

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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**Supreme Court Case No. 78092**

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Elizabeth A. Brown  
Clerk of Supreme Court

**TONOPAH SOLAR ENERGY, LLC,**

Appellant,

v.

**BRAHMA GROUP, INC.,**

Respondent.

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Appeal from Judgment  
Fifth Judicial District Court  
The Honorable Steven Elliott, District Court Judge  
District Court Case No. **CV 39348**

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**RESPONDENT'S APPENDIX VOLUME 1**

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## CHRONOLOGICAL APPENDIX OF EXHIBITS

<u>Date</u>	<u>Description</u>	<u>Bates Range</u>	<u>Volume</u>
10/18/2018	<b>Tonopah Solar Energy, LLC's Motion to Strike Brahma Group, Inc.'s First Amended Counter-Complaint, or, in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court</b>	<b>RA000001 – RA000025</b>	<b>1</b>
	Exhibit 1 – Brahma Group, Inc.'s Mechanic's Lien Foreclosure Complaint	RA000026 – RA000032	1
	Exhibit 2 - Brahma Group, Inc.'s (i) First Amended Counter Complaint; and (ii) Third-Party Complaint	RA000033– RA000047	1
	Exhibit 3 – Complaint	RA000048– RA000053	1
	Exhibit 4 – Services Agreement between Tonopah Solar Energy, LLC and Brahma Group, Inc.	RA000054 - RA000075	1
	Exhibit 5 – Notice of Removal to Federal Court	RA000076– RA000085	1
	Exhibit 6 – Defendant Tonopah Solar Energy, LLC's Answer to Brahma Group, Inc.'s Complaint and Counterclaim against Brahma	RA000086– RA000105	1
	Exhibit 7 – First Amended Complaint	RA000106– RA000110	1
	Exhibit 8 – Brahma Group, Inc.'s Motion for Stay, or in the Alternative, Motion to Amend Complaint	RA000111– RA000130	1
	Exhibit 9 – Fourth Amended and/or Restated Notice of Lien recorded 9/14/18	RA000131– RA000141	1
	Exhibit 10 – Certificate of Service of Surety Rider Bond 854481 and Surety Bond 85441	RA000142– RA000153	1
11/05/18	<b>Brahma Group, Inc.'s Opposition to Tonopah Solar Energy, LLC's Motion to Strike, Motion to Dismiss or Motion to Stay</b>	<b>RA000154– RA000186</b>	<b>1</b>
	Exhibit 1 - Services Agreement between Tonopah Solar Energy, LLC and Brahma Group, Inc.	RA000187– RA000208	2

Exhibit 2 – Notice of Lien recorded 4/9/18	RA000209– RA000216	2
Exhibit 3 – Complaint	RA000217– RA000223	2
Exhibit 4 – Notice of Foreclosure of Mechanic’s Lien	RA000224– RA000231	2
Exhibit 5 – Notice of Lis Pendens	RA000232– RA000239	2
Exhibit 6 – Correspondence from Lee Roberts to Justin Jones re Crescent Dunes Solar Energy Project	RA000240– RA000243	2
Exhibit 7 – Tonopah Solar Energy, LLC’s Motion to Expunge Brahma Group, Inc.’s Mechanic’s Liens and Lis Pendens	RA000244– RA000256	2
Exhibit 8 – Notice of Voluntary Dismissal without Prejudice	RA000257– RA000259	2
Exhibit 9 – Notice of First Amended and Restated Lien	RA000260– RA000272	2
Exhibit 10 – Notice of Second Amended and Restated Lien	RA000273– RA000282	2
Exhibit 11 – Third Amended and/or Restated Lien	RA000283– RA000291	2
Exhibit 12 – Fourth Amended and/or Restated Notice of Lien	RA0002292– RA000300	2
Exhibit 13 – NRS 108.2415 Surety Bond 854481 Posted to Release Lien with Power of Attorney	RA000301– RA000305	2
Exhibit 14 - Certificate of Service of Surety Rider Bond 854481 and Surety Bond 85441	RA000306– RA000316	2
Exhibit 15 – Notice of Lien recorded 5/15/2018	RA000317– RA000319	2
Exhibit 16 - NRS 108.2415 Surety Bond 854482 Posted to Release Lien with Power of Attorney	RA000320– RA000324	2
Exhibit 17 – Order of Reassignment	RA000325– RA000327	2
Exhibit 18 – Complaint	RA000328– RA000333	2
Exhibit 19 – Brahma Group, Inc.’s Motion for Stay, or in the Alternative, Motion to Amend Complaint	RA000334– RA000353	2

	Exhibit 20 – Mechanic’s Lien Foreclosure Complaint	RA000354– RA000364	2
<b>11/30/18</b>	<b>Tonopah Solar Energy, LLC’s Reply to Brahma Group, Inc.’s Opposition to Tonopah Solar Energy, LLC’s Motion to Strike Brahma Group, Inc.’s First Amended Counter-Complaint, or, in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court</b>	<b>RA000365– RA000379</b>	<b>2</b>
	Exhibit 1 – Tonopah Solar Energy, LLC’s First Set of Interrogatories to Brahma Group, Inc. and Tonopah Solar Energy, LLC’s First Set of Requests for Production to Brahma Group, Inc.	RA000380– RA000394	2
	Exhibit 2 – Brahma Group, Inc.’s Motion to Stay Discovery Pending Determination of Dispositive Motion	RA000395 - RA000410	3
	Exhibit 3 – Plaintiff’s Responses to Defendant Tonopah Energy, LLC’s First Request for Production of Documents and Responses to First Set of Interrogatories	RA000411– RA000426	3
	Exhibit 4 – Pages 283 – 286 from Nevada Construction Law (2016 Edition)	RA000427 – RA000437	3
	Exhibit 5 – Order re Discovery Plan [ECF No. 26]	RA000438– RA000440	3
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	Exhibit 7 – Brahma Group, Inc.’s Reply in Support of Motion for Stay, or in the Alternative, Motion to Amend Complaint	RA000465– RA000478	3
	Exhibit 8 – Tonopah Solar Energy, LLC’s Motion for an Injunction and to Strike	RA000479– RA000494	3
	Exhibit 9 – Brahma Group, Inc.’s Response to Tonopah Solar Energy, LLC’s Motion for Preliminary Injunction and Motion to Strike [ECF No.16]	RA000495– RA000520	4
	Exhibit 10 – Reply in Support of Tonopah Energy, LLC’s Motion for an Injunction and to Strike	RA000521 - RA000536	4
<b>12/17/18</b>	<b>Brahma Group, Inc.’s Motion to Consolidate Case No. CV 39799 with Case No., CV 39348</b>	<b>RA000537 – RA000541</b>	<b>4</b>

01/04/19	<b>TSE's Opposition to Brahma's Motion to Consolidate Case No. 39799 with Case No. CV 39348</b>	<b>RA000542– RA000550</b>	<b>4</b>
01/14/19	<b>Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Motion to Consolidate Case No. CV 39799 with Case No., CV 39348</b>	<b>RA000551– RA000561</b>	<b>4</b>
	Exhibit A - Tonopah Solar Energy, LLC's Reply to Brahma Group, Inc.'s Opposition to Tonopah Solar Energy, LLC's Motion to Strike Brahma Group, Inc.'s First Amended Counter-Complaint, or, in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court	RA000562– RA000577	4
	Exhibit B – Page 286 from Nevada Construction Law (2016 Edition)	RA000578– RA000579	4
	Exhibit C – Brahma Group, Inc.'s Mechanic's Lien Foreclosure Complaint Against Surety Bond	RA000580– RA000586	4
	Exhibit D – Notice of Entry of Order – Order Granting Brahma's Motion for Attorney's Fees and Costs Pursuant to NRS (108.2275(6)(C))	RA000587– RA000600	4
	Exhibit E - Brahma Group, Inc.'s First Amended Complaint for (Among Other Things): (i) Foreclosure of Notice of Lien Against Surety Bond; and (ii) Breach of Settlement Agreement	RA000601– RA000610	4
01/28/19	<b>Notice of Entry of Order (i) Denying Tonopah Solar Energy, LLC's Motion to Strike and Dismiss; and (ii) Granting in Part Tonopah Solar Energy, LLC's Motion for Stay (iii) Granting Brahma Group, Inc.'s Motion to Amend</b>	<b>RA000611– RA000618</b>	<b>4</b>
02/21/19	<b>Defendants Cobra Thermosolar Plants, Inc.'s and American Home Assurance Company's Motion to Dismiss Plaintiff Brahma Group, Inc.'s First Amended Complaint in Case No. CV 39799</b>	<b>RA000619– RA000628</b>	<b>4</b>
	Exhibit 1 – Brahma Group, Inc.'s (i) First Amended Counter Complaint; and (ii) Third-Party Complaint	RA000629– RA000643	4
	Exhibit 2 – Brahma Group, Inc.'s First Amended Complaint for (Among Other Things): (i) Foreclosure of Notice of Lien	RA000644– RA000654	4

	Against Surety Bond; and (ii) Breach of Settlement Agreement		
	Exhibit 3 – Email Correspondence from Richard Peel to Geoffrey Crisp	RA000655 - RA000657	4
<b>03/15/19</b>	<b>Notice of Entry of Order – Order Granting Brahma’s Motion to Consolidate Case No.CV 39799 with Case No. 39348</b>	<b>RA000658–RA000665</b>	4
<b>03/25/19</b>	<b>Brahma Group, Inc.’s Opposition to Cobra Thermosolar Plants, Inc.’s Motion to Dismiss and Countermotion for Leave to File a Single Consolidated Amended Complaint</b>	<b>RA000666 – RA000680</b>	4
	Exhibit 1 – Order Granting Brahma’s Motion to Consolidate Case No. CV39799 with Case No. CV39348	RA000681–RA000684	4
	Exhibit 2 – Order (i) Denying Tonopah Solar Energy, LLC’s Motion to Strike and Dismiss, and (ii) Granting in Part Tonopah Solar Energy, LLC’s Motion for Stay (iii) Granting Brahma Group, Inc.’s Motion to Amend	RA000685 – RA000689	4
	Exhibit 3 – Petition for Writ of Prohibition, or, Alternatively, Mandamus	RA000690–RA000749	4
	Exhibit 4 – Tonopah Solar Energy, LLC’s Reply to Brahma Group, Inc.’s Opposition to Tonopah Solar Energy, LLC’s Motion to Strike Brahma Group, Inc.’s First Amended Counter-Complaint, or, in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court	RA000750 – RA000765	5
	Exhibit 5 - Page 286 from Nevada Construction Law (2016 Edition)	RA000766–RA000767	5
	Exhibit 6 – Email Correspondence from Eric Zimbelman to Lee Roberts	RA000768–RA000770	5
	Exhibit 7 - Email Correspondence from Colby Balkenbush to Richard Peel	RA000771–RA000774	5
	Exhibit 8 – Defendant Tonopah Solar Energy, LLCs Answer to Brahma Group, Inc.’s Complaint and Counterclaim Against Brahma	RA000775–RA000794	5

	Exhibit 9 – TSE’s Opposition to Brahma’s Motion to Consolidate Case No. CV 39799 with Case No. 39348	RA000795– RA000804	5
	Exhibit 10 – Brahma Group, Inc.’s Reply to Tonopah Solar Energy, LLC’s Opposition to Motion to Consolidate Case No. CV 39799 with Case No. 39348	RA000805– RA000865	5
	Exhibit 11 - Brahma Group, Inc.’s First Amended Complaint for (Among Other Things): (i) Foreclosure of Notice of Lien Against Surety Bond; and (ii) Breach of Settlement Agreement	RA000866– RA000875	55
	Exhibit 12 – Brahma Group, Inc.’s (i) Second Amended Complaint; and (ii) First Amended Third-Party Complaint	RA000876– RA000891	5
<b>04/10/19</b>	<b>TSE’s Opposition to Brahma’s Countermotion for Leave to File a Single Consolidated Complaint</b>	<b>RA000892– RA000900</b>	<b>5</b>
<b>04/22/19</b>	<b>Order Granting Brahma’s Countermotion for Leave to File a Single Consolidated Amended Complaint</b>	<b>RA000901– RA000918</b>	<b>5</b>
<b>04/22/19</b>	<b>Brahma Group, Inc.’s (i) Second Amended Complaint; and (ii) First Amended Third-Party Complaint</b>	<b>RA000919– RA000931</b>	<b>5</b>



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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**

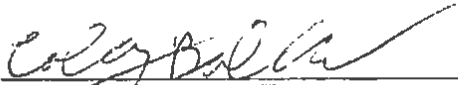
22  
23 Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through  
24 its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,  
25 hereby moves to strike and/or dismiss Brahma Group, Inc.'s (hereinafter "Brahma") First  
26 Amended Counter-Complaint ("Counter-Complaint") 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.



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

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


8 DATED this 18<sup>th</sup> day of October, 2018.

9   
10 D. Lee Roberts, Jr., Esq.  
11 Colby L. Balkenbush, Esq.  
12 Ryan T. Gormley, Esq.  
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14 GUNN & DIAL, LLC  
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17 Attorneys for Tonopah Solar Energy, LLC

18 **NOTICE OF MOTION**

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

26 DATED this 18<sup>th</sup> day of October, 2018.

27   
28 D. Lee Roberts, Esq.  
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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.<sup>1</sup> Thus, a stay is appropriate because the federal action was filed on July  
24

25 <sup>1</sup> 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

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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.<sup>2</sup> **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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27 <sup>2</sup> TSE's removal was timely as TSE was not served with the Clark County Complaint until August 21,  
28 2018.



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

4           After this Court denied TSE's Motion to Expunge on September 12, 2018, Brahma  
5           apparently had a change of heart and decided that, rather than litigating its substantive claims in  
6           Las Vegas (where it had first filed them), it preferred to litigate those claims before this Court in  
7           Pahrump. Thus, on September 25, 2018, Brahma (1) filed a First Amended Complaint in federal  
8           court that dropped its claims for Breach of Contract, Breach of the Implied Covenant of Good  
9           Faith and Fair Dealing and Violation of NRS 624<sup>3</sup> and (2) filed a First Amended Counter-  
10          Complaint in Nye County that added those same three dropped federal claims to this proceeding.  
11          See **Exhibit 7** (First Amended Federal Court Complaint filed on September 25, 2018); **Exhibit 2**  
12          (First Amended Nye County Counter-Complaint filed on September 25, 2018).

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

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

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

24          \_\_\_\_\_  
25          <sup>3</sup> This Court should not mistake Brahma's dropping of its three federal court claims via the First  
26          Amended Federal Court Complaint as court sanctioned behavior. Under FRCP 15(a)(1), a party has a  
27          right to amend its complaint without leave of court within 21 days after a responsive pleading is filed.  
28          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]hen 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.<sup>4</sup>

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.).<sup>5</sup> 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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25  
26 <sup>4</sup> 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 <sup>5</sup> 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.<sup>6</sup> 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

<sup>6</sup> 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”<sup>7</sup> 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

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<sup>7</sup> 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.



1 credible.<sup>8</sup>

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

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

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

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

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27 <sup>8</sup> In Brahma’s Motion to Stay filed with the federal court on October 16, 2018, Brahma makes this  
28 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 proceeding<sup>9</sup> 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

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<sup>9</sup> 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).



1 of their jurisdiction over a particular dispute.”); Wright & Miller, *Federal Practice & Procedure*  
2 § 3736 (4th ed.) (stating that, following removal, any further proceedings in a state court are  
3 considered *coram non judice* and will be vacated even if the case is later remanded).

4 Moreover, it is not just the particular state court from which the case was removed that is  
5 divested of jurisdiction over the dispute but all courts in the state. *See In re M.M.*, 154 Cal. App.  
6 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007) (“states are separate sovereigns with respect to the  
7 federal government. Removal of an action may therefore be viewed as a transfer of the  
8 proceeding from the courts of one sovereign (a state) to the courts of another (the United  
9 States).”).

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

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

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

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

28 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  
law of jurisdiction. [plaintiff] had no basis for filing the amended complaint  
in state court.

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

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



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

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

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

11           Here, Brahma has already admitted in a recent filing in federal court that this proceeding  
12 is "duplicative" of the federal action and that it fulfills the "substantial similarity" requirement.  
13 **Exhibit 8** (Brahma's Motion to Stay Federal Action at pp. 7, 9 (emphasis added). In fact, the  
14 three claims against TSE that Brahma recently added to this action via the filing of its "Counter-  
15 Complaint" are the exact same three claims that TSE previously removed to federal court. Those  
16 claims are (1) Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair  
17 Dealing and (3) Violation of NRS 624. The allegations that make up these claims are the same  
18 allegations that were asserted in the federal court action. *Compare* **Exhibit 3** 2:11-28 – 5:1-5  
19 (Brahma's July 17, 2018 Complaint filed in the Eighth Judicial District Court and removed to  
20 Nevada Federal District Court on September 10, 2018) with **Exhibit 2** at 4:17-28 – 8:1-19  
21 (Brahma's September 25, 2018 First Amended Counter-Complaint filed with the Nye County  
22 District Court). Thus, pursuant to 28 U.S.C. § 1446(d), this Court lacks jurisdiction over those  
23 three claims and "shall proceed no further unless and until the case is remanded." 28 U.S.C. §  
24 1446(d) (emphasis added). TSE requests that these three claims be dismissed.

25           As an aside, TSE does not contend that this Court lacks jurisdiction over Brahma's lien  
26

27 <sup>10</sup> *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997); *Kansas Pub. Employees Ret.*  
28 *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 whether 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 Lien<sup>11</sup> was in the amount of \$12,859,577.74.

26  
27 <sup>11</sup> 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, Cobra<sup>12</sup> 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 NRCP  
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 <sup>12</sup> 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);<sup>13</sup> 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 <sup>13</sup> 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.<sup>14</sup> 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 <sup>14</sup> 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       ///

28       ///



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

5           DATED this 18<sup>th</sup> day of October, 2018.

6  
7   
8 D. Lee-Roberts, Jr., Esq.  
9 Colby L. Balkenbush, Esq.  
10 Ryan T. Gormley, Esq.  
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15 *Attorneys for Tonopah Solar Energy, LLC*  
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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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Eric B. Zimbelman, Esq.  
Ronald J. Cox, Esq.  
Peel Brimley, LLP  
3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074  
*Attorneys for Brahma Group, Inc.*

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



# **EXHIBIT 1**

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9 *Attorneys for Brahma Group, Inc.*

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

13 Plaintiff,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Defendant.

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

19 Counterclaimant/Lien Claimant,

20 vs.

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

25 Counterdefendant,  
26  
27  
28

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

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

**[Arbitration Exemption: Action  
Concerning Title to Real Estate]**

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

### THE PARTIES

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

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

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

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

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

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

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

///

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

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

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

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

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

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

ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty Parcels.<sup>3</sup>

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

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

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

///

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

**FIRST CAUSE OF ACTION**  
**(Foreclosure of Notice of Lien)**

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

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

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

- a. The BLM; and
- b. TSE, even though it had no statutory duty to do so.

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

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

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

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

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

///

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

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

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

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

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

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

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

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

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

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

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

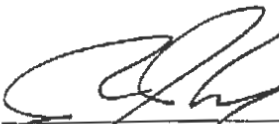
3 5. For such other and further relief as this Honorable Court deems just and proper in  
4 the premises.

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

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

8 Dated this 20<sup>th</sup> day of September 2018.

9 **PEEL BRIMLEY LLP**

10  
11 

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# EXHIBIT 2

# EXHIBIT 2



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

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

15 Plaintiff,

16 vs.

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

19 Defendant.

20 BRAHMA GROUP, INC., a Nevada corporation,  
21

22 Counterclaimant/Lien Claimant,

23 vs.

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

28 Counterdefendant,

**FILED**  
**FIFTH JUDICIAL DISTRICT**

**SEP 25 2010**

*Terri Pemberton* Clerk  
Deputy

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

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

[Arbitration Exemption: Action  
Concerning Title to Real Estate]

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

10 Third-Party Defendants.

11 **FIRST AMENDED COUNTER-COMPLAINT**

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

18 **THE PARTIES**

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

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

24 ///

25 ///

26 ///

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

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

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

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

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

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

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

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

ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty Parcels.<sup>3</sup>

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

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

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

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

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

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

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

28 |||

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

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

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

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

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

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

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

17 **SECOND CAUSE OF ACTION**

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

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

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

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

26 ///

27 ///

28 ///

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

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

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

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

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

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

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

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

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

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

27 a. The BLM; and

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

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

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

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

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

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

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

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

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

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

28

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

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

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

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

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

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

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


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

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

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

14           Dated this 24 day of September 2018.

15                   **PEEL BRIMLEY LLP**

16                     
17                   \_\_\_\_\_  
18                   RICHARD L. PEEL, ESQ.  
19                   Nevada Bar No. 4359  
20                   ERIC ZIMBELMAN, ESQ.  
21                   Nevada Bar No. 9407  
22                   RONALD J. COX, ESQ.  
23                   Nevada Bar No. 12723  
24                   3333 E. Serene Avenue, Suite 200  
25                   Henderson, Nevada 89074-6571  
26                   Attorneys for Brahma Group, Inc.

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**BRAHMA GROUP, INC.'S THIRD-PARTY COMPLAINT**

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

**THE PARTIES**

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

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

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

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

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

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

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

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

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

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

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

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

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

10                  ii.    Constructed on the BLM Parcels, the TSE Parcels, and the Liberty  
11     Parcels.<sup>7</sup>

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

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

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

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

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

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

26                  b.     Is the principal on the Surety Bond.

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

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

9           9.     Cobra, AHAC and the Doe Defendants are collectively referred to in this Third-  
10    Party Complaint as the "Third-Party Defendants."

11                                   FIRST CAUSE OF ACTION  
12                                   (Claim Against Surety, Surety Bond and Principal thereon)

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

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

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

- 20                   a.     The BLM; and  
21                   b.     TSE, even though it had no statutory duty to do so.

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

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

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

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

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

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

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

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

15 c. In writing;

16 d. Recorded against the Work of Improvement; and

17 e. Were given or served on the authorized agents of the BLM and TSE, or the  
18 BLM and/or TSE knew of the existence of the Lien.

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

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

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

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

3 42. Brahma makes claim against and Cobra and AHAC are obligated to Brahma for the  
4 Outstanding Balance plus interest, costs and attorney's fees up to the penal sum<sup>2</sup> of the Surety  
5 Bond as provided in Chapter 108 of the Nevada Revised Statutes.

6 WHEREFORE, Brahma prays that this Honorable Court:

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

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

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


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

15 AFFIRMATION PURSUANT TO NRS 239B.030

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

18 Dated this 24 day of September 2018.

19 PEEL BRIMLEY LLP

20  
21   
22 RICHARD L. PEEL, ESQ.  
23 Nevada Bar No. 4359  
24 ERIC ZIMBELMAN, ESQ.  
25 Nevada Bar No. 9407  
26 RONALD J. COX, ESQ.  
27 Nevada Bar No. 12723  
28 3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074-6571  
Attorneys for Brahma Group, Inc.

<sup>2</sup> Brahma has separately excepted to the sufficiency of the penal sum of the Surety Bond under NRS 108.2425. Nothing herein shall be deemed a waiver of any rights and claims that Brahma may possess under contract, at law or in equity.

# EXHIBIT 3

# EXHIBIT 3

*Steven D. Grierson*

1 **COMP**  
2 RICHARD L. PEEL, ESQ.  
3 Nevada Bar No. 4359  
4 ERIC B. ZIMBELMAN, ESQ.  
5 Nevada Bar No. 9407  
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12 [ezimbelman@peelbrimley.com](mailto:ezimbelman@peelbrimley.com)  
13 *Attorneys for Plaintiff*  
14 **BRAHMA GROUP, INC.**

15 **DISTRICT COURT**  
16 **CLARK COUNTY, NEVADA**

17 BRAHMA GROUP, INC., a Nevada Corporation,  
18 Plaintiff,

19 vs.

20 TONOPAH SOLAR ENERGY, LLC, a Delaware  
21 Limited Liability Company; DOES I through X;  
22 and ROE CORPORATIONS I through X,  
23 Defendants.

CASE NO.: A-18-777815-C  
DEPT. NO.: Department 14

**COMPLAINT**

*(Arbitration Exempt: Amount in  
Controversy Exceeds \$50,000.00)*

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

27 **THE PARTIES**

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

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

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1           3.       BGI and TSE are parties to a Services Agreement that establishes jurisdiction and  
2 venue in this Court with respect to all disputes between the parties. Accordingly, this Court has  
3 jurisdiction over the parties and the subject matter of this action.

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

11                               **FIRST CAUSE OF ACTION**  
                                  **(Breach of Contract)**

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

14           6.       On or about February 1, 2017, BGI entered a Services Agreement (the  
15 "Agreement") with TSE, wherein BGI agreed to provide a portion of the work, materials and/or  
16 equipment (the "Work") for or relating to the Crescent Dunes Concentrated Solar Power Plant  
17 ("the Project") in or near Tonopah, Nevada.

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

20           8.       As required by the Agreement, BGI has, on a monthly basis and in the form and  
21 manner required by the Agreement, provided numerous invoices to TSE for the Work in an amount  
22 totaling in excess of Twenty-Six Million U.S. Dollars (\$26,000,000.00).

23           9.       Pursuant to the Agreement and Nevada law, TSE agreed to and is obligated to pay  
24 BGI for its Work within no more than 45 days after TSE's receipt of BGI's invoices

25           10.      TSE breached the Agreement by, among other things:

- 26                   a.     Failing and/or refusing to pay the Services Fees and other monies owed to  
27                               BGI for the Work; and  
28

1 b. Otherwise failing and/or refusing to comply with the Agreement and  
2 Nevada law.

3 11. BGI is owed an amount in excess of Eleven Million Nine Hundred Thousand U.S.  
4 Dollars (\$11,900,000) (the "Outstanding Balance") from TSE for the Work.

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

8 **SECOND CAUSE OF ACTION**  
**(Breach of Implied Covenant of Good Faith & Fair Dealing)**

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

11 14. There is a covenant of good faith and fair dealing implied in every agreement,  
12 including the Agreement between BGI and TSE.

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

15 16. Specifically, but without limitation, TSE breached its duty to act in good faith by  
16 asserting pre-textual, extra-contractual and inaccurate reasons for withholding payments long after  
17 the time required by the Agreement and Nevada law has elapsed. Also, and as part of the  
18 Outstanding Balance, TSE has improperly withheld moneys totaling in excess of One Million U.S.  
19 Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1). While that statutory  
20 provision permits withholding (on a payment-by-payment basis) a retention amount, not to exceed  
21 five percent (5%), such retention must be authorized pursuant to the Agreement, which is it not.  
22 Furthermore, and even if the Agreement allowed TSE to withhold retention from monthly  
23 payments (which it does not), TSE's withholding of retention amounts retroactively aggregated  
24 from invoices issued (and, in some cases, payments previously made) long ago constitutes extreme  
25 bad faith.

26 17. Due to the actions of TSE, BGI suffered damages in the amount of or exceeding  
27 the Outstanding Balance for which BGI is entitled to judgment in an amount to be determined at  
28 trial.

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

4 **THIRD CAUSE OF ACTION**  
5 **(Unjust Enrichment)**

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

8 20. This cause of action is being pled in the alternative.

9 21. BGI furnished the Work for the benefit of and/or at the specific instance and request  
10 of TSE.

11 22. TSE accepted, used and enjoyed the benefit of the Work.

12 23. Owner and TSE knew or should have known that BGI expected to be paid for the  
13 Work.

14 24. BGI has demanded payment of the Outstanding Balance.

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

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

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

20 **FOURTH CAUSE OF ACTION**  
21 **(Violation of NRS 624)**

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

24 29. NRS 624.609 and NRS 624.610 (the "Statute") requires owners (such as TSE as  
25 defined by the Statute) to, among other things, (i) timely pay their prime contractors (such as BGI  
26 as defined by the Statute), and (ii) respond to payment applications and change order requests, as  
27 provided in the Statute.

28 30. TSE violated the Statute by failing or refusing to comply with the requirements set  
forth therein.

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

PEEL BRIMLEY LLP

**RICHARD L. PEEL, ESQ.**  
Nevada Bar No. 4359  
**ERIC B. ZIMBELMAN, ESQ.**  
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*Attorneys for Plaintiff*  
**BRAHMA GROUP, INC.**

# EXHIBIT 4

# EXHIBIT 4

## SERVICES AGREEMENT

This SERVICES AGREEMENT is made as of February 1, 2017 between:

**Tonopah Solar Energy, LLC**  
("TSE")

AND

**Brahma Group, Inc.**  
("Contractor")

In this Services Agreement (the "**Agreement**"), "TSE Affiliate" means any parent or affiliate of TSE.

1. Mandate and Role of Contractor. TSE agrees to contract with Contractor as an independent contractor and Contractor agrees to contract with TSE as an independent contractor for the Term (as defined below). Contractor shall act hereunder as an independent contractor and no partnership, joint venture, employment or other association shall exist or be implied by reason of this Agreement or the provision of the Services (as defined below).
2. Services. During the Term, Contractor agrees to render to TSE such services as are reasonably necessary to perform the work described in **Exhibit A**, attached hereto and made a part hereof (the "**Services**"). Contractor shall perform the Services and deliver the deliverables, as required by and in accordance with the specifications and standards set forth in **Exhibit A**; if no specifications or standards are indicated, the performance and delivery will be in accordance with industry and professional standards.
3. Term of Contract. The term of this Agreement shall commence on February 7, 2017 and shall end on November 14, 2018, unless extended by TSE in writing, or sooner terminated at any time in writing by TSE at its sole discretion and without any requirement for advance notice (the "**Term**").
4. Services Fees and Reimbursement of Expenses.
  - (a) For all Services rendered by Contractor during the Term, Contractor will receive solely the following fees, and will have no other rights or privileges whatsoever, including without limitation in any employee benefits or plans of TSE or any TSE Affiliate: In full and sole consideration for the Services provided hereunder, TSE shall pay Contractor at an hourly rate, Not to Exceed the aggregate amount specified in **Exhibit A**, at the applicable billing rates detailed in **Exhibit C**.
  - (b) **Exhibit C** contains both Prevailing and Non-Prevailing billing rates. Prior to execution of the work described in **Exhibit A**, the distinction shall be made in writing as to which billing rate is applicable.

- (c) Contractor shall provide to TSE on the 5<sup>th</sup> day of each calendar month an invoice for Services rendered by the Contractor during the relevant monthly period terminating five (5) days prior to the date of such invoice. Except with respect to disputed amounts, each invoice shall be due and payable within forty-five (45) days following TSE's receipt of such invoice accompanied by all applicable Payment Deliverables (as defined in **Exhibit D**).
- (d) TSE will reimburse the Contractor for its reasonable out-of-pocket incidental expenses that are necessary and reasonable for performance of the Services, provided such expenses are approved in advance by TSE's Authorized Representative (designated in **Exhibit A**). Contractor shall provide TSE within five (5) days after the end of each calendar month a written request for reimbursement of such expenses for that month, using a format acceptable to TSE, together with all documentation and receipts supporting each individual expense item. TSE is under no obligation to reimburse the Contractor for any requests for reimbursement not meeting the conditions of this paragraph.

5. Work Policy, Personnel.

- (a) The scope of the Services to be performed hereunder by Contractor shall be coordinated with the Authorized Representative at all times;. TSE is interested only in the results to be achieved, and the conduct and control of the Services and Contractor's workmen will lie solely with Contractor. Though Contractor, in performance of the Services, is an independent contractor with the sole authority and responsibility to control and direct the performance of the details of the Services, the final product and result of the Services must meet the approval of TSE and shall be subject to TSE's general rights of inspection and supervision to secure the satisfactory completion of the Services. TSE may change the Authorized Representative at any time upon written notice to Contractor.
- (b) Contractor shall observe and comply with TSE's and applicable TSE Affiliate's security procedures, rules, regulations, policies, working hours and holiday schedules. Contractor shall use commercially reasonable efforts to minimize any disruption to TSE's and any TSE Affiliate's normal business operations at all times.
- (c) Contractor agrees to comply with TSE's safety programs and all safety requirements promulgated by any local or Federal governmental authority, including without limitation, the requirements of the Occupational Safety and Health Act of 1970 and the Construction Safety Act of 1969 and all standards and regulations which have been and shall be promulgated by the agencies which administer such or similar acts. Contractor shall prevent the use, planned release, or other introduction onto the Plant site, or the exposure to persons and property, of any toxic or hazardous substance, whether subject to regulation or not. Contractor shall clean up and abate any spills or contamination, and restore the affected area to its prior condition and as required by applicable governmental authorities. To the fullest extent allowed by law (and no further),

Contractor shall be solely responsible for and shall indemnify and hold harmless TSE from and against any and all claims, damages, liabilities, costs or expense (including the fees of counsel and other expenses of litigation) suffered or incurred as a result of Contractor's use or introduction onto the Crescent Dunes plant site of any hazardous or toxic substance, whether subject to regulation or not, or Contractor's failure to otherwise abide by the provision of this paragraph. At the completion of the Services, Contractor shall remove all waste materials and rubbish from the Plant site as well as all tools, construction equipment, machinery and surplus materials.

6. Representations and Warranties: Undertakings.

- (a) Contractor represents and warrants that it has the knowledge, skill and experience to provide the Services, that it is a contractor licensed in the State of Nevada, and that all Services will be performed in a good and professional manner in accordance with industry standards and all applicable laws, statutes, regulations or ordinances.
- (b) Contractor represents and warrants that this Agreement and the Services are not in conflict with any other agreement to which Contractor is a party or by which it may be bound.
- (c) Contractor agrees to be solely responsible for payment of compensation, workman's compensation, social security, disability, medical, savings, pension, fringe and other benefits, unemployment insurance and employment tax withholding in relation to its employees (all being the "Payments"). Contractor further agrees to pay, on a monthly basis for the duration of any such claim, TSE's attorney's fees and costs if Contractor, one of Contractor's employees, or someone acting on their behalf, alleges that Contractor, was an employee of TSE or any TSE Affiliate.
- (d) Contractor is and will be an independent contractor. In the event that the Contractor chooses to subcontract a portion of the services described in **Exhibit A**, Contractor shall be fully responsible for any work in accordance with the terms of this agreement.
- (e) If a natural person, the Contractor additionally agrees to be solely responsible for self-employment taxes, unincorporated business taxes, other taxes and payments related to the Services (the "**Self-Employment Payments**"), and agrees to otherwise not be or try to be deemed an employee of TSE or any TSE Affiliate in any way, with respect to Payments, Self-Employment Payments or otherwise.
- (f) Contractor will cooperate in the defense of TSE or any TSE Affiliate against any governmental or other claim made for taxes of any kind related to the Services or this Agreement, or any payment made to Contractor or any person assigned by Contractor. Further, Contractor agrees to indemnify TSE and any TSE Affiliate for the amount of any employment taxes required to be paid by TSE or TSE Affiliate as the result of Contractor not paying any federal, state or local income taxes with respect to the fees or any other payment or benefit received by Contractor with respect to the Services.



7. Intellectual Property Rights.

- (a) If Contractor (alone or with others) during this Agreement or its performance (whichever is longer) or based on information acquired during the same, makes, creates, or otherwise contributes to an idea, concept, improvement, method, invention, discovery, writings, programming, documentation, source code, object code, compilations, design or other work or intellectual property, tangible or intangible, that relates to, affects or is capable of being used in the business of TSE or a TSE Affiliate (all of the above, the specifications and the deliverables, being the "Work"), Contractor will disclose promptly full details of the Work to TSE and, irrespective of such disclosure, hereby assigns and agrees to assign all rights in any patents, patent applications, copyrights, disclosures, or trade secrets, to TSE or such TSE Affiliates as TSE may direct.
- (b) Contractor agrees that the Work shall be deemed "works made for hire" and that TSE or the applicable TSE Affiliate shall be deemed the author and sole, exclusive owner thereof, including all copyrights therein. Contractor hereby transfers, assigns, sells, and conveys to TSE, or to the applicable TSE Affiliate, all of Contractor's right, title and interest in the Work, and in all property of any nature, whether patentable or not, pertaining to the Work, including Contractor's interest in any and all worldwide trade secret, patent, copyright and other intellectual property. All records of or pertaining to the Work shall also be the property of TSE, or the applicable TSE Affiliate. Contractor will not do any act that would or might prejudice TSE or any TSE Affiliate.
- (c) Contractor agrees to execute all documents necessary or desirable in TSE's judgment to confirm TSE's or TSE Affiliate's, as the case may be, ownership interest in the Work, or to document, perfect, record or confirm the rights given to TSE and TSE Affiliates hereunder.
- (d) The Contractor also agrees to assist TSE, at TSE's request and expense, in preparing, prosecuting, perfecting and enforcing the rights of TSE, or of such TSE Affiliate as TSE may direct, in, and its ownership of, any intellectual property including without limitation, U.S. or foreign patents, copyrights, or patent applications for which Contractor may be named as an inventor (including any continuation, continuation-in-part, divisional applications, reissue, or reexamination applications).

8. Confidentiality Provisions.

- (a) Contractor acknowledges that, in the course of performing the Services, Contractor may receive or have access to non-public, proprietary and confidential information from or about TSE and TSE Affiliates, including but not limited to financial, business and technical information and models, names of potential and actual customers or partners, and their affiliates, proposed and actual business deals, transactions, processes, reports, plans, products, strategies, market projections, software programs, data or any other information. All such information, as well as the Work defined above, in whatever form or medium (including without limitation, paper, electronic, voice,

audio, and computer) are collectively referred to herein as "**Confidential Information**".

- (b) Contractor shall keep the Confidential Information confidential and shall not disclose or show such information, in whole or in part to any person, and will make no use of it except for, the sole purpose of performing the Services. Confidential Information shall not in any event be used for Contractor's own benefit or for any purpose detrimental to the interests of TSE or any TSE Affiliate.
  - (c) Without limiting the generality of the foregoing, Contractor agrees that it will not disclose or use TSE's or any TSE Affiliate's customer information provided to it under this Agreement or to which Contractor has access in performing the Services in any way, except for the purpose for which TSE or TSE Affiliates provided it. Contractor also agrees that it will implement information security measures to ensure that it, its employees and any service provider used by it will protect customer information. Contractor further agrees that, upon the reasonable request of TSE, it will provide TSE with copies of audits, test result information, or other measures that will enable TSE to assess whether it is in compliance with this Section 8.
  - (d) No license to Contractor or any other person, under any trademark, patent, copyright, or any other intellectual property right, is either granted or implied by the conveying of any Confidential Information. Within ten (10) days following the receipt of a request from TSE, Contractor will deliver to TSE all tangible materials containing or embodying Confidential Information, together with a certificate of Contractor certifying that all such materials in Contractor's possession or control have been delivered to TSE or the specified TSE Affiliate or destroyed. Contractor shall not assert directly or indirectly any right with respect to the Confidential Information which may impair or be adverse to TSE's or any TSE Affiliate's ownership thereof.
  - (e) Contractor agrees to comply with the confidentiality covenants contained in any other transactional documents to which TSE becomes bound in connection with this Agreement, in each case to the extent more restrictive than the confidentiality provisions otherwise contained in this Section 8.
  - (f) It is expressly understood and agreed that this Section 8 shall survive the termination of this Agreement.
9. No Infringement. Contractor covenants and agrees that the Work does not and will not infringe upon the intellectual property or confidentiality rights of any third party. Contractor will at its cost defend TSE and applicable TSE Affiliates against any claim that the Services, Work, or products used by Contractor so infringe.
10. No Liens.
- (a) Contractor shall not voluntarily permit any laborer's, materialmen's, mechanic's or other similar lien, claim or encumbrance (collectively, "Lien") to be filed or otherwise

imposed on any part of the Services, the materials and equipment necessary for the performance of the Services, or the Crescent Dunes plant site (except to the extent that such Lien arises from TSE wrongfully withholding payment from Contractor). If any such Lien or claim therefor is filed or otherwise imposed, then, in such event, Contractor shall, at the request of TSE, cause such Lien promptly to be released and otherwise discharged. If any Lien is filed and Contractor does not promptly cause such Lien to be released, discharged, or if a bond is not filed to indemnify against or release such Lien, then, TSE shall have the right to pay all sums necessary to obtain such release and discharge and to deduct all amounts so paid by it from any payment owing to Contractor. Contractor shall indemnify and hold harmless TSE from all claims, losses, demands, causes of action or suits of whatever nature arising out of any Lien or claim therefor (except to the extent that such Lien arises from TSE wrongfully withholding payment from Contractor).

- (b) Upon TSE's request at any time, Contractor agrees promptly to furnish such statements, certificates and documents in form and substance satisfactory to TSE, in its sole discretion, which statements, certificates and/or other documents shall include, without limitation, names of Contractor's any permitted subcontractors and suppliers, their addresses, amounts due or to become due or previously paid to such subcontractors and suppliers, information concerning any Lien claims, Lien releases and/or Lien waivers or receipted bills evidencing payment, estimates of the cost of the Services performed to the date of such certificate, and estimates of the cost of completing such Services.
11. Remedies for Breach. Contractor understands and agrees that money damages would not be sufficient remedy for any breach of this Agreement and that TSE or applicable TSE Affiliate shall be entitled to seek injunctive or otherwise equitable relief to remedy or forestall any such breach or threatened breach. Such remedy shall be in addition to all other rights and remedies available at law or in equity.
12. No Consequential Damages. Notwithstanding any other provision in this Agreement, under no circumstances will either party or any affiliate of a party be liable to the other for any consequential, indirect, special, punitive or incidental damages. Each party hereby waives and releases any and all rights which it has, or may have in the future which arises out of or relates to the non-continuation or termination of this Agreement by TSE for any reason, except, however for any rights which Contractor may have for compensation due and payable in accordance with the terms of this Agreement.
13. Right of Publicity. Contractor may not use the name, logo, trademarks or service marks of TSE or TSE Affiliates or any part thereof in any publicity, advertisement or brochure without their prior written consent.
14. Equal Employment. TSE does not discriminate in employment on the basis of sex, age, race, creed, color, religion, sexual orientation, national origin, marital status, disability or any other basis that is prohibited by law. Contractor agrees in providing the Services not to discriminate on any basis and, if an entity, represents that it is an equal employment opportunity firm.

15. Compliance with laws and with advisory guidelines. Contractor will comply with all laws applicable to its business, the Services, and goods and products it provides in the Services.
16. Indemnification.
- (a) Contractor will take proper safeguards for the prevention of accidents or injury to persons or property. Property as used in this Agreement includes money. Money includes, but is not limited to, currency, coin, checks, and/or securities and any other documents or items of value or documents which represent value.
  - (b) Contractor will to the fullest extent permitted by law, indemnify and hold harmless TSE from and against all direct and indirect loss, whether suffered by TSE or others, liability, damages, suits, settlements, judgments, costs and expenses (including without limitation, reasonable attorneys' fees and court costs) (collectively, "Losses"), resulting from any claims, actions or legal proceedings arising from or related to any (i) injury to persons, including death, (ii) damage to property, including loss of property, (iii) loss of use of property, (iv) fidelity or crime loss, or (v) professional services liability, error or omission, in each case of the foregoing (i) through and including (v) arising in connection with the Services, and/or materials or premises supplied by Contractor, or any of its employees, agents, subcontractors, servants or invitees to TSE or which may be caused by any act, negligence, or default whatever of Contractor, its employees, agents, servants or invitees, except to the extent caused by TSE's gross negligence or intentional misconduct.
  - (c) As respects any services provided by Contractor under this Agreement related to money, Contractor assumes liability for all risk of loss or damage should money, in any form, come into its care.
  - (d) It is expressly understood and agreed that the foregoing provisions of this Section 15 shall survive the termination of this Agreement.
  - (e) The term TSE as used in this Section 15 include any of TSE's subsidiaries, affiliates, as well as its and their respective shareholders, directors, officers, agents, representatives, and employees.
17. Insurance. Contractor shall obtain and maintain the insurance requirements outlined in **Exhibit B**, attached hereto and made a part hereof. Each of the insurances that Contractor is required to obtain and maintain under the Agreement shall be with recognized reputable companies acceptable to TSE. Upon request from TSE from time to time, Contractor shall furnish TSE with insurance certificates evidencing that Contractor has complied with the foregoing insurance requirements. In the event that Contractor performs any Services on the site of TSE's Crescent Dunes project in Tonopah, Nevada, Contractor shall comply with the insurance requirements provided by TSE to Contractor.

18. Waiver. If TSE fails or delays in exercising any right, power, or privilege hereunder, this shall not be deemed a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise of any other right, power or privilege hereunder.
19. Amendment. No part of this Agreement may be modified, waived, or amended except in a writing signed by the party to be charged, and solely as to the matters specified in such writing.
20. Successor Provision. This Agreement shall be binding upon and inure to the benefit of Contractor and TSE, and their respective successors, heirs, executors, administrators and assigns, except that neither party hereto may assign or delegate any of its rights or obligations hereunder without the prior written consent of the other party hereto; provided, however, that TSE may assign and delegate to one or more TSE Affiliates.
21. Severability-Survival. If any of the provisions of this Agreement are held invalid, illegal or unenforceable, the remaining provisions shall be unimpaired. The provisions of this Agreement expressly provided as being or intended by their meaning to be of unlimited duration shall survive termination of this Agreement.
22. Headings. Headings are for reference and shall not affect the meaning of any provision of this Agreement.
23. Entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes all previous agreements, promises, proposals, representations, understandings and negotiations, whether written or oral, between the parties respecting the subject matter hereof.
24. Governing Law-Submission to Jurisdiction-Waiver of Jury Trial. This Agreement shall be governed by the laws of the State of Nevada. Contractor 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, and agrees that service on Contractor in such action shall be valid when mailed to Contractor at Contractor's address below. Mediation is a condition precedent to the institution of legal proceedings arising from or relating to this Agreement; provided, however, that either party may file a legal proceeding in advance of mediation if necessary to protect or preserve a legal right, and any such proceeding filed in advance of mediation must be stayed pending mediation for a period of sixty (60) days from the date of filing or for such longer period as the parties may agree or a court may order. Contractor and TSE, on behalf of itself and of applicable TSE Affiliates hereby irrevocably waive any and all right to trial by jury in any action or proceeding arising out of or relating to this Agreement.
25. Notices. All notices, demands or other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given to a Party when delivered personally to such Party or sent to such Party by reputable express courier service (charges prepaid), or mailed to such Party by certified or registered mail, return receipt requested and postage prepaid, to such Party's address

stated in the caption of this Agreement or any other address that such Party has identified as the address for notices by written notice hereunder to the other Party at least thirty (30) days prior to such other Party's notice. Such notices, demands and other communications shall be addressed to each Party at their address provided below.

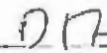
[Signature page follows]

IN WITNESS WHEREOF, TSE and Contractor have caused this Agreement to be executed by a duly authorized officer, or if Contractor is a natural person, Contractor hereby signs in its individual capacity. This Agreement may be executed in counterparts, which, when taken together, will constitute one agreement.

**TONOPAH SOLAR ENERGY, LLC**

By:   
Name: Kevin B. Smith  
Title: President  
Address: 520 Broadway  
6<sup>th</sup> Floor  
Santa Monica, CA 90401  
Email: legal@solarreserve.com  
Fax: (310) 315-2201

**BRAHMA GROUP, INC.**

By:   
Name: David Zimmermann  
Title: VP General Counsel  
Address: 1132 South 500 West  
Salt Lake City, UT 84101  
Email: david.z@bgi.email  
Fax: \_\_\_\_\_

## **EXHIBIT A**

Start Date: February 7, 2017

End Date: November 14, 2018

Hourly Rate: See Exhibit C

Total Not to Exceed (NTE) amount: \$5,000,000

Authorized Representative: Rob Howe, Project Director

### **Scope of Work**

Brahma Group, Inc. will perform work for as directed by TSE which will be described in Work Orders issued by TSE as necessary.



## **EXHIBIT B**

### **INSURANCE REQUIREMENTS**

#### **Insurance Requirements**

Contractor shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Services hereunder by Contractor, its permitted agents, representatives, or employees.

#### **MINIMUM SCOPE AND LIMIT OF INSURANCE**

Coverage shall be at least as broad as:

1. **Commercial General Liability (CGL):** Insurance Services Office Form CG 00 01 12 07 (CG 00 01 04 13, if available) or carrier equivalent covering CGL on an "occurrence" basis, including premises, products and completed operations, property damage, bodily injury and personal & advertising injury with limits no less than One Million (\$1,000,000) per occurrence; Two Million (\$2,000,000) general in the aggregate. Coverage shall include Sudden & Accidental Pollution. Coverage shall be provided on a per-location or per-project basis. If coverage is written on a "claims-made" basis, the policy shall have a three-year (3) extended reporting period following the completion of Services or expiration of the Agreement;
2. **Business Automobile Liability:** Insurance Services Official Form Number CA 00 01 or carrier equivalent covering all owned (if any), hired, and non-owned vehicles with a limit of no less than One Million (\$1,000,000) per accident for bodily injury and property damage.
3. **Workers' Compensation** insurance as required by the State in which work is being performed, with Statutory Limits, and **Employer's Liability** Insurance with a limit of no less than One Million (\$1,000,000) per accident; One Million (\$1,000,000) disease-each employee; One Million (\$1,000,000) disease-policy limit.
4. **Umbrella or Excess Liability** coverage with a limit of no less than Five Million (\$5,000,000) for each occurrence with an annual aggregate of Five Million (\$5,000,000). Policy shall follow the CGL regarding per location or per project coverage basis and shall include (i) Commercial General Liability, (ii) the Business Auto Liability, and (iii) Employers Liability coverage limit of no less than Five Million Dollars (\$5,000,000) (following CGL or a separate policy shall be an underlyer to this policy). If coverage is written on a "claims-made" basis, the policy shall have a three-year (3) extended reporting period following the completion of Services or expiration of the Agreement.

### **Insurance Policy Provisions**

**The insurance policies are to contain, or be endorsed to contain, the following provisions:**

#### ***Additional Insured***

SolarReserve, LLC ("SolarReserve") and TSE, their subsidiaries, sub-subsidiaries, divisions, and members of limited liability company and any affiliated, associated, allied, controlled or interrelated entity over which SolarReserve has control, The United States Department of Energy ("DOE"), and PNC Bank, National Association doing business as Midland Loan Services, a division of PNC Bank, National Association ("PNC") and their respective officers and employees shall be named as additional insured on all policies (except Workers' Compensation/Employer's Liability and Professional Liability) with respect to liability arising out of Services or operations performed by or on behalf of Contractor, including Goods, materials, parts, or equipment furnished in connection with such Services or operations. Additional Insured coverage shall be provided in the form of an endorsement to Contractor's insurance (at least as broad as ISO Form CG 20 10 11 85 or both CG 20 10 "ongoing operations" and CG 20 37 "completed operations" forms (or later versions of or a carrier equivalent of such forms)).

#### ***Primary and Non-Contributory Coverage***

The insurance shall be primary and non-contributory with respect to the insurance provided for the benefit of TSE, SolarReserve, DOE and PNC and their respective officers and employees. Each insurance policy required above shall be included in coverage form or be endorsed to provide Separation of Insureds. Each of the insurances that Contractor is required to obtain and maintain under the Agreement shall be with recognized reputable companies with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to TSE.

#### ***Separation of Insureds***

Each insurance policy required above shall include in coverage form or be endorsed to provide Separation of Insureds.

#### ***Notice of Cancellation***

The insurance policies may not be cancelled, non-renewed or materially changed by Contractor or its subcontractor without giving 30 days or, in the case of cancellation for non-payment of premiums, 10 days, prior written notice. The policies shall be endorsed to provide notice to TSE, SolarReserve, DOE and PNC and their respective officers and employees.

#### ***Waiver of Subrogation***

All such insurance shall include a waiver of any rights of subrogation of the insurer as against

SolarReserve, and TSE, their subsidiaries, sub-subsidiaries, divisions, and members of limited liability company and any affiliated, associated, allied, controlled or interrelated entity over which SolarReserve has control, DOE, and PNC and their respective officers and employees; and shall waive the right of insurer to any set-off, counterclaim, or other deduction of any sort.

***Acceptability of Insurers***

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to TSE.

***Verification of Coverage***

Contractor shall furnish TSE, SolarReserve, the DOE, the Collateral Agent and the Loan Servicer with its own original certificates including carrier-issued endorsements with policy numbers referenced or copies of the applicable policy language effecting coverage required evidencing that Contractor has complied with the foregoing insurance requirements. All certificates and endorsements are to be received and approved by TSE before Contractor commences performing the Services. Failure to obtain the required documents prior to commencement of the Services shall not waive Contractor's obligation to provide them. TSE reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

**EXHIBIT C**  
**BILLING RATES**



CRAFT LABOR RATES  
General Conditions - Support  
**Crescent Dunes Solar Energy Project**  
Tonopah, NV

CLASSIFICATION		Straight Time	Overtime	Double Time
Project Manager	X	150.76	X 199.88	
Field Engineer	X	134.73	X 179.69	
Cost Scheduler	X	134.73	X 179.69	
Superintendent	X	111.33	X 149.19	
QA/QC Manager	X	95.89	X 127.83	
Safety Manager	X	95.89	X 127.83	
Field Safety	X	68.93	X 94.65	
CWI	X	68.93	X 94.65	
Admin	X	57.08	X 75.78	

\* Per Diem - Will be billed in addition to rate listed above.

11-1409-10



CRAFT LABOR RATES

Field

**Crescent Dunes Solar Energy Project**

Tonopah, NV

CLASSIFICATION	Straight Time		Overtime		Double Time
General Foreman	\$	91.26	\$	135.36	
Foreman	\$	90.36	\$	135.18	
Iron Worker	\$	85.43	\$	113.62	
Carpenter	\$	71.92	\$	98.3	
Electrician	\$	83.91	\$	111.60	
Operator	\$	79.62	\$	105.50	
Millwright	\$	85.43	\$	113.62	
Pipe Fitter	\$	86.46	\$	114.99	
Laborer	\$	58.62	\$	73.97	

- Per Diem - Will be billed in addition to rates noted above
- Small hand tools are included in the rate noted above
- Equipment - Will be billed in addition to the rates noted above according to our current rates
- Third Party Costs - Will be billed in addition to the rates noted above with 10% mark up

11-NV-36



**CRAFT LABOR RATES**  
**General Conditions - Support**

**Crescent Dunes Solar Energy Project**

Tonopah, NV

Per 2017 Prevailing Wage Rates Nye County Effective 10/1/16 through 9/30/17

<b>CLASSIFICATION</b>	<b>Straight Time</b>	<b>Overtime</b>	<b>Double Time</b>
Project Manager	\$ 176.78	\$ 215.13	
Field Engineer	\$ 158.50	\$ 210.81	
Cost Scheduler	\$ 158.50	\$ 210.81	
Superintendent	\$ 158.50	\$ 210.81	
QA/QC Manager	\$ 112.81	\$ 150.04	
Safety Manager	\$ 112.81	\$ 150.04	
Field Safety	\$ 81.07	\$ 107.55	
CWI	\$ 81.07	\$ 107.55	
Admin	\$ 67.13	\$ 89.37	

\* Per Diem - Will be billed in addition to rates listed above

11-100x-16



**CRAFT LABOR RATES**

Field

**Crescent Dunes Solar Energy Project**

Tonopah, NV

Per 2017 Prevailing Wage Rates Nye County Effective 10/1/16 through 9/30/17

<b>CLASSIFICATION</b>		<b>Straight Time</b>	<b>Overtime</b>	<b>Double Time</b>
General Foreman	\$	110.50	\$	117.48
Foreman	\$	106.95	\$	141.50
Iron Worker	\$	100.50	\$	133.67
Carpenter	\$	86.97	\$	115.67
Electrician	\$	95.72	\$	131.50
Operator	\$	73.58	\$	74.45
Millwright	\$	89.30	\$	133.67
Pipe Fitter	\$	101.72	\$	135.29
Laborer	\$	69.41	\$	87.02

- Per Diem - Will be billed in addition to rates noted above
- Small hand tools are included in the rates noted above
- Equipment - Will be billed in addition to the rates noted above according to our current rates
- Third Party Costs - Will be billed in addition to the rates noted above with 10% mark up

11-Nov-16



**EXHIBIT D**  
**Payment Deliverables**

Each of Contractor's invoices shall be accompanied by the following documents (collectively, "Payment Deliverables"):

1. with regard to payments sought for work (labor and materials) furnished by subcontractors or suppliers (which may be used only if consented to by TSE), Contractor must identify all subcontractors and suppliers for whose work or materials payment is being sought in the invoice and, in addition to providing such supporting documentation as may be reasonably required or requested by TSE, provide, for each such subcontractor the following information: (a) a brief description of the Services performed for which payment is being sought, (b) the agreed upon price or value of the Services, (c) the amount to be retained or withheld from the subcontractor, and (d) the amount requested for payment to the subcontractor;

2. a duly executed Waiver/Release of Mechanic's Lien from the Contractor and each of the Contractor's subcontractors and suppliers for whom payment is sought, in the form required by TSE, unconditionally waiving and releasing all contractual, statutory and constitutional liens or all claims for payment for the work covered by previously paid invoices;

3. a duly executed Waiver/Release of Mechanic's Lien from the Contractor and each of the Contractor's Subcontractors and Suppliers for whom payment is sought, in the form required by TSE, waiving and releasing all contractual, statutory and constitutional liens or all claims for payment for the work covered by the invoices being submitted, conditioned only upon receipt of the requested payment;

4. In the case of a request for final payment:

(A) a "Bills Paid Affidavit" by Contractor that states, under oath and in a form acceptable to TSE, that all bills or obligations incurred by Contractor through the final completion of the Services have been paid or are as set forth in the affidavit. Amounts unpaid or claimed to be owed by Contractor (including claims asserted by Subcontractors, whether or not disputed by Contractor), including such amounts to be paid to Subcontractors from the final payment requested by Contractor, shall be fully identified in the Affidavit (by name of person to whom payment is owed or who is claiming payment and the amount owed or claimed to be due);

(B) a duly executed Final Waiver/Release of Mechanic's Lien from Contractor and each of the Contractor's subcontractors for whom payment is sought, in the form required by TSE, unconditionally waiving and releasing all contractual, statutory and constitutional liens or all claims for payment for the work covered by previously paid Requests for Payment; and

(C) a duly executed Final Waiver/Release of Mechanic's Lien from Contractor and each of the Contractor's subcontractors and suppliers for whom payment is sought, in the form required by TSE, waiving and releasing all contractual, statutory and constitutional liens or all claims for payment for the work through final completion, conditioned only upon receipt of payment of the amount stated therein, conditioned only upon receipt of the requested payment, which amount must match the amount set forth as

due and owing in the Contractor's Bills Paid Affidavit required under subparagraph (A) above.

5. Contemporaneous with receipt of the final payment (or, at TSE's sole option, after final payment) Contractor shall furnish a duly executed Full and Final Waiver/Release of Mechanic's Lien from the Contractor in the form required by TSE, unconditionally waiving all contractual, statutory and constitutional liens or all claims for payment for the work through final completion thereof. At TSE's option, contemporaneous receipt of such Full and Final Unconditional Lien Waiver shall be a condition to actual payment of the final payment to the Contractor.

# EXHIBIT 5

# EXHIBIT 5

*Steven D. Grierson*

1 **NOTC**

2 D. Lee Roberts, Jr., Esq.  
3 Nevada Bar No. 8877  
4 *lroberts@wwhgd.com*  
5 Colby L. Balkenbush, Esq.  
6 Nevada Bar No. 13066  
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8 WEINBERG, WHEELER, HUDGINS,  
9 GUNN & DIAL, LLC  
6385 South Rainbow Blvd., Suite 400  
Las Vegas, Nevada 89118  
Telephone: (702) 938-3838  
Facsimile: (702) 938-3864  
*Attorneys for Defendant*  
*Tonopah Solar Energy, LLC*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 BRAHMA GROUP, INC., a Nevada corporation,

13 Plaintiff,

14 vs.

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

17 Defendants.

Case No. A-18-777815-B

Dept. No. 11

18 **NOTICE OF REMOVAL TO FEDERAL  
19 COURT**

20 **TO THE EIGHTH JUDICIAL DISTRICT COURT:**

21 PLEASE TAKE NOTICE THAT a Notice of Removal of this action was filed by  
22 Defendant Tonopah Solar Energy, LLC on September 10, 2018 in Nevada Federal District Court.  
23 A copy of the Notice of Removal is attached to this Notice as **Exhibit 1**, and is served and filed  
24 herewith.

25 ///

26 ///

27 ///

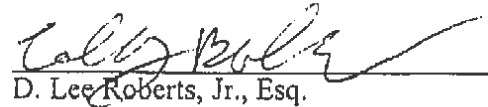
28 ///





1 NOTICE IS FURTHER GIVEN that the filing of the Notice of Removal, together with a  
2 copy of the notice with the Clerk of this Court, effectuates the removal of this action in  
3 accordance with 28 U.S.C. § 1446(d).

4 DATED this 10<sup>th</sup> day of September, 2018.



D. Lee Roberts, Jr., Esq.  
Colby L. Balkenbush, Esq.  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
*Attorneys for Defendant*  
*Tonopah Solar Energy, LLC*



# CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of September, 2018, a true and correct copy of the foregoing **NOTICE TO STATE COURT OF REMOVAL TO FEDERAL COURT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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

*Cynthia S. Bannan*

An employee of WEINBERG, WHEELER, HUDGINS  
GUNN & DIAL, LLC

## **EXHIBIT 1**

## **EXHIBIT 1**

1 D. Lee Roberts, Jr., Esq.  
Nevada Bar No. 8877  
2 *lroberts@wwhgd.com*  
Colby L. Balkenbush, Esq.  
3 Nevada Bar No. 13066  
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5 6385 South Rainbow Blvd., Suite 400  
Las Vegas, Nevada 89118  
6 Telephone: (702) 938-3838  
Facsimile: (702) 938-3864  
7 *Attorneys for Defendant*  
*Tonopah Solar Energy, LLC*  
8  
9

10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

12 BRAHMA GROUP, INC., a Nevada corporation,

Case No.

13 Plaintiff,

14 vs.

**DEFENDANT TONOPAH SOLAR  
ENERGY, LLC'S NOTICE OF  
REMOVAL**

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

17 Defendants.  
18

19 PLEASE TAKE NOTICE that Defendant TONOPAH SOLAR ENERGY, LLC  
20 (hereinafter "TSE"), by and through its attorneys of record, the law firm of WEINBERG,  
21 WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby removes this action from the Eighth Judicial  
22 District Court for Clark County, Nevada, Case No. A-18-777815-B, to the United States District  
23 Court for the District of Nevada. Federal jurisdiction exists over these proceedings pursuant to  
24 28 U.S.C. §§ 1332, 1441, and 1446 because there is complete diversity between the parties and  
25 because the amount in controversy exceeds \$75,000.00. In support of removal, TSE states:

26 I. INTRODUCTION AND BACKGROUND

27 This action arises from a dispute between Plaintiff BRAHMA GROUP, INC. ("Brahma")  
28 and Defendant TSE regarding a services agreement whereby Brahma agreed to perform certain





work at the Crescent Dunes Solar Energy Project for TSE. *See* Plaintiff's Complaint at ¶¶ 5–6, attached hereto as **Exhibit 1**. Plaintiff filed its Complaint on July 17, 2018 in the Eighth Judicial District Court, Clark County, Nevada, case number A-18-777815-B. Plaintiff alleges causes of action for (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Unjust Enrichment; and (4) Violation of NRS 624. Plaintiff alleges it is owed an amount in excess of \$11,900,000.00. *See* Plaintiff's Complaint at ¶ 11.

As more fully set forth below, this case is properly removed to this Court pursuant to 28 U.S.C. § 1441 because TSE has satisfied the procedural requirements for removal and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a).

## II. REMOVAL IS PROPER IN THIS CASE

### A. Complete Diversity Exists Between Plaintiff and Defendant.

Plaintiff is a Nevada corporation with its principal place of business in Utah, and for jurisdictional purposes, is a citizen of both Nevada and Utah. *See* U.S.C. § 1332(c)(1) (“a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”).

Defendant TSE is a limited liability company. Tonopah Solar Energy Holdings II, LLC (“TSEH II”) is the sole member of TSE. TSEH II's members are Capital One, National Association (“Capital One”), and Tonopah Solar Energy Holdings I, LLC (“TSEH I”). Capital One is a national banking association with its main office located in McClean, Virginia, making it a citizen of Virginia.<sup>1</sup> TSEH I's members are Tonopah Solar I, LLC and Tonopah Solar Investments, LLC. Tonopah Solar I, LLC's members are Banco Santander, S.A and Inversiones Capital Global, S.A. Banco Santander, S.A. is an international banking institution with its

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<sup>1</sup> *See* 28 U.S.C. § 1348 (“All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.”); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 303, 126 S. Ct. 941, 942, 163 L. Ed. 2d 797 (2006) (holding that a national banking association is only a citizen of the state in which its main office is located rather than a citizen of every state where it operates or has a branch office).





headquarters and principal place of business in Madrid, Spain, making it a citizen of Spain. Inversiones Capital Global, S.A. is a subsidiary of Banco Santander, S.A. with its principal place of business also in Spain, making it a citizen of Spain. Tonopah Solar Investments, LLC's members are SolarReserve CSP Holdings, LLC and Cobra Energy Investment, LLC. SolarReserve CSP Holdings, LLC's sole member is SolarReserve CSP Finance, LLC. SolarReserve CSP Finance, LLC's sole member is SolarReserve, LLC. The sole member of SolarReserve, LLC is SolarReserve, Inc., which is a corporation formed in Delaware with its principal place of business in Santa Monica, California, making it a citizen of Delaware and California. Cobra Energy Investment, LLC's sole member is Cobra Energy Investment Finance, LLC. Cobra Energy Investment Finance, LLC's sole member is Cobra Industrial Services, Inc., which is a Delaware corporation with its principal place of business in Texas, making it a citizen of Delaware and Texas.

In sum, TSE is a citizen of Spain, Delaware, California, Texas, and Virginia for purposes of diversity jurisdiction. *See Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("an LLC is a citizen of every state of which its owners/members are citizens."). Since Plaintiff is not citizen of any the states Defendant is a citizen of, complete diversity exists.

#### **B. The Amount in Controversy Exceeds \$75,000.00.**

A preponderance of evidence supports that the amount in controversy exceeds \$75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-404 (9th Cir. 1996); *Guglielmino v. McKee Foods Corp.*, 2007 WL 2916193 (9th Cir. Oct. 9, 2007). Here, Plaintiff expressly alleges it is owed an amount in excess of \$11,900,000.00 for work performed. *See* Plaintiff's Complaint ¶ 11, attached hereto as **Exhibit 1**. Based on these allegations, it is clear Plaintiff's claimed damages are in excess of \$75,000. *See Guglielmino*, 2007 WL 2916193, slip op. at n.5. Accordingly, the jurisdictional amount is satisfied in this case.

#### **III. TSE HAS SATISFIED THE PROCEDURAL REQUIREMENT FOR REMOVAL**

This notice is timely filed within 30 days of service of the Complaint and summons. 28 U.S.C. § 1446(b). Specifically, the Complaint was filed July 17, 2018, and Counsel for TSE accepted service on behalf of TSE on August 21, 2018.

Venue, for removal purposes, properly lies in the United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1446(a) because it encompasses the Eighth Judicial District Court, where this action was originally brought.

TSE will file a copy of this Notice of Removal with the Clerk of the Eighth Judicial District Court and will serve a copy on Plaintiff's counsel as required by 28 U.S.C. § 1446(d).

Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and orders that were filed in the state court action are attached hereto as **Exhibit 1**.

#### IV. CONCLUSION

For all the above reasons, it is proper for TSE to remove this action from the Eighth Judicial District Court for Clark County, Nevada to the United States District Court for the District of Nevada.

DATED this 10th day of September, 2018.

/s/ Colby Balkenbush

D. Lee Roberts, Jr., Esq.

Colby L. Balkenbush, Esq.

WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC

6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118

*Attorneys for Defendant*

*Tonopah Solar Energy, LLC*

WEINBERG WHEELER  
HUDGINS GUNN & DIAL



**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of September, 2018, a true and correct copy of the foregoing **DEFENDANT TONOPAH SOLAR ENERGY, LLC'S NOTICE OF REMOVAL** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

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

/s/ Cynthia S. Bowman

An employee of WEINBERG, WHEELER, HUDGINS  
GUNN & DIAL, LLC

WEINBERG WHEELER  
HUDGINS GUNN & DIAL



# EXHIBIT 6

1 D. Lee Roberts, Jr., Esq.  
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2 *lroberts@wwhgd.com*  
Colby L. Balkenbush, Esq.  
3 Nevada Bar No. 13066  
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6 Telephone: (702) 938-3838  
Facsimile: (702) 938-3864  
7  
8 *Attorneys for Defendant/Counterclaimant*  
*Tonopah Solar Energy, LLC*

10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

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

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

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

18  
19 Defendant TONOPAH SOLAR ENERGY, LLC (hereinafter "TSE"), by and through  
20 its attorneys of the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby  
21 submits its Answer to Plaintiff's Complaint ("Complaint").

22 **GENERAL ALLEGATIONS**

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

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



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

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

6                               **FIRST CAUSE OF ACTION**

7                               **(Breach of Contract)**

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

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

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

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

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

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

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

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

26        ///

27        ///

28        ///





**SECOND CAUSE OF ACTION**

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

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

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

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

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

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

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

**THIRD CAUSE OF ACTION**

**(Unjust Enrichment)**

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

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

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

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

///





WEINBERG WHEELER  
HUDGINS GUNN & DIAL



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

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

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

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

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

**FOURTH CAUSE OF ACTION**

**(Violation of NRS 624)**

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

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

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

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

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

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

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

///

///

**AFFIRMATIVE DEFENSES**

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

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

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

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

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





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

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

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

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

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

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

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

28 ///



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

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

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

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

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

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

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

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

28       ///

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

### **TSE'S COUNTERCLAIM**

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

### **JURISDICTION AND PARTIES**

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

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





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

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

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

#### 14 GENERAL ALLEGATIONS

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

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

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

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



1 Energy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7           23.    BGI billing TSE for improper equipment charges.

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

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

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

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

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

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

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

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

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





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

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

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

12 **FIRST CLAIM FOR RELIEF**

13 **(Breach of Contract)**

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

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

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

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

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

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

27 ///

28 ///

**SECOND CLAIM FOR RELIEF**

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

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

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

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

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

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

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

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

**THIRD CLAIM FOR RELIEF**

**(Declaratory Relief)**

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

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



1 charges that are not supported by backup documentation.

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

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

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

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

9 **FOURTH CLAIM FOR RELIEF**

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

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

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

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

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

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

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

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

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

26 ///

27 ///

28 ///



**FIFTH CLAIM FOR RELIEF**

**(Fraudulent/Intentional Misrepresentation)**

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

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

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

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

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

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

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



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

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

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

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

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

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

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

24           76. While TSE believes it has meet the pleading standard under Nev. R. Civ. P.  
25 9(b), TSE avers, that, in the alternative, the relaxed pleading standard set forth in *Rocker v.*  
26 *KPMG LLP*, 122 Nev. 1185, 1195, 148 P.3d 703, 709 (2006), overruled on other grounds by  
27 *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008), applies.

28       ///

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

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

6 **SIXTH CLAIM FOR RELIEF**

7 **(Negligent Misrepresentation)**

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

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

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

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

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

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

21 WHEREFORE, TSE prays for relief as follows:

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



conscious disregard of TSE's rights; and

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

DATED this 17th day of September 2018.



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Colby L. Balkenbush, Esq.  
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GUNN & DIAL, LLC  
6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118

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

WEINBERG WHEELER  
HUDGINS GUNN & DIAL





**CERTIFICATE OF SERVICE**

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

Richard L. Peel, Esq.  
Eric B. Zimbelman, Esq.  
Ronald J. Cox, Esq.  
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*Attorneys for Plaintiff Brahma Group, Inc.*

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

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# EXHIBIT 7

# EXHIBIT 7

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

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

11 BRAHMA GROUP, INC., a Nevada Corporation, 12 Plaintiff, 13 vs. 14 TONOPAH SOLAR ENERGY, LLC, a Delaware Limited Liability Company; DOES I through X; and 15 ROE CORPORATIONS I through X, 16 Defendants. 17 TONOPAH SOLAR ENERGY, LLC a Delaware limited liability company; DOES I through X; and 18 ROE CORPORATIONS I through X, 19 Counterclaimant, 20 vs. 21 BRAHMA GROUP, INC., a Nevada corporation 22 Counterdefendant.	CASE NO.: 2:18-CV-01747-RFB-GWF  <b>FIRST AMENDED COMPLAINT</b>
--	---

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

26 ///  
27 ///  
28 ///

**THE PARTIES**

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

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

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

**FIRST CAUSE OF ACTION**  
**(Unjust Enrichment)**

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

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

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

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

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

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

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

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

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

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

**WHEREFORE**, BGI prays that this Honorable Court:

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

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

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

Dated this 25 day of September, 2018.

**PEEL BRIMLEY LLP**



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**CERTIFICATE OF SERVICE**

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

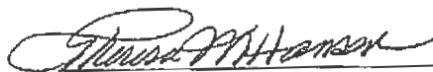
**FIRST AMENDED COMPLAINT**

to be served as follows:

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

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

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# EXHIBIT 8

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

10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

12 BRAHMA GROUP, INC., a Nevada Corporation,

13 Plaintiff,

14 vs.

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

17 Defendants.

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

20 Counterclaimant,

21 vs.

22 BRAHMA GROUP, INC., a Nevada corporation

23 Counterdefendant.

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

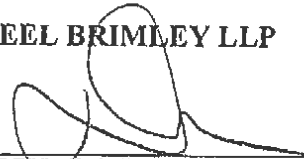
**BRAHMA GROUP, INC.'S MOTION  
FOR STAY, OR IN THE  
ALTERNATIVE, MOTION TO  
AMEND COMPLAINT**

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

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

4 Dated this 16 day of October, 2018.

5 **PEEL BRIMLEY LLP**



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

17 **I. INTRODUCTION**

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

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

28 ///

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

5 **II. STATEMENT OF FACTS**

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

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

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

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

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

18 Thereafter, the Original Lien was amended and/or restated on several occasions and  
19 ultimately increased to \$12,859,577.74, when Brahma caused its Fourth Amended Notice of Lien  
20 ("Fourth Amended Lien") to be recorded on September 14, 2018 with the Nye County Recorder  
21 as Document No. 899351.<sup>3</sup> Brahma's Original Lien and the amendments and restatements thereto,  
22 including the Fourth Amended Lien are referred to collectively herein as the "Brahma Lien."

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

27 <sup>1</sup> A copy of the Agreement is attached hereto as Exhibit 1.

28 <sup>2</sup> A copy of the Original Lien is attached hereto as Exhibit 2.

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

<sup>4</sup> An affiliate of Cobra possesses an indirect ownership interest in TSE.

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1 be recorded with the Nye County Recorder's Office on September 6, 2018, as Document No.  
2 898974 (the "Brahma Surety Bond"). The Brahma Surety Bond (i) was issued by American Home  
3 Assurance Company, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal  
4 ("Principal"), and (iii) was in the amount of \$10,767,580.00.<sup>5</sup>

5 At Brahma's request and in compliance with Nevada law, Cobra caused the Penal Sum of  
6 the Surety Bond to be increased to \$19,289,366.61 or 1.5 times the amount of Brahma's Fourth  
7 Amended Lien by causing a Rider to the Surety Bond (the "Brahma Surety Bond Rider") to be  
8 recorded on October 9, 2018 with the Nye County Recorder's Office as Document No. 900303.<sup>6</sup>  
9 The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as  
10 the "Brahma Surety Bond."

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

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

15 To replace the Work of Improvement as security for the H&E Lien, on September 6, 2018,  
16 Cobra caused a surety bond to be recorded with the Nye County Recorder's Office as Document  
17 No. 898975 (the "H&E Surety Bond"). The H&E Surety Bond (i) was issued by American Home  
18 Assurance Company, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal  
19 ("Principal"), and (iii) is in the amount of \$716,741.10.<sup>7</sup>

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

22 ///

23 ///

24 ///

25  
26 <sup>5</sup> A true and correct copy of the Brahma Surety Bond is attached hereto as Exhibit 7.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 **III. LEGAL ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 Specifically, NRS 108.239(8) provides:

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

17 (a) the court **shall give preference** in setting a date for the trial **of an**  
**action brought pursuant to this section**; and

18 (b) if a lien action is designated as complex by the court, the court  
19 may take into account the rights and claims of all lien claimants in  
20 setting a date for the preferential trial.

21 NRS 108.239(7) provides:

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

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

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1 the object of the lien statutes is to secure payment to those who perform work or furnish material  
2 to improve the property of the owner). Among the protections afforded lien claimants is the  
3 statutory right to a preferential trial setting. By enacting Nevada's mechanic's lien statutes, the  
4 Nevada Legislature has created a means to provide contractors with secured payment for their work,  
5 materials and equipment furnished to construction projects in Nevada inasmuch as "contractors are  
6 generally in a vulnerable position because they extend large blocks of credit; invest significant time,  
7 labor and materials into a project; and have any number of works vitally depend upon them for  
8 eventual payment." *Wilmington Trust FSB v. A1 Concrete Cutting & Demolition, LLC (In re*  
9 *Fontainebleau Las Vegas Holdings, LLC)*, 289 P.3d 1199, 1210 (Nev. 2012).

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

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

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

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

28       ///

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1 **4. Desirability of Avoiding Piecemeal Litigation**

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

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

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

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

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

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

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

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

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

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

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

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

25 ///

26 ///

27 ///

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

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

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

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

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

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

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

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

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

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

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

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

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

27 **I. No Undue Delay**

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

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

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

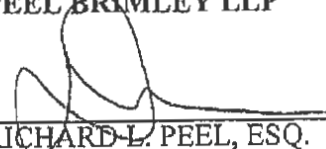
5 Given the infancy of this Case, TSE will suffer no prejudice if Brahma is permitted to  
6 Amend its Complaint to add its contract-based claims. In fact, it is Brahma who would be  
7 prejudiced if this Court does not stay this Case and does not allow Brahma to amend its Complaint.

8 **IV. CONCLUSION**

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

13 Dated this 16 day of October, 2018.

14 **PEEL BRIMLEY LLP**

15   
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19 Nevada Bar No. 10567  
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28 *Attorneys for Plaintiff*  
*BRAHMA GROUP, INC.*

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**CERTIFICATE OF SERVICE**

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

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

to be served as follows:

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

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

D. Lee Roberts, Jr., Esq. (NV Bar No. 8877)  
Colby L. Balkenbush, Esq. (NV Bar No. 13066)  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
Telephone: (702) 938-3838  
[lroberts@wwhgd.com](mailto:lroberts@wwhgd.com)  
[cbalkenbush@wwhgd.com](mailto:cbalkenbush@wwhgd.com)  
*Attorneys for Defendant*  
*Tonopah Solar Energy, LLC*

/s/ Theresa M. Hansen

An employee of PEEL BRIMLEY LLP

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# EXHIBIT 9

# DOC #899351

Official Records Nye County NV  
Deborah Beatty - Recorder  
09/14/2018 04:24:42 PM  
Requested By: PEEL BRIMLEY LLP  
Recorded By: MJ RPTT:\$0  
Recording Fee: \$35.00  
Non Conformity Fee: \$  
Page 1 of 8

APN 012-031-04; 012-131-03;  
APN 012-131-04; 612-141-01;  
APN 012-151-01; 012-141-01;  
APN 012-431-06; 012-140-01; 012-150-01

## Recording Requested By:

Name Ronald J. Cox, Esq. - Peel Brimley LLP  
Address 3333 E. Serene Ave., #200  
City / State / Zip Henderson, NV 89074

## Fourth Amended and/or Restated Notice of Lien

(Print Name Of Document On The Line Above)

☐ I the undersigned hereby affirm that this document submitted for recording contains personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information. The Nevada Revised Statute (NRS), public program or grant referenced is:

(Insert The NRS, public program or grant referenced on the line above.)

Signature

Name Typed or Printed

This page is added to provide additional information required by NRS 111.312 Sections 1-2.  
This cover page must be typed or printed. Additional recording fee applies.

#### ***FOURTH AMENDED AND/OR RESTATED NOTICE OF LIEN***

This Fourth Amended and/or Restated Notice of Lien ("Restated Lien"):

- Amends, restates and incorporates (by this reference):
  - That certain Notice of Lien recorded by Brahma Group, Inc. ("Lien Claimant") in the official records of the County Recorder's Office for Nye County, Nevada, on April 9, 2018, as Document No. 890822 (the "Original Lien");
  - That certain Notice of First Amended and Restated Lien recorded in the Official records of the County Recorder's Office for Nye County, Nevada, on April 16, 2018, as Document No. 891073, and as corrected by Document No. 891507 (collectively, the "First Amended Lien");
  - That certain Notice of Second Amended and Restated Lien recorded in the Official records of the County Recorder's Office for Nye County, Nevada, on April 24, 2018, as Document No. 891766 ("Second Amended Lien"); and
  - That certain Third Amended and/or Restated Notice of Lien recorded in the Official records of the County Recorder's Office for Nye County, Nevada, on July 19, 2018, as Document No. 896269 ("Third Amended Lien");<sup>1</sup> or
- To the extent allowed by law and to the extent the statutory period to record a notice of lien against the Work of Improvement (defined below) has not expired, shall act as a newly recorded notice of lien, which replaces and supersedes the Lien.

By way of this Restated Lien, Lien Claimant:

- Does hereby claim a lien against:
  - The real property described in Exhibit A (the "Land"), to the extent not owned by the Bureau of Land Management ("BLM") or Liberty Moly, LLC; and/or
  - The improvements located and constructed on the Land, including, but not limited to the improvements identified as the Crescent Dunes Solar Energy Plant (collectively, the "Improvements").
- Does hereby reserve the right to further amend this Restated Lien or to record a new notice of lien with respect to the Work it has furnished or may furnish on, about or for the benefit of any part of portion of the overall Work of Improvement (defined below), for which it is not paid, even if the same was previously the subject of the Lien; and

---

<sup>1</sup> The Original Lien, First Amended Lien, Second Amended Lien and Third Amended Lien are collectively referred to herein as the "Lien."

- Does not cancel, withdraw, discharge or release and expressly reserves all rights, remedies and claims that it may possess with respect to the Work it has furnished or may furnish on, about or for the benefit of the Improvements and the Work of Improvement.
1. The amount of the original contract is:
    - \$27,315,971.63.
  2. The amount of additional or changed work, materials and equipment, if any, is:
    - \$0.00.
  3. The total amount of all payments received to date is:
    - \$14,456,393.89.
  4. The amount of the lien, after deducting all just credits and offsets, is:
    - \$12,859,577.74.
  5. The name of the owner, if known, of the Improvements is:
    - Tonopah Solar Energy, LLC, including its subsidiaries and all other related or associated entities (collectively, "TSE").
    - Upon information and belief, TSE's principal address is believed to be 520 Broadway, 6<sup>th</sup> Floor, Santa Monica, CA 90401.
  6. The name of the owner, if known, of the Land is:
    - As to APNs 612-141-01, 012-031-04, 012-131-03, 012-131-04:
      - TSE, with its principal address at 520 Broadway, 6<sup>th</sup> Floor, Santa Monica, CA 90401.
    - As to APNs 012-151-01 and 012-141-01:
      - The Bureau of Land Management ("BLM"), with its principal address at 1340 Financial Blvd., Reno, NV 89502.
    - As to APN 012-431-06:
      - Liberty Moly, LLC, with its principal address at 790 Commercial St. #B, Elko, NV 89801-3858.
    - As to APNs 012-140-01 and 012-150-01:
      - Unknown.
  7. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment is:
    - TSE, with its principal address at 520 Broadway, 6<sup>th</sup> Floor, Santa Monica, CA 90401.
  8. A brief statement of the terms of payment of the lien claimant's contract is:
    - As required by Nevada law, but in no event later than 45 days after the submission of an invoice.

9. A description of the Land and the Improvements thereon to be charged with the Restated Lien (the "Work of Improvement") is:
- See Attached Exhibit A.

**BRAHMA GROUP, INC.**

By   
Print Name: Sean Davis  
Title: President and Chief Operating Officer

STATE OF UTAH                    )  
  ) ss:  
COUNTY OF SALT LAKE    )


Sean Davis, being first duly sworn on oath according to law, deposes and says:

I have read the foregoing Fourth Amended and/or Restated Notice of Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon information and belief, and, as to those matters, I believe them to be true.

**BRAHMA GROUP, INC.**

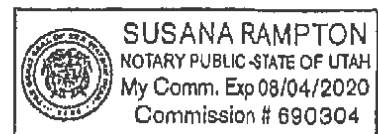
By   
Print Name: Sean Davis  
Title: President and Chief Operating Officer

SUBSCRIBED AND SWORN to before me this 18<sup>th</sup> day of September 2018, by Sean Davis, President and Chief Operating Officer of Brahma Group, Inc.

  
\_\_\_\_\_  
NOTARY PUBLIC In and For Said  
County & State

RECORDED AT THE REQUEST OF  
AND WHEN RECORDED RETURN  
TO:

*Brahma Group, Inc.*  
c/o PEEL BRIMLEY LLP  
3333 E. Serene Avenue Suite 200  
Henderson, NV 89074-6571



## EXHIBIT A

### Improvements:

The Crescent Dunes Solar Energy Project is a 110 MW plant constructed on the Land in Tonopah, Nevada.

### Land:

Nye County Assessor Parcels:

APN	Owner or Reputed Owner
012-031-04	Tonopah Solar Energy, LLC
012-131-03	Tonopah Solar Energy, LLC
012-131-04	Tonopah Solar Energy, LLC
012-140-01	Unknown
012-150-01	Unknown
012-141-01	Bureau of Land Management
012-431-06	Liberty Moly, LLC
012-151-01	Bureau of Land Management
612-141-01	Tonopah Solar Energy, LLC

AND MORE PARTICULARLY DESCRIBED BY DOCUMENTS PREPARED BY OR FOR TONOPAH SOLAR ENERGY, LLC AS FOLLOWS:

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

#### PARCEL 1: GEN-TIE LINE (NVN-087933)

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

- Section 2: The SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  and the W  $\frac{1}{2}$  SE  $\frac{1}{4}$ ;
- Section 11: The W  $\frac{1}{2}$  NE  $\frac{1}{4}$ , the W  $\frac{1}{2}$  SE  $\frac{1}{4}$  and the E  $\frac{1}{2}$  SW  $\frac{1}{4}$ ;
- Section 14: The NE  $\frac{1}{4}$  NW  $\frac{1}{4}$ , the W  $\frac{1}{2}$  NW  $\frac{1}{4}$  and the NW  $\frac{1}{4}$  SW  $\frac{1}{4}$ ;
- Section 15: The E  $\frac{1}{2}$  SE  $\frac{1}{4}$  and the SW  $\frac{1}{4}$  SE  $\frac{1}{4}$ ;
- Section 22: The NE  $\frac{1}{4}$  NE  $\frac{1}{4}$ , the W  $\frac{1}{2}$  NE  $\frac{1}{4}$ , the SE  $\frac{1}{4}$  NW  $\frac{1}{4}$ , the E  $\frac{1}{2}$  SW  $\frac{1}{4}$ , the SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  and the NW  $\frac{1}{4}$  SE  $\frac{1}{4}$ ;
- Section 27: The NE  $\frac{1}{4}$  NW  $\frac{1}{4}$  and the W  $\frac{1}{2}$  NW  $\frac{1}{4}$ ;
- Section 28: The SE  $\frac{1}{4}$  NE  $\frac{1}{4}$ , the E  $\frac{1}{2}$  SE  $\frac{1}{4}$  and the SW  $\frac{1}{4}$  SE  $\frac{1}{4}$ ;
- Section 33: The NW  $\frac{1}{4}$  NE  $\frac{1}{4}$

PARCEL 2: SOLAR ENERGY PROJECT (NVN-086292)

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

- Section 33: The SE  $\frac{1}{4}$ , the E  $\frac{1}{2}$  SW  $\frac{1}{4}$ , the E  $\frac{1}{2}$  SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ , the E  $\frac{1}{2}$  SE  $\frac{1}{4}$  NW  $\frac{1}{4}$ , the S  $\frac{1}{2}$  NE  $\frac{1}{4}$ , the NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  and the SE  $\frac{1}{4}$  NW  $\frac{1}{4}$  NE  $\frac{1}{4}$ ;
- Section 34: The W  $\frac{1}{2}$ , the SE  $\frac{1}{4}$ , the W  $\frac{1}{2}$  NE  $\frac{1}{4}$ , the SE  $\frac{1}{4}$  NE  $\frac{1}{4}$  and the SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  NE  $\frac{1}{4}$ ;
- Section 35: The SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  NW  $\frac{1}{4}$ , the SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ , the SE  $\frac{1}{4}$  NW  $\frac{1}{4}$  SW  $\frac{1}{4}$  and the W  $\frac{1}{2}$  NW  $\frac{1}{4}$  SW  $\frac{1}{4}$ .

All that property lying within Township 4 North, Range 41 East, M.D.B.&M., in the County of Nye, State of Nevada, according to the Official Plat thereof, described as follows:

- Section 2: Lot 4 and the W  $\frac{1}{4}$  SW  $\frac{1}{4}$  NW  $\frac{1}{4}$
- Section 3: The N  $\frac{1}{2}$ , the NW  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the N  $\frac{1}{2}$  NE  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the NW  $\frac{1}{4}$  SW  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the N  $\frac{1}{2}$  SW  $\frac{1}{4}$ , the N  $\frac{1}{2}$  S  $\frac{1}{2}$  SW  $\frac{1}{4}$  and the SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  SW  $\frac{1}{4}$ ;
- Section 4: The NE  $\frac{1}{4}$ , the N  $\frac{1}{2}$  SE  $\frac{1}{4}$ , the E  $\frac{1}{2}$  SE  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the NW  $\frac{1}{4}$  SE  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  SE  $\frac{1}{4}$ , the NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  SW  $\frac{1}{4}$ , the E  $\frac{1}{2}$  NW  $\frac{1}{4}$ , the E  $\frac{1}{2}$  of Lot 4 and the NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  NW  $\frac{1}{4}$

PARCEL 3:

ANACONDA-MOLY SUBSTATION EXPANSION (NVN-089273)

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

Section 2: The E  $\frac{1}{2}$  NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  NE  $\frac{1}{4}$

And

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

BEGINNING AT THE SOUTHEAST CORNER OF SAID LOT 2; THENCE ALONG THE SOUTH LINE THEREOF, NORTH 88°34'27" WEST, 331.44 FEET TO THE NORTHWEST CORNER OF THE EAST HALF (E  $\frac{1}{2}$ ) OF THE NORTHEAST QUARTER (NE  $\frac{1}{4}$ ) OF THE SOUTHWEST QUARTER (SW  $\frac{1}{4}$ ) OF THE NORTHEAST QUARTER (NE  $\frac{1}{4}$ ) OF SAID SECTION 2;



THENCE ALONG THE NORTHERLY PROLONGATION OF THE WEST LINE THEREOF, NORTH 00°20'22" EAST, 663.03 FEET; THENCE SOUTH 88°42'55" EAST, 331.39 FEET TO THE EAST LINE OF SAID LOT 2; THENCE ALONG SAID EAST LINE, SOUTH 00°20'11" WEST, 663.85 FEET TO THE POINT OF BEGINNING.

PARCEL 4-1:

The North One Half (N ½) of the Southeast Quarter (SE ¼) and the Southeast Quarter (SE ¼) of the Southeast Quarter (SE ¼) of Section 12 in Township 6 North, Range 40 East, M.D.B.&M., according to the Official Plat of said Land on file in the Office of the Bureau of Land Management.

Said land is also known as Parcel 4 of Parcel Map recorded July 25, 1980, as File No. 26731, Nye County, Nevada Records.

PARCEL 4-2:

Lots One (1) and Two (2) in the Northwest Quarter (NW ¼) of Section 18, Township 6 North, Range 41 East, M.D.B.&M., according to the Official Plat of said land on file in the Office of the Bureau of Land Management.

Said land is also known as Parcel Two (2) of Parcel Map recorded July 25, 1980 as File No. 26731, Nye County, Nevada Records.

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

Commencing at the Northeast corner of Section 13, Township 6 North, Range 40 East, M.D.B.&M.;

Thence South 200 feet at the True Point of Beginning;

Continuing South for 50 feet;

Thence Westerly for 20 feet;

Thence Northerly for 50 feet;

Thence Easterly for 20 feet, at the true point of beginning.

PARCEL 4-3

East Half (E ½) of the Northwest Quarter (NW ¼) of Section 18, Township 6 North, Range 41 East, M.D.B. & M., according to the Official Plat of said land on file in the Office of the Bureau of Land Management.

Said land is also known as Parcel One (1) of Parcel Maps, recorded July 25, 1980 as File No. 26731, Nye County, Nevada Records.

PARCEL 5:

All land defined as "Servient Property," described and depicted in that certain document entitled "Grant of Generation-Tie Easement" recorded September 14, 2011 as Document No. 772385, Official Records, Nye County, Nevada, being a portion of the Southeast Quarter (SE ¼) of the Northeast Quarter (NE ¼) of Section 2, Township 5 North, Range 41 East, M.D.B.&M., according to the Official Plat thereof, EXCEPTING THEREFROM any portion conveyed to Sierra Pacific Power Company by a Deed recorded January 1, 1981 in Book 295, Page 553 as File No. 36411 of Official Records, Nye County, Nevada.

### CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of September 2018, I served a true and correct copy of Brahma Group, Inc.'s Fourth Amended and/or Restated Notice of Lien on the interested parties by serving the same in the following manner to the addresses listed below:

OWNER	MANNER OF SERVICE
BLM Washington Office 1849 C Street NW, Rm 5665 Washington, DC 20240	Certified Mail – 7017 3040 0000 8289 7541 Regular Mail
BLM Nevada Office 1340 Financial Blvd. Reno, NV 89502	Certified Mail – 7017 3040 0000 8289 7558 Regular Mail
Bureau of Land Management Tonopah Field Station PO Box 911 Tonopah, NV 89049	Certified Mail – 7017 3040 0000 8289 7565 Regular Mail
Liberty Moly, LLC 790 Commercial St., #B Elko, NV 89801-3585	Certified Mail – 7017 3040 0000 8289 7572 Regular Mail
Liberty Moly, LLC c/o Ross Delipkau 50 West Liberty Street Reno, NV 89501	Certified Mail – 7017 3040 0000 8289 7589 Regular Mail
<b>OWNER/LESSEE</b>	
Tonopah Solar Energy, LLC c/o Kevin B. Smith, President 520 Broadway, 6 <sup>th</sup> Floor Santa Monica, CA 90401	Certified Mail – 7017 3040 0000 8289 7596 Regular Mail
Tonopah Solar Energy LLC c/o CSC Services of Nevada Inc. 2215 B Renaissance Drive Las Vegas, NV 89119	Certified Mail – 7017 3040 0000 8289 7602 Regular Mail
Tonopah Solar Energy, LLC c/o SolarReserve LLC Attn: Rob Howe 7881 W. Sahara Avenue, Suite 230 Las Vegas, NV 89117	Certified Mail – 7017 3040 0000 8289 7619 Regular Mail
D. Lee Roberts, Jr., Esq. Colby L. Balkenbush, Esq. Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC 6385 S. Rainbow Blvd., Suite 400 Las Vegas, NV 89118	Certified Mail – 7017 3040 0000 8289 7626 Regular Mail

  
Employee of PEEL BRIMLEY LLP

RA000140

13-\*

# **EXHIBIT 10**

# **EXHIBIT 10**

1 Geoffrey Crisp, Esq.  
Nevada Bar No. 2104  
2 Jeremy R. Kilber, Esq.  
Nevada Bar No. 10643  
3 WEIL & DRAGE, APC  
4 2500 Anthem Village Drive  
Henderson, NV 89052  
5 (702) 314-1905 • Fax (702) 314-1909  
6 [gcrisp@weildrage.com](mailto:gcrisp@weildrage.com)  
[jkilber@weildrage.com](mailto:jkilber@weildrage.com)  
7 Attorneys for  
8 COBRA THERMOSOLAR PLANTS, INC.

9  
10 **FIFTH JUDICIAL DISTRICT COURT**

**NYE COUNTY, NEVADA**

11 TONOPAH SOLAR ENERGY, LLC, a ) Case No.: CV 39348  
12 Delaware limited liability company, ) Dept. No.: 2

13 Plaintiff, )

14 vs. )

15 BRAHMA GROUP, INC., a Nevada )  
16 corporation, )

17 Defendant. )

18 BRAHMA GROUP, INC., a Nevada )  
19 corporation, )

20 Counterclaimant/Lien Claimant, )

21 vs. )

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

27 Counterdefendant, )

**CERTIFICATE OF SERVICE**

28  
WEIL & DRAGE  
ATTORNEYS AT LAW  
2500 Anthem Village Drive  
Henderson, NV 89052  
Phone: (702) 314-1905  
Fax: (702) 314-1909  
[www.weildrage.com](http://www.weildrage.com)

{01467320;1}

**CERTIFICATE OF SERVICE**

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that I am an employee of WEIL & DRAGE, APC, and that on this 9<sup>th</sup> day of October, 2018, I caused the following documents:

1. 10/09/2018 Recorded Doc #900303

Surety Rider Bond 854481 Posted to Release Lien with Power of Attorney; and

2. 09/24/2018 Affidavit of Service of 09/06/2018 Recorded Doc #898974

Surety Bond 85441 Posted to Release Lien with Power of Attorney.

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 Henderson, Nevada; and

By facsimile; and

By email transmission

to the attorneys listed below at the address, facsimile and email transmission indicated below:

Richard L. Peel, Esq.  
Eric B. Zimbelman, Esq.  
Ronald J. Cox, Esq.  
Terri Hansen, Paralegal  
PEEL BRIMLEY LLP  
3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074-6571  
(702) 990-7273 Fax  
[Peel@PeelBrimley.com](mailto:Peel@PeelBrimley.com)  
[Zimbelman@PeelBrimley.com](mailto:Zimbelman@PeelBrimley.com)  
[RCox@PeelBrimley.com](mailto:RCox@PeelBrimley.com)  
[thansen@peelbrimley.com](mailto:thansen@peelbrimley.com)

Attorneys for  
BRAHMA GROUP, INC.

Colby Balkenbush, Esq.  
WEINBERG WHEELER HUDGINS  
GUNN & DIAL  
6385 South Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
702.938.3864 Fax  
[CBalkenbush@wwhgd.com](mailto:CBalkenbush@wwhgd.com)  
Attorney for  
TONOPAH SOLAR ENERGY, LLC

/s/ Ana M. Maldonado

Ana M. Maldonado, An Employee of  
WEIL & DRAGE, APC

**DOC #900303**

Official Records Nye County NV  
Deborah Beatty - Recorder  
10/09/2018 11:13:27 AM  
Requested By: WEIL & DRAGE APC  
Recorded By: kd RPTT:\$0  
Recording Fee: \$35.00  
Non Conformity Fee: \$  
Page 1 of 3

APN 012-031-04; 012-131-03; 012-131-04;

APN 012-140-01; 012-141-01; 012-431-06;

APN 012-150-01; 012-151-01; and

APN 612-141-01.

Recording Requested By:

Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, NV 89052

Surety Rider Bond 854481 Posted to Release Lien with Power of Attorney

Title of Document (required)

**\*\*Only use below if applicable\*\***

This document is being re-recorded to correct document number \_\_\_\_\_  
and is correcting \_\_\_\_\_

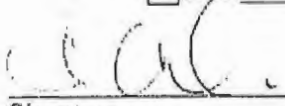
I the undersigned hereby affirm that this document submitted for recording does contain personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information. The Nevada Revised Statute (NRS), public program or grant referenced is: (check applicable)

☐ Affidavit of Death - NRS 440.380(1)(A) & NRS 40.525(5)

☐ Judgment - NRS 17.150(4)

☐ Military Discharge - NRS 419.020(2)

☐ Other \_\_\_\_\_

  
Signature

Ana M. Maldonado

Name Typed or Printed

This page is added to provide additional information required by NRS 111.312 Sections 1-2.  
This cover page must be typed or printed.

RA000145



## SURETY RIDER

To be attached to and form a part of American Home Assurance Company

Bond No. 254481

dated 08/15/2018  
effective (MONTH DAY YEAR)

executed by Cobra Thermosolar Plants, Inc. as Principal,  
(PRINCIPAL)

and by American Home Assurance Company, as Surety,

in favor of Brahma Group Inc.  
(COBLENCE)

In consideration of the mutual agreements herein contained the Principal and the Surety hereby consent to changing

The Bond Amount as follows:

From \$10,767,580.00

To \$18,289,386.61

and

The Lien Amount as follows:

From \$7,178,386.94

To \$12,859,577.74

Nothing herein contained shall vary, alter or extend any provision or condition of this bond except as herein expressly stated.

This rider  
is effective 08/15/2018  
(MONTH DAY YEAR)

Signed and Sealed 09/25/2018  
(MONTH DAY YEAR)

Cobra Thermosolar Plants, Inc.  
(PRINCIPAL)

By: José Antonio Fernández  
(PRINCIPAL)

American Home Assurance Company

By: Tannis Mattson Attorney-in-Fact  
(SURETY)

## POWER OF ATTORNEY

American Home Assurance Company  
 National Union Fire Insurance Company of Pittsburgh, PA.  
 Principal Bond Office, 175 Water Street, New York, NY 10038

Power No. 7212

No. 21-01-002348

## KNOW ALL MEN BY THESE PRESENTS:

That American Home Assurance Company, a New York corporation, and National Union Fire Insurance Company of Pittsburgh, PA., a Pennsylvania corporation, does each hereby appoint

Mary Ann Garcia, Gloria Mackon, Melissa Shepherd, Terri Morrison, Lanni Sudduth,  
 Sandra Parker, Gina A. Rodriguez, Tawana Mackon, Mario Arzuena Jr., Orlando Aguirre: of Houston, Texas

its true and lawful Attorney(s)-in-Fact, with full authority to execute on its behalf bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. have each executed these presents

This 16th day of May, 2018



Michael Yang, Vice President

STATE OF NEW YORK )  
 COUNTY OF NEW YORK ) ss.

On this 16th day of May, 2018, before me came the above named officer of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA., or me personally known to be the individual and officer described herein, and acknowledged that he executed the foregoing instrument and affixed the seals of said corporations therein by authority of his office.

*Juliana Hallenbeck*  
 JULIANA HALLENBECK  
 Notary Public - State of New York  
 My Comm. Exp. 01/01/2021  
 Certified in Good Standing  
 My Commission Expires April 18, 2021

## CERTIFICATE

Excerpts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. on May 18, 1978:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and he/she is, authorized to appoint Attorney(s)-in-Fact to represent and act for and on behalf of the Company to execute bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, and to attach thereto the corporate seal of the Company, in the transaction of its strict business.

"RESOLVED, that the signatures and attestations of such officers, and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by this rule, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance and other contract of indemnity and writing obligatory in the nature thereof.

"RESOLVED, that any such Attorney-in-Fact delivering a secretarial certification that the foregoing resolutions still be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact."

I, Martin Hogue, Assistant Secretary of American Home Assurance Company and of National Union Fire Insurance Company of Pittsburgh, PA. do hereby certify that the foregoing excerpts of Resolutions adopted by the Boards of Directors of these corporations, and the Powers of Attorney issued pursuant thereto, are true and correct, and that both the Resolutions and the Powers of Attorney are in full force and effect.

IN WITNESS WHEREOF, I have herein set my hand and affixed the facsimile seal of each corporation



This 15th day of September, 2018

Martin Hogue, Assistant Secretary

(65166) (4/96)

Attorney or Party without Attorney: Weill R. Drage, APC 2500 Anthem Village Drive, 2nd Floor Henderson, NV 89052 Telephone No: (702) 314-1905 Attorney For:				For Court Use Only	
				Ref. No. or File No.: 2803.001 CRESCENT DUNES	
Insert name of Court, and Judicial District and Branch Court:					
Plaintiff: Defendant:					
AFFIDAVIT OF SERVICE		Hearing Date:	Time:	Dept/Div:	Case Number: DOC #098974

- At the time of service I was at least 18 years of age and not a party to this action.
- I served copies of the NRS 108.2415 Surety Bond 854481 Posted to Release Lien with Power of Attorney, Power of Attorney
- Party served: Brahma Group, Inc.
  - Person served: Amber-Rose Aparicio, Authorized Agent, a person of suitable age and discretion at the most recent street address of the registered agent shown on the Information filed with the Secretary of State.
- Address where the party was served: Cogency Global Inc. - Registered Agent  
321 W. Winnie Lane, #104, Carson City, NV 89703
- I served the party:
  - by personal service. I personally delivered the documents listed in Item 2 to the party or person authorized to receive process for the party (1) on: Fri, Sep 14 2018 (2) at: 02:40 PM

Fee for Service: \$0.00

I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

- Person Who Served Papers:
  - Toni Ruckman (R-052005, Washoe)
  - FIRST LEGAL  
NEVADA PI/PS LICENSE 1452  
2920 N. GREEN VALLEY PARKWAY, SUITE 514  
HENDERSON, NV 89014
  - (702) 671-4002

24 Sept 18 (Date)      Toni Ruckman (Signature)

- STATE OF NEVADA, COUNTY OF Clark  
 Subscribed and sworn to (or affirmed) before on this 24 day of Sept, 2018 by Toni Ruckman (R-052005, Washoe)  
 proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Amber-Rose Aparicio  
 (Notary Signature)



AFFIDAVIT OF SERVICE

26-11854  
(55000604)

RA000148

**DOC #898974**

Official Records Nye County NV  
Deborah Beatty - Recorder  
09/06/2018 11:58:11 AM  
Requested By: WEIL & DRAGE APC  
Recorded By: MJ RPTT:\$0  
Recording Fee: \$35.00  
Non Conformity Fee: \$  
Page 1 of 4

APN 012-031-04; 012-131-03; 012-131-04;  
APN 012-140-01; 012-141-01; 012-431-06;  
APN 012-150-01; 012-151-01; and  
APN 612-141-01.  
Recording Requested By:  
Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

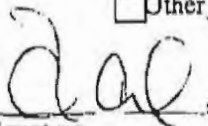
NRS 108.2415 Surety Bond 854481 Posted to Release Lien with Power of Attorney

Title of Document (required)  
\*\*Only use below if applicable\*\*

This document is being re-recorded to correct document number \_\_\_\_\_  
and is correcting \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I the undersigned hereby affirm that this document submitted for recording does contain personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information. The Nevada Revised Statute (NRS), public program or grant referenced is: (check applicable)

- ☐ Affidavit of Death - NRS 440.380(1)(A) & NRS 40.525(5)  
☐ Judgment - NRS 17.150(4)  
☐ Military Discharge - NRS 419.020(2)  
☐ Other \_\_\_\_\_

  
Signature

Ana M. Maldonado, Paralegal  
Name Typed or Printed

This page is added to provide additional information required by NRS 111.312 Sections 1-2.  
This cover page must be typed or printed.

NRS 108.2415 Form of surety bond posted to release lien:

Bond #854481

(Assessor's Parcel Numbers: 012-031-04; 012-131-03; 012-131-04; 612-141-01; 012-431-06; 012-140-01; 012-150-01; 012-151-01; 012-141-01)

WHEREAS, Cobra Thermosolar Plant Inc. (name of principal), located at 11 Miles North Gabbs Pole Line Road, Tonopah, NV 89049 (address of principal), desires to give a bond for releasing the following described property owned by Tonopah Solar Energy, LLC (name of owners) from that certain notice of lien in the sum of \$7,178,386.94 recorded July (month) 19 (day) 2018 (year), in the office of the recorder in Nye County (name of county where the property is located):

## Crescent Dunes Solar Energy Project

NOW, THEREFORE, the undersigned principal and surety do hereby obligate themselves to the lien claimant named in the notice of lien, Brahma Group, Inc. (name of lien claimant) under the conditions prescribed by NRS 108.2413 to 108.2425, inclusive, in the sum of \$10,767,580.00 (1 1/2 x lienable amount), from which sum they will pay the lien claimant that amount as a court of competent jurisdiction may adjudge to have been secured by the lien, including the total amount awarded pursuant to NRS 108.237, but the liability of the surety may not exceed the penal sum of the surety bond.

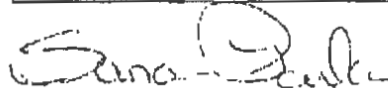
IN TESTIMONY WHEREOF, the principal and surety have executed this bond at Houston, Texas on the 15th day of August, 2018.

Cobra Thermosolar Plant, Inc.



(Signature of Principal) Carlos Ramirez Visser

American Home Assurance Company



Sandra Parker, Attorney-in-Fact

State of Texas }  
 } ss.  
 County of Harris }

On August 15, 2018, before me, the undersigned, a notary public of this County and State, personally appeared Sandra Parker known (or satisfactorily proved), who acknowledged that he or she executed the foregoing instrument for the principal and the surety for the purposes therein mentioned, Sandra Parker known (or satisfactorily proved) to me to be the attorney in fact of the surety that executed the foregoing instrument, known to me to be the person who executed that instrument on behalf of the surety therein named, and he or she acknowledged to me that the surety executed the foregoing instrument.

  
(Notary Public in and for the County of Harris and State of Texas)  
Laura Elizabeth Sudduth Commission Expires: 04/20/2022





## POWER OF ATTORNEY

American Home Assurance Company  
National Union Fire Insurance Company of Pittsburgh, PA.  
Principal Bond Office: 115 Water Street, New York, NY 10013

Power No. 7188

No. 31-G-002348

## KNOW ALL MEN BY THESE PRESENTS:

That American Home Assurance Company, a New York corporation, and National Union Fire Insurance Company of Pittsburgh, PA., a Pennsylvania corporation, does each hereby appoint

Mary Ann Gerich, Gloria Minton, Marissa Shepherd, Terri Morrison, Lauren Sudholt,  
Stacey Parker, Gina A. Rodriguez, Tannis Mattson, Mario Arzuendo, Orlando Aguirre, of Houston, Texas

its true and lawful Attorney-in-Fact, with full authority to execute on its behalf (jointly, severally, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, issued in the course of its business, and to bind the respective companies thereby.

IN WITNESS WHEREOF, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. have each executed these presents



this 15th day of May, 2018

*Michael Yang*  
Michael Yang, Vice President

STATE OF NEW YORK )

COUNTY OF NEW YORK ) ss.

On this 15th day of May, 2018, before me came the above named  
Officer of American Home Assurance Company and National Union Fire  
Insurance Company of Pittsburgh, PA., to me personally known to be the  
individual and officer described herein, and acknowledged that he executed the  
 foregoing instrument and affixed the seals of said corporations thereto by  
 authority of his office.

*Juliana Hallenbeck*  
JULIANA HALLENBECK  
Notary Public - State of New York  
No. 01428125071  
Office: In Essex County  
My Commission Expires April 18, 2021

## CERTIFICATE

Exempts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. on May 18, 1970:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorney-in-Fact to represent and act for and on behalf of the Company to execute bonds, indentures, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, and to attach thereto the corporate seal of the Company, in the transaction of its storey business.

"RESOLVED, that the signatures and attestations of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating therein by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bond, indenture, recognizance and other contract of indemnity and writing obligatory in the nature thereof.

"RESOLVED, that any such Attorney-in-Fact delivering a secretarial certification that the foregoing resolutions still be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact."

I, Martin Hogue, Assistant Secretary of American Home Assurance Company and of National Union Fire Insurance Company of Pittsburgh, PA. do hereby certify that the foregoing exempts of Resolutions adopted by the Boards of Directors of these Corporations, and the Powers of Attorney issued pursuant thereto, are true and correct, and that both the Resolutions and the Powers of Attorney are in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of such corporation



this 15th day of August, 2018  
*Martin Hogue*

Martin Hogue, Assistant Secretary

85166 (4/86)

BROADCAST REPORT

TIME : 10/09/2018 15:07  
 NAME : WEIL & DRAGE, APC  
 FAX : 17023141909  
 TEL :  
 SER. # : BROK3J469756

PAGE(S)

10

DATE	TIME	FAX NO./NAME	DURATION	PAGE(S)	RESULT	COMMENT
10/09	15:02	7029907273	01:45	10	OK	ECM
10/09	15:04	7029383864	03:15	10	OK	ECM

BUSY: BUSY/NO RESPONSE  
 NG : POOR LINE CONDITION  
 CV : COVERPAGE



3333 E. SERENE AVENUE, STE. 200  
HENDERSON, NEVADA 89074  
(702) 990-7272 ♦ FAX (702) 990-7273

RICHARD L. PEEL, ESQ.  
Nevada Bar No. 4359  
CARY B. DOMINA, ESQ.  
Nevada Bar No. 10567  
RONALD J. COX, ESQ.  
Nevada Bar No. 12723  
**PEEL BRIMLEY LLP**  
3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074-6571  
Telephone: (702) 990-7272  
Facsimile: (702) 990-7273  
[rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
[cdomina@peelbrimley.com](mailto:cdomina@peelbrimley.com)  
[rcox@peelbrimley.com](mailto:rcox@peelbrimley.com)  
*Attorneys for Plaintiff*  
**BRAHMA GROUP, INC.**

FILED  
FIFTH JUDICIAL DISTRICT

NOV 05 2018

Nye County Clerk  
Deputy  
Veronica Aguilar

**FIFTH JUDICIAL DISTRICT COURT**

**NYE COUNTY, NEVADA**

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

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

**BRAHMA GROUP, INC.'S  
OPPOSITION TO TONOPAH  
SOLAR ENERGY, LLC'S MOTION  
TO STRIKE, MOTION TO DISMISS  
OR MOTION FOR STAY**

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. ("Brahma"), by and through its attorneys, the law firm of Peel  
12 Brimley LLP, hereby submits its Opposition to Tonopah Solar Energy, LLC's Motion to Strike,  
13 Motion to Dismiss or Motion for Stay ("Opposition").<sup>1</sup>

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

17 Dated this 5 day of November, 2018.

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*BRAHMA GROUP, INC.*

<sup>1</sup> As used herein:

- "TSE" shall mean Tonopah Solar Energy, LLC; and
- "Motion to Dismiss" shall mean TSE's Motion to Strike, Motion to Dismiss or Motion for Stay.

1 MEMORANDUM OF POINTS & AUTHORITIES

2 I. INTRODUCTION.

3 1. TSE Is Engaged In Forum Shopping. By attempting to strike, stay or dismiss this  
4 Action in favor of proceeding in Federal Court (defined below), TSE, not Brahma, has engaged  
5 and is engaging in forum shopping for the following reasons:

6 • TSE availed itself of this Court's jurisdiction (first) when it filed its Motion to  
7 Expunge under NRS 108.2275 ("Motion to Expunge"); and

8 • After losing on its Motion to Expunge, TSE now asks the Court to ignore Nevada  
9 law and stay the entire Action, including:

10 ○ Brahma's pending Fee Motion (defined below), which must be granted  
11 under NRS 108.2275(6)(c); and

12 ○ Brahma's claims against the following parties, who are not and cannot be  
13 parties to the Federal Action (defined below) due to diversity issues:

14 ■ Cobra Thermosolar Plants, Inc., a Nevada corporation ("Cobra"), (i)  
15 the original general contractor that TSE hired to construct the Work of Improvement, (ii) the  
16 principal who caused the a) Brahma Surety Bond (defined below) to be posted as collateral for the  
17 Brahma Lien (defined below), and b) the H&E Surety Bond (defined below) to be posted as  
18 collateral for the H&E Lien, (iii) an entity that must be prosecuted in the county where the Work  
19 of Improvement is located under NRS 108.2421(1), as TSE admits in its Motion to Dismiss, and  
20 (iv) an entity that is domiciled in Nevada, the same domicile as Brahma;

21 ■ American Home Assurance Company ("AHAC" or "Surety"), (i)  
22 the surety who issued the Brahma Surety Bond and the H&E Surety Bond, and (ii) an entity that  
23 must be prosecuted in the county where the Work of Improvement is located under NRS  
24 108.2421(1), as TSE admits in its Motion to Dismiss;

25 ■ TSE, an entity (i) which is Brahma's debtor, (ii) that is the subject  
26 of Brahma's Counter-Complaint, and (iii) which Brahma, under NRS 108.2421(1), is statutorily  
27 allowed to prosecute in the county where the Work of Improvement is located;  
28



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- 1 • NRS 108.2453 renders the forum selection clause void and unenforceable; and
- 2 • By initially filing its contract claims in Clark County, Brahma did not waive its
- 3 right to file its claims against TSE in this Action, since such rights cannot be waived.

4 In other words, if this Action is stayed and Brahma is forced to prosecute its contract claims  
5 against TSE in Federal Court, Brahma will effectively be deprived of:

- 6 • Its claims against Cobra (as principal), AHAC (as Surety) and the Brahma Surety
- 7 Bond; and
- 8 • Its immediate right to file a demand for preferential trial under NRS 108.2421
- 9 (which is precisely why TSE wants so badly to be before the Federal Court), while (i) being forced
- 10 to litigate with H&E in this Court and on an expedited basis under NRS 108.2421, and (ii) Brahma
- 11 is waiting for the Federal Action to be resolved.

12 Such a result would necessarily delay Brahma's recovery and force it to return to this Court  
13 a second time to assert its claims against Cobra and AHAC.

14 Further, because all of Brahma's claims in this Action and the Federal Action arise out of  
15 the same transaction and occurrence, a single judge should try all claims. The only way to have a  
16 single judge hear all disputes between the parties will be to have this Court preside over all matters.  
17 This makes the most sense since:

- 18 • The Work of Improvement is located in Nye County;
- 19 • All of the contracts that are the subject of the dispute were performed in Nye
- 20 County;
- 21 • The Brahma Lien, the Brahma Surety Bond, the H&E Lien and the H&E Surety
- 22 Bond were all recorded with the Nye County Recorder's Office; and
- 23 • This Court is the most familiar with the Project.

24 If the Court grants TSE's requested relief, Brahma would be stripped of its sacrosanct right  
25 under the mechanic's lien statute to file a demand for preferential trial setting, which statutorily  
26 entitles Brahma the right to proceed to trial within 60 days of the filing of such demand. *See* NRS  
27 108.2421.

28 3. Brahma's Counter-Complaint Is Proper. To further its objective of thwarting

1 Brahma's efforts to prosecute this Action, TSE claims that Brahma's Counter-Complaint is  
2 improper and should be stricken. However, Brahma's Counter-Complaint is proper because:

3 • The Counter-Complaint accomplishes the same goals contemplated by Nevada's  
4 motion to expunge statute (NRS 108.2275(5)), which recognizes and allows the consolidation of  
5 motions to expunge with lien foreclosure actions;

6 • The Counter-Complaint was properly served on TSE and gives TSE notice of  
7 Brahma's claims; and

8 • Despite TSE's misrepresentations, this Action remains open given Brahma's  
9 pending Motion for Attorneys' Fees and Costs.

10 Notwithstanding the foregoing, should the Court find that the Counter-Complaint is  
11 procedurally improper, this Court could exercise its discretion and sever the Counter-Complaint  
12 and immediately consolidate it again in this Action under NRCP 42.

13 4. Brahma Has Not Engaged In Fraud. Moreover, by filing its contract claims in Nye  
14 County, Brahma has not engaged in fraud or attempted to subvert federal jurisdiction. Therefore,  
15 TSE's motion for preliminary injunction filed before the Federal Court must fail.

16 5. Brahma's Motion to Amend Is Pending. Finally, TSE's Motion to Dismiss  
17 Brahma's Foreclosure Cause of Action is unnecessary as Brahma has filed a Motion to Amend its  
18 Counter Complaint, which will remove the Brahma Lien foreclosure action and replaces the same  
19 with a claim against the Brahma Surety Bond, as collateral for the Work of Improvement.<sup>3</sup>

20 In Sum, TSE's Motion to Dismiss must be denied and this Court should proceed with this  
21 Action to ensure that Brahma and H&E are timely compensated for the Work they furnished for  
22 TSE's Work of Improvement.

23 ///

24 ///

25 ///

26 ///

27 <sup>3</sup> When Brahma asked TSE to stipulate to allow Brahma to file a Second Amended Counter-Complaint and Amended  
28 Third-Party Complaint, TSE refused. Clearly, TSE is hoping that this Court will dismiss all or portions of Brahma's  
Counter-Complaint, allowing TSE to argue that the two-dismissal rule has been triggered (which argument would be  
legally and factually incorrect). See a true and correct copy of Richard L. Peel, Esq.'s Declaration attached hereto.

1     **II.     STATEMENT OF FACTS.**

2             **A.     The Work of Improvement.**

3             TSE is the owner of the Crescent Dunes Solar Energy Project constructed on certain real  
4     property located in Nye County, Nevada (the "Work of Improvement").

5             On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with  
6     Brahma,<sup>4</sup> whereby Brahma agreed to provide (on a time and material basis), certain work,  
7     materials, and equipment (collectively, the "Work") for the Work of Improvement. Brahma  
8     provided the Work for the Work of Improvement and TSE has failed to fully pay Brahma for such  
9     Work.

10            **B.     The Brahma Lien, the First Complaint and the Brahma Surety Bond.**

11            Because of TSE's failure to fully pay Brahma for its Work, Brahma caused a notice of lien  
12     ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as Document No.  
13     890822 against the Work of Improvement.<sup>5</sup>

14            Seven days later, on April 17, 2018, Brahma, through prior counsel, Jones Lovelock, filed  
15     a complaint in the Fifth Judicial District Court ("Nye County Court") as Case No. CV39237 (the  
16     "First Complaint"), to foreclose against the Original Lien, among other causes of action.<sup>6</sup> Brahma  
17     filed with the Nye County Court a Notice of Lis Pendens and Notice of Foreclosure of Mechanic's  
18     Lien and recorded the same against the Work of Improvement.<sup>7</sup>

19            Two days later, on April 19, 2018, TSE, through its counsel, Weinberg Wheeler Hudgins  
20     Gunn & Dial, sent Jones Lovelock a letter (the "Demand Letter") demanding that Brahma (i)  
21     discharge and release its Original Lien, and (ii) participate in mediation before filing for litigation  
22     (see Section 24 of the Agreement).<sup>8</sup>

23            Finally, TSE threatened to file (i) a motion to expunge under NRS 108.2275 if Brahma did  
24     not voluntarily release its Original Lien by noon the next day, and (ii) a motion to dismiss under  
25

26     <sup>4</sup> A true and correct copy of the Agreement is attached hereto as **Exhibit 1.**

27     <sup>5</sup> A true and correct copy of the Original Lien is attached hereto as **Exhibit 2.**

28     <sup>6</sup> A true and correct copy of the First Complaint is attached hereto at **Exhibit 3.**

<sup>7</sup> True and correct copies of Brahma's First Notice of Foreclosure and Notice of Lis Pendens are attached hereto as  
      **Exhibits 4 and 5, respectively.**

<sup>8</sup> A true and correct copy of this correspondence is attached hereto at **Exhibit 6.**

1 NRS 108.237(3), if Brahma did not immediately dismiss its First Complaint without prejudice. *Id.*

2 On April 24, 2018, TSE filed in Case No. CV39237, a Motion to Expunge Brahma's Lien  
3 ("First Motion to Expunge").<sup>9</sup> Before Brahma received notice of TSE's First Motion to Expunge,  
4 and to avoid extensive motion practice with TSE regarding the ripeness of the First Complaint,  
5 Brahma voluntarily dismissed its First Complaint on April 24, 2018, but declined to discharge and  
6 release its Original Lien.<sup>10</sup> Even though it had officially appeared in that Case by filing the First  
7 Motion to Expunge and Brahma had not released its Lien, TSE decided to withdraw its First  
8 Motion to Expunge instead of proceeding in that Case.

9 The Original Lien was amended and/or restated on several occasions and ultimately  
10 increased to \$12,859,577.74, when Brahma caused its Fourth Amended Notice of Lien ("Fourth  
11 Amended Lien") to be recorded on September 14, 2018 with the Nye County Recorder as  
12 Document No. 899351.<sup>11</sup>

13 To replace the Work of Improvement as security for the Brahma Lien, TSE demanded that  
14 Cobra, the original general contractor for the Work of Improvement,<sup>12</sup> bond around the Brahma  
15 Lien. Per TSE's demand, Cobra, as principal, caused a surety bond to be recorded with the Nye  
16 County Recorder's Office on September 6, 2018, as Document No. 898974 (the "Brahma Surety  
17 Bond").<sup>13</sup> The Brahma Surety Bond (i) was issued by American Home Assurance Company  
18 ("AHAC" or "Surety") on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) was in the  
19 amount of \$10,767,580.00.

20 At Brahma's request and in compliance with Nevada law, Cobra caused the Penal Sum of  
21 the Brahma Surety Bond to be increased by AHAC to \$19,289,366.61 (or 1.5 times the amount of  
22 the Brahma Lien) by causing a Rider to the Brahma Surety Bond (the "Brahma Surety Bond Rider")  
23 to be recorded on October 9, 2018 with the Nye County Recorder's Office as Document No.

24  
25 <sup>9</sup> A true and correct copy of the First Motion to Expunge is attached hereto at **Exhibit 7**.

<sup>10</sup> A true and correct copy of the Voluntary Dismissal is attached hereto at **Exhibit 8**.

26 <sup>11</sup> True and correct copies of Brahma's First Amended Lien, Second Amended Lien, Third Amended Lien and Fourth  
27 Amended Lien are attached hereto as **Exhibits 9, 10, 11 and 12**, respectively. Brahma's Original Lien and the  
28 amendments and restatements thereto, including the Fourth Amended Lien are referred to collectively herein as the  
"Brahma Lien."

<sup>12</sup> An affiliate of Cobra possesses an indirect ownership interest in TSE. Further, TSE has advised Brahma and its  
counsel that Cobra is contractually responsible to TSE to pay for the Work that TSE contracted with Brahma to perform.

<sup>13</sup> A true and correct copy of the Brahma Surety Bond is attached hereto as **Exhibit 13**.



1 900303.<sup>14</sup>

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

3 On May 15, 2018, H&E (one of Brahma's suppliers for the Work of Improvement) caused  
4 a notice of lien to be recorded with the Nye County Recorder as Document No. 892768 in the  
5 amount of \$477,831.40 (the "H&E Lien").<sup>15</sup> On June 8, 2008, TSE filed in Case No. CV 39347, a  
6 motion to expunge the H&E Lien in the Nye County Court which was assigned to the Honorable  
7 Kimberly Wanker in Department 1, and which was later withdrawn before Judge Wanker held a  
8 hearing on the same.

9 On September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County  
10 Recorder's Office as Document No. 898975 (the "H&E Surety Bond"), to replace the Work of  
11 Improvement as security for the H&E Lien. The H&E Surety Bond (i) was issued by Surety on  
12 August 15, 2018, (ii) identifies Cobra, as principal, and (iii) is in the amount of \$716,741.10.<sup>16</sup>

13 Because TSE failed to fully pay Brahma, and Brahma has not paid H&E, H&E has filed  
14 (or is in the process of filing) a foreclosure action against the H&E Surety Bond in Nye County  
15 and has also asserted breach of contract claims against Brahma in this Action, which claims are  
16 derivative of Brahma's claims against TSE.<sup>17</sup>

17 **D. To Expunge the Brahma Lien, TSE, as the Plaintiff, Commenced a New**  
18 **Action in Nye County Against Brahma, the Defendant.**

19 On or about June 1, 2018, TSE, as plaintiff, commenced this Action in Nye County as Case  
20 No. CV 39348 (the "Action"), seeking to expunge the Brahma Lien from the Work of  
21 Improvement, by filing its motion to expunge.

22 On August 14, 2018, Judge Lane, entered an Order of Reassignment, assigning this Case  
23 to Senior Judge Steven Elliot based on the stipulated agreement of counsel for TSE and Brahma

24 \_\_\_\_\_  
25 <sup>14</sup> A true and correct copy of the Brahma Surety Bond Rider is attached hereto as **Exhibit 14**.

26 <sup>15</sup> A true and correct copy of the H&E Lien is attached hereto as **Exhibit 15**.

27 <sup>16</sup> A true and correct copy of the H&E Surety Bond is attached hereto as **Exhibit 16**. It should be noted that (i) AHAC  
28 is the surety on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the  
"Surety," and (ii) Cobra is identified as the principal on both the Brahma Surety Bond and the H&E Surety Bond and  
is sometimes referred to herein as the "principal."

<sup>17</sup> At the time of this filing, a copy of the H&E Complaint was not available, but H&E's counsel notified Brahma's  
counsel that it would be filed on or before November 6, 2018. By the time this matter is heard, H&E's Complaint will  
be filed in this Action.

1 (at the August 6, 2018 hearing) that the Case should be assigned to Judge Elliot because he “has  
2 familiarity with the parties and the facts due to his involvement in a previous case.”<sup>18</sup> Indeed, Judge  
3 Elliot (i) previously presided over extensive litigation involving the construction of the Work of  
4 Improvement, and (ii) is very familiar with the Work of Improvement. *see* [Case No. CV-36323  
5 titled *Helix Electric of Nevada, LLC v. Cobra Thermosolar Plants, Inc.; Tonopah Solar Energy*  
6 *LLC et. al.*; *see also*, Case No. 35217 titled *Merlin Hall dba Mt. Grant Electric v. Cobra*  
7 *Thermosolar Plants, Inc.; Tonopah Solar Energy, LLC, et. al.*] Notably, the Order indicates that  
8 the case would be assigned to Judge Elliot “for hearing or decision on the pending motions and  
9 for future handling of the case.”<sup>19</sup>

10 At a hearing held on September 12, 2018 (the “September 12 Hearing”), Judge Elliot  
11 denied TSE’s Second Motion to Expunge and entered a written order regarding on October 29,  
12 2018 (the “Order”). Since Brahma was the prevailing party at the September 12 Hearing, Brahma  
13 filed a motion for an award of attorney’s fees and costs pursuant to NRS 108.2275(6)(c) (“Fee  
14 Motion”).<sup>20</sup> NRS 108.2275(6)(c) provides that when the court finds a prevailing lien claimant’s  
15 notice of lien is not frivolous and was made with reasonable cause (which is what the Court found  
16 here), the court must award to such prevailing lien claimant the costs and reasonable attorney’s  
17 fees it incurred to defend the motion.

18 Because this Court (i) has jurisdiction over the Work of Improvement, Brahma’s Lien, the  
19 Brahma Surety Bond, Cobra, AHAC and the claims of H&E and (ii) heard the arguments presented  
20 at the September 12 Hearing, the Fee Motion must necessarily be heard by this Court and cannot  
21 be stayed.

22 Based on the mistaken belief that Section 24 of the Agreement required Brahma to pursue  
23 its contract-based claims in Clark County, Nevada, and after (i) Richard Peel and Ronnie Cox  
24 (counsel for Brahma) had consulted with Lee Roberts (counsel for TSE) about the possibility of  
25 stipulating to have the parties’ claims filed in one action and one forum, and (ii) TSE declining to  
26 do so,<sup>21</sup> Brahma filed a complaint on July 17, 2018 in the Eighth Judicial District Court of Nevada

27 <sup>18</sup> A true and correct copy of the Notice of Reassignment is attached hereto as Exhibit 17.

28 <sup>19</sup> *Id.*

<sup>20</sup> Brahma’s Fee Motion was filed with this Court on November 1, 2018.

<sup>21</sup> *See* Declaration of Richard L. Peel, Esq. attached hereto.

1 (the "Clark County Action"), against TSE for breach of contract, unjust enrichment, and violation  
2 of NRS Chapter 624.<sup>22</sup>

3 On September 10, 2018, TSE removed the Clark County Action to Federal Court (Case  
4 No.: 2:18-CV-01747-RFB-GWF) based on diversity jurisdiction only (the "Federal Action").

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

9 For the reasons discussed above and after Cobra had caused the Brahma Surety Bond to be  
10 posted (discussed more fully below), Brahma filed its First Amended Complaint in the Federal  
11 Action on September 25, 2018, and removed all causes of action against TSE except for its Unjust  
12 Enrichment claim so that those claims could be properly pursued in this Action in conjunction with  
13 Brahma's claim against Cobra, AHAC, the Brahma Surety Bond and TSE, required and allowed  
14 in NRS 108.2421(1).

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

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

18 **E. Brahma Filed an Action to Foreclose on the Brahma Lien in this Action.**

19 Because the Nye County Court had already ruled on the validity of the Brahma Lien and  
20 is well acquainted with the facts of this case, Brahma filed its Mechanic's Lien Foreclosure  
21 Complaint in this Action (i.e., Case No. CV 39348) on September 21, 2018, as required by NRS  
22 108.239(1).<sup>23</sup>

23 On September 25, 2018, Brahma filed (in this Action) its, (i) First Amended Counter-  
24 Complaint and included therein its contract-based claims against TSE, and (ii) a Third-Party  
25 Complaint asserting claims against AHAC, the Brahma Surety Bond and Cobra, as principal.  
26

27 <sup>22</sup> A true and correct copy of Brahma's Complaint filed in the Clark County Action is attached hereto as **Exhibit 18**.

28 <sup>23</sup> In pertinent part, NRS 108.239(1) states, "A notice of lien may be enforced by an action in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located ...."

1 H&E has also brought (or is in the process of bringing) (in this Action) its, (i) contract-  
2 based claims against Brahma, and (ii) claims against the Surety, the H&E Surety Bond and Cobra,  
3 as Principal.

4 **F. Brahma Filed a Motion to Stay the Federal Action.**

5 On October 16, 2018, Brahma filed in the Federal Action a Motion for Stay (the “Brahma  
6 Motion to Stay”) based on the *Colorado River* Doctrine, which requests that the Federal Court  
7 abstain from hearing the Federal Action in favor of this Court proceeding with this Action since,  
8 (i) the Federal Action involves the same transaction and occurrences as those that are the subject  
9 of this Action, and (ii) this Court already has familiarity with this Case and has ruled on a  
10 dispositive motion in this matter.<sup>24</sup> The Brahma Motion to Stay has yet to be scheduled for a  
11 hearing by the Federal Court.

12 **III. LEGAL ARGUMENT**

13 **A. Brahma’s Counter-Complaint was Properly Filed in this Action.**

14 Brahma’s Counter-Complaint is properly filed in this Action and should not be stricken  
15 inasmuch as:

16 • The Nevada Legislature contemplated that foreclosure actions and motions  
17 to expunge liens should be filed in the same action, and the Counter-Complaint filed into this  
18 Action accomplishes the Legislature’s goal (*see* NRS 108.2275(5));

19 • The Counter-Complaint was properly served on TSE through a Summons  
20 and gives TSE notice of Brahma’s claims against it;

21 • Contrary to TSE’s representations, this Action is not closed and will remain  
22 open while this Court determines Brahma’s Fee Motion, since Brahma was the prevailing party  
23 under NRS 108.2275(6)(c); and

24 • The Court can sever the Counter-Complaint and then consolidate it with this  
25 Action should it believe the Counter-Complaint was improperly filed.

26 ***1. The Counter-Complaint accomplishes the same goal contemplated***  
27 ***under NRS 108.2275(5) of consolidating motions to expunge with***  
28 ***foreclosure actions.***

<sup>24</sup> A true and correct copy of Brahma’s Motion for Stay without exhibits is attached hereto as Exhibit 19.

1 TSE's argument that the Counter-Complaint is improper and must be stricken places form  
2 over substance. Filing the Counter-Complaint<sup>25</sup> into this Action puts the parties in the same  
3 procedural posture that would have existed had the Counter-Complaint been filed first, followed  
4 by the Motion to Expunge.

5 Notably, under "Rule 2" of the Rules of the District Courts of Nevada, the term "Case"  
6 "shall include and apply to any and all actions, proceedings and other court matters, however  
7 designated." Therefore, as a practical matter, whether the Counter-Complaint is styled as a  
8 "Complaint", "Counter-Claim" or "Counter-Complaint," makes little difference to the validity of  
9 this Case.

10 In fact, had Brahma filed its Counter-Complaint as a standalone case (as TSE claims it  
11 should have), that case would have likely been assigned to a different Judge, requiring Brahma to  
12 file a Motion to Consolidate that action with this Action to ensure that the same Judge heard both  
13 matters. Filing the Counter-Complaint in an Action that TSE had already commenced, maximizes  
14 judicial economy, eliminates unnecessary delays and embraces the court's mandate to apply the  
15 Nevada Rules of Civil Procedure to (i) "secure the just, speedy and inexpensive determination of  
16 every action,"<sup>26</sup> and (ii) construe all pleadings "to do substantial justice".<sup>27</sup>

17 In a case where a creditor attempted to revive a judgement by filing a new complaint into  
18 the same case number as the original judgment, the debtor filed a motion for summary judgment  
19 arguing that the relevant statute required the creditor to file an independent action. *H.W. Polk v.*  
20 *Tully*, 97 Nev. 27, 29, 623 P.2d 972, 973 (1981). In denying the motion, the Court held "in the  
21 absence of a specific statute requiring an independent action, the procedure followed by [the  
22 creditor] was not improper" because the debtor was served with a summons and complaint and  
23 had notice of the action. *Id.* The Court further reasoned, "to hold otherwise would exalt form over  
24 substance." *Id.* While the creditor in the *Polk* case filed its new complaint into the old case number  
25 and the old case was technically closed, the Nevada Supreme Court took a more practical approach

26  
27 <sup>25</sup> When Brahma first filed its pleading in this Action on September 20, 2018, it was styled as a "Lien Foreclosure  
28 Complaint" and not a "Counter-Complaint." It was only after it was amended that Brahma named it, perhaps in artfully,  
a "Counter-Complaint."

<sup>26</sup> See NRCP 1

<sup>27</sup> See NRCP 8(f).

1 and determined that the new action still provided the debtor with all the protections it would have  
2 received had the action been filed independently. In other words, no harm, no foul!

3 Here, this Action is no different—TSE argues that Brahma was required to file its  
4 complaint as an independent action instead of in the same Case Number as the Motion to Expunge.  
5 However, just like the debtor in *Polk*, TSE was served with the Summons and Counter-Complaint  
6 just as it would have been had the Counter-Complaint been filed in a standalone complaint with  
7 an independent case number. Further, just like the situation in *Polk*, there is nothing in the  
8 Mechanic's Lien Statute that prohibits a lien claimant from seeking to foreclose against its  
9 mechanic's lien by filing its complaint in the same case number commenced by an owner who  
10 previously filed a motion to expunge under NRS 108.2275.

11 Indeed, NRS 108.2275(5) (the motion to expunge statute) expressly establishes the  
12 Legislature's intent to combine lien foreclosure actions with motions to expunge the lien so both  
13 matters are heard by the same judge. That section states:

14 If, at the time the application is filed, an action to foreclose the notice  
15 of lien has not been filed, the clerk of the court shall assign a number  
16 to the application and obtain from the applicant a filing fee of \$85.  
17 If an action has been filed to foreclose the notice of lien before the  
application was filed pursuant to this section, **the application must  
be made a part of the action to foreclose the notice of lien.**

18 Hence, because the First Complaint was dismissed without prejudice and there was no  
19 foreclosure action pending at the time TSE filed its Second Motion to Expunge, TSE filed the new  
20 Action independent of the dismissed action. When it came time for Brahma to file its mechanic's  
21 lien foreclosure complaint and claim against Brahma Surety Bond, Brahma decided to conserve  
22 judicial resources and file in the pending Action instead of commencing a new independent action  
23 that would then have to be consolidated with the instant Action. From a practical standpoint, there  
24 is absolutely no difference whether the Motion to Expunge was filed first or the Counter-  
25 Complaint—the result is the same—this Court will preside over both matters.

26 Further, there is nothing novel about the filing. Brahma's counsel has filed this exact  
27 pleading numerous times in situations where an owner or general contractor has first initiated the  
28

1 action by filing a motion to expunge under NRS 108.2275.<sup>28</sup> Thus, TSE's argument that it "has  
2 conducted an extensive search of Nevada case law and has been unable to find any situation similar  
3 to this one....,"<sup>29</sup> demonstrates Brahma's point—the lack of case law only supports Brahma's  
4 contention that litigants and district courts throughout Nevada consider the filing of a foreclosure  
5 action within the same case as a first filed motion to expunge to be proper.

6 To support its claim that Brahma's Counter-Complaint should not have been filed in this  
7 Action, TSE improperly cites to the *Crestline* case wherein the Nevada Supreme Court held that  
8 during a hearing on a motion to expunge brought under NRS 108.2275, the district court can only  
9 take one of three actions (i) determine the lien is frivolous and expunge it, (ii) determine the lien  
10 is excessive and reduce it, or (iii) determine the lien is not frivolous or excessive, and deny the  
11 motion. *Crestline Inv. Grp., Inc. v. Lewis*, 119 Nev. 365, 371, 75 P.3d 363, 367 (2003).

12 In *Crestline* and at the hearing on the property owner's motion to expunge, the district court  
13 decided to increase the lien amount, which the Court found to be improper. *Id.* However, the  
14 *Crestline* Court did not address whether a lien claimant who was seeking to foreclose on a lien  
15 could file its foreclosure action in the same case number assigned to the owner's action to expunge  
16 the lien. *Id.* So long as the court limited the expungement hearing to the three inquiries set forth  
17 under *Crestline*, there is nothing wrong with allowing a lien claimant to file a foreclosure action  
18 in the same case number after-the-fact, for the sake of judicial economy and to ensure that the two  
19 related matters remain consolidated before the same judge. In fact, had Brahma filed its Counter-  
20 Complaint first, TSE would have filed its Second Motion to Expunge in that same Case Number,  
21 effectively creating the same procedural posture currently before the Court.

22 Moreover, NRS 108.2275(7) ensures that "proceedings conducted pursuant to [NRS  
23 108.2275] do not affect any other rights and remedies otherwise available to the parties," which  
24 includes the right for Brahma to file its Complaint to foreclose against the Work of Improvement  
25 and the Bond under NRS 108.239(1) and NRS 108.2421(1).

26  
27 <sup>28</sup> See e.g. the W&W-AFCO Steel Case, attached hereto as Exhibit 20. In that case, the general contractor, Austin  
28 General, commenced the Action by filing a Motion to Expunge. W&W-AFCO Steel then filed its Complaint to  
Foreclose upon its Lien in that same Action. This is a recognized procedure and has been done dozens of times over  
the years by Peel Brimley LLP and other recognized construction litigation firms in Nevada.

<sup>29</sup> See Motion to Dismiss at pg. 11:18-21.

2. *The Counter-Complaint was properly served on TSE and gives TSE notice of Brahma's claims.*

Pursuant to NRCP 8(a), "a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks." Brahma's Counter-Complaint does exactly that.

Additionally, Nevada is a notice-pleading jurisdiction and pleadings should be liberally construed to allow issues that are fairly noticed to the adverse party. *See* NRCP 8; *see also, Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). There is no question that Brahma's Counter-Complaint which was served on TSE by personal service and includes four causes of action directly against TSE, "places into issue matters which are fairly noticed" to TSE. *See Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984). In fact, there is no question that TSE acknowledges that the Counter-Complaint asserts claims against it, as it has previously asked for several extensions to file its answer to the Counter-Complaint.

Accordingly, to the extent the Counter-Complaint was inartfully styled, the Court should look past this technicality and allow the Counter-Complaint to stand as an independent action in this Case. *See State Dept. of Taxation v. Masco Builder Cabinet Group*, 127 Nev. 730, 738, 265 P.3d 666, 671 (Nev. 2011) ("procedural technicalities that would bar claims...will be looked upon with disfavor").

Additionally, the *Smith* Case upon which TSE relies in its Motion, is unavailing. *See Smith v. Eighth Judicial District Court*, 113 Nev. 1343, 950 P.2d 280 (1997). In that case, the *Smith* court found that the cross-claim plaintiff filed against respondents was improper because under NRCP 12(a), it should have been served along with the answer (within 20 days of being served with the complaint), and not as a standalone pleading. In support of its rationale, the Court held, "we do not suggest that dismissal of Chang's cross-claim was mandated because of a technical defect in pleading...there is, however, nothing technical about the defect in Chang's cross-claim; the document simply is not a pleading and does not itself put the matters asserted therein at issue." *Id.* at 1348, 283. Unlike the cross-claim in the *Smith* case which was time barred and required by



1 an express rule to be filed with an answer, Brahma's Counter-Complaint was timely filed and there  
2 is no requirement that it be filed with an answer. Hence, the holding in *Smith* does not control this  
3 matter.

4 Finally, NRCP 81(a) states, "these rules do not govern procedure and practice in any  
5 special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and  
6 practice provided by the applicable statute." To the extent the Court finds that it was improper  
7 under NRCP 7(a) for Brahma to file the Counter-Complaint in this Action because it is a special  
8 statutory proceeding, NRCP 81(a) exempts NRCP 7(a) from a proceeding filed under NRS  
9 108.2275. Indeed, the procedure under NRS 108.2275(5) which contemplates that foreclosure  
10 actions and motions to expunge liens should be brought in the same Action appears to conflict  
11 with NRCP 7(a), and therefore, to the extent there is a conflict, NRS 108.2275(5) controls based  
12 on NRCP 81(a).

13 **3. *Contrary to TSE's Representations, this Action remains open given***  
14 ***Brahma's pending Motion for Attorney's Fees and Costs.***

15 TSE argues that when the Court denied its Second Motion to Expunge on September 12,  
16 2018, "that ruling should have been the end of this limited special proceeding."<sup>30</sup> Curiously, as of  
17 the date TSE filed its Second Motion to Expunge, the Court had yet to (i) enter its Order, and (ii)  
18 entertain Brahma's Fee Motion pursuant to NRS 108.2275(6)(c), which Fee Motion was  
19 contemplated in the Order and the award of which is statutorily mandated.

20 Thus, this Action was and is still very much open and will require additional briefing and  
21 oral argument relating to the Fee Motion before the Court can arguably be in a position to close  
22 the same.

23 Therefore, based on the foregoing, TSE's Motion to Strike the Counter-Complaint should  
24 be denied because it was proper for Braham to file the same in this Action.

25 **4. *In the event the Court finds the Counter-Complaint to be improperly***  
26 ***filed in this Action, the Court can, under its own authority, sever the***  
27 ***Counter-Complaint and then consolidate it with this Action under***  
28 ***NRCP 42.***

Should the Court determine that it was an error for Brahma to file its Counter-Complaint

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<sup>30</sup> See Motion to Dismiss at pg. 5:9.

1 in this Action, the Court need not strike the Counter-Complaint to resolve any procedural hiccups.  
2 Rather, this Court may under NRCP 42, sever the Counter-Complaint from this Action by  
3 assigning it a separate Case Number, then consolidate that Case Number back into this Action to  
4 ensure that all disputes (between Brahma and TSE) are heard by this Court, which Brahma requests  
5 the Court to do, should such a determination be made.

6 **B. Brahma's Claim for Attorney's Fees Against TSE and Cause of Action**  
7 **Against the Brahma Surety Bond Cannot be Stayed or Removed to Federal**  
8 **Court.**

9 By way of its Motion, TSE brazenly argues "the stay should apply not only to the three  
10 claims that were previously removed to Federal Court but to this entire action."<sup>31</sup> In other words,  
11 TSE seeks to stay Brahma's (i) statutory right under NRS 108.2275(6)(c) to pursue attorney's fees  
12 and costs against TSE for defeating the Motion to Expunge, and (ii) claims directly against the  
13 Brahma Surety Bond, Cobra (as principal) and AHAC (as Surety).<sup>32</sup> As a preliminary matter TSE  
14 should not be allowed to avail itself of this Court's jurisdiction by filing its Second Motion to  
15 Expunge under NRS 108.2275, lose that motion, and then move the Court to stay the Case before  
16 the Court awards Brahma its attorney's fees and costs as mandated under the statute. TSE's  
17 attempt to stay the impending fee award against it clearly highlights its forum shopping efforts.

18 **1. Brahma's Counter-Complaint against the Brahma Surety Bond, the**  
19 **Surety and Cobra, as Principal, is properly filed in Nye County.**

20 TSE admits in its Motion that under NRS 108.2421, Brahma was required to bring its claim  
21 against the Brahma Surety Bond in Nye County.<sup>33</sup>

22 Specifically, NRS 108.2421 states in relevant part:

23 The lien claimant is entitled to bring an action against the principal  
24 and surety on the surety bond and the lien claimant's debtor in any  
25 court of competent jurisdiction that is located within the county  
26 where the property upon which the work of improvement is located.

27 Moreover, "[b]y entering into a surety bond given pursuant to NRS 108.2415, the principal  
28 [Cobra] and surety [AHAC] submit themselves to the jurisdiction of the court in which an action  
or suit is pending on a notice of lien on the property described in the surety bond" and "[t]he

<sup>31</sup> *Id.* at pg. 23:1-2.

<sup>32</sup> *Id.* at pg. 23:1-2.

<sup>33</sup> *Id.* at pg. 19:3-7.

1 liability of the principal may be established by the court in the pending action,” whereas “[t]he  
2 liability of the surety may be enforced on motion without the necessity of an independent action.”  
3 (NRS 108.2423(1)).

4 Hence, because Brahma filed its Counter-Complaint to foreclosure against the Brahma  
5 Lien in Nye County, and has now amended the Counter-Complaint to assert claims against the  
6 Brahma Surety Bond, Cobra and AHAC, both Cobra and AHAC are bound to the jurisdiction of  
7 this Court and liability against both will be determined in this Action. Additionally, Brahma’s  
8 claims against the Brahma Surety Bond (which are attributable to TSE’s failure to pay Brahma for  
9 its Work) are properly filed in this Action since NRS 13.010(2) requires that actions for the  
10 foreclosure of all lien rights upon real property must be filed in the county where the subject  
11 property is located. Here, the Brahma Surety Bond serves as collateral for the Brahma Lien and  
12 is recorded in the Nye County Recorder’s Office.

13 **2. *Brahma’s right to a Preferential Trial under NRS 108.2421 cannot be***  
14 ***stayed.***

15 Additionally, because the Brahma Surety Bond now stands as the collateral for the Brahma  
16 Lien, Brahma intends to file a Demand for Preferential Trial Setting under NRS 108.2421, which  
17 is a right that cannot be taken away, abrogated or stayed. In deciding whether to grant a stay, courts  
18 must consider “the possible damage which may result from the granting of the stay, the hardship  
19 or inequity which a party may suffer in being required to go forward, and the orderly course of  
20 justice measured in terms of the simplifying or complicating of issues, proof and questions of law  
21 which could be expected to result from a stay.” *PHH Mortgage Corp. v. SFR Investments Pool 1,*  
22 *LLC*, 2018 WL 547230 \*1 (D.Nev. January 24, 2018)(citing *Lockyer v. Mirant Corp.*, 398 F.3d  
23 1098, 1110 (9thCir. 2005)).

24 The Nevada Legislature has afforded mechanic’s lien claimants special rights to a just and  
25 speedy trial because of the value they add to real property and to the economy in general, as well  
26 as the vulnerable position they find themselves in when an owner fails to pay for work, materials  
27 and equipment furnished to a construction project, just as TSE has done here. In 2003 and 2005,  
28 and in response to the Venetian lien litigation, the Nevada Legislature substantially revised the

1 mechanic's lien statutes with the intent to facilitate payments to lien claimants in an expeditious  
2 manner. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 245 P.3d 1149, 1156 (2010). One of  
3 those revisions was to arm lien claimants with the right to petition the Court for a summary trial  
4 on their mechanic's lien claims.

5 Specifically, NRS 108.2421(3) provides:

6 Each lien claimant in the action may serve upon the adverse party a  
7 "demand for preferential trial setting" and file the demand with the  
8 clerk of the court. Upon filing, the clerk of the court shall, before the  
9 Friday after the demand is filed, vacate a case or cases in a  
10 department of the court and set the lien claimant's case for hearing,  
on a day or days certain, to be heard within 60 days after the filing of  
the "demand for preferential trial setting."

11 NRS 108.2421(6) further provides:

12 A prevailing lien claimant on a claim against a surety bond must be  
13 awarded the lienable amount plus the total amount that may be  
14 awarded by the court pursuant to NRS 108.237...Such a judgment is  
immediately enforceable...

15 See *Venetian Casino Resort, LLC v. Eighth Judicial District Court*, 118 Nev. 124, 128, 41  
16 P.3d 327, 329 (2002)(recognizing lien claimants pursuing claims against surety bonds are entitled  
17 to request a preferential lien hearing pursuant to NRS 108.2421).

18 The Nevada Supreme Court has recognized the Legislature's intent to provide lien  
19 claimants with special rights designed to provide them with a speedy remedy on their lien claims.  
20 See *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 67 P.3d 328 (2003); See also,  
21 *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032 (Nev.  
22 2008)(acknowledging that the object of the lien statutes is to secure payment to those who perform  
23 work or furnish material to improve the property of the owner). Among the protections afforded  
24 lien claimants is the statutory right to a preferential trial setting. By enacting Nevada's mechanic's  
25 lien statutes, the Nevada Legislature has created a means to provide contractors with secured  
26 payment for their work, materials and equipment furnished to construction projects in Nevada  
27 inasmuch as "contractors are generally in a vulnerable position because they extend large blocks  
28 of credit; invest significant time, labor and materials into a project; and have any number of works

1 vitally depend upon them for eventual payment.” *Wilmington Trust FSB v. A1 Concrete Cutting*  
2 *& Demolition, LLC (In re Fontainebleau Las Vegas Holdings, LLC)*, 289 P.3d 1199, 1210 (Nev.  
3 2012).

4 Moreover, courts in Nevada recognize that this sacrosanct right to demand a preferential  
5 trial setting cannot be stayed. See *Lehrer McGovern Bovis, Inc., v. Maui One Excavating, Inc.*, 124  
6 Nev. 1487, 238 P.3d 832 (2008). In the *Maui One* case, the district court entered a Case  
7 Management Order which granted a limited stay to some proceedings, but expressly provided that  
8 “the parties may continue to file demands for preferential lien hearings before the Court as  
9 provided in NRS 108.2421...” *Id.* While the issue on appeal dealt with whether the case should  
10 be dismissed for failure to prosecute the claim within the five-year rule under NRCP 41(e), both  
11 the lower court and the Nevada Supreme Court recognized that a lien claimant’s right to a  
12 preferential trial setting under NRS 108.2421 could not be stayed or infringed. Specifically, the  
13 Nevada Supreme Court held “because CMO 10 expressly permitted the lien claimants to seek  
14 hearing dates, we conclude that it did not constitute a court-ordered stay of Maui’s action.” *Id.*

15 Accordingly, Brahma (as a lien and bond claimant) is entitled to a preferential trial setting  
16 pursuant to NRS 108.2421 against the Brahma Surety Bond. Preferential trial rights in this Action  
17 mean this case will be handled expeditiously, thereby reducing delay where Brahma has fronted  
18 money for the Work.<sup>34</sup> By contrast, because (i) the Brahma Lien, the Brahma Surety Bond and  
19 Brahma’s claims against AHAC and Cobra are not before the Federal Court, and (ii) Cobra cannot  
20 be brought into the Federal Action because it is of the same domicile as Brahma, there would be  
21 no preferential trial mechanism in the Federal Action, nor does the Federal Court have jurisdiction  
22 over this claim.

23 Further, because (i) the Brahma Surety Bond claim, (ii) Brahma’s claims against Cobra  
24 and AHAC, and (ii) the H&E Lien claim, the H&E Surety Bond claim and H&E’s claims against  
25 Brahma (claims that are derivative of Brahma’s claims against TSE), will be litigated in this  
26 Action, H&E’s claims will also be litigated in the same action.

27 <sup>34</sup> A significant portion of Brahma’s lienable amount is attributable to the work, materials or equipment furnished by  
28 Brahma’s subcontractors and suppliers, several of which TSE directed Brahma to contract with for TSE’s convenience.  
For example, TSE directed Brahma to contract with CTEH and CTEH is now seeking a claim against Brahma of more  
than \$1 Million. TSE’s failure to pay Brahma is also affecting Brahma’s Dunn & Bradstreet score.

1 Therefore, because Brahma's Third-Party Complaint cannot be stayed, the Court must not  
2 stay Brahma's contract claims against TSE either. Because all claims arise out of the same  
3 transaction and occurrence (i.e., unpaid invoices for Work rendered on a time and material basis  
4 by Brahma), a single judge should try all claims. The only way to have a single judge hear all  
5 disputes between the parties will be to have this Court preside over all matters. This makes the  
6 most sense since (i) the Work of Improvement is located in Nye County, (ii) all of the contracts  
7 that are the subject of the dispute were performed in Nye County, (iii) the liens and bonds are  
8 recorded with the Nye County recorder's office, and (iv) this Court is the most familiar with the  
9 Project.

10 **C. Brahma's Contract Claims Against TSE are Properly Brought in this Court.**

11 As part of its Motion to Dismiss, TSE asks this Court to enforce the forum selection clause  
12 and require Brahma to litigate its claims in Clark County.<sup>35</sup> However, the forum selection clause  
13 is inapplicable to this Case because:

- 14 • NRS 13.010 requires any action between TSE and Brahma to be filed in Nye  
15 County since the Agreement was performed entirely in Nye County;
- 16 • The forum selection clause is permissive only and not mandatory;
- 17 • NRS 108.2421 expressly authorizes and requires Brahma to file its Claims  
18 against TSE, the Debtor, in Nye County; and
- 19 • The forum selection clause violates Brahma's rights under Nevada's  
20 Mechanic's Lien Statute and is against public policy, void and unenforceable pursuant to NRS  
21 108.2453.<sup>36</sup>

22 **1. *Because the Agreement was performed entirely in Nye County, NRS***  
23 ***13.010 requires Brahma's contract claims to be commenced in Nye***  
24 ***County.***

25 Because the Agreement between TSE and Braham was entirely performed in Nye County,  
26 NRS 13.010 requires the Action to be commenced in Nye County. When a person has contracted

27 <sup>35</sup> See Motion to Dismiss at pg. 8:6-8.

28 <sup>36</sup> It should be noted that when Brahma filed the First Complaint in Nye County, TSE demanded that the same be dismissed for a variety reasons. Once the law firm of Peel Brimley was engaged, and to avoid another fight about the proper jurisdiction of the contract claims, Mr. Peel reached out to counsel for TSE in an attempt to stipulate to an acceptable forum to hear all claims. TSE rejected Mr. Peel's efforts. See Declaration of Richard L. Peel, Esq.

1 to perform in one place, but the contracting party resides in another location, NRS 13.010(1)  
2 requires that the action be commenced and tried in the county in which the obligation is to be  
3 performed or where the person resides, unless there is a 'special contract to the contrary. The  
4 special contract to the contrary referenced in NRS 13.010(1) refers to a contract regarding place  
5 of performance, not an agreement regarding venue. *Borden v. Silver State Equip., Inc.*, 100 Nev.  
6 87, 89, 675 P.2d 995, 996 (1984). Therefore, NRS 13.010 trumps any contrary language in the  
7 forum selection clause.

8                   2.     *The Forum Selection Clause in the Agreement is permissive, not*  
9                             *mandatory.*

10           Moreover, even if NRS 13.010 does not trump the forum selection clause in the Agreement,  
11 the forum selection clause is permissive, not mandatory, and did not require Brahma to file its  
12 contract claims in Clark County. Notably, Section 24 of the Agreement reads, "[Brahma] submits  
13 to the jurisdiction of the courts in such state, with a venue in Las Vegas, Nevada, for any action or  
14 proceeding directly or indirectly arising out of this Agreement."

15           In *Am. First Federal Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P. 3d 105 (Nev.  
16 2015), the Nevada Supreme Court found that:

17                   Clauses in which a party agrees to submit to jurisdiction are not  
18 necessarily mandatory. Such language means that the party agrees to  
19 be subject to that forum's jurisdiction if sued there. It does not  
20 prevent the party from bringing suit in another forum. The language  
21 of a mandatory clause shows more than that jurisdiction is  
22 appropriate in a designated forum; it unequivocally mandates  
23 exclusive jurisdiction. Absent specific language of exclusion, an  
24 agreement conferring jurisdiction in one forum will not be  
25 interpreted as excluding jurisdiction elsewhere.

26           Based on the reasoning of the *Am. First Federal Credit Union* Court, the forum selection  
27 clause contained in Section 24 of the parties' Agreement is "permissive" and "does not require"  
28 the parties to resolve their contract claims in Las Vegas, Nevada.

          Rather, Section 24 allows Brahma to bring such claims in this Action along with Brahma's  
claims against the Brahma Surety Bond, which it has done by way of its Counter-Complaint.

///

///

1                                3.     *NRS 108.2421 expressly authorizes Brahma to file its Claims against*  
2    *TSE, the Debtor, in Nye County.*

3                                Now that the Brahma Lien has been replaced by the Brahma Surety Bond, pursuant to NRS  
4                                108.2421, Brahma is expressly authorized to pursue its contract claims against TSE in Nye County.

5                                Specifically, NRS 108.2421 states in relevant part:

6    The lien claimant is entitled to bring an action against **the principal**  
7    **and surety** on the surety bond and the lien claimant's debtor in any  
8    court of competent jurisdiction that is located within the county  
9    where the property upon which the work of improvement is located.

10                               Here, Cobra is the principal on the Brahma Surety Bond, and AHAC is the surety who  
11                               issued the Brahma Surety Bond. However, TSE is the lien claimant's debtor, not Cobra or AHAC.  
12                               Therefore, the statute expressly authorizes Brahma to file its contract claims against TSE (its  
13                               debtor) in Nye County, irrespective of the language contained in the parties' Agreement or  
14                               otherwise. This makes good sense since Cobra's and the Surety's liability to Brahma is dependent  
15                               on TSE's liability to Brahma.

16                               Venue statutes such as NRS 108.2421 "serve important public interests, including avoiding  
17                               costs to taxpayers of defending actions in other communities, maintaining actions where **relevant**  
18                               **official records are kept, and reducing forum shopping.**" *Nevada Civil Practice Manual*, §  
19                               3.01. Venue statutes should be applied strictly. *Lyon County v. Washoe Medical Ctr.*, 104 Nev. 765,  
20                               768, 766 P.2d 902, 904 (1988). "Statutes that contain exclusive venue and jurisdiction provisions  
21                               also accomplish the objective of conserving court resources and avoiding judicial collision and  
22                               conflicts involving the same parties and controversies." *Nevada Civil Practice Manual*, § 3.01. *See*  
23                               *Pub. Serv. Comm'n v. S.W. Gas Corp.*, 103 Nev. 307, 308, 738 P.2d 890, 891 (1987).

24                               NRS 108.2421 conserves judicial resources and avoids conflicting judgments by allowing  
25                               Brahma to pursue all claims against all defendants before a single judge in Nye County, the County  
26                               where TSE chose to (i) construct its Work of Improvement; (ii) seek relief by filing the Motion to  
27                               Expunge; and (iii) compel Cobra to record the Brahma Surety Bond.

28    *a) NRS 108.2453, renders the forum selection clause void and*  
   *unenforceable.*

To the extent this Court finds that the forum selection clause is mandatory and requires



1 Brahma to file its claims against TSE in Clark County, that contract provision is against public  
2 policy, void and unenforceable under NRS 108.2453(1) & (2) which states in relevant part:

- 3 (1) A person may not waive or modify a right, obligation or liability  
4 set forth in the provisions of NRS 108.221 to 108.246, inclusive.  
5 (2) A condition, stipulation or provision in a contract or other  
6 agreement for the improvement of property or for the  
7 construction, alteration or repair of a work of improvement in this  
8 State that attempts to do any of the following is contrary to public  
9 policy and is void and unenforceable: (a) **Require a lien**  
10 **claimant to waive rights provided by law to lien claimants or**  
11 **to limit the rights provided to lien claimants,** other than as  
12 expressly provided in NRS 108.221 to 108.246, inclusive.

13 Here, under NRS 108.2421, Brahma, as the lien claimant, is statutorily entitled to pursue  
14 its contract claims against TSE, its debtor, in Nye County along with its claims against the Brahma  
15 Surety Bond, Cobra and AHAC. Hence, the forum selection clause or provision in the Agreement  
16 which attempts to require Brahma to file its contract claims against TSE in Clark County violates  
17 NRS 108.2453, rendering it against public policy, void and unenforceable. Because that provision  
18 is void and unenforceable, TSE cannot rely on it as a basis for its position that the contract claims  
19 should be litigated in Clark County (now the Federal Action), nor should this Court.

20 *b) By filing its contract claims in Clark County, Brahma did not*  
21 *wave its right to file its claims against TSE in this Action.*

22 Further, because the forum selection clause found in the Agreement is against public  
23 policy, void and unenforceable under NRS 108.2453, Brahma did not waive its right to file claims  
24 against TSE in Nye County when it (i) signed the Agreement, or (ii) filed the Clark County Action.

25 In a case involving the application of NRS 108.2453, the Nevada Supreme Court held that  
26 a subordination agreement which required lien claimants to waive prospective mechanic's lien  
27 rights, (i) violated NRS 108.2453, (ii) was against public policy, and (iii) was void and  
28 unenforceable. *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 289 P.3d 1199  
(2012). In that case, certain bank lenders who provided construction financing to the owners of a  
multi-billion-dollar construction project on the Las Vegas Strip, required as a condition precedent  
to providing financing, that the owner's contractor and all of its subcontractors sign subordination  
agreements which would allow the lenders' deeds of trust to have priority over any lien claims

1 recorded on the project. *Id.* Hence, even though the lien claimants executed the subordination  
2 agreement and acknowledged that their lien rights were subordinate to certain lenders, the Nevada  
3 Supreme Court found such a provision to be against public policy, void and unenforceable since  
4 NRS 108.222 gave priority to lien claimants over all later-in-time recorded encumbrances,  
5 including deeds of trust. *Id.*

6 Therefore, while TSE may argue that by filing the Clark County Action, Brahma waived  
7 its (i) right to file its contract claims in this Action, or (ii) claim that the forum selection clause  
8 violates NRS 108.2453, the Nevada Supreme Court would find that Brahma cannot waive rights  
9 under the mechanic's lien statute, including, the right to pursue its contract claims against its  
10 debtor, TSE, in Nye County as provided for under NRS 108.2421.

11 **D. By Filing its Contract Claims Against TSE in this Action, Brahma has Not**  
12 **Engaged in Fraud or Attempted to Subvert Federal Jurisdiction, So the**  
13 **Federal Court Cannot Enjoin this Action.**

14 As explained above, because Brahma did not file its contract claims against TSE in this  
15 Action to fraudulently subvert federal jurisdiction, the Federal Court will likely deny TSE's  
16 Motion for Preliminary Injunction wherein it asks the Federal Court to enjoin this Court from  
17 proceeding with this Case.

18 The Anti-Injunction Act found under 28 USC § 2283 generally prohibits federal courts from  
19 enjoining or staying state court proceedings unless (i) expressly authorized by an Act of Congress,  
20 (ii) where necessary in aid of its jurisdiction, or (iii) to protect or effectuate its judgments. *See* 28  
21 USC § 2283. Exceptions to the Anti-Injunction Act "must be construed narrowly and doubts as to  
22 the propriety of a federal injunction against a state court proceeding should be resolved in favor of  
23 permitting the state action to proceed." *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987)(citing *Vendo*  
24 *Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977)). "Unless  
25 one of the statutory exceptions applies, a federal injunction restraining prosecution of a lawsuit in  
26 state court is absolutely prohibited." *Lou*, 834 F.2d at 740 (citing *Mitchum v. Foster*, 407 U.S. 225,  
27 228-29, 92 S.Ct. 2151, 2154-56, 32 L.Ed.2 705 (1972)).

28 A federal court may enjoin the continued prosecution of the same case in state court after its  
removal. *Lou*, 834 F.2d at 740. "A more difficult problem is presented when a new action is filed

1 in state court.” *Id.* In *Lou*, the Ninth Circuit Court of Appeals agreed with the Fifth Circuit Court  
2 of Appeals in holding, “where a second state court suit is fraudulently filed in an attempt to subvert  
3 the removal of a prior case, a federal court may enter an injunction.” *Id.*; *see also, Frith v. Blazon-*  
4 *Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975)(holding, “where no fraud is found, the  
5 second action brought in state court should not be enjoined”). The Court found that the injunction  
6 was improper because there “was no finding that the second state court action was fraudulent or  
7 an attempt to subvert the purposes of the removal statute.” *Id.* In reaching its conclusion that “the  
8 preliminary injunction was not authorized by section 1446(e),” the Court noted that the state court  
9 case “involved different plaintiffs, additional counsel, additional defendants, and only state  
10 claims.” *Id.*

11 Notably, in the *Frith* case, the Fifth Circuit Court of Appeals found that it was improper to  
12 issue the injunction because “the second suit was not brought in an attempt to subvert the purpose  
13 of the removal statute and was not aimed at defeating federal jurisdiction” since “the joinder of the  
14 resident defendant in the state court suit was not fraudulent.” *Frith*, 512 F.2d at 901.

15 Like the Plaintiff in *Lou*, here Brahma did not file its contract claims against TSE in this  
16 Action fraudulently or to subvert the purposes of the removal statute.

17 First, the Federal Action was removed from Clark County, not Nye County. As TSE  
18 acknowledges, this Action has not been removed to Federal Court.<sup>37</sup> Second, this Action was  
19 commenced by TSE before the Federal Action was filed, so Brahma filed into an existing Case,  
20 not a new state case. Accordingly, TSE’s “first in time” argument fails because this Action was  
21 the first action commenced, not the Clark County Action or Federal Action. Third, because  
22 Brahma’s claims against Cobra, AHAC and the Brahma Surety Bond must necessarily remain  
23 before this Court, Brahma’s contract claims must be litigated before this Court as well to ensure  
24 that its right to file a demand for preferential trial setting is not hindered. Fourth, H&E has now  
25 filed (or is in the process of filing) litigation in Nye County against Brahma asserting contract  
26 claims which are derivative of Brahma’s contract claims against TSE. Fifth, by filing its contract  
27 claims in this Action, Brahma does not escape the jurisdiction of the Federal Court and remains a  
28

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<sup>37</sup> See Motion to Dismiss at pg. 19:11-13.

1 party in that Action. Finally, Brahma has not engaged in forum shopping because it does not seek  
2 to avoid a negative judgment from the Federal Court as the Federal Court has made absolutely no  
3 rulings in that case.

4 In other words, the purpose of filing its breach of contract claims against TSE in this Action  
5 was not aimed at defeating federal jurisdiction. Rather, these claims were filed in this Action out  
6 of necessity to allow this Court to rule on Brahma's claim against the Brahma Surety Bond, which  
7 was not removed to Federal Court, and which cannot be stayed as discussed previously. In fact,  
8 in the event the Federal Court denies Brahma's Motion for Stay under the *Colorado River*  
9 Doctrine, Brahma has sought leave of the Federal Court to re-assert its contract claims against TSE  
10 in the Federal Action which, if it occurs, would not prevent this Court from proceeding with  
11 Brahma's claims brought against TSE in the Counter-Complaint.

12 Moreover, while the contract claims brought in this Action overlap with the contract claims  
13 previously brought in the Federal Action, this Action (i) is more comprehensive, (ii) includes  
14 different plaintiffs (i.e. H&E), (iii) different defendants (i.e. Cobra and AHAC), and (iii) state law  
15 claims only.

16 Therefore, because Brahma has not engaged in fraud or attempted to subvert the Federal  
17 Court's jurisdiction, the Federal Court cannot enjoin this Action from proceeding. In any event,  
18 TSE's Motion for Preliminary Injunction may not be heard for several months, so this Court should  
19 proceed with hearing the entire case unless and until the Federal Court rules otherwise. This Court  
20 will need to resolve the contract dispute between TSE and Brahma at the same time it proceeds on  
21 Brahma's claim against the Brahma Surety Bond, so there will be no prejudice to either party if  
22 the Court allows Brahma to pursue its contract claims against TSE.

23  
24 **E. The Motion to Dismiss is Unnecessary Because Brahma Has Filed a Motion**  
25 **to Amend its Counter-Complaint to Remove its Foreclosure Action Against**  
26 **the Work of Improvement Now that the Brahma Surety Bond Secures the**  
27 **Brahma Lien.**

28 Because Brahma has filed a motion to amend its Counter-Complaint to remove the  
Foreclosure Cause of Action against the Work of Improvement, TSE's Motion to Dismiss is  
unnecessary and will likely be moot by the time this Motion is heard. Now that the Brahma Surety

1 Bond secures the Brahma Lien, Brahma's Counter-Complaint will be amended to remove the  
2 Foreclosure Cause of Action against TSE's Work of Improvement. In its place will be Brahma's  
3 claims against the Brahma Surety Bond.

4 **IV. CONCLUSION**


5 Based on the foregoing, this Court should deny TSE's Motion to Strike, Motion to Dismiss  
6 and Motion for Stay.

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 Dated this 5 day of November, 2018.

11 **PEEL BRIMLEY LLP**

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CERTIFICATE OF SERVICE

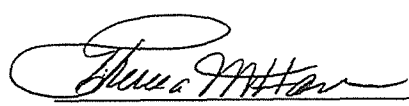
Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 5th day of November, 2018, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE, MOTION TO DISMISS OR MOTION FOR STAY** 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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8 *Attorneys for Plaintiff*  
9 *BRAHMA GROUP, INC.*

10 **FIFTH JUDICIAL DISTRICT COURT**  
11 **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  
23 COMPANIES I through X; DOES I through X; ROE  
24 CORPORATIONS I through X; and TOE  
25 TENANTS I through X, inclusive,

26 Counterdefendant,

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

**DECLARATION OF RICHARD L.  
PEEL, ESQ. IN SUPPORT OF  
BRAHMA GROUP, INC.'S  
OPPOSITION TO TONOPAH  
SOLAR ENERGY, LLC'S MOTION  
TO STRIKE, MOTION TO DISMISS  
OR MOTION FOR STAY**

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  
through X; ROE CORPORATIONS I through X,  
inclusive,

8  
9 Third-Party Defendants.

10 I, Richard L. Peel, Esq. hereby declare under penalty of perjury under the laws of the State  
11 of Nevada that the following is true and correct:

12 1. I am the managing partner at Peel Brimley LLP, counsel of record for Brahma  
13 Group, Inc. ("Brahma") in this matter, and I make this Declaration in support of Brahma's  
14 Opposition to Tonopah Solar Energy, LLC's ("TSE") Motion to Strike, Motion to Dismiss or  
15 Motion for Stay.

16 2. I have personal knowledge of the facts stated herein, except as stated upon  
17 information and belief, and as to those matters, I believe them to be true, and I am competent to  
18 testify to their truthfulness if called upon to do so.

19 3. On July 3, 2018, Ronnie Cox and I (both counsel for Brahma) consulted with  
20 attorney Lee Roberts (counsel for TSE) about the possibility of stipulating to have Brahma's and  
21 TSE's claims (including Brahma's mechanic's lien foreclosure action which had yet to be filed), in  
22 one forum.

23 4. On July 9, 2018 and prior to filing the Clark County Complaint, I again reached out  
24 to attorney Roberts to see if he had heard back from his client regarding Brahma's request.

25 5. On July 10, 2018, attorney Roberts advised me that he had yet to confer with his  
26 client.

27 6. Several weeks thereafter and prior to filing the Clark County Action, I again reached  
28 out to attorney Roberts to see if he had a chance to speak to his client about Brahma's request. I

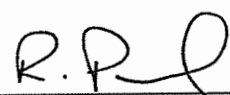


1 understood from that conversation that TSE was not willing to stipulate to have the parties' claims  
2 filed in one action and in one forum.

3 7. As a result and based on a mistaken interpretation of the parties' Services  
4 Agreement, Brahma caused the Clark County Action to be filed for Brahma's contract related  
5 claims only.

6 I declare under penalty of perjury that the foregoing is true and correct.

7  
8 DATED this 5 day of November 2018.

9   
10 Richard L. Peel, Esq.

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