
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	Exhibit 12 – Brahma Group, Inc.’s First Amended Counter-Complaint; and Third-Party Complaint	AA719-0733	10
	Exhibit 13 – Brahma Group, Inc.’s Answer to TSE Counterclaim	AA0734-0742	10

ALPHBETICAL INDEX

	Exhibit 14 – Brahma Group, Inc.’s Motion for Stay, or in the Alternative, Motion to Amend Complaint	AA0743-0762	10
	Exhibit 15 – TSE Motion to Strike Brahma Group, Inc.’s First Amended Counter-Complaint, or in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court	AA0763-0803	11
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	Exhibit F – Article from Department of Energy dated 09/28/2011	AA0265-0267	3
	Exhibit G – Affidavit of Justin Pugh	AA0268-0271	3

ALPHBETICAL INDEX

09/07/2018	TSE's Response to Brahma Group, Inc.'s Statement of Supplemental Authorities in Support of its Opposition to TSE's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien	AA0332-0339	4
	Exhibit 1 – Loan Guarantee Agreement	AA0340-0344	4

EXHIBIT 15

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FILED
FIFTH JUDICIAL DISTRICT

OCT 18 2018

[Signature]
Nye County Clerk
Deputy

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

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

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

Case No. CV 39348

Dept. No. 2


**TONOPAH SOLAR ENERGY, LLC'S
MOTION TO STRIKE BRAHMA
GROUP, INC.'S FIRST AMENDED
COUNTER-COMPLAINT, OR, IN THE
ALTERNATIVE, MOTION TO DISMISS
COUNTER-COMPLAINT, OR, IN THE
ALTERNATIVE, MOTION TO STAY
THIS ACTION UNTIL THE
CONCLUSION OF THE PROCEEDINGS
IN FEDERAL COURT**

22
23 Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through
24 its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,
25 hereby moves to strike and/or dismiss Brahma Group, Inc.'s (hereinafter "Brahma") First
26 Amended Counter-Complaint ("Counter-Complaint") that was filed on September 25, 2018. The
27 Counter-Complaint is a transparent attempt by Brahma to avoid the jurisdiction of the Nevada
28 Federal District Court over the Parties' dispute.

In the alternative, this Court should stay this action until the Parties' litigation in Nevada Federal District Court is complete. The federal action was filed first and thus, under principles of comity, and in order to not reward Brahma's forum shopping strategy, this action should be stayed.

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

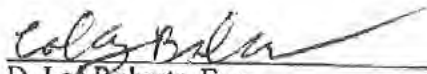
DATED this 18th day of October, 2018.


D. Lee Roberts, Jr., Esq.
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Ryan T. Gormley, Esq.
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NOTICE OF MOTION

PLEASE TAKE NOTICE that TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE BRAHMA GROUP, INC.'S FIRST AMENDED COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO DISMISS COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO STAY THIS ACTION UNTIL THE CONCLUSION OF THE PROCEEDINGS IN FEDERAL COURT will come on for hearing in Department No. _____ of the above-entitled Court on the _____ day of _____ 2018, at _____ a.m./p.m.

DATED this 18th day of October, 2018.


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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

TSE is the project developer for the Crescent Dunes Solar Energy Facility located outside Tonopah, Nevada ("Project"). TSE contracted with Brahma to perform certain warranty work on the Project. The Parties are currently in the midst of a dispute over the sufficiency of certain invoices Brahma has submitted to TSE for payment. In essence, Brahma contends that TSE owes it additional money for work Brahma performed on the Project. TSE contends that Brahma is not owed any additional money and that many of Brahma's invoices are fraudulent.

This Motion is necessary as Brahma has improperly attempted to move the substantive portion of the Parties' dispute (i.e. who owes who what) out of federal court, where it was first filed, and into this Court. Brahma first filed a complaint against TSE on July 17, 2018 in the Eighth Judicial District Court in Las Vegas. On September 10, 2018, TSE removed that action to Nevada Federal District Court.

Brahma, apparently unhappy with its new federal forum, has turned this case into a procedural quagmire in an attempt to avoid federal jurisdiction. On September 25, 2018, Brahma filed a First Amended Complaint in federal court that dropped all but one of its claims against TSE. On the exact same day, Brahma filed a "Counter-Complaint" in this proceeding that added the dropped federal court claims to this case. In other words, Brahma has affected a stunning "back-door remand" of its federal court claims to this Court without even filing a motion to remand with the federal court. However, there are numerous problems with Brahma's forum shopping that should result in this Court either (1) striking/dismissing the Counter-Complaint or (2) staying this proceeding until the parallel action in federal court is complete.

First, Brahma's stand-alone "Counter-Complaint" is not a recognized pleading under NRCP 7(a) and thus should be stricken. Pursuant to NRCP 7(a) and the Nevada Supreme Court's *Smith* decision, the only permissible pleadings are complaints, answers and replies. Further, this is a special proceeding under NRS 108.2275 that was created solely to address TSE's Motion to Expunge Brahma's Mechanic's Lien. Thus, the jurisdictional basis for this proceeding ceased to exist once the Court denied TSE's Motion to Expunge on September 12,



1 2018. There is no Nevada authority permitting a "Counter-Complaint" to be filed into a special
2 proceeding such as this.

3 Second, the Parties' Contract requires that "any action or proceeding directly or indirectly
4 arising out of this Agreement" be venued in Las Vegas. Indeed, Brahma initially filed its
5 substantive claims in the Eighth Judicial District Court but now, after it has received a favorable
6 ruling from this Court, seeks to move the litigation to the Fifth Judicial District in Pahrump. The
7 Court should enforce the venue selection clause and require Brahma to re-file its claims in a Las
8 Vegas court.

9 Third, a substantial body of state and federal case law holds that once an action is
10 removed to federal court, state courts lack subject matter jurisdiction over the parties' dispute
11 until the matter is remanded back to state court. Thus, this Court should dismiss Brahma's
12 claims that were removed to federal court and then re-filed with this Court based on lack of
13 subject matter jurisdiction.

14 Fourth, in regard to Brahma's Lien Foreclosure claim against TSE, that claim is now
15 moot and should be dismissed as an over \$19 million bond has been posted as security for
16 Brahma's mechanic's lien. NRS 108.2415(6) provides that a surety bond replaces the property
17 as security for the lien once it is posted.

18 Finally, in the alternative, assuming *arguendo* that the Court disagrees with all of TSE's
19 above arguments, the Court should at least stay this proceeding until the first filed federal action
20 is completed. Under the "first to file rule," a stay is appropriate if there is a substantially similar
21 action pending before a different court. Here, Brahma has admitted in a recent federal court
22 filing that this proceeding is a "duplicative dispute" and that it fulfills the "substantial similarity"
23 requirement for a stay.¹ Thus, a stay is appropriate because the federal action was filed on July
24

25 ¹ Brahma agrees with TSE that this dispute is duplicative of the first filed federal court action but the
26 parties disagree over which action should be stayed, this proceeding or the federal one. Brahma has filed
27 a motion to stay with the federal court arguing that that court should stay the federal action under the
28 *Colorado River* abstention doctrine. For reasons TSE will not go into in detail here, the *Colorado River*
doctrine is completely inapplicable to this matter and Brahma's motion to stay is unlikely to be granted.
Brahma's motion to stay misrepresents key facts to the federal court (a matter TSE will bring to that
court's attention in its opposition which is not yet due). For example, Brahma represents that its claims
against TSE were first brought in Nye County rather than federal court (a misrepresentation) and



17, 2018 but Brahma did not file a complaint in this proceeding until September 20, 2018.

II. PROCEDURAL HISTORY OF THIS NYE COUNTY ACTION

This proceeding was created not by the filing of a complaint but rather by TSE's filing of its Motion to Expunge Brahma's Mechanic's Lien on June 11, 2018. NRS 108.2275 creates a statutory exception to NRCP 3 (requiring the filing of a complaint to institute a civil action) permitting parties to institute special limited proceedings with the mere filing of a motion to expunge. TSE's Motion to Expunge was heard by this Court on September 12, 2018 and denied in full.

That ruling should have been the end of this limited special proceeding. Instead, Brahma has now filed a Complaint and First Amended Counter-Complaint, seeking to broaden the scope of this proceeding beyond NRS 108.2275. On September, 20, 2018, Brahma filed a "Lien Foreclosure Complaint" against TSE asserting a single cause of action for lien foreclosure in this Nye County proceeding. **Exhibit 1** (Lien Foreclosure Complaint). On September 25, 2018, Brahma filed a "First Amended Counter-Complaint" in this proceeding that added three additional claims against TSE that had already been asserted in a first filed federal court action. **Exhibit 2** (First Amended Counter-Complaint). Those claims were (1) Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair Dealing and (3) Violation of NRS 624.

In addition, on September 25, 2018, Brahma filed a Third Party Complaint against American Home Assurance Company ("American Home") and Cobra Thermosolar Plants, Inc. ("Cobra"), asserting a claim against the surety bond those entities had posted in satisfaction of Brahma's mechanic's lien.

To reiterate, the original jurisdictional basis for this action no longer exists. First, TSE's Motion to Expunge was denied in full by this Court. Second, subsequent to the denial of TSE's Motion to Expunge, American Home and Cobra posted a surety bond in the amount of \$19,289,366.61. As required by NRS 108.2415(1), this bond is 1.5 times the amount of

represents that TSE is the one seeking a friendly judge by engaging in forum shopping, even though TSE removed the Eighth Judicial District Court action to federal court **BEFORE** this Court denied TSE's Motion to Expunge.

1 Brahma's most recent Fourth Amended Mechanic's Lien (\$12,859,577.74.). As a result of that
2 bond being posted Brahma's mechanic's lien that was the subject of TSE's Motion to Expunge
3 has been released.

4 **III. STATEMENT OF FACTS**

5 **A. Brahma's Contract and NRS 624 Claims Have Been Removed to Federal**
6 **Court, Thus Divesting this Court of Jurisdiction**

7 On July 17, 2018, while this special proceeding was still ongoing in this Court, Brahma
8 filed a Complaint in the Eighth Judicial District Court asserting claims against TSE for (1)
9 Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair Dealing, (3)
10 Violation of NRS 624 and (4) Unjust Enrichment. **Exhibit 3** (Clark County Complaint).
11 Brahma's decision to file its substantive claims against TSE in Clark County rather than Nye
12 County was appropriate as the Parties' Contract contains a clause requiring venue in Las Vegas.
13 **Exhibit 4** at p. 8 (Contract). TSE then removed that action to Nevada Federal District Court on
14 September 10, 2018 based on diversity.² **Exhibit 5** (Notice of Removal). As detailed more fully
15 in Section VI below, this removal divested all Nevada state courts of jurisdiction over the
16 removed claims. See 28 U.S.C. § 1446(d) (stating that upon the filing of the Notice of Removal,
17 "the State court shall proceed no further unless and until the case is remanded.").

18 On September 17, 2018, TSE filed an Answer and Counterclaim to Brahma's removed
19 Complaint. **Exhibit 6** (TSE's Answer and Counterclaim). TSE's Counterclaim asserts six
20 claims against Brahma in the federal court action including (1) Breach of Contract, (2) Breach of
21 the Implied Covenant, (3) Declaratory Relief, (4) Unjust Enrichment/Quantum Meruit, (5) Fraud
22 and (6) Negligent Misrepresentation. All of these counterclaims were properly before the federal
23 court before Brahma attempted a back-door remand to this Court that has created a procedural
24 quagmire.

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28 ² TSE's removal was timely as TSE was not served with the Clark County Complaint until August 21,
2018.

B. In an Attempt to Avoid the Federal Court's Jurisdiction, Brahma Dropped Three Claims from its Federal Court Complaint and Re-filed Those Claims in a Nye County Counter-Complaint in this Court

After this Court denied TSE's Motion to Expunge on September 12, 2018, Brahma apparently had a change of heart and decided that, rather than litigating its substantive claims in Las Vegas (where it had first filed them), it preferred to litigate those claims before this Court in Pahrump. Thus, on September 25, 2018, Brahma (1) filed a First Amended Complaint in federal court that dropped its claims for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing and Violation of NRS 624³ and (2) filed a First Amended Counter-Complaint in Nye County that added those same three dropped federal claims to this proceeding. See Exhibit 7 (First Amended Federal Court Complaint filed on September 25, 2018); Exhibit 2 (First Amended Nye County Counter-Complaint filed on September 25, 2018).

Brahma's attempt at a back-door remand of the removed federal action was not subtle. The three claims dropped from Brahma's federal court Complaint on September 25, 2018 are the exact same claims that were simultaneously added to this Nye County proceeding that same day. The allegations that make up the three new claims in Nye County are also identical to those asserted in the removed federal action. Thus, there can be no question that Brahma is engaged in transparent and impermissible forum shopping.

C. The Parties' Contract Contains a Venue Selection Clause Requiring that this Matter be Litigated in Las Vegas, Nevada

The Parties' substantive claims against each other belong in Las Vegas Federal District Court not only because the claims were first filed there by Brahma, but also because the Parties' Contract requires a Las Vegas venue. The Contract provides as follows:

³ This Court should not mistake Brahma's dropping of its three federal court claims via the First Amended Federal Court Complaint as court sanctioned behavior. Under FRCP 15(a)(1), a party has a right to amend its complaint without leave of court within 21 days after a responsive pleading is filed. Since TSE filed its Answer to Brahma's removed Complaint on September 17, 2018, Brahma was able to drop the three claims via its First Amended Complaint without seeking leave from the federal court. However, TSE has brought a motion in federal court seeking to have that court strike Brahma's amendment as it was done as part of a bad faith effort to defeat the federal court's exclusive jurisdiction over all removed claims.

This Agreement shall be governed by the laws of the State of Nevada. Contractor (i.e. Brahma) submits to the jurisdiction of the courts in such State, with a venue in Las Vegas, Nevada, for any action or proceeding directly or indirectly arising out of this Agreement.

Exhibit 4 at p. 8 (Contract) (emphasis added). Brahma was apparently aware of this clause as it decided to first file its substantive claims against TSE in the Eighth Judicial District Court on July 17, 2018. Now, for whatever reason, Brahma has decided to ignore this clause and seeks to unilaterally move three of its federal court claims to Nye County. TSE requests that this Court enforce the venue selection clause and require Brahma to litigate its claims where they were originally brought—Las Vegas.

IV. LEGAL STANDARD FOR MOTION TO STRIKE AND MOTION TO DISMISS

TSE brings this Motion pursuant to NRCP 12(f), NRCP 12(b)(1) and NRCP 12(b)(5). Under NRCP 12(f), it is appropriate to bring a motion to strike “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Further, the Nevada Supreme Court has stated that when a pleading other than those expressly permitted in NRCP 7(a) is filed, the appropriate remedy is a motion to strike that pleading. *Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997).

Under NRCP 12(b)(1), lack of subject matter jurisdiction is appropriately raised in a motion to dismiss. Similarly, NRCP 12(h)(3) provides that “[w]hensoever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” In general, the party moving to dismiss an action bears the burden of persuasion. However, when the defense of lack of subject matter jurisdiction is raised “[t]he burden of proving the jurisdictional requirement is properly placed on the plaintiff.” *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982, 983 (2000) (emphasis added). The district court can take evidence on the claim that the court lacks subject matter jurisdiction and such evidence is not necessarily confined to the allegations of the complaint. *Id.* Thus, the burden is on Brahma rather than TSE to prove that this Court can still retain jurisdiction of claims that have been removed to federal court.



Under NRCP 12(b)(5), a defendant may request that a court dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." In deciding a motion to dismiss, a court should treat the factual allegations in the complaint as true and it should draw all inferences in favor of the plaintiff. *See Simpson v. Mars, Inc.*, 113 Nev. 188, 190 (1997). If, after crediting the factual allegations in the plaintiff's complaint as true the plaintiff cannot prove a set of facts that would entitle him to relief, then a court should dismiss the plaintiff's lawsuit. *See id.*

V. BRAHMA'S COUNTER-COMPLAINT SHOULD BE DISMISSED BECAUSE A "COUNTER-COMPLAINT" IS NOT A RECOGNIZED PLEADING AND CANNOT BE FILED IN A SPECIAL ACTION SUCH AS THIS ONE

A. Brahma's "Counter-Complaint" is Not One of the Three Permitted Pleadings Under NRCP 7(a) and Thus Must be Stricken/Dismissed

NRCP 7(a) provides as follows:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(emphasis added). In *Smith*, the Nevada Supreme Court provided an extensive explanation of this rule. *Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997). There, the first pleading filed was plaintiff Lee's complaint against defendant Chang for injuries incurred in a car accident. Defendant Chang then filed a separate document entitled "cross-claim" that alleged that a different defendant (Smith) was responsible for Chang's injuries in the accident.

The Nevada Supreme Court explained that the district court should have stricken the defendant's "cross-claim" under NRCP 7(a) because "the only pleadings allowed are complaints, answers and replies" and a "cross-claim" or "counter-claim" was not a permitted pleading. *Id.* (emphasis added). "Counterclaims and cross-claims are not separate pleadings, but are claims for relief that may be set forth in answers and complaints." *Id.* Thus, because the defendant had failed to assert the cross-claim in his answer (a permitted pleading), the court was

1 obligated to strike the rogue "cross-claim" as an impermissible pleading under NRCP 7(a). *Id.*
2 ("[c]ounterclaims and cross-claims must be set forth in pleadings authorized by NRCP 7,
3 because '[n]o other pleading shall be allowed.'").

4 The Nevada Supreme Court further explained that the fact that Nevada is a notice-
5 pleading jurisdiction that liberally construes pleadings could not save the defendant's rogue
6 pleading from being stricken. "There is, however, nothing technical about the defect in Chang's
7 cross-claim; the document simply is not a pleading, and does not itself put the matters asserted
8 therein at issue." *Id.* at 283 (emphasis added).

9 Here, like defendant Chang in the *Smith* case, Brahma has filed a pleading that is not
10 permitted under NRCP 7(a). Brahma's "Counter-Complaint" filed on September 25, 2018 is not
11 one of the three permitted pleadings under Nevada law (i.e. a "complaint," "answer" or "reply.").
12 Thus, under NRCP 7(a) and *Smith*, Brahma's Counter-Complaint constitutes a rogue pleading
13 that must be stricken.

14 Brahma may argue in response that, even if it is styled as a "Counter-Complaint," its
15 pleading should be construed as a "complaint" which is a permitted pleading under NRCP 7(a).
16 However, such an argument would be without merit as, by definition, a "complaint" is a pleading
17 that initiates an action. BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a "Complaint" as
18 "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction.");
19 *see also* NRCP 3. Since this action was initiated by TSE's June 11, 2018 Motion to Expunge,
20 there is no way to construe Brahma's "Counter-Complaint" as a "complaint."

21 Brahma's Counter-Complaint also cannot be construed as an "answer" or a "reply." By
22 definition, an "answer" responds to the allegations in a plaintiff's complaint yet TSE has not
23 filed a complaint in this action. Similarly, a "reply" responds to the allegations in a counter-
24 claim yet TSE has not filed a counter-claim in this action. *See* NRCP 7(a) (identifying proper
25 pleadings and expressly stating that "No other pleading shall be allowed . . ."); NRCP 12(a);
26 BLACK'S LAW DICTIONARY (10th ed. 2014). In sum, since Brahma's "Counter-Complaint" is not
27 a "complaint," "answer" or "reply," and, pursuant to Rule 7(a), "[n]o other pleading shall be
28

1 allowed . . . ,” it must be stricken.⁴

2 **B. This is a Special Proceeding With a Limited Focus. The Court Lacks**
3 **Jurisdiction to Hear Matters Beyond TSE’s Already Decided Motion to**
4 **Expunge**

5 Brahma’s failure to file one of the pleadings permitted by NRCP 7(a) points to a broader
6 problem with Brahma’s strategy of attempting to bring its substantive claims before this court—
7 NRS 108.2275 proceedings were not intended to address parties’ substantive claims against each
8 other. This proceeding was initiated by the filing of TSE’s Motion to Expunge. Thus, the sole
9 jurisdictional basis for this proceeding is NRS 108.2275 (governing motions to expunge
10 mechanic’s liens). The Nevada Supreme Court has indicated that proceedings to expunge a lien
11 under NRS 108.2275 are special proceedings. In these proceedings, a district court’s authority is
12 strictly limited to making one of three findings: (1) that a lien is frivolous, (2) that a lien is
13 excessive or (3) that a lien is neither frivolous nor excessive. *See e.g., Crestline Inv. Grp., Inc. v.*
14 *Lewis*, 119 Nev. 365, 371, 75 P.3d 363, 367 (2003) (finding that district court exceeded its
15 authority by going beyond making one of the above 3 findings) (superseded by statute on
16 unrelated grounds). Importantly, nothing in NRS 108.2275 permits a party to broaden those
17 proceedings by filing a “counter-complaint.”

18 Counsel for TSE has conducted an extensive search of Nevada case law and has been
19 unable to find any situation similar to this one (i.e. where a proceeding was initiated by the filing
20 of a motion to expunge and was later broadened by the party opposing the motion to expunge
21 filing a “counter-complaint” that brought its substantive claims before the court.).⁵ Thus, a
22 second independent ground for striking/dismissing Brahma’s Counter-Complaint is that such a
23 filing simply does not fall within the limited scope of NRS 108.2275 proceedings.

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26 ⁴ The Nevada Supreme Court’s decision in *Smith* indicates that striking the pleading rather than
dismissing it is the appropriate remedy when NRCP 7(a) is violated.

27 ⁵ Conversely, if this action had been initiated by the filing of a complaint rather than a motion to expunge,
28 the court’s jurisdiction would be broader. *See e.g., J.D. Constr. v. IBEX Int’l Grp.*, 126 Nev. 366, 370,
240 P.3d 1033, 1036 (2010) (plaintiff first filed complaint then later filed a motion to expunge).

VI. BRAHMA'S "COUNTER-COMPLAINT" SHOULD BE DISMISSED BECAUSE THE PARTIES' CONTRACT CONTAINS A VENUE SELECTION CLAUSE REQUIRING THAT THIS MATTER BE LITIGATED IN LAS VEGAS, NEVADA

A. The Venue Clause is Reasonable and Enforceable

The Nevada Supreme Court has held that venue selection clauses will be enforced so long as they are reasonable and do not offend due process. *Tandy Computer Leasing, a Div. of Tandy Elecs., Inc. v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989). Further, when a party seeks to set aside a venue selection clause, the burden is on that party to make a "strong showing" that the clause should not be enforced. *Id.* at 844, 784 P.2d at 8 (emphasis added); *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ("in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."). In *Bremen*, which the Nevada Supreme Court cited with approval to in *Tandy*, the U.S. Supreme Court held that anyone seeking to avoid the enforcement of a venue selection clause has a "heavy burden of proof." *M/S Bremen*, 407 U.S. at 17.

Here, section 24 of the Parties' contract provides in clear normal size font that venue shall be in Las Vegas, Nevada "for any action or proceeding directly or indirectly arising out of this Agreement." Exhibit 4 at p. 8. The title of this section is "GOVERNING LAW-SUBMISSION TO JURISDICTION-WAIVER OF JURY TRIAL." *Id.* (emphasis in original). Thus, Brahma knew it was agreeing to litigate all disputes with TSE in Las Vegas rather than Pahrump when it signed the contract. Further, Brahma is a sophisticated entity that regularly negotiates multi-million dollar construction contracts all over the country.⁶ There is nothing unfair about forcing Brahma to litigate this dispute in Las Vegas, a much more convenient location for both parties, rather than Pahrump. Indeed, Brahma originally filed its substantive claims against TSE in the Eighth Judicial District Court in Las Vegas. Exhibit 3 (Clark County Complaint). Brahma should not be permitted to dance back and forth between different

⁶ See e.g., <https://brahmagroupinc.com>.

forums depending on which way it thinks the winds are blowing on a given day.

B. Brahma is Estopped from Arguing Against a Venue in Federal Court Located in Las Vegas Because it Chose to File the First Lawsuit in the Eighth Judicial District Court in Las Vegas

TSE anticipates that Brahma will argue that the clause in this case is “permissive” rather than “mandatory” and thus venue is permitted in Las Vegas but not required. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 107 (2015) (discussing the difference between mandatory and permissive venue clauses). While TSE believes the clause is mandatory, the Court need not reach this issue as Brahma waived its right to raise this argument when Brahma voluntarily filed its first Complaint in Las Vegas. “Waiver requires the intentional relinquishment of a known right. If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention. Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished.” *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007).

Here, Brahma elected to file a Complaint in the Eighth Judicial District Court in Las Vegas on July 17, 2018 rather than in this Court. Further, Brahma took this action with full knowledge that the forum selection clause may have been “permissive”⁷ rather than “mandatory” since “[e]very one is presumed to know the law and this presumption is not even rebuttable.” *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915). TSE, in turn, relied on Brahma’s actions and removed the Complaint filed in Las Vegas to federal court. TSE, in reliance on Brahma first filing its substantive claims in Las Vegas, has also filed an Answer and Counterclaim in the federal action. Brahma’s argument that it was confused about whether the forum selection clause was permissive or mandatory at the time it filed the July 17 suit in Las Vegas is not

⁷ Again, TSE makes this argument “in the alternative,” assuming for the sake of argument that the forum selection clause is permissible rather than mandatory, which it is not.



credible.⁸

Moreover, Courts have held that even if a forum selection clause is permissive (as Brahma contends), it serves to waive any objection the party has to the listed venue. *Structural Pres. Sys., LLC v. Andrews*, 931 F. Supp. 2d 667, 673 (D. Md. 2013) (“permissive forum-selection clauses are sometimes referred to as ‘consent to jurisdiction’ clauses because such clauses specify one court empowered to hear the litigation which, in effect, waives any objection to personal jurisdiction or venue in that jurisdiction”) (emphasis added) (internal citation omitted); see also *Am. Airlines, Inc. v. Rogerson ATS*, 952 F. Supp. 377, 384 (N.D. Tex. 1996) (holding that a forum selection clause waives a party’s right to contest venue in the forum specified).

In other words, now that suit has been brought in a Las Vegas court (the federal action), Brahma is barred from contesting that some other court (i.e. this Court) is a more appropriate venue. This “consent to jurisdiction” rule is particularly appropriate here as it was not TSE that chose to file the first lawsuit in Las Vegas but rather Brahma.

C. TSE Did Not Relinquish its Right to Enforce the Forum Selection Clause by Filing the Motion to Expunge with the Nye County Court. TSE Merely Complied with Nevada Law

TSE anticipates that Brahma may also argue that TSE’s filing of the Motion to Expunge with the Nye County Court results in a waiver of TSE’s right to enforce the forum selection clause. However, such an argument would be misplaced. The only reason TSE initiated this proceeding in Nye County (which has now been resolved) was that Nevada law requires that a motion to expunge a mechanic’s lien be brought in the county where the land affected by the lien is located. See NRS 108.2275(1) (providing that a motion to expunge must be brought in “the district court for the county where the property or some part thereof is located.”). Critically, the filing of a special proceeding such as this one does not waive a party’s right to enforce a forum selection clause for other claims. *Pirola Bros. v. Angelo Maffei & Figli, SAS*, No. 87 CIV. 7561

⁸ In Brahma’s Motion to Stay filed with the federal court on October 16, 2018, Brahma makes this argument.

(MBM), 1989 WL 20945, at *2 (S.D.N.Y. Mar. 2, 1989) ("when a party disregards a forum selection clause and sues on a contract in an unauthorized forum, it waives the forum selection clause only for the specific claim that it pursues").

Now that this Court has decided TSE's Motion to Expunge, the venue selection clause should be enforced and the remainder of this proceeding⁹ sent back to federal court in Clark County.

VII. THIS COURT LACKS JURISDICTION OVER THE THREE BRAHMA CLAIMS IN THE "COUNTER-COMPLAINT" THAT WERE REMOVED TO FEDERAL COURT

A. Once a Matter Has Been Removed to Federal Court, States Courts Lose Jurisdiction Over the Dispute

Even assuming this Court were to (1) decline to strike Brahma's "Counter-Complaint" and (2) decline to enforce the Contract's venue selection clause, there are additional grounds for dismissal. The federal removal statute expressly bars any further proceedings in state court once a notice of removal has been filed. The statute provides as follows:

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C. § 1446(d) (emphasis added). In interpreting the above language, the Ninth Circuit stated that "the clear language of the general removal statute provides that the state court loses jurisdiction upon the filing of the petition for removal." *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir.1994); see also *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000) ("it is impossible to obtain judicial remedies and sanctions in state and local courts once an action is removed to federal court. The removal of an action to federal court necessarily divests state and local courts

⁹ Brahma's Lien Foreclosure claim is addressed in Section VIII, *supra*. That claim must be dismissed on separate grounds since a surety bond has been posted in 1.5 times the amount of Brahma's most recent mechanic's lien. See NRS 108,2415(6) (providing that lien on land is released upon posting of bond).

of their jurisdiction over a particular dispute.”); Wright & Miller, *Federal Practice & Procedure* § 3736 (4th ed.) (stating that, following removal, any further proceedings in a state court are considered *coram non judge* and will be vacated even if the case is later remanded).

Moreover, it is not just the particular state court from which the case was removed that is divested of jurisdiction over the dispute but all courts in the state. See *In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007) (“states are separate sovereigns with respect to the federal government. Removal of an action may therefore be viewed as a transfer of the proceeding from the courts of one sovereign (a state) to the courts of another (the United States).”).

In *Hollandsworth*, the Idaho Supreme Court upheld the district court’s dismissal of a complaint that was filed in state court after a separate action was already pending in federal court, stating as follows:

The filing of the second action in the state court under these circumstances, involving as it did the same parties, the same issues and the same facts, incurs needless and substantially increased costs to the defendants, is a waste of judicial resources, and conjures up the possibility of conflicting judgments by state and federal courts.

Roberts v. Hollandsworth, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980).

In *General Handkerchief Corp.*, an insured brought an action in New York state court against its insurer to recover on a policy issued to it. The insurer subsequently removed the action to federal court. Later, the insurer brought a separate action against the insured in New York state court (i.e. a second subsequent state court action) for the recovery of insurance premiums. The insured filed a counterclaim in the second state court action (i.e. similar to the “Counter-Complaint” filed by Brahma here) that was nearly identical to its complaint that had been previously removed to federal court. The state court dismissed the counterclaim based on lack of subject matter jurisdiction due to the prior removal of the same claims to federal court and the New York Court of Appeals upheld the dismissal. *Fire Ass’n of Philadelphia v. Gen. Handkerchief Corp.*, 304 N.Y. 382, 385, 107 N.E.2d 499, 500 (1952).

In *Leffall*, an inmate brought an action against staff members for injuries he received in

1 slip and fall accident. That action was removed to federal court. The inmate then filed a second
2 suit in state court against the same defendants. The court found that because the theories of
3 causation and damages in the second state court suit were "substantively identical" to those in
4 the removed federal case, dismissal of the second state court suit was required. *Leffall v.*
5 *Johnson*, No. 09-01-177 CV, 2002 WL 125824, at *2 (Tex. App. Jan. 31, 2002).

6 In *Riley*, the plaintiff filed her complaint in state court and the defendant then removed to
7 federal court based on federal question jurisdiction. The plaintiff then filed a motion to remand
8 which the federal court denied. Unhappy with being stuck in a federal forum, plaintiff then filed
9 an amended complaint in state court. The federal court severely criticized plaintiff's actions:

10 [Plaintiff], however, has created a procedural mess. After the court denied
11 her original motion to remand, she filed an amended complaint in state
12 court; the court has no idea why she did this. Once removed, this court, not
13 the state court, had jurisdiction until this court remanded the case or
14 dismissed it without prejudice. This concept is not subtle; it is basic to the
15 law of jurisdiction. [plaintiff] had no basis for filing the amended complaint
16 in state court.

17 *Riley v. Carson Pirie Scott & Co.*, 946 F. Supp. 716, 718 (E.D. Wis. 1996) (emphasis added).
18 Similarly, in *Crummie*, the plaintiff filed an amended complaint in state court after the action
19 was removed to federal court. The federal court found the amended state court complaint was
20 void and of no effect because the state court lacked jurisdiction. *Crummie v. Dayton-Hudson*
21 *Corp.*, 611 F. Supp. 692, 693 (E.D. Mich. 1985) ("After a removal of an action, a federal court
22 acquires total, exclusive jurisdiction over the litigation . . . Applying the foregoing precepts to
23 the matter at bar, it is evident that Plaintiff's filing of an amended complaint in state court
24 subsequent to the removal of the cause was of no effect.").

25 The rule that removal divests all state courts of jurisdiction over a dispute is both
26 necessary and logical. Without such a rule, any party could defeat federal jurisdiction by simply
27 re-filing its case in a different state court than the one the case was removed from without ever
28 even having to file a motion to remand expressly challenging the federal court's jurisdiction.
Such an outcome would be directly contrary to both the letter and spirit of 28 U.S.C. § 1446(d)
and make removal meaningless. Indeed, not only do state courts lack jurisdiction once a matter



is removed to federal court, but federal courts have authority to issue injunctions to enjoin state court litigation that is filed after removal in an attempt to defeat federal jurisdiction.¹⁰

B. This Court Lacks Jurisdiction Over the Three Brahma Claims in the Counter-Complaint that Were Removed to Federal Court

As set out above, state and federal courts from around the country have held that plaintiffs will not be permitted to defeat federal jurisdiction by simply re-filing the same claims in a second state court action after those claims have been removed to federal court. In determining whether this court lacks jurisdiction to hear Brahma's three federal court claims, the only question is whether the claims asserted in Brahma's Counter-Complaint are substantially similar to the claims that were previously removed to federal court by TSE.

Here, Brahma has already admitted in a recent filing in federal court that this proceeding is "duplicative" of the federal action and that it fulfills the "substantial similarity" requirement. **Exhibit 8** (Brahma's Motion to Stay Federal Action at pp. 7, 9 (emphasis added)). In fact, the three claims against TSE that Brahma recently added to this action via the filing of its "Counter-Complaint" are the exact same three claims that TSE previously removed to federal court. Those claims are (1) Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair Dealing and (3) Violation of NRS 624. The allegations that make up these claims are the same allegations that were asserted in the federal court action. *Compare Exhibit 3* 2:11-28 – 5:1-5 (Brahma's July 17, 2018 Complaint filed in the Eighth Judicial District Court and removed to Nevada Federal District Court on September 10, 2018) with **Exhibit 2** at 4:17-28 – 8:1-19 (Brahma's September 25, 2018 First Amended Counter-Complaint filed with the Nye County District Court). Thus, pursuant to 28 U.S.C. § 1446(d), this Court lacks jurisdiction over those three claims and "shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d) (emphasis added). TSE requests that these three claims be dismissed.

As an aside, TSE does not contend that this Court lacks jurisdiction over Brahma's lien

¹⁰ *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996). TSE will be filing a motion seeking to have the federal court enjoin this litigation.



1 foreclosure claim against TSE or over Brahma's third party bond claim against third party
2 defendants American Home Assurance Company ("American Home") and Cobra Thermosolar
3 Plants, Inc. ("Cobra"). NRS 108.239 (governing lien foreclosure claims) and NRS 108.2421
4 (governing bond claims) indicate that proceedings on those statutory claims must be brought in
5 the county where the property at issue is located. Further, unlike the three claims TSE is
6 seeking dismissal of, the lien foreclosure and bond claims were not previously removed to
7 federal court by TSE. However, as set forth more fully below, Brahma's lien foreclosure claim
8 against TSE should be dismissed on other grounds and the surety bond claim should be stayed.

9 **VIII. BRAHMA'S LIEN FORECLOSURE CLAIM MUST BE DISMISSED BECAUSE**
10 **A BOND HAS BEEN POSTED AS SECURITY FOR THE LIEN**

11 Brahma's third cause of action is for Foreclosure of Notice of Lien and seeks to foreclose
12 on the TSE owned improvements to which its mechanic's lien attaches. This is the only claim
13 before this Court that has not already been removed to federal court. NRS 108.2415 provides
14 that if a surety bond is provided in the amount of 1.5 times the notice of lien, the mechanic's lien
15 is released from the land/improvements and attaches instead to the bond. NRS 108.2415(6) ("the
16 recording and service of the surety bond . . . releases the property described in the surety bond
17 from the lien and the surety bond shall be deemed to replace the property as security for the
18 lien."). See also NRS 108.2413 ("[a] lien claimant's lien rights or notice of lien may be released
19 upon the posting of a surety bond in the manner provided in NRS 108.2415 to 108.2425,
20 inclusive."); *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 551, 331 P.3d 850, 857-58
21 (2014) (" . . . each surety bond replaced its corresponding property as security for the lien. This
22 means that a judgment awarded to respondent for one of those four properties would not be
23 against the property, but against the respective surety, up to the amount of the bond, and against
24 the principal for any amounts in excess of the bond amount.").

25 Here, Brahma's Fourth Amended Notice of Lien¹¹ was in the amount of \$12,859,577.74.
26

27 ¹¹ The Fourth Amended Notice of Lien was recorded on September 14, 2018 with the Nye County
28 Recorder. This is the most recent lien recorded by Brahma.

1 **Exhibit 9.** 1.5 times this amount is \$19,289,366.61. On October 9, 2018, Cobra¹² caused a bond
2 in this amount to be recorded against the property/improvements encumbered by Brahma's lien.
3 **Exhibit 10** (surety bond). Thus, under NRS 108.2415(6), Brahma's lien against the
4 property/improvements owned by TSE has been released and now attaches to Cobra's bond. As
5 such, it is appropriate to dismiss Brahma's Lien Foreclosure claim as there is no set of facts
6 under which Brahma could be permitted to foreclose on TSE's property.

7 **IX. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS ACTION UNTIL**
8 **THE COMPLETION OF THE PARALLEL FEDERAL COURT PROCEEDINGS**
9 **BASED ON THE "FIRST TO FILE RULE" AND PRINCIPLES OF COMITY**

10 **A. Legal Standard for Staying Proceedings Under the First to File Rule**

11 In the event this Court (1) declines to strike Brahma's Counter-Complaint under NRCF
12 7(a), (2) declines to enforce the Contract's clause requiring venue in Las Vegas, (3) declines to
13 dismiss the Counter-Complaint for lack of subject matter jurisdiction, and (4) declines to dismiss
14 Brahma's Lien Foreclosure claim based on the posting of Cobra's \$19 million bond, this Court
15 should at least stay this action until the first filed parallel proceedings in federal court are
16 complete.

17 "The power to stay proceedings is incidental to the power inherent in every court to
18 control the disposition of the causes on its docket with economy of time and effort for itself, for
19 counsel, and for litigants. How this can best be done calls for the exercise of judgment which
20 must weigh competing interests and maintain an even balance." *Maheu v. Eighth Judicial Dist.*
21 *Court In & For Clark Cty., Dep't No. 6*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973); *see also*
22 *Jordan v. State ex rel. DMV and Public Safety*, 110 P.3d 30, 41 (Nev. 2005) ("Nevada courts
23 possess inherent powers of equity and of control over the exercise of their jurisdiction.")
24 (overruled on other grounds).

25 Under the "first to file rule," a stay is particularly appropriate where there is a
26 substantially similar prior action pending before a different court. *Pacesetter Sys., Inc. v.*

27 ¹² Due to certain contractual obligations that are not pertinent to the instant Motion, Cobra was obligated
28 to TSE to post this bond to keep the property/improvements free of liens.

1 *Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982) (holding that it is appropriate for the “district
2 court to decline jurisdiction over an action when a complaint involving the same parties and
3 issues has already been filed in another district”). The two actions need not be identical, only
4 “substantially similar.” *Inherent.com v. Martindale-Hubbell*, 420 F.Supp.2d 1093, 1097
5 (N.D.Cal.2006);¹³ see also *McWane Cast Iron Pipe Corp. v. McDowell, Wellman Eng’g Co.*, 263
6 A.2d 281, 283 (Del. 1970) (stating that courts generally exercise that discretion “freely in favor
7 of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt
8 and complete justice, involving the same parties and the same issues.”); *Diet Ctr., Inc. v.*
9 *Basford*, 124 Idaho 20, 22, 855 P.2d 481, 483 (Ct. App. 1993) (“Where two actions between the
10 same parties, on the same subject, and to test the same rights, are brought in different courts
11 having concurrent jurisdiction, the court which first acquires jurisdiction, its power being
12 adequate to the administration of complete justice, retains its jurisdiction and may dispose of the
13 whole controversy, and no court of coordinate power is at liberty to interfere with its action.”);
14 21 C.J.S. Courts § 280 (“a state court should refuse to exercise jurisdiction over an action once it
15 is apprised of the fact that the federal court has assumed jurisdiction of an earlier suit based on
16 the same cause of action.”).

17 The *Schwartz* case is directly on point. In *Schwartz*, the plaintiff sued the defendants in
18 state court, the defendants removed the case to federal court and plaintiff then filed a separate
19 second action in state court. The second state court action involved identical claims to those
20 pending in the first filed federal action. The defendants filed a motion to stay the second state
21 court action which was denied. The Florida appellate court reversed and granted the stay,
22 holding that “[t]he [district] court’s ruling has the effect of circumventing federal removal
23 jurisdiction and requires the petitioners to defend against the same causes of action in two
24 forums.” *Schwartz v. DeLoach*, 453 So. 2d 454, 456 (Fla. Dist. Ct. App. 1984) (emphasis
25

26 ¹³ The *Inherent.com* decision was cited to with approval by the Nevada Supreme Court in the *Gabrielle*
27 decision. *Gabrielle v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, No. 66762, 2014 WL
28 5502460, at *1 (Nev. Oct. 30, 2014) (unpublished). In *Gabrielle*, the Nevada Supreme Court held that it
was an abuse of discretion for a district court to not stay a state court action that was filed subsequent to a
federal court action involving the same claims and parties. *Id.*

1 added). Just like the court did in *Schwartz*, this Court should stay this action and refuse to allow
2 Brahma to circumvent federal removal jurisdiction

3 **B. Brahma's Claims Were First Filed in the Federal Court Action and Thus**
4 **This Action Should be Stayed Until the Federal Action is Resolved**

5 It is hard to imagine a more compelling set of facts justifying a stay than those presented
6 in this case. Brahma's claims for (1) Breach of Contract, (2) Breach of the Implied Covenant
7 and (3) Violation of NRS 624 were first filed in the Eighth Judicial District Court on July 17,
8 2018. TSE then removed those claims to federal court on September 10, 2018. It was not until
9 September 20, 2018 that Brahma filed its original Complaint in this proceeding asserting a Lien
10 Foreclosure claim and not until September 25, 2018 that Brahma filed its Counter-Complaint
11 adding the three federal court claims to this proceeding.¹⁴ Thus, whether this Court looks at the
12 date of Brahma's original Complaint or Counter-Complaint in this proceeding, Brahma's
13 substantive claims against TSE were first asserted in the federal court action.

14 Moreover, the timing of Brahma's actions indicates a calculated attempt to undermine the
15 federal court's jurisdiction and forum shop. On September 25, 2018, Brahma filed its First
16 Amended Complaint in federal court dropping three claims from that action. That same day,
17 Brahma filed the Counter-Complaint adding the exact same three claims to this action. Clearly,
18 after this Court denied TSE's Motion to Expunge on September 12, 2018, Brahma decided that
19 this Court was a more advantageous venue and proceeded to attempt to move its federal court
20 claims here via any means necessary. The "first to file rule" exists precisely to prevent parties
21 like Brahma from switching between different forums on a whim and should be enforced here.
22 In sum, if this Court is not inclined to strike/dismiss Brahma's Counter-Complaint, the Court
23 should stay this proceeding until the resolution of the first filed federal court litigation.

24
25 ¹⁴ Brahma may attempt to argue that the present action was the one "first filed" as TSE did file its Motion
26 to Expunge (which created this action) on June 11, 2018 which is prior to the July 17, 2018 Complaint
27 Brahma filed in Clark County state court. However, the case law is clear that, for purposes of the first
28 filed rule, the filing date of an action is derived from the filing date of the complaint. See NRCP 3 ("a
civil action is commenced by the filing of a complaint"); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d
93, 96 n. 3 (9th Cir.1982) (filing date of respective complaints was all that mattered for purposes of the
first filed rule); *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994).



1 Importantly, the stay should apply not only to the three claims that were previously
2 removed to federal court but to this entire action. Brahma's claim for Lien Foreclosure (against
3 TSE) and its third party Surety Bond Claim (against Cobra and American Home) both involve
4 the exact same issues and subject matter as Brahma's contract and NRS 624 claims. Both of
5 these claims boil down to allegations that TSE owes Brahma money for work Brahma performed
6 on the Project. If Brahma were permitted to proceed in this Court with its Lien Foreclosure and
7 Surety Bond claim, TSE would be forced to litigate the same issue in two forums and there
8 would be the possibility of multiple inconsistent judgments. *Barapind v. Reno*, 72 F. Supp. 2d
9 1132, 1146 (E.D. Cal. 1999) (noting that one justification for applying the first to file rule is that
10 it "avoids the embarrassment of conflicting judgments"). As such, TSE requests that the Court
11 stay this action until the first filed federal action is complete.

12 **X. CONCLUSION**

13 TSE requests the following relief from the Court:

14 1.) Strike Brahma's September 25, 2018 Counter-Complaint because it is an
15 impermissible pleading under both NRCP 7(a) and NRS 108.2275;

16 2.) Dismiss Brahma's Counter-Complaint because it was filed in violation of the
17 Contract's requirement that venue be in Las Vegas, Nevada;

18 3.) Dismiss Brahma's claims for (1) Breach of Contract, (2) Breach of the Implied
19 Covenant of Good Faith and Fair Dealing and (3) Violation of NRS 624 because this Court lacks
20 subject matter jurisdiction over those claims. Since those claims were removed to federal court
21 prior to being filed in this action, this Court lacks jurisdiction under 28 U.S.C. § 1446(d).

22 4.) Dismiss Brahma's Lien Foreclosure claim since Cobra has now posted an over
23 \$19 million bond as security for Brahma's lien. NRS 108.2415(6) provides that a lien on
24 property is released once a surety bond is posted; and

25 ///

26 ///

27 ///

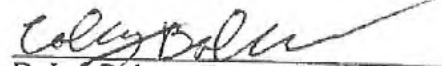
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5.) In the alternative, stay this action until the lawsuit pending in Nevada Federal District Court is resolved. A stay is appropriate under the "first to file rule" because the complaint in the federal court action was filed before the Complaint and First Amended Counter-Complaint in this action.

DATED this 18th day of October, 2018.


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CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of October, 2018, a true and correct copy of the foregoing TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE BRAHMA GROUP, INC.'S FIRST AMENDED COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO DISMISS COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO STAY THIS ACTION UNTIL THE CONCLUSION OF THE PROCEEDINGS IN FEDERAL COURT was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

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10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 BRAHMA GROUP, INC., a Nevada corporation,
14 Plaintiff,
15 vs.
16 TONOPAH SOLAR ENERGY, LLC, a Delaware
17 limited liability company,
18 Defendant.

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

**TONOPAH SOLAR ENERGY, LLC'S
MOTION FOR AN INJUNCTION AND
TO STRIKE**

ORAL ARGUMENT REQUESTED

19 TONOPAH SOLAR ENERGY, LLC, a Delaware
20 limited liability company; DOES I through X; and
21 ROE CORPORATIONS I through X,
22 Counterclaimant,
23 vs.
24 BRAHMA GROUP, INC., a Nevada corporation,
25 Counterdefendant.



1 Tonopah Solar Energy, LLC ("TSE"), by and through its undersigned counsel, moves for
2 two forms of relief to remedy Brahma Group, Inc.'s ("Brahma") forum shopping efforts: (1) an
3 injunction enjoining Brahma from prosecuting claims in a later filed state court action and (2) the
4 striking of Brahma's first amended complaint in this action. As explained in the following
5 Memorandum of Points and Authorities, both forms of relief, as requested herein, are warranted.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 This motion seeks two forms of relief pertaining to Brahma's willful attempt to subvert
9 this Court's jurisdiction over the claims at issue in this case through forum shopping.

10 First, this Court should enjoin Brahma from prosecuting claims in a later filed state court
11 action. Courts can enjoin a state court action filed for the purposes of subverting federal removal
12 jurisdiction. After TSE removed this action to this Court, Brahma dropped certain claims from
13 this action via amendment and refiled the same claims in a later filed state court action. Courts
14 have recognized such claim splitting schemes as a quintessential attempt to subvert federal
15 removal jurisdiction. Therefore, the injunction requested herein is warranted.

16 Second, this Court should strike Brahma's amendment to its complaint in this action.
17 Courts can strike amendments to complaints that attempt to deprive the court of jurisdiction over
18 a removed action. By amending its complaint in this action as part of its claim splitting scheme,
19 Brahma attempted to deprive this Court of jurisdiction over this removed action. Thus,
20 Brahma's amendment should be stricken.

21 **II. STATEMENT OF PERTINENT FACTS**

22 This case concerns disputes over the performance of and payments for construction work
23 on the Crescent Dunes Solar Energy Facility ("Project"). The Project is a solar energy project
24 located outside Tonopah, Nevada designed to produce 110 megawatts of electricity. TSE is the
25 project developer. TSE entered into an agreement as of February 1, 2017 with Brahma
26 ("Agreement") pertaining to the Project.

27 The Agreement governs the relationship between TSE and Brahma. Under the
28 Agreement, TSE agreed to issue work orders to Brahma describing the work to be performed by



1 Brahma and the hourly rates Brahma could charge for the work. Notably, the Agreement also
2 featured a venue selection clause, under which Brahma agreed to “submit[] to the jurisdiction of
3 the Courts in such State, with a venue in Las Vegas, Nevada, for any action or proceeding
4 directly or indirectly arising out of this Agreement.” See Agreement, attached hereto as **Exhibit**
5 **1**, (Section 24).

6 As explained in more detail below, disputes arose concerning performance under the
7 Agreement. These disputes led to the recording of a mechanic’s lien and the needlessly
8 complicated procedural actions taken by Brahma, which are the focus of this motion.

9 **A. TSE moves to expunge a mechanic’s lien filed by Brahma, which features**
10 **multiple amendments, and results in two Nye County Actions**

11 On April 9, 2018, Brahma recorded a mechanic’s lien concerning the Project. See Notice
12 of Lien in the Official Records of Nye County, Nevada, as Document No. 890822, attached
13 hereto **Exhibit 2**. On April 16, 2018, Brahma amended the lien. See Notice of First Amended
14 and Restated Lien in the Official Records of Nye County, Nevada, as Document No. 891073,
15 attached hereto as **Exhibit 3**. On April 18, 2018, Brahma re-recorded the first amended lien.
16 See Notice of First Amended and Restate Lien in the Official Records of Nye County, Nevada,
17 as Document No. 891507, attached hereto as **Exhibit 4**.

18 On April 17, 2018, Brahma filed a complaint in the Fifth Judicial District Court, Nye
19 County, Nevada, Case Number 39237 (“Nye County Action”). See Complaint, attached hereto
20 as **Exhibit 5**. The complaint asserted five claims against TSE: (1) breach of the Agreement, (2)
21 breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) violation
22 of Nevada’s prompt payment act, and (5) foreclosure of the mechanic’s lien. *Id.*

23 On, April 24, 2018, TSE filed a motion to expunge the mechanic’s lien under NRS
24 108.2275(1), which provides that “[t]he debtor of the lien claimant . . . may apply by motion to
25 the district court for the county where the property or some part thereof is located for an order
26 directing the lien claimant to appear before the court to show cause why the relief requested
27 should not be granted.” See First Motion to Expunge, attached hereto as **Exhibit 6**. TSE filed
28 the motion into the Nye County Action in accordance with NRS 108.2275(5), which provides

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that “[i]f an action has been filed to foreclose the notice of lien before the [motion] was filed pursuant to this section, the [motion] must be made a part of the action to foreclose the notice of lien.”

Due to defects with the lien, on the same day that TSE filed the motion to expunge, April 24, 2018, Brahma voluntarily dismissed the entire complaint in the Nye County Action without prejudice under Nevada Rule Civil Procedure 41(a)(1)(A)(i). Notice of Voluntary Dismissal, attached hereto as **Exhibit 7**. That same day, Brahma also recorded a second amendment to the lien. See Notice of Second Amended and Restated Lien in the Official Records of Nye County, Nevada, as Document No. 891766, attached hereto as **Exhibit 8**. As a result, TSE withdrew its motion to expunge.

On June 11, 2018, TSE filed a second motion to expunge the lien under NRS 108.2275(1). See Second Motion to Expunge, attached hereto as **Exhibit 9**. As there was no complaint pending, this second motion resulted in the opening of a special proceeding in the Fifth Judicial District Court, Nye County Nevada in accordance with NRS 108.2275(5), which provides that “[i]f, at the time the [motion] is filed, an action to foreclose the notice of lien **has not been filed**, the clerk of the court shall assign a number to the [motion] and obtain from the [moving party] a filing fee of \$85.” (“Nye County Special Proceeding”) (emphasis added). See *id.* The Nye County court would eventually hear arguments on the motion on September 12, 2018.

B. Brahma files a complaint against TSE in the Eighth Judicial District Court, Clark County, Nevada

While the motion to expunge in the Nye County Special Proceeding was waiting to be heard, on July 17, 2018, Brahma filed a complaint in the Eighth Judicial District Court, Clark County, Nevada against TSE (“Clark County Action”) in accordance with the Agreement’s venue selection clause. See ECF No. 1-1. The complaint in the Clark County Action asserted the same claims against TSE as the previously dismissed complaint, with the exception of the lien foreclosure claim: (1) breach of the Agreement, (2) breach of the implied covenant of good



1 faith and fair dealing, (3) unjust enrichment, (4) and violation of Nevada's prompt payment act.
2 *See id.*

3 Two days later, on July 19, 2018, Brahma recorded a third amendment to the lien. *See*
4 Third Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada,
5 as Document No. 896269, attached hereto as **Exhibit 10**.

6 On September 6, 2018, Cobra Thermosolar Plant, Inc. ("Cobra")¹ recorded a bond issued
7 by American Home Assurance Company, which released Brahma's mechanic's lien pursuant to
8 NRS 108.2415(6). *See* NRS 108.2415; Surety Bond 854481 Posted to Release Lien with Power
9 of Attorney in the Official Records of Nye County, Nevada, as Document No. 898974, attached
10 hereto as **Exhibit 11**.

11 **C. TSE removes the Clark County Action to this Court and files a counterclaim.**

12 On September 10, 2018, TSE timely removed the Clark County Action to this Court. *See*
13 ECF No. 1. Thus, the Clark County Action converted to this action—the Federal Court Action.

14 Meanwhile, back in Nye County, on September 12, 2018, Judge Elliott heard and denied
15 the second motion to expunge filed by TSE.

16 Two days after the motion was denied, on September 14, 2018, Brahma recorded a fourth
17 amendment to the lien. *See* Fourth Amended and/or Restated Notice of Lien in the Official
18 Records of Nye County, Nevada as Document No. 899351, attached hereto as **Exhibit 12**. Due
19 to Brahma's mechanic's lien being increased by this amendment, Cobra increased the amount of
20 its surety bond to over \$19 million, which is 1.5 times the amount of Brahma's lien. Due to the
21 posting of this bond by Cobra, Brahma's mechanic's lien no longer attaches to TSE's property in
22 Nye County. *See* NRS 108.2415(6).

23 Three days later, on September 17, 2018, TSE filed an answer and counterclaim against
24 Brahma in the Federal Court Action. *See* ECF No. 4. The counterclaim asserted six claims
25 against Brahma: (1) breach of the Agreement, (2) breach of the implied covenant of good faith
26

27
28 ¹ Cobra was the original prime contractor that TSE had contracted with to complete the Project. It obtained the bond to release Brahma's lien pursuant to its contractual relationship with TSE.

1 and fair dealing, (3) declaratory relief, (4) unjust enrichment/quantum meruit, (5) fraudulent
2 misrepresentation, and (6) negligent misrepresentation. *Id.*

3 **D. Brahma attempts to subvert this Court's removal jurisdiction over the claims**
4 **in the Federal Court Action**

5 On September 20, 2018, Brahma filed a Lien Foreclosure Complaint in the Nye County
6 Special Proceeding, despite the fact that the Nye County Special Proceeding was a special
7 proceeding limited to TSE's motion to expunge. *See* Mechanic's Lien Foreclosure Complaint,
8 attached hereto as **Exhibit 13**. In the complaint, Brahma asserted a single claim: foreclosure of
9 notice of lien against TSE. *Id.*

10 Five days later, on September 25, 2018, Brahma initiated its claim splitting scheme in an
11 effort to get out of federal court. Brahma filed a first amended complaint in the Federal Court
12 Action. *See* ECF No. 8. In this first amended complaint, Brahma asserted a single claim: unjust
13 enrichment against TSE. *See id.* As a result of the amendment, Brahma dropped its three other
14 previously asserted claims: (1) breach of the Agreement, (2) breach of the implied covenant of
15 good faith and fair dealing, and (3) violation of Nevada's prompt payment act. *See id.*

16 At the same time, Brahma filed a first amended counter-complaint and third-party
17 complaint in the Nye County Special Proceeding, again, despite the fact that the Nye County
18 Special Proceeding was a special proceeding limited to TSE's motion to expunge. *See* First
19 Amended Counter-Complaint and Third-Party Complaint, attached hereto as **Exhibit 14**. This
20 first amended counter-complaint asserted four claims against TSE—three of which were the
21 same three claims that Brahma had just dropped from the Federal Court Action (i.e., the copycat
22 claims)—(1) breach of the Agreement, (2) breach of the implied covenant of good faith and fair
23 dealing, (3) foreclosure of notice of lien, and (4) violation of Nevada's prompt payment act. *Id.*²
24 The third-party complaint asserted one claim against Cobra and American Home Assurance
25 Company: claim on the surety bond. *Id.*

26 ² A "counter-complaint" is not a permitted pleading under Nev. R. Civ. P. 7(a) and based on the
27 nature of the filing, Brahma's counter-complaint does not constitute a poorly named complaint or
28 answer. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 282
(1997) (providing that counterclaims and cross-claims "are not separate pleadings, but are claims
for relief that may be set forth in answers and complaints").





1 On October 9, 2018, TSE answered Brahma's first amended complaint in the Federal
2 Court Action. *See* ECF No. 11.

3 On October 8, 2018, TSE's counsel sent a letter to Brahma's counsel explaining that its
4 claim splitting scheme ran astray of state and federal law. *See* Letter, attached hereto as **Exhibit**
5 **15**. In response, Brahma stood by its actions. *See* Response to Letter, attached hereto as **Exhibit**
6 **16**.³

7 Filed concurrently with this motion, on October 18, 2018, TSE moved in the Nye County
8 Special Proceeding to dismiss Brahma's first amended counter-complaint, or, in the alternative,
9 to stay the action until this Court resolves this motion. Among other things, that motion argues
10 that the Nye County District Court should dismiss Brahma's first amended counter-complaint as
11

12
13 ³ On October 16, 2018, Brahma filed a Motion for Stay, or in the alternative, Motion to Amend
14 Complaint in this Court, *see* ECF No. 13, in an apparent effort to justify its forum shopping
15 efforts. The timing of this filing warrants discussion. TSE wrote to Brahma informing Brahma
16 that its forum shopping efforts ran astray of federal and state law and revealing an intent to move
17 to remedy those efforts. Brahma requested an extension of time to respond to the letter, which
18 TSE granted as a courtesy. Brahma apparently used that additional time to draft the motion for
19 stay and attempt to "get out in front" of their forum shopping efforts. Such gamesmanship is
20 evidenced by the fact that Brahma responded to the letter and filed the motion for stay
21 simultaneously after 9:00 p.m. on October 16, 2018. Yet, Brahma's motion for stay serves as
22 further evidence of its forum shopping efforts, as it confirms Brahma's intent to move the
23 copycat claims out of this Court to the Nye County Special Proceeding in an improper manner
24 (i.e. without seeking a remand from this Court).

25 Indeed, the motion for stay is just one more frivolous filing by Brahma. By way of example, in
26 the motion for stay, Brahma contends that TSE has engaged in forum shopping by properly
27 removing the Clark County Action to this Court "to avoid the effects of the adverse ruling by
28 Judge Elliot." ECF No. 13 at 16:23. While it is remarkable to assert that a proper removal
constitutes forum shopping, it is more remarkable to assert that TSE engaged in forum shopping
to avoid the effects of a ruling that had not yet occurred at the time of removal. TSE removed
this action on **September 10, 2018**. Judge Elliot ruled on the motion to expunge on **September**
12, 2018. Judge Elliott was able to rule after removal because the Nye special lien expungement
proceeding pending before Judge Elliott was never removed. This action now pending in federal
court was removed from the Clark County District Court and Judge Gonzales. It was Brahma
who chose to initiate a new lawsuit in Clark County on their contract claims even though the
special proceeding to expunge was already pending in Nye County before Judge Elliott. The
removed action was never before Judge Elliott and he never had jurisdiction of the removed
claims. This is just one example of the frivolous assertions and gross mischaracterizations that
run throughout Brahma's motion to stay. TSE will respond to the motion for stay in a separate
filing, but it is safe to say that its frivolous assertions and mischaracterizations should not impact
this motion.



1 TSE's removal of this action deprived the state court of subject matter jurisdiction and because
2 Brahma has engaged in transparent forum shopping.⁴

3 **III. LEGAL ARGUMENT**

4 By dropping its claims in the Federal Court Action and asserting the same claims in the
5 Nye County Special Proceeding, Brahma has engaged in the classic forum shopping scheme of
6 claim splitting. Case law has developed to provide specific remedies for such unjustified
7 behavior. As explained below, this Court should enjoin Brahma from prosecuting the copycat
8 claims asserted in its first amended counter-complaint in the Nye County Special Proceeding and
9 strike Brahma's amendment of its complaint in the Federal Court Action.

10 **A. This Court should enjoin Brahma from prosecuting its copycat claims in the**
11 **first amended counter-complaint in the Nye County Special Proceeding**
12 **because Brahma brought those claims to subvert this Court's removal**
13 **jurisdiction**

14 The Ninth Circuit has held that federal courts can enjoin state court actions that were
15 filed for the purposes of subverting federal removal jurisdiction under the All Writs Act. The
16 facts outlined above demonstrate that Brahma amended its complaint in this action and filed the
17 first amended counter-complaint in the Nye County Special Proceeding in order to subvert this
18 Court's removal jurisdiction over the copycat claims.

19 **1. Federal courts can enjoin state court actions that were filed for the**
20 **purposes of subverting federal removal jurisdiction under the All**
21 **Writs Act**

22 The All Writs Act, 28 U.S.C. § 1651, confers a broad grant of authority to federal courts.
23 *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1098 (9th Cir. 2008). It provides that
24 "[t]he Supreme Court and all courts established by Act of Congress may issue all writs
25 necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and
26

27 ⁴ TSE has brought the instant motion on a non-emergency basis. TSE does not believe that
28 emergency status is warranted at this time because TSE has moved to, among other relief,
dismiss/stay the inappropriate claims asserted by Brahma in the Nye County Special Proceeding
until this Court decides this motion. If, however, Nye County denies the stay and that case
proceeds to discovery, TSE reserves the right to modify this motion to emergency status in order
to limit the time in which TSE will have to incur costs in both this action and the Nye County
Special Proceeding.



principles of law.” *Id.* (quoting 28 U.S.C. § 1651(a)). Under this authority, courts may issue injunctions to enjoin state court proceedings. *See Sandpiper Vill. Condo. Ass’n, Inc. v. Louisiana-Pac. Corp.*, 428 F.3d 831, 842 (9th Cir. 2005); *Hamlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

The Anti-Injunction Act, 28 U.S.C. § 2283, however, restricts the authority conferred on federal courts by the All Writs Act, by generally prohibiting federal courts from enjoining ongoing state court proceedings. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Negrete*, 523 F.3d at 1098; *Sandpiper*, 428 F.3d at 842. The Act has a simple purpose: “prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances.” *Sandpiper*, 428 F.3d at 842.

This restriction—prohibiting federal courts from enjoining ongoing state court proceedings—is subject to three exceptions. 28 U.S.C. § 2283; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). A federal court may enjoin ongoing state court proceedings if the injunction is (1) expressly authorized by an Act of Congress, (2) necessary in aid of jurisdiction, or (3) necessary to protect or effectuate judgments. 28 U.S.C. § 2283; *Vendo*, 433 U.S. at 630; *Chick Kam Choo*, 486 U.S. at 146. An injunction under one of these exceptions requires “a strong and unequivocal showing” that such relief is necessary. *Sandpiper*, 428 F.3d at 842.

Only the first exception—expressly authorized by an Act of Congress—is at issue here. The removal statute, 28 U.S.C. § 1446, constitutes such an act, as it “provides express authorization to enjoin state proceedings in removed cases.” *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997) (citing *Mitchum v. Foster*, 407 U.S. 225, 237 (1972)).

As a result, the Ninth Circuit has held that the removal statute authorizes federal courts to “enjoin later filed state cases that were filed for the purpose of subverting federal removal jurisdiction.” *Quackenbush*, 121 F.3d at 1378 (quoting *Kansas Pub. Employees Retirement Sys. (“KPERS”) v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1068 (8th Cir. 1996)). This makes sense, as “[i]t would be of little value to enjoin continuance of a state case after removal and then permit the refile of essentially the same suit in state court.” *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987). Other circuits agree. *See Davis Int’l, LLC v. New Start Group Corp.*, 488



1 F.3d 597 (3d Cir. 2007) (providing that “[c]ourts considering the question have unanimously
2 held that a plaintiff’s fraudulent attempt to subvert the removal statute implicates the ‘expressly
3 authorized’ exception to the Anti-Injunction Act and may warrant the granting of an anti-suit
4 injunction.”); *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 251 (4th Cir. 2013) (providing that
5 “courts have concluded that, under certain circumstances, [the removal statute] also authorizes
6 injunctions against separate ‘copycat’ actions—actions involving essentially the same parties and
7 claims that are filed in state court after removal of the original action.”).

8 To determine whether to issue an injunction enjoining a later filed state court “copycat”
9 action, the focus is on whether there is evidence of an attempt to “subvert the rulings and
10 jurisdiction of the district court.” *Quackenbush*, 121 F.3d at 1379. In *Quackenbush*, the Ninth
11 Circuit concluded that the district court did not abuse its discretion by declining to enjoin a later
12 filed state court action because the later filed state court action was “entirely distinct” from the
13 federal court action. 121 F.3d at 1378.

14 Yet, courts across the country have recognized that the splitting of claims between a
15 federal court action and a later filed state court action, such as that done by Brahma here, serves
16 as evidence of an attempt to subvert federal removal jurisdiction, and thus warrants an
17 injunction. *See KPERS*, 77 F.3d at 1068; *Faye v. High’s of Baltimore*, 541 F. Supp. 2d 752, 760
18 (D. Md. 2008); *Davis Int’l, LLC v. New Start Grp. Corp.*, No. CIV.A. 04-1482GMS, 2009 WL
19 1321900, at *3 (D. Del. May 13, 2009), *aff’d*, 367 F. App’x 334 (3d Cir. 2010); *Cross v. City of*
20 *Liscomb*, No. 4:03-CV-30172, 2004 WL 840274, at *4 (S.D. Iowa Mar. 2, 2004).

21 In *KPERS*, the Eighth Circuit affirmed the issuance of an injunction based on a claim
22 splitting scheme. *Id.* at 1071. There, the district court granted an injunction under the All Writs
23 Act enjoining the plaintiff from pursuing a later filed state court action against a defendant. 77
24 F.3d at 1067. On appeal, the plaintiff argued that the Anti-Injunction Act barred the injunction.
25 *Id.* at 1068. The Eighth Circuit reasoned, however, that substantial evidence supported the
26 district court’s finding that the later filed state court action “was substantially identical to the old
27 [federal court action] and that [the plaintiff] had merely tried to carve up what was one case into
28 separate cases with separate claims, all leading to a subversion of [a defendant’s] right to remove



1 the entire case.” *Id.* at 1070 (internal quotation marks omitted). As a result, the Eighth Circuit
2 concluded that the injunction enjoining the plaintiff from prosecuting its later filed state court
3 action was “expressly authorized” by Congress and permitted under the Anti-Injunction Act. *Id.*
4 at 1071.

5 *Faye* is particularly instructive when it comes to a claim splitting scheme. There, a
6 plaintiff filed a complaint in state court. *Faye*, 541 F. Supp. 2d at 754. A defendant removed the
7 case to federal court. *Id.* The plaintiff then moved for leave to amend the complaint. *Id.* at 755.
8 The proposed amended complaint eliminated certain claims and re-styled the remaining claims
9 as a Collective Action. *Id.* While the motion for leave was pending, the plaintiff filed a second
10 lawsuit against the same defendant in state court. *Id.* In the state court complaint, the plaintiff
11 alleged the same claims as the previously removed complaint. *Id.* The state court complaint was
12 served after the federal court granted the plaintiff leave to amend the complaint. *Id.* When faced
13 with these facts, the district court concluded “I have no doubt that the second-filed suit
14 constituted an attempt to subvert this Court’s supplemental jurisdiction and defendant’s right to
15 removal.” *Id.* at 760. Thus, the court enjoined the plaintiff from prosecuting the later filed state
16 court action. *Id.*

17 In *Davis*, the plaintiffs filed a complaint in state court. 2009 WL 1321900, at *1. The
18 defendants removed the action and filed a motion to dismiss. *Id.* While the motion was pending,
19 the plaintiffs, on the same day, filed an amended complaint, which dropped certain claims from
20 the removed complaint, and asserted the same dropped claims in a new state court action. *Id.*
21 The district court recognized that the plaintiffs were attempting to subvert federal removal
22 jurisdiction by splitting their claims, and, thus, enjoined them from proceeding with the later
23 filed state court action. *Id.*

24 In *Cross*, the plaintiff filed a complaint in state court. 2004 WL 840274, at *1. The
25 defendant removed the action to federal court. *Id.* The plaintiff then voluntarily dismissed
26 certain claims and filed a complaint in a new state court action asserting the same dropped
27 claims. *Id.* The court recognized the plaintiff’s attempt at subverting removal jurisdiction:
28

1 When [the plaintiff's] motion to stay this [federal] lawsuit in favor
2 of the state lawsuit is considered [the plaintiff's] purpose to subvert
3 removal jurisdiction is unmistakable. Her plan is to split her causes
4 of action between state and federal courts, proceed to judgment
5 first on the state claims while putting the federal action on the back
6 burner in the hope the result will trump the federal action,
7 reserving the federal option if in her interest to proceed later.
8 Defendants' right to remove the first state case would thus be
9 eviscerated. The Court finds the subsequent state action is
10 substantially identical to this action and that it was filed to subvert
11 removal to this Court of the state claims in the earlier state case.

12 *Id.* at *4. Thus, the court enjoined the plaintiff from prosecuting the later filed state court action.

13 *Id.*

14 **2. Brahma executed a claim splitting scheme in order to subvert this**
15 **Court's removal jurisdiction over the copycat claims**

16 There is no doubt that Brahma has engaged in a classic claim splitting scheme in order to
17 subvert this Court's removal jurisdiction. Indeed, Brahma's actions align with the actions of the
18 plaintiffs in *KPERS*, *Faye*, *Davis*, and *Cross*, all of which warranted injunctive relief.

19 Based on the timeline of Brahma's actions, it is clear that Brahma attempted to subvert
20 this Court's removal jurisdiction over the copycat claims. Brahma recorded a mechanic's lien.
21 TSE then moved to expunge the mechanic's lien. By moving to expunge the mechanic's lien,
22 TSE opened a special proceeding in Nye County—the Nye County Special Proceeding.⁵ While
23 the motion was pending, Brahma filed a complaint in the Eighth Judicial District Court, Clark
24 County, Nevada in accordance with the Agreement's venue selection clause. TSE properly
25 removed that action to this Court, answered the complaint, and filed counterclaims against
26 Brahma. Brahma then improperly filed a complaint into the Nye County Special Proceeding
27 asserting lien foreclosure. Five days later, Brahma filed both a first amended complaint in this
28 action, which dropped three claims, and a first amended counter-complaint in the Nye County
Special Proceeding, which asserted the three dropped claims.

⁵ TSE filed its motion to expunge in Nye County District Court as NRS 108.2275 requires that motions to expunge should be brought in the county where the property subject to the mechanic's lien is located.





1 There is no legitimate justification for the course of action taken by Brahma. For
2 instance, there is no reason to split the unjust enrichment claim from the claims for breach of the
3 Agreement, breach of the implied covenant of good faith and fair dealing, and violation of
4 Nevada's prompt payment act. Indeed, all of the claims arise from the same set of facts.
5 Moreover, by leaving the unjust enrichment claim behind, Brahma demonstrates its motivation to
6 litigate its copycat claims outside of this Court, despite this Court's removal jurisdiction over the
7 claims. As Brahma's claims appear to entirely or predominately originate out of the Agreement,
8 Brahma's left behind claim of unjust enrichment claim appears to be nothing more than a mere
9 placeholder.

10 Thus, there is no doubt that Brahma attempted to subvert this Court's removal
11 jurisdiction over the copycat claims. An injunction enjoining Brahma from prosecuting the
12 copycat claims asserted in its first amended counter-complaint in the Nye County Special
13 Proceeding is warranted.

14 **B. This Court should strike Brahma's first amended complaint in this action**
15 **because it constitutes an attempt to deprive this Court of jurisdiction over a**
16 **removed action**

17 Under Rule 15(a), a party may amend its pleading once as a matter of course within 21
18 days after serving it, or within 21 days after service of a responsive pleading or a motion under
19 Rule 12(b), (c), or (f). Fed. R. Civ. P. 15(a). Rule 15(a), however, "cannot be used to deprive
20 the Court of jurisdiction over a removed action." *Winner's Circle of Las Vegas, Inc. v. AMI*
21 *Franchising, Inc.*, 916 F. Supp. 1024, 1026 (D. Nev. 1996). Courts strike amendments that are
22 used as a basis to deprive a court of jurisdiction over a removed action. *Clinco v. Roberts*, 41 F.
23 Supp. 2d 1080, 1088 (C.D. Cal. 1999) (striking an amended complaint filed under Rule 15(a) in
24 a removed action because it attempted to destroy diversity).

25 Courts have recognized that the claim splitting scheme used by Brahma here constitutes
26 an attempt at depriving a federal court of removal jurisdiction via amendment. *See Faye*, 541 F.
27 Supp. 2d at 754; *Cross*, 2004 WL 840274, at *3 ("what she has done amounts to the same
28 thing"). As a result, in *Faye*, the court struck the plaintiff's amended complaint. 541 F. Supp. 2d
at 758.



Here, Brahma has attempted to deprive this Court of removal jurisdiction through the amendment process. By filing the first amended complaint in this action, Brahma dropped claims and then reasserted the same claims in the Nye County Special Proceeding, which, as found in *Faye* and *Cross*, constitutes a clear attempt at depriving this Court of jurisdiction over the claims. Thus, Brahma's amendment to its complaint in the Federal Court Action, *see* ECF No. 8, should be stricken.⁶

IV. CONCLUSION

As set forth above, Brahma has engaged in forum shopping in an effort to subvert this Court's removal jurisdiction over the claims at issue in this case. Therefore, TSE respectfully requests that this Court grant this motion and (1) enter an injunction enjoining Brahma from prosecuting its copycat claims—breach of the Agreement, breach of the implied covenant of good faith and fair dealing, and violation of Nevada's prompt payment act—in its first amended counter-complaint in the Nye County Special Proceeding and (2) strike Brahma's first amended complaint in this action (ECF No. 8). Brahma's actions warrant such a result. This result will restore this case to the same procedural posture as existed before Brahma took such actions.

DATED this 18th day of October 2018.

/s/ Colby Balkenbush

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⁶ In fact, courts have found that "blatant forum shopping," such as that done by Brahma here, warrants sanctions under both a court's inherent power and 28 U.S.C. § 1927. *See Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 130 (D.D.C. 2012), *aff'd*, 554 F. App'x 3 (D.C. Cir. 2014) (sanctioning an attorney under 28 U.S.C. § 1927 for increasing expenses due to forum shopping); *Boyer v. BNSF Ry. Co.*, 832 F.3d 699, 701 (7th Cir. 2016) (sanctioning a party under the court's inherent power for forum shopping); *John Akridge Co. v. Travelers Companies*, 944 F. Supp. 33, 34 (D.D.C. 1996), *aff'd*, No. 95-7237, 1997 WL 411654 (D.C. Cir. June 30, 1997) (sanctioning a party under the court's inherent power for "blatant forum shopping").

WEINBERG WHEELER
HUDGINS GUNN & DIAL



CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S MOTION FOR AN INJUNCTION AND TO STRIKE** 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 16

EXHIBIT 16



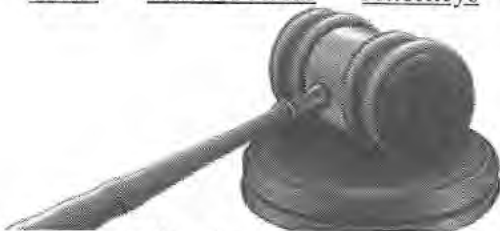
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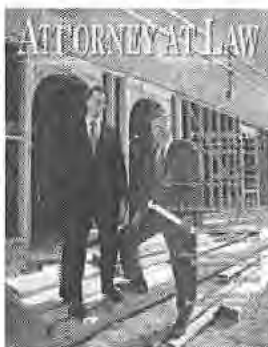


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Jefferson is an associate attorney with the firm and enjoys providing complete legal services to our construction industry clients. As a member of the litigation team, Jefferson assists clients with disputes, large and small. His representation includes appearances before the State and Federal Courts of Nevada, alternative dispute resolution panels (including arbitration and mediation), and the Nevada State Contractors Board. Prior to joining the firm, Jefferson participated in every aspect of the construction process as a project and property manager for a regional development company.

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FIFTH JUDICIAL DISTRICT

DEC - 4 2018

Nye County Clerk

Deputy

Sarah Westfall

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

18 BRAHMA GROUP, INC., a Nevada corporation,

19 Counterclaimant/Lien Claimant,

20 vs.

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

24 Counterdefendant.

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

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

25 ///

26 ///

27 ///

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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.

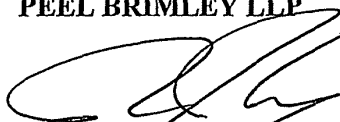
11 **BRAHMA GROUP, INC.'S REPLY RE: MOTION FOR ATTORNEY'S FEES**
12 **AND COSTS PURSUANT TO NRS 108.2275(6)(C)**

13 Defendant, Counterclaimant/Lien Claimant and Third-Party Plaintiff, BRAHMA GROUP,
14 INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP,
15 hereby submits its Reply to Tonopah Solar Energy LLC's ("TSE") Opposition ("Opposition") to
16 Brahma's Motion for Attorney's Fees and Costs ("Fee Motion") pursuant to NRS 108.2275(6)(c).

17 This Reply is made and based upon (i) the papers and documents on file in this matter, (ii)
18 the accompanying points and authorities, and (iii) the arguments of counsel at the hearing of this
19 Fee Motion.

20 Respectfully submitted this 4th of December, 2018.

21 PEEL BRIMLEY LLP



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REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Opposition, TSE argues that Brahma should receive an award of less than one-third of the fees it incurred and paid in defending TSE's "single motion" to expunge Brahma's mechanics' lien ("Motion to Expunge"). Unlike the simple discovery motions TSE relies upon in support of its flawed analysis, TSE's Motion to Expunge posed an existential threat to Brahma's lien rights – its sole source of security¹ for the \$12,859,577.74 TSE has refused to pay Brahma for Brahma's work on TSE's Crescent Dunes Solar Energy Project (the "Project").² As more fully discussed below, TSE (i) availed itself of the expungement proceeding provided by NRS 108.2275, (ii) threatened the continuing viability of Brahma's lien rights and (iii) sought an award of attorney's fees and costs associated with its Motion to Expunge. Just as NRS 108.2275(6)(a) would have entitled to TSE to an award of its reasonable attorney's fees had it prevailed, so too does NRS 108.2275(6)(c) impose on TSE the obligation to pay Brahma's reasonable fees incurred in defending such a motion. Brahma seeks nothing more and nothing less.

Having challenged Brahma's lien in a summary proceeding, TSE's complaints about the time, effort and money Brahma and its counsel spent defending that proceeding ring hollow. Brahma's fees were reasonable under the *Brunzell* factors³ and were solely related to and expended in defense of the expungement proceeding that TSE set in motion. Although Brahma will below address some of the nits TSE has picked, Brahma respectfully submits that the total dollars requested is reasonable, actually incurred, and justified by (among other things) the quality of the

¹ A mechanic's lien is a statutory creature established to help ensure payment of work, materials and/or equipment provided for the construction or improvements on real property (*In re Fontainebleau Las Vegas Holdings*, 289 p.3D 1199, 1210 (Nev. 2012).

² Underlying Nevada's public policy of securing payment to contractors by way of mechanics' liens is that "contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment." *Id.*

³ The *Brunzell* factors are:

- 1) The advocate's qualities, including ability, training, education, experience, professional standing, and skill;
- 2) The character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
- 3) The work performed, including the skill, time, and attention given to the work; and
- 4) The result—whether the attorney was successful and what benefits were derived.

See Barney v. Mt. Rose Heating & Air Conditioning, 124 Nev. 821, 829, 192 P.3d 730, 736 (2008).

1 legal services, the nature of the litigation, the complexity of the issues and the amount of money
2 at stake.

3 II. STANDARD OF REVIEW

4 In Nevada, the method upon which a reasonable fee is determined is subject to the
5 discretion of the court, which is tempered only by reason and fairness. *Shuette v. Beazer Homes*
6 *Holdings Corp.*, 121 Nev. 837, 864–65, 124 P.3d 530, 548–49 (2005). The court is not limited to
7 one specific approach and its analysis may begin with any method rationally designed to calculate
8 a reasonable amount. *Id.* Whichever method is chosen as a starting point:

9 ... the court must continue its analysis by considering the requested amount in light
10 of the factors enumerated by this court in *Brunzell v. Golden Gate National Bank*,
11 namely, the advocate's professional qualities, the nature of the litigation, the work
12 performed, and the result. In this manner, whichever method the court ultimately
13 uses, the result will prove reasonable as long as the court provides sufficient
14 reasoning and findings in support of its ultimate determination.

15 *Schuette*, 127 Nev at 549.

16 While explicit findings with respect to the *Brunzell* factors are preferred, “the district court
17 need only demonstrate that it considered the required factors, and the award must be supported by
18 substantial evidence.” *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv. Op.
19 31, 416 P.3d 249, 258–59 (2018) citing *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143
20 (2015). *See also Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994)
21 (providing that the district court “need not ... make explicit findings as to all of the factors where
22 support for an implicit ruling regarding one or more of the factors is clear on the record”).

23 As to the methods or approaches a district court may use to determine a reasonable amount,
24 there are certainly more considerations than just hourly billing records. *O'Connell v. Wynn Las*
25 *Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 672 (Nev. App. 2018) citing e.g., *Hsu v. Cty. of*
26 *Clark*, 123 Nev. 625, 637, 173 P.3d 724, 733 (2007) (remanding the issue of attorney fees to the
27 district court to determine a starting point and adjust the fee accordingly based on several factors,
28 including the “time taken away from other work,” case-imposed deadlines, how long the attorney
worked with the client, the usual fee and awards in similar cases, if the fee was contingent or
hourly, the amount of money at stake, and how desirable the case was to the attorneys involved);

1 RPC 1.5(a)(1)-(8) (listing factors to consider in deciding if a fee is reasonable).⁴ Thus the district
2 court is not confined to authorizing an award of attorney fees exclusively from billing records or
3 hourly statements. *O'Connell v. Wynn Las Vegas, LLC*, citing *Shuette*, 121 Nev. at 864-65, 124
4 P.3d at 548-49;

5 As more fully discussed in the Fee Motion and below, the fees requested by Brahma are
6 reasonable under the *Brunzell* factors and in consideration of all of the circumstances of this
7 proceeding.

8 **III. THIS "SINGLE MOTION" WAS COMPLEX AND POTENTIALLY**
9 **DISPOSITIVE OF BRAHMA'S LIEN.**

10 Contrary to Brahma's express contractual right to record a mechanics' lien "to the extent that
11 such lien arises from TSE wrongfully withholding payment from [Brahma],"⁵ TSE initially argued that
12 Brahma's lien was frivolous and made without reasonable cause on (among others) the following
13 grounds:

- 14 • That the lien attached to real property owned by the Bureau of Land Management
15 ("BLM") when in fact the lien attached to the work of improvement (that includes
16 real property owned by TSE) and expressly does not attach to BLM land;
- 17 • That the lien was "void" for allegedly attaching to BLM-owned real property
18 (which it did not) and could not be amended (which, to the contrary, NRS 108.229
19 liberally allows);
- 20 • That Brahma could only lien those parcels on which it actually performed work
21 (itself a disputed fact) when in fact the Nevada Mechanics' Lien Statute (the
22 "Statute") permits a lien on the "the entire structure or scheme of improvement as

23 ⁴ Pursuant to NRCP 1.5(a) the factors to be considered in determining the reasonableness of a fee include the following:

- 24 (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to
perform the legal service properly;
- 25 (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other
employment by the lawyer;
- 26 (3) The fee customarily charged in the locality for similar legal services;
- 27 (4) The amount involved and the results obtained;
- 28 (5) The time limitations imposed by the client or by the circumstances;
- (6) The nature and length of the professional relationship with the client;
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent.

⁵ See Brahma's Opposition to the Motion to Expunge p. 14 and Exhibit 4 thereto.

1 a whole” (i.e., the “work of improvement” - the Project) – *see* NRS 108.22188; and

- 2 • That Brahma did not give the BLM a Notice of Right to Lien (also known as a “pre-
3 lien notice”) pursuant to NRS 108.245 when (i) no such notice was required and
4 (ii) Brahma did in fact provide such a notice out of an abundance of caution;

5 After Brahma’s Opposition disproved TSE’s arguments, TSE turned its attention on reply
6 and at oral argument to asserting that Brahma’s lien was barred by the doctrine of sovereign
7 immunity because the United States Department of Energy (“DOE”) provided loan guarantees and
8 is, through PNC Bank as its collateral agent, the beneficiary of a Construction Deed of Trust
9 pledging all of TSE’s right, title, and interest in the Project. By way of its Statement of
10 Supplemental Authorities and at oral argument, Brahma successfully demonstrated that:

- 11 • “[N]ot every lien or action will be void/barred just because it tangentially affects
12 a federal government security interest.” *United States v. Rural Elec. Convenience*
13 *Co-op. Co.*, 922 F.2d 429, 436 (7th Cir. 1991); and
14 • Nevada law (among other states) recognizes that governmental immunity does
15 not preclude a mechanic’s lien against a leasehold interest on land owned by the
16 federal government. *Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 298 P.2d
17 810, 59 A.L.R.2d 457 (1956). *See also Crutcher v. Block*, 19 Okl. 246, 91 P. 895,
18 14 Ann.Cas. 1029 (“it is immaterial that the legal title to the land in question is
19 in the United States”).

20 Ultimately, this Court rejected TSE’s sovereign immunity claim because:

- 21 • No one is suing the United States in this action and neither the BLM’s fee simple
22 interest in certain parcels that comprise the Work of Improvement, nor is the
23 DOE’s security interest impaired by Brahma asserting a Notice of Lien; especially
24 if (as TSE contends) the DOE has first priority over Brahma’s Notice of Lien; and
25 • Even if Brahma were to eventually foreclose on its Notice of Lien, the Work of
26 Improvement could still be operated as a solar electric facility.⁶

27 There can be no question that the issues presented to this Court were complex and multi-
28 faceted and that the stakes were high indeed. The issues expressly discussed in the Order alone
required substantial time and careful analysis to provide the Court with high quality work product
in the form of Brahma’s briefing and oral argument. Notwithstanding TSE’s unfair attacks on
Brahma and its counsel (discussed *infra*) TSE does not dispute the quality of work performed by

⁶ See Order Denying Motion to Expunge pp. 5-6.

1 Brahma's counsel. TSE obviously cannot dispute that Brahma was the prevailing party in the
2 expungement proceeding.

3 Instead, TSE relies on dissimilar cases for the otherwise unsupportable and counter-
4 intuitive assertion that Brahma "overstaffed" the proceeding. Specifically, TSE cites to *Maracco*
5 v. *Hill*, 291 F.R.D. 586,588 (D. Nev. 2013), which by TSE's admission involved a "relatively
6 straightforward discovery motion." [See Opposition pp. 9-10]. TSE further relies on two other
7 cases reaching similar conclusions with respect to motions to compel discovery. [See Opposition
8 p. 10]. Plainly this is not that.

9 Rather than a mundane procedural motion, this statutory summary proceeding challenged
10 Brahma's lien as frivolous and sought to expunge Brahma's only security for a claim for unpaid
11 work in excess of \$12.8 million. Brahma does not need to apologize for vigorously defending a
12 motion it did not file that sought to expunge a mechanics' lien to which Brahma is contractually
13 and statutorily entitled. Similarly, Brahma's counsel should not be faulted for its collaborative,
14 team-based approach to ensuring that its client's lien was preserved in the face of TSE's uninvited
15 Motion to Expunge.

16 Finally, and while Brahma's attorneys indeed performed work on its client's behalf during
17 this same period of time that "did not pertain to TSE's Motion to Expunge," [see Opposition p. 6],
18 Brahma has not requested (at this time⁷) an award of any fees other than those relating to the
19 Motion to Expunge. TSE's Opposition for some reason nonetheless discusses such unrelated
20 activities and – perhaps in an effort to confuse the Court – attaches several pleadings and lien
21 amendments prepared during the pendency of the expungement proceeding. [See Opposition p. 6].
22 While these facts are undisputed, TSE does not argue – because it cannot show – that Brahma has
23 applied for an award of any fees incurred for such other activities. Simply stated, Brahma has
24 applied to this Court for an award of those fees – and only those fees – that it actually incurred in
25 defending the Motion to Expunge.

26
27 ⁷ At the conclusion of the case, once Brahma has established the amount of its lien, Brahma will request an award of
28 reasonable attorneys fees for those other activities pursuant to NRS 108.237(1) ("The court shall also award to the
prevailing lien claimant, whether on its lien or on a surety bond, the costs of the proceedings, including, without
limitation, reasonable attorney's fees, the costs for representation of the lien claimant in the proceedings ..."). That,
however, is for another day.

1 IV. TSE'S ATTACK ON BRAHMA'S ATTORNEY'S RATES IS FLAWED.

2 TSE attacks Brahma's Fee Motion – and by implication the value of Brahma's counsel,
3 Peel Brimley LLP ("PB") – by claiming that the attorney's hourly rates were too high and that PB
4 has inaccurately classified some of its attorneys. With respect to the latter allegation, TSE argues
5 (based on an admittedly out-of-date webpage) that one of its partners, Jefferson Boswell, is an
6 associate. In fact, after serving as a senior associate for several years, Mr. Boswell became a partner
7 and part owner in PB as of January 1, 2018. In any event, Mr. Boswell's billings relating to the
8 Motion to Expunge, while valuable to the team effort, amount to a small part of the total incurred
9 and TSE seeks a reduction of only \$1,012.50 for this issue. While TSE is simply wrong in the
10 premises, to the extent the Court is inclined to issue a \$1,012.50 demerit for inadvertent website
11 mis-management, Brahma will accept the same (and PB will happily credit its client for that
12 amount).

13 More importantly, TSE argues that PB's partner and associate rates are simply too high for
14 the jurisdiction. To be precise, PB billed Brahma at the following hour rates for the following
15 partners and associates:

16 Richard L. Peel, Managing Partner: ⁸	\$425
17 Eric Zimbelman, Partner: ⁹	\$400
Jefferson Boswell, Partner: ¹⁰	\$375
18 Ronald Cox, Associate: ¹¹	\$350

19 TSE contends these rates are outside the prevailing market rates on this jurisdiction. Without
20 engaging in a debate as to whether there even exists a "prevailing rate" in a market-based economic
21 system,¹² PB's rates are neither excessive nor substantially outside of the norm for this market,
22 especially for attorneys and a law firm with the experience and reputation shared by PB. [See e.g.,
23 Declaration of Richard L. Peel, Esq. submitted with the Fee Motion].

24 As to the rates themselves, TSE cites to non-construction/mechanics' lien cases suggesting
25 that the court should impose rates of less than \$400 per hour for PB's partners and merely \$250

26 ⁸ Mr. Peel has been licensed in (among other states) Nevada since 1991 and is PB's managing partner.

27 ⁹ Mr. Zimbelman has been licensed in Washington since 1992, in Nevada since 2005, and in North Dakota since 2014.

28 ¹⁰ Mr. Boswell has been licensed in Nevada since 2010 and, as noted above, became a partner in PB on January 1, 2018.

¹¹ Mr. Cox has been licensed in Nevada since 2012 and is an experienced senior associate of PB.

¹² It is also worth noting that an analysis of "prevailing rates" is not one of the *Brunzell* factors.

1 per hour for Mr. Cox's time.¹³ In fact, a brief survey of cases shows a broad range of approved rate
2 determinations. *See e.g., Plaza Bank v. Alan Green Family Trust*, 2013 U.S. Dist. LEXIS 58657,
3 2013 WL 1759580 (D. Nev. April 24, 2013) (\$425 -\$475 for partners; \$250-\$325 for associates);
4 *Perrigo v. Premium Asset Servs., LLC*, No. 2:14-CV-1052-GMN-PAL, 2015 WL 4597569, at *10
5 (D. Nev. July 28, 2015) (\$450 for partners; \$250 for associates); *Marrocco v. Hill*, 291 F.R.D. 586
6 (D.Nev.2013) (\$375-\$400 for partner); *Agarwal v. Oregon Mut. Ins. Co.*, 2013 WL 5882710
7 (D.Nev. Oct.30, 2013) (\$300 for partners hour; \$260 for associates); *Stephens Media LLC v.*
8 *Citihealth, LLC*, 2013 WL 4045926 (D.Nev. Aug.7, 2013) (\$185-\$400); *In re USA Commercial*
9 *Mortg. Co.*, 2013 WL 3944184 (D.Nev. July 30, 2013) (\$170 to \$420).

10 PB's rates are fair, reasonable and justified and should not be reduced based simply on a
11 purported "prevailing rate" identified in dissimilar cases. Even then, PB's rates are not wildly
12 outside the purported "prevailing" range. The best measure of the value of PB's rates is the quality
13 of the work product they presented to the Court and the success their work achieved. Without false
14 modesty, PB respectfully but proudly stands by its achievements and its hourly rates.

15 V. COLLABORATION IS NOT DUPLICATION

16 TSE further criticized Brahma's Fee Motion on the grounds that its work was redundant or
17 duplicated. [See Opposition pp. 10-11]. Like TSE's complaint of "overstaffing," this argument is
18 based on the incorrect assumption that work descriptions in time records necessarily mean there
19 was duplication of the same efforts. Like any quality law firm, PB's attorneys work collaboratively
20 where appropriate (and this \$12.8 million lien action is certainly an appropriate case for such
21 collaboration) to produce high quality work product in support of their clients' legal claims. That,
22 for example, more than one partner reviewed and revised the work product of an associate (and,
23 indeed, each other) should not be a surprise. Neither should it be controversial that highly complex
24 legal briefs are drafted, re-drafted and revised multiple times before submission to the Court. The
25 practice of law is not like making widgets. TSE's nitpicking aside, PB billed – and Brahma paid –
26 only for the work performed in defending TSE's Motion to Expunge. Brahma asks to be

27 ¹³ TSE also suggests that the hourly rate charged by Mr. Cox more than two years ago in another matter should be the
28 same rate billed today in this matter. This is incorrect for multiple reasons, including (i) Mr. Cox had less experience
then and (ii) more importantly, those rates were reduced and billed to a legacy matter dating back to 2008 (the
Manhattan West Litigation).

1 reimbursed no more than that as required by NRS 108.2275(6)(c).

2 **VI. PB DID NOT “BLOCK BILL.”**

3 TSE complains that PB’s invoices to Brahma include “block billing” that (TSE argues)
4 make it impossible to evaluate the reasonableness of PB’s billings. While some of the time entries
5 contain multiple tasks, all of those tasks pertain to Brahma’s defense of TSE’s Motion to Expunge.
6 As such the Court should have no concerns as to the applicability of such time entries to the matter
7 at hand. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) citing *Hensley v.*
8 *Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (holding that applicant should
9 “maintain billing time records in a manner that will enable a reviewing court to identify distinct
10 claims”). Here, all of the time for which an award is sought was spent in defense of a single
11 “claim.” TSE’s demand that Brahma’s lien be expunged.

12 PB’s billing records more than accurately describe the work performed and the time it
13 billed to Brahma in defending TSE’s Motion to Expunge. This time is reasonable and was
14 necessary to defend Brahma’s lien - its sole security for more than \$12.8 million in unpaid work.
15 Ironically, and although TSE claims that “over 80 percent of [PB’s time entries] rely on block
16 billing” (which Brahma disputes) TSE asks this court to make “an across-the-board 30 percent
17 reduction” of 100 percent of PB’s time entries. Such fuzzy math parodies itself.

18 In addition, and in support of its request for a 30 percent overall reduction, TSE relies for
19 support on a case that expressly rejected and vacated the U.S. District Court of Nevada’s 20
20 percent across-the-board reduction for block billing. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d
21 942, 948 (9th Cir. 2007). The *Welch* court remanded and required the District court to instead
22 “explain how or why ... the reduction ... fairly balance[s]” those hours that were actually billed in
23 block format. *Id.* citing *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir.2001). As TSE makes no
24 effort to explain how or why a reduction (especially of 30 percent across-the-board) would “fairly
25 balance” the hours reflected in PB’s invoices, this Court should summarily reject such an
26 invitation. To the extent the Court nonetheless believes that a reduction is warranted, Brahma
27 respectfully suggests that such a reduction not be more than 5 percent.

28 ///

VII. BRAHMA'S RESPONSE TO SPECIFIC COMPLAINTS

Without agreeing that TSE's nits merit response, Brahma offers the following discussion and response to some of the other complaints raised in TSE's Opposition:

- In response to TSE's complaint that PB billed approximately 41 hours on "purely drafting and revising the opposition" [see Opposition p. 12]: A cursory review of the complained-of entries shows this claim to be inaccurate.¹⁴ Even if this were true (which it is not), such time is in no way excessive given the complexity of issues and the stakes of the motion as discussed herein;
- In response to TSE's complaint that "Brahma's counsel billed 59.50 hours to prepare for and attend the hearing" [see Opposition p. 12]: Again, TSE ignores other work performed within the recorded billing hours to support a (at best) misleading calculation of hours performed on these tasks. In addition, the Motion to Expunge was set for hearing on two occasions, both of which required PB's attorneys to prepare for the hearing, drive to Pahrump and return to their office. Does TSE seriously contend that PB should not have prepared for the hearing that was (only after Judge Lane took the bench that day) re-assigned to this Honorable Judge for hearing on another date? It is also worth noting that in between the two hearings each party submitted additional statements of authority (TSE's was in the form of an eight-page supplemental brief with argument) for which additional preparation was required.
- In response to TSE's complaints about PB's hours incurred in preparing the "relatively short proposed order" [see Opposition p. 12]: If this "relatively short proposed order" were so simple, why did TSE vigorously oppose the same, demand numerous revisions (to which Brahma in good faith attempted to seek compromise) and ultimately submit a competing proposed order (that the Court rejected in favor of Brahma's proposed order)? The order PB prepared denying TSE's Motion to Expunge (i) was factually and legally detailed, (ii) accurately captured the Court's oral ruling in written order form, and (iii) addressed multiple complex legal conclusions. The time spent preparing this order was more than

¹⁴ As TSE knows – because it complained of PB's "block billing" (see discussion *supra*) many of these entries describe tasks other than "purely drafting and revising the opposition."

reasonable.

- In response to TSE's complaints about PB's hours spent in preparing the present Fee Motion [see Opposition p.12]: Brahma's Fee Motion is hardly a "form motion," nor is "most of it completely duplicative" of other motions PB has previously filed. Of course, any motion for fees must address the *Brunzell* factors, *see e.g., Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. at 864–65, and biographical information about PB and its attorneys is important to the *Brunzell* analysis. Beyond this information, however, the Fee Motion looks nothing like the other motion TSE found and submitted as PB's alleged "form motion." Again, where TSE has vigorously opposed the Fee Motion (as Brahma anticipated it would do), a collaborative effort to provide the court with a high-quality work product was certainly appropriate and the time spent to do so was reasonable.
- In response to TSE's complaint regarding "nonpermitted briefs" [see Opposition p. 12]: Brahma submitted a Supplemental Statement of Authorities (not a brief) in response to new arguments and authorities cited by TSE for the first time on Reply relating to TSE's contention that Brahma's lien was barred by the doctrine of sovereign immunity.¹⁵ Brahma believed such authorities would assist the Court in more fully understanding this complex area of the law. Similarly, Brahma's Affidavit in Support of its Request for Discovery is a requirement whenever such discovery is requested. If the Court believes that these hours were wasted, the Court is of course within its discretion to disallow that time, but Brahma and PB stand by the same as reasonable, necessary and appropriate to their defense of TSE's Motion to Expunge.
- In response to TSE's complaints about "inadequate documentation and descriptions" [see Opposition p. 13]: While no billing record is ever perfect, PB respectfully submits that it makes every effort to advise its clients of the nature and description of the work for which it seeks payment. Similarly, PB has certified to this court [see Peel Affidavit] that the time reflected on its billing statements was incurred specifically relating to and in defense of TSE's Motion to Expunge. TSE's demand for a "20 percent reduction across the board"

¹⁵ As noted above, TSE responded by filing a lengthy brief with additional argument (something Brahma did not do).

1 is far less supported (and far more non-specific) than Brahma's request for a fee award.

2 **VIII. TSE'S REQUEST FOR A 70 PERCENT FEE REDUCTION IS ABSURD.**

3 Having earlier argued for a 30 percent across-the-board reduction of Brahma's fees
4 incurred in defending TSE's Motion to Expunge on the grounds of "block billing," TSE concludes
5 its Opposition with the stunning request that the Court reduce Brahma's fee request by 70 percent.
6 Having forced Brahma to respond to a summary motion seeking to expunge its lien, TSE now
7 insists that Brahma could have and should have risked its only security for unpaid work exceeding
8 \$12.8 million by spending no more than it might have spent to defend a discovery motion. The
9 "single straightforward motion" that TSE (not Brahma) filed involved (i) complex and highly
10 intricate legal issues, a sizable factual record (especially for a case that did not exist until TSE filed
11 its Motion to Expunge), (ii) sophisticated parties and (iii) highly experienced and competent
12 counsel on both sides. Brahma had every right to defend its lien and to incur any reasonable cost
13 in doing so. Brahma respectfully submits that it did just that.

14 TSE's argument that Brahma (and by extension its attorneys) treated the Fee Motion "as a
15 negotiation starting with a higher number and hoping to land somewhere in the middle" is
16 particularly offensive. TSE (and by extension the attorneys who made this outrageous accusation
17 on its behalf) has no factual basis to support this assault on PB's ethics. PB recorded and billed its
18 client for the time it incurred in defending a motion that was an existential threat to Brahma's lien
19 rights and in conformance to the public policy of the State of Nevada - securing payment to
20 contractors by way of mechanics' liens. *See In re Fontainebleau Las Vegas Holdings*, 289 p.3d
21 1199, 1210 (Nev. 2012). In earning its lien, Brahma "extend[ed] large blocks of credit; invest[ed]
22 significant time, labor, and materials into [the] project; and [has] any number of workers vitally
23 depend upon [it] for eventual payment." *See Id.*

24 In the face of TSE's Motion to Expunge its \$12,859,577.74 lien, Brahma's payment of
25 another \$78,417.34 to successfully defend that lien against expungement is hardly unreasonable
26 even in the abstract. When carefully viewed in light of the issues brought to the Court, the need
27 for high quality work product and detailed and persuasive analysis, the fees PB billed to Brahma
28 are more than reasonable. Brahma respectfully requests that the court award it all sums requested

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1 (\$78,417.34) plus an additional estimated \$7,500.00 for the cost of this Reply and anticipated oral
2 argument.

3 **IX. CONCLUSION**

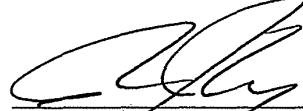
4 Based on the foregoing, Brahma is entitled by NRS 108.2275(6)(c) to, and respectfully
5 requests, an award of \$78,417.34 plus an estimated \$7,500.00 for this Reply and anticipated oral
6 argument.

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

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

10 RESPECTFULLY SUBMITTED this 4th day of December 2018.

11 **PEEL BRIMLEY LLP**

12 

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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 4th day of December 2018, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S REPLY RE: MOTION FOR ATTORNEY'S FEES AND COSTS PURSUANT TO NRS 108.2275(6)(C)** to be served as follows:

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

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

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