

IN THE SUPREME COURT OF THE STATE OF NEVADA

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.

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

RESPONDENT'S APPENDIX VOLUME 3

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CHRONOLOGICAL APPENDIX OF EXHIBITS

<u>Date</u>	<u>Description</u>	<u>Bates Range</u>	<u>Volume</u>
10/18/2018	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	RA000001 – RA000025	1
	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	Brahma Group, Inc.'s Opposition to Tonopah Solar Energy, LLC's Motion to Strike, Motion to Dismiss or Motion to Stay	RA000154– RA000186	1
	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
11/30/18	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	RA000365– RA000379	2
	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
	Exhibit 6 – Tonopah Solar Energy, LLC’s Response to Brahma’s Motion for Stay, or in the Alternative, Motion to Amend Complaint	RA000441 – RA000464	3
	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
12/17/18	Brahma Group, Inc.’s Motion to Consolidate Case No. CV 39799 with Case No., CV 39348	RA000537 – RA000541	4

01/04/19	TSE's Opposition to Brahma's Motion to Consolidate Case No. 39799 with Case No. CV 39348	RA000542– RA000550	4
01/14/19	Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Motion to Consolidate Case No. CV 39799 with Case No., CV 39348	RA000551– RA000561	4
	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	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	RA000611– RA000618	4
02/21/19	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	RA000619– RA000628	4
	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
03/15/19	Notice of Entry of Order – Order Granting Brahma’s Motion to Consolidate Case No.CV 39799 with Case No. 39348	RA000658–RA000665	4
03/25/19	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	RA000666 – RA000680	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
04/10/19	TSE’s Opposition to Brahma’s Countermotion for Leave to File a Single Consolidated Complaint	RA000892– RA000900	5
04/22/19	Order Granting Brahma’s Countermotion for Leave to File a Single Consolidated Amended Complaint	RA000901– RA000918	5
04/22/19	Brahma Group, Inc.’s (i) Second Amended Complaint; and (ii) First Amended Third-Party Complaint	RA000919– RA000931	5

EXHIBIT 2

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

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

11 BRAHMA GROUP, INC., a Nevada Corporation,

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

12 Plaintiff,

13 vs.

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

**BRAHMA GROUP, INC.'S MOTION
TO STAY DISCOVERY PENDING
DETERMINATION OF
DISPOSITIVE MOTION**

15 Defendants.

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

18 Counterclaimant,

19 vs.

20 BRAHMA GROUP, INC., a Nevada corporation

21 Counterdefendant.

22
23 Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm
24 of Peel Brimley LLP, hereby submits its Motion To Stay Discovery Pending Determination of
25 Dispositive Motion ("Motion").

26 ///

27 ///

28 ///

PEEL BRIMLEY LLP
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1 This Motion is made and based on the following Memorandum of Points and Authorities,
2 the Declaration of Ronald J. Cox, Esq., the attached exhibits, and any further evidence and
3 argument this Court may allow.

4 Dated this 28 day of November, 2018.

5 **PEEL BRIMLEY LLP**

6
7 
8 **RICHARD L. PEEL, ESQ.**

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17 *Attorneys for Plaintiff*
18 **BRAHMA GROUP, INC.**

19 **MEMORANDUM OF POINTS & AUTHORITIES**

20 **I. INTRODUCTION**

21 Tonopah Solar Energy, LLC ("TSE") served written discovery requests (collectively, the
22 "Discovery Requests") on Brahma in the instant action solely in an attempt to defeat Brahma's
23 Motion for Stay, or in the Alternative, Motion to Amend Complaint ("Dispositive Motion"). By
24 serving the TSE Discovery, TSE was able to state to this Court in its Response to the Dispositive
25 Motion (which was filed one day after the TSE Discovery was served) that "this action has
26 progressed into discovery." ECF No. 18, p. 18. The sole purpose for this is merely to give TSE an
27 argument that this action is further along than the parallel action filed in Nye County, which is one
28 of the factors considered in the *Colorado River* Doctrine that is the subject of the Dispositive
Motion.

However, Brahma satisfies the Ninth Circuit's requirements for a stay of discovery as the
Dispositive Motion (i) is dispositive of the matter¹, and (ii) can be decided without the need for
additional discovery.

¹ Although the case law only requires that a motion be potentially dispositive.

1 Accordingly, the Court should grant this Motion and stay the discovery pending the
2 determination of the Dispositive Motion.

3 **II. STATEMENT OF FACTS**²

4 TSE is the owner of the Crescent Dunes Solar Energy Project constructed on certain real
5 property located in Nye County, Nevada (the "Work of Improvement").

6 TSE hired Brahma pursuant to a written agreement (the "Agreement")³ to provide certain
7 work, 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. TSE owes Brahma \$12,859,577.74 ("Outstanding Balance") for the Work.

10 Because of TSE's failure to fully pay Brahma for its Work, Brahma caused a notice of lien
11 ("Original Lien") to be recorded against the Work of Improvement on April 9, 2018 with the Nye
12 County Recorder.⁴ Thereafter, the Original Lien was subsequently amended and/or restated on
13 several occasions⁵ (collectively, the "Lien") to reflect, among other things, the Outstanding
14 Balance.

15 On June 1, 2018, TSE, as plaintiff, commenced an action in Nye County as Case No. CV
16 39348 (the "Nye County Action"), seeking to expunge the Lien from the Work of Improvement by
17 filing a Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien (the "Motion to Expunge").⁶

18 Based on a mistaken belief that the Agreement required Brahma to pursue its contract-based
19 claims in Clark County, Nevada, Brahma filed a Complaint on July 17, 2018, against TSE for
20 breach of contract, unjust enrichment, and violation of NRS Chapter 624 in the Eighth Judicial
21 District Court of Nevada (the "Clark County Action").⁷

22 ///

23
24 ² The facts supporting Brahma's Dispositive Motion are set forth more fully in the Dispositive Motion and are
25 incorporated herein by this reference, but are only summarized herein for context. Additionally, the evidence supporting
26 the facts is attached to the Dispositive Motion as exhibits and are incorporated herein by reference, but not included
27 herein for purposes of brevity.

28 ³ See, Exhibit 1 attached to Brahma's Motion For Stay, Or in the Alternative, Motion to Amend Complaint, ECF No.
13 (hereinafter, "ECF No. 13")

⁴ See, Exhibit 2 attached to ECF No. 13.

⁵ See, Exhibits 3, 4, 5 and 6 attached to ECF No. 13.

⁶ See, Exhibit 10 attached to ECF No. 13.

⁷ See, Exhibit 11 attached to ECF No. 13.

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

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

On September 21, 2018, Brahma (as the defendant in Case No. CV 39348) filed its Mechanic’s Lien Foreclosure Complaint⁸ in the Nye County Action, as required by NRS 108.239(1).⁹

On September 25, 2018:

- Brahma filed in the Nye County Action its (i) First Amended Counter-Complaint and included therein its contract-based claims against TSE, and (ii) Third-Party Complaint asserting a claim against a surety that issued a mechanic’s lien release bond (“Bond”), and the principal on the Bond.¹⁰
- On September 25, 2018, Brahma filed its First Amended Complaint in the Federal Action wherein it removed all causes of action against TSE except for its Unjust Enrichment claim.

On October 16, 2018, Brahma filed its Dispositive Motion asking this Court to stay the Federal Action based on the *Colorado River* Doctrine.

On October 25, 2018, the Parties attended the FRCP 26(f) conference.

On October 29, 2018, the day before TSE’s Response to the Dispositive Motion was due, TSE served Brahma with the Discovery Requests.

On October 30, 2018, TSE filed and served its Response to the Dispositive Motion.

On November 21, 2018, the Parties participated in a conference call¹¹ to discuss staying all

⁸ See, Exhibit 12 attached to ECF No. 13.

⁹ 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”

¹⁰ See, Exhibit 13 attached to ECF No. 13.

¹¹ Although Brahma is asking for a stay of all discovery and is not seeking a protective order pursuant to FRCP 26(c), Brahma is not required to demonstrate it made a good faith effort to confer with TSE and resolve this issue. However, Brahma did so in an effort to resolve the matter without the need for this Court to rule on the current Motion.

discovery pending this Court's determination of the Dispositive Motion.¹² In anticipation of the call, counsel for Brahma sent an email to TSE's counsel with relevant caselaw that supported a stay of discovery.¹³ During the call, TSE advised Brahma that, despite the caselaw, it would not agree to stay discovery.¹⁴

On November 14, 2018, the Parties filed the Proposed Joint Discovery Plan and Scheduling Order, which the Court adopted on November 15, 2018. Notably, despite immediately serving Brahma with the Discovery Requests even before the Court approved the Discovery Plan, TSE requested a full year for discovery, whereas, Brahma believed discovery could be accomplished within six months.

III. LEGAL ARGUMENT

A stay of discovery in this action is appropriate as Brahma has filed its Dispositive Motion based on the *Colorado River* Doctrine, which is currently pending. This very Court granted a discovery stay for this very reason in *Puckett v. Schnog*, No. 2:12-CV-0198-GMN, 2013 WL 1874754, at 1 (D. Nev. May 3, 2013), and should also do so here.

"Courts have broad discretionary power to control discovery." *In re Dillon Estate v. Bayview Loan Servicing, LLC*, No. 2:18-cv-01582-JCM-GWF, 2018 WL 5116841, at 1 (D. Nev. Oct. 18, 2018). "When deciding whether to grant a stay of discovery, the Court is guided by the objectives of *Fed. R. Civ. Pro. 1* that ensures a 'just, speedy, and inexpensive determination of every action.'" *Id.* (citing *Kor Media Group, LLC v. Green*, 294 F.R.D. 579, 581 (D. Nev. 2013)).

Although the Ninth Circuit has stated that the Federal Rules of Civil Procedure do not provide for blanket stays of discovery when a potentially dispositive motion is pending, it has set forth a test for granting such stays. *Puckett*, 2013 WL 1874754, at 1 (D. Nev. 2013).

"It is well-established that a party seeking a stay of discovery carries the heavy burden of making a strong showing why discovery should be stayed." *Tradebay, LLC v. eBay, Inc.*, 278

¹² See, Declaration of Ronald J. Cox, Esq. attached hereto as Exhibit 1.

¹³ *Id.*

¹⁴ *Id.*

EXHIBIT 13

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

APN012-031-04; 012-131-03; 012-131-04;
APN012-140-01; 012-141-01; 012-431-06;
APN012-150-01; 012-151-01; and
APN612-141-01.
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)

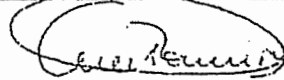
WHEREAS, Cobra Thermosolar Plant Inc. (name of principal), located at 11 Miles North Gabbs Pole Line Road, Tonopah, NV 89049 (address of principal), desires to give a bond for releasing the following described property owned by Tonopah Solar Energy, LLC (name of owner) from that certain notice of lien 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 Vissal

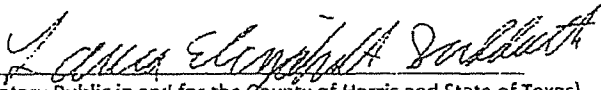
American Home Assurance Company

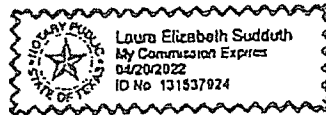


Sandra Parker, Attorney-in-Fact

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 Office: 175 Water Street, New York, NY 10038

Power No. 2185

No. 41-0-502340

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, have each hereby agreed:

That Amy Victoria, Elena Iordache, Marian Sheehan, Terri Morrison, Laura Sudolich, Sandra Parker, Gail A. Redinger, Terrell Mikron, Maria Aguirre and Orlando Aguirre, of Houston, Texas

do hereby and lawfully authorize in full, with full authority to execute on their behalf (under, evidence of, ratification and other contracts of indemnity and warranty obligation in the nature thereof, issued in and course of its business, and to bind the respective company thereby.

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

This 14th day of May, 2018



Michael Young, Vice President

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

On this 14th day of May, 2018, before me came the above named, officers of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA., in me personally known to be the individuals and officers described herein, and acknowledged that he executed the foregoing instrument and affixed the seal of said corporation thereto in the authority of his office.

Juliana Hallenbeck
 JULIANA HALLENBECK
 Notary Public - State of New York
 No. 011687271
 On file in New York
 My Commission Expires April 18, 2021

CERTIFICATE

Exempt of Notarization, adopted by the Board of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. on August 13, 1976

"RESOLVED, that the Chairman of the Board, the President, or any Vice President or any other officer authorized to represent the Company in fact to represent the Company in fact to execute bonds, undertakings, recognizances and other contracts of indemnity and warranty obligation in the nature thereof, and to sign thereon the corporate seal of the Company, in the execution of its business.

"RESOLVED, that the signatories and officers of such officers and the seal of the Company may be affixed to any such Power of Attorney or any certificate bearing such seal and signatures of the signatories and shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance and other contracts of indemnity and warranty obligation in the nature thereof.

"RESOLVED, that the signatories and officers of such officers and the seal of the Company may be affixed to any such Power of Attorney or any certificate bearing such seal and signatures of the signatories and shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance and other contracts of indemnity and warranty obligation in the nature thereof.

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of each corporation.



Maria Lopez, Assistant Secretary

EXHIBIT 14

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
jkilber@weildrage.com
7 Attorneys for
8 COBRA THERMOSOLAR PLANTS, INC.

9
10
11 FIFTH JUDICIAL DISTRICT COURT
12 NYE COUNTY, NEVADA

11 TONOPAH SOLAR ENERGY, LLC, a) Case No.: CV 39348
12 Delaware limited liability company,) Dept. No.: 2
13)

13 Plaintiff,)

14 vs.)

15 BRAHMA GROUP, INC., a Nevada)
16 corporation,)
17)

17 Defendant.)

18 BRAHMA GROUP, INC., a Nevada)
19 corporation,)
20)

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)
26 through X; and TOE TENANTS I through X,)
27 inclusive,)

27 Counterdefendant,)

CERTIFICATE OF SERVICE

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 9th 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
Zimbelman@PeelBrimley.com
RCox@PeelBrimley.com
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
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

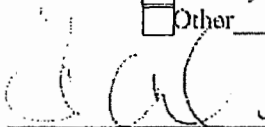
Surety Rider Bond 854481 Posted to Release Lien with Power of Attorney

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 Statue (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.

SURETY RIDER

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

Bond No. 854481

dated 03/15/2018
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.
(OBLIGEE)

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 \$19,289,366.61

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: _____
(PRINCIPAL)

José Antonio Fernández

American Home Assurance Company

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

POWER OF ATTORNEY

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

Power No. 7312

No. 31-B-002348

KNOW ALL MEN BY THESE PRESENTS:

The 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 Houston, Melissa Shepherd, Terri Morrison, Lanni Sudduth,
 Sinda Parker, Gina A. Rodriguez, Tawlis Jackson, Mario Arzamez, 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., 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 herein by authority of his office.

Juliana Hallenbeck
 JULIANA HALLENBECK
 Notary Public, State of New York
 No. 0148123811
 Qualified in Essex County,
 My Commission Expires April 15, 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, 1976:

"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 surety 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 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, 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 Bogue, 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 hereunto set my hand and affixed the corporate seal of each corporation



this 25th day of September, 2018

Martin Bogue, Assistant Secretary

6516674466

Attorney or Party without Attorney: Weil & 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/Disc:	Case Number: DOC #898974

- 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

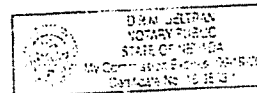
I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

- G. 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
c. (702) 671-4002

24 Sept 18 (Date) Toni Ruckman (Signature)

7. STATE OF NEVADA, COUNTY OF Clark day of Sept, 2018 by Toni Ruckman (R-052005, Washoe)
 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



2641854
(55090504)

RA000312

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

APN012-031-04; 012-131-03; 012-131-04;
APN012-140-01; 012-141-01; 012-431-06;
APN012-150-01; 012-151-01; and
APN612-141-01.
Recording Requested By:
Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

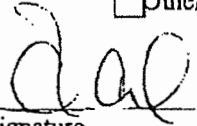
NRS 108.2415 Surety Bond 854481 Posted to Release Lien with Power of Attorney

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.

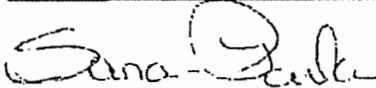
IN TESTIMONY WHEREOF, the principal and surety have executed this bond at Houston, Texas on the 15th day of August, 2018.

Cobra Thermosolar Plant, Inc.



(Signature of Principal) Carlos Ramirez Vissar

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 Office: 175 Water Street, New York, NY 10038

Power No. 7188

No. 41-B-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

Blair Ann Gerola, Gloria Minton, Marissa Shepherd, Terri Morrison, Laurie Sudoluth,
Sandra Parker, Gina A. Rodriguez, Tamara Madison, Mario Arzonendi, Orlando Aguirre, of Houston, Texas

its true and lawful Attorneys-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 15th day of May, 2018



Michael Yung, 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. 01148212371
October 1, 2020
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, 1976:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorneys-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 affix 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 thereto 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, 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 Bogue, 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 hereunto set my hand and affixed the facsimile seal of each corporation.



this 15th day of August, 2018

Martin Bogue, Assistant Secretary

65165 (4/86)

EXHIBIT 15

DOC #892768

Official Records Nye County NV

Deborah Beatty - Recorder

05/15/2018 10:36:41 AM

Requested By: NATIONWIDE NOTICE INC

Recorded By: kd RPTT:\$0

Recording Fee: \$35.00

Non Conformity Fee: \$

Page 1 of 2

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

Recorded at the Request of and
Return Recorded Document to:

LUANN BERTRAND
H & E Equipment Services
4899 West 2100 South
Salt Lake City, UT 84120
702-320-6597

NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished or to be furnished for the improvement of the property:

1. The amount of the original contract is: **\$477,831.40**
2. The total amount of all additional or changed work, materials and equipment, if any, is:
3. The total amount of all payments received to date is: **\$0.00**
4. The amount of the lien, after deducting all just credits and offsets, is: **\$477,831.40**
5. The name of the owner, if known, of the property is: **U.S. DEPARTMENT OF THE INTERIOR - BUREAU OF LAND MANAGEMENT, 1340 FINANCIAL BLVD, RENO, NV 89502.**
6. The name of the lessee, if known, of the property is: **TONOPAH SOLAR ENERGY, LLC, 2425 OLYMPIC BLVD., SUITE 500 EAST, SANTA MONICA, CA 90404.**
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: **BRAHMA GROUP INC, 1132 S 500 W, SALT LAKE CITY, UT 84101-3018.**
8. A brief statement of the terms of payment of the lien claimant's contract is: **Net 30**
9. A description of the property to be charged with the lien is: **11 MI N. GABBS POLE LINE NV89, TONOPAH, NEVADA; IMPROVEMENT: THE CRESCENT DUNES SOLAR ENERGY PROJECT IS A 110 MW PLANT CONSTRUCTED ON THE LAND IN TONAPAH, NEVADA. LAND: FURTHER DESCRIBED IN OR INSTRUMENT NUMBER 891507, ACCORDING TO THE PUBLIC RECORDS RECORDED IN NYE COUNTY, NEVADA; PARCEL ID: 012-031-04 / 012-131-03 / 012-131-04 / 012-140-01 / 012-141-01 / 012-150-01 / 012-151-01 / 012-431-06 / 612-141-01; 5076500**

H & E Equipment Services
4899 West 2100 South
Salt Lake City, UT 84120
702-320-6597

STATE OF NEVADA
COUNTY OF CLARK

LUANN BERTRAND being first duly sworn on oath according to law, deposes and says:

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

By: *Luann Bertrand*

LUANN BERTRAND, Agent

The foregoing instrument was acknowledged before me this 15 day of May, 2018 by LUANN BERTRAND, agent for H & E Equipment Services, who is personally known to me or who has produced _____ as identification, and who did/did not take an oath.

Kathleen A. Bistritz
NOTARY PUBLIC STATE OF NEVADA

My commission expires: 1-1-2019



EXHIBIT 16

DOC #898975

Official Records Nye County NV

Deborah Beatty - Recorder

09/06/2018 11:58:41 AM

Requested By: WEIL & DRAGE APC

Recorded By: MJ-RPTT:\$0

Recording Fee: \$35.00

Non Conformity Fee: \$

Page 1 of 4

APN012-031-04; 012-131-03; 012-131-04;

APN012-140-01; 012-141-01; 012-431-06;

APN012-150-01; 012-151-01; and

APN612-141-01.

Recording Requested By:

Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

NRS 108.2415 Surety Bond 854482 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.

RA000321

NRS 108.2415 Form of surety bond posted to release lien:

Bond #854482

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

WHEREAS, Cobra Thermosolar Plant Inc. (name of principal), located at 11 Miles North Gibbs Pole Line Road, Tonopah, NV 89049 (address of principal), desires to give a bond for releasing the following described property owned by U.S. Department of the Interior – Bureau of Land Management (name of owners) from that certain notice of lien in the sum of \$477,831.40 recorded May (month) 15 (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, H&E Equipment Services, (name of lien claimant) under the conditions prescribed by NRS 108.2413 to 108.2425, inclusive, in the sum of \$716,741.10 (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

Tannis Mattson, 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 Tannis Mattson 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, Tannis Mattson 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.

Laura Elizabeth Sudduth
(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: 175 Water Street, New York, NY 10038

Power No. **7189**No. **31-B-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 Mouton, Marissa Shepherd, Terri Morrison, Laura Sudduth,
 Sandra Parker, Gina A. Rodriguez, Tannis Matson, Mario Arzamendi, 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., 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. 011945123671
 Certified in Essex County
 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, 1976:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorneys-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 surety 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 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, 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 Bogue, 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 hereunto set my hand and affixed the facsimile seal of each corporation



this 15th day of August, 2018

Martin Bogue, Assistant Secretary

65166-1496

EXHIBIT 17

FILED
FIFTH JUDICIAL DISTRICT

AUG 14 2018

Nye County Clerk
Terri Pemberton Deputy

CV 39348
Dept. No. 2

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR NYE COUNTY

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada Corp.

Defendant.

ORDER OF REASSIGNMENT

Plaintiff filed a Motion to Expunge Brahma Group Inc.'s Mechanic's Lien on June 11, 2018. A hearing was held in the matter on August 6, 2018. Both parties were present at the hearing and indicated to the Court that Senior Judge Steven Elliott has familiarity with the parties and the facts due to his involvement in a previous case. Defendant then requested that this matter be heard before the Senior Judge. As such, the Court finds it appropriate to reassign the case to Senior Judge Steven Elliott for hearing or decision on the pending motions and for future handling of the case. Good cause appearing,

IT IS FURTHER ORDERED that this matter be reassigned to Senior Judge Steven Elliot for further proceedings.

DATED this 8th day of August, 2018.


District Court Judge

FIFTH JUDICIAL DISTRICT COURT
ESMERALDA AND NYE COUNTIES



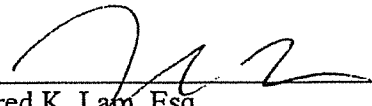


CERTIFICATION OF SERVICE

The undersigned hereby certifies that on the 8th day of August, 2018, he mailed
copies of the foregoing ORDER OF REASSIGNMENT to the following:

WEINBERG WHEELER HUDGINS
GUNN & DIAL
6385 South Rainbow Boulevard, Suite 400
Las Vegas, NV 89118

PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074


Jared K. Lam, Esq.
Law Clerk to Judge Robert W. Lane

AFFIRMATION

The undersigned hereby affirms that this Court Order does not contain the social
security number of any person.

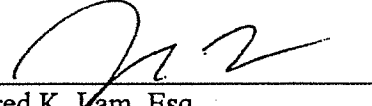

Jared K. Lam, Esq.
Law Clerk to Judge Robert W. Lane

EXHIBIT 18

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
6 PEEL BRIMLEY LLP
7 3333 E. Serene Avenue, Suite 200
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11 rpeel@peelbrimley.com
12 ezimbelman@peelbrimley.com
13 Attorneys for Plaintiff
14 BRAHMA GROUP, INC.

DISTRICT COURT
CLARK COUNTY, NEVADA

BRAHMA GROUP, INC., a Nevada Corporation,

Plaintiff,

vs.

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

Defendants.

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

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

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

THE PARTIES

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**
12 **(Breach of Contract)**

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

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

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

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

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

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

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.

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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.

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

6 WHEREFORE, BGI prays that this Honorable Court:

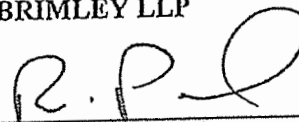
7 1. Enters judgment against TSE in the amount of the Outstanding Balance;

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

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

12 Dated this 17th day of July, 2018.

13 PEEL BRIMLEY LLP

14 

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24 Attorneys for Plaintiff

25 BRAHMA GROUP, INC.

EXHIBIT 19

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Attorneys for Plaintiff
BRAHMA GROUP, INC.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRAHMA GROUP, INC., a Nevada Corporation,

Plaintiff,

vs.

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

Defendants.

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

Counterclaimant,

vs.

BRAHMA GROUP, INC., a Nevada corporation

Counterdefendant.

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

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

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

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

Dated this 16 day of October, 2018.

PEEL BRIMLEY LLP



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Attorneys for Plaintiff
BRAHMA GROUP, INC.

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

I. INTRODUCTION

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

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

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

II. STATEMENT OF FACTS

A. The Work of Improvement.

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

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

B. The Brahma Lien and the Brahma Surety Bond.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 ///

23 ///

24 ///

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

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

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

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”).⁸ 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.⁹ 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”).¹⁰

///

///

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ///

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

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

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

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

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

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

21 **III. LEGAL ARGUMENT**

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

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

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

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

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

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).

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

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

21 “These factors are to be applied in a pragmatic and flexible way, as part of a balancing process
 22 rather than as a mechanical checklist.” *40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 588
 23 (9th Cir. 1992). “As part of this flexible approach, it may be important to consider additional factors
 24 not spelled out in the *Colorado River* opinion.” *Commercial Casualty Ins. Co.*, 616 F.Supp.2d at
 25 1033 (citing *Moses Cone*, 460 U.S. at 26, 103 S.Ct. 927).

26 ///

27
 28 ¹⁴ For factors (5) and (6), see, *Moses H. Cone Memorial Hosp.*, 460 U.S. 1 at 23-25.

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

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

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

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

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

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28 ///

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
to a special master to ascertain and report upon the liens and the
amount justly due thereon...

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

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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.

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4. *Desirability of Avoiding Piecemeal Litigation*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 “The Supreme Court has interpreted Rule 15(a) and confirmed the liberal standard district
 12 courts must apply when granting such leave.” *Dannenbring v. Wynn Las Vegas, LLC*, 907 F.Supp.
 13 2d 1214, 1221 (D. Nev. 2013). In *Foman v. Davis*, the U.S. Supreme Court explained: “In the
 14 absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on
 15 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
 16 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the
 17 amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” *Foman v. Davis*,
 18 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). “If the underlying facts or circumstances relied
 19 upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test
 20 his claim on the merits.” *Id.* “Of course, the grant or denial of an opportunity to amend is within
 21 the discretion of the District Court, but outright refusal to grant the leave without any justifying
 22 reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion
 23 and inconsistent with the spirit of the Federal Rules.” *Id.*

24 *1. No Undue Delay*

25 There has been no undue delay on the part of Brahma. Brahma initially included its breach
 26 of contract claims as part of this Action but removed those claims and asserted them in the Nye
 27 County Action along with its Lien claim and now its claim against the Brahma Surety Bond.
 28 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.***

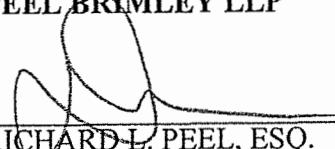
5 Given the infancy of this Case, TSE will suffer no prejudice if Brahma is permitted to
 6 Amend its Complaint to add its contract-based claims. In fact, it is Brahma who would be
 7 prejudiced if this Court does not stay this Case and does not allow Brahma to amend its Complaint.

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 
 16 **RICHARD L. PEEL, ESQ.**

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CERTIFICATE OF SERVICE

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

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

to be served as follows:

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

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

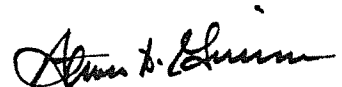
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EXHIBIT 20


CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

AUSTIN GENERAL CONTRACTING, INC., a
Nevada corporation,

Plaintiff,

vs.

W&W-AFCO STEEL LLC, a Delaware limited
liability company; VALLEY STEEL, LLC, a
Nevada limited liability company.

Defendants.

W&W-AFCO STEEL LLC, a Delaware limited
liability company,

Lien Claimant,

vs.

AUSTIN GENERAL CONTRACTING, INC., a
Nevada corporation; PARBALL NEWCO,
LLC, a Delaware limited liability company;
WARM SPRINGS ROAD CVS, L.L.C., a
Nevada limited liability company;
ARMSTRONG DEVELOPMENT
PROPERTIES, INC., a Pennsylvania
corporation; WESTERN SURETY
COMPANY, a surety; BOE BONDING
COMPANIES I through X; DOES I through X;
LOE LENDERS I through X; ROE
CORPORATIONS I through X; TOE
TENANTS I through X, inclusive,

Defendants,

CASE NO.: A-16-743285-C
DEPT. NO.: IX

**MECHANIC'S LIEN FORECLOSURE
COMPLAINT**

[Arbitration Exemption: Title to Real
Property]

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Lien Claimant, W&W-AFCO STEEL LLC ("W&W"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, as and for its Mechanic's Lien Foreclosure Complaint ("Complaint") against the above-named Defendants complains, avers and alleges as follows:

THE PARTIES

1. W&W is and was at all times relevant to this action (i) a Delaware 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. W&W is informed and believes and therefore alleges that Defendant AUSTIN GENERAL CONTRACTING, INC. ("AGC"), is and was at all times relevant to this action (i) a Nevada corporation authorized and qualified to do business in the state of Nevada, and (ii) a contractor holding a Nevada State Contractor's license.

3. W&W is informed and believes and therefore alleges that Defendant PARBALL NEWCO, LLC ("Parball") is and was at all times relevant to this action (i) a Delaware limited liability company, and (ii) the owner, reputed owner or the person, individual and/or entity who claims an ownership interest in or with respect to that certain work of improvement commonly known as CVS Pharmacy located in Clark County, Nevada and described as follows:

Common Address:	3645 S. Las Vegas Blvd. Las Vegas, NV 89109
County Assessor Description:	Parcel Map File 81 Page 21 PT Lot 2 & VAC Rd

and more particularly described as Clark County Assessor Parcel Number 162-21-102-009, including all easements, rights-of-way, common areas and appurtenances thereto, and surrounding space may be required for the convenient use and occupation thereof (collectively,

1 the "Property"), upon which Parball caused or allowed to be constructed certain improvements
2 (the "Work of Improvement").

3 4. The whole of the Property is reasonably necessary for the convenient use and
4 occupation of the Work of Improvement.

5 5. W&W is informed and believes and therefore alleges that Defendant
6 ARMSTRONG DEVELOPMENT PROPERTIES, INC. ("Armstrong") is and was at all times
7 relevant to this action (i) a Pennsylvania corporation, duly authorized to conduct business in
8 Nevada, and (ii) claims to possess an interest in the Work of Improvement.

9 6. W&W is informed and believes and therefore alleges that Defendant WARM
10 SPRINGS ROAD CVS, L.L.C. ("CVS") is and was at all times relevant to this action (i) a
11 Nevada limited liability company, duly authorized to conduct business in Nevada, and (ii) claims
12 to possess an interest in the Work of Improvement.

13 7. W&W is informed and believes and therefore alleges that Defendant WESTERN
14 SURETY COMPANY ("Western") is and was at all times relevant to this action a bonding
15 company duly licensed and qualified to do business as a surety in Nevada.

16 8. For purposes of this Action and NRS 108.22148, Parball, Armstrong and CVS are
17 collectively referred to as the "Owners."

18 9. W&W does not know the true names of the individuals, corporations, partnerships
19 and entities sued and identified in fictitious names as BOE BONDING COMPANIES I through
20 X, DOES I through X, LOE LENDERS I through X, ROE CORPORATIONS I through X and
21 TOE TENANTS I through X (collectively, "Doe Defendants"). W&W alleges that such Doe
22 Defendants claim an interest in or to the Project and/or are responsible for damages suffered by
23 W&W as more fully discussed under the claims for relief set forth below. W&W will request
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1 leave of this Honorable Court to amend this Complaint to show the true names and capacities of
2 each such fictitious Doe Defendant when W&W discovers such information.

3 **FIRST CAUSE OF ACTION**
4 **(Breach of Contract Against AGC)**

5 10. W&W repeats and realleges each and every allegation contained in the preceding
6 paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

7 11. On or about May 27, 2015, W&W entered into a Lump Sum Subcontract
8 Agreement (the "Agreement") with AGC wherein W&W agreed to provide certain construction
9 related work, materials and/or equipment (the "Work") to or for the Work of Improvement.
10

11 12. W&W furnished the Work for the benefit of and/or at the specific instance and
12 request of AGC.

13 13. Pursuant to the Agreement, W&W was to be paid an amount in excess of Ten
14 Thousand and no/100 Dollars (\$10,000.00) for the Work ("Agreement Price").

15 14. W&W furnished the Work and has otherwise performed its duties and obligations
16 as required by the Agreement.
17

18 15. AGC breached the Agreement by, among other things:

19 a. Failing and/or refusing to pay the Agreement Price and other monies owed
20 to W&W for the Work;

21 b. Failing to adjust the Agreement Price to account for extras and/or changed
22 work, as well as suspensions, delays, acceleration and/or disruption of the Work caused or
23 ordered by AGC and/or its agents or representatives;

24 c. Failing to promptly recognize and grant time extensions to reflect
25 additional time allowable under the Agreement and permit related adjustments in scheduled
26 performance;
27

28 d. Failing and/or refusing to comply with the Agreement and Nevada law; and

1 e. Negligently or intentionally preventing, obstructing, hindering or
2 interfering with W&W's performance of the Work.

3 16. W&W is owed an amount in excess of Ten Thousand and no/100 Dollars
4 (\$10,000.00) (hereinafter "Outstanding Balance") from AGC for the Work.

5 17. W&W has been required to engage the services of an attorney to collect the
6 Outstanding Balance, and W&W is entitled to recover its reasonable costs, attorney's fees and
7 interest therefor.
8

9 **SECOND CAUSE OF ACTION**
10 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against AGC)**

11 18. W&W repeats and realleges each and every allegation contained in the preceding
12 paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

13 19. There is a covenant of good faith and fair dealing implied in every agreement,
14 including the Agreement between W&W and AGC.

15 20. AGC breached its duty to act in good faith by performing the Agreement in a
16 manner that was unfaithful to the purpose of the Agreement, thereby denying W&W's justified
17 expectations.
18

19 21. Due to the actions of AGC, W&W suffered damages in an amount in excess of the
20 Outstanding Balance, for which W&W is entitled to judgment in an amount to be determined at
21 trial.

22 22. W&W has been required to engage the services of an attorney to collect the
23 Outstanding Balance, and W&W is entitled to recover its reasonable costs, attorney's fees and
24 interest therefor.
25

26 ///

27 ///

28 ///

THIRD CAUSE OF ACTION
(Unjust Enrichment Against All Defendants)

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

24. This cause of action is being pled in the alternative as to AGC.

25. W&W furnished the Work for the benefit of and/or at the specific instance and request of the Defendants.

26. The Defendants accepted, used and enjoyed the benefit of the Work.

27. The Defendants knew or should have known that W&W expected to be paid for the Work.

28. W&W has demanded payment of the Outstanding Balance.

29. To date, the Defendants have failed, neglected, and/or refused to pay the Outstanding Balance.

30. The Defendants have been unjustly enriched, to the detriment of W&W.

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

FOURTH CAUSE OF ACTION
(Foreclosure of Notice of Lien)

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

33. The Work was provided at the special instance and/or request of the Owners for the Work of Improvement as a whole.

34. W&W demanded payment of the Outstanding Balance, which amount remains past due and owing.

1 35. On or about August 11, 2016, W&W timely recorded a Notice of Lien in the
2 Official Records of Clark County, Nevada, as Instrument No. 20160811-0001544 (the "Original
3 Lien").

4 36. On or about October 24, 2016, W&W recorded an Amended and/or Restated
5 Notice of Lien in the Official Records of Clark County, Nevada, as Instrument No. 20161024-
6 0002062 the ("Amended Lien").

7
8 37. The Original Lien and the Amended Lien are collectively referred to as the
9 "Liens."

10 38. The Liens were in writing and were recorded against the Property and the Work of
11 Improvement for the Outstanding Balance due to W&W in the amount of Four Hundred Fourteen
12 Thousand One Hundred Seventy and 20/100 Dollars (\$414,170.20).

13 39. W&W has complied with all requirements to perfect the Liens.

14 40. W&W is entitled to an award of its attorney's fees, costs and interest on the
15 Outstanding Balance, as provided in Chapter 108 of the Nevada Revised Statutes.

16
17 **FIFTH CAUSE OF ACTION**
18 **(Claim of Priority Against Lenders and Doe Defendants)**

19 41. W&W repeats and realleges each and every allegation contained in the preceding
20 paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

21 42. W&W is informed and believes and therefore alleges that the Work of
22 Improvement commenced before the recording of Lenders and the Doe Defendants' Deeds of
23 Trust and/or other interest(s) in the Work of Improvement and/or any leasehold estate claimed by
24 and of the Doe Defendants.

25 43. W&W's claims against the Property, Work of Improvement and/or any leasehold
26 estates are superior to the claim(s) of Lender and/or Doe Defendants.
27
28

1 44. W&W has been required to engage the services of an attorney to collect the
2 Outstanding Balance due and owing for the Work, and W&W is entitled to recover its reasonable
3 costs, attorney's fees and interest therefor.

4 **SIXTH CAUSE OF ACTION**
5 **(Violation of NRS 624 Against AGC)**

6 45. W&W 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 46. NRS 624.624 and NRS 624.626 (the "Statute") requires higher-tiered contractors
9 (such as AGC) to, among other things, (i) timely pay their subcontractors (such as W&W), and
10 (ii) respond to payment applications and change order requests, as provided in the Statute.

11 47. In violation of the Statute, AGC has failed and/or refused to comply with the
12 requirements of the Statute.

13 48. By reason of the foregoing, W&W is entitled to a judgment against AGC in the
14 amount of the Outstanding Balance as well as other remedies as defined by the applicable
15 Statutes.

16 49. W&W has been required to engage the services of an attorney to collect the
17 Outstanding Balance and W&W is entitled to recover its reasonable costs, attorney's fees and
18 interests therefor.

19 **SEVENTH CAUSE OF ACTION**
20 **(Claim Against License Bond - Western)**

21 50. W&W repeats and realleges each and every allegation contained in the preceding
22 paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

23 51. W&W is informed and believes and therefore alleges that prior to the events
24 giving rise to the Complaint, Western issued Contractors License Bond No. 929397782 (the
25 "Bond").
26
27
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52. The Bond is in the sum of Fifty Thousand and No/100 Dollars (“\$50,000.00”).

53. AGC is named as principal and Western is named as surety on the Bond.

54. The Bond was in force during all times relevant to this action.

55. W&W provided Work for the Work of Improvement and has not been paid the Outstanding Balance.

56. AGC’s failure to pay W&W for the Work constitutes an unlawful act or omission under NRS 624.273.

57. W&W is entitled to be paid from the proceeds of the Bond.

58. W&W has been damaged in an amount in excess of \$10,000.00, and has been required to engage the services of an attorney to collect the Outstanding Balance and W&W is entitled to recover its reasonable costs, attorney’s fees and interest therefore.

WHEREFORE, W&W prays that this Honorable Court:

1. Enters judgment against the Defendants, and each of them, jointly and severally, in the amount of the Outstanding Balance;

2. Enters a judgment against the Defendants, and each of them, jointly and severally, for W&W’s reasonable costs and attorney’s fees incurred in the collection of the Outstanding Balance, as well as an award of interest thereon;

3. Enter judgment against Western for the penal sum of the Bond;

4. For judgment declaring that W&W has valid and enforceable Liens against the Work of Improvement and the Property, with priority over all Defendants, in the amount of the Outstanding Balance together with costs, attorneys’ fees and interest in accordance with NRS Chapter 108;

5. Adjudge a lien upon the Work of Improvement and the Property for the Outstanding Balance, plus reasonable attorneys’ fees, costs and interest thereon, and that this

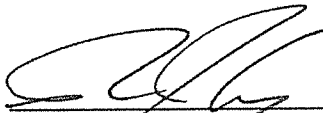
PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 Honorable Court enter an Order that the Property and Work of Improvement be sold pursuant to
2 the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of
3 sums due W&W herein; and

4 6. For such other and further relief as this Honorable Court deems just and proper in
5 the premises.
6

7 Dated this 16th day of January, 2017.

8 **PEEL BRIMLEY LLP**

9 

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Attorneys for Tonopah Solar Energy, LLC

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

Case No. CV 39348
Dept. No. 2

**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 DISMISS COUNTER-COMPLAINT,
OR, IN THE ALTERNATIVE, MOTION
TO STAY THIS ACTION UNTIL THE
CONCLUSION OF THE PROCEEDINGS
IN FEDERAL COURT**

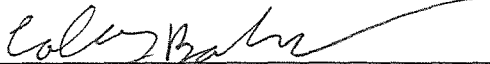
Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through
its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,
hereby submits its Reply to Brahma Group, Inc.'s (hereinafter "Brahma") Opposition to TSE's
Motion to Strike/Dismiss/Stay. Brahma's lengthy opposition amounts to nothing more than an
argument that TSE is elevating form over substance. But that is incorrect. As explained below,



1 both form and substance support the relief sought by TSE's motion. Based on Brahma's actions
2 and filings, the Nevada Federal District Court is the appropriate place for this litigation to take
3 place. The Nevada Federal District Court routinely hears lien disputes such as the dispute
4 presented here. TSE's motion should be granted.

5 This Reply 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 30th day of November, 2018.

9 
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15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 TSE's Motion presented this Court with four straight forward reasons why Brahma's
18 Counter-Complaint and Third Party Complaint should be stricken, dismissed or stayed:

19 1.) TSE argued that Brahma's "Counter-Complaint" is not a recognized pleading and
20 therefore, pursuant to NRCP 7(a) and the Nevada Supreme Court's *Smith* decision, it must be
21 stricken. TSE further pointed out that NRS 108.2275 proceedings are special limited
22 proceedings that cannot be used to litigate a party's substantive claims against each other.

23 2.) TSE argued that Brahma's Contract with TSE contains a forum selection clause
24 requiring venue in Las Vegas, not Pahrump. TSE further argued that Brahma is estopped from
25 litigating the validity of this clause and/or has waived its right to challenge the clause because,
26 before filing its Counter-Complaint in this action, Brahma filed a nearly identical complaint in
27 the Eighth Judicial District Court in Las Vegas, thus acknowledging the enforceability of the
28 venue clause.



1 3.) TSE argued that this Court lacks subject matter jurisdiction over the three federal
2 court claims that Brahma dropped from its Eighth Judicial District Court complaint (the
3 complaint that was removed to federal court by TSE) and re-filed in Nye County because, once a
4 complaint is removed to federal court, all state courts lose jurisdiction over the claims, not just
5 the particular state court from which the claims were removed. TSE cited extensive case law
6 supporting this argument which Brahma's Opposition does not even attempt to address. *See*
7 Motion at pp. 15-19. TSE further pointed out that any different rule would result in removal to
8 federal court being a meaningless exercise as a plaintiff could simply re-file the same claims in a
9 state court action and proceed as if removal never occurred (which Brahma is attempting to do
10 here).

11 4.) Finally, TSE argued that, even if this Court disagrees with all of the above
12 arguments, this Court should still stay this action until completion of the parallel federal
13 proceedings under the "First to File" rule. TSE set forth extensive case law holding that where
14 two actions are "substantially similar," a court should stay the later filed action and allow the
15 first filed action to proceed to completion. In determining which action was "first filed" courts
16 look to the date of filing of the competing complaints. TSE showed that Brahma's Eighth
17 Judicial District Court complaint (that was later removed to federal court) was filed on July 17,
18 2018 whereas Brahma's Lien Foreclosure Complaint and Counter-Complaint in this action were
19 filed on September 20 and September 25, 2018, respectively. TSE further showed, and Brahma
20 has admitted in its federal court filings, that this later filed Nye County action is "substantially
21 similar" to the first filed federal action since it involves the same transaction or occurrence and
22 many of the same claims. Thus, TSE argued that a stay of this action is appropriate until the
23 federal court action is completed.

24 Rather than address the above straight forward arguments, Brahma's Opposition
25 essentially ignores them and trots out a hypothetical parade of horrors that will allegedly occur
26 if Brahma is forced to litigate its claims in Nevada Federal District Court. According to
27 Brahma, the prospect of a mechanic's lien claimant having to litigate in Nevada federal court is
28 so dire and unthinkable that this Court should ignore the well-settled legal principles set forth in

1 TSE's Motion and save Brahma from a federal court that is allegedly bent on depriving Brahma
2 of its mechanic's lien rights.

3 Brahma's scare tactics are a transparent attempt to distract this Court from the obvious
4 conclusion that Las Vegas federal court is the correct and appropriate forum for this litigation.
5 Contrary to Brahma's contentions, the federal court is fully capable of addressing all of
6 Brahma's claims, allowing all parties to participate in the litigation there (i.e. Cobra, AHAC,
7 H&E, etc.) under federal law permitting intervention of non-diverse parties and protecting all of
8 Brahma's rights under Nevada law. Indeed, Nevada's federal courts regularly handle mechanic's
9 lien cases both inside and outside the counties in which they sit. As an example, in *SMC*
10 *Construction*, the federal court in Washoe County expunged a mechanic's lien recorded on
11 property in Douglas County. *SMC Constr. Co. v. Rex Moore Grp., Inc.*, No.
12 317CV00470LRHVPC, 2017 WL 4227940, at *4 (D. Nev. Sept. 21, 2017). Judge Boulware, the
13 federal judge this dispute is currently pending before, recently issued a thorough opinion
14 regarding a mechanic's lien case that was before him and has experience handling such disputes.
15 *YWS Architects, LLC v. Alon Las Vegas Resort, LLC*, No. 217CV01417RFBVCF, 2018 WL
16 4615983, at *1 (D. Nev. Sept. 26, 2018). There is no policy that cases arising under Nevada's
17 mechanic's lien law cannot be litigated in federal court.

18 Brahma also argues that TSE is attempting to litigate the case in federal court as a delay
19 tactic. This is false. It is Brahma who is engaging and continues to engage in delay tactics.
20 Within two days of the FRCP 26(f) conference occurring, TSE served requests for production of
21 documents and interrogatories on Brahma in the federal action. **Exhibit 1** (written discovery).
22 Rather than responding, Brahma recently filed a motion to stay all discovery in the federal action
23 and objected to all of TSE's requests. **Exhibit 2** (Motion to Stay Discovery filed on November
24 28, 2018); *see also* **Exhibit 3** (Brahma's objections to TSE's written discovery). Brahma's
25 action belies its alleged desire for a speedy trial while TSE's actions show it is actively moving
26 the federal case forward.

27 Despite the rhetoric in Brahma's Opposition, the timeline of events set forth in TSE's
28 Motion shows that it is Brahma, not TSE, who is engaged in forum shopping. Brahma filed its

first complaint alleging substantive claims against TSE in the Eighth Judicial District Court on July 17, 2018. TSE removed Brahma's Eighth Judicial District Court complaint to federal court on September 10, 2018. Then, on September 12, 2018, this Court held a hearing on TSE's Motion to Expunge and denied the motion. Believing that it had found a favorable judge, Brahma changed strategies and sought to move its federal court claims to this Court within 2 weeks of receiving the favorable ruling on the Motion to Expunge, which has created the present procedural quagmire.

This Court can end this quagmire by ignoring the inapposite arguments in Brahma's Opposition and enforcing the following non-controversial principles set forth in TSE's Motion: (1) the only pleadings recognized in Nevada are those set forth in NRCP 7(a) and a "Counter-Complaint" is not among those; (2) a contractual forum selection clause that is not unreasonable and has been invoked by Brahma should be enforced; (3) state courts lose jurisdiction of claims that are removed to federal court unless and until the federal court issues an order remanding the claims back to state court; and (4) courts should allow the first-filed complaint to proceed and stay similar later-filed complaints in different actions. These well-established rules lead to one conclusion— this action should be dismissed or stayed and the first filed federal action in Las Vegas should be allowed to proceed. For these reasons and those set forth below, TSE requests that the Court grant its Motion.

II. BRAHMA'S COUNTER-COMPLAINT MUST BE STRICKEN BECAUSE THE NEVADA SUPREME COURT HELD IN *SMITH* THAT FILING A PLEADING THAT IS NOT RECOGNIZED BY NRCP 7(a) IS NOT AN EXCUSABLE TECHNICAL ERROR

A. Brahma's "Substance Over Form" Counter-Argument is Defeated by *Smith* and NRCP 7(a).

TSE's Motion argued that under NRCP 7(a), only three types of pleadings are allowed, a complaint, an answer and a reply to a counterclaim. TSE further pointed out that NRCP 7(a) clearly states that "no other pleading shall be allowed" and thus Brahma's "Counter-Complaint" should be stricken. In response, Brahma more or less acknowledges that its Counter-Complaint is problematic but argues that the Court should overlook this "technicality" because (1) the

Counter-Complaint gives TSE notice of Brahma's claims and (2) Nevada has a liberal notice pleading standard.

Brahma's arguments fail because they would require this Court to disregard the express language of NRCP 7(a) and the Nevada Supreme Court's decision in *Smith*. In *Smith*, the Nevada Supreme Court was confronted with the exact same issue as here—what is the remedy when a party files a pleading that is not permitted by NRCP 7(a). *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997). The party that filed the rogue document in *Smith* argued that its error should be excused because Nevada is a notice-pleading jurisdiction that liberally construes pleadings (i.e. the same argument Brahma raises in its Opposition). The *Smith* Court rejected this argument and ruled as follows:

Nevada is a notice-pleading jurisdiction and *pleadings* should be liberally construed to allow issues that are fairly noticed to the adverse party. 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. (emphasis in original). In sum, *Smith* held that (1) filing a document not permitted by NRCP 7(a) is not a "technicality" and (2) that only the pleadings set forth in NRCP 7(a) fall within Nevada's liberal pleading standard. Thus, since Brahma has filed a document that is not permitted under NRCP 7(a), it cannot rely on Nevada's liberal notice-pleading standard to save the document from being stricken.

B. Brahma Has Not Cited any Case that Addresses NRCP 7(a) or *Smith*

The other cases cited by Brahma in its Opposition do not help its argument because they do not address NRCP 7(a) or *Smith* and merely support the idea that Nevada is a notice pleading jurisdiction, which no one disputes. Brahma cites *Nevada State Bank v. Jamison Family P'ship*, 106 Nev. 792, 800, 801 P.2d 1377, 1383 (1990) and *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) for the basic proposition that Nevada is a notice pleading jurisdiction. Brahma's reliance on *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d 666, 671 (2011) is misplaced because this case has nothing to do with the current issue before the court, as it pertains to equitable tolling in the context of a statute of limitation for tax refunds.

None of the cases cited by Brahma address the applicability of NRCP 7(a) and *Smith*.

C. Contrary to Brahma's Strained Interpretation of the Statute, NRS 108.2275 Does Not Permit Filing a Counter-Complaint into a Motion to Expunge Proceeding

Brahma raises a handful of additional weak arguments that merit only brief discussion here. Brahma argues that even if the "Counter-Complaint" violates NRCP 7(a), NRCP 7(a) is trumped by NRS 108.2275 because NRS 108.2275(5) permits Brahma to file a Counter-Complaint in a special proceeding such as this one. This is incorrect. NRS 108.2275(5) only provides that, if a lien foreclosure complaint has already been filed, a motion to expunge can be filed in that action rather than being filed in a separate action. The statute says nothing about parties being permitted to file substantive claims via a "Counter-Complaint" in a limited proceeding that was created by a motion to expunge rather than a complaint. Indeed, the leading Nevada construction law treatise agrees that one cannot file a Counter-Complaint into a special proceeding such as this:

[a] foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) 4. Likewise, a "petition" is not a proper "pleading" under NRCP Rule 7(a), to which a counter-claim may be filed. Rather, it is a "motion" under NRCP Rule 7(b). As such, it is improper legal practice to file a counter-claim to a petition under NRS 108.2275.¹

In sum, contrary to Brahma's contentions, there is no conflict between NRCP 7(a) and NRS 108.2275(5) that would require resorting to NRCP 81(a)'s tiebreaker rule. No statute, rule or case permits what Brahma has done.

D. Brahma's Counsel's Past Violations of NRCP 7(a) and *Smith* Do Not Justify His Current Violation

Realizing the precariousness of its position, Brahma argues that, even though there is no legal authority permitting the filing of a Counter-Complaint in a proceeding such as this and even though such an action clearly violates NRCP 7 and *Smith*, this Court should not be

¹ LEON F. MEAD II, NEVADA CONSTRUCTION LAW 286 (2016 ed.), attached hereto as **Exhibit 4**.



1 perturbed as Brahma's counsel has done this in the past. *See* Opposition at 14:26-28 – 15:1-5
2 and Exhibit 20 to Opposition. But a past violation of the rules does not justify a current
3 violation. An attorney cannot cite his own violations of the rules of civil procedure and the
4 mechanic's lien statute as precedent for permitting him to continue violating said rules in the
5 future.

6 **E. NRCP 42 Has No Application Here**

7 Finally, Brahma's argument that the Court should sever the Counter-Complaint from this
8 action and then consolidate it under NRCP 42 is also unavailing. NRCP 42 does not permit such
9 a course of action and, in any case, a pleading that violates NRCP 7(a) is void and cannot be
10 somehow revived by severing and consolidation.

11 **III. THE CONTRACT'S FORUM SELECTION CLAUSE IS ENFORCEABLE AND**
12 **IS NOT VOIDED BY ANY NEVADA STATUTE**

13 As pointed out in TSE's Motion, Brahma cannot now challenge the enforceability of the
14 Contract's clause requiring all litigation take place in Las Vegas since Brahma is the one who
15 first chose to file suit in the Eighth Judicial District Court in Las Vegas. Even if the clause were
16 "permissive" as Brahma contends, it operates to "waive any objection to . . . venue in that
17 jurisdiction." *Structural Pres. Sys., LLC v. Andrews*, 931 F. Supp. 2d 667, 673 (D. Md. 2013).
18 All of Brahma's other arguments are red herrings designed to distract the court from this simple
19 fact.

20 For example, Brahma argues that the clause requiring a Las Vegas venue is
21 unenforceable because NRS 108.2421 allegedly requires that all bond and lien claims be brought
22 in the county where the property at issue is located. This is incorrect. Nevada federal district
23 courts and Nevada state courts regularly adjudicate mechanic's lien and bond claim cases that
24 affect property located in counties other than the counties in which those courts sit. *See e.g.*,
25 *SMC Constr. Co. v. Rex Moore Grp., Inc.*, No. 317CV00470LRHVPC, 2017 WL 4227940, at *4
26 (D. Nev. Sept. 21, 2017). (the federal court in Washoe County expunged a mechanic's lien
27 recorded on property in Douglas County); *Lamb v. Knox*, 77 Nev. 12, 16, 358 P.2d 994, 996
28 (1961) (Clark County state court ruled on mechanic's lien recorded on property in Nye County).

1 Thus, it is entirely appropriate for sophisticated parties to agree to litigate their construction
2 dispute in a Nevada county other than the county where the construction project took place.

3 Finally, contrary to Brahma's assertions, Brahma's alleged right to a Nye County venue
4 is neither sacrosanct nor unwaivable. *Lamb* at 16, 358 P.2d at 996 (mechanic's lien case holding
5 that "appellants waived any right under said statute to have the case tried in Nye County where
6 the land involved in the action was situated."). The Court should enforce the forum selection
7 clause and require Brahma to litigate in the forum it contractually agreed to and originally
8 chose—Las Vegas.

9 **IV. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THE**
10 **CLAIMS THAT TSE REMOVED TO FEDERAL COURT**

11 In its Motion, TSE cited extensive case law demonstrating that once an action is removed
12 to federal court, the state courts lose jurisdiction of all removed claims unless/until the federal
13 court issues an order remanding the case back to state court. TSE further demonstrated that this
14 rule divests all courts in the state of jurisdiction over the removed claims, not just the particular
15 state court from which the action was originally removed. *See* Motion at pp. 15-19. Among
16 others, the *Hollandsworth*, *General Handkerchief Corp.* and the *Leffall* cases² have nearly
17 identical facts to this case and resulted in the state court dismissing the later filed state court
18 action that sought to assert claims that were duplicative of those that were first removed to
19 federal court.

20 Brahma's Opposition does not attempt to respond to any of TSE's above arguments.
21 Instead, as stated earlier, Brahma focuses on trying to trick this Court into believing that
22 Brahma's fundamental rights will be prejudiced if this Court does not find some creative way to
23 keep this litigation in Nye County. Brahma points to its alleged right to pursue its contract
24 claims against TSE in conjunction with its claim against the Brahma Surety Bond and its alleged
25 right to a quick trial. But, these are not fundamental rights; they are procedural preferences.

26
27 ² *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980); *Fire Ass'n of Philadelphia*
28 *v. Gen. Handkerchief Corp.*, 304 N.Y. 382, 385, 107 N.E.2d 499, 500 (1952); *Leffall v. Johnson*, No. 09-
01-177 CV, 2002 WL 125824, at *2 (Tex. App. Jan. 31, 2002).



Moreover, the federal court is fully capable of protecting all of Brahma's fundamental rights. There is no prohibition on federal courts resolving Nevada mechanic's lien cases or entertaining requests for a speedy trial. It is common for federal courts in Nevada to adjudicate mechanic's lien cases outside of the county in which they sit. Brahma's procedural preferences do not justify forum shopping or subverting the removal jurisdiction of the Las Vegas federal court.

To reiterate, this Court lacks subject matter jurisdiction over the three contract claims that TSE removed to federal court and that Brahma then re-filed in this action via the "Counter-Complaint." The Court should construe Brahma's failure to address this issue as an admission that it lacks a good faith argument to the contrary, which it does.

V. BRAHMA'S REMOVED EIGHTH JUDICIAL DISTRICT COURT COMPLAINT WAS FILED BEFORE BRAHMA'S NYE COUNTY COMPLAINT AND THUS THIS ACTION SHOULD BE STAYED AND THE "FIRST FILED" FEDERAL ACTION ALLOWED TO PROCEED

As set forth in TSE's Motion, a stay is appropriate under the "First to File" rule where there is a substantially similar prior action pending before a different court. *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982). In determining which action came "first" courts universally look to the date the respective complaints were filed. *Id.* at 96, n.3; *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994). Since Brahma's Eighth Judicial District Court complaint was filed on July 17, 2018 and its Complaint and "Counter-Complaint" in the Nye County action were filed on September 20 and September 25, 2018, respectively, Brahma loses the first to file argument.

A. TSE is Not Seeking a Stay of Brahma's Motion for Attorneys' Fees

Brahma posits four arguments for why, even though its federal court complaint was first filed, this Court should still not stay this action. First, Brahma argues that the real motive behind TSE's request for a stay is that TSE is improperly trying to avoid an award of attorneys' fees against it for the Motion to Expunge that this Court denied. This is incorrect. As shown by TSE's Opposition to Brahma's Motion for Attorneys' Fees that was filed on November 20, 2018, TSE acknowledges that this Court should award attorneys' fees to Brahma but takes issue with the grossly unreasonable *amount* of fees Brahma is requesting. Indeed, TSE proposes in its

Opposition that the Court award Brahma approximately \$23,000 in fees. A hearing is set for December 11, 2018 on Brahma's Motion for Attorneys' Fees and TSE is not seeking to stay the Court's adjudication of that issue as it is not substantially related to the issues raised in the parallel federal action.

B. The Nevada Federal District Court Can Adjudicate All Aspects of the Parties' Dispute and the Litigation There is Already Further Along Than This Litigation

Second, Brahma argues that this Court is the most convenient forum because only this Court can hear all claims related to the Project in a single proceeding. Brahma is wrong and misunderstands the federal procedural rules and statutes. The federal court could resolve this entire dispute in an efficient manner and is already further along in doing so as that court has already issued a scheduling order and TSE has issued discovery requests to Brahma. *See Exhibit 5* (federal court scheduling order); *Exhibit 1* (federal court written discovery). Brahma and TSE could litigate all of their claims against each other in federal court. Brahma's bond claim against Cobra and AHAC (the surety) would be stayed by this Court and Cobra and the surety would interplead as non-diverse defendants in the federal action, as interested parties. *See Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1095 (C.D. Cal. 2005) *aff'd*, 446 F.3d 1011 (9th Cir. 2006) (providing that intervention by a non-diverse non-indispensable party in an action removed on the basis of diversity does not destroy diversity and that a party can intervene as a defendant even if there is no claim against it). Thus, the findings of fact and conclusions of law in the federal action would have a claim preclusive effect on Brahma's stayed bond claim against Cobra and the surety in this Court. *See Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003) (discussing claim preclusion).³ After the federal action is completed, there will be no need for Brahma to re-litigate any issues in Nye County.

³ Brahma also alludes to a pending lawsuit from H&E, a subcontractor to Brahma. The implications of this lawsuit are difficult to assess as it has not been filed yet. But, if H&E were to file claims against Brahma, as suggested by Brahma, it would do so in a separate action. According to Brahma, those claims are derivative of Brahma's claims against TSE. Thus, the H&E action will be the same whether or not this case is in state court or federal court; H&E's claims against Brahma will either be litigated simultaneously in a separate action, or, as H&E's claims are derivative, its case would most likely be stayed pending resolution of the federal action, which would have preclusive effect once decided.



1 **C. Nevada's Federal Courts Regularly Handle Mechanic's Lien and Bond**
2 **Claim Cases**

3 Third, Brahma argues that mechanic's lien actions are not suitable to being adjudicated in
4 federal court due to Nevada's special procedural rules regarding where a claim must be brought
5 and when that claim should be brought to trial. Again, the case law refutes Brahma's position as
6 Nevada federal courts regularly adjudicate mechanic's lien and bond claims that are located
7 outside the counties in which they sit. *See e.g., SMC Constr. Co. v. Rex Moore Grp., Inc.*, No.
8 317CV00470LRHVPC, 2017 WL 4227940, at *4 (D. Nev. Sept. 21, 2017). (the federal court in
9 Washoe County expunged a mechanic's lien recorded on property in Douglas County); *YWS*
10 *Architects, LLC v. Alon Las Vegas Resort, LLC*, No. 217CV01417RFBVCF, 2018 WL 4615983,
11 at *1 (D. Nev. Sept. 26, 2018) (Las Vegas federal district court adjudicating lien claim).
12 Clearly, Nevada's federal courts are more than capable of protecting lien and bond claimants'
13 statutory rights and have been doing so for a long time. Further, Brahma's misrepresents its
14 desire for a speedy trial of this matter as it has just recently filed a motion to stay all discovery in
15 the federal action and is refusing to respond to the written discovery TSE served on it. **Exhibits**
16 **2** (motion to stay) and **3** (Brahma's objections to TSE's written discovery).

17 **D. No Authority Exists that Prevents this Court From Issuing a Stay**

18 Fourth, Brahma argues that the *Maui One*⁴ case stands for the proposition that courts are
19 not permitted to stay a mechanic's lien or bond claim case. *Lehrer McGovern Bovis, Inc. v.*
20 *Maui One Excavating, Inc.*, 124 Nev. 1487, 238 P.3d 832 (2008). Brahma again misrepresents
21 the case law. *Maui One* says nothing about when a stay can or cannot issue in a mechanic's lien
22 case and instead involved the issue of whether NRCP 41's five year rule had been tolled by a
23 court ordered stay. *Id.*

24 In conclusion, there is no reason for this Court to deviate from the "First to File" rule.
25 Brahma's complaint in the Eighth Judicial District Court was filed before its Complaint and
26

27
28 ⁴ The *Maui One* case is an unpublished decision that Brahma has cited in violation of Nevada Rule of
Appellate Procedure 36. Regardless, the case does not support Brahma's argument.



1 Counter-Complaint in the Nye County action. Further, the Nevada Federal District Court is fully
2 able to adjudicate all issues among all parties in this matter, will not prejudice Brahma's rights in
3 any way and the pending litigation there is already further along than this litigation.

4 **VI. THE FEDERAL COURT IS LIKELY TO DENY BRAHMA'S MOTION TO STAY**
5 **THAT ACTION AND GRANT TSE'S MOTION TO ENJOIN BRAHMA FROM**
6 **PROCEEDING IN NYE COUNTY**

7 To further distract this Court from the merits of TSE's Motion, Brahma attached its
8 Motion to Stay the federal court action to its Opposition and argued that the federal court is
9 likely to grant that motion. Brahma also argued that TSE's Motion requesting that the federal
10 court issue an injunction enjoining Brahma from litigating this action any further is likely to be
11 denied.⁵ Brahma is wrong. The *Colorado River* abstention doctrine on which Brahma relies for
12 its Motion to Stay is disfavored. Further, federal courts regularly issue injunctions when parties
13 like Brahma seek to subvert their jurisdiction by re-filing removed claims in a different state
14 court action. In an abundance of caution and to defeat Brahma's attempt to give this Court only
15 one side of the story, TSE has attached hereto (1) TSE's Opposition to Brahma's Motion to Stay
16 the federal action, (2) Brahma's Reply to same, (3) TSE's Motion for Injunction in the federal
17 action, (4) Brahma's Opposition to same, and (5) TSE's Reply to the Motion for Injunction. *See*
18 **Exhibits 6-10.**⁶

19 **VII. BRAHMA'S LIEN FORECLOSURE CLAIM MUST BE DISMISSED BECAUSE**
20 **IT WAS FILED AS PART OF AN IMPERMISSIBLE AND VOID PLEADING**

21 Brahma acknowledges that its Lien Foreclosure claim must be dismissed now that a
22 surety bond has been posted by Cobra. However, Brahma disagrees as to the appropriate
23 procedure for accomplishing this. Brahma argues it should be permitted to amend the "Counter-
24 Complaint" to drop this claim. As set forth in Section II, above, this is not possible as the
25 Counter-Complaint was filed in violation of NRCP 7(a) and *Smith* and must be stricken. One

26 ⁵ Curiously, Brahma only attached its own federal court papers to its Opposition and did not include any
27 of TSE's papers.

28 ⁶ TSE has omitted attaching the voluminous exhibits to these motions to avoid burdening this Court but
can provide them upon request.

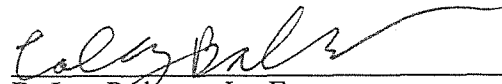


1 cannot amend a void pleading. Thus, Brahma's Lien Foreclosure claim should be dismissed
2 rather than amended out of the Counter-Complaint.

3 **VIII. CONCLUSION**

4 For all the reasons cited above and set forth in TSE's Motion, TSE requests that the Court
5 grant the Motion so that all aspects of the parties' dispute can be heard in the first filed federal
6 action. Federal courts regularly hear lien and bond claims such as these and are well equipped to
7 protect Brahma and TSE's procedural and substantive rights under Nevada's lien laws.

8 DATED this 30th day of November, 2018.

9
10 
11 D. Lee Roberts, Jr., Esq.
12 Colby L. Balkenbush, Esq.
13 Ryan T. Gormley, Esq.
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18 Attorneys for Tonopah Solar Energy, LLC
19
20
21
22
23
24
25
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27
28



CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2018, a true and correct copy of the foregoing **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 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:

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

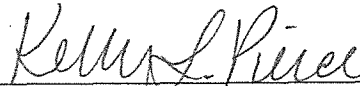

An employee of WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC

EXHIBIT 1

EXHIBIT 1

RA000380



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

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

14 BRAHMA GROUP, INC., a Nevada corporation,
15 Plaintiff,

16 vs.

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

20 TONOPAH SOLAR ENERGY, LLC, a Delaware
limited liability company; DOES I through X; and
21 ROE CORPORATIONS I through X,
22 Counterclaimant,

23 vs.
24

25 BRAHMA GROUP, INC., a Nevada corporation,
26 Counterdefendant.

Case No. 2:18-cv-01747-RFB-GWF

**TONOPAH SOLAR ENERGY, LLC'S
FIRST SET OF INTERROGATORIES TO
BRAHMA GROUP, INC.**



Defendant/Counterclaimant Tonopah Solar Energy, LLC ("TSE") requests that Plaintiff/Counterdefendant Brahma Group, Inc. ("Brahma," "you," or "your") answer under oath the interrogatories set forth below within 30 days of the date of service of the same upon you in accordance with Federal Rule of Civil Procedure 33. In answering these interrogatories, adhere to the following definitions and instructions.

DEFINITIONS

Notwithstanding any definition below, each word, term, or phrase used herein is intended to have the broadest meaning permitted under the Federal Rules of Civil Procedure.

1. "Document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), which includes, but is not limited to, all electronic, written, or printed matter, information, communication, or data of any kind, including the originals and all copies thereof, such as, but not limited to, correspondence, letters, emails, text messages, electronic messages, contracts, reports, memoranda, notes, minutes, receipts, invoices, calendar entries, digital images, digital recordings, photographs, microfiche, videotapes, spreadsheets, drawings, all electronically stored information, unstructured data, and structured data. A draft of a nonidentical copy is a separate document within the meaning of this term.

2. "Communication" refers to the transmittal of information (in the form of facts, ideas, inquiries, or otherwise).

3. "Concerning" means relating to, referring to, describing, evidencing, or constituting.

4. "Brahma," "you," and "your" refer to Plaintiff/Counterdefendant Brahma Group, Inc. and its past or present officers, directors, employees, corporate parents, subsidiaries, successors, predecessors, affiliates, agents, subcontractors and any other persons or entities who obtained or maintained information on its or their behalf.

5. "Contract" refers to the Services Agreement made as of February 1, 2017, between TSE and you, as amended by Amendment No. 1 to Services Agreement made as of November 2017, attached hereto as **Exhibit A**.



6. "Project" has the same meaning attributed to it by paragraph 6 in your Complaint filed in the Eighth Judicial District Court, dated July 17, 2018, wherein it refers to the Crescent Dunes Concentrated Solar Power Plant in or near Tonopah, Nevada.

INSTRUCTIONS

1. Construe each interrogatory in accordance with the following: (i) construe each interrogatory independently; do not construe any interrogatory so as to limit the scope of any other interrogatory; (ii) references to the singular include the plural and vice versa; (iii) references to one gender include the other gender; (iv) references to the past include the present and vice versa; (v) disjunctive terms include the conjunctive and vice versa; (vi) the words "and" and "or" are conjunctive and disjunctive as necessary to bring within the scope of the interrogatory all responses that might otherwise be construed to be outside of its scope; (vii) the word "all" refers to all and each, and (viii) the word "each" refers to all and each.

2. Answer each interrogatory separately and fully. If you cannot answer an interrogatory fully, answer it to the extent possible, explain why you cannot answer the remainder, and state the nature of the information you cannot furnish. If you object to an interrogatory, you must object with specificity.

3. If, in responding to these interrogatories, you assert a privilege to any particular interrogatory, provide a privilege log as required by Fed. R. Civ. P. 26(b)(5), which identifies the nature of the claimed privilege and, at a minimum, includes enough information so that the propounding party and the Court can make an informed decision as to whether the matter is indeed privileged.

4. Each interrogatory is continuing in nature. If, after responding to these interrogatories, you obtain or become aware of further responsive information, promptly provide that information in accordance with Fed. R. Civ. P. 26(e) and the definitions and instructions herein.

5. To the extent that you produce documents in response to an interrogatory, produce all documents in accordance with the ESI Production Format, attached as Exhibit B to TSE's First Set of Requests for Production to you.



INTERROGATORIES

1
2 1. Identify and describe all of the persons and entities that you contracted with
3 pertaining to or concerning the Project, including, but not limited to, subcontractors, suppliers,
4 and consultants. Your description should include the person's or entity's complete name,
5 address, telephone number, and a brief description of the type of services it, he, or she
6 provided.

7 2. Identify and describe all of your current or past employees that performed work
8 pertaining to the Project. Your description should include the employee's first name, last
9 name, current employment status with you, current job title, job title(s) during the Project,
10 present or last known address, present or last known email address, and present or last known
11 telephone number.

12 3. Identify and describe all subcontractors you contracted with, pertaining to, or
13 concerning the Project that are owned, in whole or in part, by you, any of your affiliates, or any
14 of your or your affiliate's directors, officers, or employees, or any relative of any such director,
15 officer, or employee. Your description should include the person's or entity's complete name,
16 address, telephone number, a brief description of the type of services it, he, or she provided,
17 the relationship of such person or entity to you and/or the ownership of such entity, and the
18 amounts paid or to be paid to such person or entity with respect to the services performed.

19 ///

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4. If you contend that TSE failed to pay you and/or underpaid you for work you performed on the Project, identify and describe each such failure. Your description should include the specific nature of each component of the work, the date the work was performed, the document you submitted to TSE requesting payment for the work, the amount of money you were not paid and/or underpaid, and the bates-numbers of the material documents that support your contention that TSE failed to pay you and/or underpaid you.

DATED this 29th day of October, 2018.

/s/ Colby Balkenbush
D. Lee Roberts, Jr., Esq.
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Ryan T. Gormley, Esq.
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GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118

*Attorneys for Defendant
Tonopah Solar Energy, LLC*

Exhibit A: Services Agreement, as amended



RECEIPT OF COPY

RECEIPT OF COPY of TONOPAH SOLAR ENERGY, LLC'S FIRST SET OF
INTERROGATORIES TO BRAHMA GROUP, INC. is hereby acknowledged this 29th day of
October, 2018.

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Ronald J. Cox, Esq.

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

11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

14 BRAHMA GROUP, INC., a Nevada corporation,
15 Plaintiff,

16 vs.

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

20 TONOPAH SOLAR ENERGY, LLC, a Delaware
limited liability company; DOES I through X; and
21 ROE CORPORATIONS I through X,
22 Counterclaimant,

23 vs.
24

25 BRAHMA GROUP, INC., a Nevada corporation,
26 Counterdefendant.

Case No. 2:18-cv-01747-RFB-GWF

**TONOPAH SOLAR ENERGY, LLC'S
FIRST SET OF REQUESTS FOR
PRODUCTION TO BRAHMA GROUP,
INC.**



1 Defendant/Counterclaimant Tonopah Solar Energy, LLC ("TSE") requests that
2 Plaintiff/Counterdefendant Brahma Group, Inc. ("Brahma," "you," or "your") produce the
3 documents and things requested below at the offices of Weinberg, Wheeler, Hudgins, Gunn, &
4 Dial, 6385 South Rainbow Boulevard, Suite 400, Las Vegas, Nevada 89118 within 30 days of
5 the date of service of this request in accordance with Federal Rule of Civil Procedure 34. In
6 responding to these requests, adhere to the following definitions and instructions.

7 DEFINITIONS

8 Notwithstanding any definition below, each word, term, or phrase used herein is intended
9 to have the broadest meaning permitted under the Federal Rules of Civil Procedure.

10 1. "Document" is defined to be synonymous in meaning and equal in scope to the
11 usage of this term in Federal Rule of Civil Procedure 34(a), which includes, but is not limited to,
12 all electronic, written, or printed matter, information, communication, or data of any kind,
13 including the originals and all copies thereof, such as, but not limited to, correspondence, letters,
14 emails, text messages, electronic messages, contracts, reports, memoranda, notes, minutes,
15 receipts, invoices, calendar entries, digital images, digital recordings, photographs, microfiche,
16 videotapes, spreadsheets, drawings, all electronically stored information, unstructured data, and
17 structured data. A draft of a nonidentical copy is a separate document within the meaning of this
18 term.

19 2. "Communication" refers to the transmittal of information (in the form of facts,
20 ideas, inquiries, or otherwise).

21 3. "Concerning" means relating to, referring to, describing, evidencing, or
22 constituting.

23 4. "Brahma," "you," and "your" refer to Plaintiff/Counterdefendant Brahma Group,
24 Inc. and its past or present officers, directors, employees, corporate parents, subsidiaries,
25 successors, predecessors, affiliates, agents, subcontractors and any other persons or entities who
26 obtained or maintained information on its or their behalf.

27 5. "JT Thorpe" refers to J.T. Thorpe & Son, Inc. and its past or present officers,
28 directors, employees, corporate parents, subsidiaries, successors, predecessors, affiliates, agents,



1 and any other persons or entities who obtained or maintained information on its or their behalf.

2 6. "Liberty Industrial" refers to Liberty Industrial Group, Inc. and its past or present
3 officers, directors, employees, corporate parents, subsidiaries, successors, predecessors,
4 affiliates, agents, and any other persons or entities who obtained or maintained information on its
5 or their behalf.

6 7. "Cobra" refers to Cobra Thermosolar Plants, Inc. and its past or present officers,
7 director, employees, corporate parents, subsidiaries, successors, predecessors, affiliates, agents,
8 and any other persons or entities who obtained or maintained information on its or their behalf.

9 8. "Contract" refers to the Services Agreement made as of February 1, 2017,
10 between TSE and you, as amended by Amendment No. 1 to Services Agreement made as of
11 November 2017, attached hereto as **Exhibit A**.

12 9. "Invoice" refers to the invoices that you had to submit to TSE for payment under
13 Section 4(c) of the Contract. This term includes your subcontractor invoices.

14 10. "Payment Deliverables" refers to the documents that you must provide with an
15 Invoice pursuant to Exhibit D to the Contract.

16 11. "Request for Reimbursement" refers to the written requests for reimbursement
17 governed by Section 4(d) of the Contract.

18 12. "Project" has the same meaning attributed to it by paragraph 6 in your Complaint
19 filed in the Eighth Judicial District Court, dated July 17, 2018, wherein it refers to the Crescent
20 Dunes Concentrated Solar Power Plant in or near Tonopah, Nevada.

21 **INSTRUCTIONS**

22 1. Produce all documents known or available to you after making a diligent search
23 of your records that are within your possession, custody, or control, or in the possession, custody,
24 or control of your counsel, agents, or representatives, or which can be obtained through
25 reasonably diligent efforts.

26 2. Construe each request in accordance with the following: (i) construe each request
27 for production independently; do not construe any request so as to limit the scope of any other
28 request; (ii) references to the singular include the plural and vice versa; (iii) references to one



1 gender include the other gender; (iv) references to the past include the present and vice versa; (v)
2 disjunctive terms include the conjunctive and vice versa; (vi) the words "and" and "or" are
3 conjunctive and disjunctive as necessary to bring within the scope of the request all responses
4 that might otherwise be construed to be outside of its scope; (vii) the word "all" refers to all and
5 each, and (viii) the word "each" refers to all and each.

6 3. If any document or thing requested was at one time in existence, but is no longer
7 in existence, please so state, specifying for each document and thing, (a) the type of document or
8 thing, (b) the types of information contained therein, (c) the date upon which the document or
9 thing was destroyed or ceased to exist, (d) the circumstances under which it was destroyed or
10 ceased to exist, (e) the identity of all persons having knowledge of the circumstances under
11 which it was destroyed or ceased to exist, and (f) the identity of all persons having knowledge or
12 persons who had knowledge of the contents thereof.

13 4. If you have previously produced any documents required to be produced by any
14 of these discovery requests, identify the document(s) by bates-number in responding to the
15 request.

16 5. If you object to a request, state your objection with specificity and state whether
17 any responsive materials are being withheld on the basis of that objection.

18 6. If, in responding to these requests, you claim any ambiguity in interpreting either
19 a request or a definition or instruction applicable thereto, you cannot use such a claim as a basis
20 for failing to respond; instead, you must set forth as part of your response to the request the
21 language deemed to be ambiguous and the interpretation chosen to be used in responding to the
22 request.

23 7. If, in responding to these requests, you assert a privilege to any particular request,
24 provide a privilege log as required by Fed. R. Civ. P. 26(b)(5), which identifies the nature of the
25 claimed privilege and, at a minimum, includes enough information so that the propounding party
26 and the Court can make an informed decision whether the matter is indeed privileged.

27 8. Each request is continuing in nature. If, after responding to these requests, you
28 obtain or become aware of further documents responsive to these requests, promptly produce



1 those documents and things in accordance with Fed. R. Civ. P. 26(e) and the definitions and
2 instructions herein.

3 9. Produce all documents in accordance with the ESI Production Format, attached
4 hereto as **Exhibit B**.

5 **REQUESTS FOR PRODUCTION OF DOCUMENTS**

6 For the time period of January 1, 2017 to the present, produce the following
7 documents:

8 1. Produce all construction project documents pertaining to the Project, including,
9 but not limited to, work orders, contracts, change orders, requests for information, submittals,
10 drawings, specifications, plans, daily logs, daily reports, daily details, meeting minutes, journal
11 entries, schedules, monthly narratives, payment applications, invoices, time cards, and receipts.

12 2. Produce all Invoices you submitted to TSE under the Contract.

13 3. For each Invoice you submitted to TSE under the Contract, produce all Payment
14 Deliverables included with those Invoices.

15 4. For each Invoice you submitted to TSE under the Contract, produce all
16 documents that support or relate to the amount of money requested therein.

17 5. For each Invoice you submitted to TSE under the Contract, produce all
18 documents that demonstrate that the work set forth in that Invoice was actually performed
19 and/or completed.

20 6. Produce all Requests for Reimbursement you submitted to TSE under the
21 Contract.

22 7. For each Request for Reimbursement you submitted to TSE under the Contract,
23 produce all documents that support or relate to the amount of money requested therein.

24 8. Produce all documents reflecting the corporate relationship between you and
25 Liberty Industrial and/or the ownership of Liberty Industrial.

26 9. Produce all documents reflecting communications between you and Liberty
27 Industrial concerning the Project.

28 10. Produce all documents reflecting the corporate relationship between you and JT



- 1 Thorpe and/or the ownership of JT Thorpe.
- 2 11. Produce all documents reflecting communications between you and JT Thorpe
- 3 concerning the Project.
- 4 12. Produce all documents showing related party transaction disclosures you made
- 5 to TSE that indicate that a particular subcontractor or vendor was a related entity to Brahma.
- 6 13. Produce all documents concerning the services that you provided under the
- 7 Contract.
- 8 14. Produce all documents concerning the services that you provided that benefitted
- 9 TSE and fell outside the scope of the Contract.
- 10 15. Produce all documents reflecting communications between you and any persons
- 11 and/or entities concerning the Project.
- 12 16. Produce all bids you received that pertain to your work on the Project.
- 13 17. Produce all requests for proposals and/or requests for bids that you sent out that
- 14 pertain to your work on the Project.
- 15 18. For all equipment related charges that you have sought/are seeking payment on,
- 16 produce all documents that support or relate to the amount of money requested therein.
- 17 Documents that would be responsive to this request include, but are not limited to, rate cards
- 18 showing the hourly/daily rate for each piece of equipment, and documentation showing what
- 19 equipment was used, for how long and for what purpose.
- 20 19. Produce all documents showing that TSE agreed to pay your employees and
- 21 subcontractors' employees for lunch breaks and breaks while on site at the Project.
- 22 20. Produce all payroll records submitted to any unions related to the wages earned
- 23 by your employees and your subcontractors' employees for work on the Project.
- 24 21. Produce all documents showing that TSE authorized you to bill overtime hours
- 25 to the standby work order.
- 26 22. Produce all documents showing that TSE authorized you to bill hours to closed
- 27 work orders.
- 28 23. Produce all documents showing that TSE authorized you to bill hours to work



1 order 10131.

2 24. Produce all documents showing that TSE authorized you to bill hours for
3 employees who did not provide timesheets.

4 25. Produce all documents concerning work you performed as a subcontractor to
5 Cobra on or after January 1, 2017.

6 26. If certain equipment was not demobilized after you stopped performing work as
7 a subcontractor to Cobra and you used that equipment when performing work on the Project,
8 produce all documents pertaining to your use of the non-demobilized equipment.

9 27. Produce any organizational chart(s) or other similarly purposed documents,
10 which reflect your corporate structure.

11 28. Produce any employee roster(s) or other similarly purposed documents, which
12 identifies employees that provided services under the Contract.

13 29. Produce all documents reflecting your policy or practice with respect to the
14 retention or destruction of documents that may be responsive to any of the document requests
15 set forth herein.

16 30. Produce all documents identified, referenced, relied upon, or concerning your
17 answers to any interrogatories served upon you in this case.

18 DATED this 29th day of October, 2018.

19
20 /s/ Colby Balkenbush
21 D. Lee Roberts, Jr., Esq.
22 Colby L. Balkenbush, Esq.
23 Ryan T. Gormley, Esq.
24 WEINBERG, WHEELER, HUDGINS,
25 GUNN & DIAL, LLC
26 6385 S. Rainbow Blvd., Suite 400
27 Las Vegas, NV 89118

28 *Attorneys for Defendant
Tonopah Solar Energy, LLC*

26 **Exhibit A: Services Agreement, as amended**
27 **Exhibit B: ESI Production Format**



RECEIPT OF COPY

RECEIPT OF COPY of TONOPAH SOLAR ENERGY, LLC'S FIRST SET OF
REQUESTS FOR PRODUCTION TO BRAHMA GROUP, INC. is hereby acknowledged this
29th day of October, 2018.

Richard L. Peel, Esq.
Eric B. Zimbelman, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
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ezimbelman@peelbrimley.com
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Attorneys for Plaintiff Brahma Group, Inc.

EXHIBIT 2

1 RICHARD L. PEEL, ESQ.
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Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
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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
ROE CORPORATIONS I through X,

15 Defendants.

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

18 Counterclaimant,

19 vs.

20 BRAHMA GROUP, INC., a Nevada corporation

21 Counterdefendant.

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

**BRAHMA GROUP, INC.'S MOTION
TO STAY DISCOVERY PENDING
DETERMINATION OF
DISPOSITIVE MOTION**

22
23 Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm
24 of Peel Brimley LLP, hereby submits its Motion To Stay Discovery Pending Determination of
25 Dispositive Motion ("Motion").

26 ///

27 ///

28 ///

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 This Motion is made and based on the following Memorandum of Points and Authorities,
2 the Declaration of Ronald J. Cox, Esq., the attached exhibits, and any further evidence and
3 argument this Court may allow.

4 Dated this 28 day of November, 2018.

5 **PEEL BRIMLEY LLP**

6
7 
8 **RICHARD L. PEEL, ESQ.**

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10 CARY B. DOMINA, ESQ.
11 Nevada Bar No. 10567
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13 Henderson, Nevada 89074-6571
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15 rpeel@peelbrimley.com
16 cdomina@peelbrimley.com
17 *Attorneys for Plaintiff*
18 **BRAHMA GROUP, INC.**

19 **MEMORANDUM OF POINTS & AUTHORITIES**

20 **I. INTRODUCTION**

21 Tonopah Solar Energy, LLC ("TSE") served written discovery requests (collectively, the
22 "Discovery Requests") on Brahma in the instant action solely in an attempt to defeat Brahma's
23 Motion for Stay, or in the Alternative, Motion to Amend Complaint ("Dispositive Motion"). By
24 serving the TSE Discovery, TSE was able to state to this Court in its Response to the Dispositive
25 Motion (which was filed one day after the TSE Discovery was served) that "this action has
26 progressed into discovery." ECF No. 18, p. 18. The sole purpose for this is merely to give TSE an
27 argument that this action is further along than the parallel action filed in Nye County, which is one
28 of the factors considered in the *Colorado River* Doctrine that is the subject of the Dispositive
Motion.

However, Brahma satisfies the Ninth Circuit's requirements for a stay of discovery as the
Dispositive Motion (i) is dispositive of the matter¹, and (ii) can be decided without the need for
additional discovery.

¹ Although the case law only requires that a motion be potentially dispositive.

1 Accordingly, the Court should grant this Motion and stay the discovery pending the
2 determination of the Dispositive Motion.

3 **II. STATEMENT OF FACTS²**

4 TSE is the owner of the Crescent Dunes Solar Energy Project constructed on certain real
5 property located in Nye County, Nevada (the "Work of Improvement").

6 TSE hired Brahma pursuant to a written agreement (the "Agreement")³ to provide certain
7 work, 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. TSE owes Brahma \$12,859,577.74 ("Outstanding Balance") for the Work.

10 Because of TSE's failure to fully pay Brahma for its Work, Brahma caused a notice of lien
11 ("Original Lien") to be recorded against the Work of Improvement on April 9, 2018 with the Nye
12 County Recorder.⁴ Thereafter, the Original Lien was subsequently amended and/or restated on
13 several occasions⁵ (collectively, the "Lien") to reflect, among other things, the Outstanding
14 Balance.

15 On June 1, 2018, TSE, as plaintiff, commenced an action in Nye County as Case No. CV
16 39348 (the "Nye County Action"), seeking to expunge the Lien from the Work of Improvement by
17 filing a Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien (the "Motion to Expunge").⁶

18 Based on a mistaken belief that the Agreement required Brahma to pursue its contract-based
19 claims in Clark County, Nevada, Brahma filed a Complaint on July 17, 2018, against TSE for
20 breach of contract, unjust enrichment, and violation of NRS Chapter 624 in the Eighth Judicial
21 District Court of Nevada (the "Clark County Action").⁷

22 ///

23
24 ² The facts supporting Brahma's Dispositive Motion are set forth more fully in the Dispositive Motion and are
25 incorporated herein by this reference, but are only summarized herein for context. Additionally, the evidence supporting
26 the facts is attached to the Dispositive Motion as exhibits and are incorporated herein by reference, but not included
27 herein for purposes of brevity.

28 ³ See, Exhibit 1 attached to Brahma's Motion For Stay, Or in the Alternative, Motion to Amend Complaint, ECF No.
13 (hereinafter, "ECF No. 13")

⁴ See, Exhibit 2 attached to ECF No. 13.

⁵ See, Exhibits 3, 4, 5 and 6 attached to ECF No. 13.

⁶ See, Exhibit 10 attached to ECF No. 13.

⁷ See, Exhibit 11 attached to ECF No. 13.

1 On September 10, 2018, TSE removed the Clark County Action to Federal Court based on
2 diversity jurisdiction only (this "Action").

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

7 On September 21, 2018, Brahma (as the defendant in Case No. CV 39348) filed its
8 Mechanic's Lien Foreclosure Complaint⁸ in the Nye County Action, as required by NRS
9 108.239(1).⁹

10 On September 25, 2018:

- 11 • Brahma filed in the Nye County Action its (i) First Amended Counter-Complaint
12 and included therein its contract-based claims against TSE, and (ii) Third-Party
13 Complaint asserting a claim against a surety that issued a mechanic's lien release
14 bond ("Bond"), and the principal on the Bond.¹⁰
- 15 • On September 25, 2018, Brahma filed its First Amended Complaint in the Federal
16 Action wherein it removed all causes of action against TSE except for its Unjust
17 Enrichment claim.

18 On October 16, 2018, Brahma filed its Dispositive Motion asking this Court to stay the
19 Federal Action based on the *Colorado River* Doctrine.

20 On October 25, 2018, the Parties attended the FRCP 26(f) conference.

21 On October 29, 2018, the day before TSE's Response to the Dispositive Motion was due,
22 TSE served Brahma with the Discovery Requests.

23 On October 30, 2018, TSE filed and served its Response to the Dispositive Motion.

24 On November 21, 2018, the Parties participated in a conference call¹¹ to discuss staying all

25 ⁸ See, Exhibit 12 attached to ECF No. 13.

26 ⁹ In pertinent part, NRS 108.239(1) states, "A notice of lien may be enforced by an action in any court of competent
27 jurisdiction that is located within the county where the property upon which the work of improvement is located"

28 ¹⁰ See, Exhibit 13 attached to ECF No. 13.

¹¹ Although Brahma is asking for a stay of all discovery and is not seeking a protective order pursuant to FRCP 26(c),
Brahma is not required to demonstrate it made a good faith effort to confer with TSE and resolve this issue. However,
Brahma did so in an effort to resolve the matter without the need for this Court to rule on the current Motion.

discovery pending this Court's determination of the Dispositive Motion.¹² In anticipation of the call, counsel for Brahma sent an email to TSE's counsel with relevant caselaw that supported a stay of discovery.¹³ During the call, TSE advised Brahma that, despite the caselaw, it would not agree to stay discovery.¹⁴

On November 14, 2018, the Parties filed the Proposed Joint Discovery Plan and Scheduling Order, which the Court adopted on November 15, 2018. Notably, despite immediately serving Brahma with the Discovery Requests even before the Court approved the Discovery Plan, TSE requested a full year for discovery, whereas, Brahma believed discovery could be accomplished within six months.

III. LEGAL ARGUMENT

A stay of discovery in this action is appropriate as Brahma has filed its Dispositive Motion based on the *Colorado River* Doctrine, which is currently pending. This very Court granted a discovery stay for this very reason in *Puckett v. Schnog*, No. 2:12-CV-0198-GMN, 2013 WL 1874754, at 1 (D. Nev. May 3, 2013), and should also do so here.

"Courts have broad discretionary power to control discovery." *In re Dillon Estate v. Bayview Loan Servicing, LLC*, No. 2:18-cv-01582-JCM-GWF, 2018 WL 5116841, at 1 (D. Nev. Oct. 18, 2018). "When deciding whether to grant a stay of discovery, the Court is guided by the objectives of *Fed. R. Civ. Pro. 1* that ensures a 'just, speedy, and inexpensive determination of every action.'" *Id.* (citing *Kor Media Group, LLC v. Green*, 294 F.R.D. 579, 581 (D. Nev. 2013)).

Although the Ninth Circuit has stated that the Federal Rules of Civil Procedure do not provide for blanket stays of discovery when a potentially dispositive motion is pending, it has set forth a test for granting such stays. *Puckett*, 2013 WL 1874754, at 1 (D. Nev. 2013).

"It is well-established that a party seeking a stay of discovery carries the heavy burden of making a strong showing why discovery should be stayed." *Tradebay, LLC v. eBay, Inc.*, 278

¹² See, Declaration of Ronald J. Cox, Esq. attached hereto as Exhibit 1.

¹³ *Id.*

¹⁴ *Id.*

1 F.R.D. 597, 601 (D. Nev. 2011). “To determine whether this requirement is met, the Court employs
 2 a two-part test: (1) the pending motion must be potentially dispositive of the entire case or at least
 3 dispositive of the issue on which discovery is sought, and (2) the court must determine whether the
 4 pending potentially dispositive motion can be decided without additional discovery.” *Puckett*, 2013
 5 WL 1874754, at 1 (D. Nev. 2013)(citing *Ministerio Roca Solida v. U.S. Dep’t of Fish & Wildlife*,
 6 288 F.R.D. 500, 506 (D. Nev. 2013)).

8 In applying the two-factor test, “the court deciding the motion to stay must take a
 9 ‘preliminary peek’ at the merits of the pending dispositive motion to assess whether a stay is
 10 warranted.” *Id.* at 2 (footnote 1).¹⁵ “Common examples of when a stay is warranted are cases
 11 involving jurisdiction, venue or immunity as preliminary issues.” *In re Dillon Estate*, 2018 WL
 12 5116841, at 1 (D. Nev. Oct. 18, 2018). *See also*, *Diuffitelli v. Deloitte & Touche LLP*, No. 3:16-cv-
 13 0580-AC, 2016 WL 6963039, at 4 (D. Or. Nov. 28, 2016) (“[i]f the pending motion raises
 14 dispositive procedural issues, the district court may stay discovery”).

16 Brahma satisfies both requirements and therefore the Court has discretion to grant a stay of
 17 discovery. Additionally, a stay of discovery is warranted as this matter involves issues related to
 18 jurisdiction.

19 **A. Brahma’s Dispositive Motion Disposes of this Action.**

20 On or about October 1, 2018, Brahma filed its Dispositive Motion to stay this Action based
 21 on the *Colorado River* Doctrine. The *Colorado River* doctrine requires a federal court to abstain in
 22 favor of a concurrent state court proceeding where necessary to promote “wise judicial
 23 administration, conservation of judicial resources, and comprehensive disposition of litigation.”
 24 *Southwest Circle Group, Inc. v. Perini Building Company*, 2010 WL 2667335 *2 (D. Nev. June 29,
 25 2010) (citing *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989). Under the *Colorado River*
 26

27
 28 ¹⁵ Brahma’s arguments are set forth in detail in its Motion to Stay [ECF No. 13], which arguments are incorporated herein by reference.

1 Doctrine, “[i]n exceptional circumstances, the court may stay or dismiss an action where there are
 2 ‘substantially similar’ concurrent state court proceedings.” *Puckett*, 2013 WL 1874754, at 1 (D.
 3 Nev. 2013). The *Puckett* Court correctly noted however, that “when a case only involves questions
 4 of state law, the requirement for exceptional circumstances does not apply.” *Id.* (citing *Southwest*
 5 *Circle Group, Inc. v. Perini Bldg. Co.*, 2010 WL 2667335, at 1 (D. Nev. June 29, 2010)) (holding
 6 “while exception under Colorado River is limited to ‘exceptional circumstances,’ ... such a
 7 limitation only relates to cases which involve questions of federal law.”).

8
 9 This case satisfies the standards for a *Colorado River* stay to promote “wise judicial
 10 administration and conserve judicial resources and comprehensive disposition of litigation.” The
 11 Nye County Action and this Action are substantially similar, contemporaneous, concurrent state
 12 and federal cases. *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 845 (9th Cir. 2017).
 13 Here, the pending Nye County Action (State Action) and District of Nevada Action (this Action)
 14 fulfill the substantial similarity requirement. Both cases involve the same parties and arise out of
 15 the same events—the Agreement, its performance, TSE’s failure to pay Brahma for its Work and
 16 TSE’s claims that Brahma over charged it for its Work. Both cases assert contractual and quasi-
 17 contractual claims and should be decided by the same trier of fact who will decide the Lien
 18 litigation—i.e., the Nye County Court. There is concurrent jurisdiction over all claims in these two
 19 cases; neither case asserts a claim within the exclusive subject-matter jurisdiction of a federal court.
 20 In other words, the federal court’s expertise on federal law is not required in this Case.
 21
 22

23 Because the *Colorado River* Doctrine requires a federal court to abstain in favor of a
 24 concurrent state court proceeding, Brahma’s Dispositive Motion disposes of this Action (not merely
 25 “potentially dispositive” as required), thus satisfying the first prong of the test.

26 ///

27 ///

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B. No Discovery is Necessary to Decide Brahma's Dispositive Motion.

Additional discovery will not assist this Court in deciding Brahma's Motion for Stay. "Once a party has met the threshold requirement, the court must consider whether the pending potentially dispositive motion can be decided without additional discovery." *Puckett*, 2013 WL 1874754, at 1 (D. Nev. 2013). The Court in *In re Dillon Estate* found that the "issues raised in the motions to dismiss deal with issues of law and do not require further factual discovery at this time." *In re Dillon Estate*, 2018 WL 5116841, at 1 (D. Nev. Oct. 18, 2018).

Unlike a motion for summary judgment or a motion to dismiss pursuant to FRCP 12(b)(6), which potentially require factual discovery, the issues raised in Brahma's Dispositive Motion are issues of law only. Brahma believes this Court should stay this Action based on the *Colorado River* Doctrine (a legal doctrine) and allow the Nye County Action to proceed. TSE on the other hand, incorrectly believes the *Colorado River* Doctrine does not apply and that this Action and the Nye County Action should both proceed simultaneously. The procedural posture of this Action and the Nye County Action is set and no amount of discovery will change the same. This Court has the necessary information to determine as a matter of law whether a stay of this Action is appropriate pursuant to the *Colorado River* Doctrine. Similar to the Court in *In re Dillon Estate*, this matter does not "require further factual discovery at this time."

C. The Competing Interests of the Parties Weigh in Favor of A Stay.

The Court in *Puckett* recognized that it has "inherent power to control its docket, including the discretion to stay proceedings." *Puckett*, 2013 WL 1874754, at 3 (D. Nev. 2013). In determining whether the proceedings should be stayed, the Court should weigh the competing interests of the parties and of the Court. *Id.* "Among those competing interest are the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or

1 complicating of issues, proof, and questions of law which could be expected to result from a stay.”

2 *Id.* (citing *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005)).

3 The Court must decide “whether it is more just to speed the parties along in discovery and
4 other proceedings while a dispositive motion is pending, or whether it is more just to delay or limit
5 discovery and other proceedings to accomplish the inexpensive determination of the case.” *Id.*
6 (citing *Ministerio*, 288 F.R.D. 500 (D. Nev. 2013)). Here, it is more just to “delay or limit discovery
7 and other proceedings to accomplish the inexpensive determination of the case.”

8
9 ***1. No damage will result from granting a stay of discovery.***

10 As discussed above, Brahma is seeking recovery of payment it is owed from TSE for work
11 Brahma performed for TSE pursuant to the Agreement. Although there is the Lien and the Bond
12 securing payment of the Lien, this case stems from a simple contractual dispute. Similar to the
13 *Puckett* case, this is simply a “contractual dispute and it does not appear that discovery is urgent.”
14 *Puckett*, 2013 WL 1874754, at 3 (D. Nev. 2013).

15
16 Discovery in this matter is not urgent and even TSE appears to agree. In the Proposed Joint
17 Discovery Plan and Scheduling Order, TSE stated it was not necessary to exchange initial
18 disclosures until December 10, 2018 (46 days after the FRCP 26(f) conference). If TSE believed
19 that discovery was urgent, or that it would be harmed by not immediately commencing discovery,
20 it would have identified the date for such initial disclosures (and provided such initial disclosures
21 to Brahma) as November 8, 2018 (14 days after the FRCP 26(f) conference as required by FRCP
22 26(a)(1)(C)). However, TSE has yet to provide its initial disclosures to Brahma. Furthermore, even
23 under TSE’s own timeline, Brahma is not yet required to exchange its initial disclosures, yet TSE
24 served the Discovery Requests which required Brahma to produce documents prior to its initial
25 disclosures.
26

27 ///
28

1 Additionally, TSE believes that it is necessary for discovery to remain open for 365 days,
 2 despite the fact that 180 days is the default time pursuant to LR 26-1(b)(1). TSE cannot claim that
 3 discovery needs to remain open for twice the amount of time normally allowed, and then claim it
 4 is urgent that discovery commence immediately. Brahma believes 180 days of discovery is
 5 sufficient time for both parties to gather the necessary information to support their claims and
 6 defenses.
 7

8 Therefore, this Court should stay discovery pending the resolution of the Dispositive
 9 Motion as there will be no damage to TSE as a result of the same.

10 ***2. It is inequitable to force Brahma to participate in discovery in two***
 11 ***forums.***

12 TSE owes Brahma more than \$12 Million for the Work Brahma performed for TSE. Despite
 13 this fact, TSE is attempting to force Brahma to litigate similar claims arising from the same
 14 transaction in two separate forums to collect the money TSE has illegally withheld from Brahma.
 15 Should this Court not grant a stay of the discovery, Brahma will be forced to participate in discovery
 16 in two separate forums, which discovery will be unnecessary, duplicative and expensive.
 17

18 The *Puckett* Court, found that “in light of the fact that this entire case may be referred for
 19 arbitration or dismissed, forcing the parties to conduct discovery at this time could cause both
 20 parties unnecessary hardship both financially and strategically in their future litigation before an
 21 arbitrator or Kansas State Court judge.” *Puckett*, 2013 WL 1874754, at 3 (D. Nev. 2013).

22 Similar to the *Puckett* Court, this Court should grant a stay of the discovery pending the
 23 resolution of Brahma’s Dispositive Motion.
 24

25 ///

26 ///

27 ///

28 ///

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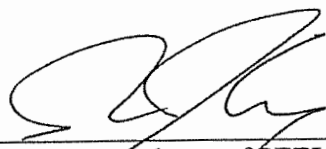
CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of PEEL BRIMLEY LLP, I am over the age of eighteen years, and not a party to the within action. My business address is 3333 E. Serene Ave, Suite 200, Henderson, NV 89074. On November 28, 2018, I caused the within document(s): **MOTION TO STAY DISCOVERY PENDING DETERMINATION OF DISPOSITIVE MOTION** to be served as follows:

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

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

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


An employee of PEEL BRIMLEY LLP

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

EXHIBIT 1

Declaration of Ronald J. Cox, Esq.

1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
3 **PEEL BRIMLEY LLP**
3333 E. Serene Avenue, Suite 200
4 Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
5 Facsimile: (702) 990-7273
rpeel@peelbrimley.com
6 cdomina@peelbrimley.com
Attorneys for Plaintiff
7 **BRAHMA GROUP, INC.**

8
9 **UNITED STATES DISTRICT COURT**

10 **DISTRICT OF NEVADA**

11 BRAHMA GROUP, INC., a Nevada Corporation,

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

12 Plaintiff,

13 vs.

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

16 Defendants.

**DECLARATION OF RONALD J.
COX, ESQ.**

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.

23 I, Ronald J. Cox, hereby declare under penalty of perjury under the laws of the State of
24 Nevada that the following is true and correct:

25 1. I am an associate at the law firm of Peel Brimley LLP, counsel for BRAHMA
26 GROUP, INC. ("Brahma"), and I have personal knowledge of the facts stated herein, except as
27 stated upon information and belief, and as to those matters, I believe them to be true, and I am
28 competent to testify to their truthfulness if called upon to do so.

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1 2. I make this Declaration in Support of Brahma's Motion to Stay Discovery Pending
2 Determination of Dispositive Motion.

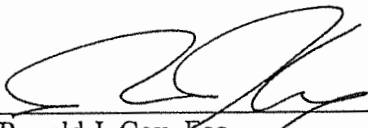
3 3. On November 21, 2018, counsel for Brahma and counsel for Tonopah Solar Energy,
4 LLC ("TSE") participated in a conference call to discuss staying all discovery pending this Court's
5 determination of the Brahma's Motion for Stay, or in the Alternative, Motion to Amend Complaint.

6 4. In anticipation of the call, I sent an email to TSE's counsel with relevant caselaw
7 that supported a stay of discovery.

8 5. During the call, TSE's counsel advised me that, despite the caselaw, it would not
9 agree to stay discovery.

10 I declare under penalty of perjury as provided under the laws of the State of Nevada that the
11 foregoing is true and correct and if called upon to testify, would do so.

12 Dated this 28th day of Nevada, 2018.

13 
14 Ronald J. Cox, Esq

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EXHIBIT 3

EXHIBIT 3

RA000411

1 RICHARD L. PEEL, ESQ.
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2 ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
3 **PEEL BRIMLEY LLP**
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6 ezimbelman@peelbrimley.com
Attorneys for Plaintiff
7 **BRAHMA GROUP, INC.**

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

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

13 Plaintiff,

14 vs.

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

17 Defendants.

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

20 Counterclaimant,

21 vs.

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

24 Counterdefendant.
25

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

**PLAINTIFF'S RESPONSES TO
DEFENDANT TONOPAH ENERGY,
LLC'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS**

26 ///

27 ///

28 ///

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**PLAINTIFF'S RESPONSES TO DEFENDANT TONOPAH ENERGY, LLC'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

TO: TONOPAH SOLAR ENEGERY, LLC, Defendant; and

TO: D. Lee Roberts, Jr., Esq., Colby L. Balkenbush, Esq. and Ryan T. Gormley, Esq. of
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, Defendant's attorneys:

Pursuant to Fed. R. Civ. P. 34, Defendant, BRAHMA GROUP, INC. ("Plaintiff" or
"BGI"), by and through its attorneys, PEEL BRIMLEY LLP, respond to Defendant's First Set of
Requests for Production of Documents below. Plaintiff reserves its right to supplement any and
all responses as additional information becomes known:

GENERAL OBJECTIONS

These general objections and caveats are applicable to each and every document request,
unless otherwise specified and are incorporated into each response as though set forth in full. These
responses are made solely for the purpose of this action.

1. Each response is subject to all objections as to competence, relevance, materiality,
propriety, admissibility, and exclusion of any statement herein, as if any portion of the requests
were asked of, or if any statement contained herein was made by a witness present and testifying
in court, all of which, objections and grounds are reserved and may be interposed at the time of
trial.

2. The responses contained herein are based upon information presently known and
ascertained by Plaintiff. However, Plaintiff has not yet completed its investigation of all the
circumstances relating to this dispute and has not completed discovery or preparation for trial.
Plaintiff is unable to produce documents that are not in its possession. Accordingly, the responses
herein are without prejudice to utilizing subsequently obtained discovery or recalled documents or
information; and Plaintiff reserves the right to amend, add to, delete from, or in any other manner
modify these responses after it has completed its discovery and investigation efforts and has
ascertained all relevant facts and documents.

3. Plaintiff objects to each request (and any portion thereof) to the extent that it calls
for information and/or documents protected from discovery by the attorney-client privilege and/or

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1 work product doctrine. Plaintiff's attorneys join in this objection to the extent that the right to
2 protect items from discovery pursuant to the "work product" doctrine belongs to said attorneys.

3 4. Plaintiff reserves the right to make any and all evidentiary objections to the
4 introduction of any of these responses and/or documents into evidence at the trial of this
5 proceeding or otherwise.

6 5. Plaintiff further objects to all requests on the grounds they are burdensome, vague,
7 ambiguous, unintelligible, uncertain, incomprehensible, compound, oppressive, intrusive of the
8 constitutional right of privacy of Plaintiff and/or third parties, overbroad, irrelevant, and/or not
9 reasonably calculated to lead to the discovery of admissible evidence, and/or fail to identify the
10 documents requested with reasonable or adequate particularity.

11 **RESPONSES**

12 **REQUEST FOR PRODUCTION NO. 1:**

13 Produce all construction project documents pertaining to the Project, including, but not limited
14 to, work orders, contracts, change orders, requests for information, submittals, drawings,
15 specifications, plans, daily logs, daily reports, daily details, meeting minutes, journal entries, schedules,
16 monthly narratives, payment applications, invoices, time cards, and receipts.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 1:**

18 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
19 Determination of Dispositive Motion. Please see ECF No. 29.

20 **REQUEST FOR PRODUCTION NO. 2:**

21 Produce all Invoices you submitted to TSE under the Contract.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 2:**

23 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
24 Determination of Dispositive Motion. Please see ECF No. 29.

25 **REQUEST FOR PRODUCTION NO. 3:**

26 For each Invoice you submitted to TSE under the Contract, produce all Payment Deliverables
27 included with those Invoices.

28 ///

1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

2 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
3 Determination of Dispositive Motion. Please see ECF No. 29.

4 **REQUEST FOR PRODUCTION NO. 4:**

5 For each Invoice you submitted to TSE under the Contract, produce all documents that support
6 or relate to the amount of money requested therein.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 4:**

8 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
9 Determination of Dispositive Motion. Please see ECF No. 29.

10 **REQUEST FOR PRODUCTION NO. 5:**

11 For each Invoice you submitted to TSE under the Contract, produce all documents that
12 demonstrate that the work set forth in that Invoice was actually performed and/or completed.

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 5:**

14 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
15 Determination of Dispositive Motion. Please see ECF No. 29.

16 **REQUEST FOR PRODUCTION NO. 6:**

17 Produce all Requests for Reimbursement you submitted to TSE under the Contract.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 6:**

19 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
20 Determination of Dispositive Motion. Please see ECF No. 29.

21 **REQUEST FOR PRODUCTION NO. 7:**

22 For each Request for Reimbursement you submitted to TSE under the Contract, produce all
23 documents that support or relate to the amount of money requested therein.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 7:**

25 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
26 Determination of Dispositive Motion. Please see ECF No. 29.

27 ///

28 ///

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1 **REQUEST FOR PRODUCTION NO. 8:**

2 Produce all documents reflecting the corporate relationship between you and Liberty Industrial
3 and/or the ownership of Liberty Industrial.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 8:**

5 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
6 Determination of Dispositive Motion. Please see ECF No. 29.

7 **REQUEST FOR PRODUCTION NO. 9:**

8 Produce all documents reflecting communications between you and Liberty Industrial
9 concerning the Project.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 9:**

11 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
12 Determination of Dispositive Motion. Please see ECF No. 29.

13 **REQUEST FOR PRODUCTION NO. 10:**

14 Produce all documents reflecting the corporate relationship between you and JT Thorpe and/or
15 the ownership of JT Thorpe.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

17 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
18 Determination of Dispositive Motion. Please see ECF No. 29.

19 **REQUEST FOR PRODUCTION NO. 11:**

20 Produce all documents reflecting communications between you and JT Thorpe concerning the
21 Project.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

23 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
24 Determination of Dispositive Motion. Please see ECF No. 29.

25 **REQUEST FOR PRODUCTION NO. 12:**

26 Produce all documents showing related party transaction disclosures you made to TSE that
27 indicate that a particular subcontractor or vendor was a related entity to Brahma.

28 ///

1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

2 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
3 Determination of Dispositive Motion. Please see ECF No. 29.

4 **REQUEST FOR PRODUCTION NO. 13:**

5 Produce all documents concerning the services that you provided under the Contract.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

7 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
8 Determination of Dispositive Motion. Please see ECF No. 29.

9 **REQUEST FOR PRODUCTION NO. 14:**

10 Produce all documents concerning the services that you provided that benefitted TSE and fell
11 outside the scope of the Contract.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

13 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
14 Determination of Dispositive Motion. Please see ECF No. 29.

15 **REQUEST FOR PRODUCTION NO. 15:**

16 Produce all documents reflecting communications between you and any persons and/or entities
17 concerning the Project.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

19 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
20 Determination of Dispositive Motion. Please see ECF No. 29.

21 **REQUEST FOR PRODUCTION NO. 16:**

22 Produce all bids you received that pertain to your work on the Project.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

24 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
25 Determination of Dispositive Motion. Please see ECF No. 29.

26 **REQUEST FOR PRODUCTION NO. 17:**

27 Produce all requests for proposals and/or requests for bids that you sent out that pertain to your
28 work on the Project.

1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 17:**

2 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
3 Determination of Dispositive Motion. Please see ECF No. 29.

4 **REQUEST FOR PRODUCTION NO. 18:**

5 For all equipment related charges that you have sought/are seeking payment on, produce all
6 documents that support or relate to the amount of money requested therein. Documents that would be
7 responsive to this request include, but are not limited to, rate cards showing the hourly/daily rate for
8 each piece of equipment, and documentation showing what equipment was used, for how long and for
9 what purpose.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 18:**

11 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
12 Determination of Dispositive Motion. Please see ECF No. 29.

13 **REQUEST FOR PRODUCTION NO. 19:**

14 Produce all documents showing that TSE ag agreed to pay your employees and subcontractors'
15 employees for lunch breaks and breaks while on site at the Project.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 19:**

17 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
18 Determination of Dispositive Motion. Please see ECF No. 29.

19 **REQUEST FOR PRODUCTION NO. 20:**

20 Produce all payroll records submitted to any unions related to the wages earned by your
21 employees and your subcontractors' employees for work on the Project.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 20:**

23 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
24 Determination of Dispositive Motion. Please see ECF No. 29.

25 **REQUEST FOR PRODUCTION NO. 21:**

26 Produce all documents showing that TSE authorized you to bill overtime hours to the standby
27 work order.

28 ///

1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 21:**

2 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
3 Determination of Dispositive Motion. Please see ECF No. 29.

4 **REQUEST FOR PRODUCTION NO. 22:**

5 Produce all documents showing that TSE authorized you to bill hours to closed work orders.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 22:**

7 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
8 Determination of Dispositive Motion. Please see ECF No. 29.

9 **REQUEST FOR PRODUCTION NO. 23:**

10 Produce all documents showing that TSE authorized you to bill hours to work order 1013 1.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 23:**

12 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
13 Determination of Dispositive Motion. Please see ECF No. 29.

14 **REQUEST FOR PRODUCTION NO. 24:**

15 Produce all documents showing that TSE authorized you to bill hours for employees who did not
16 provide timesheets.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

18 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
19 Determination of Dispositive Motion. Please see ECF No. 29.

20 **REQUEST FOR PRODUCTION NO. 25:**

21 Produce all documents concerning work you performed as a subcontractor to Cobra on or after
22 January 1, 2017.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 25:**

24 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
25 Determination of Dispositive Motion. Please see ECF No. 29.

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1 **REQUEST FOR PRODUCTION NO. 26:**

2 If certain equipment was not demobilized after you stopped performing work as a subcontractor to
3 Cobra and you used that equipment when performing work on the Project, produce all documents pertaining
4 to your use of the non-demobilized equipment.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

6 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
7 Determination of Dispositive Motion. Please see ECF No. 29.

8 **REQUEST FOR PRODUCTION NO. 27:**

9 Produce any organizational chart(s) or other similarly purposed documents, which reflect your
10 corporate structure.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 27:**

12 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
13 Determination of Dispositive Motion. Please see ECF No. 29.

14 **REQUEST FOR PRODUCTION NO. 28:**

15 Produce any employee roster(s) or other similarly purposed documents, which identifies employees
16 that provided services under the Contract.

17 **RESPONSE TO REQUEST FOR PRODUCTION NO. 28:**

18 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
19 Determination of Dispositive Motion. Please see ECF No. 29.

20 **REQUEST FOR PRODUCTION NO. 29:**

21 Produce all documents reflecting your policy or practice with respect to the retention or destruction
22 of documents that may be responsive to any of the document requests set forth herein.

23 **RESPONSE TO REQUEST FOR PRODUCTION NO. 29:**

24 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
25 Determination of Dispositive Motion. Please see ECF No. 29.

26 **REQUEST FOR PRODUCTION NO. 30:**

27 Produce all documents identified, referenced, relied upon, or concerning your answers to any
28 interrogatories served upon you in this case.

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1 **RESPONSE TO REQUEST FOR PRODUCTION NO. 30:**

2 Brahma objects to this Request as Brahma filed its Motion to Stay Discovery Pending
3 Determination of Dispositive Motion. Please see ECF No. 29.

4 Dated this 28th day of November, 2018.

5 **PEEL BRIMLEY LLP**

6 

7 RICHARD L. PEEL, ESQ.

8 Nevada Bar No. 4359

9 ERIC B. ZIMBELMAN, ESQ.

10 Nevada Bar No. 9407

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13 Telephone: (702) 990-7272

14 rpeel@peelbrimley.com

15 ezimbelman@peelbrimley.com

16 *Attorneys for Plaintiff*

17 **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 November 28, 2018, I served the within document(s):

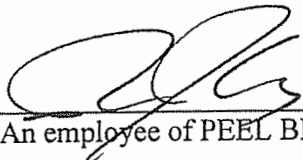
**PLAINTIFF'S RESPONSES TO DEFENDANT TONOPAH ENERGY, LLC'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS**

to be served as follows:

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

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

D. Lee Roberts, Jr., Esq. (NV Bar No. 8877)
Colby L. Balkenbush, Esq. (NV Bar No. 13066)
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GUNN & DIAL, LLC
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cbalkenbush@wwhgd.com
Attorneys for Defendant
Tonopah Solar Energy, LLC


An employee of PEEL BRIMLEY LLP

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Attorneys for Plaintiff
BRAHMA GROUP, INC.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada
corporation,

Plaintiff,

vs.

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

Defendants.

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

Counterclaimant,

vs.

BRAHMA GROUP, INC., a Nevada
corporation

Counterdefendant.

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

**BRAHMA GROUP, INC.'S RESPONSES TO
TONAPAH SOLAR ENERGY, LLC'S
FIRST SET OF INTERROGATORIES**

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**BRAHMA GROUP, INC.'S RESPONSES TO TONAPAH SOLAR ENERGY, LLC'S
FIRST SET OF INTERROGATORIES**

TO: TONAPAH SOLAR ENERGY, LLC, Defendant; and

TO: D. Lee Roberts, Esq., Colby Balkenbush, Esq. and Ryan T. Gormley, Esq., of
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, Defendant's Attorney:

Plaintiff, BRAHMA GROUP, INC. ("Brahma"), pursuant to Fed. R. Civ. P. 33, Answers
the Interrogatories propounded by TONAPAH SOLAR ENERGY, LLC ("TSE") as follows:

ANSWERS TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify and describe all of the persons and entities that you contracted with pertaining to
or concerning the Project, including, but not limited to, subcontractors, suppliers, and consultants.
Your description should include the person's or entity's complete name, address, telephone
number, and a brief description of the type of services it, he, or she provided.

ANSWER TO INTERROGATORY NO. 1:

Brahma objects to this Interrogatory as Brahma filed its Motion to Stay Discovery Pending
Determination of Dispositive Motion. Please see ECF No. 29.

INTERROGATORY NO. 2:

Identify and describe all of your current or past employees that performed work pertaining
to the Project. Your description should include the employee's first name, last name, current
employment status with you, current job title, job title(s) during the Project, present or last known
address, present or last known email address, and present or last known telephone number.

ANSWER TO INTERROGATORY NO. 2:

Brahma objects to this Interrogatory as Brahma filed its Motion to Stay Discovery Pending
Determination of Dispositive Motion. Please see ECF No. 29.

INTERROGATORY NO. 3:

Identify and describe all subcontractors you contracted with, pertaining to, or concerning
the Project that are owned, in whole or in part, by you, any of your affiliates, or any of your or
your affiliate's directors, officers, or employees, or any relative of any such director, officer, or

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1 employee. Your description should include the person's or entity's complete name, address,
2 telephone number, a brief description of the type of services it, he, or she provided, the relationship
3 of such person or entity to you and/or the ownership of such entity, and the amounts paid or to be
4 paid to such person or entity with respect to the services performed.

5 **ANSWER TO INTERROGATORY NO. 3:**

6 Brahma objects to this Interrogatory as Brahma filed its Motion to Stay Discovery Pending
7 Determination of Dispositive Motion. Please see ECF No. 29.

8 **INTERROGATORY NO. 4:**

9 If you contend that TSE failed to pay you and/or underpaid you for work you performed
10 on the Project, identify and describe each such failure. Your description should include the specific
11 nature of each component of the work, the date the work was performed, the document you
12 submitted to TSE requesting payment for the work, the amount of money you were not paid and/or
13 underpaid, and the bates-numbers of the material documents that support your contention that TSE
14 failed to pay you and/or underpaid you.

15 **ANSWER TO INTERROGATORY NO. 4:**

16 Brahma objects to this Interrogatory as Brahma filed its Motion to Stay Discovery Pending
17 Determination of Dispositive Motion. Please see ECF No. 29.

18 Dated this 28th day of November, 2018.

19 **PEEL BRIMLEY LLP**

20  **BAL 12723**
PEL

21 RICHARD L. PEEL, ESQ.
22 Nevada Bar No. 4359
23 ERIC B. ZIMBELMAN, ESQ.
24 Nevada Bar No. 9407
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ezimbelman@peelbrimley.com
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 November 28, 2018, I served the within document(s):

**PLAINTIFF'S RESPONSES TO TONAPAH SOLAR ENERGY, LLC'S
FIRST SET OF INTERROGATORIES**

to be served as follows:

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

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

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EXHIBIT 4

EXHIBIT 4

RA000427

Nevada Construction Law

2016 Edition

Leon F. Mead II

NEVADA CONSTRUCTION LAW

2016 Edition

LEON F. MEAD II

Nevada Construction Law – 2016 Edition

Nevada Construction Law – 2016 Edition

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NEVADA CONSTRUCTION LAW

2016 Edition

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DEDICATION

This book, and all its edition
devotion to their as ever stub

SPECIAL DEDICATION

In memory of my friends and Ne
their time, and are truly missed:

SPECIAL THANKS

A very special thank you goes on
research, writing and "blue booki

DEDICATION

This book, and all its editions, are dedicated to my children for their love, support, and devotion to their as ever stubborn father:

Sarah A. C. Mead, Esq.
Michael P. Mead

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James Donofrio, Sr.

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contents of this book, in all of its

In both cases, the bond surety's liability is limited to the penal sum of the bond provided. If the Court determines that a particular lien release bond is insufficient to cover all claims of the lien claimant, it may order the principal on the bond to obtain a new bond in a higher amount, or to order an additional bond or other security be added to the bond already provided.

Lien claimants have 5 days after service of the bond to file an objection with the State District Court to the sufficiency of the surety. If the District Court finds the surety unacceptable, the lien will remain on the property, or the court will order a new and sufficient surety be substituted.

In 2005, the statute of limitations on a mechanics lien release bond was specifically delineated to be 9 months after the lien claimant was served with a copy of the release bond. In the case of the project wide release bond, the lien claimants have 9 months after the completion of the project to bring an action on the bond.

8:26 RELEASE BY MOTION

NRS 108.2275⁷⁷⁰ provides a remedy for owners to remove frivolous or excessive liens from their properties by motion. The legislation is aimed at claimants who file

⁷⁷⁰ NRS 108.2275 provides:

- 1. The debtor of the lien claimant or 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, or that the amount of the notice of lien is excessive, may apply by motion to the district court for the county where the property or some part thereof 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.*
- 2. The motion must:*
 - (a) Set forth in detail the legal and factual grounds upon which relief is requested; and*
 - (b) Be supported by:*
 - (1) A notarized affidavit signed by the applicant setting forth a concise statement of the facts upon which the motion is based; and*
 - (2) Documentary evidence in support of the affidavit, if any.*
- 3. If the court issues an order for a hearing, the applicant shall serve notice of the application and order of the court on the lien claimant within 3 days after the court issues the order. The court shall conduct the hearing within not less than 15 days or more than 30 days after the court issues the order for a hearing.*
- 4. The order for a hearing must include a statement that if the lien claimant fails to appear at the time and place noted, the notice of lien will be released with prejudice and the lien claimant will be ordered to pay the reasonable costs the applicant incurs in bringing the motion, including reasonable attorney's fees.*
- 5. If, at the time the application is filed, an action to foreclose the notice of lien has not been filed, the clerk of the court shall assign a number to the application and obtain from the applicant a filing fee of \$85. If an action has been filed to foreclose the notice of lien before*

fraudulent liens, or overstate the lien amount in order to put pressure on the owner or general contractor. Nevertheless, in practice the motion is used to remove liens that are not valid for various reasons, including failure to provide preliminary notices, untimely recording, etc.

While a precise standard is not articulated in the statute, most practitioners have historically asserted that the courts should review the lien claim under a summary judgment standard as outlined in Nevada Rules of Civil Procedure, Rule 56, that is, there is no genuine issue of material fact in dispute that the lien is either frivolous and made without reasonable cause, or is excessive. This view has now been obviated by the Nevada Supreme Court's decision in *J.D. Const, Inc. v. IBEX Intern. Group, LLC*.⁷⁷¹

In *J.D. Construction*, the Nevada Supreme Court determined that because the determination of whether a lien is frivolous or excessive requires the determination of material facts, the District Court should make appropriate factual findings at a NRS 08.2275 hearing. Further, in making a ruling on lien amount excessiveness, the district courts should use a preponderance of the evidence standard to adjudicate the issue. On the other hand, a determination that a lien is frivolous would require a finding that there was no reasonable cause to record the lien. In either case, the district court upon request of the parties may take live testimony and allow discovery for the purpose of the 08.2275 hearing, but these are not necessary to a determination so long as both parties

the application was filed pursuant to this section, the application must be made a part of the action to foreclose the notice of lien.

6. If, after a hearing on the matter, the court determines that:

(a) The notice of lien is frivolous and was made without reasonable cause, the court shall make an order releasing the lien and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.

(b) The amount of the notice of lien is excessive, the court may make an order reducing the notice of lien to an amount deemed appropriate by the court and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.

(c) The notice of lien is not frivolous and was made with reasonable cause or that the amount of the notice of lien is not excessive, the court shall make an order awarding costs and reasonable attorney's fees to the lien claimant for defending the motion.

7. Proceedings conducted pursuant to this section do not affect any other rights and remedies otherwise available to the parties.

8. An appeal may be taken from an order made pursuant to subsection 6. A stay may not be granted if the district court does not release the lien pursuant to subsection 6.

9. If an order releasing or reducing a notice of lien is entered by the court, and the order is not stayed, the applicant may, within 5 days after the order is entered, record a certified copy of the order in the office of the county recorder of the county where the property or some part thereof is located. The recording of a certified copy of the order releasing or reducing a notice of lien is notice to any interested party that the notice of lien has been released or reduced.

D. Const, Inc. v. IBEX Intern. Group, LLC, 240 P.3d 1033, 126 Nev. Adv. Op. No. 36 (Nev. 2010).

are provided a sufficient opportunity to present their cases--affidavits are sufficient to meet the due process rights of the involved parties. Whether a District Court's refusal to have live testimony at a hearing upon the request of the parties was a denial of due process was a question for another case.

Thus, under NRS 108.2275, the Court uses the affidavit process to determine if an order to show cause is appropriate, and once determined, the Court is free to hold and weigh evidence tending to show that the lien is either frivolous or excessive. In sum, the motion under NRS 108.2275 becomes a trial-within-a-trial on shortened time, and the court has only three options in which to rule: 1) the lien is frivolous and made without reasonable cause; 2) the lien is excessive and must be reduced, or 3) the lien is not frivolous and is not excessive,⁷⁷² and cannot make any other ruling arising from that matter.⁷⁷³ Once that ruling is made, the Court has an obligation to award attorney's fees and costs to the prevailing party on the motion, if the challenge is made based on the lien being frivolous,⁷⁷⁴ and may make an award of fees to the challenging party if the lien is reduced.⁷⁷⁵ Oddly, the court must also award attorneys fees to the lien claimant, if the court does not reduce the lien after it has been challenged as excessive.⁷⁷⁶

Some additional issues arise from the *J.D. Construction* case. In its holding, the Court indicated that mechanics' liens are not, in fact, an interest in property, but are a legislative "taking," in that the owner is deprived of a significant property interest that entitles the owner to state and federal due process.⁷⁷⁷ This is not necessarily in keeping with the theory of a mechanics lien as they are historically viewed,⁷⁷⁸ and is difficult to reconcile with the ability of the lien claimant to *assign* lien claims as any other property rights under NRS 108.243.⁷⁷⁹

The statute provides that the debtor to the lien claimant, or any party with an interest in the property may apply for an order directing the claimant to show cause why the lien should not be reduced or dismissed. The petition must be made upon affidavits and

⁷⁷² NRS 108.2275(6).

⁷⁷³ *Crestline Inv. Group, Inc. v. Lewis*, 119 Nev. 365, 75 P.3d 363 (2003).

⁷⁷⁴ NRS 108.2275(6)(a) and (c).

⁷⁷⁵ NRS 108.2275(6)(b).

⁷⁷⁶ NRS 108.2275(6)(c).

⁷⁷⁷ *J.D. Const., Inc. v. IBEX Intern. Group, LLC*, 240 P.3d 1033, 1040, 126 Nev. Adv. Op. No. 36 (Nev. 2010).

⁷⁷⁸ See Section 8:2.

⁷⁷⁹ See Section 8:23.

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is not necessarily in keeping
viewed,⁷⁷⁸ and is difficult to
claims as any other property

any party with an interest in
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be made upon affidavits and

evidence to support the petitioner's claim. If the court agrees that a hearing should be held, it must give 15 to 30 days notice of the hearing.⁷⁸⁰ Many times the courts will not be aware of this strict mandate and will issue the order to show cause on a shorter time basis, often because the moving party has provided a request for a shortened time period on some pending transaction or date with which the lien is interfering. While the trial courts are often accommodating to that request, there is no basis under the mechanics lien statute for the expedited hearing. Moreover, since the motion is effectively a challenge to the validity of the lien with limited due process, the Courts should be slow to shorten the time for a motion to less than the statutory minimum of 15 days. It should be noted that while the hearing must commence within 15 to 30 days, it need not be completed in that time, so long as the owner's rights to a speeding resolution of the validity or excessiveness of the lien is made expeditiously.⁷⁸¹

A ruling on a motion under NRS 108.2275 is a final order and is immediately appealable, however, a ruling that the lien claim is not frivolous or excessive does not allow a stay to be entered during the time of the appeal's pendency.⁷⁸² As such, the fact that a ruling is being appealed should not be taken by the lien claimant as tolling any statute of limitations on the claim of lien itself. The lien claimant still must file suit to foreclose the mechanics lien timely under NRS 108.233 and NRS 108.239.⁷⁸³ A foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) Rule 4. Likewise, a "petition" is not a proper "pleading" under NRCP Rule 7(a), to which a counter-claim may be filed. Rather, it is a "motion" under NRCP Rule 7(b). As such, it is improper legal practice to file a counter-claim to a petition under NRS 108.2275. The proper procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate the two matters.

If the lien is ordered expunged or reduced under NRS 108.2275, the party removing the lien needs merely to record a copy of the certified order reducing or expunging the lien claim to release the property from the lien or reducing the same for all purposes.⁷⁸⁴

⁷⁸⁰ NRS 108.2275(3).

⁷⁸¹ *J.D. Const., Inc. v. IBEX Intern. Group, LLC*, 240 P.3d 1033, 126 Nev. Adv. Op. No. 36 (Nev. 2010).

⁷⁸² NRS 108.2275(8).

⁷⁸³ See Section 8:22, Foreclosing the claim of lien.

⁷⁸⁴ NRS 108.2275(9).

EXHIBIT 5

EXHIBIT 5

RA000438

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRAHMA GROUP, INC.,

Plaintiff,

v.

TONOPAH SOLAR ENERGY,

Defendant.

Case No. 2:18-cv-01747-RFB-GWF

ORDER

This matter is before the Court on the parties' Proposed Discovery Plan and Scheduling Order (ECF 25), filed on November 14, 2018.

Plaintiff proposes that discovery should not commence until 30 days after the Court issues a ruling on its pending motion to stay. Defendant proposes a 365 day discovery plan commencing from the parties' Rule 26(f) conference. The Court will grant the 365 day discovery plan as proposed by Defendant. Accordingly,

IT IS HEREBY ORDERED that the following discovery plan and scheduling order dates shall apply:

1. Initial Disclosures Deadline: **December 10, 2018**
2. Last date to complete discovery: **October 25, 2019**
3. Last date to amend pleadings and add parties: **July 29, 2019**
4. Last date to file interim status report: **August 26, 2019**
5. Last date to disclose experts: **August 26, 2019**
6. Last date to disclose rebuttal experts: **September 25, 2019**
7. Last date to file dispositive motions: **November 25, 2019**

Further, Defendant represents that it believes it will require leave to conduct more than 10 depositions as permitted by Fed. R. Civ. P. 30(a)(2)(A)(i), but does not specify the amount of depositions that will be requested. Plaintiff represents that the parties should be limited to 10 depositions. The Court denies Defendant's request to increase the deposition limit without prejudice because Defendant has not provided enough information to allow the Court to discern whether additional depositions are needed.

George Foley Jr.

GEORGE FOLEY, JR.
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 6

EXHIBIT 6

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9 *Tonopah Solar Energy, LLC*

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF NEVADA

13 BRAHMA GROUP, INC., a Nevada corporation,

14 Plaintiff,

15 vs.

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

17 Defendant.

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

21 Counterclaimant,

22 vs.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Counterdefendant.

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

TONOPAH SOLAR ENERGY, LLC'S
RESPONSE TO BRAHMA'S MOTION
FOR STAY, OR IN THE ALTERNATIVE,
MOTION TO AMEND COMPLAINT

WEINBERG WHEELER
HUDGINS GUNN & DIAL



1 On October 16, 2018, Brahma Group, Inc. ("Brahma") filed a Motion for Stay, or in the
2 Alternative, Motion to Amend Complaint ("Motion for Stay"). See ECF No. 13. Tonopah Solar
3 Energy, LLC ("TSE"), by and through its undersigned counsel, opposes the Motion for Stay. As
4 explained in the following Memorandum of Points and Authorities, the Motion should be denied.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. INTRODUCTION**

7 Brahma brings the Motion for Stay in an effort to benefit from a procedural quagmire of
8 its own making. In short, Brahma filed a state court action in Clark County, which TSE properly
9 removed, and answered with counterclaims against Brahma. Brahma then filed a lien
10 foreclosure action into a special proceeding in Nye County. Faced with litigating its claims in
11 this Court, Brahma dropped all but one of its claims from this action via a Rule 15(a)(1)
12 amendment and asserted the dropped claims into the Nye County special proceeding. To remedy
13 this maneuvering, TSE moved in this action for an injunction and to strike Brahma's amended
14 complaint and in the Nye County special proceeding for, among other relief, dismissal.

15 In the Motion for Stay, Brahma, in an effort to litigate the remaining claims in this action
16 in its favored forum of Nye County, asks that this Court stay this action under the *Colorado*
17 *River* abstention doctrine. Alternatively, Brahma seeks leave to amend its complaint to re-assert
18 its previously dropped claims. Neither form of relief is warranted.

19 As a preliminary matter, this Court should resolve the motion for injunction filed by TSE
20 in this action (ECF No. 16) prior to resolving Brahma's Motion for Stay, so as to avoid
21 inconsistent results and not encourage the type of impermissible maneuvering undertaken by
22 Brahma.

23 Regardless of the order in which this Court resolves the pending motions, this action
24 should not be stayed. The *Colorado River* abstention doctrine warrants staying a federal action
25 only in exceptional circumstances. In determining whether such circumstances exist, courts must
26 determine whether the concurrent state and federal suits are "parallel," and, if so, weigh
27 additional factors. Here, the two suits at issue are not "parallel," as resolution of the Nye County
28 special proceeding will not completely resolve the claims in this action. This consideration is



1 dispositive and defeats Brahma's argument. Yet, beyond that, five of the seven additional
2 factors weigh against abstention, one is neutral, and one is inconsequential under the case law.
3 And the suits do not present the type of exceptional circumstances that warrant a stay under the
4 doctrine. Rather, Brahma's actions warrant the issuance of an injunction that enjoins Brahma
5 from prosecuting its dropped claims in the later filed Nye County special proceeding, as
6 requested by TSE's motion for injunction in this action (ECF No. 16).

7 Moreover, this Court should not permit Brahma leave to amend its complaint. Instead,
8 the appropriate result would be to strike Brahma's amended complaint, as requested by TSE's
9 motion for injunction in this action (ECF No. 16). Accordingly, Brahma's Motion for Stay
10 should be denied in its entirety.

11 II. STATEMENT OF PERTINENT FACTS

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

17 While Brahma's statement of facts includes many of the pertinent facts, it downplays the
18 nature of its forum shopping efforts and does not include some of the more recent filings.

19 A. Brahma maneuvers to try to move its claims out of this Court and into Nye County.

20 In April 2018, Brahma recorded a mechanic's lien concerning the Project. Brahma has
21 amended the lien multiple times and is now on its fourth iteration of the lien.

22 Also in April, Brahma filed a complaint in the Fifth Judicial District Court, Nye County,
23 Nevada ("Nye County Action"). A week later, TSE filed a motion to expunge the mechanic's
24 lien in that action. The same day TSE filed the motion to expunge, Brahma voluntarily
25 dismissed its complaint, which resulted in the withdrawal of TSE's motion.

26 On June 11, 2018, TSE filed a second motion to expunge the lien under NRS
27 108.2275(1). *See* Second Motion to Expunge, ECF No. 16-9. As there was no complaint
28 pending, this second motion to expunge resulted in the opening of a special proceeding in the





1 Fifth Judicial District Court, Nye County, Nevada in accordance with NRS 108.2275(5), which
2 provides that “[i]f, at the time the [motion] is filed, an action to foreclose the notice of lien **has**
3 **not been filed**, the clerk of the court shall assign a number to the [motion] and obtain from the
4 [moving party] a filing fee of \$85.” (“Nye County Special Proceeding”) (emphasis added). *See*
5 *id.* The motion to expunge challenged Brahma’s lien on the basis of notice and recording issues.
6 *See id.*

7 On July 17, 2018, while the motion to expunge in the Nye County Special Proceeding
8 was waiting to be heard, Brahma filed a new complaint in the Eighth Judicial District Court,
9 Clark County, Nevada against TSE (“Clark County Action”) in accordance with the Agreement’s
10 venue selection clause. *See* ECF No. 1-1. The complaint in the Clark County Action asserted
11 the same claims against TSE as the previously dismissed Nye County Action, with the exception
12 of the lien foreclosure claim: (1) breach of the Agreement, (2) breach of the implied covenant of
13 good faith and fair dealing, (3) unjust enrichment, (4) and violation of Nevada’s prompt payment
14 act. *See id.*

15 On September 6, 2018, Cobra Thermosolar Plants, Inc. (“Cobra”)¹ recorded a bond to
16 bond around Brahma’s mechanics lien pursuant to NRS 108.2415. The bond, which was issued
17 by American Home Assurance Company, thereby released Brahma’s mechanic’s lien pursuant to
18 NRS 108.2415(6). The amount of the Bond was later increased.

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

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

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

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

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

3 Shortly thereafter, on September 20, 2018, Brahma filed a Lien Foreclosure Complaint in
4 the Nye County Special Proceeding, despite the fact that the Nye County Special Proceeding was
5 a special proceeding limited to TSE's motion to expunge. *See* Mechanic's Lien Foreclosure
6 Complaint, ECF No. 16-13. In the complaint, Brahma asserted a single claim: lien foreclosure
7 against TSE. *Id.*

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

16 At the same time, Brahma filed a first amended counter-complaint and third-party
17 complaint in the Nye County Special Proceeding, again, despite the fact that the Nye County
18 Special Proceeding was a special proceeding limited to TSE's motion to expunge. *See* First
19 Amended Counter-Complaint and Third-Party Complaint, ECF No. 16-14. This first amended
20 counter-complaint asserted four claims against TSE—three of which were the same three claims
21 that Brahma had just dropped from the Federal Court Action (i.e., the copycat claims)—(1)
22 breach of the Agreement, (2) breach of the implied covenant of good faith and fair dealing, (3)
23 foreclosure of notice of lien, and (4) violation of Nevada's prompt payment act. *Id.*² The third-

24
25
26 ² A "counter-complaint" is not a permitted pleading under Nev. R. Civ. P. 7(a) and based on the
27 nature of the filing, Brahma's counter-complaint does not constitute a poorly named complaint or
28 answer. *See Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 282
(1997) (providing that counterclaims and cross-claims "are not separate pleadings, but are claims
for relief that may be set forth in answers and complaints").



WEINBERG WHEELER
HUDGINS GUNN & DIAL



1 party complaint asserted one claim against Cobra and American Home Assurance Company:
2 claim on the surety bond. *Id.*

3 **B. Brahma's impermissible maneuverings led to the filing of multiple motions.**

4 On October 8, 2018, TSE's counsel sent a letter to Brahma's counsel explaining that its
5 claim splitting scheme ran afoul of state and federal law and indicating an intent to move for
6 relief. *See* Letter, ECF No. 16-15. In response, Brahma stood by its actions. *See* Response to
7 Letter, ECF No. 16-16. Brahma requested an extension of time in which to respond to the letter
8 and appears to have used that time to file the Motion for Stay in order to get "out in front" of its
9 forum shopping efforts.

10 On October 18, 2018, TSE filed two motions: one in this court and one in the Nye
11 County Special Proceeding. In this Court, TSE filed a Motion for an Injunction and to Strike
12 ("Motion for Injunction"), which seeks (1) to enjoin Brahma from prosecuting its copycat claims
13 in the Nye County Special Proceeding under the All Writs Act and (2) to strike Brahma's first
14 amended complaint in this action (ECF No. 8) because it constitutes a bad faith amendment
15 intended to divest this Court of jurisdiction over the claims. *See* ECF No. 16.

16 In the Nye County Special Proceeding, TSE filed a Motion to Strike Brahma's First
17 Amended Counter-Complaint, or, in the alternative, Motion to Dismiss Counter-Complaint, or in
18 the alternative, Motion to Stay this Action until the Conclusion of the Proceedings in Federal
19 Court ("Motion to Dismiss"). *See* Motion to Dismiss (without exhibits), attached as **Exhibit 1**.

20 On October 19, 2018, in the Nye County Special Proceeding, Brahma sought leave to
21 amend its complaint to remove its lien foreclosure claim because the Bond released its lien. *See*
22 Motion for Leave to Amend, attached as **Exhibit 2**. Notably, in its motion for leave to amend,
23 Brahma argued that the amendment was proper "at this early stage of the litigation" and that the
24 "litigation is in its infancy" because the "Initial Complaint was filed only 28 days ago and the
25 Amended Complaint was filed 24 days ago." *Id.* at p. 5.³

26
27 ³ This characterization contradicts Brahma's characterization of the Nye County Special
28 Proceeding in its Motion for Stay where Brahma states that the Nye County Court is "well
acquainted with the facts of the case." *See* ECF No. 13 at p. 7.

III. LEGAL ARGUMENT

In its Motion for Stay, Brahma asks that this Court abstain from exercising its jurisdiction in this case by entering a stay under the *Colorado River* abstention doctrine. Alternatively, Brahma asks for leave to amend its complaint. Neither result is warranted. But, before addressing those arguments, it is critical to identify what pleadings this Court should consider in performing its analysis. Due to Brahma's forum shopping efforts, there are multiple motions pending right now that could impact the nature of the pleadings. As explained below, this Court should perform its *Colorado River* analysis after the resolution of TSE's Motion for Injunction (ECF No. 16), so as to avoid inconsistent results and discourage improper maneuvering.

A. The *Colorado River* abstention doctrine analysis should be performed after the resolution of TSE's Motion for Injunction.

Once a party removes a case, the federal removal statute bars any further proceedings in state court because "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* 28 U.S.C. § 1446(d). In fact, the Ninth Circuit has stated that "it is impossible to obtain judicial remedies and sanctions in state and local courts once an action is removed to federal court . . . [because] removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute." *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000); *see also* Wright & Miller, *Federal Practice & Procedure* § 3736 (4th ed.) (providing that, following removal, any further proceedings in a state court are considered *coram non judge* and will be vacated even if the case is later remanded). This divestiture of jurisdiction applies to all state courts—not just the particular state court from which the case was removed. *See, e.g., In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007); *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980).

At least two federal district court have addressed conduct strikingly similar to the actions taken by Brahma in this case. In *Riley*, where the plaintiff filed an amended complaint in state



1 court after the federal court denied her motion to remand, the federal court issued a strong rebuke
2 of the plaintiff's actions:

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

11 *Riley v. Carson Pirie Scott & Co.*, 946 F. Supp. 716, 718 (E.D. Wis. 1996). In *Crummie*, where
12 the plaintiff filed an amended complaint in state court after the action was removed to federal
13 court, the federal court found the amended state court complaint void and of no effect:

14 After removal of an action, a federal court acquires total, exclusive
15 jurisdiction over the litigation . . . Applying the foregoing precepts
16 to the matter at bar, it is evident that Plaintiff's filing of an
17 amended complaint in state court subsequent to the removal of the
18 cause was of no effect.

19 *Crummie v. Dayton-Hudson Corp.*, 611 F. Supp. 692, 693 (E.D. Mich. 1985).

20 Here, Brahma has created a "procedural mess." Brahma filed the Clark County Action
21 asserting claims for breach of contract, breach of the implied covenant of good faith and fair
22 dealing, unjust enrichment, and violation of Nevada's prompt payment act. TSE properly
23 removed the case to this Court and asserted counterclaims against Brahma. Brahma then filed a
24 lien foreclosure action into the Nye County Special Proceeding. When Brahma decided it did
25 not want to litigate its claims in this Court it filed a Rule 15(a)(1) amendment in this action
26 dropping the copycat claims—breach of contract, breach of the implied covenant of good faith
27 and fair dealing, and violation of Nevada's prompt payment act—and, *on the same day*, refiled
28 those same claims in the Nye County Special Proceeding. Thus, Brahma created the current
procedural posture by forum shopping and disregarding basic tenets of jurisdiction.

TSE has moved in this action and the Nye County Special Proceeding to fix Brahma's
"procedural mess." TSE's motion in this Court seeks (1) an injunction enjoining Brahma from
prosecuting its copycat claims in the Nye County Special Proceeding and (2) the striking of
Brahma's first amended complaint in this action because the amendment was done in bad faith to



1 divest this Court of jurisdiction. *See* ECF No. 16. TSE's motion in the Nye County Special
2 Proceeding seeks, among other relief, (1) the striking of Brahma's counter-complaint in the Nye
3 County Special Proceeding because it is an impermissible pleading under both NRCP 7(a) and
4 NRS 108.2275, (2) dismissal of Brahma's copycat claims in the Nye County Special Proceeding
5 because the state court lacks jurisdiction over them in accordance with the case law cited above,
6 and (3) a stay of the Nye County Special Proceeding under the "first to file" rule. *See Exhibit 1*
7 (Motion to Dismiss). These motions will restore both cases to a more correct procedural posture.

8 It would be inappropriate to perform the *Colorado River* abstention doctrine analysis
9 prior to the resolution of TSE's Motion for Injunction. Although the stay requested by Brahma
10 should be denied under all potential forms of the pleadings, performing the *Colorado River*
11 analysis prior to resolution of TSE's Motion for Injunction could encourage parties to make
12 impermissible last-second filings in order to arrange the pleadings in a more advantageous
13 manner. Further, it could lead to strange and inconsistent results. For instance, this Court could
14 stay this case (although that would be inappropriate as discussed below), enjoin Brahma from
15 prosecuting the copycat claims in the Nye County Special Proceeding, and the Nye County Court
16 could dismiss Brahma's claims so that they can be litigated in this Court. To avoid such
17 inconsistent results, the *Colorado River* analysis should be performed after the resolution of
18 TSE's Motion for Injunction.⁴

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24 ⁴ In the Motion for Stay, Brahma contends that "[t]o determine whether contemporaneous,
25 concurrent state and federal litigation exists, the Court must look to the point in time when the
26 party moved for its stay under *Colorado River*." ECF No. 13, p. 8:26-28. In support of this
27 notion, Brahma cites to *FDIC v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989). *Nichols*, however,
28 does not provide this. There, the Ninth Circuit simply concluded that it was an abuse of
discretion by the district court to decline jurisdiction under the *Colorado River* doctrine because
"there was no concurrent or pending state court proceeding" when the party moved for
abstention under the doctrine. *Id.* at 638. This is a far cry from a steadfast rule that a court must
perform a *Colorado River* analysis based on the state of the case when the motion is filed.





1 **B. A stay of this action under the *Colorado River* abstention doctrine is not appropriate**
2 **regardless of whether this Court performs the analysis before or after the resolution**
3 **of TSE's Motion for Injunction.**

4 Brahma argues that this Court should stay this action under the *Colorado River*
5 abstention doctrine because seven of the factors that courts consider in deciding whether to issue
6 such a stay weigh in favor of issuing a stay here. *See* ECF No. 13, pp. 7-16.

7 As explained below, Brahma is mistaken. First, Brahma overlooks the most important
8 threshold question—are the concurrent state and federal actions “parallel.” They are not.
9 Second, Brahma fundamentally misapplies the factors. When viewed through the proper lens,
10 the factors weigh against the issuance of a stay. Third and finally, Brahma ignores that this case
11 does not present the exceptional circumstances necessary to warrant a stay under *Colorado*
12 *River*. The stay sought by Brahma must be denied.

13 **1. This action and the Nye County Special Proceeding are not parallel because**
14 **resolution of the Nye County Special Proceeding would not completely**
15 **resolve this action.**

16 In the Motion for Stay, Brahma overlooks “[t]he threshold question in deciding whether
17 *Colorado River* abstention is appropriate”—“whether there are parallel federal and state suits.”
18 *ScriptsAmerica, Inc. v. Ironridge Glob. LLC*, 56 F. Supp. 3d 1121, 1147 (C.D. Cal. 2014)
19 (quoting *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005));
20 *see Intel Corp v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993); *Summit*
21 *Contracting Grp., Inc. v. Ashland Heights, LP*, 187 F. Supp. 3d 893, 897 (M.D. Tenn. 2016);
22 *DDR Const. Servs., Inc. v. Siemens Indus., Inc.*, 770 F. Supp. 2d 627, 644 (S.D.N.Y. 2011). In
23 deciding whether concurrent federal and state suits are parallel, exact parallelism between the
24 two suits is not required. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989).

25 For concurrent federal and state suits to qualify as “parallel,” the suits must be
26 “substantially similar.” *Nakash*, 882 F.2d at 1416. Determining substantial similarity requires
27 looking to whether the suits involve the same parties, claims, and facts. *See ScriptsAmerica*, 56
28 F. Supp. 3d at 1147-48 (citing *Nakash*, 882 F.2d at 1416). But, “[w]hen the nature of the claims
in question differs, cases are not parallel despite the fact that both actions arise out of a similar



1 set of circumstances.” *DDR Construction*, 770 F.Supp.2d at 645 (internal quotation marks
2 omitted).

3 Further, for concurrent federal and state suits to qualify as “parallel,” a court must have
4 ““full confidence that the parallel state proceeding will end the litigation.”” *ScriptsAmerica*, 56 F.
5 Supp. 3d at 1148 (quoting *Intel*, 12 F.3d at 913). A court may only enter a stay under the
6 *Colorado River* abstention doctrine if it “necessarily contemplates that the federal court will have
7 nothing further to do in resolving any substantive part of the case.” *Intel*, 12 F.3d at 913
8 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 28
9 (1983)). Any “substantial doubt as to whether the state proceedings will resolve the federal
10 action precludes the granting of [such] a stay.” *Intel*, 12 F.3d at 913. Granting a stay in the face
11 of such doubt ““would be a serious abuse of discretion.”” *Id.* (quoting *Moses H. Cone*, 460 U.S.
12 at 28). In *Intel*, the Ninth Circuit reversed a district court’s stay under the *Colorado River*
13 doctrine because it had doubts as to whether the concurrent state court action would completely
14 resolve the federal court action. 12 F.3d at 913. In reaching this decision, the Ninth Circuit did
15 not consider any other factors. *Id.*

16 Courts that have faced the question whether a concurrent state court action featuring a
17 foreclosure claim on a mechanics’ lien and a federal court action featuring contractual claims
18 qualify as “parallel” have concluded that they do not.⁵ The Middle District of Tennessee’s
19 discussion on this issue in *Summit Contracting* is comprehensive and on point. 187 F. Supp. 3d
20 at 893-899. There, a general contractor filed a state court action against a project owner to
21 enforce a mechanic’s lien and a federal court action against the project owner asserting claims
22 for breach of contract, violation of Tennessee’s prompt pay act, and violation of Tennessee’s
23 retainage laws. *Id.* at 896. In response to the concurrent suits, the project owner moved for
24 dismissal of the federal court action under the *Colorado River* abstention doctrine. *Id.* at 897.

25
26 ⁵ *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009); *Gannett Co. v. Clark*
27 *Const. Grp., Inc.*, 286 F.3d 737, 740 (4th Cir. 2002); *Titan Wrecking & Envtl., LLC v. Vestige*
28 *Redevelopment Grp. LLC*, No. 1:15-CV-00577, 2016 WL 1028261, at *4 (S.D. Ohio Mar. 15, 2016);
Boccard USA Corp. v. TigPro, Inc., No. CIV.A.H-07-0177, 2007 WL 1894154, at *6 (S.D. Tex. July 2,
2007).

1 The district court denied the motion. The court reasoned that it had to first determine “if
2 the concurrent state and federal actions are actually parallel.” *Id.* at 897. The court followed the
3 same analysis set forth above for determining whether the suits are parallel. *See id.* at 897-98.
4 Although the project owner contended that the suits were parallel because they involved “the
5 same parties, litigating identical issues arising out of the same contract,” *id.* at 898, the court
6 followed the reasoning of the Fourth and Eighth Circuits, explaining that “[w]hile [the project
7 owner] may believe that the amount of damages sought by [the general contractor] overlap, it is
8 clear that the State Court Lien Action raises issues not raised in the Federal Court Contract
9 Action . . . [and] that the Federal Court Contract Action raises issues that go beyond that
10 contemplated by the more limited State Court Lien Action.” *Id.* at 899. As a result, the court
11 allowed the federal court action to proceed, concluding that “there is substantial doubt that
12 resolution of the State Court Lien Action would result in a *complete* resolution of the issues
13 between the parties.” *Id.*

14 Here, the Nye County Special Proceeding and this action are not parallel. While they are
15 certainly similar, like the concurrent suits in *Intel*, *DDR Construction*, and *Summit Contracting*,
16 resolution of the Nye County Special Proceeding will not completely resolve this action. Or, at a
17 minimum, substantial doubt exists as to whether resolution of the Nye County Special
18 Proceeding would completely resolve this action. This conclusion applies under both the current
19 state of pleadings and the likely state of the pleadings following resolution of TSE’s Motion for
20 Injunction.

21 If this Court enjoins Brahma from prosecuting its copycat claims in the Nye County
22 Special Proceeding and strikes Brahma’s bad faith amendment to its complaint (which it should),
23 this action will address Brahma’s claims for breach of contract, breach of the implied covenant
24 of good faith and fair dealing, violation of Nevada’s prompt payment act, and unjust enrichment
25 and TSE’s counterclaims for breach of contract, breach of the implied covenant of good faith and
26 fair dealing, declaratory relief, unjust enrichment/quantum meruit, fraudulent misrepresentation,
27 and negligent misrepresentation. The Nye County Special Proceeding would only concern
28 Brahma’s lien foreclosure claim against TSE (which will no longer exist per Brahma’s recently





1 filed motion for leave to amend the complaint in the Nye County Special Proceeding and the fact
2 that the lien was bonded off) and its surety bond claim against Cobra and American Home
3 Assurance Company. The resolution of those causes of action in the Nye County Special
4 Proceeding will not “end” this action, especially taking into TSE’s fraud based counterclaims in
5 this action. The same is true if this Court denies TSE’s Motion for Injunction, as resolution of
6 the Nye County Special Proceeding would not necessarily adjudicate Brahma’s unjust
7 enrichment claim in this court and it certainly would not adjudicate TSE’s counterclaims. Thus,
8 a stay under the *Colorado River* abstention doctrine is inappropriate.

9 **2. The *Colorado River* abstention doctrine factors weigh against staying this**
10 **action.**

11 In the Motion for Stay, Brahma misapplies the factors courts consider “for determining
12 whether ‘exceptional circumstances’ exist warranting federal abstention from concurrent federal
13 and state proceedings.” *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir.
14 2017). Although Brahma discussed seven factors, the Ninth Circuit actually evaluates eight
15 factors: (1) which court first assumed jurisdiction over any property at stake; (2) the
16 inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in
17 which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of
18 decision on the merits; (6) whether the state court proceedings can adequately protect the rights
19 of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court
20 proceedings will resolve all issues before the federal court. *Id.*

21 In evaluating these factors, courts use a flexible balancing test “in which one factor may
22 be accorded substantially more weight than another depending on the circumstances of the case,
23 and ‘with the balance heavily weighted in favor of the exercise of jurisdiction.’” *Holder v.*
24 *Holder*, 305 F.3d 854, 871 (9th Cir. 2002) (quoting *Moses H. Cone*, 460 U.S. at 16) (emphasis
25 added). Indeed, “[t]he underlying principle guiding [a court’s] review is a strong presumption
26 against federal abstention.” *Seneca*, 862 F.3d at 841. The court’s “task in cases such as this is
27 not to find some substantial reason for the exercise of federal jurisdiction by the district court;
28 rather, the task is to ascertain whether there exist ‘exceptional’ circumstances, the ‘clearest of

1 justifications,' that can suffice under *Colorado River* to justify the *surrender* of that
 2 jurisdiction.'" *Id.* (quoting *Moses H. Cone*, 460 U.S. at 25-26) (emphasis in original). As a
 3 result, "[a]ny doubt as to whether a factor exists should be resolved against a stay, not in favor of
 4 one." *Seneca*, 862 F.3d at 842.

5 Here, as explained below, the factors weigh against abstention: five weigh against
 6 abstention, one is neutral, one is fairly inconsequential, and one precludes abstention. Thus, the
 7 stay requested by Brahma must be denied.

8 **a. The *res* factor weighs against abstention.**

9 Brahma argues that this factor weighs in favor of abstention because Nye County "first
 10 assumed jurisdiction over the Res." ECF No. 13, pp. 10-11. This argument is wrong on multiple
 11 levels: this action and the Nye County Special Proceeding are not competing for jurisdiction over
 12 a *res* and if they are, or ever were, this action would have assumed jurisdiction first.

13 The first factor—jurisdiction over a *res*—weighs in favor of abstention "when both
 14 forums exercise jurisdiction over the same property, and addresses the concern that the parallel
 15 proceedings will result in inconsistent dispositions of such property." *Montanore Minerals*
 16 *Corp. v. Bakie*, 867 F.3d 1160, 1166 (9th Cir. 2017). Where "there is no possibility that the
 17 parallel proceedings will result in inconsistent dispositions of a single *res*," this factor does not
 18 apply. *Seneca*, 862 F.3d at 842. Said another way, for this factor to apply, the concurrent
 19 proceedings must both be *in rem* or *quasi in rem* proceedings. *40235 Washington St. Corp. v.*
 20 *Lusardi*, 976 F.2d 587, 589 (9th Cir. 1992). In *Boccard*, the court found that this factor did not
 21 weigh in favor of abstention because although the concurrent state court action asserted a
 22 mechanic's lien claim, the concurrent federal court action did not. *Boccard USA Corp. v.*
 23 *TigPro, Inc.*, No. CIV.A. H-07-0177, 2007 WL 1894154, at *7 (S.D. Tex. July 2, 2007). Thus,
 24 the court concluded that the suits were "not competing for jurisdiction over a *res*." *Id.* at *8.⁶

25
 26 ⁶ An *in rem* proceeding is an action against property, which affects the rights of all persons with
 27 an interest in the property; a *quasi in rem* proceeding only affects the rights of certain persons in
 28 the property; and an *in personam* proceeding merely "determine[s] the personal rights and
 obligations of the defendant." *Hanover Ins. Co. v. Fremont Bank*, 68 F. Supp. 3d 1085, 1109
 (N.D. Cal. 2014) (citing to multiple Supreme Court cases to support these definitions).





1 While a claim to foreclose a mechanic's lien may constitute a *quasi in rem* proceeding
2 because it determines the interests of certain persons in a piece of property, *see Andersen Const.*
3 *Co. v. Employee Painters' Tr.*, No. C13-0580-JCC, 2013 WL 3305475, at *2 (W.D. Wash. June
4 28, 2013), a claim on a surety bond is an *in personam* proceeding because it does not determine
5 interest in property, *see Welding Techs. v. James Mach. Works, LLC*, No. 3:12-CV-336, 2013
6 WL 1123852, at *3 (S.D. Tex. Mar. 18, 2013). In *Welding Technologies*, in discussing this
7 factor, the parties agreed that there was no *res* under either court's jurisdiction since the
8 defendant "bonded around [the plaintiff's] mechanic's lien on [the property in question]." *Id.*
9 The court reasoned that "[t]he absence of a *res* means that this first factor 'is not, however, a
10 merely neutral item;' instead, it weighs against abstention." *Id.* (quoting *Evanston Ins. Co. v.*
11 *Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988)).

12 Here, the first factor does not weigh in favor of abstention because, as in *Boccard*, the
13 Nye County Special Proceeding and this action are not competing for jurisdiction over a *res*. In
14 fact, neither action is *in rem* or *quasi in rem*. This action has never been *in rem* because none of
15 the claims or counterclaims asserted in this action were or are *in rem* or *quasi in rem* claims.
16 Although at one time the Nye County Special Proceeding qualified as *quasi in rem* due to
17 Brahma's lien foreclosure claim, that claim is moot as the lien has been bonded off. Indeed, for
18 this reason, TSE has moved to dismiss the lien foreclosure claim and Brahma has sought leave to
19 file an amended complaint dropping the lien foreclosure claim. Thus, neither this action nor the
20 Nye County Special Proceeding constitutes an *in rem* or *quasi in rem* proceeding.

21 Moreover, if in some unforeseeable way, both this action and the Nye County Special
22 Proceeding constitute *in rem* or *quasi in rem* proceedings, this action first assumed jurisdiction
23 over the *res*. TSE removed the Clark County Action to this Court on September 10, 2018.
24 Brahma filed the Lien Foreclosure Complaint in the Nye County Special Proceeding on
25 September 20, 2018. Thus, this action was in front of this Court prior to Brahma filing for
26 foreclosure in Nye County.

27 To the extent that Brahma attempts to link its filing in the Nye County Special
28 Proceeding with TSE's motion to expunge, such an attempt fails for three reasons. One, as



1 explained in TSE's Motion to Dismiss in the Nye County Special Proceeding, Brahma's
 2 complaint and counter-complaint in the Nye County Special Proceeding are impermissible
 3 filings, as they do not comply with Nev. R. Civ. P. 7(a) or NRS 108.2275. Brahma should have
 4 filed its lien foreclosure claim in a separate action; the Nye County Special Proceeding was
 5 limited to TSE's motion to expunge. Two, even assuming, *arguendo*, that Brahma's "counter-
 6 complaint" in the Nye County proceeding was a permissible filing, its date of filing does not
 7 relate back to the date TSE filed its motion to expunge. Under the first to file rule, federal courts
 8 look to the date the "complaints" were filed to determine which court assumed jurisdiction first.
 9 *See Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 96, n. 3 (9th Cir. 1982). Third and
 10 finally, even if Brahma could link its foreclosure action to the date TSE filed its motion to
 11 expunge, which it cannot, a motion to expunge a mechanic's lien is an *in personam* proceeding
 12 not an *in rem* proceeding, as it seeks to establish the rights of the party recording the lien, as
 13 opposed to a proceeding against property. *See Commonwealth Trust Co. of Pittsburgh v.*
 14 *Bradford*, 297 U.S. 613, 619 (1936) (proceeding to determine rights to funds in a trust was not *in*
 15 *rem* because it sought "only to establish rights," rather than to "deal with the property and other
 16 distribution"). Therefore, this first factor does not weigh in favor of abstention; rather, as stated
 17 in *Welding Technologies*, it weighs against abstention.

18 **b. The convenience of the forum factor weighs against abstention.**

19 Brahma contends that Nye County is a convenient forum. *See* ECF No. 13:26-27. But
 20 that is not the test. The test is "whether the inconvenience of the federal forum is so great that
 21 this factor points toward abstention." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1368
 22 (9th Cir. 1990). Here, the Nevada Federal District Court in Las Vegas is more convenient than
 23 the Nye County courthouse in Pahrump, Nevada, as counsel for both parties are located closer to
 24 this Court than the Nye County courthouse in Pahrump. Thus, this factor weighs against
 25 abstention.

26 Within its discussion on this factor, Brahma shoe-horns in two additional arguments.
 27 Neither argument, however, concerns the convenience of the forum. Brahma argues that in
 28 federal court it is not afforded the opportunity to obtain a preferential trial setting on its bond

1 claim under NRS 108.237(9).⁷ This argument is a red herring. Brahma's bond claim is not
 2 against TSE—it is against Cobra and American Home Assurance Company. Further, Brahma's
 3 bond claim will remain in state court as Cobra has the same domicile as Brahma. Next, Brahma
 4 argues that H&E cannot intervene to assert claims in this action due to a lack of diversity with
 5 TSE. But, as H&E has not yet asserted such claims, such theorizing is premature. Neither
 6 argument changes the fact that the convenience factor weighs against abstention.

7 **c. The piecemeal litigation factor appears neutral.**

8 Brahma argues that this factor weighs in favor of abstention because the concurrent
 9 proceedings could reach different conclusions on Brahma's lien and that the Nye County Court
 10 has already adjudicated TSE's motion to expunge. ECF No. 13, pp. 14-15. This argument is
 11 flawed, as Brahma ignores the applicable test and misconstrues its lien and TSE's motion to
 12 expunge.

13 For the piecemeal litigation factor "to favor a stay, the case must raise a special concern
 14 about piecemeal litigation, which can be remedied by staying or dismissing the federal
 15 proceeding, and which the court could not have avoided by other means." *Montanore*, 867 F.3d
 16 at 1167. "The mere possibility of piecemeal litigation does not constitute an exceptional
 17 circumstance." *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011).

18 Here, the lien argument raised by Brahma does not raise a special concern, or any
 19 concern for that matter, because the lien has been released. The lien was automatically released
 20 upon the recording of the bond. *See* NRS 108.2413. That is why Brahma's proposed amended
 21 complaint in the Nye County Special Proceeding drops its lien foreclosure claim. Moreover, the
 22 already adjudicated issues in TSE's motion to expunge do not raise a special concern. The
 23 arguments made by TSE related to lien notice and recording requirements. The arguments did
 24 not relate to the substance of the case. Brahma's reliance on TSE's October 15, 2018 letter to
 25 assert otherwise is misplaced. That letter merely sought to alert Judge Elliot to Brahma's bad
 26

27
 28 ⁷ Brahma cites to the wrong statute. The correct statute is NRS 108.2421(3).



1 faith conduct in unilaterally submitting a proposed order that contained trumped up factual
2 findings that fell outside the scope of the expungement issue.

3 Finally, Brahma ignores the likelihood that its bond claim against Cobra and American
4 Home Assurance Company in the Nye County Special Proceeding will be dismissed or stayed
5 and that the remaining claims will proceed in this action. Thus, there is only the “mere
6 possibility of piecemeal litigation” at this time. As a result, this factor is neutral.

7 **d. The jurisdiction order factor weighs against abstention.**

8 Brahma contends that this factor weighs in favor of abstention because the Nye County
9 Special Proceeding predates this action and is further along. ECF No. 13, p. 11. Brahma is
10 mistaken on both accounts.

11 “In determining the order in which the state and federal courts obtained jurisdiction,
12 district courts are instructed not simply to compare filing dates, but to analyze the progress made
13 in each case in a pragmatic, flexible manner with a view to the realities of the case at hand.”
14 *Seneca*, 862 F.3d at 843.

15 Here, this action was first filed, and is further along than the Nye County Special
16 Proceeding. As mentioned, the first to file rule looks to the date the complaints were filed to
17 determine which court assumed jurisdiction first: Brahma filed the Clark County Action in July
18 2018, and TSE removed it to this Court on September 10, 2018; Brahma filed its lien foreclosure
19 claim on September 20, 2018, and its amended counter-complaint in the Nye County Special
20 Proceeding on September 25, 2018. *See Exhibit 2* (Brahma’s Motion for Leave to Amend)
21 (discussing the infant nature of its case, despite its argument in the Motion that the case is further
22 along).

23 Moreover, this case is further along than the Nye County Special Proceeding. While the
24 Nye County Court ruled on TSE’s motion for expungement, that motion focused only on lien
25 notice and recording issues, which did not impact the merits of Brahma’s claims or TSE’s
26 counterclaims. Indeed, this action has progressed into discovery, while the Nye County Special
27 Proceeding has not. In this action, the parties held a Rule 26(f) conference on October 25, 2018,
28 thus, triggering discovery. TSE served Brahma with an initial round of written discovery on



1 October 29, 2018. The parties have not commenced discovery in the Nye County Special
2 Proceeding, and cannot, until after that court addresses TSE's pending motion to dismiss
3 Brahma's impermissible cross-complaint. The fact that the Nye County Court has addressed
4 mechanic's lien claims pertaining to the Project that are unrelated to the dispute presented here
5 does not change the reality that this action was first filed and is further along. Thus, this factor
6 weighs against abstention.

7 **e. The rule of decision factor weighs against abstention.**

8 Brahma contends that this factor weighs in favor of abstention because there are no
9 federal questions involved in this case and state courts are "better equipped to handle complex
10 lien litigation." ECF No. 13, p. 15. This argument is wrong as Brahma again ignores the law on
11 this issue.

12 While the presence of a federal question is a major consideration weighing against
13 abstention, the presence of state-law issues may only weigh in favor of abstention in "rare
14 circumstances." *Seneca*, 862 F.3d at 844. "That state law provides the rule of decision supports
15 abstention only when the state law questions are themselves complex and difficult issues better
16 resolved by a state court; it is not enough that a state law case is complex because it involves
17 numerous parties or claims." *Id.* Routine state law claims, such as breach of contract and
18 misrepresentation, do not constitute the type of "rare circumstances" that favor abstention. *Id.*
19 In *Seneca*, the Ninth Circuit disagreed with the district court's conclusion that the fact that the
20 case only included state law claims weighed heavily in favor of abstention because the claims
21 "ultimately boil[ed] down to arguments about misrepresentation, fraudulent inducement,
22 detrimental reliance, breach of contract, and rescission, none of which [raised] the 'rare
23 circumstances' required for the rule of decision factor to weigh toward abstention." *Id.*

24 Here, as in *Seneca*, Brahma's claims and TSE's counterclaims do not raise the "rare
25 circumstances" required for this factor to weigh in favor of abstention. Rather, the claims are run
26 of the mill state law claims such as breach of contract, unjust enrichment, and fraud. The one
27 NRS 624 prompt pay act claim asserted by Brahma does not change this. This Court is equipped
28



1 to handle all of the claims presented by this litigation. Thus, this factor weighs against
2 abstention.

3 **f. The right protection factor is fairly inconsequential.**

4 Brahma is correct that a state court proceeding can adequately protect the rights of the
5 parties to this case. *See Madonna*, 914 F.2d at 1370 (“This factor involves the state court’s
6 adequacy to protect federal rights, not the federal court’s adequacy to protect state rights.”). But,
7 Brahma ignores that “this factor is more important when it weighs against a stay.” *Montanore*,
8 867 F.3d at 1169. Thus, while this factor weighs in favor of abstention, it is fairly
9 inconsequential.

10 **g. The forum shopping factor weighs heavily against abstention.**

11 Brahma argues that this factor weighs in favor of abstention because “TSE’s removal of
12 the Clark County Action is nothing more than an effort to engage in forum shopping to avoid the
13 effects of the adverse ruling by Judge Elliott.” ECF No. 13, p. 16:12-23. This is wholly
14 incorrect—Brahma has engaged in forum shopping, not TSE.

15 TSE removed the Clark County Action *prior to* Judge Elliot issuing his ruling denying
16 TSE’s motion to expunge. TSE removed the Clark County Action on September 10, 2018;
17 Judge Elliot issued his ruling on September 12, 2018. Brahma, on the other hand, dropped its
18 claims from this Court and reasserted them in the Nye County Special Proceeding in a backdoor
19 attempt to evade this Court’s jurisdiction without filing a motion to remand. Brahma should not
20 benefit from its forum shopping efforts by obtaining a stay of this action. This factor weighs
21 heavily against abstention. *See Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989)
22 (weighing this factor “strongly” against the party that engaged in forum shopping because the
23 court had “no interest in encouraging [the] practice”).

24 **h. The complete resolution factor precludes abstention.**

25 Brahma did not discuss this factor—the most important factor. This factor is identical to
26 the parallel discussion above. Some courts in the Ninth Circuit treat this as an eighth factor,
27 while others treat it as a threshold issue to address before applying the factors. *Compare Seneca*,
28 862 F.3d at 845 *with Holder v. Holder*, 305 F.3d 854, 868 (9th Cir. 2002); *Intel Corp v.*



1 *Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993); *ScriptsAmerica, Inc. v.*
 2 *Ironridge Glob. LLC*, 56 F. Supp. 3d 1121, 1147 (C.D. Cal. 2014). Regardless of when it is
 3 applied, the rule is the same: “the existence of a substantial doubt as to whether the state
 4 proceedings will resolve the federal action precludes a *Colorado River* stay or dismissal.”
 5 *Seneca*, 862 F.3d at 845 (internal quotation marks omitted). This rule is “dispositive.” *Intel*, 12
 6 F.3d at 913. Here, as explained above, the Nye County Special Proceeding will not resolve all of
 7 the claims asserted in this action. Thus, a stay would be inappropriate.

8 **3. The circumstances presented here are not exceptional enough to warrant a**
 9 **stay under the *Colorado River* abstention doctrine.**

10 In addition to misapplying the factors, Brahma overlooks the narrow and extraordinary
 11 nature of the *Colorado River* abstention doctrine. A federal court has a “‘virtually unflagging
 12 obligation . . . to exercise the jurisdiction given them,’ including in cases involving parallel state
 13 litigation.” *Seneca*, 862 F.3d at 841 (quoting *Colo. River Water Conservation Dist. v. United*
 14 *States*, 424 U.S. 800, 817 (1976)). Abstention from the exercise of federal jurisdiction under the
 15 *Colorado River* doctrine is “‘an extraordinary and narrow exception’” to that obligation. *Am.*
 16 *Int’l Underwriters (Philippines), Inc. v. Cont’l Ins. Co.*, 843 F.2d 1253, 1256-57 (9th Cir. 1988)
 17 (quoting *Colorado River*, 424 U.S. at 813). Such abstention should only be exercised under
 18 “‘exceedingly rare,’” *Seneca*, 862 F.3d at 841, and “‘exceptional’” circumstances, *Nakash*, 882 F.2d
 19 at 1415.

20 The Ninth Circuit’s decision in *Seneca* demonstrates the narrow and extraordinary nature
 21 of the doctrine. There, the district court issued a stay under the doctrine. On appeal, the Ninth
 22 Circuit vacated the stay, stating that “[t]he reasons that the district court offered to justify
 23 abstention—that the parallel proceedings will involve piecemeal disposition of the issues, that
 24 the state law provides the rule of decision, and that the state proceeding is better suited to
 25 promote resolution of all the issues among the parties—are likely to be present in nearly every
 26 instance of concurrent state and federal suits where state law provides the rule of decision.” *Id.*
 27 at 847. The Ninth Circuit concluded that these concerns were not “‘exceptional’” so as to
 28 “‘warrant disregarding the ‘virtually unflagging obligation’ of a federal court to exercise its



1 jurisdiction.” *Id.*

2 Here, the reasoning from *Seneca* applies with equal force. To the extent that this Court
3 believes that any of the factors weigh in favor of abstention, the circumstances presented by this
4 action and the Nye County Special Proceeding are neither exceptional nor extraordinary. It
5 would be an abuse of discretion to issue the stay requested by Brahma.

6 **C. Brahma should not be permitted leave to amend its complaint.**

7 Brahma requests that, to the extent that this Court denies its requested stay, it should be
8 given leave to amend its complaint “to reassert its contract claims against TSE which are
9 currently being litigated in the Nye County Action.” ECF No. 12, pp. 16-18. This request
10 should be denied because the proper remedy is to resort back to Brahma’s original complaint,
11 which included the contract claims, by striking its amended complaint. *See* ECF No. 16
12 (requesting this relief). Moreover, Brahma failed to attach a proposed amended pleading to the
13 Motion in accordance with LR 15-1.

14 **IV. CONCLUSION**

15 As set forth above, this Court should not abstain from exercising its jurisdiction or permit
16 Brahma leave to amend its complaint. A stay under the *Colorado River* abstention doctrine is
17 not warranted. This action and the Nye County Special Proceeding are not parallel, the factors
18 weigh against the issuance of a stay, and the suits do not present the type of exceptional
19 circumstances that could warrant a stay. Rather, this Court should enjoin Brahma from
20 prosecuting its copycat claims in the Nye County Special Proceeding, strike Brahma’s
21 amendment to its complaint, as requested by TSE’s Motion for Injunction (ECF No. 16), and
22 permit this action to proceed. Brahma’s Motion for Stay should be denied.

23 DATED this 30th day of October 2018.

24 /s/ Colby Balkenbush

D. Lee Roberts, Jr., Esq.

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25 Ryan T. Gormley, Esq.

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28 *Tonopah Solar Energy, LLC*



CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S RESPONSE TO BRAHMA'S MOTION FOR STAY, OR IN THE ALTERNATIVE, MOTION TO AMEND COMPLAINT** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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EXHIBIT 7

EXHIBIT 7

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada Corporation,

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

Plaintiff,

vs.

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

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

Defendants.

AND ALL RELATED MATTERS

Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm of Peel
Brimley LLP, hereby submits its Reply in Support of its Motion for Stay, or in the Alternative Motion to
Amend Complaint ("Reply").

This Reply¹ is made and based on the following Memorandum of Points and Authorities, the
pleadings, declarations and papers on file in this case (the "Case"), and any argument that the Court may
entertain in this matter.

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¹ Terms defined in the Motion [ECF. No. 13] and Response to Motion for Injunction [ECF. No. 20] are carried through in this Reply.

1 Dated this 8 day of November, 2018.

2 **PEEL BRIMLEY LLP**

3 
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14 **MEMORANDUM OF POINTS & AUTHORITIES**

15 **I. INTRODUCTION**

16 TSE acknowledges in its state court pleadings that this Action and the Nye County Action are
17 parallel proceedings—it cannot now claim that they are different to avoid a stay. In any event, TSE’s
18 analysis of the *Colorado River* factors is flawed inasmuch as the Ninth Circuit case law holds that exact
19 parallelism is not required. Rather, the cases must only be “substantially similar,” which these cases are.
20 Both cases will require the trier of fact to determine, among other issues, (i) the agreed upon contract amount
21 between TSE and Brahma; (ii) the unpaid balance of the agreed upon contract amount; (iii) the amount of
22 labor, materials and equipment Brahma furnished to the Project; (iv) the accuracy and legitimacy of
23 Brahma’s billings and invoices to TSE; (v) the amount of payments TSE has made to Brahma; and (vi)
24 whether TSE is entitled to withhold money owed to Brahma. Further, when the eight *Colorado River* Factors
25 are analyzed, all but one weigh in favor of a stay, and the one that does not favor a stay, remains neutral to
26 the analysis.

27 Finally, in a case very similar to this one, this Court granted a *Colorado River* stay recognizing that
28 construction disputes involving owners, contractors and subcontractors and mechanic’s lien claims “are
more frequently and more competently addressed by the state court, which has, over the past ten years,
engaged in an enormous amount of construction litigation.” *Southwest Circle Group, Inc. v. Perini Building
Company*, 2010 WL 26667335, *3 (D.Nev. June 29, 2010). This Court’s time and resources are better
allocated addressing cases involving actual federal right issues. Accordingly, the Court should grant the

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Motion and allow Judge Elliot, who was expressly appointed to resolve this construction dispute between Brahma and TSE, to preside over the entire Case.

II. LEGAL ARGUMENT

A. **The Court Should Hear Brahma's Motion for Stay Before it Hears TSE's Motion for Injunction.**

Because Brahma filed its Motion for Stay [ECF. No. 13] first, the Court should decide that Motion first and deny the Motion for Injunction [ECF No. 16] as moot. Deciding the Motion for Stay first promotes (i) judicial efficiency by avoiding unnecessary rulings;² and (ii) federal judicial comity toward state courts by reaching the question of enjoining a state court judge only if necessary. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971) (abstaining from enjoining state court to promote "comity" for state judicial proceedings).

B. **TSE's Motion for Injunction Should Be Denied.**

While not relevant to Brahma's Motion for Stay, TSE dedicates a substantial amount of its Response attempting to bolster its shaky position that an injunction should issue against the Nye County Action. Brahma believes its Response [ECF No. 20] adequately responds to TSE's Motion for Injunction, however, the new cases TSE cites in its Response merit a short discussion which Brahma has included in a footnote below.³ None of those cases support the proposition that federal removal of a civil action automatically and unquestionably divests any state court of jurisdiction over another separately filed state court action.

C. **Because this Case is Substantially Parallel to the Nye County Action, the Court Should Stay this Case Under *Colorado River*.**

"The *Colorado River* doctrine requires a federal court to abstain from exercising jurisdiction during the pendency of state court proceedings when necessary to promote "wise judicial administration,

² That is, if the Court were to decide to enjoin the Nye County Court (though it would be improper to do so), but then later concluded that abstention was proper, the permanent injunction would need to be dissolved.

³ In *Roberts v. Hollandsworth*, the Idaho Supreme Court affirmed a state trial court's dismissal of an action before it on the grounds another action was pending "between the same parties for the same cause" in federal court. *Roberts*, 101 Idaho 522, 524, 616 P.2d 1058, 1061 (1980). However, the court affirmed because the plaintiffs initiated their state court action "only after the federal district court had ruled against the plaintiffs adversely, albeit by summary judgment." *Id.* at 525. In this litigation, there has been no adverse federal court hearing on any matter, let alone a substantive one. Moreover, TSE commenced the Nye County Action prior to the Federal Action. Similarly, *In re M.M.* concerned jurisdictional transfer of a case from a state court to a tribal court and provides no support for the idea that concurrent jurisdiction cannot exist in a state court over a separately filed civil action. *In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007). In *Riley v. Carson Pirie Scott & Co.*, after the federal court denied plaintiff's motion to remand, she filed an amended complaint in the very same state court case which defendants had removed, asserting her state law claims against defendants. *Riley*, 946 F. Supp. 716 (E.D. Wisc. 1996). *Riley* is inapplicable because Brahma did not file its contract claims in the Clark County Action and because Brahma did not file its amended Complaint in contradiction to an order from this Court. It did so pursuant to FRCP 15(a) and to preserve claims against the Brahma Bond in the Nye County Action. Similarly, in *Crummie v. Dayton-Hudson Corp.*, the plaintiff filed an amended complaint in the very same state court action from which defendants had removed their case. *Crummie*, 611 F. Supp. 692 (E.D. Mich. 1985). In contrast, Brahma filed its Amended Complaint in the Nye County Action, which TSE commenced before it removed the Clark County Action.

1 conservation of judicial resources, and comprehensive disposition of litigation.” *Puckett v. Schmog*, 2013
 2 WL 1874754, *1 (D.Nev. May 3, 2013).

3 The only threshold question in deciding whether a *Colorado River* stay is appropriate is whether
 4 there are parallel federal and state suits. *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457,
 5 463 (4th Cir. 2005). However, “in the Ninth Circuit, ‘exact parallelism’ between the two suits is not
 6 required. It is enough if the two proceedings are ‘substantially similar.’” *Nakash v. Marciano*, 882 F.2d
 7 1411, 1416 (9th Cir. 1989). “Substantial similarity does not mean that the cases must be identical.” *County*
 8 *of Marin v. Deloitte Consulting LLP*, 2011 WL 3903222, *1 (N.D.Cal. Sept. 6, 2011). “This inquiry
 9 examines whether the suits involve the same parties and the same claims.” *Nakash*, 882 F.2d at 1416. The
 10 Ninth Circuit is “particularly reluctant to find that the actions are not parallel when the federal action is but
 11 a ‘spin-off’ of more comprehensive state litigation.” *Id.* at 417.

12 By contrast, the out-of-circuit authority TSE cites requires a comparison that calls for the “exact
 13 parallelism” restriction the Ninth Circuit rejected in *Nakash*. Specifically, TSE cites *DDR Const. Services,*
 14 *Inc. v. Siemens Industry, Inc.*, which held, even where the same factual issues were involved, the plaintiff’s
 15 federal action “did not involve substantially the same legal issues as the claims remaining” in the state court
 16 action. *Id.* at 645. 770 F.Supp.2d 627 (S.D.N.Y. 2011). In particular, the court found an accounting claim in
 17 the state action and a quasi-criminal civil RICO claim in the federal action were “entirely different” from
 18 each other and it was unclear how resolution of the state action would dispose of all the claims in the federal
 19 case. *Id.*

20 Another out-of-circuit case cited by TSE, *Summit Contracting Grp., Inc. v. Ashland Heights, LP* is
 21 inapposite to this litigation. *Summit Contracting Grp.*, 187 F. Supp. 3d 893, 897 (M.D. Tenn. 2016). That
 22 case declined to find parallelism where there was a state lien action and a federal breach of contract action.
 23 Unlike this Case, however, the state lien action in *Summit Contracting* did not also include contractual
 24 claims. Here, the Nye County Action includes *both* mechanic’s lien claims as well as related breach of
 25 contract claims. All the cases TSE cites in footnote 5 to its Response can be distinguished from this Case in
 26 the same manner.

27 Even if *DDR Const. Services* were consistent with the Ninth Circuit’s rejection of an “exact
 28 parallelism” requirement, the facts of this Case are very different from that case. Here, Brahma’s claims and

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TSE's claims in state and federal court are, for the most part, virtually identical. In fact, the state court proceedings are more comprehensive and involve additional parties and claims, making the federal action merely a spin-off of the Nye County Action. Even so, both cases will require the trier of fact to determine, among other issues, (i) the agreed upon contract amount between TSE and Brahma; (ii) the unpaid balance of the agreed upon contract amount; (iii) the amount of labor, materials and equipment Brahma furnished to the Project; (iv) the accuracy and legitimacy of Brahma's billings and invoices to TSE; (v) the amount of payments TSE has made to Brahma; and (vi) whether TSE is entitled to withhold money owed to Brahma.

Indeed, in its Motion to Strike/Dismiss Brahma's pleadings filed in the Nye County Action, TSE moves the Nye County Court to stay the Nye County Action based on its admission that the Federal Action and Nye County Action are "duplicative disputes" and "substantially similar."⁴ Hence, as acknowledged by TSE, these are substantially parallel cases.

While TSE does assert negligent misrepresentation and fraudulent misrepresentation counterclaims in the Nye County Action, that Action, however, constitutes part of the same alleged contractual transactions that TSE proposes to be heard as federal counterclaims. Nothing prevents TSE from bringing these claims within the concurrent jurisdiction of the Nye County Court. Indeed, (as more fully discussed below) failure to litigate these compulsory claims concerning the contract TSE breached would result in the federal claims being extinguished as claim precluded (*res judicata*).

Hence, both pending cases arise out of the same transaction and occurrence and represent precisely the piecemeal litigation the *Colorado River* Doctrine seeks to avoid. *See Gardner v. Letcher*, 2012 WL 4863055 at *4 (D.Nev. 2012); *Southwest Circle Group, Inc.*, 2010 WL 26667335, *2 (finding that subcontractor's breach of contract case against general contractor was "but a 'split-off' from the more comprehensive state litigation" involving mechanic's lien claims.).

D. The Colorado River Factors Weigh in Favor of a Stay.

⁴ See Motion to Strike/Dismiss at pg. 4:21-23 attached as Exhibit "25" to Brahma's Response [ECF No. 20]. Indeed, in footnote 1 to the Motion to Strike, TSE states, "Brahma agrees with TSE that this dispute is duplicative of the first filed federal court action..." see Motion to Strike, Pg. 4, footnote 1. In that same filing, TSE acknowledges that "the Parties are currently in the midst of a dispute over the sufficiency of certain invoices Brahma has submitted to TSE for payment" where "Brahma contends that TSE owes it additional money for work Brahma performed on the Project" and "TSE contends that Brahma is not owed any additional money and that many of Brahma's invoices are fraudulent." *Id.* at pg. 3:4-8. In addition to asserting breach of contract claims against Brahma which are essentially the counter-parts of Brahma's contract claims against TSE, TSE also alleges in its Fifth Claim for Relief of its Counter-Claim filed with this Court, "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." See Counter-Claim at pg. 15, ¶ 63 [ECF No. 4].

1 In determining whether “exceptional circumstances” exist to grant a stay under the *Colorado River*
 2 Doctrine, the Ninth Circuit Court of Appeals evaluates eight factors: (1) which court first assumed
 3 jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid
 4 piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state
 5 law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect
 6 the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court
 7 proceedings will resolve all issues before the federal court. *Seneca Ins. Co. Inc. v. Strange Land, Inc.*, 862
 8 F.3d 835 (9th Cir. 2017).

9 “These factors are not a mechanical checklist; indeed, some may not have any applicability to the
 10 case.” *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, 103 S.Ct. 927, 74
 11 L.Ed.2d 765 (1983)). Contrary to TSE’s position, “exceptional circumstances” is not a threshold factor or
 12 an independent factor in the analysis, but rather, whether such circumstances exist is determined by weighing
 13 the eight factors above. *Intel Corp. v. Advanced Micro Devices*, 12 F.3d 908, 912 (9th Cir. 1993). Notably,
 14 this Court has held on several occasions that the “exceptional circumstances” limitation “only relates to
 15 cases which involve questions of federal law,” not when a case is before the federal court based on diversity
 16 jurisdiction only, as is the case here.⁵ See *Southwest Circle Group, Inc.*, 2010 WL 2667335, *1; see also,
 17 *Puckett*, 2013 WL 1874754, * 1; *Gardner*, 2012 WL 4863055, *2.

18 *I. Jurisdiction over the Res*

19 “[A] mechanic’s lien is a statutory creature established to help ensure payment for work or materials
 20 provided for construction or improvements on land.” *In re Fontainebleau Las Vegas Holdings*, 289 P.3d at
 21 1210. Under NRS 108.2415(6), a party may record a surety bond or “bond off” the lien, which “releases the
 22 property described in the surety bond.” The surety bond, which is recorded with the county recorder’s office,
 23 is “deemed to replace the property as security for the lien.” NRS 108.2415(6); see also *Simmons Self-Storage*
 24 *v. Rib Roof, Inc.*, 130 Nev. 540, 551 (2014). However, even after the substitution of the surety bond, the
 25 Court continues to hold jurisdiction over the lien and the underlying dispute. Under NRS 108.2423(1), “the
 26 principal and surety submit themselves to the jurisdiction of the court in which an action or suit is pending
 27

28 ⁵ While it appears this Court does not analyze the “exceptional circumstances” doctrine when deciding cases with no federal questions, out of an abundance of caution, Brahma has followed the Ninth Circuit’s case law and provided analysis for why exceptional circumstances exist in this Case.

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on a notice of lien on the property described in the surety bond.” Moreover, by procuring a bond, the principal and surety agree “they will pay the lien claimant that amount as a court of competent jurisdiction may adjudge to have been secured by his lien...”; however, “the liability of the surety may not exceed the penal sum of the bond.” NRS 108.2415(1).

Thus, TSE “bonding off” the lien affects the remedial aspect of a mechanic’s lien, but not the court’s jurisdiction over the lien. Moreover, in the event Brahma obtains a judgement against TSE which exceeds the penal sum of the Brahma Surety Bond, Brahma would still be entitled to pursue any deficiency judgment against the principal on the Surety Bond (or in most cases, the owner of the work of improvement to which the lien originally attached). *Simmons Self-Storage*, 130 Nev. at 552 (“Only upon showing that an individual surety bond is insufficient in relation to its respective charge can the district court take further action against that bond’s principal to satisfy the judgment”).

Here, on June 11, 2018, the Nye County Court first assumed jurisdiction over the *res* when TSE invoked that state court’s jurisdiction to expunge Brahma’s Lien recorded against the work of improvement.⁶ By contrast, TSE removed the Clark County Action to this Court on September 10, 2018. Hence, the Nye County Court maintains jurisdiction over the *res*. Therefore, this factor weighs in favor of this Court granting the stay.

At worst, if the court concludes that no jurisdiction over a *res* is at stake, this factor simply becomes “irrelevant,” *see R.R. Street & Co. Inc., v. Transport Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011); *see also, Seneca Ins. Co. Inc.*, 862 F.3d at 842. TSE unavailingly relies on contrary, out-of-circuit authority to claim absence of a *res* “weighs against” a stay.⁷ *Welding Technologies v. James Mach. Works, LLC*, No. 3:12-CV-336, 2013 WL 1123852, at *3 (S.D. Tex. Mar. 18, 2013) (citing *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988)). However, this Court follows the Ninth Circuit and has found otherwise. *See Gardner*, 2012 WL 4863055, at *3 (holding, when neither state court nor federal court has jurisdiction over property, “this element weighs in neither party’s favor”).

2. Nye County Court obtained jurisdiction first.

“In determining the order in which the state and federal courts obtained jurisdiction, district courts

⁶ Contrary to TSE’s assertion, the Nye County Action is on-going since Brahma has filed a Motion for Fees and Costs pursuant to NRS 108.2275(6)(c) given Judge Elliot’s decision to deny the Motion to Expunge. In addition, Brahma also has its own claims in its own pleading that relate to the dispute that underlies the mechanic’s lien, among others, TSE’s breach of contract and failure to timely pay.

⁷ Response at pg. 14:13-20

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are instructed not simply to compare filing dates, but to analyze the progress made in each case “in a pragmatic, flexible manner with a view to the realities of the case at hand.” *Seneca Ins. Co. Inc. v. Strange Land, Inc.*, 862 F.3d 835 (9th Cir. 2017) (citing *Cone Mem’l Hosp.*, 460 U.S. 21, 103).

While it is true both cases are relatively young, the Nye County Action has progressed further along than the Federal Action since Judge Elliot⁸ has already ruled on a dispositive motion in the Nye County Action. That Action was first commenced by TSE on June 11, 2018 when it filed its Second Motion to Expunge Brahma’s Lien. After reviewing all of the briefs on that matter, including receiving supplemental briefing from both parties, Judge Elliot held a 2-hour hearing on September 12, 2018, and denied TSE’s Second Motion to Expunge.

In an obvious attempt to create an argument that the Federal Action has progressed further along than the Nye County Action, TSE directs the Courts attention to certain written discovery requests TSE served on Brahma on October 29, 2018, just one day before filing its Response to Brahma’s Motion for Stay. TSE’s blatant scheme to quickly serve Brahma with discovery requests (i) before it filed its Response to the Motion for Stay; and (ii) despite demanding a one-year discovery period, only proves Brahma’s point that it is TSE who is forum shopping, not Brahma. These actions, coupled with TSE’s efforts to (i) strip away Brahma’s lien rights by staying the Nye County Action and (ii) thwart Brahma from recovering its mandatory award for attorney’s fees and costs under NRS 108.2275(6)(c), should not be overlooked.

Therefore, when the “realities of the case at hand” are considered, it is clear TSE’s discovery requests are nothing more than sham discovery requests put forth to bolster its argument against staying this Case.⁹ Therefore, because the Nye County Action has progressed further along than the Federal Action, this factor favors the Court granting the stay.

3. Convenience of the forum.

A court may consider the inconvenience of the federal forum, but the geographic dimension of convenience is “irrelevant” when the federal and state actions are located in the same general geographic area. *See, e.g., Jesus Garcia v. County of Contra Costa*, 2015 WL 1548928, at *3 (N.D. Cal. 2015) (citing *R&R Street & Co. v. Transport Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011) (same)).

⁸ Judge Elliot has also presided over several cases in Nye County involving mechanic’s lien rights against the Project and TSE, so he has significant familiarity with the Project and as a result, has a much shorter “learner-curve” than this Court.

⁹ Brahma intends to file a Motion for a Protective Order to stay any obligation to respond to those discovery requests until such time as this Court rules on the Motion for Stay so Brahma does not waste its time and resources indulging in TSE’s transparent scheme by providing responses.

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Here, the Federal Action in the Lloyd D. George courthouse is located within 65 miles—under an hour’s drive—of the Pahrump state courthouse where the Nye County Action is filed. Contrary to what TSE claims, the geographic dimension of this factor is simply irrelevant in this case and weighs neither for nor against any stay. Convenience, however, extends beyond geographic considerations. Because Brahma has a statutory right to a preferential trial setting in the Nye County Action on the related Brahma Surety Bond, and because the underlying Lien and Brahma Bond are recorded in Nye County, temporal convenience is certainly a relevant convenience consideration. Moreover, H&E’s contract claims against Brahma in the Nye County Action are derivative of Brahma’s claims against TSE, and those claims must remain in the Nye County Action, thus forcing Brahma to litigate “integral and interwoven” issues in two separate forums. *Southwest Circle Group, Inc.*, 2010 WL 26667335, *2. TSE’s ignores the Court’s admonition that the stay inquiry is to be applied pragmatically and flexibly, not as some “mechanical checklist.” *American Intern. Underwriters v. Continental Ins.*, 843 F.2d 1253, 1257 (9th Cir. 1988). This is especially important where the list of factors favoring a stay “is not exclusive, and others may be considered.” *Nakash*, 882 F.2d 1416.

In the event the Court finds this factor is limited to geographic considerations, since “neither forum is more convenient than the other, this factor is not a factor to be considered.” *Southwest Circle Group, Inc.*, 2010 WL 26667335, at * 3.

4. Avoiding piecemeal litigation.

“A substantial factor in the *Colorado River* analysis is whether there are special concerns associated with resolving the issues in piecemeal fashion via parallel proceedings.” *Seneca Ins. Co.*, 862 F.3d at 842. “The case must raise a special concern about piecemeal litigation which can be remedied by staying...the federal proceeding.” *R.R. Street & Co. Inc.*, 656 F.3d at 980. For this factor to weigh in favor of granting a stay, there must be “a special or important rationale or legislative preference for resolving these issues in a single proceeding.” *Seneca Ins. Co.*, 862 F.3d at 843.

The Nevada’s Mechanic’s Lien Statute evidences the Nevada Legislature’s preference for resolving construction disputes involving owners, contractors, subcontractors and mechanic’s liens within the same proceeding. Specifically, under NRS 108.2421(1), Brahma (the lien claimant) “is entitled to bring an action against the principal (Cobra) and surety (AHAC) on the surety bond and the lien claimant’s debtor (TSE) in any court of competent jurisdiction that is located within the county where the property upon which the work

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of improvement is located.” Further, under NRS 108.2421(3), Brahma is entitled to file a “demand for preferential trial setting,” and “upon filing, the clerk of the court shall, before the Friday after the demand is filed...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.” Because (i) NRS 108.2421(1) required Brahma’s foreclosure action against the Brahma Bond to be filed in Nye County; and (ii) Cobra, the principal on the Brahma Surety Bond is domiciled in Nevada (the same domicile as Brahma), Brahma’s claims against Brahma Surety Bond must be litigated in Nye County, not the Federal Action, a fact TSE has acknowledged throughout its briefing in this Court and the Nye County Action. In addition, because H&E also has the right to file a demand for preferential trial setting to pursue its claims against the H&E Surety Bond and Brahma (its debtor), staying this Case will ensure that that there are not inconsistent judgements between Brahma and TSE and Brahma and H&E.

Hence, given the clear “legislative preference” under NRS 108.2421 for resolving mechanic’s lien foreclosure actions and disputes between owners, contractors and subcontractors in a single proceeding, this factor weighs in favor of granting the stay.

5. *State law controls the decision on the merits.*

“That state law provides the rule of decision supports abstention only when the state law questions are themselves complex and difficult issues better resolved by a state court...” *Seneca Ins. Co. Inc.*, 862 F.3d at 844 (*citing R.R. St. & Co.*, 656 F.3d at 978-79). This Court has found that cases before it based on diversity jurisdiction only, play “an important factor” in deciding to grant the stay under *Colorado River Southwest Circle Group, Inc.*, 2010 WL 26667335, *3 (holding that mechanic’s lien litigation and construction disputes “are more frequently and more competently addressed by the state court, which has, over the past ten years, engaged in an enormous amount of construction litigation”).

Like *Perini*, there are no federal questions in this Case. The parties’ claims are before the Court based solely on diversity jurisdiction with only state law claims in dispute. In addition, like *Perini*, this case involves complex construction litigation involving mechanic’s lien claims, and a dispute between the owner, the general contractor and its subcontractor. Moreover, given the unique and somewhat burdensome nature of NRS 108.2421, which entitles Brahma to (i) a preferential trial setting within sixty (60) days of making its demand and (ii) assert contract claims against TSE (Brahma’s debtor) in the same preferential trial setting,

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this Case constitutes one of those “rare circumstances” where the Court is justified in granting a stay. As part of that preferential trial, Judge Elliot will be required to determine, among other issues, the agreed upon contract price between TSE and Brahma, and the unpaid balance of the agreed upon contract price pursuant to NRS 108.222. This fact weighs in favor of a stay.

6. Whether state court proceedings can adequately protect the rights of the federal litigants.

Brahma agrees with TSE that “a state court proceeding can adequately protect the rights of the parties to this case.”¹⁰ Therefore, this factor weighs in favor of a stay.

7. Whether the state court proceedings will resolve all issues before the federal court.

“When a district court decides to stay a case under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.” *Cone Memorial Hospital*, 460 U.S. at 28.

TSE argues that its counter-claims against Brahma for breach of contract and misrepresentation are not before the Nye County Court, so proceeding with the Nye County Action would not resolve all of the claims currently before this Court.¹¹ However, such a position ignores the fact that should this Court stay the Federal Action, TSE will be required to assert its compulsory counter-claims in the Nye County Action pursuant to NRCP 13(a), or risk having those claims barred.¹²

Regardless of whether TSE brings its counterclaims in the Nye County, those claims will be resolved by the Nye County Action because that Court will either adjudicate those claims on the merits, or if TSE does not bring them, they will be barred, resulting in an adjudication under NRCP 13(a). Therefore, TSE’s argument that the Nye County Action will not resolve its counterclaims is a red-herring and should not

¹⁰ Response, at pg. 20:3-9.

¹¹ *Id.* at pg. 13:3-8; TSE’s reliance on *Intel Corp.*, 12 F.3d at 913 n.7, is misplaced. The *Intel* court considered a *Colorado River* motion and found that “[a] stay would be especially difficult to justify...where the copyright claims are subject to exclusive federal jurisdiction...the Circuit Courts, and the Ninth Circuit in particular, have uniformly held that a district court may not grant a stay in this context.” *Id.* Here, the Nye County Court, a state court of general subject-matter jurisdiction, may entertain all the claims asserted as they all involve questions of state law.

¹² Indeed, should the Court stay this Case, TSE would then be required to file an Answer to Brahma’s Complaint filed in the Nye County Action, which Answer “shall state as a counterclaim any claim which at the time of serving the pleading [TSE] has against [Brahma], if it arises out of the transaction or occurrence that is the subject matter of [Brahma’s] claim.” *see MacDonald v. Krause*, 77 Nev. 312, 362 P.2d 724 (1961) (“where a compulsory counterclaim is not pled, the party failing to assert such a claim is thereafter barred from bringing a separate suit on such claim”); *see also Great W. Land & Cattle Corp. v. Sixth Judicial Dist. Court ex rel. County of Pershing*, 86 Nev. 282, 467 P.2d 1019 (1970) (holding, purpose of this rule is to discourage circuity of action and promote speedy settlement of all controversies between parties in one action). Nevada’s test for claim preclusion “applies to all grounds of recovery that were or could have been brought in the first case.” *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008) (emphasis added).

1 persuade this Court to deny the Motion for Stay.

2 **8. Whether exercising jurisdiction would promote forum shopping.**

3 "It typically does not constitute forum shopping where a party 'acted within [its] rights in filing a
4 suit in the forum of [its] choice' ... even where '[t]he chronology of events suggests that both parties took a
5 somewhat opportunistic approach to th[e] litigation.'" *Seneca Ins. Co.*, 862 F.3d at 846. (citations omitted).
6 The primary purpose of amending its Counter-Complaint in the Nye County Action was not to forum shop,
7 but rather, to preserve Brahma's right to pursue its contract claims against TSE in conjunction with its claim
8 against the Brahma Surety Bond, which claims must be decided along with Brahma's claims against the
9 Brahma Surety Bond in the Nye County Action. Forbidden forum shopping is limited to when a party
10 "pursue[s] suit in a new forum after facing setbacks in the original proceeding," *Seneca*, 862 F.3d at 846.
11 As no federal court ruling has occurred, simply put, Brahma has not engaged in forum shopping, and every
12 case TSE cites regarding forum shopping can easily be distinguished from the facts of this Case.

13 Weighing these eight factors, a stay of this Case under *Colorado River* is appropriate as only one is
14 possibly neutral and all others favor the stay.

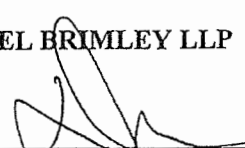
15 **E. In the Event the Court Does Not Stay this Case, it Should Allow Brahma to Amend its**
16 **Complaint.**

17 Should the Court deny Brahma's Motion for Stay, Brahma must be permitted to amend its
18 Complaint to reassert its contract claims against TSE.

19 **III. CONCLUSION**

20 Dated this 8 day of November, 2018.

21 **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 November 8, 2018, I served the within document(s):

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

to be served as follows:

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

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

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EXHIBIT 8

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RA000479

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

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

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

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

ORAL ARGUMENT REQUESTED

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



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

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

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

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

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

21 **II. STATEMENT OF PERTINENT FACTS**

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

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



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

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

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

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

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

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

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

4 Due to defects with the lien, on the same day that TSE filed the motion to expunge, April
5 24, 2018, Brahma voluntarily dismissed the entire complaint in the Nye County Action without
6 prejudice under Nevada Rule Civil Procedure 41(a)(1)(A)(i). Notice of Voluntary Dismissal,
7 attached hereto as **Exhibit 7**. That same day, Brahma also recorded a second amendment to the
8 lien. *See* Notice of Second Amended and Restated Lien in the Official Records of Nye County,
9 Nevada, as Document No. 891766, attached hereto as **Exhibit 8**. As a result, TSE withdrew its
10 motion to expunge.

11 On June 11, 2018, TSE filed a second motion to expunge the lien under NRS
12 108.2275(1). *See* Second Motion to Expunge, attached hereto as **Exhibit 9**. As there was no
13 complaint pending, this second motion resulted in the opening of a special proceeding in the
14 Fifth Judicial District Court, Nye County Nevada in accordance with NRS 108.2275(5), which
15 provides that “[i]f, at the time the [motion] is filed, an action to foreclose the notice of lien **has**
16 **not been filed**, the clerk of the court shall assign a number to the [motion] and obtain from the
17 [moving party] a filing fee of \$85.” (“Nye County Special Proceeding”) (emphasis added). *See*
18 *id.* The Nye County court would eventually hear arguments on the motion on September 12,
19 2018.

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

22 While the motion to expunge in the Nye County Special Proceeding was waiting to be
23 heard, on July 17, 2018, Brahma filed a complaint in the Eighth Judicial District Court, Clark
24 County, Nevada against TSE (“Clark County Action”) in accordance with the Agreement’s
25 venue selection clause. *See* ECF No. 1-1. The complaint in the Clark County Action asserted
26 the same claims against TSE as the previously dismissed complaint, with the exception of the
27 lien foreclosure claim: (1) breach of the Agreement, (2) breach of the implied covenant of good
28



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

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

7 Filed concurrently with this motion, on October 18, 2018, TSE moved in the Nye County
8 Special Proceeding to dismiss Brahma's first amended counter-complaint, or, in the alternative,
9 to stay the action until this Court resolves this motion. Among other things, that motion argues
10 that the Nye County District Court should dismiss Brahma's first amended counter-complaint as
11
12

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

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



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

3 **III. LEGAL ARGUMENT**

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

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

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

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

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

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



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

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

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

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

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



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

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

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

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

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

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

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

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

28



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

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

Id.

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

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

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

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



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

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

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

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

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



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

IV. CONCLUSION

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

DATED this 18th day of October 2018.

/s/ Colby Balkenbush

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



CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S MOTION FOR AN INJUNCTION AND TO STRIKE** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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