

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 4

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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 |

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|---|------------------------|---|
| 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 |

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| | 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 |

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| 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 |

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| | 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 |

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|-----------------|--|-------------------------------|----------|
| | 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 9

EXHIBIT 9

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

12 BRAHMA GROUP, INC., a Nevada Corporation,

13 Plaintiff,

14 vs.

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

18 Defendants.

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

**BRAHMA GROUP, INC.'S RESPONSE
TO TONOPAH SOLAR ENERGY,
LLC'S MOTION FOR PRELIMINARY
INJUNCTION AND MOTION TO
STRIKE [ECF No. 16]**

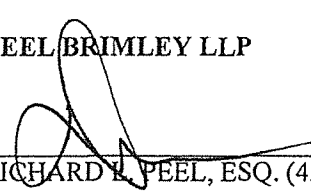
19 **AND ALL RELATED MATTERS**

20 BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm of Peel Brimley
21 LLP, hereby submits its Response to TONOPAH SOLAR ENERGY, LLC'S Motion for Preliminary
22 Injunction and Motion to Strike [ECF No. 16] ("Response").¹

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

26 Dated this 5 day of November, 2018.

27 **PEEL BRIMLEY LLP**

28 
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¹ As used herein, (i) "TSE" shall mean Tonopah Solar Energy, LLC; and (ii) "Motion" shall mean TSE's Motion for Preliminary Injunction and Motion to Strike.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION.²

In filing its Motion, TSE's goal is clear—it seeks to (i) deprive Brahma of its statutory rights under Nevada's mechanic's lien statute, and (ii) delay paying Brahma the nearly \$13 Million³ it owes to Brahma for the Work (defined below) Brahma furnished to TSE's Project. Along with its Motion, TSE has also filed its Nye County Motion asking the Nye County Court to stay the entire case, including Brahma's (i) right to an award of attorneys' fees and costs under NRS 108.2275 for defeating TSE's Second Motion to Expunge, (ii) mechanic's lien foreclosure action against the Brahma Surety Bond, and (iii) Brahma's right to a preferential trial setting against the Brahma Surety Bond, Cobra (as principal) and AHAC (as Surety).

Notably, TSE chose to avail itself of the laws and business opportunities in Nye County by (i) constructing the Work of Improvement there, filing its Second Motion to Expunge (under NRS 108.2275) there, and (ii) demanding that Cobra record (in the Nye County Recorder's Office) the Brahma Surety Bond to release Brahma's Lien from the Work of Improvement. Accordingly, TSE should now be required to resolve all its disputes with Brahma in the Nye County Action.

In its Motion, TSE acknowledges that Brahma was required to file its foreclosure action against the Brahma Bond in Nye County. Because Cobra (the entity who TSE required to procure the Brahma Surety Bond) is a non-diverse entity, Brahma's claims against Cobra, the Surety (American Home Assurance Company) and the Brahma Surety Bond must necessarily be litigated in Nye County, which means its contract claims against TSE should also be litigated in the Nye County Action.

Moreover, this Action is before the Court based on diversity jurisdiction only, but such diversity is entirely predicated on an incorrect interpretation of the forum selection clause in the Agreement between TSE and Brahma which did not require Brahma to litigate its claims in Clark County because, (i) the forum selection clause is permissive only, not mandatory, and (ii) by agreeing to the forum selection clause, Brahma could not have waived its right under NRS 108.2421 to pursue its contract claims against TSE in the Nye County Action because such a provision is against public policy, void and unenforceable under NRS 108.2453 and the Nevada Supreme Court's holding in *In re Fontainebleau Las Vegas Holdings, LLC*, 289

² The defined terms set forth in this Section 1, are defined below in this Response.

³ A significant portion of which represents amounts owed to Brahma's subcontractors and suppliers.

1 P.3d 1199, 1210 (Nev. 2012).

2 Therefore, because all claims arise out of the same transaction and occurrence (i.e., unpaid invoices
3 for Work rendered on a time and material basis by Brahma), a single judge should try all claims. The only
4 way to have a single judge hear all disputes between the parties will be to have the Nye County Court preside
5 over all matters. This makes the most sense since (i) the Work of Improvement is located in Nye County,
6 (ii) all of the contracts that are the subject of the dispute were performed in Nye County, (iii) the liens and
7 bonds are recorded with the Nye County recorder's office, and (iv) the Nye County Court is the most familiar
8 with the Project and has already ruled on a dispositive matter involving Brahma and TSE (i.e., TSE's Second
9 Motion to Expunge Brahma's Mechanics' Lien).

10 Further, if the Court grants Brahma's Motion for Stay under the *Colorado River* doctrine in favor
11 of the Nye County Action, it can simply deny as moot TSE's Motion, since all claims between the Parties
12 can and should be litigated before Judge Elliot in the Nye County Action.

13 In the event the Court is not inclined to grant Brahma's Motion for Stay, the Court should
14 nonetheless deny TSE's Motion to enjoin the Nye County Action on the merits since the Anti-Injunction
15 Act, 28 U.S.C. § 2283, prohibits this Court from enjoining the earlier filed Nye County Action. Moreover,
16 no statutory exception properly authorizes this Court to enjoin the earlier filed Nye County Action (which
17 was filed by TSE on June 11, 2018) on the basis of the later removed, Clark County Action (September 10,
18 2018).

19 Further, by amending its Complaint in this Action to remove its contract claims against TSE and
20 assert them in the Nye County Action, Brahma legitimately protected its legal interests in the Nye County
21 Action to prevent any preclusive impairment that might result from litigation of the same transaction or
22 occurrence that is the subject of its lien rights pertaining to the Brahma Surety Bond.

23 Finally, the Court can dismiss as moot TSE's Motion to Strike Brahma's Amended Complaint
24 inasmuch as Brahma has already moved this Court as an alternative argument under its *Colorado River*
25 Motion, to amend its federal complaint to restore its claims for (i) breach of contract, (ii) breach of the duty
26 of good faith and fair dealing, and (iii) violation of NRS 624, in the event the Court does not grant its Motion
27 for Stay.

28

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II. STATEMENT OF FACTS

A. The Work of Improvement.

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,⁴ whereby Brahma agreed to provide (on a time and material basis), certain work, materials, and equipment (collectively, the “Work”) for the Work of Improvement. Even though Brahma has provided the Work for the Work of Improvement, TSE has failed to fully pay Brahma for such Work.

B. The Brahma Lien, the First Complaint 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.⁵ Seven days later, on April 17, 2018, Brahma, through prior counsel, Jones Lovelock, filed a complaint in the Fifth Judicial District Court (“Nye County Court”) as Case No. CV39237 (the “First Complaint”), to foreclose against the Original Lien, among other causes of action.⁶ Brahma filed with the Nye County Court a Notice of Lis Pendens and Notice of Foreclosure of Mechanic’s Lien and recorded the same against the Work of Improvement.⁷ Two days later, on April 19, 2018, TSE, through its counsel, Weinberg Wheeler Hudgins Gunn & Dial, sent Jones Lovelock a letter (the “Demand Letter”) demanding that Brahma (i) discharge and release its Original Lien, and (ii) participate in mediation before filing for litigation (see Section 24 of the Agreement).⁸ Finally, TSE threatened to file (i) a motion to expunge under NRS 108.2275 if Brahma did not voluntarily release its Original Lien by noon the next day, and (ii) a motion to dismiss under NRS 108.237(3), if Brahma did not immediately dismiss its First Complaint without prejudice.⁹

On April 24, 2018, TSE filed in Case No. CV39237, a motion to expunge Brahma’s Lien (“First

⁴ A true and correct copy of the Agreement is attached hereto as Exhibit 1.

⁵ A true and correct copy of the Original Lien is attached hereto as Exhibit 2.

⁶ A true and correct copy of the First Complaint is attached hereto as Exhibit 3.

⁷ A true and correct copy of the Notice of Foreclosure and Lis Pendens are attached hereto as Exhibit 4 and Exhibit 5, respectively.

⁸ A true and correct copy of this correspondence is attached hereto as Exhibit 6.

⁹ *Id.*

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Motion to Expunge”) in the Nye County Court.¹⁰ Before Brahma received notice of TSE’s First Motion to Expunge, and to avoid extensive motion practice with TSE regarding the ripeness of the First Complaint, Brahma voluntarily dismissed its First Complaint on April 24, 2018, but declined to discharge and release its Original Lien.¹¹ Even though (i) TSE had officially appeared in that Case by filing the First Motion to Expunge, and (ii) Brahma had not released its Lien, TSE decided to withdraw its First Motion to Expunge instead of proceeding in that Case.

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. 899351.¹²

To replace the Work of Improvement as security for the Brahma Lien, TSE demanded that Cobra, the original general contractor for the Work of Improvement,¹³ bond around the Brahma Lien. Per TSE’s demand, Cobra, as principal, caused a surety bond to be recorded with the Nye County Recorder’s Office on September 6, 2018, as Document No. 898974 (the “Brahma Surety Bond”). The Brahma Surety Bond (i) was issued by American Home Assurance Company (“AHAC” or “Surety”) on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) was in the amount of \$10,767,580.00.¹⁴

At Brahma’s request and in compliance with Nevada law, Cobra caused the Penal Sum of the Brahma Surety Bond to be increased by AHAC to \$19,289,366.61 (or 1.5 times the amount of the Brahma Lien) by causing a Rider to the Brahma Surety Bond (the “Brahma Surety Bond Rider”) to be recorded on October 9, 2018 with the Nye County Recorder’s Office as Document No. 900303.¹⁵

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

On May 15, 2018, H&E (one of Brahma’s suppliers for the Work of Improvement) caused a notice of lien to be recorded with the Nye County Recorder as Document No. 892768 in the amount of \$477,831.40

¹⁰ A true and correct copy of the First Motion to Expunge is attached hereto as Exhibit 7.

¹¹ A true and correct copy of the Voluntary Dismissal is attached hereto as Exhibit 8.

¹² 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 9, 10, 11 and 12, respectively. Brahma’s Original Lien and the amendments and restatements thereto, including the Fourth Amended Lien are referred to collectively herein as the “Brahma Lien.”

¹³ Further, TSE has advised Brahma and its counsel that Cobra is contractually responsible to TSE to pay for the Work that TSE contracted with Brahma to perform.

¹⁴ A true and correct copy of the Brahma Surety Bond is attached hereto as Exhibit 13.

¹⁵ A true and correct copy of the Brahma Surety Bond Rider is attached hereto as Exhibit 14. The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as the “Brahma Surety Bond.”

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(the “H&E Lien”).¹⁶ On June 8, 2008, TSE filed in Case No. CV 39347, a motion to expunge the H&E Lien in the Nye County Court which was assigned to the Honorable Kimberly Wanker in Department 1, and which was later withdrawn by TSE before Judge Wanker held a hearing on the same.¹⁷ On September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County Recorder’s Office as Document No. 898975 (the “H&E Surety Bond”), to replace the Work of Improvement as security for the H&E Lien.¹⁸ The H&E Surety Bond (i) was issued by AHAC on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) is in the amount of \$716,741.10.¹⁹

Because TSE failed to fully pay Brahma, and Brahma has not paid H&E, Brahma understands that H&E has filed or intends to file a foreclosure action against the H&E Surety Bond in the Nye County Court, and has asserted or intends to assert breach of contract claims against Brahma in that action, which claims are derivative of Brahma’s claims against TSE.

D. To Expunge the Brahma Lien, TSE, as the Plaintiff, Commenced a New Action in Nye County Against Brahma, the Defendant.

On or about June 1, 2018, TSE, as plaintiff, commenced a new 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 “Second Motion to Expunge”).²⁰ On August 14, 2018, Judge Lane, entered an Order of Reassignment, assigning that Case to Senior Judge Steven Elliot based on the stipulated agreement of counsel for TSE and Brahma (at the August 6, 2018 hearing) that the Case should be assigned to Judge Elliot because he “has familiarity with the parties and the facts due to his involvement in a previous case.”²¹ Notably, the Order indicates that the case would be assigned to Judge Elliot “for hearing or decision on the pending motions and for future handling of the case.”²²

¹⁶ A true and correct copy of the H&E Lien is attached hereto as Exhibit 15.

¹⁷ A true and correct copy of TSE’s Motion to Expunge the H&E Lien is attached hereto as Exhibit 16.

¹⁸ A true and correct copy of the H&E Surety Bond is attached hereto as Exhibit 17.

¹⁹ It should be noted that (i) AHAC is the surety on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the “Surety,” and (ii) Cobra is identified as the principal on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the “principal.”

²⁰ A true and correct copy of TSE’s Second Motion to Expunge the Brahma Lien is attached hereto as Exhibit 18.

²¹ A true and correct copy of the Reassignment Order is attached hereto as Exhibit 19. Indeed, Judge Elliot (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.]

²² *Id.*

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At a hearing held on September 12, 2018 (the “September 12 Hearing”), Judge Elliot denied TSE’s Second Motion to Expunge and entered a written order on October 29, 2018 (the “Order”).²³ Since Brahma was the prevailing party at the September 12 Hearing, Brahma filed a motion for an award of attorney’s fees and costs pursuant to NRS 108.2275(6)(c) (“Fee Motion”), which Fee Motion is still pending.²⁴

Because the Nye County Court (i) has jurisdiction over the Work of Improvement, Brahma’s Lien, the Brahma Surety Bond, Cobra, AHAC and the claims of H&E,²⁵ and (ii) heard the arguments presented at the September 12 Hearing, the dispute between TSE and Brahma should necessarily be heard by Judge Elliot, rather than this Court.

Based on the mistaken belief that Section 24 of the Agreement required it to pursue its contract-based claims in Clark County, Nevada, and after (i) Richard Peel and Ronnie Cox (counsel for Brahma) had consulted with Lee Roberts (counsel for TSE) about the possibility of stipulating to have the parties’ claims filed in one action and one forum, and (ii) TSE declining to do so,²⁶ Brahma filed a complaint on July 17, 2018 in the Eighth Judicial District Court of Nevada (the “Clark County Action”), against TSE for breach of contract, unjust enrichment, and violation of NRS Chapter 624.²⁷

On September 10, 2018, TSE removed the Clark County Action to Federal Court (Case No.: 2:18-CV-01747-RFB-GWF) based on diversity jurisdiction only (the “Federal 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.

For the reasons discussed above, including Brahma’s discovery that the forum selection clause is against public policy, void and unenforceable, and after Cobra had caused the Brahma Surety Bond to be posted (discussed more fully below) but within the timeframe allowed under FRCP 15(a), Brahma filed its

²³ A true and correct copy of Judge Elliot’s Order Denying TSE’s Second Motion to Expunge the Brahma Lien is attached hereto as **Exhibit 20**.

²⁴ A true and correct copy of Brahma’s Fee Motion is attached hereto as **Exhibit 21**. NRS 108.2275(6)(c) provides that when the court finds a prevailing lien claimant’s notice of lien is not frivolous and was made with reasonable cause (which is what the Court found here), the court must award to such prevailing lien claimant the costs and reasonable attorney’s fees it incurred to defend the motion.

²⁵ As acknowledged by TSE in its Motion to Strike, to Dismiss or to Stay filed in the Nye County Action.

²⁶ See Declaration of Richard L. Peel, Esq. attached hereto.

²⁷ A true and correct copy of Brahma’s Complaint filed in the Clark County Action is attached hereto as **Exhibit 22**.

1 First Amended Complaint in the Federal Action on September 25, 2018, and removed all causes of action
2 against TSE except for its Unjust Enrichment claim so that those claims could be properly pursued in the
3 Nye County Action in conjunction with Brahma's claim against Cobra, AHAC, the Brahma Surety Bond
4 and TSE, as required and allowed in NRS 108.2421(1).

5 On October 5, 2018, Brahma filed its Answer to TSE's Counterclaim in the Federal Action. On
6 October 9, 2018, TSE filed its Answer to Brahma's First Amended Complaint in the Federal Action.

7 **E. Brahma Filed an Action to Foreclose on the Brahma Lien in the Nye County**
8 **Action.**

9 Because the Nye County Court had already ruled on the validity of the Brahma Lien and is well
10 acquainted with the facts of this case, Brahma filed its Mechanic's Lien Foreclosure Complaint in the Nye
11 County Action (i.e., Case No. CV 39348) on September 21, 2018,²⁸ as required by NRS 108.239(1).²⁹

12 On September 25, 2018, Brahma filed in the Nye County Action its, (i) First Amended Counter-
13 Complaint and included therein its contract-based claims against TSE, and (ii) a Third-Party Complaint
14 asserting claims against AHAC, the Brahma Surety Bond and Cobra, as principal.³⁰ H&E has also brought
15 (or intends to bring) in the Nye County Action its, (i) contract-based claims against Brahma, and (ii) claims
16 against the Surety, the H&E Surety Bond and Cobra, as Principal in the Nye County Court.

17 On October 18, 2018, TSE submitted to the Nye County Court, a Motion to Strike, Motion to
18 Dismiss or Motion for Stay in the Nye County Action ("Nye County Motion for Stay").³¹ On November
19 5, 2018, Brahma filed its Opposition to TSE's Nye County Motion for Stay.³²

20 **III. LEGAL ARGUMENT**

21 **A. This Court Should Grant Brahma's Pending *Colorado River* Motion.**

22 As a preliminary matter, on October 16, 2018, Brahma filed in this Court a Motion for Stay (the
23 "Brahma Motion to Stay") based on the *Colorado River* Doctrine. Brahma filed its Motion for Stay before
24 TSE filed its Motion for Injunction, so the Court should hear Brahma's Motion for Stay before it hears the

25 ²⁸ A true and correct copy of the Mechanic's Lien Foreclosure Complaint is attached hereto as **Exhibit 23**.

26 ²⁹ 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"

27 ³⁰ A true and correct copy of the First Amended Counter-Complaint and Third-Party Complaint is attached hereto as **Exhibit 24**.

28 ³¹ A true and correct copy of TSE's Motion to Strike, Motion to Dismiss or Motion to Stay is attached hereto as **Exhibit 25**.

³² A true and correct copy of Brahma's Opposition to TSE's Nye County Motion for Stay is attached hereto as **Exhibit 26**.

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1 Motion for Injunction. More importantly, because the Parties are proceeding with parallel litigation in the
2 Nye County Action, which was filed before the Federal Action, the Court should stay this removed civil
3 action under the *Colorado River Abstention* Doctrine, thereby allowing Judge Elliot and the Nye County
4 Action to efficiently resolve this duplicative dispute and all disputes involving Brahma, TSE, Cobra, H&E
5 and the Surety. The Nye County Court has already ruled on TSE's Second Motion to Expunge, so the Nye
6 County Court is more familiar than this Court with many of the disputed issues between the Parties.
7 Moreover, as noted above, Judge Elliot presided over other litigation involving TSE and the Work of
8 Improvement, so he is already familiar with the Project and many of the Parties currently before this Court.

9 **B. Nevada's Mechanic's Lien Statute (i) Provides Brahma with Certain Rights, and**
10 **(ii) Compels Certain Actions, Which the Court Must Consider Before it Decides**
TSE's Motion for Injunction.

11 Before Brahma can effectively discuss the legitimate reasons why it amended its Complaint to
12 remove certain contract claims in this Case and asserted those same claims in its Counter-Complaint in the
13 Nye County Action, Brahma must first discuss the legal context and implications underlying this filing as
14 well as certain rights Brahma is entitled to under Nevada's mechanic's lien statute.

15 **1. Brahma's Counter-Complaint against the Brahma Surety Bond, the Surety**
16 **and Cobra, as Principal, is properly filed in Nye County.**

17 Brahma's actions were not done to avoid federal court jurisdiction as TSE incorrectly alleges.
18 Rather, Brahma took such steps to preserve and pursue its statutory mechanic's lien rights in the Nye County
19 Action. In fact, in its Motion to Strike, Motion to Dismiss or Motion for Stay filed in the Nye County Action
20 ("Motion to Strike"), TSE admits that under NRS 108.2421, Brahma was required to bring its claim against
21 the Brahma Surety Bond in Nye County.³³

22 Specifically, NRS 108.2421 states in relevant part:

23 The lien claimant is entitled to bring an action against the principal and
24 surety on the surety bond and the lien claimant's debtor in any court of
25 competent jurisdiction that is located within the county where the property
26 upon which the work of improvement is located.

27 Moreover, "[b]y entering into a surety bond given pursuant to NRS 108.2415, the principal [Cobra]
28 and surety [AHAC] submit themselves to the jurisdiction of the court in which an action or suit is pending
on a notice of lien on the property described in the surety bond" and "[t]he liability of the principal may be

³³ See Exhibit 25, Nye County Motion for Stay at pg. 19:3-7.

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1 established by the court in the pending action,” whereas “[t]he liability of the surety may be enforced on
2 motion without the necessity of an independent action.” (NRS 108.2423(1)).

3 Hence, because Brahma filed its Counter-Complaint to foreclosure against the Brahma Lien in Nye
4 County, and has now amended the Counter-Complaint to assert claims against the Brahma Surety Bond,
5 Cobra and AHAC, both Cobra and AHAC are bound to the jurisdiction of the Nye County Court and
6 liability against both will be determined in the Nye County Action. Additionally, Brahma’s claims against
7 the Brahma Surety Bond (which are attributable to TSE’s failure to pay Brahma for its Work) are properly
8 filed in the Nye County Action since NRS 13.010(2) requires that actions for the foreclosure of all lien
9 rights upon real property must be filed in the county where the subject property is located. Here, the Brahma
10 Surety Bond serves as collateral for the Brahma Lien, is recorded in the Nye County Recorder’s Office and
11 must be pursued through litigation in Nye County.

12 **2. Brahma has a Right to a Preferential Trial Under NRS 108.2421 in the Nye**
13 **County Action.**

14 Additionally, because the Brahma Surety Bond now stands as collateral for the Brahma Lien, Brahma
15 intends to file a Demand for Preferential Trial Setting under NRS 108.2421, which is a right that cannot be
16 abrogated or stayed. The Nevada Legislature has afforded mechanic’s lien claimants special rights to a just
17 and speedy trial because of the value they add to real property and to the economy in general, as well as the
18 vulnerable position they find themselves in when an owner fails to pay for work, materials and equipment
19 furnished to a construction project, just as TSE has done here. In 2003 and 2005, the Nevada Legislature
20 substantially revised the mechanic’s lien statutes with the intent to facilitate payments to lien claimants in
21 an expeditious manner. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 245 P.3d 1149, 1156 (2010).
22 One of those revisions was to arm lien claimants with the right to petition the Court for a summary trial on
23 their mechanic’s lien claims.

24 Specifically, NRS 108.2421(3) provides:

25 Each lien claimant in the action may serve upon the adverse party a
26 “demand for preferential trial setting” and file the demand with the clerk of
27 the court. Upon filing, the clerk of the court shall, before the Friday after
28 the demand is filed, vacate a case or cases in a department of the court and
set the lien claimant’s case for hearing, on a day or days certain, to be heard
within 60 days after the filing of the “demand for preferential trial setting.”

NRS 108.2421(6) further provides:

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1 A prevailing lien claimant on a claim against a surety bond must be
2 awarded the lienable amount plus the total amount that may be awarded by
3 the court pursuant to NRS 108.237...Such a judgment is immediately
4 enforceable...³⁴

5 By enacting Nevada's mechanic's lien statutes, the Nevada Legislature has created a means to
6 provide contractors with secured payment for their work, materials and equipment furnished to construction
7 projects in Nevada inasmuch as "contractors are generally in a vulnerable position because they extend
8 large blocks of credit; invest significant time, labor and materials into a project; and have any number of
9 works vitally depend upon them for eventual payment." *Wilmington Trust FSB v. AI Concrete Cutting &*
10 *Demolition, LLC (In re Fontainebleau Las Vegas Holdings, LLC)*, 289 P.3d 1199, 1210 (Nev. 2012).

11 Accordingly, Brahma (as a lien and bond claimant) is entitled to a preferential trial setting pursuant
12 to NRS 108.2421 against the Brahma Surety Bond, which right can only be pursued in Nye County.
13 Preferential trial rights in the Nye County Action will be handled expeditiously by Judge Elliot, thereby
14 reducing delay where Brahma has advanced millions of dollars for the Work.³⁵

15 By contrast, because (i) the Brahma Lien, the Brahma Surety Bond and Brahma's claims against
16 AHAC and Cobra are not before this Court, and (ii) Cobra cannot be brought into this Action because it is
17 of the same domicile as Brahma, there would be no preferential trial mechanism in this Action, nor does
18 this Court have jurisdiction over this claim.

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

23 Therefore, because all claims arise out of the same transaction and occurrence, a single judge should
24 try all claims, and the only way to have a single judge hear all disputes between the above parties will be
25 to have the Nye County Court preside over all matters.

26 ///

27 ³⁴ See also, *Venetian Casino Resort, LLC v. Eighth Judicial District Court*, 118 Nev. 124, 128, 41 P.3d 327, 329
28 (2002)(recognizing lien claimants pursuing claims against surety bonds are entitled to request a preferential lien hearing
pursuant to NRS 108.2421).

³⁵ A significant portion of Brahma's lienable amount is attributable to the work, materials or equipment furnished by
Brahma's subcontractors and suppliers, several of which TSE directed Brahma to contract with for TSE's convenience.
For example, TSE directed Brahma to contract with CTEH and CTEH is now seeking a claim against Brahma of more
than \$1 Million. TSE's failure to pay Brahma is also affecting Brahma's Dunn & Bradstreet score.

1 3. *Brahma's Contract Claims Against TSE are Properly Brought in the Nye*
 2 *County Action.*

3 While it is true that Brahma initially filed its contract claims against TSE in Clark County based on
 4 its mistaken belief that the forum selection clause required it to do so, after further review of the matter,
 5 Brahma has determined that the forum selection clause is inapplicable to this Case because (i) NRS 13.010
 6 requires any action between TSE and Brahma to be filed in Nye County since the Agreement was performed
 7 entirely in Nye County, (ii) the forum selection clause is permissive only and not mandatory, (iii) NRS
 8 108.2421(1) expressly authorizes and requires Brahma to file its Claims against TSE, the Debtor, in Nye
 9 County, and (iv) the forum selection clause violates Brahma's rights under Nevada's Mechanic's Lien
 10 Statute and is against public policy, void and unenforceable pursuant to NRS 108.2453.³⁶

11 a. *Because the Agreement was performed entirely in Nye County, NRS*
 12 *13.010 requires Brahma's contract claims to be commenced in Nye*
 County.

13 Because the Agreement between TSE and Braham was entirely performed in Nye County, NRS
 14 13.010 requires the Action to be commenced in Nye County. When a person has contracted to perform in
 15 one place, but the contracting party resides in another location, NRS 13.010(1) requires that the action be
 16 commenced and tried in the county in which the obligation is to be performed or where the person resides,
 17 unless there is a special contract to the contrary. The special contract to the contrary referenced in NRS
 18 13.010(1) refers to a contract regarding place of performance, not an agreement regarding venue. *Borden*
 19 *v. Silver State Equip., Inc.*, 100 Nev. 87, 89, 675 P.2d 995, 996 (1984). Therefore, NRS 13.010 trumps any
 20 contrary language in the forum selection clause.

21 b. *The Forum Selection Clause in the Agreement is permissive, not*
 mandatory.

22 Moreover, even if NRS 13.010 does not trump the forum selection clause in the Agreement, the
 23 forum selection clause is permissive, not mandatory, and did not require Brahma to file its contract claims
 24 in Clark County. Notably, Section 24 of the Agreement reads, "[Brahma] submits to the jurisdiction of the
 25 courts in such state, with a venue in Las Vegas, Nevada, for any action or proceeding directly or indirectly
 26

27 ³⁶ It should be noted that when Brahma filed the First Complaint in Nye County, TSE demanded that the same be
 28 dismissed for a variety reasons. Once Peel Brimley was engaged to represent Brahma, and to avoid another fight about
 the proper jurisdiction of the contract claims, Mr. Peel reached out to counsel for TSE to stipulate to an acceptable
 forum to hear all claims. TSE rejected Mr. Peel's efforts. See Declaration of Richard L. Peel, Esq. attached hereto.

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1 arising out of this Agreement.”³⁷

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

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

12 Based on the reasoning of the *Am. First Federal Credit Union* Court, the forum selection clause
13 contained in Section 24 of the parties’ Agreement is “permissive” and “does not require” the parties to
14 resolve their contract claims in Las Vegas, Nevada. Rather, Section 24 allows Brahma to bring such claims
15 in this Action along with Brahma’s claims against the Brahma Surety Bond, which it has done by way of
16 its Counter-Complaint.

17 *c. NRS 108.2421 expressly authorizes Brahma to file its Claims against*
18 *TSE, the Debtor, in Nye County.*

19 Now that the Brahma Lien has been replaced by the Brahma Surety Bond, pursuant to NRS
20 108.2421, Brahma is expressly authorized to pursue its contract claims against TSE in Nye County.
21 Specifically, NRS 108.2421 states in relevant part:

22 The lien claimant is entitled to bring an action against **the principal and**
23 **surety** on the surety bond and the lien claimant’s debtor in any court of
24 competent jurisdiction that is located within the county where the property
25 upon which the work of improvement is located.

26 Here, Cobra is the principal on the Brahma Surety Bond, and AHAC is the surety who issued the
27 Brahma Surety Bond. However, TSE is the lien claimant’s debtor, not Cobra or AHAC. Therefore, to ensure
28 that all disputes involving these parties and relating to the same transaction and occurrence are litigated in
the same forum, the statute expressly authorizes Brahma to file its contract claims against TSE (its debtor)
in Nye County, irrespective of the language contained in the parties’ Agreement or otherwise.

Venue statutes such as NRS 108.2421 “serve important public interests, including avoiding costs to
taxpayers of defending actions in other communities, maintaining actions where relevant official records

³⁷ See Exhibit “1”

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1 are kept, and reducing forum shopping.” Nevada Civil Practice Manual, § 3.01. Venue statutes should
 2 be applied strictly.³⁸ NRS 108.2421 also conserves judicial resources and avoids conflicting judgments by
 3 allowing Brahma to pursue all claims against all defendants before a single judge in Nye County, the County
 4 where TSE chose to (i) construct its Work of Improvement, (ii) seek relief by filing the Second Motion to
 5 Expunge; and (iii) demand that Cobra record the Brahma Surety Bond.

6 **4. NRS 108.2453, renders the forum selection clause void and unenforceable.**

7 To the extent this Court finds that the forum selection clause is mandatory and requires Brahma to
 8 file its claims against TSE in Clark County, that contract provision is against public policy, void and
 9 unenforceable under NRS 108.2453(1), which states in relevant part that a person may not waive or modify
 10 a right, obligation or liability set forth in the provisions of Nevada’s Mechanic’s Lien Statute.³⁹

11 Here, under NRS 108.2421, Brahma, as the lien claimant, is statutorily entitled to pursue its
 12 contract claims against TSE, its debtor, in Nye County along with its claims against the Brahma Surety
 13 Bond, Cobra and AHAC. Hence, the forum selection clause (a provision in the Agreement which attempts
 14 to require Brahma to file its contract claims against TSE in Clark County) violates NRS 108.2453,
 15 rendering it against public policy, void and unenforceable. Because TSE’s interpretation of the forum
 16 selection clause requires Brahma to litigate its claims in two separate forums contrary to the express
 17 statutory language entitling Brahma to file all claims in Nye County, that provision is void and
 18 unenforceable, and TSE cannot rely on it as a basis for its position that the contract claims should be
 19 litigated in Clark County (now the Federal Action), nor should this Court.

20 **5. By filing its contract claims in Clark County, Brahma did not waive its right**
 21 **to file its claims against TSE in the Nye County Action.**

22 Further, because the forum selection clause found in the Agreement is against public policy, void

23 ³⁸ See also, *Lyon County v. Washoe Medical Ctr.*, 104 Nev. 765, 768, 766 P.2d 902, 904 (1988) (Statutes that contain
 24 exclusive venue and jurisdiction provisions also accomplish the objective of conserving court resources and avoiding
 25 judicial collision and conflicts involving the same parties and controversies). See *Pub. Serv. Comm’n v. S.W. Gas Corp.*,
 103 Nev. 307, 308, 738 P.2d 890, 891 (1987).

26 ³⁹ NRS 108.2453(1) states:

27 A condition, stipulation or provision in a contract or other agreement for the improvement of
 28 property or for the construction, alteration or repair of a work of improvement in this State
 that attempts to do any of the following is contrary to public policy and is void and
 unenforceable: (a) Require a lien claimant to waive rights provided by law to lien
 claimants or to limit the rights provided to lien claimants, other than as expressly provided
 in NRS 108.221 to 108.246, inclusive.

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1 and unenforceable under NRS 108.2453, Brahma did not waive its right to file claims against TSE in Nye
2 County when it (i) signed the Agreement, or (ii) filed the Clark County Action.

3 In a case involving the application of NRS 108.2453, the Nevada Supreme Court held that a
4 subordination agreement which required lien claimants to waive prospective mechanic's lien rights, (i)
5 violated NRS 108.2453, (ii) was against public policy, and (iii) was void and unenforceable. *In re*
6 *Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 289 P.3d 1199 (2012).⁴⁰

7 Therefore, while TSE may argue that by filing the Clark County Action, Brahma waived its (i) right
8 to file its contract claims in the Nye County Action, or (ii) claim that the forum selection clause violates
9 NRS 108.2453, the Nevada Supreme Court would find that Brahma cannot waive rights under the
10 mechanic's lien statute, including, the right to pursue its contract claims against its debtor, TSE, in Nye
11 County as provided for under NRS 108.2421. Hence, this Action which is entirely premised on the Clark
12 County Action based on diversity jurisdiction, should not proceed in federal court.

13 **C. In the event this Court Refuses to Stay this Case Under the *Colorado River Doctrine*,
14 the Court Should Deny TSE's Motion for Injunction.**

15 Should the Court decide not to grant Brahma's Motion for Stay, the Court should nevertheless deny
16 TSE's Motion for Injunction since (i) the Anti-Injunction Act prohibits federal courts from enjoining state
17 courts unless certain limited exceptions apply; and (ii) none of the exceptions to the general rule apply in
18 this Case.

19 **1. *The Anti-Injunction Act prohibits federal courts from enjoining state court
20 proceedings such as the Nye County Action.***

21 Under the Anti-Injunction Act ("AIA"), Congress prohibits federal courts from enjoining state
22 court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its
23 jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. Exceptions to the Anti-Injunction
24 Act "must be construed narrowly and doubts as to the propriety of a federal injunction against a state court
25 proceeding should be resolved in favor of permitting the state action to proceed." *Lou v. Belzberg*, 834 F.2d

26 ⁴⁰ In *Fontainebleau*, certain bank lenders who provided construction financing to the owners of a multi-billion-dollar
27 construction project on the Las Vegas Strip, required as a condition precedent to providing financing, that the owner's
28 contractor and all of its subcontractors sign subordination agreements which would allow the lenders' deeds of trust to
have priority over any lien claims recorded on the project. *Id.* Hence, even though the lien claimants executed the
subordination agreement and acknowledged that their lien rights were subordinate to certain lenders, the Nevada
Supreme Court found such a provision to be against public policy, void and unenforceable since NRS 108.222 gave
priority to lien claimants over all later-in-time recorded encumbrances, including deeds of trust. *Id.*

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730 (9th Cir. 1987)(citing *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977)). “Unless one of the statutory exceptions applies, a federal injunction restraining prosecution of a lawsuit in state court is absolutely prohibited.” *Lou*, 834 F.2d at 740 (citing *Mitchum v. Foster*, 407 U.S. 225, 228-29, 92 S.Ct. 2151, 2154-56, 32 L.Ed.2 705 (1972)). The limitations expressed in the AIA “rest on the fundamental constitutional independence of the states and their courts”⁴¹ and “reflect Congress’ considered judgment as to how to balance the tensions inherent in such a system.” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988).

The federal removal statute operates as “express” congressional authorization to enjoin state court proceedings, but does so limitedly. *Mitchum v. Foster*, 407 U.S. 225 (1972). A federal court injunction against a state court will only be upheld on “a strong and unequivocal showing” that such relief is necessary. *Sandpiper Village Condo Assoc., Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 842 (9th Cir. 2005)(citing *Bechtel Petroleum, Inc. v. Webster*, 796 F.2d 252, 253-54 (9th Cir. 1986)).

2. *The exceptions to the Anti-Injunction Act, do not apply to this Case.*

The only statutory exception to the AIA on which TSE relies is § 1446(d), an express authorization from Congress. Federal injunctions may issue against state cases that are, (1) “later filed,” *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997) (quoting *KPERS*, 77 F.3d at 1069), (2) “refiling of essentially the same suit in state court,” *Lou v. Belzberg*, 834 F.2d 730, 740 (9th Cir. 1987) (quoting *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975)), and (3) filed for the purpose of subverting federal removal jurisdiction. *Quackenbush*, 121 F.3d at 1378.

While a federal court may enjoin the continued prosecution of the same case in state court after its removal, “a more difficult problem is presented when a new action is filed in state court” when that case has not been removed. *Lou*, 834 F.2d at 740. In *Lou*, the Ninth Circuit Court of Appeals agreed with the Fifth Circuit Court of Appeals in holding, “where a second state court suit is fraudulently filed in an attempt to subvert the removal of a prior case, a federal court may enter an injunction.” *Id.*; see also, *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975)(holding, “where no fraud is found, the second action brought in state court should not be enjoined”).

///

⁴¹ *Id.* at 287, 234

1 **a. *The Nye County Action was not “later filed” than the Clark County***
2 ***Action.***

3 The Nye County Action is not a “later filed” action. Following federal removal, Brahma ceased
4 prosecuting its removed Clark County Action in the Eighth Judicial District Court. Instead, Brahma filed its
5 contract claims against TSE in the Nye County Action—an action TSE commenced on June 11, 2018, before
6 the Clark County Action was filed, and which has not been removed to federal court. TSE’s proposed
7 injunction seeks to enjoin the Nye County Action, not the Clark County Action. In the Nye County Action,
8 TSE brought its Second Motion to Expunge under NRS 108.2275, serving Brahma by personal service, and
9 naming it as a “defendant” in that Action, all in a failed attempt to summarily extinguish Brahma’s property
10 interest (i.e. its Lien) in the Work of Improvement.

11 **b. *The Nye County Action is similar and parallel to the Federal Action***
12 ***but is broader than the Federal Action as it features additional***
13 ***parties and additional claims.***

14 A predicate to a federal injunction of a state court is that the second case is “refilling of essentially
15 the same suit in state court.” *Lou*, 834 F.2d at 730. In that case, the Ninth Circuit Court of Appeals reversed
16 the federal district court’s grant of an injunction against a state court proceeding, concluded that an
17 injunction was not properly issued to avoid subverting removal jurisdiction (i.e. the third requirement) where
18 the state case, though parallel, featured “different plaintiffs, additional counsel, additional defendants, and
19 only state claims.” *Id.* at 741.

20 Brahma acknowledges the federal claims duplicate some of the claims in the state court proceedings;
21 that is why this Court should grant its Motion for Stay of the federal proceedings that parallel the state court
22 proceedings. It, however, remains that the Nye County Action, held in a court with versatile general subject-
23 matter jurisdiction, is more comprehensive than the federal action, a court of limited federal subject-matter
24 jurisdiction. The Nye County Action involves non-diverse general contractor Cobra and AHAC, additional
25 parties not in the federal action and their counsel. Notably, Cobra is the principal on the Brahma Surety
26 Bond which now serves as the collateral for Brahma’s Lien. Under its contract with Cobra, TSE demanded
27 that Cobra procure the Brahma Surety Bond in order to remove Brahma’s Lien from the Work of
28 Improvement. The Nye County Action also involves H&E’s (i) contract claims against Brahma (which are
29 derivative of Brahma’s claims against TSE); and (ii) claims against Cobra, the Surety and the H&E Surety

1 Bond.

2 Hence, while certainly similar to the Federal Action, the Nye County Action is now broader and
3 includes additional claims, plaintiffs and defendants, all of which can and should be resolved by Judge Elliot,
4 the very Judge who has already (i) presided over litigation involving the Project; and (ii) ruled on a
5 dispositive issue between TSE and Brahma.

6 *c. The Nye County Action was filed with a proper motive, not the purpose*
7 *of subverting federal jurisdiction*

8 The primary purpose of amending its Counter-Complaint in the Nye County Action was not to
9 fraudulently defeat this Court's jurisdiction, but rather, to preserve Brahma's right to pursue its contract
10 claims against TSE in conjunction with its claim against the Brahma Surety Bond which claims must be
11 decided along with Brahma's claims against the Brahma Surety Bond.

12 The potential that another case—here, an earlier filed one—may have issue or claim preclusive
13 effect on a removed case does not make a state court proceeding subversive of federal jurisdiction. In
14 *Quackenbush*, 121 F.3d 1372 (9th Cir. 1997), the Ninth Circuit upheld a federal court's decision *not* to
15 enjoin such a state court proceeding. *Id.* at 1378. The possible preclusive effect of a later filed state court
16 proceeding on a removed federal case did not constitute "subversion" of the removal right. *Id.* at 1379.

17 The Nye County Action was not amended to obtain a favorable decision on an issue this Court has
18 already decided, nor was there any deception in the manner in which Brahma Amended its Counter-
19 Complaint as it did so within the timeframe required under FRCP 15(a). In other words, Brahma did not
20 file its contract claims against TSE in the Nye County Action to fraudulently subvert federal jurisdiction.

21 First, the Federal Action was removed from Clark County, not Nye County. As TSE acknowledges,
22 the Nye County Action has not been removed to Federal Court.⁴² Second, this Action was commenced by
23 TSE before the Federal Action was filed, so Brahma filed into an existing Case, not a new state case.
24 Accordingly, TSE's "first in time" argument fails because this Action was the first action commenced, not
25 the Clark County Action or Federal Action. Third, because Brahma's claims against Cobra, AHAC and the
26 Brahma Surety Bond must necessarily remain before Judge Elliot in the Nye County Action, Brahma's
27 contract claims must be litigated before Judge Elliot as well to ensure that its right to file a demand for
28 preferential trial setting is not hindered. Fourth, H&E has now filed (or will file) litigation in Nye County

⁴² See Exhibit 25, Nye County Motion for Stay at pg. 19:

1 against Brahma asserting contract claims which are derivative of Brahma's contract claims against TSE.
 2 Fifth, by filing its contract claims in this Action, Brahma does not escape the jurisdiction of the Federal
 3 Court and remains a party in this Action. Finally, Brahma has not engaged in forum shopping because it
 4 does not seek to avoid a negative judgment from the Federal Court as the Federal Court has made absolutely
 5 no rulings in that case.

6 Therefore, because Brahma has not engaged in fraud or attempted to subvert the Federal Court's
 7 jurisdiction, the Federal Court cannot enjoin the Nye County Action from proceeding.

8 *d. The Cases TSE relies upon for the Injunction to issue are*
 9 *unavailing.*

10 TSE primarily relies upon four cases for the proposition that the Court should issue the injunction.
 11 However, none of those cases are from the Ninth Circuit Court of Appeals, and each is easily distinguishable
 12 and has no persuasive value to this Court.

13 • *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063 (1996)

14 First, TSE cites *KPERS*, a decision from the Eighth Circuit Court of Appeals where the Court found
 15 a later-filed case in state court was filed with an improper motive of subverting the federal court's
 16 jurisdiction. *Id.* In that case the plaintiff filed an action in state court against several defendants, including
 17 a failed savings and loan company. *Id.* A receiver for the savings a loan company was brought into the
 18 action, and based on a unique statute, removed the case to federal court. *Id.* Plaintiff appealed a ruling from
 19 the district court barring its claims under the applicable statute of limitations. On appeal, the Eighth Circuit
 20 Court affirmed and held an even shorter statute of limitations was applicable. *Id.* One month following that
 21 decision, plaintiff filed two new cases in the state court asserting largely the same claims against the same
 22 defendants. *Id.* Notably, Plaintiff's attorney made comments to the press that the new actions were filed to
 23 correct what he called "the multitude of problems and issues that are causing delays in federal court, coupled
 24 with...an erroneous decision by the Eighth Circuit in interpreting the Kansas statute of limitations." *Id.*
 25 Those two cases were removed to federal court and the defendants moved to enjoin plaintiffs from
 26 proceeding with any further litigation in any state court. *Id.* In upholding the federal district court's decision
 27 to grant the injunction, the Eighth Circuit Court of Appeals held, "the record fully supports these findings
 28 as [plaintiff] made clear not only in a brief filed with the district court, but also in a statement to the press,

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1 that the purpose of filing the second action was to obtain a favorable decision in the Kansas courts on the
 2 statute of limitations issue decided by this court..." *Id.* at 1070.

3 By contrast to the plaintiffs in the *KPERS* case, there has been no adverse federal court ruling from
 4 which Brahma is fleeing.⁴³ In fact, this Court has made no rulings in this Case. Moreover, Brahma has done
 5 nothing to suggest its removal of state law claims was done for a fraudulent purpose. Instead, Brahma has
 6 legitimate concerns about the preclusive effects of pre-existing state court litigation in a *non-removed* case.
 7 Protecting Brahma's rights under the mechanic's lien statute against preclusive impairment constitutes
 8 proper advocacy, not subversion of federal jurisdiction. *Quackenbush*, 121 F.3d at 1379. Certainly, Brahma
 9 actions of amending its Complaint does not rise to the level of bad faith or fraudulent conduct engaged in
 10 by the *KPERS* Plaintiff.

- 11 • *Faye v. High's of Baltimore*, 541 F.Supp.2d 752, 754 (2008).

12 TSE also relies on the *Faye* case from the federal district court of Maryland, where that court issued
 13 an injunction against a plaintiff who had filed a state court complaint against his former employer asserting
 14 certain state law claims and violations of the Fair Labor Standards Act ("FLSA") which the defendant later
 15 removed to federal court based on federal subject matter jurisdiction. *Id.* While before the federal court, the
 16 plaintiff moved to amend his complaint which the Court granted, resulting in Plaintiff eliminating the state
 17 court claims from the federal complaint. *Id.* at 755. However, while the motion to amend was still pending,
 18 the plaintiff filed a second lawsuit against the employer in the same state court where the first complaint had
 19 been filed and removed, asserting identical claims as the first complaint, with the exception of the federal
 20 claims. *Id.* At no point did the plaintiff notify the Court that the purpose of its motion to amend was to
 21 remove state court claims from the federal action and pursue those claims in a new action filed within the
 22 same court from which they were previously removed. *Id.* Once served with the second lawsuit, the
 23 defendant removed that case to federal court as well. *Id.* The court found that the plaintiff acted in a manner
 24 designed to defeat federal jurisdiction over his state claims as he admitted during oral argument that

25
 26 ⁴³ Typically, the type of forum shopping that is abusive is where parties seek to vindicate their rights elsewhere only
 27 after another court's adverse rulings and the passage of substantial time. Cf, e.g., *Montanore Minerals Corp. v. Bakie*,
 28 867 F.3d 1160, 1169 (9th Cir. 2017) (finding forum shopping when federal court's jurisdiction is being invoked 6 years
 into litigation after an unfavorable state court decision); *Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989) (finding
 forum shopping where federal forum sought 3.5 years into case); *American Intern. Underwriters v. Continental Ins.*,
 843 F.2d 1253, 1259 (9th Cir. 1988) (finding forum shopping where 2.5 years in, party leaves state court for federal
 court because it is believed to be more favorable).

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Maryland courts provide more favorable rulings than the federal court on FLSA claims. *Id.* After analyzing the relevant case law from various circuit courts, the federal court held, there was no good reason for filing the second case, leaving the Court with “no doubt that the second-filed suit constituted an attempt to subvert this Court’s supplemental jurisdiction and defendant’s right to removal.” *Id.* at 760. The decision before that court was an easy one—after all, Plaintiff admitted to the court the sole reason for the amendment was the more favorable treatment of FLSA cases in state court. There was no other basis for the amendment.

Again, Brahma has not brought its state court claims to subvert this Court’s jurisdiction or to seek a more favorable ruling from Judge Elliot; rather, Brahma did what it did to preserve its right to demand a preferential trial in the Nye County Action under NRS 108.2451 (a right which cannot be waived, abrogated or stayed) and which can only be prosecuted in that Case.

- *Davis International, LLC v. New Start Group Corp.*, 2009 WL 1321900 (D. Del. May 13, 2009)

TSE next relies on the *Davis* case from the federal district of Delaware where plaintiffs filed their complaint in Delaware state court alleging federal RICO violations and state law conversion claims. The defendants subsequently removed the case to federal court based on federal question jurisdiction. *Id.* Defendants brought a motion to dismiss and motion for injunction. *Id.* While those matters were pending, plaintiffs amended their complaint and omitted the state law conversion claims while refiling those claims in a Delaware state court, along with additional state law claims. *Id.* The Court granted defendants’ motion for injunction based on its belief that “absent an injunction, the plaintiffs will continue to file this action and take up the time and resources of another court.” *Id.* at *3.

Two key features distinguish this Case from *Davis*. First, unlike *Davis*, TSE initiated the Nye County Action into which Brahma filed its breach of contract claims, which are the underlying contractual claims forming the basis of Brahma’s claims against the Brahma Surety Bond. Second, Brahma had proper motives for filing its Amended-Complaint including: (1) avoiding any potential preclusive effects of the Nye County Action; (2) resolving related claims with non-diverse parties (i.e. Cobra and H&E); and (3) securing efficient resolution of a dispute with a judge already familiar with the dispute.

- *Cross v. City of Liscomb*, 2004 WL 840274 (S.D. Iowa 2004)

Finally, TSE relies on *Cross*, an unreported federal case from the Southern District of Iowa, where the plaintiff again commenced an action against her former employer in state court, alleging violations of

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1 state law and certain federal discrimination claims under 42 USC § 1983. *Id.* The employer removed the
 2 case to federal court based on federal subject matter jurisdiction. *Id.* at *1. Plaintiff filed a motion to dismiss
 3 some of her claims⁴⁴, which the court granted without opposition. *Id.* Plaintiff then filed a second action in
 4 state court asserting the same state constitutional and defamation claims originally removed to the federal
 5 court. *Id.* Defendants sought an injunction of the second state court action, alleging that such action
 6 constituted a subversion of the federal court's removal jurisdiction. *Id.* at *2. In response, Plaintiff claimed
 7 that the state court action should not be enjoined absent evidence of fraud. *Id.* In granting the motion for
 8 injunction, the federal court held, "the absence of fraud...is not relevant to the inquiry...as the KPERS court
 9 noted, fraud is relevant in cases based on diversity jurisdiction, not when, as here, based on federal question
 10 jurisdiction." *Id.* Hence, because this was a federal question case and not based on diversity, the court did
 11 not analyze the fraud factor required under the case law in the Ninth Circuit. Therefore, this case is not only
 12 inapplicable because it is outside the Ninth Circuit, but it is also inapplicable because that court did not
 13 undertake the relevant fraud analysis.

14 *e. Federal Courts have refused to enjoin state courts on facts much more*
 15 *compelling than presently before this Court.*

16 Numerous federal courts⁴⁵, including the Ninth Circuit Court of Appeals, have explicitly
 17 disapproved of certain tactics engaged in by litigants while still finding injunctive relief improper.

18 For instance, in *Quackenbush*, a defendant was pursuing the enforcement of an arbitration clause in
 19 federal court and the plaintiff was pursuing a state court action to litigate issues between the same parties on
 20 the same facts that would likely severely impact the defendant's defenses in the federal action. *Quackenbush*,
 21 121 F.3d at 1379. The district court refused to enjoin the state court action despite finding plaintiff's tactics
 22 "questionable." *Id.* at 1378. On appeal, the Ninth Circuit affirmed the district court's ruling because "there
 23 [was] no evidence that [the plaintiff] deliberately sought to undermine the federal proceedings," or "evidence

24 ⁴⁴ The motion to dismiss appears to be akin to a motion to amend.

25 ⁴⁵ Perhaps most egregious, in *Trinity*, a plaintiff took vexatious litigation to new heights by filing six lawsuits against
 26 the same defendants on intertwined claims arising from the same facts in California state courts and federal courts in
 27 California and New York. *Trinity Christian Ctr. of Santa Ana, Inc. v. Koper*, No. SACV 12-1049 DOC, 2012 WL
 28 6552229, at *1 (C.D. Cal. Dec. 14, 2012). The court went so far as to describe some of the plaintiff's tactics as "a
 particularly bold fit of litigious incoherence," and that the plaintiff's "duplicative litigation style may be harassing."
Id. at *2, *5. The court, however, found that injunctive relief was not proper despite these tactics because no conflicting
 state and federal court orders existed and the plaintiff had not acted fraudulently in filing their duplicative claims. *Id.*
 at *5.

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1 of a deliberate attempt to subvert the rulings and jurisdiction of the district court.” *Id.* at 1378–79.

2 In *Lou v. Belzberg*, another Ninth Circuit Court of Appeals case, the plaintiff filed her action in state
 3 court alleging violations of state law fiduciary obligations and certain federal RICO and Securities Act
 4 violations. 834 F.2d 730 (9th Cir. 1987). The defendants removed the action to federal court based on federal
 5 subject matter jurisdiction. *Id.* Shortly thereafter, the law firm representing plaintiff filed another state court
 6 action on behalf of another client against defendants asserting the exact same state causes of action as those
 7 removed to federal court in the initial complaint, but omitting the federal subject matter causes of action. *Id.*
 8 The defendants removed that case to federal court and moved the federal court for an injunction enjoining
 9 plaintiff from proceeding with the second state court cause of action. *Id.* On appeal, the Ninth Circuit Court
 10 of Appeals found that it was error to issue the injunction because there was no evidence of fraud. *Id.* The
 11 Court found that because the second state court case involves different plaintiffs, additional counsel and
 12 additional defendants, and only state law claims, “a finding of fraud would be clearly erroneous.” *Id.*

13 Similarly, in the *Frith* case, the Fifth Circuit Court of Appeals vacated a federal court’s injunction
 14 against a state court proceeding because at the time the federal judge entered his injunction, another judge
 15 had already found, on the basis of his familiarity with both pending suits, that the joinder of the resident
 16 defendant in the state court suit was not fraudulent. *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5th
 17 Cir. 1975).

18 Similar to those cases, here, there is no evidence that Brahma amended its Complaint for a fraudulent
 19 purpose or to avoid federal court jurisdiction. Brahma’s sole motive in amending its Complaint was to
 20 preserve its statutory and sacrosanct right to pursue its claims against the Surety Bond in the Nye County
 21 Action which serves as the only collateral for its Lien.

22 **3. *Even if the Anti-Injunction Act is applicable, the Court should exercise its***
 23 ***discretion and deny the Motion for Injunction.***

24 Even if the Anti-Injunction Act does not prohibit this Court from enjoining the Nye County Action,
 25 the Court should exercise its discretion and decline to enjoin that Action since doing so would effectively
 26 strip away Brahma’s right to a preferential trial setting against Cobra, the Surety and the Brahma Surety
 27 Bond. “The fact that an injunction may issue under the Act does not mean that it must issue.” *Quackenbush*,
 28 121 F.3d at 1378(citing *Blalock Eddy Ranch v. MCI Telecomm. Corp.* 982 F.2d 371, 375 (9th Cir. 1992)).

1 “Whether to enjoin state-court proceedings is always discretionary.” *Ackerman v. ExxonMobil Corp.*, 734
2 F.3d 237, 252 (4th Cir. 2013)(citing *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151, 108 S.Ct. 1684,
3 100 L.Ed.2d 127 (1988)).

4 While TSE characterizes its Motion for Injunction as enjoining only the three claims removed from
5 the Federal Action, effectively, the proposed injunction would prevent the Nye County Action from taking
6 any further action on the Brahma Surety Bond and other matters in that case. This would completely
7 undermine the Nevada Legislature’s goal of ensuring that contractors such as Brahma are paid expeditiously
8 for the labor materials and equipment they furnish to projects in Nevada.

9 Cobra and the Surety are necessary parties to this dispute, but so long as this Case remains in Federal
10 Court, Brahma cannot assert its claims against them since this Court would have no jurisdiction over Cobra
11 or the Brahma Surety Bond.

12 **D. The Court should dismiss as moot TSE’s Motion to Strike.**

13 This Court can dismiss as moot TSE’s Motion to Strike Brahma’s Amended Complaint inasmuch as
14 Brahma has already moved this Court as an alternative argument under its *Colorado River* Motion, to amend
15 its Complaint to restore its previously removed claims in the event the Court does not grant its Motion for
16 Stay.

17 **IV. CONCLUSION**

18 Based on the foregoing, this Court should deny TSE’s Motion for Injunction and Motion to Strike.

19 Dated this 5 day of November, 2018.

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CERTIFICATE OF SERVICE

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

BRAHMA GROUP, INC.'S RESPONSE TO TONOPAH SOLAR ENERGY, LLC'S MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO STRIKE
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 10

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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

REPLY IN SUPPORT OF TONOPAH
SOLAR ENERGY, LLC'S MOTION FOR
AN INJUNCTION AND TO STRIKE

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



1 On October 18, 2018, Tonopah Solar Energy, LLC ("TSE") moved for an injunction and
2 to strike ("Motion for Injunction"). See ECF No. 16. On November 5, 2018, Brahma Group,
3 Inc. ("Brahma") opposed the Motion for Injunction ("Opposition"). See ECF No. 20. TSE, by
4 and through its undersigned counsel, files this reply in support of its Motion for Injunction.

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 I. INTRODUCTION

7 In the Motion for Injunction, TSE seeks an order (1) prohibiting Brahma from subverting
8 this Court's federal removal jurisdiction over certain claims by enjoining Brahma from
9 prosecuting those identical claims in a state court action and (2) striking Brahma's amendment to
10 its complaint in this action as the amendment operates to deprive this Court of jurisdiction over
11 the same claims.

12 In the Opposition, Brahma offers a plethora of arguments in order to avoid this Court's
13 jurisdiction. Brahma first attempts to impute an improper motive to TSE's actions. But,
14 Brahma, not TSE, is the one that made multiple filings in this Court and the Nye County Special
15 Proceeding in an effort to move its claims from this action to the Nye County Special Proceeding
16 without filing a motion for remand (which would not succeed). Brahma initiated this effort after
17 receiving a favorable ruling in the Nye County Special Proceeding and in furtherance of its
18 procedural preferences. TSE, on the other hand, has simply filed a proper removal and attempted
19 to enforce this Court's removal jurisdiction. Brahma also argues that TSE's Motion for
20 Injunction should be denied on its merits and requests a discretionary denial regardless of the
21 merits.

22 But, as explained below, all of Brahma's arguments lack merit. Brahma has engaged in
23 the exact claim-splitting scheme that other courts have found warrant the injunction requested by
24 TSE's Motion for Injunction. Brahma cannot be permitted to undermine the jurisdictional
25 concepts of removal and remand by subverting this Court's federal removal jurisdiction over
26 properly removed claims through the filing of amended pleadings. TSE's Motion for Injunction
27 should be granted.

28



II. LEGAL ARGUMENT

In its Motion for Injunction, TSE explained that federal courts enjoin plaintiffs from prosecuting claims in later filed state court actions under the first exception to the Anti-Injunction Act—expressly authorized by an Act of Congress—when the plaintiff has filed claims in a state court action in an effort to subvert the court’s federal removal jurisdiction. ECF No. 16, pp. 8-12. TSE demonstrated that the claim splitting scheme employed by Brahma warrants the entry of such an injunction—one that enjoins 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. *Id.* at pp. 12-13. TSE further demonstrated that because Brahma’s first amended complaint in this action was part of its effort to subvert this Court’s federal removal jurisdiction it should be struck. *Id.* at pp. 13-14.

Brahma’s sprawling Opposition can be distilled down to three arguments. First, Brahma contends that this Court should grant its Motion for Stay under the *Colorado River* abstention doctrine (ECF No. 13) prior to resolving TSE’s Motion for Injunction and then deny TSE’s Motion for Injunction as moot. Second, Brahma contends that this Court should deny TSE’s Motion for Injunction on the merits. Third and finally, Brahma contends that even if TSE’s Motion for Injunction should be granted, this Court should exercise its discretion to still deny the motion. As explained below, these arguments fail. This Court should resolve TSE’s Motion for Injunction prior to Brahma’s Motion for Stay and grant TSE’s Motion for Injunction.

A. TSE’s Motion for Injunction should be resolved prior to Brahma’s Motion for Stay.

Brahma contends that this Court should grant its Motion for Stay prior to addressing TSE’s Motion for Injunction. *See* ECF No. 20, pp. 8-9. In its Motion for Stay, Brahma requests a stay of this action under the *Colorado River* abstention doctrine, which would force the parties to litigate Brahma’s claims and TSE’s counterclaims in Brahma’s preferred forum—Nye County. *See* ECF No. 13. But, this Court should deny Brahma’s Motion for Stay, and should do so after resolving TSE’s Motion for Injunction.



1 Brahma's Motion for Stay should be denied. TSE provided numerous reasons in its
2 opposition to the motion for why a stay under the *Colorado River* abstention doctrine would be
3 inappropriate. *See* ECF No. 18.

4 In addition, TSE's Motion for Injunction should be resolved prior to Brahma's Motion
5 for Stay. In its opposition to Brahma's Motion for Stay, TSE explained in detail why its Motion
6 for Injunction should be resolved prior to Brahma's Motion for Stay. *See* ECF No. 18, pp. 6-9
7 (incorporated herein by reference). In short, like the plaintiff in *Riley v. Carson Scott & Co.*,
8 Brahma has created a "procedural mess" by making multiple improper filings. 946 F. Supp. 716,
9 718 (E.D. Wis. 1996). TSE has sought to unwind those filings by filing its Motion for Injunction
10 and a Motion to Dismiss in Nye County. To resolve Brahma's Motion for Stay before TSE's
11 Motion for Injunction, would be to allow Brahma to potentially benefit from the procedural mess
12 it created through those improper filings. Although Brahma's Motion for Stay should be denied
13 regardless of the order of resolution, it would be possible for a plaintiff to "game the system" by
14 making last second improper filings, similar to those done by Brahma, in order to alter the
15 *Colorado River* analysis in its favor. Resolving Brahma's Motion for Stay prior to TSE's
16 Motion for Injunction would encourage such tactics.

17 **B. TSE's Motion for Injunction should be granted.**

18 Brahma argues that this Court should not issue an injunction under the first exception to
19 the Anti-Injunction Act because (1) the Nye County Special Proceeding is not "later filed," (2)
20 the Nye County Special Proceeding is not similar enough to this proceeding, (3) Brahma did not
21 act to subvert federal removal jurisdiction, (4) the cases cited by TSE are distinguishable, and (5)
22 courts have refused to enjoin state court proceedings on facts more compelling than those
23 presented here. ECF No. 20, pp. 16-23.

24 Brahma is wrong on all accounts. As a threshold issue, Brahma misstates the relief
25 actually sought by TSE by focusing on the entire suit instead of the copycat claims. With the
26 focus properly set on the copycat claims, it is clear that Brahma filed the copycat claims in the
27 Nye County Special Proceeding later, the claims are identical to the claims that this Court has
28 federal removal jurisdiction over, and that Brahma intentionally subverted this Court's federal



1 removal jurisdiction. Moreover, Brahma's attempts at distinguishing the cases relied upon by
 2 TSE are not persuasive. And the supposed "more compelling" cases cited by Brahma do not
 3 support its position.

4 **1. Brahma misstates the relief available and the relief sought by TSE.**

5 Each of Brahma's arguments is premised on the idea that TSE moved to enjoin the Nye
 6 County Special Proceeding. But, that is not permitted, nor is it accurate.

7 When a federal court issues an injunction under the first exception to the Anti-Injunction
 8 Act, as requested by TSE's Motion for Injunction, it does not enjoin the later filed state court
 9 action, it enjoins the plaintiff from prosecuting its later filed claims in the state court action. *See*
 10 *Faye v. High's of Baltimore*, 541 F. Supp. 2d 752, 760 (D. Md. 2008); *Cottingham v. Tutor*
 11 *Perini Bldg. Corp.*, No. CV 14-2793, 2016 WL 54916, at *5 (E.D. Pa. Jan. 5, 2016); *Cross v.*
 12 *City of Liscomb*, No. 4:03-CV-30172, 2004 WL 840274, at *4 (S.D. Iowa Mar. 2, 2004). This
 13 difference, while slight, is critical. It changes the focus of the analysis from the state court action
 14 to the later filed claims.

15 Accordingly, TSE requested that this Court enjoin "Brahma from prosecuting its copycat
 16 claims . . . in its first amended counter-complaint in the Nye County Special Proceeding." ECF
 17 No. 16, p. 14:10-13. Brahma's erroneous focus on the Nye County Special Proceeding instead
 18 of the copycat claims pervades its entire analysis, as highlighted below.

19 **2. Brahma filed the copycat claims in the Nye County Special Proceeding after**
 20 **this Court acquired federal removal jurisdiction over them.**

21 Brahma argues that "[t]he Nye County Action is not a 'later filed' action" because the
 22 Nye County Special Proceeding was commenced by TSE prior to Brahma commencing the Clark
 23 County Action. ECF No. 20, p. 17:2. This argument is wrong on multiple levels.

24 Brahma's "later filed" argument improperly focuses on the Nye County Special
 25 Proceeding instead of the copycat claims. *See* ECF No. 20, p. 17. As explained above, the focus
 26
 27
 28



1 must be on when the copycat claims were added to the Nye County Special Proceeding, not
2 when the Nye County Special Proceeding was first instituted.¹

3 With the focus properly placed on the copycat claims, there is no question that Brahma
4 filed the copycat claims in the Nye County Special Proceeding after this Court acquired federal
5 removal jurisdiction over the claims. The Nye County Special Proceeding was opened by TSE's
6 Second Motion to Expunge on June 11, 2018. ECF No. 16-9. Brahma filed the copycat claims
7 in the Clark County Action on July 17, 2018. *See* ECF No. 1-1. TSE timely removed the
8 copycat claims to this Court on September 10, 2018. *See* ECF No. 1. Brahma dropped the
9 copycat claims from this action and filed them into the Nye County Special Proceeding via a first
10 amended counter-complaint on September 25, 2018.² *See* ECF No. 8; ECF No. 16-14. Thus, the
11 copycat claims filed by Brahma in the Nye County Special Proceeding are "later filed."

12 Moreover, Brahma's argument cannot be accurate as it would lead to absurd results. If
13 Brahma's argument was accurate, it would mean that if there is an already ongoing state court
14 action, a plaintiff in a federal court action could move claims from the federal court action to the
15 state court action with impunity without filing a motion for remand. Courts have consistently
16 rejected this absurd notion—removal divests all state courts of jurisdiction over the removed
17 claims.³ Further, it would mean that a party could refile claims in the same case that was
18

19 ¹ In multiple places Brahma emphasizes that this action was removed from the Clark County
20 Action, not the Nye County Special Proceeding. Brahma's motivation for emphasizing this distinction is
21 not clear, as the injunction sought by TSE's Motion for Injunction applies equally to filings made in the
22 removed state court action and other state court actions. *See Lou*, 834 F.2d at 740; *Faye*, 541 F. Supp. 2d
23 at 759 (citing to *Lou* to provide that "other courts to have considered the issue have taken the next logical
24 step and concluded that an injunction is authorized if the plaintiff files a second lawsuit in state court that
25 constitutes an attempt to undermine the removal statutes").

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 answer.
28 *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").

³ *Faye*, 541 F. Supp. 2d at 756 ("Plaintiffs should not amend their complaints simply to defeat
federal jurisdiction."); *Cross*, 2004 WL 840274, *2 (providing that "[u]pon removal this Court acquired
'full and exclusive subject matter jurisdiction over the litigation'" (quoting 14C C. Wright, A. Miller & E.
Cooper, *Federal Practice and Procedure: Civil* § 3738 at 390); *Resolution Trust Corp. v. Bayside
Developers*, 43 F.3d 1230, 1238 (9th Cir. 1994) (providing that "the state court loses jurisdiction upon the
Page 6 of 15





removed, as that case would not be “later filed,” which is obviously wrong. *See Faye*, 541 F. Supp. 2d at 759 (“Thus, if a defendant properly removed a case from state court to federal court, it is beyond dispute that the federal court would be justified in enjoining the state court from proceeding with the case.”). Brahma’s “later filed” argument fails.⁴

3. The later filed copycat claims in the Nye County Special Proceeding are identical to the claims that this Court acquired federal removal jurisdiction over.

Brahma argues that an injunction is not appropriate because the Nye County Special Proceeding is “more comprehensive than the federal action.” ECF No. 20, p. 17:21-22. Again, this argument is wrong on multiple levels.

Brahma again improperly focuses on the Nye County Special Proceeding instead of the copycat claims. The claims that TSE is seeking to enjoin Brahma from prosecuting in the Nye County Special Proceeding are identical to the claims that this Court has federal removal jurisdiction over, *i.e.*, the 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.

Moreover, the case cited to by Brahma—*Lou v. Belzberg*—does not support its position. There, Plaintiff Lou filed a shareholders’ derivative action and class action in state court. *Lou*, 834 F.2d at 732. Plaintiff Lou asserted state law claims and federal claims. *Id.* The defendant removed the case to federal court. *Id.* Plaintiff Mickler then filed a separate action in state court against the same defendants and several new defendants. *Id.* at 733. Plaintiff Mickler asserted additional state law claims and omitted the federal claims. *Id.* The federal district court enjoined the prosecution of the Mickler action. *Id.* The Ninth Circuit reversed the injunction because the

filing of the petition for removal”); *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000) (providing that “removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute”); *In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007) (this divestiture applies to all state courts); *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980) (same); *Riley v. Carson Pirie Scott & Co.*, 946 F. Supp. 716, 718 (E.D. Wis. 1996); *Crummie v. Dayton-Hudson Corp.*, 611 F. Supp. 692, 693 (E.D. Mich. 1985).

⁴ In addition, Brahma’s “later filed” argument contradicts the position it took in a filing it made in the Nye County Special Proceeding, wherein it asserted that the Nye County Special Proceeding “is in its infancy.” ECF No. 18-2, p. 6.

1 district court “made no finding that the second state court action was fraudulent or an attempt to
2 subvert the purposes of the removal statute” and “such a finding would be clearly erroneous.”
3 *Id.* at 741. As a result, *Lou* stands for the proposition that a party cannot subvert federal removal
4 jurisdiction by filing claims in a state court action if a federal court never had federal removal
5 jurisdiction over the claims. Here, there is no question that TSE has sought to enjoin Brahma
6 from prosecuting claims that this Court has already acquired federal removal jurisdiction over.

7 The reasoning of *Lou* also highlights another defect with Brahma’s similarity argument.
8 Similarity is not a stand alone factor to the injunction analysis. The test is whether “a second
9 state court suit is fraudulently filed” or constitutes “an attempt to subvert the removal of a prior
10 case.” *Lou*, 834 F.2d at 741; *see, e.g., Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378
11 (9th Cir. 1997) (providing that the test is “[w]hether a second suit was filed for the purpose of
12 subverting the removal of a prior case”). So, while a dissimilar case could mean that a suit was
13 not filed for the purpose of subverting federal removal jurisdiction, if a case was filed for the
14 purpose of subverting federal removal jurisdiction, then it is necessarily similar enough to
15 warrant an injunction. Contrary to Brahma’s argument, a party cannot subvert federal removal
16 jurisdiction by moving claims from a federal court action to a slightly different state court action.
17 Thus, Brahma’s similarity argument fails.

18 **4. Brahma has acted to subvert this Court’s federal removal jurisdiction over**
19 **the copycat claims.**

20 Brahma contends that it has not attempted to subvert this Court’s federal removal
21 jurisdiction. *See* ECF No. 20, pp. 18-19. Yet, Brahma’s actions and the explanation it provided
22 to justify its actions indicates otherwise.

23 The timing of Brahma’s actions reveals its intent to avoid (i.e., subvert) this Court’s
24 federal removal jurisdiction. Brahma moved its claims from this action to the Nye County
25 Special Proceeding only after receiving a favorable ruling in the Nye County Special Proceeding.
26 TSE filed its Second Motion to Expunge in June 2018. Brahma filed the Clark County Action in
27 July 2018. TSE removed the Clark County Action to this Court on September 10, 2018. Brahma
28 then received a favorable ruling in the Nye County Special Proceeding on September 12, 2018:





denial of the Second Motion to Expunge. At that point, Brahma began working to try to get all of its claims in the Nye County Special Proceeding. On September 25, 2018, under two weeks after it received the favorable Nye County ruling, Brahma filed a First Amended Complaint in this action that dropped the three copycat claims and simultaneously filed a first amended counter-complaint in the Nye County Special Proceeding that added the three copycat claims to that proceeding.⁵

Moreover, the justifications given by Brahma in its Opposition for its claim splitting scheme reveal its intent to subvert this Court's federal removal jurisdiction. Brahma's claim splitting scheme was motivated by its procedural preferences. Brahma points to its "right to pursue its contract claims against TSE in conjunction with its claim against the Brahma Surety Bond" and "its right to file a demand for preferential trial setting." ECF No. 20, p. 18. But, these are not fundamental rights; they are procedural preferences. There is no prohibition on federal courts resolving Nevada mechanic's lien cases. It is common for federal courts in Nevada to adjudicate mechanic's lien cases. A party could also point to a preferential state court rule of evidence or rule of civil procedure, perhaps a "right" to have 40 interrogatories under Nev. R. Civ. P. 33 instead of the 25 prescribed by Fed. R. Civ. P. 33. But such preferences do not justify forum shopping or subverting this Court's federal removal jurisdiction.

5. Brahma's attempts to distinguish the claim splitting cases are unpersuasive.

Brahma attempts to distinguish the four claim splitting cases analogized to by TSE in its Motion for Injunction. *See* ECF No. 20, pp. 19-22. The attempts are unpersuasive. Each case—*KPERS*, *Faye*, *Davis*, and *Cross*—supports the relief requested by TSE's Motion for Injunction.

Brahma attempts to distinguish *KPERS* on the fact that here, unlike *KPERS*, "there has been no adverse federal court ruling from which Brahma is fleeing." ECF No. 20, p. 20: 3-4. Yet, while Brahma is not fleeing an adverse ruling, it is running towards a favorable ruling and

⁵ The only reason that Brahma left its unjust enrichment claim behind in this action was to avoid adjudication on the merits under Rule 41(a)(1)(B), as it had previously voluntarily dismissed the same claims in an earlier pleading.



1 favored procedural rules. The effect is the same—intentionally taking steps to subvert federal
2 removal jurisdiction.

3 In discussing *Faye*, Brahma does not attempt to distinguish the case beyond stating in a
4 conclusory fashion that “Brahma has not brought its state court claims to subvert this Court’s
5 jurisdiction or to seek a more favorable ruling from Judge Elliot.” ECF No. 20, p. 21:7-8. But,
6 in the next line, Brahma reveals its true intent: “Brahma did what it did to preserve its right to
7 demand a preferential trial in the Nye County Action under NRS 108.2451.” *Id.* at p. 21: 8-9.
8 That is the exact same motivation the plaintiff in *Faye* had to subvert the court’s federal removal
9 jurisdiction: personal preference.

10 Brahma attempts to distinguish *Davis* on two grounds: TSE initiated the Nye County
11 Special Proceeding and “Brahma had proper motives.” ECF No. 20, p. 21:20-23. The first
12 ground is irrelevant—Brahma filed the copycat claims into the Nye County Special Proceeding.
13 And the second ground is conclusory, and, as shown above, false.

14 In discussing *Cross*, a case with notably similar facts to those presented here, Brahma
15 contends that the court used a different legal analysis from the Ninth Circuit. ECF No. 20, pp.
16 21-22. But the court relied on Ninth Circuit law to enter an injunction enjoining the plaintiff
17 from prosecuting claims in a state court action. *Cross v. City of Liscomb*, No. 4:03-CV-30172,
18 2004 WL 840274, at *4 (S.D. Iowa Mar. 2, 2004) (citing to *Lou* and *Quackenbush*).

19 **6. The supposed more egregious cases cited by Brahma are not more egregious**
20 **at all and are actually inapposite.**

21 Brahma cites to four cases to argue that federal courts have refused to enjoin state courts
22 on facts more compelling than those presented here: *Lou*, *Quackenbush*, *Frith*, and *Trinity*. See
23 ECF No. 20, pp. 22-23. None of these cases support Brahma’s argument.

24 *Lou* is inapposite as discussed above. The plaintiff in *Lou* did not subvert federal
25 removal jurisdiction by filing copycat claims in state court as the federal court never had federal
26 removal jurisdiction over the claims. That is not the case here.

27 *Quackenbush* is inapposite for the same reason. *Quackenbush* features a complicated
28 procedural history. 121 F.3d at 1375-77. But, in the end, the Ninth Circuit explained that an

1 injunction was not warranted because the state court proceedings were distinct from the federal
2 court proceedings and the defendant did not “have the right to have every issue in that case
3 decided by the federal court, regardless of the validity of the state court’s jurisdiction to consider
4 the issue in another proceeding.” *Id.* at 1379. Here, TSE is not seeking to enjoin distinct claims
5 in a state court action, it is seeking to enjoin Brahma from prosecuting the exact claims that this
6 Court had already acquired federal removal jurisdiction over—the copycat claims.

7 *Frith* is also inapposite. There, the Fifth Circuit reversed an injunction on procedural
8 grounds not at issue here. *See id.* at 901.

9 Finally, *Trinity* is inapposite. There, the court considered a different exception to the
10 Anti-Injunction Act than the exception at issue here. *See Trinity Christian Ctr. of Santa Ana,*
11 *Inc. v. Koper*, No. SACV 12-1049 DOC, 2012 WL 6552229, at *4 (C.D. Cal. Dec. 14, 2012).
12 The court assessed whether an injunction was appropriate under the second exception—
13 necessary in aid of a district court’s jurisdiction. *Id.* But, the focus of that exception is whether
14 the state and federal proceedings are *in rem* proceedings or *in personam* proceedings. Thus,
15 unlike here, the court did not have to consider whether a party acted with intent to subvert the
16 court’s federal removal jurisdiction. *Id.*

17 None of these cases feature the facts present here: Brahma deliberately dropped certain
18 claims which this Court had acquired federal removal jurisdiction over and reasserted them in a
19 state court action after having received a favorable ruling in the state court action in order to
20 obtain the benefit of preferential procedural rules.

21 **C. There is no reason for this Court to exercise its discretion to deny TSE’s Motion for**
22 **Injunction.**

23 In arguing for denial of TSE’s Motion for Injunction, Brahma tries to change the issue
24 from whether an injunction should issue under the All Writs Act to which venue would serve as
25 the best forum—Nye County or this Court. This Court should not indulge Brahma’s effort.
26 TSE’s Motion for Injunction concerns Brahma’s improper procedural filings in an effort to
27 subvert this Court’s federal removal jurisdiction, it does not call for a balancing test of which
28



1 venue is preferable. But, regardless, this Court is an appropriate, and preferable, venue for this
2 action.

3 Brahma argues that Nevada's mechanic's lien statutes call for resolution of this case in
4 state court and that certain procedural devices supposedly only available in state court make state
5 court a better venue. But, as explained above, this is merely a pretext for Brahma's intent to
6 subvert this Court's federal removal jurisdiction. Federal courts routinely resolve claims arising
7 out of Nevada's mechanic's lien statutes. There is no statutory mandate that all mechanics' lien
8 claims must be resolved in state court.

9 Brahma argues that state court is preferable for speed: "[t]his would completely
10 undermine the Nevada Legislature's goal of ensuring that contractors such as Brahma are paid
11 expeditiously for the labor materials and equipment they furnish to projects in Nevada." ECF
12 No. 20, p. 24: 6-8. But, this argument is a red herring. TSE is moving expeditiously in this
13 matter. Brahma, on the other hand, is trying to delay the case from proceeding. For instance,
14 TSE has already served a first round of written discovery on Brahma but Brahma has stated that
15 it plans to move for a protective order to delay responding to the discovery. *See* ECF No. 24, p.
16 8.

17 Further, Brahma, the party that filed in multiple forums in the first place, now expresses
18 concern that all of the claims might not be resolved in one action. But Brahma's concern is
19 misplaced. This action could resolve the entire dispute in an efficient manner. Brahma and TSE
20 could litigate their claims against each other in this action. Brahma's bond claim against Cobra
21 and the surety could proceed in Nye County, but, more likely, that action would be stayed and
22 Cobra and the surety could interplead as non-diverse defendants in this action, as interested
23 parties. *See Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1095 (C.D. Cal. 2005) *aff'd*, 446 F.3d
24 1011 (9th Cir. 2006) (providing that intervention by a non-diverse non-indispensable party in an
25 action removed on the basis of diversity does not destroy diversity and that a party can intervene
26 as a defendant even if there is no claim against it). Thus, the findings of fact and conclusions of
27 law in this action would have a claim preclusive effect on Brahma's stayed bond claim against
28



1 Cobra and the surety in state court. *See Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir.
2 2003) (discussing claim preclusion).⁶

3 Finally, for reasons that are not exactly clear, Brahma spends significant space on the
4 enforceability of the venue selection clause in its agreement with TSE. Brahma suggests that it
5 only filed the Clark County Action based on a misinterpretation of the Agreement's venue
6 selection clause and that it should not be held to that, nor should its filing be viewed as any sort
7 of waiver. ECF No. 20, pp. 12-15. To be sure, it does not actually matter why Brahma filed the
8 Clark County Action, misinterpretation or not. Because, once it did, TSE properly removed it
9 and this Court acquired federal removal jurisdiction over the claims therein. *See, supra* n. 2.
10 Brahma appears to ask for a do-over or to undo its supposedly mistaken filing, neither of which
11 would be appropriate. Thus, none of the concerns upon which Brahma bases its request for this
12 Court to exercise its discretion to deny TSE's Motion for Injunction are valid.

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25 ⁶ Brahma also alludes to a pending lawsuit from H&E, a subcontractor to Brahma. The
26 implications of this lawsuit are difficult to assess as it has not been filed yet. But, if H&E were to file
27 claims against Brahma, as suggested by Brahma, it would do so in a separate action. According to
28 Brahma, those "claims are derivative of Brahma's claims against TSE." ECF No. 20, p. 6:10-11. 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 this case.



1 **III. CONCLUSION**

2 As set forth above, TSE's Motion for Injunction should be granted. Brahma has engaged
3 in forum shopping in an effort to subvert this Court's federal removal jurisdiction over the
4 copycat claims—breach of the Agreement, breach of the implied covenant of good faith and fair
5 dealing, and violation of Nevada's prompt payment act. The relief sought by TSE's Motion for
6 Injunction is warranted.

7 DATED this 16th day of November 2018.

8
9 /s/ Colby Balkenbush
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CERTIFICATE OF SERVICE

I hereby certify that on the 16 day of November, 2018, a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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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2018 DEC 17 P 2:25
NYE COUNTY
BY JP
DEPUTY

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Defendants.

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

**BRAHMA GROUP, INC.'S MOTION
TO CONSOLIDATE CASE NO.
CV39799 WITH CASE NO. CV 39348**

Hearing Date:
Hearing Time:

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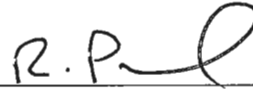
**BRAHMA GROUP, INC.'S MOTION TO CONSOLIDATE CASE NO. CV39799 WITH
CASE NO. CV 39348**

Pursuant to NRCP 42, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, respectfully moves this Honorable Court for an Order Consolidating Case No. CV 39799 with Case No. CV 39348.

This Motion is based on the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument which may be heard at the hearing set for this matter.

Dated this 17 day of December, 2018.

PEEL BRIMLEY LLP



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

On September 21, 2018, Brahma filed in this Case (i.e., Case No. CV39348) its Mechanic's Lien Foreclosure Complaint against TSE asserting a Cause of Action for Foreclosure of Mechanic's Lien.

On September 25, 2018, Brahma filed its Amended Complaint against TSE, and Third-Party Complaint against COBRA THERMOSOLAR PLANTS, INC. ("Cobra") and AMERICAN HOME ASSURANCE COMPANY ("AHAC") asserting a cause of action for Claim Against Surety, the Surety Bond and the Principal thereon.

///

1 Instead of filing an Answer to the Amended Complaint, TSE filed a Motion to Strike or
2 Dismiss (“Motion to Dismiss”) wherein it alleged that Brahma’s Amended Complaint (i) violates
3 NRCPC 7(a) because it is not a “pleading,” and (ii) should not have been filed into this Case, because
4 it is a special proceeding that TSE commenced under NRS 108.2275.

5 At the December 11, 2018 hearing on TSE’s Motion to Dismiss, this Court (i) denied TSE’s
6 Motion to Dismiss, and (ii) agreed with Brahma that its Amended Complaint was properly filed in
7 this Case. At the conclusion of the hearing, TSE threatened to file a Writ Petition with the Nevada
8 Supreme Court.

9 Assuming (i) TSE follows through with its threat and files a Writ Petition before the
10 Nevada Supreme Court, and (ii) the Nevada Supreme Court agrees with TSE’s claims that the
11 Amended Complaint was improper and should have been filed as a separate action, on remitter,
12 TSE would undoubtedly argue that the deadline for Brahma to foreclose against the Surety Bond
13 has expired since NRS 108.2421 requires a lien claimant to commence a foreclosure action against
14 the surety bond within 9 months of the posting of a surety bond.

15 Because of the foregoing and out of an abundance of caution, Brahma (i) has filed a
16 standalone Complaint in Case No. CV 39799 to foreclose against the Surety Bond that TSE
17 required Cobra to procure and provide, and (ii) seeks to consolidate Case No. CV 39799 into Case
18 No. CV 39348 as both cases relate to and arise out of the same transaction and occurrence.

19 **II. LEGAL ARGUMENT**

20 **A. NRCPC 42 Authorizes this Court to Consolidate the Cases.**

21 Pursuant to NRCPC 42, Brahma requests the Court to consolidate Case No. CV 39779 into
22 Case No. CV39348.

23 NRCPC 42 states in relevant part:

24 when actions involving a common question of law or fact are pending
25 before the court, it may order a joint hearing or trial of any or all the
26 matters in issue in the actions; it may order all the actions
27 consolidated; and it may make such orders concerning proceedings
28 therein as may tend to avoid unnecessary costs or delay.

///

1 “Hearing and trial procedures, such as consolidation and the scheduling of hearings, so
2 long as within the parameters of the governing rules, are matters vested in the sound discretion of
3 the trial court.” *Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181
4 (1981). Here, the governing rule, NRCP 42, permits consolidation and this Court should exercise
5 its discretion to consolidate Case No. CV 39799 into Case No. CV 39799. In fact, Brahma’s
6 Motion seeks to do exactly that which TSE argued Brahma should have done in the first place—
7 file an independent action and then move the Court to consolidate that action with the Motion to
8 Expunge. Therefore, TSE should be estopped from any attempt to oppose this Motion.

9 **B. Judicial Economy Requires Consolidation of these Cases.**

10 Consolidation of these two cases is within the parameters of the governing rules, promotes
11 judicial economy and saves attorney’s fees and costs for all parties involved. Each of these Cases
12 relate to the same project and dispute and involve the same parties. Therefore, consolidation is
13 appropriate and necessary here to promote judicial economy and efficiency as well as to allow the
14 Court to make consistent judgments on all claims involved.

15 **III. CONCLUSION**

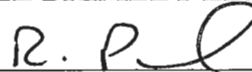
16 For the foregoing reasons, Brahma respectfully requests this Court consolidate Case No.
17 CV 39799 into Case No. CV 39799.

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

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

21 Dated this 17 day of December, 2018.

22 **PEEL BRIMLEY LLP**

23 

24 **RICHARD L. PEEL, ESQ.**

25 Nevada Bar No. 4359

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this ____ day of December, 2018, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S MOTION TO CONSOLIDATE CASE NO. CV39799 WITH CASE NO. CV 39348** to be served as follows:

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

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

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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,

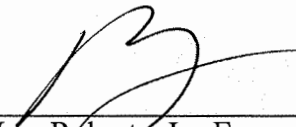
Defendant.

Case No. CV 39348
Dept. No. 2

**TSE'S OPPOSITION TO BRAHMA'S
MOTION TO CONSOLIDATE CASE NO.
CV 39799 WITH CASE NO. CV 39348**

On December 21, 2018, Brahma Group, Inc. ("Brahma") served its motion to consolidate Case No. CV39799 with Case No. CV39348 ("Motion to Consolidate"). Tonopah Solar Energy, LLC ("TSE"), by and through its undersigned counsel, hereby opposes the motion. Based on the following Memorandum of Points and Authorities, Brahma's Motion to Consolidate should be denied.

DATED this 4th day of January, 2019.


D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Motion to Consolidate, Brahma seeks to consolidate a new complaint with the proceeding that has been pending before this Court. The new complaint is identical to a pleading¹ that Brahma has already filed in this proceeding. In fact, the new complaint is Brahma's seventh pleading in this dispute. With each new pleading, Brahma continues to add unnecessary procedural complexity to this matter. Brahma has filed this new duplicative complaint for one purpose: to guard against a potential procedural defect with its prior pleading.

Brahma's course of action, filing duplicative complaints in separate actions, seems inappropriate on its face; courts agree—the rule against claim splitting has developed to prevent this very conduct. The rule instructs that where a plaintiff files a duplicative complaint in order to expand its legal rights, *as done by Brahma here*, the duplicative complaint should be dismissed. The Nevada Supreme Court recognizes this rule.

Moreover, Brahma's conduct violates both the letter and the spirit of the Nevada Rules of Civil Procedure. A party cannot fix a defect with a complaint by filing a new duplicative complaint in a separate action and consolidating the actions. By doing so, Brahma has run afoul of Rule 1—filing multiple actions and seeking to consolidate is not just, speedy, or inexpensive. Brahma has also run afoul of the amendment process governed by Rule 15—if a court ever denied a party leave to amend, under Brahma's course of action, the party could simply file a new action including the amendment and consolidate it with the already pending action to get around the denial of leave to amend. And Brahma has run afoul of the general rules against duplicity and redundancy in litigation. Brahma's new complaint epitomizes a redundant pleading, and, thus, should be struck under Rule 12(f). All of these deficiencies lead to the

¹ In this Opposition, TSE refers to the documents filed by Brahma into the special proceeding created by TSE's motion to expunge (CV 39348), namely, Brahma's Mechanic's Lien Foreclosure Complaint, its First Amended Counter-Complaint and Third-Party Complaint, and its Second Amended Counter-Complaint and Amended Third-Party Complaint as pleadings for ease of reference. Yet, the usage of the word "pleadings" should not be construed as a waiver of TSE's argument that these pleadings are improper and do not constitute legitimate pleadings.



1 conclusion that Brahma's new complaint is futile and cannot be consolidated. Brahma's Motion
2 to Consolidate must be denied. To the extent that this Court disagrees, Brahma's new action
3 should be stayed pending resolution of Brahma's previously filed duplicative claims.

4 **II. STATEMENT OF PERTINENT FACTS**

5 Brahma has already filed seven pleadings in this matter:

- 6 • *First pleading*: April 17, 2018 complaint in Nye County—Brahma voluntarily dismissed
7 this pleading.
- 8 • *Second pleading*: July 17, 2018 complaint in Clark County asserting breach of contract,
9 breach of the implied covenant, unjust enrichment, and violation of NRS Chapter 624
10 against TSE. TSE removed this pleading to federal court.
- 11 • *Third pleading*: September 20, 2018 complaint in Nye County Case No. CV 39348
12 asserting lien foreclosure against TSE. Nye County Case No. CV 39348 was a special
13 proceeding initiated by the filing of TSE's motion to expunge the mechanic's lien
14 recorded by Brahma.
- 15 • *Fourth pleading*: September 25, 2018 first amended complaint in federal court asserting
16 merely unjust enrichment against TSE (i.e., dropping the other three claims so that
17 Brahma could bring them in Nye County instead).
- 18 • *Fifth pleading*: September 25, 2018 first amended counter-complaint and third party
19 complaint in Nye County Case No. CV 39348 asserting breach of contract, breach of the
20 implied covenant, violation of NRS 624, and lien foreclosure against TSE and claim on
21 the bond against Cobra Thermosolar Plants, Inc. and its surety.
- 22 • *Sixth pleading*: This Court has permitted Brahma leave to file its second amended
23 counter-complaint and amended third party complaint in Nye County Case No. CV
24 39348 asserting breach of contract, breach of the implied covenant, and violation of NRS
25 624 against TSE and claim on the bond against Cobra and its surety. Brahma has not yet
26 filed this pleading.
- 27 • *Seventh pleading*: December 14, 2018 complaint in Nye County Case No. CV 39799,
28 which is identical to its sixth pleading—its amended third party complaint in Nye County



Case No. CV 39348.

TSE previously moved to dismiss, strike, or stay the third and fifth pleadings filed by Brahma, arguing that they should be dismissed or struck because, among other reasons, Brahma could not file them into a special proceeding created by the filing of TSE's motion to expunge. Brahma argued that it was appropriate to file the pleadings into the special proceeding. On December 11, 2018, at a hearing on the motion, the Court denied TSE's motion to dismiss, strike, or stay, agreeing with Brahma that it could file its pleadings into the special proceeding.² TSE plans to file a writ petition with the Nevada Supreme Court challenging this decision.

III. LEGAL ARGUMENT

Brahma seeks to consolidate its seventh pleading into this proceeding—Nye County CV 39348, a special proceeding created by the filing of TSE's motion to expunge. *See* Motion to Consolidate. Brahma wishes to do this in order to fix any potential statute of limitations issues that its third, fifth, and sixth pleadings might suffer from if the Nevada Supreme Court grants TSE's writ petition. *Id.* at p. 3, ll. 9-18. But, this is not a legitimate reason to file a duplicative civil action and seek to consolidate it into this proceeding. Brahma's Motion to Consolidate should be denied for two reasons: (A) Brahma's seventh pleading is futile and cannot be consolidated and (B) Brahma cannot consolidate a complaint into a special proceeding. Alternatively, to the extent that the Court permits the consolidation, Brahma's new action should be stayed pending resolution of Brahma's previously filed duplicative claims.

A. Brahma's seventh pleading is futile and cannot be consolidated.

Just as a party cannot file an amended pleading that is futile, a party cannot consolidate a complaint that is futile. *See Halcrow, Inc. v. Eighth Jud. District Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013); *Cheatham v. Muse*, No. 1:13CV320 (CMH/TRJ), 2013 WL 12155209, at *1 (E.D. Va. Apr. 12, 2013) (explaining that consolidation would be futile where the complaint to be consolidated should be dismissed). A complaint is futile if it is "impermissible"

² The Court also ordered that Brahma's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of NRS Chapter 624 would be stayed pending the federal court's handling of certain motions.



1 or subject to dismissal. *Halcrow*, 129 Nev. at 398, 302 P.3d at 1152. Brahma cannot fix a defect
2 with its current pleadings by filing a new duplicative complaint and consolidating it into this
3 proceeding. Brahma's seventh pleading is futile for the four reasons set forth below.

4 First, Brahma's seventh pleading is futile because it violates the rule against claim-
5 splitting. The Nevada Supreme Court recognizes the rule against claim splitting. *Reno Club,*
6 *Inc. v. Harrah*, 70 Nev. 125, 129, 260 P.2d 304, 306 (1953) ("This principle of res judicata has
7 also found expression in the rule against splitting of causes of action, to the effect that a single
8 cause of action or entire claim or demand cannot be split up or divided and separate suits
9 maintained for the various parts thereof."). The rule against claim-splitting provides that "a
10 plaintiff should not engage in 'claimsplitting,' in which the plaintiff seeks to maintain two
11 actions on the same subject in the same court, against the same defendant at the same time."
12 *Clayton v. D.C.*, 36 F. Supp. 3d 91, 94 (D.D.C. 2014). "[T]he law requires that a plaintiff must
13 assert all the grounds of recovery he may have against the defendant, arising from a single cause
14 of action, in one lawsuit." *Piagentini v. Ford Motor Co.*, 901 N.E.2d 986, 991 (Ill. App. 2009);
15 *Harbinger Capital Partners LLC v. Ergen*, 103 F. Supp. 3d 1251, 1259 (D. Colo. 2015). "[I]t is
16 well settled that a plaintiff may not file duplicative complaints in order to expand their legal
17 rights." *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841 (11th Cir. 2017). "[P]laintiffs have
18 no right to maintain two actions on the same subject in the same court, against the same
19 defendant at the same time." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000). A
20 plaintiff "is not at liberty to split up his demand and prosecute it by piecemeal, or present only a
21 portion of the grounds upon which special relief is sought, and leave the rest to be presented in a
22 second suit, if the first fail." *Stark v. Starr*, 94 U.S. 477, 485, 24 L. Ed. 276 (1876). Where a
23 plaintiff engages in claim-splitting, dismissal of the duplicative complaint is warranted. *See,*
24 *e.g., Clayton*, 36 F. Supp. 3d at 96.

25 Here, Brahma has engaged in claim-splitting. Brahma is maintaining two actions on the
26 same subject in the same court, against the same defendants at the same time. Brahma filed the
27 duplicative complaint "in order to expand [its] legal rights" in relation to a potential statute of
28 limitations argument. *Vanover*, 857 F.3d at 841. Brahma has "no right" to do this. *Curtis*, 226



1 F.3d at 139. Thus, Brahma's seventh pleading must be dismissed.

2 *Second*, Brahma's seventh pleading is futile because it is redundant and should be struck.
3 Nevada Rule of Civil Procedure 12(f) provides that a court may strike "redundant" matter from
4 any pleading. Brahma's seventh pleading is completely redundant of its fifth and sixth
5 pleadings. Thus, Brahma's seventh pleading is futile and cannot be consolidated.

6 *Third*, Brahma's seventh pleading is futile because it runs afoul of Rule 1. Rule 1
7 provides that the Nevada Rules of Civil Procedure "shall be construed and administered to secure
8 the just, speedy, and inexpensive determination of every action." Allowing Brahma to
9 consolidate its seventh pleading would not be just—Brahma filed the initial pleading into the
10 special proceeding in order to interfere with TSE's right of removal; Brahma defended this
11 course of action; the Court agreed; now, faced with a writ petition challenging this course of
12 action, Brahma, apparently having lost confidence in its prior argument, has now filed and seeks
13 to consolidate the seventh pleading into the current proceeding to protect against any downside
14 with its prior strategy. Brahma cannot have it both ways. Allowing Brahma to consolidate its
15 seventh pleading is also neither speedy nor inexpensive. Consolidation does not merge claims or
16 complaints, it keeps them alive in separate proceedings. *See Matter of Estate of Sarge*, 134 Nev.
17 Adv. Op. 105 (2018) (explaining that consolidated cases do not merge together but retain their
18 separate identities, as explained by the United States Supreme Court in *Hall v. Hall*, 138 S. Ct.
19 1118 (2018)). Maintaining two separate actions featuring the same claims, but each with a
20 different goal—the first to prevent removal; the second to avoid missing a statute of
21 limitations—leads to more expensive duplicative litigation. *See 3637 Corp. v. City of Miami*,
22 314 F. Supp. 3d 1320, 1333 (S.D. Fla. 2018) (explaining that the rule against claim-splitting
23 promotes judicial economy).

24 *Fourth and finally*, Brahma's seventh pleading is futile because it runs afoul of Rule 15.
25 Rule 15 sets forth the guidelines for amending a pleading and for the relation back of
26 amendments for the purposes of a statute of limitations. Rule 15 does not provide that a party
27 can file a new complaint in a new action and consolidate it with a prior pleading in order to
28 alleviate statute of limitation concerns. If Brahma is concerned with a statute of limitations



argument, it could take a variety of actions, but this claim-splitting scheme is not one of them.

B. Brahma cannot consolidate a complaint into a special proceeding.

Although this argument is mostly duplicative of the argument that this Court denied in TSE's motion to dismiss, strike, or stay, TSE briefly raises it again in this context for the purposes of issue preservation. As discussed in TSE's motion to dismiss, strike, or stay, NRS 108.2275 does not permit a party to file a pleading into a special proceeding created by the filing of a motion to expunge under NRS 108.2275(5). For this same reason, there is no statutory basis upon which a party can consolidate a complaint into a special proceeding created by the filing of a motion to expunge under NRS 108.2275(5). A special proceeding created by the filing of a motion to expunge is limited to resolving the motion and any accompanying attorney fees award. *See* NRS 108.2275(6). Once those two tasks are complete, the special proceeding is complete. *See id.*

Here, Brahma is seeking to consolidate a complaint into a special proceeding created by TSE's motion to expunge. There is no legal basis for this filing. Further, the special proceeding is completely adjudicated as the Court denied TSE's motion to expunge and granted Brahma's accompanying motion for attorney fees. Thus, Brahma should not be permitted to consolidate its seventh pleading into this now completed special proceeding.

In addition, Brahma argues in passing that TSE "should be estopped" from opposing its Motion to Consolidate. *See* Motion to Consolidate at p. 4, ll. 6-8. This argument is wrong. TSE sought to dismiss or strike Brahma's third, fifth, and sixth pleadings because they were, among other reasons, procedurally improper and purposefully filed by Brahma in that manner in order to interfere with TSE's right to removal. Now Brahma is simply attempting to add another procedurally improper but strategically advantageous filing on top of those. If allowed, the result would not even remotely resemble the relief sought by TSE in its previous motion.

C. Alternatively, Brahma's new action should be stayed.

A court has the inherent power to control its docket by issuing stays when appropriate. *Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973). Here, Brahma has already asserted a bond claim against Cobra and the Surety in its fifth pleading and

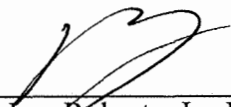


1 sought and obtained leave to file its sixth pleading asserting the same. Brahma's new action—its
2 seventh pleading—which also asserts a bond claim against Cobra and the Surety, should be
3 stayed pending resolution of the duplicative claims previously filed by Brahma in this
4 proceeding. *See Bojorquez v. Abercrombie & Fitch, Co.*, 193 F. Supp. 3d 1117, 1127 (C.D. Cal.
5 2016) (opting to dismiss a claim with prejudice for violating the rule against claim splitting, but
6 also pointing out that a stay of the later filed action can be appropriate as well).

7 IV. CONCLUSION

8 Based on the foregoing, Brahma's Motion to Consolidate should be denied. The rule
9 against claim-splitting and Rules 1, 12, and 15 prohibit the course of action undertaken by
10 Brahma. Alternatively, if Brahma is permitted to consolidate its new duplicative action into
11 this proceeding, the new action should be stayed pending resolution of the duplicative claims
12 previously filed by Brahma in this proceeding.

13 DATED this 4th day of January, 2019.

14 
15 D. Lee Roberts, Jr., Esq.
16 Colby L. Balkenbush, Esq.
17 Ryan T. Gormley, Esq.
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22 Attorneys for Tonopah Solar Energy, LLC
23
24
25
26
27
28



CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 2019, a true and correct copy of the foregoing **TSE'S OPPOSITION TO BRAHMA'S MOTION TO CONSOLIDATE CASE NO. CV 39799 WITH CASE NO. CV 39348** was served by mailing a copy of the foregoing document via Federal Express, to the following:

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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Defendants.

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

**BRAHMA GROUP, INC.'S REPLY
TO TONOPAH SOLAR ENERGY,
LLC'S OPPOSITION TO MOTION
TO CONSOLIDATE CASE NO.
CV39799 WITH CASE NO. CV 39348**

Hearing Date: January 24, 2019
Hearing Time: 9:00 a.m.

REPLY POINTS AND AUTHORITIES

I. TSE HAS ALREADY ADMITTED THAT BRAHMA CAN (AND SHOULD) CONSOLIDATE A COMPLAINT INTO A SPECIAL PROCEEDING.

In its Motion to Strike Brahma Group, Inc.’s (“Brahma”) First Amended Counter-Complaint (“Motion to Strike”),¹ Tonopah Solar Energy, LLC (“TSE”) argued that Brahma’s proposed amended pleading was improper because “one cannot file a Counter-Complaint into a special proceeding such as this.” In support of its position, TSE relied on what it claimed to be “the leading Nevada construction law treatise,” LEON F. MEAD II, CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) “it is improper legal procedure to file a counter-claim to a petition under NSR 108.2275,”² and (ii) “The proper procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate the two matters.”³

In defending TSE’s Motion to Strike, Brahma argued (and this Court agreed) that Brahma had a right to file a complaint in the special proceeding that TSE had commenced to expunge Brahma’s lien. Among other things, this Court concluded that (i) NRS 108.2275(5) establishes the Nevada Legislature’s intent to combine mechanic’s lien foreclosure actions with motions to expunge liens, (ii) had Brahma filed a standalone complaint as an independent action in Case No. CV 39799 (“Separate Action”) and then moved the Court to consolidate the standalone action with the present Case No. CV 39348 (“Action”), the Parties would be in the same position they currently find themselves, and (iii) at the time Brahma filed its Amended Counter-Complaint in this Action, the Court had not yet ruled on Brahma’s Motion for Attorney’s Fees and Costs under NRS 108.2275, so that case was still open.⁴

///

///

¹ The complete title of that motion was “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.”

² See **Exhibit A** hereto, TSE Reply to Brahma’s Opposition to Motion to Strike (exhibits omitted for brevity), p. 7.

³ See **Exhibit B** hereto, excerpt from Mead treatise as submitted to this Court by TSE as Exhibit 4 to its Reply to Brahma’s Opposition to Motion to Strike

⁴ As of this writing, Brahma has submitted a proposed Order Denying Motion to Strike to the Court, which is awaiting the Court’s review, that contains these findings as made orally by the Court at the December 11, 2018 hearing.

1 TSE continues to threaten to file a Writ Petition with the Nevada Supreme Court seeking
2 discretionary review of this Court's denial of TSE's Motion to Strike. Out of an abundance of
3 caution,⁵ but without waiving any rights it may possess, Brahma (i) filed a standalone complaint
4 on December 14, 2018 in the Separate Action⁶ to foreclose against the Surety Bond and Rider that
5 TSE required Cobra to record, and (ii) now seeks to consolidate the Separate Action into this
6 Action pursuant to NRCP 42 because both cases relate to and arise out of the same transaction and
7 occurrence. Stated differently, Brahma did exactly as TSE prescribed.

8 Even though Brahma has now done exactly what TSE claimed Brahma should have done
9 (i.e., filed a claim against the Surety Bond issued by Cobra Thermosolar Plants, Inc. ("Cobra") in
10 the Separate Action, then move to consolidate the Separate Action with this Action), TSE now
11 argues (i) "there is no legal basis" for Brahma's current Motion to Consolidate, and (ii) Brahma
12 may not pursue this course of action.⁷

13 TSE's newly adopted position (i) is contradictory to the position it took in its Motion to
14 Strike, and (ii) is incorrect because consolidation is indeed available and appropriate whether or
15 not TSE successfully appeals this Court's denial of the Motion to Strike. For this reason, this Court
16 should reject TSE's Opposition to Brahma's Motion to Consolidate on grounds of estoppel and
17 issue an Order consolidating the Separate Action (Case No. CV39799) with this Action (Case No.
18 CV 39348).

19 Further, should the Nevada Supreme Court conclude that Brahma had no right to file a
20 complaint in the special proceeding, then (following Leon Mead's analysis) Brahma would have
21 been right to file the Separate Action and move to consolidate. If, on the other hand, the Nevada
22 Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure
23 claim of the Separate Action is (at worst) moot with no prejudice having been suffered by any
24 party by way of consolidation.

25 _____
26 ⁵ If the Nevada Supreme Court agrees with TSE's claims that the Amended Complaint was improper and should have
27 been filed as a separate action, on remand, TSE would undoubtedly argue that the deadline for Brahma to foreclose
28 against the Surety Bond has expired because NRS 108.2421 requires a lien claimant to commence a foreclosure action
against the surety bond within nine (9) months of the posting of a surety bond. While anything is possible, it is at best
unlikely that any appellate proceeding would be concluded within that time period.

⁶ See Exhibit C hereto.

⁷ See TSE Opposition to Motion to Consolidate p. 7.

1 TSE also argues that consolidation is improper because “the special proceeding is
2 completely adjudicated as the court denied TSE’s motion to expunge and granted Brahma’s
3 accompanying motion for attorneys (sic) fees.”⁸ TSE’s argument is factually and legally incorrect
4 for the following reasons:

5 • First, TSE has yet to comply with the Court’s Order Granting Brahma’s Motion for
6 Attorney’s Fees and Costs Pursuant to NRS 108.2275(6)(c) (“Fee Award”), which makes such
7 fees and costs due and payable within 10 days of notice of entry of the Order – i.e., no later than
8 January 28, 2019,⁹ which means the special proceeding is not “completely adjudicated;”

9 • Second, TSE has stated its intention by way of several letters to this Court to defy
10 the Court’s Fee Award, which will necessitate further motion practice (i.e., Brahma will file a
11 motion to hold TSE in contempt), which (again) means the special proceeding is not “completely
12 adjudicated”;¹⁰ and

13 • Third, and more fundamentally, the present action is most certainly not “complete”
14 because Brahma (i) has filed a complaint in this Action, which this Court has allowed to stand and
15 be amended¹¹ (with certain claims stayed), and (ii) has now moved to consolidate the Separate
16 Action into this Action, which Motion to Consolidate has yet to be ruled on by this Court. Stated
17 differently, while this Action began as a special proceeding it is now no longer that.

18 **II. BRAHMA’S CONSOLIDATION IS NOT “FUTILE.”**

19 TSE next argues that the Separate Action is futile and may not be consolidated into this
20 Action. Specifically, TSE argues that Brahma’s Complaint filed in the Separate Action (which
21 TSE misleadingly refers to as “Brahma’s seventh pleading”) is (i) impermissible claim-splitting,
22 (ii) “redundant,” (iii) violates NRCP 1, and (iv) violates NRCP 15. TSE is wrong on all counts.

23 ///

24 ///

25 _____
26 ⁸ See Opposition p. 7.

27 ⁹ See **Exhibit D** hereto, Notice of Entry of Fee Award.

28 ¹⁰ After this section was first written, the parties appear to have reached an agreement in principle as to a timeline for payment of the fees and costs awarded to Brahma. Despite this agreement, those fees have not yet been paid and the matter therefore remains open.

¹¹ The amended pleading will be filed once the Court issues the Order Denying Motion to Strike. See also footnote 4 hereto.

1 **A. Brahma Has Not Engaged in Impermissible Claim-Splitting.**

2 Even though no judgment has been entered, TSE incorrectly claims¹² that Brahma has
3 engaged in impermissible claim-splitting, a concept grounded in the doctrine of claim preclusion,
4 formerly called *res judicata*. See *Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*,
5 407 P.3d 761, 763 (Nev. 2017) (the rule against claim-splitting “underlies claim preclusion”). In
6 *Boca Park*, the Nevada Supreme Court noted that “[e]xceptions to the doctrine have been created
7 to address situations in which barring a later-filed claim does not advance the doctrine’s underlying
8 policies or conflicts with a statutory scheme, constitutional rights, or the agreed-upon or stated
9 limits of the first proceeding.” 407 P.3d at 763 citing Restatement (Second) of Judgments § 26
10 (Am. Law Inst. 1982).

11 Nothing in the Separate Action “conflicts with a statutory scheme, constitutional rights, or
12 the agreed-upon or stated limits of the first proceeding” and TSE makes no effort to show how this
13 might be. This is especially (though not exclusively) true if (as TSE argued in its Motion to Strike)
14 Brahma had no legal right to file a foreclosure complaint in this Action and the proper statutory
15 procedure is for Brahma to file a foreclosure action (i.e., the Separate Action), then move to
16 consolidate the same into the present Action. See *supra* and LEON F. MEAD II,
17 CONSTRUCTION LAW 286 (2016 Ed.).

18 Similarly, nothing in the Separate Action conflicts with the “policy-driven doctrine” of
19 claim preclusion, which is “designed to promote finality of judgments and judicial efficiency by
20 requiring a party to bring all related claims against its adversary in a single suit, on penalty of
21 forfeiture.” See *Boca Park*, 407 P.3d at 763, citing *Weddell v. Sharp*, 131 Nev. ___, 350 P.3d 80,
22 83–85 (2015). Indeed, the entire purpose of the Motion to Consolidate is to ensure that all related
23 claims are brought in a single suit.¹³

24 ///

25 ///

26 ///

27 ¹² See Opposition p. 5.

28 ¹³ Ironically, while purporting to stand for the proposition that all claims should be combined in the same action, TSE continues to assert that some of the claims between the parties must be heard in an entirely different jurisdiction – i.e., the U.S. District Court.

1 In any event, among the numerous exceptions to the rule against claim-splitting, as
2 enumerated in the Restatement¹⁴ and adopted by Nevada in the *Boca Park* Court decision¹⁵ are the
3 following:

- 4 (a) The parties have agreed in terms or in effect that the plaintiff may split his
5 claim, or the defendant has acquiesced therein; and
- 6 (c) The plaintiff was unable to rely on a certain theory of the case or to seek a
7 certain remedy or form of relief in the first action because of the limitations
8 on the subject matter jurisdiction of the courts or restrictions on their
9 authority to entertain multiple theories or demands for multiple remedies or
forms of relief in a single action, and the plaintiff desires in the second
action to rely on that theory or to seek that remedy or form of relief;

10 Restatement (Second) of Judgments § 26 (Am. Law Inst. 1982).

11 Here, and although TSE's Opposition now contradicts its earlier position, TSE plainly
12 agreed or acquiesced to the course of action Brahma has now pursued and which Brahma is now
13 asking the Court to bless – i.e., doing exactly as Leon Mead suggested by filing a separate action
14 and seeking to consolidate the separate action into the special proceeding. More to the point, the
15 reason why Mr. Mead recommends this course of action (adopted *in toto* by TSE in support of its
16 Motion to Strike) is that it is (allegedly) improper for Brahma to file a foreclosure complaint in
17 this Action in the first place. Stated differently, if TSE is correct in asserting that Brahma had no
18 right to file a complaint in this Action because it was a special proceeding, then Brahma was
19 “unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the
20 first action [i.e., foreclosure] because of the limitations on the subject matter jurisdiction of” the
21 special proceeding. *See* Restatement (Second) of Judgments § 26(1)(c) (Am. Law Inst. 1982).
22 Accordingly, even if Brahma has engaged in “claim-splitting” (which it has not), the facts of this
23 case fit squarely within recognized exceptions to the general rule.

24 ///

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26 ///

27 ¹⁴ When such exceptions apply, “the general rule of [against claim-splitting] does not apply to extinguish the claim,
28 and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant.” *See*
Restatement (Second) of Judgments § 26 (Am. Law Inst. 1982)

¹⁵ 407 P.3d at 763.

1 **B. The Separate Action Is Not Impermissibly “Redundant”**

2 TSE next argues, without analysis, that the Separate Action violates NRCP 12(f) because
3 it is “redundant” of prior pleadings.¹⁶ While NRCP 12(f) allows a court to strike from a pleading
4 “any redundant, immaterial, impertinent, or scandalous matter,” TSE offers no case authority (or
5 rationale of any kind) for rejecting the Separate Action purely on the grounds of redundancy.
6 Indeed, the only Nevada case the undersigned has located in which NRCP 12(f) was cited (an
7 unpublished decision)¹⁷ involved the dismissal of an amended pleading because it “was nearly
8 identical, and therefore redundant, to the original complaint,” which the court had previously
9 dismissed. See *Angel v. Eldorado Casino, Inc.*, No. 59401, 2013 WL 1116822, at *1 (Nev. Mar.
10 15, 2013).¹⁸

11 Here, Brahma’s foreclosure claim in this Action survived TSE’s Motion to Dismiss and
12 even if the claims in the Separate Action are redundant, the claims may easily be merged by way
13 of consolidation. Furthermore, and for unrelated reasons, Brahma has now amended the claims
14 brought in this Action to include additional claims against Cobra Thermosolar Plants, Inc.
15 (“Cobra” - the Surety Bond principal)¹⁹ arising out of a separate agreement and work performed
16 for Cobra.²⁰ Accordingly, the Separate Action is not redundant of this Action.

17 **C. The Separate Action Does Not Violate NRCP 1.**

18 TSE also argues that the Separate Action violates NRCP 1.²¹ NRCP 1 simply defines the
19 scope of the Nevada Rules of Procedure and dictates how those rules should be construed and
20 administered:

21 ///

22 ///

23 ¹⁶ See Opposition p. 6.

24 ¹⁷ Brahma in no way means to violate NRAP 36(c) by citing this unpublished decision. Rather, the lack of any non-
abrogated published decisions is evidence enough that TSE’s reliance on NRCP 12(f) is thin.

25 ¹⁸ The only published decision found has been abrogated (on other grounds) and cited Rule 12(f) merely for the
proposition that abuse could be found when a litigant “persistently files documents that are unintelligible, redundant,
26 44, 61, 110 P.3d 30, 43 (2005), abrogated by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670
(2008).

27 ¹⁹ As the Court may recall, at TSE’s insistence, Cobra posted a Surety Bond pursuant to NRS 108.2415(1) to release
Brahma’s lien from the work of improvement.

28 ²⁰ See **Exhibit E** hereto.

²¹ See Opposition p. 6.

1 These rules govern the procedure in the district courts in all suits of a civil nature
2 whether cognizable as cases at law or in equity, with the exceptions stated in Rule
3 81. They shall be construed and administered to secure the just, speedy, and
inexpensive determination of every action.

4 TSE offers no coherent explanation as to why consolidation of the Separate Action into
5 this Action would deter the “just, speedy, and inexpensive determination” of the parties’ dispute.
6 To the contrary, the express purpose of consolidation pursuant to NRCP 42 is “to avoid
7 unnecessary costs or delay.”²² Consolidation of these actions would do just that and provide
8 obvious judicial economy. Because consolidation is vested in the sound discretion of the trial
9 court” (*Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981)),
10 Brahma respectfully submits that the Court should grant Brahma’s Motion to Consolidate.

11 **D. The Separate Action Does Not Violate NRCP 15.**

12 Finally, and apparently grasping at straws, TSE argues that the Separate Action is futile
13 “because it runs afoul of Rule 15.”²³ Again without any substantive analysis, TSE implies that the
14 relation back provisions of NRCP 15(c)²⁴ somehow render the Separate Action and this Motion to
15 Consolidate void. However, resort to the relation back provisions of NRCP 15(c) is only necessary
16 when a claim in an amended pleading is filed after the statute of limitations on such claim has run.
17 See e.g., *Costello v. Casler*, 127 Nev. 436, 440, 254 P.3d 631, 634 (2011) (allowing claim in
18 amended pleading to relate back to the date of the original pleading if “the proper defendant (1)
19 receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been
20 misled to its prejudice by the amendment”) citing *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601
21 P.2d 716, 717 (1979).

22 ///

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24 ///

25 ²² NRCP 42 states in relevant part:

26 [W]hen actions involving a common question of law or fact are pending before the court, it may
27 order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions
28 consolidated; and it may make such orders concerning proceedings therein as may tend to avoid
unnecessary costs or delay.

29 ²³ See Opposition p. 6.

30 ²⁴ NRCP 15(c) provides: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct,
transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back
to the date of the original pleading.”

1 Here, there is no allegation that any claim filed by Brahma in either the Separate Action or
2 this Action is outside the applicable statute of limitations. Indeed, pursuant to NRS
3 108.2421(2)(b)(1), a “lien claimant may bring an action against the principal and the surety not
4 later than 9 months after the date that the lien claimant was served with notice of the recording of
5 the surety bond.” Here, as alleged in the Separate Action, Cobra (as principal) first caused an
6 (inadequate) Surety Bond to be recorded on September 6, 2018 and subsequently recorded a Rider
7 to increase the amount of the Surety Bond on October 9, 2018.²⁵ Even if the Surety Bond and Rider
8 were properly served pursuant to the Statute immediately after recording (which they were not),
9 the Separate Action was commenced on December 14, 2018, well within the nine month period.²⁶

10 In any event, NRCP 15(c) is to be liberally construed to allow relation back of the amended
11 pleading where the opposing party will be put to no disadvantage. *Costello*, 127 Nev. at 441 *citing*
12 *E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1396 (9th Cir.1989) (“[C]ourts
13 should apply the relation back doctrine of [Federal] Rule 15(c) liberally.”); *University & Cmty.*
14 *Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 18–19 (2004) (noting the liberal policy
15 underlying NRCP 15). Thus, even if resort to NRCP 15(c) were necessary here (it is not), it is
16 unlikely that the rule would serve to bar Brahma’s claim(s).

17 **III. CONCLUSION**

18 For the foregoing reasons, Brahma respectfully requests this Court consolidate Case No.
19 CV 39799 into Case No. CV 39799.

20 ///

21 ///

22 ///

28 ²⁵ See Exhibit C.

²⁶ See *Id.*

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AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 14 day of January, 2019.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 18th day of January, 2019, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S REPLY TO TONOPAH SOLAR ENERGY, LLC'S OPPOSITION TO MOTION TO CONSOLIDATE CASE NO. CV39799 WITH CASE NO. CV 39348** to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☒ other: Electronic Service (E-mail)

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

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EXHIBIT A

RA000562



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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

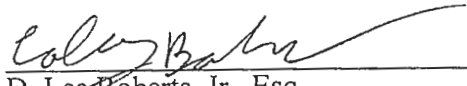
Defendant TONOPAH SOLAR ENERGY, LLC (hereinafter "TSE"), by and through
its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,
hereby submits its Reply to Brahma Group, Inc.'s (hereinafter "Brahma") Opposition to TSE's
Motion to Strike/Dismiss/Stay. Brahma's lengthy opposition 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.



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

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

Rather than address the above straight forward arguments, Brahma's Opposition essentially ignores them and trots out a hypothetical parade of horrors that will allegedly occur if Brahma is forced to litigate its claims in Nevada Federal District Court. According to Brahma, the prospect of a mechanic's lien claimant having to litigate in Nevada federal court is 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



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

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

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

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

25 TSE's Motion argued that under NRCP 7(a), only three types of pleadings are allowed, a
26 complaint, an answer and a reply to a counterclaim. TSE further pointed out that NRCP 7(a)
27 clearly states that "no other pleading shall be allowed" and thus Brahma's "Counter-Complaint"
28 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



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

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

11 Nevada is a notice-pleading jurisdiction and *pleadings* should be liberally
12 construed to allow issues that are fairly noticed to the adverse party. There
13 is, however, nothing technical about the defect in Chang's cross-claim; the
14 document simply is not a pleading, and does not itself put the matters
15 asserted therein at issue.

16 *Id.* (emphasis in original). In sum, *Smith* held that (1) filing a document not permitted by NRCP
17 7(a) is not a "technicality" and (2) that only the pleadings set forth in NRCP 7(a) fall within
18 Nevada's liberal pleading standard. Thus, since Brahma has filed a document that is not
19 permitted under NRCP 7(a), it cannot rely on Nevada's liberal notice-pleading standard to save
20 the document from being stricken.

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

22 The other cases cited by Brahma in its Opposition do not help its argument because they
23 do not address NRCP 7(a) or *Smith* and merely support the idea that Nevada is a notice pleading
24 jurisdiction, which no one disputes. Brahma cites *Nevada State Bank v. Jamison Family P'ship*,
25 106 Nev. 792, 800, 801 P.2d 1377, 1383 (1990) and *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d
26 672, 674 (1984) for the basic proposition that Nevada is a notice pleading jurisdiction. Brahma's
27 reliance on *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d
28 666, 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.



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

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

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

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

22 In sum, contrary to Brahma's contentions, there is no conflict between NRCP 7(a) and NRS
23 108.2275(5) that would require resorting to NRCP 81(a)'s tiebreaker rule. No statute, rule or
24 case permits what Brahma has done.

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

27 Realizing the precariousness of its position, Brahma argues that, even though there is no
28 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).



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

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

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

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

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

² *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980); *Fire Ass'n of Philadelphia 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



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

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

8 Second, Brahma argues that this Court is the most convenient forum because only this
9 Court can hear all claims related to the Project in a single proceeding. Brahma is wrong and
10 misunderstands the federal procedural rules and statutes. The federal court could resolve this
11 entire dispute in an efficient manner and is already further along in doing so as that court has
12 already issued a scheduling order and TSE has issued discovery requests to Brahma. *See*
13 **Exhibit 5** (federal court scheduling order); **Exhibit 1** (federal court written discovery). Brahma
14 and TSE could litigate all of their claims against each other in federal court. Brahma's bond
15 claim against Cobra and AHAC (the surety) would be stayed by this Court and Cobra and the
16 surety would interplead as non-diverse defendants in the federal action, as interested parties. *See*
17 *Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1095 (C.D. Cal. 2005) *aff'd*, 446 F.3d 1011 (9th
18 Cir. 2006) (providing that intervention by a non-diverse non-indispensable party in an action
19 removed on the basis of diversity does not destroy diversity and that a party can intervene as a
20 defendant even if there is no claim against it). Thus, the findings of fact and conclusions of law
21 in the federal action would have a claim preclusive effect on Brahma's stayed bond claim against
22 Cobra and the surety in this Court. *See Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir.
23 2003) (discussing claim preclusion).³ After the federal action is completed, there will be no need
24 for Brahma to re-litigate any issues in Nye County.

25 ³ Brahma also alludes to a pending lawsuit from H&E, a subcontractor to Brahma. The implications of
26 this lawsuit are difficult to assess as it has not been filed yet. But, if H&E were to file claims against
27 Brahma, as suggested by Brahma, it would do so in a separate action. According to Brahma, those claims
28 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.



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

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

To further distract this Court from the merits of TSE's Motion, Brahma attached its Motion to Stay the federal court action to its Opposition and argued that the federal court is likely to grant that motion. Brahma also argued that TSE's Motion requesting that the federal court issue an injunction enjoining Brahma from litigating this action any further is likely to be denied.⁵ Brahma is wrong. The *Colorado River* abstention doctrine on which Brahma relies for its Motion to Stay is disfavored. Further, federal courts regularly issue injunctions when parties like Brahma seek to subvert their jurisdiction by re-filing removed claims in a different state court action. In an abundance of caution and to defeat Brahma's attempt to give this Court only one side of the story, TSE has attached hereto (1) TSE's Opposition to Brahma's Motion to Stay the federal action, (2) Brahma's Reply to same, (3) TSE's Motion for Injunction in the federal action, (4) Brahma's Opposition to same, and (5) TSE's Reply to the Motion for Injunction. See Exhibits 6-10.⁶

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

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

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

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

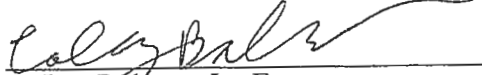


1 cannot amend a void pleading. Thus, Brahma's Lien Foreclosure claim should be dismissed
2 rather than amended out of the Counter-Complaint.

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.
14 WEINBERG, WHEELER, HUDGINS,
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17 Las Vegas, NV 89118
18 *Attorneys for Tonopah Solar Energy, LLC*
19
20
21
22
23
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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
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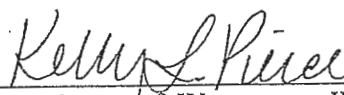

An employee of WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC

EXHIBIT B

RA000578

es--affidavits are sufficient to
er a District Court's refusal to
a parties was a denial of due

ccess to determine if an order
ourt is free to hold and weigh
excessive. In sum, the motion
tened time, and the court has
and made without reasonable
the lien is not frivolous and is
from that matter.⁷⁷³ Once that
orney's fees and costs to the
de based on the lien being
allenging party if the lien is
es to the lien claimant, if the
s excessive.⁷⁷⁶

ase. In its holding, the Court
rest in property, but are a
ificant property interest that
is not necessarily in keeping
viewed,⁷⁷⁸ and is difficult to
claims as any other property

any party with an interest in
t to show cause why the lien
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 C

RA000580

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FILED
FIFTH JUDICIAL DISTRICT COURT

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NYE COUNTY DEPUTY CLERK
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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Lien/Bond Claimant,

17 vs.

18
19 COBRA THERMOSOLAR PLANTS, INC., a
20 Nevada corporation; AMERICAN HOME
21 ASSURANCE COMPANY, a surety; BOE
22 BONDING COMPANIES I through X; DOES I
23 through X; ROE CORPORATIONS I through X,
24 inclusive,

25 Defendants,

CASE NO. : CV39799
DEPT. NO. : 1

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

[Arbitration Exemption: Amount in
Controversy in Excess of \$50,000]

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

///

THE PARTIES

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

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

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

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

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

4. TONOPAH SOLAR ENERGY, LLC ("TSE")³ is and was at all times relevant to this Action:

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

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

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

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

³ While TSE is not a party to this Case, it is a party to Case No. CV 39348 in the Fifth Judicial District Court of Nye County, which Case Brahma will seek to consolidate this Action into.

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

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

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

6 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
7 Parcels.⁴

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

12 6. Brahma is informed, believes and therefore alleges that Defendant AMERICAN
13 HOME ASSURANCE COMPANY ("AHAC"):

14 a. Is and was at all times relevant to this Action a bonding company duly
15 licensed and qualified to do business as a surety in Nevada;

16 b. Issued Bond No. 854481 ("Surety Bond") pursuant to NRS 108.2415 as
17 discussed more fully below; and

18 c. Issued a Surety Rider to the Surety Bond as discussed more fully below.

19 7. Brahma is informed, believes and therefore alleges that Defendant COBRA
20 THERMOSOLAR PLANTS, INC. ("Cobra"):

21 a. Is and was at all times relevant to this Action a Nevada corporation; and

22 b. Is the principal on the Surety Bond and the Rider.

23 8. Brahma does not know the true names of the individuals, corporations, partnerships
24 and entities identified and named as Defendants by the fictitious names of (collectively, the "Doe
25 Defendants"), (i) BOE BONDING COMPANIES I through X, (ii) DOES I through X, and (iii)
26 ROE CORPORATIONS I through X. Brahma alleges that such Doe Defendants may be liable to
27 Brahma for damages arising from the construction of the Work of Improvement, as more fully

28 ⁴ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels and the Liberty Parcels.

1 discussed under the claims for relief set forth below. Brahma will request leave of this Honorable
2 Court to amend this Complaint to show the true names and capacities of each such fictitious Doe
3 Defendants when Brahma discovers such information.

4 9. Cobra, AHAC and the Doe Defendants are collectively referred to in the Complaint
5 as the "Defendants."

6 **FIRST CAUSE OF ACTION**
7 **(Claim Against Surety, Surety Bond and Principal thereon)**

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

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

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

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

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

19 14. On or about April 09, 2018, Brahma timely recorded a Notice of Lien in the Official
20 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
21 \$6,982,186.24.

22 15. On or about April 16, 2018 and as allowed by NRS 108.229(1), Brahma recorded
23 a Notice of First Amended and Restated Lien in the Official Records of Nye County, Nevada, as
24 Document 891073 and re-recorded the same document on April 18, 2018 as Document No.
25 891507, in the amount of \$7,178,376.94 (the "First Amended Lien").

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

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

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

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

- 9 a. in writing;
10 b. recorded against the Work of Improvement; and
11 c. given or served on the authorized agents of the BLM and TSE, or the BLM
12 and/or TSE knew of the existence of the Lien.

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

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

19 22. On or about October 9, 2018, Cobra (as principal) and AHAC (as surety) caused a
20 Surety Rider ("Rider") to be recorded in the Official Records of Nye County, Nevada as Document
21 No. 900303.

22 23. The Rider increased the penal sum of the Surety Bond to \$19,289,300.61.

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

25 25. Brahma makes claim against Cobra and AHAC, and Cobra and AHAC are
26 obligated to Brahma for the Lienable Amount plus interest, costs and attorney's fees up to the
27 penal sum of the Surety Bond and Rider as provided in Chapter 108 of the Nevada Revised
28 Statutes.

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1 WHEREFORE, Brahma prays that this Honorable Court:

2 1. Enters judgment against the Defendants, and each of them, jointly and severally in
3 the amount of the Liable Amount;

4 2. Enters a judgment against the Defendants and each of them, jointly and severally,
5 for Brahma's reasonable costs and attorney's fees incurred in the collection of the Liable
6 Amount, as well as an award of interest thereon;

7 3. Enters judgment against AHAC up to the penal sum of the Surety Bond and Rider;
8 and

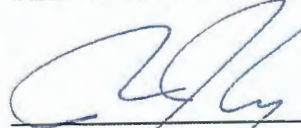
9 4. For such other and further relief as this Honorable Court deems just and proper in
10 the premises.

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

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

14 Dated this 14th day of December 2018.

15 **PEEL BRIMLEY LLP**

16 

17 RICHARD L. PEEL, ESQ.

18 Nevada Bar No. 4359

19 ERIC ZIMBELMAN, ESQ.

20 Nevada Bar No. 9407

21 CARY B. DOMINA, ESQ.

22 Nevada Bar No. 10567

23 RONALD J. COX, ESQ.

24 Nevada Bar No. 12723

25 3333 E. Serene Avenue, Suite 200

26 Henderson, Nevada 89074-6571

27 *Attorneys for Brahma Group, Inc.*

EXHIBIT D

RA000587

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1 RICHARD L. PEEL, Esq.
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2 ERIC B. ZIMBELMAN, ESQ.
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rcox@peelbrimley.com
9 *Attorneys for Brahma Group, Inc.*

FILED
2019 JAN -9 A 11:56
NYE COUNTY CLERK
BY JP
DEPUTY

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

18 BRAHMA GROUP, INC., a Nevada corporation,

19 Counterclaimant/Lien Claimant,

20 vs.

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

24 Counter-Defendant.

25 ///

26 ///

27 ///

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

NOTICE OF ENTRY OF ORDER

28
RA000588

PEEL BRIMLEY LLP
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HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

10 Third-Party Defendants.

11 **NOTICE OF ENTRY OF ORDER**

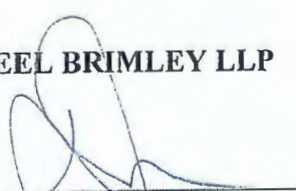
12 PLEASE TAKE NOTICE that an **Order Granting Brahma's Motion for Attorney's Fees**
13 **and Costs Pursuant to NRS 108.2275(6)(C)** was filed on January 8, 2019, a copy of which is
14 attached as Exhibit1.

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

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

18 Dated this 9 day of January, 2019.

19 **PEEL BRIMLEY LLP**

20 
21 RICHARD L. PEEL, ESQ. (4359)
22 ERIC ZIMBELMAN, ESQ. (9863)
23 CARY B. DOMINA, ESQ. (10567)
24 RONALD J. COX, ESQ. (12723)
25 3333 E. Serene Avenue, Suite 200
26 Henderson, Nevada 89074-6571
27 *Attorneys for Brahma Group, Inc.*
28

PEEL BRIMLEY LLP
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 9th day of December 2018, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

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

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

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

Geoffrey Crisp, Esq.
WEIL & DRAGE
2500 Anthem Village Drive
Henderson, NV 89052
gcrisp@weildrage.com
Attorneys for Cobra Thermosolar Plants, Inc.



An Employee of Peel Brimley LLP

EXHIBIT 1

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

JAN 08 2019

Nye County Clerk
Deputy

1 **ORDR**
2 **RICHARD L. PEEL, ESQ.**
3 Nevada Bar No. 4359
4 **ERIC B. ZIMBELMAN, ESQ.**
5 Nevada Bar No. 9407
6 **RONALD J. COX, ESQ.**
7 Nevada Bar No. 12723
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14 rcox@peelbrimley.com
15 Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

18 Plaintiff,

19 vs.

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

21 Defendant.

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

**ORDER GRANTING BRAHMA'S
MOTION FOR ATTORNEY'S FEES
AND COSTS PURSUANT TO NRS
108.2275(6)(C)**

22 This matter came on for hearing December 11, 2018 (the "Hearing") before the
23 Honorable Senior Judge Steven Elliott on the Motion For Attorney's Fees And Costs Pursuant To
24 NRS 108.2275(6)(c) ("Fee Motion") filed by BRAHMA GROUP, INC. ("Brahma"). Eric B.
25 Zimbelman, Esq. of PEEL BRIMLEY LLP appeared on behalf of Brahma. D. Lee Roberts,
26 Esq. of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of
27 Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE").

28 The Court having considered all the pleadings and papers on file, and having heard
argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
bench on December 11, 2018:

I. STATUTORY BASIS FOR AWARD OF FEES AND COSTS.

On October 17, 2018, this Court signed an Order¹ Denying TSE's Motion to Expunge

¹ The Order Denying the Underlying Motion was entered by the Clerk on October 29, 2018.

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1 Brahma's mechanic's lien pursuant to NRS 108.2275 ("Underlying Motion"). As part of the
2 Order Denying the Underlying Motion, the Court concluded that Brahma's Notice of Lien is
3 not frivolous nor was it made without reasonable cause. NRS 108.2275(6)(c) states in relevant
4 part:

5 (6) If, after a hearing on the matter, the court determines that:

6 ***

7 (c) The notice of lien is *not frivolous* and was made *with reasonable*
8 *cause*...the court *shall* make an order awarding costs and reasonable
9 attorney's fees to the lien claimant for defending the motion.

10 Accordingly, once the Court determines that a lien is not frivolous or excessive and
11 made with reasonable cause, an award of attorneys' fees is mandatory. In Nevada, the method
12 upon which a reasonable fee is determined is subject to the discretion of the court, which is
13 tempered only by reason and fairness. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837,
14 864-65, 124 P.3d 530, 548-49 (2005).

15 II. BRAHMA'S APPLICATION FOR AWARD OF FEES AND COSTS.

16 Pursuant to NRS 108.2275(6)(c), Brahma applied to the Court by way of the Fee
17 Motion for an award of \$77,937.50 in attorney's fees and \$479.84 in costs plus additional
18 sums, discussed below, for work performed on the Reply, at oral argument on the Fee Motion
19 and in preparation of this Order. In support of its Fee Motion, Brahma submitted the
20 Declaration of Richard L. Peel, Esq. and supporting documentation including invoicing and
21 time records relating to Peel Brimley LLP's work performed on Brahma's behalf in defending
22 the Underlying Motion. Brahma's motion addressed the factors identified in *Brunzell v.*
23 *Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969) that the District Court is
24 required to consider in reviewing any application for reasonable attorney's fees ("the *Brunzell*
25 *Factors*"). See *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d
26 730, 736 (2008).²

27 ² The *Brunzell* factors are:

- 28 1) The advocate's qualities, including ability, training, education, experience, professional standing, and skill;
- 2) The character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
- 3) The work performed, including the skill, time, and attention given to the work; and

1 TSE opposed the Fee Motion on multiple grounds and asserted that the fees requested
2 were excessive for work performed in response to a "single motion." [TSE Opposition p. 2].
3 Among other things, TSE contends that (i) PB's rates are higher than the "prevailing rate," (ii)
4 PB engaged in "block billing," and (iii) PB "overstaffed" the work on the Underlying Motion
5 and its invoices contain duplicative work or billings. On Reply, Brahma argued, among other
6 things, that (i) the Underlying Motion was an existential threat to Brahma's lien rights – its sole
7 source of security³ for the \$12,859,577.74 Brahma claims to be owed for its work on TSE's
8 Crescent Dunes Solar Energy Project (the "Project"),⁴ (ii) involved multiple complex issues,
9 and (iii) the work successfully performed by Brahma's attorneys was reasonable and necessary
10 under the circumstances.

11 Having received and reviewed the Fee Motion, TSE's Opposition, Brahma's Reply,
12 having heard and considered oral argument counsel at hearing on December 11, 2018, and
13 having considered the *Brunzell* Factors, the Court makes the following findings and
14 conclusions:

15 **III. FINDINGS.**

16 In general, and while the attorney hours expended and resulting amount sought by way of
17 the Fee Motion are substantial, the hour and amounts are reasonable and not excessive in light
18 of (i) the size and importance of Brahma's lien, (ii) the complex and varied issues presented to
19 the Court, (iii) the high quality counsel on both sides of the case, (iv) higher quality work
20 product than seen in ordinary cases and (v) the clients' reasonable expectations for superior
21 intellectual ability and work product on both sides. In addition, the Court is satisfied that the
22 rates charged by Brahma's counsel, including associate and partner rates, are reasonable and
23 justified.

24
25 4) The result—whether the attorney was successful and what benefits were derived.
See *Brunzell*, 85 Nev. at 349; *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. at 829.

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

27 ⁴ Underlying Nevada's public policy of securing payment to contractors by way of mechanics' liens is that
28 "contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time,
labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment."
Id.

As to the *Brunzell* Factors, the Court finds, without limitation, as follows:

1. Advocate's Qualities: Brahma's counsel are highly experienced, knowledgeable and competent, especially relating to the Nevada Mechanics' Lien Statute and construction law;
2. Character of the Work: Brahma's lien claim of nearly \$13 million is substantial and the Underlying Motion presented big stakes. In addition, the Court enjoyed the benefit of high-quality briefing and argument on atypical, challenging and varied subject matter;
3. The Work Performed: The Underlying Motion presented the Court with a lot to consider; and
4. The Result: The arguments presented by Brahma's attorneys were persuasive to the Court and the Court ruled in favor of Brahma on the Underlying Motion.

III. CONCLUSION.

Based on the foregoing, and having considered the *Brunzell* Factors, the Court concludes that the time expended and amounts incurred by Brahma's counsel in defending the Underlying Motion were reasonable and appropriate and, pursuant to NRS 108.2275(6)(c), Brahma is awarded reasonable attorneys fees and costs as follows:

1. As presented by way of the Declaration of Richard L. Peel, Esq., for fees and costs incurred in defending the Underlying Motion and submitting the Fee Motion the sum of \$78,417.34; and

2. As agreed by the parties by a separate Stipulation attached hereto as Exhibit A, for fees incurred in preparing Brahma's Reply to TSE's Opposition to the Fee Motion, for appearance of counsel at oral argument and preparation of this Order, the additional sum of \$10,000.00.

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///


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1
2 NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion For
3 Attorney's Fees And Costs Pursuant To NRS 108.2275(6)(c) is **GRANTED** and Brahma is
4 awarded the sum of \$88,417.34 which shall be due and payable by TSE within ten (10) days of
5 a notice of entry of this order being filed.

6 Dated this 31 day December 2018.

7
8 
9 Senior Judge Steven Elliott

10 Submitted by:
11 PEEL BRIMLEY LLP

12 
13 RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
14 ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
15 RONALD J. COX, ESQ. (NV Bar No. 12723)
16 3333 E. Serene Avenue, Suite 200
17 Henderson, Nevada 89074-6571
18 Attorneys for Brahma Group, Inc.
19
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RA000597

EXHIBIT A

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1 **ORDR**
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15 rcox@peelbrimley.com
16 Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

19 Plaintiff,

20 vs.

21 BRAHMA GROUP, INC., a Nevada corporation,

22 Defendant.

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

**STIPULATION REGARDING
AMOUNT OF ADDITIONAL FEES
AWARDED TO BRAHMA**

23 Defendant BRAHMA GROUP, INC. ("Brahma") and Plaintiff TONOPAH SOLAR
24 ENERGY, LLC ("TSE") by and through their respective counsel stipulate and agree as follows:

25 WHEREAS, on October 29, 2018, the Court entered an Order Denying Tonopah Solar
26 Energy, LLC's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien ("Underlying
27 Order");

28 WHEREAS, Brahma thereafter filed a Motion for Order Granting Fees and Costs
Pursuant to NRS 108.2275(6)(c) ("Fee Motion");

WHEREAS, at a hearing on December 11, 2018 the Court orally ruled that Brahma was
entitled to an award of fees and costs of \$78,417.34 plus additional fees incurred for appearance
of counsel at oral argument and preparation of the Order ("Additional Fees") and directed
counsel for Brahma to submit a declaration in support of such Additional Fees; and

WHEREAS, the Parties have stipulated and agreed that the amount of the Additional

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1 Fees shall be \$10,000.00 (Ten Thousand U.S. Dollars);

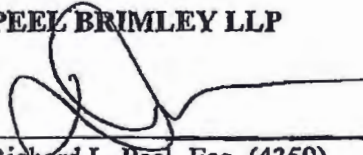
2 Now therefore,

3 **IT IS STIPULATED AND AGREED** that Brahma shall be awarded additional fees
4 incurred for appearance of counsel at oral argument and preparation of the Order Granting
5 Motion for Fees and Costs Pursuant to NRS 108.2275(6)(c) in the amount of \$10,000.00 (Ten
6 Thousand U.S. Dollars) such that the total amount of fees and costs awarded to Brahma is and
7 shall be a total of \$88,417.34 (Eighty Eight Thousand Four Hundred Seventeen U.S. Dollars and
8 Thirty-Four Cents).

9 This stipulation is to the amount of additional fees in light of the court's ruling on
10 entitlement. TSE reserves its right to appeal the decision on expungment and entitlement to fees.

11 IT IS SO STIPULATED this 27th day of December, 2018.

12
13 **PEEL BRIMLEY LLP**

14 
15 _____
16 Richard L. Peel, Esq. (4359)
17 Eric B. Zimbelman, Esq. (9407)
18 Cary B. Domina, Esq. (10567)
19 3333 E. Serene Avenue, Suite 200
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23 ezimbelman@peelbrimley.com
24 cdomina@peelbrimley.com
25 *Attorneys for Defendant Brahma Group,*
26 *Inc.*

**WEINBERG, WHEELER, HUDGINS,
GUNN & DIAP, LLC**

14 
15 _____
16 D. Lee Roberts, Jr., Esq. (8877)
17 Colby L. Balkenbush, Esq. (13066)
18 Ryan T. Gormley, Esq. (13494)
19 6385 S. Rainbow Blvd., Suite 400
20 Las Vegas, NV 89118
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23 cbalkenbush@wwhgd.com
24 rgormley@wwhgd.com
25 *Attorneys for Plaintiff Tonopah Solar Energy,*
26 *LLC*

EXHIBIT E

RA000601

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1 RICHARD L. PEEL, ESQ.
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2 ERIC B. ZIMBELMAN, ESQ.
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3 CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
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9 ezimbelman@peelbrimley.com
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10 rcox@peelbrimley.com
11 *Attorneys for Brahma Group, Inc.*

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

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

18 vs.

19 COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
20 ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES I through X; DOES I
21 through X; ROE CORPORATIONS I through X,
22 inclusive,

23 Defendants,
24
25
26
27
28

CASE NO. : CV39799
DEPT. NO. : 1

**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.**

**[Arbitration Exemption: Amount in
Controversy in Excess of \$50,000]**

FILE
2019 JAN 11 P 1:14
NYE COUNTY CLERK
BY
DEPUTY

1 This First Amended Complaint for (Among Other Things) (i) Foreclosure of Notice of Lien
2 Against Surety Bond, and (ii) Breach of Settlement Agreement ("Amended Complaint"), amends
3 that certain Mechanic's Lien Foreclosure Complaint Against Surety Bond ("Original Complaint")
4 filed with the Court on December 14, 2018 in this action (the "Action"), by Plaintiff, BRAHMA
5 GROUP, INC. ("Brahma").

6 By way of this Amended Complaint against the above-named Defendants, Brahma, by and
7 through its attorneys of record, the law firm of PEEL BRIMLEY LLP, complains, avers, and alleges
8 as follows:

9 THE PARTIES

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

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

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

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

20 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
21 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
22 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
23 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
24 06 (the "Liberty Parcel").²

25
26
27 ¹ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of
the BLM Parcels by way of this Action.

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

1 4. TONOPAH SOLAR ENERGY, LLC ("TSE")³ is and was at all times relevant to
2 this Action:

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

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

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

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

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

14 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
15 Parcels.⁴

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

20 6. Brahma is informed, believes and therefore alleges that Defendant AMERICAN
21 HOME ASSURANCE COMPANY ("AHAC"):

22 a. Is and was at all times relevant to this Action a company duly licensed and
23 qualified to issue surety bonds and do business in Nevada;

24 b. Issued Bond No. 854481 ("Surety Bond") pursuant to NRS 108.2413 as
25 discussed more fully below; and

26 c. Issued a Surety Rider to the Surety Bond as discussed more fully below.

27 ³ While TSE is not a party to this Case, it is a party to Case No. CV 39348 in the Fifth Judicial District Court of Nye
County, which Case Brahma will seek to consolidate this Action into.

28 ⁴ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels
and the Liberty Parcels.

1 7. Brahma is informed, believes and therefore alleges that Defendant COBRA
2 THERMOSOLAR PLANTS, INC. ("Cobra"):

- 3 a. Is and was at all times relevant to this Action a Nevada corporation;
4 b. Is the principal on the Surety Bond and the Rider; and
5 c. Is a party to a negotiated settlement between Cobra and Brahma for the
6 payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra
7 Work") at the Project.

8 8. Brahma does not know the true names of the individuals, corporations, partnerships
9 and entities identified and named as Defendants by the fictitious names of (collectively, the “Doe
10 Defendants”), (i) BOE BONDING COMPANIES I through X, (ii) DOES I through X, and (iii)
11 ROE CORPORATIONS I through X. Brahma alleges that such Doe Defendants may be liable to
12 Brahma for damages arising from the construction of the Work of Improvement, as more fully
13 discussed under the claims for relief set forth below. Brahma will request leave of this Honorable
14 Court to amend this Amended Complaint to show the true names and capacities of each such
15 fictitious Doe Defendants when Brahma discovers such information.

9. Cobra, AHAC and the Doe Defendants, are sometimes referred to in the First Cause of Action of this Amended Complaint (below), (i) individually, as a “Defendant,” and (ii) collectively, as the “Defendants”.

19 10. Cobra and the Does Defendants, are sometimes referred to in the Second through
20 Fourth Causes of Action (below), (i) individually, as a “Defendant,” and (ii) collectively, as the
21 “Defendants”.

22 FIRST CAUSE OF ACTION
23 (Claim Against Surety, Surety Bond and Principal thereon)

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

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

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

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

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

7 15. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official
8 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
9 \$6,982,186.24.

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

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

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

21 19. On or about September 14, 2018 (as allowed by NRS 108.229(1)) Brahma recorded
22 a Fourth Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada,
23 as Document 899351 in the amount of \$12,859,577.74 (the "Fourth Amended Lien").

24 20. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
25 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, referred to herein as the "Lien,"
26 were:

- 27 a. in writing;
28 b. recorded against the Work of Improvement; and

1 c. given or served on the authorized agents of the BLM and TSE, or the BLM
2 and/or TSE knew of the existence of the Lien.

3 21. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
4 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
5 (\$12,859,577.74 — “Lienable Amount”).

6 22. The Lienable Amount is due and owing Brahma as of the date of this Amended
7 Complaint.

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

11 24. On or about October 9, 2018, Cobra (as principal) and AHAC (as surety) caused a
12 Surety Rider (“Rider”) to be recorded in the Official Records of Nye County, Nevada as Document
13 No. 900303.

14 25. The Rider increased the penal sum of the Surety Bond to \$19,289,300.61.

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

17 27. Brahma makes claim against the Defendants and AHAC is obligated to Brahma for
18 the Lienable Amount plus interest, costs, and attorney’s fees up to the penal sum of the Surety
19 Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

20 **SECOND CAUSE OF ACTION**

21 **(Breach of Settlement Agreement Against Cobra)**

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

24 29. Prior to the commencement of the Work of Improvement, Brahma previously
25 contracted directly with Cobra to perform the Cobra Work at the Project.

26 30. Brahma performed the Cobra Work and a dispute over payment arose between
27 Brahma and Cobra (the “Cobra Dispute”).
28

1 31. Brahma and Cobra (i) negotiated a resolution of the Cobra Dispute, and (ii) agreed
2 to certain terms, which terms were memorialized in writing ("Settlement Agreement").

3 32. Pursuant to the Settlement Agreement, Cobra was to make (i) a first payment to
4 Brahma in the amount of \$2,881,397.67 ("First Payment") upon Brahma providing certain
5 documentation/information concerning the Cobra Work (the "Documentation"), and (ii) a second
6 payment to Brahma in the amount of \$412,224.62 ("Second Payment") upon Brahma providing
7 additional documentation/information ("Additional Documentation").

8 33. Brahma provided the Documentation and Cobra paid Brahma the First Payment.

9 34. Brahma tendered and/or provided Cobra the Additional Documentation to receive
10 the Second Payment, but Cobra has failed to pay Brahma the Second Payment.

11 35. Brahma has tendered and/or performed its duties and obligations as required by the
12 Settlement Agreement.

13 36. The Defendants have breached the Settlement Agreement by failing to tender
14 payment of the Second Payment to Brahma, which Second Payment is due and owing.

15 37. Brahma has been required to engage the services of an attorney to collect the
16 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
17 interest therefore.

18 **THIRD CAUSE OF ACTION**

19 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against Cobra)**

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

22 39. There is a covenant of good faith and fair dealing implied in every agreement,
23 including the Settlement Agreement.

24 40. The Defendants breached their duty to act in good faith by performing the
25 Settlement Agreement in a manner that was unfaithful to the purpose of the Settlement Agreement,
26 thereby denying Brahma's justified expectations.

1 41. Due to the actions of the Defendants, Brahma suffered damages in an amount more
2 than the Second Payment, for which Brahma is entitled to judgment in an amount to be determined
3 at trial.

4 42. Brahma has been required to engage the services of an attorney to collect the
5 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
6 interest therefore.

7 **FOURTH CAUSE OF ACTION**
8 **(Unjust Enrichment Against Cobra)**

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

11 44. This cause of action is being pled in the alternative.

12 45. Brahma tendered and/or provided the Additional Documentation for the benefit
13 and/or at the specific instance and request of the Defendants.

14 46. The Defendants accepted, used, and enjoyed the benefit of the Additional
15 Documentation.

16 47. Brahma has demanded payment of the Second Payment.

17 48. To Date, the Defendants have failed, neglected, and/or refused to pay the Second
18 Payment.

19 49. The Defendants have been unjustly enriched, to the detriment of Brahma.

20 50. Brahma has been required to engage the services of an attorney to collect the
21 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
22 interest therefore.

23 **WHEREFORE**, with respect to the First Cause of Action, Brahma prays that this
24 Honorable Court:

25 1. Enters judgment against the Defendants, and each of them, jointly and severally in
26 the Lienable Amount;

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1 2. Enters a judgment against the Defendants and each of them, jointly and severally,
2 for Brahma's reasonable costs and attorney's fees incurred in the collection of the Liable
3 Amount, as well as an award of interest thereon;

4 3. Enters judgment against AHAC up to the penal sum of the Surety Bond and Rider;
5 and

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

8 **WHEREFORE**, with respect to the Second through Fourth Causes of Action, Brahma
9 prays that this Honorable Court:

10 1. Enters judgment against the Defendants and each of them, jointly and severally, in
11 the amount of the Second Payment, plus Brahma's reasonable costs and attorney's fees incurred
12 in the collection of the Second Payment; and

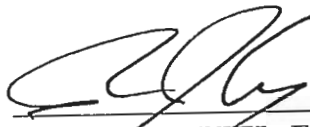
13 2. For such other and further relief as this Honorable Court deems just and proper in
14 the premises.

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

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

18 Dated this 11th day of January 2019.

19 **PEEL BRIMLEY LLP**

20
21 
22 RICHARD L. PEEL, ESQ.
23 Nevada Bar No. 4359
24 ERIC ZIMBELMAN, ESQ.
25 Nevada Bar No. 9407
26 CARY B. DOMINA, ESQ.
27 Nevada Bar No. 10567
28 RONALD J. COX, ESQ.
 Nevada Bar No. 12723
 3333 E. Serene Avenue, Suite 200
 Henderson, Nevada 89074-6571
 Attorneys for Brahma Group, Inc.

JAN 28 2019

Nye County Clerk

Deputy
Veronica Aguilar

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3 Nevada Bar No. 4359
4 ERIC B. ZIMBELMAN, ESQ.
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17 cdomina@peelbrimley.com
18 rcox@peelbrimley.com
19 *Attorneys for Brahma Group, Inc.*

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

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.

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

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**

21 AND ALL RELATED CROSS-ACTIONS.

22 ///

23 ///

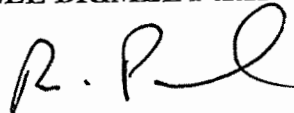
24 ///

1 NOTICE OF ENTRY OF ORDER

2 PLEASE TAKE NOTICE that an ORDER (I) DENYING TONOPAH SOLAR ENERGY,
3 LLC'S MOTION TO STRIKE AND DISMISS; AND (II) GRANTING IN PART
4 TONOPAH SOLAR ENERGY, LLC'S MOTION FOR STAY and (III) GRANTING
5 BRAHMA GROUP, INC'S MOTION TO AMEND was filed on January 24, 2019, a copy of
6 which is attached as Exhibit 1.

7 Dated this 25th day of January, 2019.

8 PEEL BRIMLEY LLP

9 

10 RICHARD L. PEEL, ESQ. (4359)
11 ERIC B. ZIMBELMAN, ESQ. (9407)
12 CARY B. DOMINA, ESQ. (10567)
13 RONALD J. COX, ESQ. (12723)
14 3333 E. Serene Avenue, Suite 200
15 Henderson, Nevada 89074-6571
16 Attorneys for Brahma Group, Inc.

17
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28
PEEL BRIMLEY LLP
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(702) 990-7272 ♦ FAX (702) 990-7273

1 **CERTIFICATE OF SERVICE**

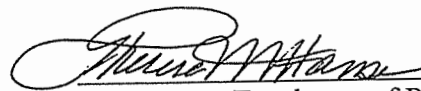
2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP
3 and that on this 25th day of January, 2019, I caused the above and foregoing document entitled
4 **NOTICE OF ENTRY OF ORDER** to be served as follows:

- 5 ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
7 ☐ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing
8 system;
9 ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
10 ☐ to be hand-delivered; and/or
11 ☒ other: Electronic Service (E-mail)

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

14
15 D. Lee Roberts, Jr., Esq.
16 Colby L. Balkenbush, Esq.
17 WEINBERG, WHEELER, HUDGINS
18 GUNN & DIAL, LLC
19 6385 S. Rainbow Blvd., Suite 400
20 Las Vegas, NV 89118
21 lroberts@wwhgd.com
22 cbalkenbush@wwhgd.com
23 *Attorneys for Tonopah Solar Energy, LLC*

Geoffrey Crisp, Esq.
WEIL & DRAGE
2500 Anthem Village Drive
Henderson, NV 89052
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*Attorneys for Cobra Thermosolar
Plants, Inc.*

24
25
26
27
28


An Employee of Peel Brimley LLP

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EXHIBIT 1

ORIGINAL

1 **ORDR**

2 RICHARD L. PEEL, ESQ.

3 Nevada Bar No. 4359

4 ERIC B. ZIMBELMAN, ESQ.

5 Nevada Bar No. 9407

6 CARY B. DOMINA, ESQ.

7 Nevada Bar No. 10567

8 RONALD J. COX, ESQ.

9 Nevada Bar No. 12723

10 **PEEL BRIMLEY LLP**

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15 rpeel@peelbrimley.com

16 ezimbelman@peelbrimley.com

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18 rcox@peelbrimley.com

19 *Attorneys for Brahma Group, Inc.*

FILED

2019 JAN 24 A 10:37

NYE COUNTY CLERK

BY Bennett
DEPUTY

21 **FIFTH JUDICIAL DISTRICT COURT**

22 **NYE COUNTY, NEVADA**

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

25 Plaintiff,

26 vs.

27 BRAHMA GROUP, INC., a Nevada corporation,

28 Defendant.

CASE NO. : CV 39348

DEPT. NO. : 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

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Counterclaimant/Lien Claimant,

3 vs.

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

8 Counter-Defendant,

9 BRAHMA GROUP, INC., a Nevada corporation,

10 Third-Party Plaintiff,

11 vs.

12 COBRA THERMOSOLAR PLANTS, INC., a
13 Nevada corporation; AMERICAN HOME
14 ASSURANCE COMPANY, a surety; BOE
15 BONDING COMPANIES I through X; DOES I
16 through X; ROE CORPORATIONS I through X,
inclusive,

17 Third-Party Defendants.

18 **ORDER**

19 These matters came on for hearing December 11, 2018 (the "Hearing") before the
20 Honorable Senior Judge Steven Elliott on the Motion to Strike, Motion to Dismiss and Motion
21 for Stay ("Motion to Strike") filed by Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE")
22 and Motion to Amend filed by Defendant, Brahma Group, Inc. ("Brahma"). D. Lee Roberts,
23 Esq., and Ryan Gormley, Esq. of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
24 appeared on behalf of TSE. Richard Peel, Esq., Eric B. Zimbelman, Esq. and Cary Domina, Esq.
25 of PEEL BRIMLEY LLP appeared on behalf of Brahma.

26 The Court having considered all the pleadings and papers on file, and having heard
27 argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
28 bench on December 11, 2018:

RA000616

1 The Court finds that Brahma's Amended Counter-Complaint does not violate NRCP 7(a)
2 because it (i) acts as a standalone complaint, (ii) was served on TSE, and (iii) provides adequate
3 notice of the claims that are at issue between Brahma and TSE. While incorrectly styled as a
4 "Counter-Complaint," the Court finds that it is really a "Complaint" and complies with NRCP
5 7(a) as it "puts the matters asserted therein at issue." In fact, the initial pleading Brahma filed in
6 this Action was identified as a "Mechanic's Lien Foreclosure Complaint" and was not called an
7 Amended Counter-Complaint until Brahma amended the initial Complaint.

8 The Court further finds that there was nothing improper with Brahma filing its Counter-
9 Complaint in the same Case TSE commenced when it filed its Motion to Expunge Brahma's
10 Lien. First, NRS 108.2275(5) establishes the Nevada Legislature's intent to combine mechanic's
11 lien foreclosure actions with motions to expunge liens. ~~Had Brahma filed a standalone complaint~~
12 ~~as an independent action and then moved the Court to consolidate that action with Case No. CV-~~
13 ~~39348 as TSE suggests, the Parties would be in the same position they currently find themselves~~
14 ~~in. Also,~~ ^{SPE} at the time Brahma filed its Amended Counter-Complaint in this Action, the Court had
15 not yet ruled on Brahma's Motion for Attorney's Fees and Costs under NRS 108.2275, so that
16 Case was still open.

17 The Court further finds that the following three Causes of Action asserted by Brahma
18 against TSE are stayed: (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith
19 and Fair Dealing; and (iii) Violations of NRS 624 until such time as the federal court rules on
20 Brahma's and TSE's pending motions filed in the federal action. With respect to all remaining
21 causes of action (as may be further amended), nothing herein is intended to be a stay of such
22 claims and causes of action and Brahma is entitled to proceed with the prosecution of such
23 claims.

24 Finally, the Court finds that Brahma shall be permitted to amend its Amended Counter-
25 Complaint to (i) withdraw the mechanic's lien foreclosure action against TSE's Work of
26 Improvement; (ii) identify the Rider to the Bond (as defined in the Parties' Briefing); and (iii)
27 increase its mechanic's lien foreclosure action against the Bond and Rider to \$19,289,366. The
28 three stayed Causes of Action shall be included in the Second Amended Complaint but shall

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1 remain stayed as set forth above.

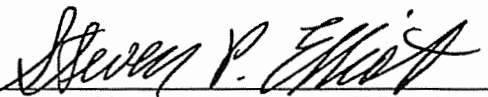
2 **THEREFORE, IT IS HEREBY ORDERED** that TSE's Motion to Strike Brahma's
3 Amended Counter-Compliant is DENIED;

4 **IT IS FURTHER ORDERED** that TSE's Motion to Dismiss Brahma's Amended
5 Counter-Complaint is DENIED; and

6 **IT IS FURTHER ORDERED** that TSE's Motion for Stay is DENIED in part and
7 GRANTED in part. The Motion for Stay is granted only as to the following three Causes of
8 Action which TSE initially removed to federal court: (i) Breach of Contract; (ii) Breach of
9 Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624. These three
10 Causes of Action shall be stayed until such time as the Federal Court rules on whether this Court
11 has proper jurisdiction over these claims. Brahma may prosecute its remaining claims and causes
12 of action as amended. TSE's Motion for Stay is DENIED as to all other claims.

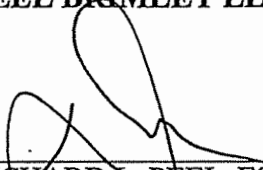
13 **IT IS FURTHER ORDERED** that Brahma shall be permitted to amend its Amended
14 Counter-Complaint.

15 Dated this 24 day of January, 2019.

16 

17 SENIOR JUDGE STEVEN ELLIOTT

18
19
20 Respectfully submitted by:
21 **PEEL BRIMLEY LLP**

22 
23 **RICHARD L. PEEL, ESQ. (4359)**
24 **ERIC B. ZIMBELMAN, ESQ. (9407)**
25 **CARY B. DOMINA, ESQ. (10567)**
26 **RONALD J. COX, ESQ. (12723)**
27 3333 E. Serene Avenue, Suite 200
28 Henderson, Nevada 89074-6571
Attorneys for Brahma Group, Inc.

Approved as to form and Content
WEINBERG, WHEELER, HUDGINS,
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6 gcrisp@weildrage.com
jkilber@weildrage.com
7 Attorneys for Defendants,
8 COBRA THERMOSOLAR PLANTS, INC. and
AMERICAN HOME ASSURANCE COMPANY

9
10 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF NYE**

| | | | |
|----|---|---|--|
| 11 | TONOPAH SOLOR ENERGY, LLC, a |) | Case No.: CV39348 |
| 12 | Delaware limited liability company, |) | <i>Consolidated With</i> |
| | |) | Case No.: CV39799 |
| 13 | Plaintiff, |) | Dept. No.: 2 |
| 14 | vs. |) | |
| 15 | BRAHMA GROUP, INC., a Nevada |) | DEFENDANTS COBRA THERMOSOLAR |
| | corporation, |) | PLANTS, INC.'S AND AMERICAN HOME |
| 16 | |) | ASSURANCE COMPANY'S MOTION TO |
| | Defendant. |) | DISMISS PLAINTIFF BRAHMA GROUP, |
| 17 | |) | INC.'S FIRST AMENDED COMPLAINT IN |
| | |) | CASE NO. CV39799 |
| 18 | BRAHMA GROUP, INC., a Nevada |) | |
| | corporation, |) | [ORAL ARGUMENT REQUESTED] |
| 19 | |) | |
| | Counter-claimant, |) | |
| 20 | vs. |) | |
| 21 | TONOPAH SOLOR ENERGY, LLC, a |) | |
| 22 | Delaware limited liability company; BOE |) | |
| 23 | BONDING COMPANIES I through X; |) | |
| 24 | DOES I through X; ROE CORPORATIONS |) | |
| | I through X; and TOE TENANTS I through |) | |
| | X, inclusive, |) | |
| 25 | |) | Date of Hearing: _____ |
| | Counter-defendants. |) | |
| 26 | |) | Time of Hearing: _____ |
| 27 | BRAHMA GROUP, INC., a Nevada |) | |
| | corporation, |) | |
| 28 | |) | |
| | Third-Party Plaintiff, |) | |

1 vs.)
2)
3 COBRA THERMOSOLAR PLANTS, INC.,)
4 a Nevada corporation; AMERICAN HOME)
5 ASSURANCE COMPANY, a surety; BOE)
6 BONDING COMPANIES I through X;)
7 DOES I through X; ROE CORPORATIONS)
8 I through X, inclusive,)
9)
10 Third-Party Defendants.)
11)
12 H&E EQUIPMENT SERVICES, INC, a)
13 Delaware corporation,)
14)
15 Plaintiff-In-Intervention,)
16 vs.)
17)
18 BRAHMA GROUP, INC, a Nevada)
19 corporation, TONOPAH SOLAR ENERGY)
20 LLC, a Delaware limited liability company,)
21 COBRA THERMOSOLAR PLANTS, INC, a)
22 Nevada corporation; AMERICAN HOME)
23 ASSURANCE COMPANY, a surety; BOE)
24 BONDING COMPANIES I through X;)
25 DOES I through X; ROE CORPORATIONS)
26 I through X, and TOE TENANTS I through)
27 X, inclusive,)
28)
29 Defendants-In-Intervention.)
30)
31)
32 BRAHMA GROUP, INC., a Nevada)
33 corporation,)
34)
35 Plaintiff,)
36 vs.)
37)
38 COBRA THERMOSOLAR PLANTS, INC.,)
39 a Nevada corporation; AMERICAN HOME)
40 ASSURANCE COMPANY, a surety; BOE)
41 BONDING COMPANIES I through X;)
42 DOES I through X; ROE CORPORATIONS)
43 I through X, inclusive,)
44)
45 Defendants.)
46)
47)
48)

1 DEFENDANTS COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME
2 ASSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFF BRAHMA GROUP,
3 INC.'S FIRST AMENDED COMPLAINT IN CASE NO. CV39799

4 COME NOW Defendants COBRA THERMOSOLAR PLANTS, INC. (hereinafter,
5 "Cobra") and AMERICAN HOME ASSURANCE COMPANY (hereinafter, "AHAC")
6 (collectively, "Defendants"), by and through their attorneys of record, the law firm of WEIL &
7 DRAGE, APC, and hereby file their Motion to Dismiss Plaintiff BRAHMA GROUP, INC.'s
8 (hereinafter, "BGI") First Amended Complaint filed in Case No. CV39799.

9 This Motion is based on the Memorandum of Points and Authorities submitted herein, all
10 pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this
11 Honorable Court will entertain.

12 DATED this 21st day of February, 2019.

13 WEIL & DRAGE, APC

14 
15

16 GEOFFREY CRISP, ESQ.

17 Nevada Bar No. 2104

18 JEREMY R. KILBER, ESQ.

19 Nevada Bar No. 10643

20 2500 Anthem Village Drive

21 Henderson, NV 89052

22 Attorneys for Defendants,

23 COBRA THERMOSOLAR PLANTS, INC. and

24 AMERICAN HOME ASSURANCE COMPANY


NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing **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. CV39799** will be heard before the above-entitled Court located at 1520 E. Basin Avenue, Pahrump, Nevada 89060, in Department 2, on the _____ day of _____, 2019, at _____ a.m./p.m., or as soon thereafter as counsel may be heard.

Oral argument is requested.

DATED this 21st day of February, 2019.

WEIL & DRAGE, APC



GEOFFREY CRISP, ESQ.
Nevada Bar No. 2104
JEREMY R. KILBER, ESQ.
Nevada Bar No. 10643
2500 Anthem Village Drive
Henderson, NV 89052
Attorneys for Defendants,
COBRA THERMOSOLAR PLANTS, INC. and
AMERICAN HOME ASSURANCE COMPANY

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 PROCEDURAL HISTORY / RELEVANT FACTS

4 BGI is asserting duplicative and improper claims against Cobra and AHAC. As the Court
5 is aware, on or about September 25, 2018, BGI filed a Third-Party Complaint in Case No.
6 CV39348 asserting a single cause of action against Cobra and AHAC for “Claim Against Surety,
7 Surety Bond and Principal thereon.”¹ Nevertheless, on January 11, 2019, BGI filed a new separate
8 action, Case No. CV39799 against Cobra and AHAC asserting, *inter alia*, its “Claim Against
9 Surety, Surety Bond and Principal thereon.”² The Claim Against Surety, Surety Bond and
10 Principal thereon in Case Nos. CV39348 and CV39799 are identical.

11 On or about January 24, 2019, the Court consolidated cases CV39348 and CV39799.
12 However, the Court did not expressly hold the cases are to be merged into a single action.
13 Consequently, BGI is presently maintaining the exact same “Claim Against Surety, Surety Bond
14 and Principal thereon” in two separate actions, against the same parties in each action. While the
15 two actions do differ with respect to other claims asserted, there is an improper, redundant claim in
16 the two actions.

17 II.

18 SUMMARY OF LEGAL ARGUMENT

19 Defendants seek dismissal of BGI’s duplicative claim in Case No. CV39799, as well as
20 dismissal of BGI’s improper claim for unjust enrichment in Case No. CV39799. Nevada case law
21 precedence establishes duplicative claims are inappropriate. Further, inasmuch as BGI alleges a
22 contract exists between BGI and Cobra (specifically, a Settlement Agreement), an independent
23 claim for unjust enrichment against Cobra is not appropriate. Consequently, Defendants
24 respectfully request the Court dismiss BGI’s duplicative “Claim Against Surety, Surety Bond and
25

26
27 ¹ BGI’s First Amended Counter-Complaint; and Third-Party Complaint in Case No. CV39348 is attached
hereto as *Exhibit 1*.

28 ² BGI’s First Amended Complaint in Case No. CV39799 is attached hereto as *Exhibit 2*.

Principal thereon” and dismiss BGI’s Fourth Cause of Action for Unjust Enrichment against Cobra in Case No. CV39799.

III.

LEGAL STANDARD

NRCP 12(b) authorizes the dismissal of a lawsuit when it fails to state a claim upon which relief may be granted. When, after construing the pleading liberally and drawing every fair intendment in favor of the plaintiff, no claim has been stated, dismissal is proper.³ Rule 12(b)(5) of the NRCP authorizes dismissal of a Complaint when the Complaint fails to state a claim upon which relief can be granted. A Motion to Dismiss is properly granted where the allegations in the challenged pleading, taken at “face value” and construed favorably in the Plaintiff’s behalf, fail to state a cognizable claim for relief.⁴

NRCP 12(f) also authorizes the Court to strike redundant claims, stating “Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court’s own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”

IV.

LEGAL ARGUMENT

A. THE COURT SHOULD STRIKE BGI’S REDUNDANT CLAIM AGAINST SURETY, SURETY BOND AND PRINCIPAL THEREON IN CASE NO. CV39799

In *Smith v. Hutchins* the Nevada Supreme Court found “a single cause of action may not be split and separate actions maintained. The wrongful act of the defendant creates the plaintiff’s cause of action. Policy demands that all forms of injury or damage sustained by the plaintiff as a

³ *Brown v. Kellar*, 97 Nev. 582, 583, 636 P.2d 874, 874 (Nev. 1981).

⁴ *See, Morris v. Bank of America Nevada*, 110 Nev. 1274, 886 P.2d 454, 456 (1994).

1 consequence of the defendant's wrongful act be recovered in one action rather than in multiple
2 actions."⁵ Indeed, the *Smith* Court stated "[t]he great weight of authority supports the single cause
3 of action rule when the plaintiff in each case is the same person."⁶

4 In *Matter of Estate of Sarge*, the Nevada Supreme Court found "[c]onsolidated cases retain
5 their separate identities so that an order resolving all of the claims in one of the consolidated cases
6 is immediately appealable as a final judgment under NRAP 3A(b)(1)."⁷ Additionally, the *Sarge*
7 Court noted, "the federal courts consistently held that consolidation for the purpose of joint trial
8 does not merge the cases into a single cause of action."⁸

9 Here, BGI seeks to assert the exact same claim in *two* separate actions. BGI's "Claim
10 Against Surety, Surety Bond and Principal thereon" asserted in each case are identical. While the
11 cases have been consolidated, pursuant to Nevada case law precedence each action maintains its
12 separate identity. In fact, BGI's counsel is requiring Defendants to separately respond to *both* the
13 First Amended Complaint in Case No. CV39799, as well as the Amended (but not yet filed) Third-
14 Party Complaint in Case No. CV39348.⁹ BGI cannot maintain the exact same cause of action
15 against the exact same defendants in two separate actions. See *Smith, supra*. Therefore,
16 Defendants respectfully request the Court uphold *Smith* and dismiss the duplicative "Claim
17 Against Surety, Surety Bond and Principal thereon" in Case No. CV39799.

18 **B. BGI'S CLAIM OF UNJUST ENRICHMENT IS IMPROPER AND SHOULD BE**
19 **DISMISSED**

20 In *Leasepartners Corp. v. Brooks*, the Nevada Supreme Court held "[a]n action based on a
21 theory of unjust enrichment is not available when there is an express, written contract, because no
22 agreement can be implied when there is an express agreement. 'The doctrine of unjust enrichment

23 ⁵ *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977). Citing *Reno Club v. Harrah et al.*, 70
24 Nev. 125, 260 P.2d 304 (1953).

25 ⁶ *Id.*

26 ⁷ *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018).

27 ⁸ *Id.* Citing, *Mikulich v. Carner*, 68 Nev. 161, 169-70, 228 P.2d 257,261 (1951).

28 ⁹ See email correspondence between BGI's counsel and Defendants' counsel dated February 13, 2019, attached
hereto as *Exhibit 3*.

1 or recovery in quasi contract applies to situations where there is no legal contract but where the
2 person sought to be charged is in possession of money or property which in good conscience and
3 justice he should not retain but should deliver to another [or should pay for].”¹⁰

4 In *May v. Anderson*, the Nevada Supreme Court found that “[b]ecause a settlement
5 agreement is a contract, its construction and enforcement are governed by principles of contract
6 law.”¹¹

7 Here, BGI’s cause of action for Unjust Enrichment in Case No. CV39799 is not proper.
8 The First Amended Complaint expressly states, BGI contracted with Cobra, that a dispute arose as
9 a result of the contract, the dispute was resolved through settlement, a separate Settlement
10 Agreement was executed, BGI allegedly performed under the terms of the Settlement Agreement,
11 Cobra allegedly did not perform under the terms of the Settlement Agreement, and a new dispute
12 now arises under the terms of the Settlement Agreement.¹² Despite the existence of the Settlement
13 Agreement, BGI now seeks to recover damages against Cobra under a theory of unjust enrichment.

14 Pursuant to *May*, the Settlement Agreement must be treated as a contract. As BGI is
15 asserting contract, *Leasepartners* renders BGI’s unjust enrichment claim improper. Therefore,
16 Cobra respectfully requests the Court dismiss BGI’s Fourth Cause of Action for Unjust
17 Enrichment against Cobra.

18 V.

19 CONCLUSION

20 BGI seeks to improperly assert redundant claims against Defendants in two cases. While
21 the cases are consolidated, each case maintains its own identity. As Nevada case law precedence
22 does not allow BGI to maintain duplicative claims, Defendants Cobra and AHAC respectfully
23

24
25 ¹⁰ *Leasepartners Corp. v. Robert L. Brooks Tr. Dated November 12, 1975*, 113 Nev. 747, 755–56, 942 P.2d
26 182, 187 (1997). Internal citations omitted. Citing, 66 Am.Jur.2d *Restitution* § 11 (1973); see *Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) (“To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles.”).

27 ¹¹ *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Citing, *Reichelt v. Urban Inv. & Dev. Co.*, 611 F.Supp. 952, 954 (N.D.Ill.1985).


28 ¹² See *Exhibit 2*, page 6, line 21 through page 7, line 17.

1 request the Court dismiss BGI's "Claim Against Surety, Surety Bond and Principal thereon" in
2 Case No. CV39799. Additionally, BGI seeks to assert a claim for unjust enrichment against
3 Cobra, despite alleging the existence of a contract between BGI and Cobra. As Nevada case law
4 does not allow recovery under an unjust enrichment claim when a contract exists, Cobra
5 respectfully requests the Court dismiss BGI's Fourth Cause of Action for Unjust Enrichment
6 against Cobra.

7 *The undersigned does hereby affirm, pursuant to NRS 239B.030, that this document does*
8 *not contain personal information as defined in NRS 603A.040 about any person.*

9 DATED this 21st day of February, 2019.

10 WEIL & DRAGE, APC

11
12 
13 GEOFFREY CRISP, ESQ.
14 Nevada Bar No. 2104
15 JEREMY R. KILBER, ESQ.
16 Nevada Bar No. 10643
17 2500 Anthem Village Drive
18 Henderson, NV 89052
19 Attorneys for Defendants,
20 COBRA THERMOSOLAR PLANTS, INC. and
21 AMERICAN HOME ASSURANCE COMPANY
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 21st day of February, 2019, service of the foregoing **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. CV39799** was made this date by mailing a true and correct copy of the same, via first-class mail, at Henderson, Nevada, addressed to the following:

D. Lee Roberts, Jr., Esq.
Colby Balkenbush, Esq.
WEINBERG, WHEELER, HUDGINS, GUNN
& DIAL, LLC
6385 South Rainbow Boulevard, Suite 400
Las Vegas, NV 89118
Attorneys for TONOPAH SOLAR ENERGY,
LLC

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Attorneys for BRAHMA GROUP, INC.

Richard E. Haskin, Esq.
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Attorneys for Plaintiff-In-Intervention,
H&E EQUIPMENT SERVICES, INC.

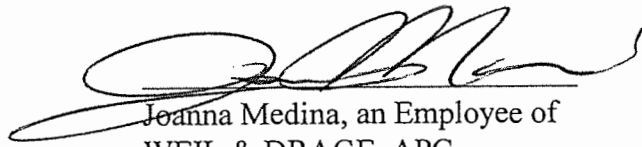

Joanna Medina, an Employee of
WEIL & DRAGE, APC

Exhibit 1

Exhibit 1

FILED
FIFTH JUDICIAL DISTRICT

SEP 25 2010

Terri Pemberton, Clerk
Deputy

1 RICHARD L. PEEL, Esq.
Nevada Bar No. 4359
2 ERIC B. ZIMBELMAN, ESQ.
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9 *Attorneys for Brahma Group, Inc.*

10
11 FIFTH JUDICIAL DISTRICT COURT
12 NYE COUNTY, NEVADA

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.

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

21 Counterclaimant/Lien Claimant,

22 vs.

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

28 Counterdefendant,

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

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

[Arbitration Exemption: Action
Concerning Title to Real Estate]

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

8 Third-Party Defendants.
9

10
11 FIRST AMENDED COUNTER-COMPLAINT

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

18 THE PARTIES

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

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

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

24 ///

25 ///

26 ///

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

6 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
7 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
8 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
9 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
10 06 (the "Liberty Parcel").²

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 9. On or about February 1, 2017, BGI entered a Services Agreement (the
22 "Agreement") with TSE, wherein BGI agreed to provide a portion of the work, materials and/or
23 equipment (the "Work") for or relating to Work of Improvement.

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

///

///

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

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

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

- 8 a. Failing and/or refusing to pay monies owed to BGI for the Work; and
9 b. Otherwise failing and/or refusing to comply with the Agreement and
10 Nevada law.

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

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

17 **SECOND CAUSE OF ACTION**

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

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

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

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

26 ///

27 ///

28 ///

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

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

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

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

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

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

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

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

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

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

27 a. The BLM; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, Brahma prays that this Honorable Court:

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

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

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

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


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

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

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

14 Dated this 24 day of September 2018.

15 **PEEL BRIMLEY LLP**

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

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HENDERSON, NEVADA 89074
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BRAHMA GROUP, INC.'S THIRD-PARTY COMPLAINT

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

THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Is the principal on the Surety Bond.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 BLM and/or TSE knew of the existence of the Lien.

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

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

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

28

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

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

6 WHEREFORE, Brahma prays that this Honorable Court:

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

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

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


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

15 AFFIRMATION PURSUANT TO NRS 239B.030

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

18 Dated this 24 day of September 2018.

19 PEEL BRIMLEY LLP

20
21 
22 RICHARD L. PEEL, ESQ.
23 Nevada Bar No. 4359
24 ERIC ZIMBELMAN, ESQ.
25 Nevada Bar No. 9407
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Attorneys for Brahma Group, Inc.

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

Exhibit 2

Exhibit 2

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10 rcox@peelbrimley.com
11 Attorneys for Brahma Group, Inc.

12 FIFTH JUDICIAL DISTRICT COURT
13 NYE COUNTY, NEVADA
14

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

18 vs.

19 COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
20 ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES I through X; DOES I
21 through X; ROE CORPORATIONS I through X,
22 inclusive,

23 Defendants,
24
25
26
27

CASE NO. : CV39799
DEPT. NO. : 1

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.

[Arbitration Exemption: Amount in
Controversy in Excess of \$50,000]

1 This First Amended Complaint for (Among Other Things) (i) Foreclosure of Notice of Lien
2 Against Surety Bond, and (ii) Breach of Settlement Agreement ("Amended Complaint"), amends
3 that certain Mechanic's Lien Foreclosure Complaint Against Surety Bond ("Original Complaint")
4 filed with the Court on December 14, 2018 in this action (the "Action"), by Plaintiff, BRAHMA
5 GROUP, INC. ("Brahma").

6 By way of this Amended Complaint against the above-named Defendants, Brahma, by and
7 through its attorneys of record, the law firm of PEEL BRIMLEY LLP, complains, avers, and alleges
8 as follows:

9 THE PARTIES

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

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

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

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

20 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
21 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
22 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
23 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
24 06 (the "Liberty Parcel").²

25
26
27 ¹ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of
the BLM Parcels by way of this Action.

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

1 4. TONOPAH SOLAR ENERGY, LLC ("TSE")³ is and was at all times relevant to
2 this Action:

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

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

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

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

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

14 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
15 Parcels.⁴

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

20 6. Brahma is informed, believes and therefore alleges that Defendant AMERICAN
21 HOME ASSURANCE COMPANY ("AHAC"):

22 a. Is and was at all times relevant to this Action a company duly licensed and
23 qualified to issue surety bonds and do business in Nevada;

24 b. Issued Bond No. 854481 ("Surety Bond") pursuant to NRS 108.2413 as
25 discussed more fully below; and

26 c. Issued a Surety Rider to the Surety Bond as discussed more fully below.

27 ³ While TSE is not a party to this Case, it is a party to Case No. CV 39348 in the Fifth Judicial District Court of Nye
County, which Case Brahma will seek to consolidate this Action into.

28 ⁴ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels
and the Liberty Parcels.

1 7. Brahma is informed, believes and therefore alleges that Defendant COBRA
2 THERMOSOLAR PLANTS, INC. ("Cobra"):

3 a. Is and was at all times relevant to this Action a Nevada corporation;
4 b. Is the principal on the Surety Bond and the Rider; and
5 c. Is a party to a negotiated settlement between Cobra and Brahma for the
6 payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra
7 Work") at the Project.

8 8. Brahma does not know the true names of the individuals, corporations, partnerships
9 and entities identified and named as Defendants by the fictitious names of (collectively, the “Doe
10 Defendants”), (i) BOE BONDING COMPANIES I through X, (ii) DOES I through X, and (iii)
11 ROE CORPORATIONS I through X. Brahma alleges that such Doe Defendants may be liable to
12 Brahma for damages arising from the construction of the Work of Improvement, as more fully
13 discussed under the claims for relief set forth below. Brahma will request leave of this Honorable
14 Court to amend this Amended Complaint to show the true names and capacities of each such
15 fictitious Doe Defendants when Brahma discovers such information.

16 9. Cobra, AHAC and the Doe Defendants, are sometimes referred to in the First Cause
17 of Action of this Amended Complaint (below), (i) individually, as a "Defendant," and (ii)
18 collectively, as the "Defendants".

19 10. Cobra and the Does Defendants, are sometimes referred to in the Second through
20 Fourth Causes of Action (below), (i) individually, as a "Defendant," and (ii) collectively, as the
21 "Defendants".

(Claim Against Surety, Surety Bond and Principal thereon)

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

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

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

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

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

7 15. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official
8 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
9 \$6,982,186.24.

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

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

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

21 19. On or about September 14, 2018 (as allowed by NRS 108.229(1)) Brahma recorded
22 a Fourth Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada,
23 as Document 899351 in the amount of \$12,859,577.74 (the "Fourth Amended Lien").

24 20. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
25 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, referred to herein as the "Lien,"
26 were:

- 27 a. in writing;
28 b. recorded against the Work of Improvement; and

1 c. given or served on the authorized agents of the BLM and TSE, or the BLM
2 and/or TSE knew of the existence of the Lien.

3 21. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
4 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
5 (\$12,859,577.74 — "Lienable Amount").

6 22. The Lienable Amount is due and owing Brahma as of the date of this Amended
7 Complaint.

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

11 24. On or about October 9, 2018, Cobra (as principal) and AHAC (as surety) caused a
12 Surety Rider ("Rider") to be recorded in the Official Records of Nye County, Nevada as Document
13 No. 900303.

14 25. The Rider increased the penal sum of the Surety Bond to \$19,289,300.61.

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

17 27. Brahma makes claim against the Defendants and AHAC is obligated to Brahma for
18 the Lienable Amount plus interest, costs, and attorney's fees up to the penal sum of the Surety
19 Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

20 **SECOND CAUSE OF ACTION**

21 **(Breach of Settlement Agreement Against Cobra)**

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

24 29. Prior to the commencement of the Work of Improvement, Brahma previously
25 contracted directly with Cobra to perform the Cobra Work at the Project.

26 30. Brahma performed the Cobra Work and a dispute over payment arose between
27 Brahma and Cobra (the "Cobra Dispute").
28

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1 31. Brahma and Cobra (i) negotiated a resolution of the Cobra Dispute, and (ii) agreed
2 to certain terms, which terms were memorialized in writing ("Settlement Agreement").

3 32. Pursuant to the Settlement Agreement, Cobra was to make (i) a first payment to
4 Brahma in the amount of \$2,881,397.67 ("First Payment") upon Brahma providing certain
5 documentation/information concerning the Cobra Work (the "Documentation"), and (ii) a second
6 payment to Brahma in the amount of \$412,224.62 ("Second Payment") upon Brahma providing
7 additional documentation/information ("Additional Documentation").

8 33. Brahma provided the Documentation and Cobra paid Brahma the First Payment.

9 34. Brahma tendered and/or provided Cobra the Additional Documentation to receive
10 the Second Payment, but Cobra has failed to pay Brahma the Second Payment.

11 35. Brahma has tendered and/or performed its duties and obligations as required by the
12 Settlement Agreement.

13 36. The Defendants have breached the Settlement Agreement by failing to tender
14 payment of the Second Payment to Brahma, which Second Payment is due and owing.

15 37. Brahma has been required to engage the services of an attorney to collect the
16 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
17 interest therefore.

18 **THIRD CAUSE OF ACTION**

19 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against Cobra)**

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

22 39. There is a covenant of good faith and fair dealing implied in every agreement,
23 including the Settlement Agreement.

24 40. The Defendants breached their duty to act in good faith by performing the
25 Settlement Agreement in a manner that was unfaithful to the purpose of the Settlement Agreement,
26 thereby denying Brahma's justified expectations.

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1 41. Due to the actions of the Defendants, Brahma suffered damages in an amount more
2 than the Second Payment, for which Brahma is entitled to judgment in an amount to be determined
3 at trial.

4 42. Brahma has been required to engage the services of an attorney to collect the
5 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
6 interest therefore.

7 **FOURTH CAUSE OF ACTION**
8 **(Unjust Enrichment Against Cobra)**

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

11 44. This cause of action is being pled in the alternative.

12 45. Brahma tendered and/or provided the Additional Documentation for the benefit
13 and/or at the specific instance and request of the Defendants.

14 46. The Defendants accepted, used, and enjoyed the benefit of the Additional
15 Documentation.

16 47. Brahma has demanded payment of the Second Payment.

17 48. To Date, the Defendants have failed, neglected, and/or refused to pay the Second
18 Payment.

19 49. The Defendants have been unjustly enriched, to the detriment of Brahma.

20 50. Brahma has been required to engage the services of an attorney to collect the
21 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
22 interest therefore.

23 ~~WHEREFORE~~, with respect to the First Cause of Action, Brahma prays that this
24 Honorable Court:

25 1. Enters judgment against the Defendants, and each of them, jointly and severally in
26 the Liable Amount;

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2. Enters a judgment against the Defendants and each of them, jointly and severally, for Brahma's reasonable costs and attorney's fees incurred in the collection of the Lienable Amount, as well as an award of interest thereon;

3. Enters judgment against AHAC up to the penal sum of the Surety Bond and Rider; and

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

WHEREFORE, with respect to the Second through Fourth Causes of Action, Brahma prays that this Honorable Court:

1. Enters judgment against the Defendants and each of them, jointly and severally, in the amount of the Second Payment, plus Brahma's reasonable costs and attorney's fees incurred in the collection of the Second Payment; and

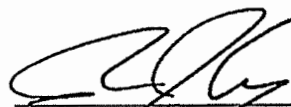
2. For such other and further relief as this Honorable Court deems just and proper in the premises.

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 11th day of January 2019.

PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ.

Nevada Bar No. 4359

ERIC ZIMBELMAN, ESQ.

Nevada Bar No. 9407

CARY B. DOMINA, ESQ.

Nevada Bar No. 10567

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Henderson, Nevada 89074-6571

Attorneys for Brahma Group, Inc.

JAN 23 2019

WEIL & DRAGE
ATTORNEYS AT LAW

Exhibit 3

Exhibit 3

From: Jeremy Kilber
Sent: Wednesday, February 20, 2019 11:01 AM
To: Jeremy Kilber
Subject: Our File No. 0630-003 (Brahma vs. Cobra)

From: Richard Peel [<mailto:rpeel@peelbrimley.com>]
Sent: Wednesday, February 13, 2019 11:25 AM
To: Geoffrey Crisp
Cc: Richard Peel; Eric Zimbelman; Terri Hansen; Ronnie Cox
Subject: Our File No. 0630-003 (Brahma vs. Cobra)
Importance: High

Geoff,

You will recall the following:

- Original Action (Case No. CV 39348) pending before Judge Elliott.
 - TSE originally sued Brahma in Nye County District Court by initiating Case No. CV39348 (the "Original Action").
 - Subsequently, Brahma filed in the Original Action:
 - A Mechanic's Lien Foreclosure Complaint against TSE ("Lien Foreclosure Complaint"); then
 - A First Amended Counter-Complaint (against TSE) and a Third Party Complaint against Cobra Thermosolar Plants, Inc. ("Cobra") and its surety, American Home Assurance Home Company ("AHAC").
 - Brahma has since been granted leave by the Court to file (but has yet to file) a Second Amended Complaint (against TSE) and a Amended Third-Party Complaint (against Cobra and AHAC).
 - We will be filing the Second Amended Complaint and Amended Third-Party Complaint this week.
 - We understand from prior conversations that your office is willing to accept service on behalf of both Cobra and AHAC of this pleading.
- Separate Action (Case NO. CV39799), assigned to Judge Wanker.
 - Because of arguments made by TSE in in the Original Action, Brahma commenced a second action in Nye County District Court (Case No. CV39799) by filing a Mechanic's Lien Foreclosure Complaint Against Surety Bond against Cobra and AHAC.
 - Brahma subsequently filed a First Amended Complaint against Cobra and AHAC, which your office accepted service of some time ago.
 - A copy of the First Amended Complaint is attached hereto.
- Consolidated Action (Case No. CV 39348), pending before Judge Elliott.
 - Brahma subsequently filed (and the Court granted) Brahma's Motion to Consolidate the Separate Action into the Original Action (collectively, the "Consolidated Action").
 - TSE is unwilling to stipulate to allow Brahma to file a Second Amended Complaint (in the Consolidated Action) that would amend and restate the pleadings filed previously against TSE, Cobra and AHAC in the Original and Separate Actions.

Unfortunately, due to TSE's position, Cobra/AHAC will need to separately answer:

- Brahma's First Amended Complaint (filed in the Separate Action); and
- Brahma's Second Amended Complaint and Amended Third-Party Complaint (which will be filed this week in the Consolidated Action).

In light of the foregoing, we ask (and we understand that you have agreed on behalf of Cobra and AHAC) that Cobra/AHAC:

- Answer the First Amended Complaint filed in the Separate Action by no later than February 22, 2019.
- Answer the Second Amended Complaint (to be filed in the Consolidated Action) within two weeks of service of the same on your office.

Please let me know if my understanding of the above is incorrect in any way. Otherwise, we look forward to your clients' answers as noted above.

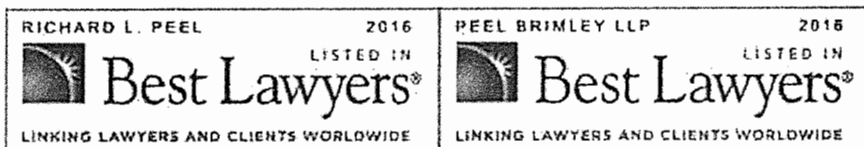
Thank you.

Sincerely,

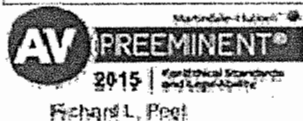
Richard L. Peel, Esq.
MANAGING PARTNER



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(Attorneys licensed to practice in: Nevada • Washington • California • Utah • Arizona • Hawaii • North Dakota • US Court of Federal Claims)

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FILED
FIFTH JUDICIAL DISTRICT

MAR 15 2019

Nye County Clerk

Marianne Yoffee Deputy

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

CASE NO. : CV 39348
Consolidated with CV39799
DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

8 Third-Party Defendants.

9
10 H&E EQUIPMENT SERVICES, INC., a Delaware
corporation,

11 Plaintiff-in-Intervention,

12 vs.

13 BRAHMA GROUP, INC., a Nevada corporation,
14 TONOPAH SOLAR ENERGY LLC, a Delaware
15 limited liability company, COBRA
16 THERMOSOLAR PLANTS, INC., a Nevada
Corporation; AMERICAN HOME ASSURANCE
17 COMPANY, a surety; BOE BONDING
COMPANIES I through X; DOES I through X;
18 ROE CORPORATIONS I through X, and TOE
TENANTS I through X, inclusive,

19 Defendants-in-Intervention.

20 BRAHMA GROUP, INC. a Nevada corporation,

21 Plaintiff,

22 vs.

23 COBRA THERMOSOLAR PLANTS, INC., a
24 Nevada corporation; AMERICAN HOME
25 ASSURANCE COMPANY, a surety; BOE
26 BONDING COMPANIES 1 through X; DOES I
through X; ROE CORPORATIONS I through X,
inclusive,

27 Defendants.
28

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 13th day of March, 2019, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

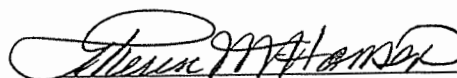
- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered;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

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

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EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

FEB 19 2019

Nye County Clerk

~~Marianne Yoffe~~ Deputy

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16 Attorneys for Brahma Group, Inc.

17 **FIFTH JUDICIAL DISTRICT COURT**

18 **NYE COUNTY, NEVADA**

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

21 Plaintiff,

22 vs.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Defendant.

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

**ORDER GRANTING BRAHMA'S
MOTION TO CONSOLIDATE CASE
NO. CV39799 WITH CASE NO. CV
39348**

25 This matter came on for hearing January 24, 2019 (the "Hearing") before the Honorable
26 Senior Judge Steven Elliott on the Motion to Consolidate Case No. CV39799 with Case No. CV
27 39348 ("Motion") filed by BRAHMA GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of
28 PEEL BRIMLEY LLP appeared on behalf of Brahma. Colby L. Balkenbush, Esq. of
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of Plaintiff
TONOPAH SOLAR ENERGY, LLC ("TSE").

The Court having considered all the pleadings and papers on file, and having heard
argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
bench on January 24, 2019:

I. BASIS FOR CONSOLIDATION

Brahma seeks to consolidate Case No. CV39799 with Case No. CV 39348 pursuant to
NRCP 42, which provides in relevant part:

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1 [W]hen actions involving a common question of law or fact are pending before the
2 court, it may order a joint hearing or trial of any or all the matters in issue in the
3 actions; it may order all the actions consolidated; and it may make such orders
concerning proceedings therein as may tend to avoid unnecessary costs or delay.

4 Consolidation is vested in the sound discretion of the trial court. (*Zupancic v. Sierra Vista*
5 *Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981).)

6 **II. FINDINGS AND CONCLUSIONS.**

7 1. The Court finds (i) the two cases involve common questions of law or fact, and
8 (ii) consolidation would “avoid unnecessary costs or delay” and provide judicial economy.

9 2. TSE opposed the Motion on several grounds. First, TSE argues that it was
10 procedurally improper for Brahma to file Case No. CV39799 when Case No. CV 39348 is
11 pending in this Court with similar or identical claims. However, in its Motion to Strike Brahma
12 Group, Inc.’s (“Brahma”) First Amended Counter-Complaint (“Motion to Strike”),¹ TSE argued
13 that Brahma’s proposed amended pleading was improper because “one cannot file a Counter-
14 Complaint into a special proceeding such as this.” In support of its position, TSE relied on what
15 it claimed to be “the leading Nevada construction law treatise,” LEON F. MEAD II,
16 CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) “it is improper legal
17 procedure to file a counter-claim to a petition under NRS 108.2275,” and (ii) “the proper
18 procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate
19 the two matters.”

20 3. As discussed in the Court’s Order Denying Motion to Strike, the Court does not
21 agree with Mr. Mead’s premise and found that there was nothing improper with Brahma filing
22 its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge
23 Brahma’s Lien. Additionally, the Court has now come to the conclusion that had Brahma filed a
24 standalone complaint as an independent action and then moved the Court to consolidate that
25 action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they
26 currently find themselves in.

27
28 ¹ The complete title of that motion was “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.”

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4. In any event, and especially where TSE has stated its intention to file a Writ Petition to the Nevada Supreme Court with respect to this Court's denial of TSE's Motion to Strike, it was appropriate for Brahma to file Case No. CV39799 and for this Court to consolidate that action into the present action. Specifically, but without limitation, if the Supreme Court were to ultimately overrule this court and determine that it was improper for Brahma to file a counterclaim to a petition under NRS 108.2275, Brahma's time to file a complaint against the applicable surety bond would by then have lapsed pursuant to NRS 108.2421. If, on the other hand, the Nevada Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure claim filed in Case No. CV39799 is (at worst) moot with no prejudice having been suffered by any party by way of consolidation.

5. The Court also rejects TSE's contention that Case No. CV39799 and Brahma's Motion to Consolidate is futile. The Court finds that Brahma's Complaint filed in Case No. CV39799 is not impermissible claim-splitting and does not violate NRCP 1 or NRCP 15.

6. Based on the foregoing, the Court hereby concludes that Case No. CV39799 may be and is hereby consolidated with Case No. CV 39348.

NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion to Consolidate is **GRANTED** and Case No. CV39799 is hereby consolidated with Case No. CV 39348.

Dated this 12th day February 2019.

 2-14-19
Senior Judge Steven Elliott

Submitted by:
PEEL BRIMLEY LLP

/s/
RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
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1 **OPP**
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FILED
FIFTH JUDICIAL DISTRICT

MAR 25 2019

Nye County Clerk
Terri Pemberton Deputy

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Counterdefendants,

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

Consolidated with:
Case No. CV39799

**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**

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Lien/Bond Claimant and
3 Third-Party Plaintiff,

4 vs.

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

11 Third-Party Defendants.


12 **BRAHMA GROUP, INC.'S OPPOSITION TO COBRA THERMOSOLAR PLANTS,**
13 **INC.'S MOTION TO DISMISS AND COUNTERMOTION FOR LEAVE TO FILE A**
14 **SINGLE CONSOLIDATED AMENDED COMPLAINT**

15 Defendant/Lien Bond Claimant, BRAHMA GROUP, INC. ("Brahma" or "BGI"), by and
16 through its counsel of record, the law firm of Peel Brimley LLP, hereby files its Opposition to the
17 Motion to Dismiss ("Motion") filed by Third-Party Defendant COBRA THERMOSOLAR PLANTS,
18 INC. ("Cobra") and its Bond Surety, American Home Assurance Company ("AHAC").

19 Brahma also concurrently submits its Countermotion for Leave to File a Consolidated
20 Amended Complaint. This Opposition and Countermotion is supported by the papers and pleadings on
21 file herein, the following memorandum of points and authorities, and any oral argument this Court may
22 entertain.

23 Dated this 25 day of March, 2019.

24 PEEL BRIMLEY LLP

25 
26 RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
27 ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
28 RONALD J. COX, ESQ. (NV Bar No. 12723)
3333 E. Serene Avenue, Suite 200
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Attorneys for Brahma Group, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

As the Court is aware, these consolidated actions are the subject of a lengthy procedural history involving numerous motions, pleadings amendments and related actions filed in Nye County, Clark County and the United States District Court for the District of Nevada. Recently, this Court granted Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348 ("Motion to Consolidate") based on NRCP 42(a) and the Court's findings that "(i) these two cases involve common questions of law or fact, and (ii) consolidation would 'avoid unnecessary costs or delay.'"¹

In addition, the Court also recently denied Plaintiff/Counterdefendant Tonopah Solar Energy, LLC's ("TSE") Motion to Strike and Dismiss Brahma's Complaint ("TSE Motion to Strike and Dismiss") and granted Brahma's Motion to Amend.² As a result of these two Orders, Brahma proposed to TSE, in the interest of time, cost and efficiency, that it file a single, clean amended pleading in the consolidated action rather than have separate complaints in the two consolidated actions with partially overlapping claims. In response, TSE refused to stipulate to such consolidated pleading. Shortly thereafter, TSE's affiliate, Cobra, filed the present Motion, citing the same legal contentions relied on by TSE in refusing to stipulate to a consolidated pleading.

It is regrettable that Cobra and TSE have once again chosen to seek dismissal of Brahma's claims through wasteful procedural posturing rather than through a trial on the merits. Nonetheless, the Court should deny Cobra's Motion and grant Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint for the following non-exclusive reasons:

- While Nevada Supreme Court's recent decision in *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 721 (2018) conformed to federal practice in holding that "constituent cases retain their separate identities to the extent that a final decision in one is immediately appealable," this does not mean two consolidated cases can never be merged for other purposes. In fact, the United States Supreme Court precedent upon which *Sarge* is based is to the contrary. *See Hall v. Hall*, 138 S. Ct. 1118, 1122, 200 L.

¹ See Exhibit 1, Order Granting Motion to Consolidate.

² See Exhibit 2, Order (I) Denying Tonopah Solar Energy, LLC's Motion to Strike and Dismiss; (II) Granting in Part Tonopah Solar Energy, LLC's Motion for Stay and (III) Granting Brahma Group Inc.'s Motion to Amend.

Ed. 2d 399 (2018) (“[t]his decision does not mean that district courts may not consolidate cases for all purposes in appropriate circumstances.”);

- Cobra’s reliance on *Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1337 (1977) for the proposition that the parallel (now consolidated) actions violate the “one action rule” is similarly incorrect based on the same reasons this Court denied TSE’s Motion to Strike and Dismiss, in which TSE argued that the two actions involved impermissible “claim-splitting.” Nothing in the Bond Action “conflicts with a statutory scheme, Cobra’s or TSE’s constitutional rights, or the agreed-upon or stated limits of” Case No. CV 39348, and Cobra fails to make any effort to show how this might be; and
- The Proposed Consolidated Amended Pleading submitted with Brahma’s Countermotion hereto, provides an efficient, non-redundant pleading that Cobra’s motion purports to promote, and as a result, the Court should approve the same.

With respect to Cobra’s separate contention that Brahma’s claim for unjust enrichment should be dismissed simply because Brahma also claims the existence of a written enforceable contract, the Court should deny that motion as (at best) premature. Brahma is entitled to plead “in the alternative” as it has done here. Unless and until Cobra acknowledges that an agreement exists between the parties (a choice Cobra clearly hopes to avoid making), Brahma should be permitted to argue for the existence of a “quasi-contract which requires the defendant to pay to plaintiff the value of the benefit conferred. In other words, the defendant makes restitution to the plaintiff in *quantum meruit*.” See *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 380–81, 283 P.3d 250, 257 (2012).

II. STATEMENT OF FACTS

At the January 24, 2019 hearing, this Court granted Brahma’s Motion to Consolidate and ordered the consolidation of Case Nos. CV39348 (“the Lien Foreclosure Action”) and CV39799 (“the Bond Action”).³ As the Court will recall, Brahma filed the Bond Action out of an abundance of caution because TSE threatened to file a Writ Petition to the Nevada Supreme Court (and it has now done)⁴ arguing that this Court should have dismissed Brahma’s pleading in the Lien

³ See Exhibit 1.

⁴ See Exhibit 3, Writ Petition.

1 Foreclosure Action. The Lien Foreclosure Action was initially commenced by TSE as a special
2 proceeding seeking to expunge Brahma's mechanic's lien pursuant to NRS 108.2275.

3 Relying on LEON F. MEAD II, CONSTRUCTION LAW 286 (2016 Ed.), TSE argued that
4 (i) "it is improper legal procedure to file a counter-claim to a petition under NRS 108.2275,"⁵ and
5 (ii) "The proper procedure is to file a complaint for foreclosure and to move the petitioning court
6 to consolidate the two matters."⁶ Brahma was and remains concerned (now that the Writ Petition
7 has been filed) that if the Writ Petition is granted and Brahma's pleading is stricken or dismissed,
8 the time for Brahma to commence an action against the Surety Bond, the Surety (AHAC) and the
9 Principal on the Surety Bond (Cobra) would have expired unless Brahma filed the allegedly
10 redundant claims in the Bond Action (which is exactly what TSE originally argued Brahma was
11 required to do).

12 In granting Brahma's Motion to Consolidate over TSE's objection, this Court concluded,
13 inter alia:

14 3. As discussed in the Court's Order Denying Motion to Strike, the
15 Court does not agree with Mr. Mead's premise and found that there was nothing
16 improper with Brahma filing its Counter-Complaint in the same Case TSE
17 commenced when it filed its Motion to Expunge Brahma's Lien. Additionally, the
18 Court has now come to the conclusion that had Brahma filed a standalone
complaint as an independent action and then moved the Court to consolidate that
action with Case No. CV 39348 as TSE suggests, the Parties would be in the same
position they currently find themselves in.

19 4. In any event, and especially where TSE has stated its intention to
20 file a Writ Petition to the Nevada Supreme Court with respect to this Court's denial
21 of TSE's Motion to Strike, it was appropriate for Brahma to file Case No. CV39799
22 and for this Court to consolidate that action into the present action. Specifically, but
23 without limitation, if the Supreme Court were to ultimately overrule this court and
24 determine that it was improper for Brahma to file a counter-claim to a petition under
25 NRS 108.2275, Brahma's time to file a complaint against the applicable surety bond
26 would by then have lapsed pursuant to NRS 108.2421. If, on the other hand, the
27 Nevada Supreme Court rejects TSE's position (or TSE chooses not to challenge the
28 issue), the foreclosure claim filed in Case No. CV39799 is (at worst) moot with no
prejudice having been suffered by any party by way of consolidation.

26 ///

⁵ See Exhibit 4 hereto, TSE Reply to Brahma's Opposition to Motion to Strike (exhibits omitted for brevity), p. 7.

⁶ See Exhibit 5 hereto, excerpt from Mead treatise as submitted to this Court by TSE as Exhibit 4 to its Reply to Brahma's Opposition to TSE's Motion to Strike and Dismiss.

1 5. The Court also rejects TSE's contention that Case No. CV39799 and
2 Brahma's Motion to Consolidate is futile. The Court finds that Brahma's Complaint
3 filed in Case No. CV39799 is not impermissible claim-splitting and does not violate
4 NRCP 1 or NRCP 15.⁷

5 By way of this Court's Order Denying TSE's Motion to Strike and Dismiss,⁸ the Court
6 granted Brahma leave to file a Second Amended Complaint in the Lien Foreclosure Action
7 consistent with the Court's decision and its intent to stay the three causes of action that TSE had
8 initially removed to the federal court "until such time as the Federal Court rules on whether this
9 Court has proper jurisdiction over these claims."⁹

10 In compliance with the Order Denying TSE's Motion to Strike and Dismiss and in light of
11 the Consolidation Order, on February 6, 2019, BRAHMA's counsel proposed to TSE's counsel
12 that Brahma file a single "clean" document in the consolidated action that (i) amends Brahma's
13 First Amended Counter-Complaint filed in the Lien Foreclosure Action and (ii) includes a Third-
14 Party Complaint against Cobra, and its surety (AHAC) that would mirror the bond foreclosure
15 claims of the Bond Action, thereby eliminating the need for parallel pleadings.¹⁰ Brahma's
16 proposal would have expressly reserved (i) the parties' respective positions regarding the proper
17 jurisdiction and venue for the Parties' dispute as more fully set forth in the Parties' briefs filed in
18 the Federal Court and (ii) TSE's rights of appeal.¹¹

19 In rejecting TSE's proposal, TSE's counsel wrote:

20 Procedurally, this would be inappropriate as courts view two cases as continuing to
21 exist separately even after consolidation. Federal courts have long held this and the
22 Nevada Supreme Court adopted the federal position on this issue in a December
23 2018 decision. *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718,
24 722 (2018) ("We thus overrule our decision in *Mallin* to the extent it holds that cases
25 consolidated in the district court become a single case for all appellate purposes.
26 Consolidated cases retain their separate identities so that an order resolving all of
27 the claims in one of the consolidated cases is immediately appealable as a final
28 judgment under NRAP 3A(b)(1)"); *see also* Wright & Miller, 9A FED. PRAC. &
29 PROC. CIV. § 2382 (3d ed.) ("federal courts have held that actions do not lose their
30 separate identity because of consolidation under Rule 42(a)(2) . . . actions
31 consolidated under Rule 42(a)(2) retain their separate identity."¹²)

⁷ See Exhibit 1

⁸ See Exhibit 2.

⁹ See *id.* The stayed claims are (i) Breach of Contract, (ii) Breach of the Duty of Good Faith and Fair Dealing and (iii) Violations of NRS 624 but not the lien and bond foreclosure causes of action at issue here.

¹⁰ See Exhibit 6.

¹¹ See *id.*

¹² See Exhibit 7.

1 While Cobra disingenuously complains in its Motion that “BGI’s counsel is requiring Defendants
2 to separately respond to” Brahma’s pleadings in both actions,¹³ this is only because TSE refused to
3 permit Brahma to file a consolidated pleading.¹⁴

4 Shortly thereafter, Cobra (TSE’s affiliate) filed the present Motion, citing the identical
5 legal contentions and authority relied on by TSE in refusing to stipulate to a consolidated pleading.
6 That TSE and Cobra are coordinating these efforts is not surprising in light of their affiliate
7 relationship. Specifically, and as set forth in TSE’s Counterclaim filed in the federal court, TSE
8 has admitted that:

- 9
- Cobra is an affiliate of Cobra Energy Investment, LLC (“Cobra Energy”),¹⁵
 - 10 • Cobra Energy is a member of Tonopah Solar Investments LLC (“TSI”);¹⁶
 - 11 • TSI is a member of Tonopah Solar Energy Holdings I, LLC (“TSEH I”);¹⁷
 - 12 • TSEH I is a member of Tonopah Solar Energy Holdings II (“TSEH II”)¹⁸;
 - 13 and
 - TSEH II is the sole member of TSE.¹⁹

14 In other words, through this complicated maze of shell companies, Cobra is not only affiliate of
15 TSE, it is a part owner of TSE.

16 III. ARGUMENT/AUTHORITY

17 A. The Bond Action Is Not Impermissibly Redundant.

18 Cobra’s request that the Court dismiss Brahma’s entire Complaint on grounds of
19 redundancy, should be denied on grounds similar to those this Court relied on in rejecting TSE’s
20 opposition to Brahma’s Motion to Consolidate. Here, Cobra argues that under *Smith v. Hutchins*,
21 93 Nev. 431, 432, 566 P.2d 1136, 1337 (1977), the parallel (now consolidated) actions violate the
22 so-called “one action rule.”²⁰ There, TSE argued that The Bond Action was “impermissible claim
23

24 ¹³ See Motion p. 7.

25 ¹⁴ See Motion, Exhibit 3. It is also worth noting that Cobra would have required far less time preparing two Answers
than commencing and engaging in the present Motion proceeding.

26 ¹⁵ See Exhibit 8, TSE Counterclaim ¶9.

27 ¹⁶ See TSE Counterclaim ¶3

28 ¹⁷ See TSE Counterclaim ¶3

¹⁸ See TSE Counterclaim ¶2

¹⁹ See TSE Counterclaim ¶2

²⁰ It is worth noting that the term “one action rule” does not appear anywhere in *Smith*, though it does refer to a “single
cause of action rule.” See 93 Nev. at 432

1 splitting”²¹ and “redundant” of prior pleadings such that it should be stricken pursuant to NRCP
2 12(f) as “redundant, immaterial, impertinent, or scandalous matter.”²²

3 As Brahma demonstrated in its Reply brief to TSE’s Motion to Strike or Dismiss:²³

4 TSE offer[ed] no case authority (or rationale of any kind) for rejecting [the Bond
5 Action] purely on the grounds of redundancy. Indeed, the only Nevada case the
6 undersigned has located in which NRCP 12(f) was cited (an unpublished decision)²⁴
7 involved the dismissal of an amended pleading because it “was nearly identical, and
8 therefore redundant, to the original complaint,” which the court had previously
9 dismissed. See *Angel v. Eldorado Casino, Inc.*, No. 59401, 2013 WL 1116822, at
10 *1 (Nev. Mar. 15, 2013).²⁵

11 Unlike *Eldorado Casino*, Brahma’s lien foreclosure claim in the Lien Foreclosure Action survived
12 TSE’s Motion to Dismiss.

13 Moreover, and at least until Brahma files the amended pleading contemplated by the Court’s
14 Order Denying Motion to Strike or Dismiss, Brahma’s claim for lien foreclosure (against the Work of
15 Improvement) in the Lien Foreclosure Action is technically not redundant of the cause of action for
16 Claim Against Surety, Surety Bond and Principal Thereon in the Bond Action. Stated differently, the
17 claim for lien foreclosure in the Lien Foreclosure Action was filed before Cobra and AHAC recorded
18 the Surety Bond to release Brahma’s Notice of Lien (as amended),²⁶ after which Brahma commenced
19 the Bond Action to assert a claim on the Surety Bond. Even if Brahma were to file an amended pleading
20 in the Lien Foreclosure Action to (as it must) assert a claim on the Bond rather than the Work of
21 Improvement, these claims may be easily merged (at least in part) by way of consolidation without
22 prejudice to any party. [See Discussion *infra*].

23 ²¹ See Exhibit 9, TSE Opposition to Motion to Consolidate pp. 5-6.

24 ²² See TSE Opposition to Motion to Consolidate p. 6.

25 ²³ See Exhibit 10.

26 ²⁴ As before, Brahma in no way means to violate NRAP 36(c) by citing this unpublished decision. Rather, the lack of
27 any non-abrogated published decisions is evidence enough that TSE’s reliance on NRCP 12(f) was thin.

28 ²⁵ The only published decision found has been abrogated (on other grounds) and cited Rule 12(f) merely for the
proposition that abuse could be found when a litigant “persistently files documents that are unintelligible, redundant,
immaterial, impertinent, or scandalous.” See *Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety*, 121 Nev.
44, 61, 110 P.3d 30, 43 (2005), abrogated by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670
(2008).

²⁶ See NRS 108.2413(6)(b) (the Surety Bond “releases the property described in the surety bond from the lien and the
surety bond shall be deemed to replace the property as security for the lien.”)

1 In any event, like TSE's Motion to Strike or Dismiss, and despite this Court's Order Granting
2 [Brahma's] Motion to Consolidate the Bond Action with the Lien Foreclosure Action, Cobra's present
3 Motion claims that "[Brahma] cannot maintain the exact same cause of action against the exact same
4 defendants in two separate actions" and asks this Court to dismiss the "duplicative" claims in the Bond
5 Action. Other than its reliance on *Smith*, which acknowledges that the single cause of action rule is a
6 "general proposition,"²⁷ Cobra offers no compelling reason for this Court to (as TSE previously asked
7 it do to) put form over substance to give Cobra a procedural victory where it cannot defend the merits
8 of the action.

9 By now, this Court certainly understands that by seeking dismissal of the Bond Action, Cobra
10 and TSE hope to again put the timeliness of Brahma's action on the Bond at risk in the event the
11 Supreme Court grants TSE's Writ Petition (at some delayed and future point in time). Specifically, if
12 TSE successfully convinces the Supreme Court that Brahma's operative pleading filed in the Lien
13 Foreclosure Action was "void," the time for filing a new complaint against the Surety Bond (the Bond
14 Action by then having been dismissed), which is nine months after Brahma was served with notice of
15 the recording of the surety bond,²⁸ would have lapsed.

16 Notwithstanding the transparency of this strategy, Cobra disingenuously suggests that its
17 Motion is a matter of cost, inconvenience or fairness and complains that "Brahma's counsel is requiring
18 Defendants to separately respond to" Brahma's pleadings in both actions.²⁹ In reality, as Brahma's
19 counsel informed Cobra's counsel,³⁰ Cobra is only required to answer both pleadings because TSE
20 (Cobra's affiliate) refused to allow Brahma to file an amended pleading in the Lien Foreclosure Action,
21 including a Third-Party Complaint Against Surety, Surety Bond and Principal Thereon that would have
22 effectively brought Cobra and AHAC into the Lien Foreclosure Action consolidated and simplified
23 pleading for both actions.

27 See *Smith*, 93 Nev. at 432.

28 See NRS 108.2421(1)(b)(1).

29 See Motion p. 7.

30 See Motion, Exhibit 3.

1 As noted above, in rejecting Brahma's proposed amendment, TSE's counsel argued that it
2 would be procedurally "inappropriate as courts view two cases as continuing to exist separately
3 even after consolidation," citing (as Cobra does here) *Matter of Estate of Sarge*, 134 Nev. Adv.
4 Op. 105, 432 P.3d 718, 722 (2018). As discussed below, TSE's and Cobra's coordinated analysis
5 is flawed, inapposite, inappropriate and solely intended to gain a procedural hammer to be used
6 against Brahma and its nearly \$13 million Surety Bond claim (exclusive of interest, costs and
7 attorney's fees) for unpaid work, which TSE and Cobra cannot defend on the merits.

8 **B. *Estate of Sarge* Does Not Preclude Merger "In Appropriate Circumstances."**

9 As Cobra and TSE have correctly noted, the Nevada Supreme Court in *Matter of Estate of*
10 *Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) conformed Nevada practice regarding
11 NRCP 42(a) to its federal counterpart, overruling its own precedent of *Mallin v. Farmers Insurance*
12 *Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990). *Mallin* held that cases consolidated by a
13 district court "become a single case for all appellate purposes." *See Sarge*, 432 P.3d at 719 (emphasis
14 added). At their core, *Mallin* and *Sarge* involve an issue of appellate jurisdiction – i.e., whether "an
15 order finally resolving a constituent consolidated case is immediately appealable as a final judgment
16 even where the other constituent case or cases remain pending." *Id.* at 720. In overruling *Mallin*, the
17 Court in *Sarge* concluded, consistent with federal practice, that such an order is immediately appealable
18 as a final judgment. *Id.* Of course, appellate jurisdiction has nothing to do with the procedural history
19 and vector of this consolidated case or its constituent cases.

20 Cobra and TSE nonetheless contend that *Sarge* also stands for the proposition that
21 consolidation can never merge constituent cases such that there must forever be substantially identical
22 causes of action in the constituent cases (which, as noted, they also claim is improper). This is
23 completely wrong. While *Sarge* does correctly note that in federal practice "consolidation for purposes
24 of joint trial does not merge the cases into a single cause of action,"³¹ the United States Supreme Court
25 precedent upon which *Sarge* is based makes clear that this it never intended to preclude merger in all
26 cases for all purposes. *See Hall v. Hall*, 138 S. Ct. 1118, 1122, 200 L. Ed. 2d 399 (2018). Instead, *Hall*
27 concluded that "constituent cases retain their separate identities at least to the extent that a final
28

³¹ *See Sarge*, 432 P.3d at 721.

1 decision in one is immediately appealable by the losing party.” *Sarge* at 722 quoting *Hall*, 138 S.Ct. at
2 1131 (emphasis added). *Hall* explicitly left open the possibility of merger in appropriate cases, stating:
3 “This decision does not mean that district courts may not consolidate cases for all purposes in
4 appropriate circumstances.” *Hall*, 138 S. Ct. at 1122 (emphasis added).

5 As *Sarge* noted, the *Hall* case determined that “the term ‘consolidate,’ as used in FRCP 42(a),
6 is ambiguous; it can mean ‘the complete merger of discrete units’ or ‘joining together discrete units
7 without causing them to lose their independent character.’” *Sarge* at 722 quoting *Hall*, 138 S.Ct. at
8 1124-25. Accordingly, *Sarge* and *Hall* stand only for the following propositions: (i) consolidation does
9 not necessarily create merger, and (ii) consolidation does not create a merger that precludes an
10 immediate appeal of an otherwise final decision in a constituent case of a consolidated action. To
11 ascribe more meaning than this to *Sarge* (as *Cobra* and *TSE* attempt to do) is to fundamentally
12 misrepresent its holding. Nothing in *Sarge* or *Hall* precludes this Court from (if it deems it necessary
13 or appropriate) merging the “redundant” claims of the two consolidated actions involving the same
14 parties to simplify the pleadings and the consolidated case. As discussed more fully below in *Brahma’s*
15 *Counter-motion*, this is precisely what this Court should do.

16 **C. Cobra’s Motion to Dismiss *Brahma’s* Claim for Unjust Enrichment is Premature.**

17 With respect to *Cobra’s* separate contention that *Brahma’s* claim for unjust enrichment in the
18 Bond Action should be dismissed simply because *Brahma* also claims the existence of a legal contract,
19 the Court should deny that motion as (at best) premature. *Brahma* is entitled to plead in the alternative,
20 as it has done here. See NRCP 8(a)(3) ([a] pleading that states a claim for relief must contain ... a
21 demand for relief sought, which may include relief in the alternative or different types of relief.”)³²

22 First, it is important to clarify that, by way of its First Amended Complaint in the Bond Action,
23 *Brahma* asserted three new causes of action against *Cobra* (in addition to the Claim Against Surety,
24 Surety Bond and Principal Thereon) arising out of a separate relationship between *Brahma* and *Cobra*
25 at the same Work of Improvement.³³ In summary fashion but without limitation, *Brahma* claims that,

26 ³² While *Cobra* does not so explicitly state, this portion of its Motion is made pursuant to NRCP 12(b)(5). On a motion
27 to dismiss for failure to state a claim for relief, the trial court and this court must construe the pleading liberally and
28 draw every fair intendment in favor of the plaintiff. *San Diego Prestressed v. Chicago Title Ins.*, 92 Nev. 569, 555 P.2d
484 (1976). Allegations in the complaint must be accepted as true. *Id.*

³³ As the Court is aware, *Cobra* and AHAC posted the Surety Bond to release *Brahma’s* Notice of Lien, as amended,
from the Work of Improvement, which lien claim arose from *Brahma’s* work for *TSE*.

1 (i) pursuant to an earlier contract, Brahma performed work for Cobra at the Work of Improvement, (ii)
2 a dispute over payment arose between Brahma and Cobra, (iii) Brahma and Cobra negotiated a
3 resolution of that dispute, which terms were memorialized in writing (the "Settlement Agreement")
4 and (iv) Cobra breached the terms of that Settlement Agreement by failing to pay Brahma as agreed.³⁴
5 Based on these facts, Brahma asserts three causes of action: (i) Breach of Contract, (ii) Breach of the
6 Duty of Good Faith and Fair Dealing and (iii) Unjust Enrichment.³⁵

7 Cobra argues that because Brahma claims the existence of a written agreement (the Settlement
8 Agreement), Brahma may not seek a recovery based on unjust enrichment, citing *Leasepartners Corp.*
9 *v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (an action
10 based on a theory of unjust enrichment is not available when there is an express, written contract,
11 because no agreement can be implied when there is an express agreement.) and *May v. Anderson*, 121
12 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (because a settlement agreement is a contract, its
13 construction and enforcement are governed by principles of contract law).

14 While these authorities are certainly valid, Brahma's mere assertion of the existence of a valid
15 contract does not preclude Brahma from asserting, in the alternative (i.e., if Court determines that
16 there is no Settlement Agreement) that there is an implied contract entitling Brahma to the reasonable
17 value of its work. *See e.g.*, NRCP 8(a)(3).

18 "Where unjust enrichment is found, the law implies a quasi-contract which requires the
19 defendant to pay to plaintiff the value of the benefit conferred. In other words, the defendant makes
20 restitution to the plaintiff in *quantum meruit*." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev.
21 371, 380–81, 283 P.3d 250, 257 (2012). Where an implied-in-fact contract exists "*quantum meruit*
22 ensures the laborer receives the reasonable value, usually market price, for his services." *Precision*
23 *Constr.*, 128 Nev. at 380 citing Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e
24 (2011); *Sack v. Tomlin*, 110 Nev. 204, 208, 871 P.2d 298, 302 (1994) ("The doctrine of *quantum meruit*
25 generally applies to an action ... involving work and labor performed which is founded on a[n] oral
26 promise [or other circumstances] on the part of the defendant to pay the plaintiff as much as the plaintiff
27 reasonably deserves for his labor in the absence of an agreed upon amount.").

28 ³⁴ See Exhibit 11, First Amended Complaint ¶¶ 29-36, Case No. CV39799.

³⁵ See *Id.* ¶¶ 28-50.

Here, unless and until Cobra acknowledges the existence and terms of an agreement between the parties (the Settlement Agreement, as Brahma alleges), Brahma should be permitted to argue for the existence of a quasi-contract entitling Brahma to restitution in *quantum meruit*, which is the basis of its claim for unjust enrichment. See *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 380–81, 283 P.3d 250, 257 (2012). If the Court were to dismiss Brahma’s alternative cause of action, Brahma may be left without any remedy whatsoever if the Court also concludes (as Cobra will no doubt argue) that there is no enforceable Settlement Agreement under *May v. Anderson*. See 121 Nev at 673-74 (“an enforceable settlement agreement cannot exist when the parties have not agreed to the essential terms of the release because these provisions constitute a material term of the settlement contract.”).

By filing its Motion in lieu of an Answer, Cobra has so far avoided taking a position regarding the existence of an enforceable Settlement Agreement. Making the reasonable assumption that, once required to file an Answer, Cobra will deny the existence of an enforceable Settlement Agreement, the foundational basis of Brahma’s claim for unjust enrichment (and the basis of Cobra’s Motion) will be at play. Should Cobra concede the existence and enforceability of the Settlement Agreement, Brahma will happily dismiss its claim for unjust enrichment. Because such an event seems unlikely at best, Brahma should be allowed to proceed with its alternative claim for unjust enrichment.

D. Conclusion.

Based on the foregoing, Brahma respectfully requests that the Court deny Cobra’s Motion in its entirety.

IV. COUNTERMOTION

For all of the reasons set forth in Brahma’s Opposition to Cobra’s Motion, Brahma respectfully seeks leave of this Court to file a single consolidated pleading in this consolidated action substantially in the form attached hereto as **Exhibit 12** (“the Proposed Consolidated Pleading”).

A. The Court Should Grant Leave to Brahma to File and Serve the Proposed Consolidated Pleading.

Brahma’s Proposed Consolidated Pleading:

///

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- Acknowledges and incorporates this Court's reasoning in (i) denying TSE's Motion to Dismiss or Strike, and (ii) granting Brahma's Motion to Consolidate;
- Simplifies the pleadings and reduces needless paperwork in the interest of judicial economy; and
- Eliminates arguable redundancies in causes of action appearing in both the Lien Foreclosure Action and the Bond Action.


The Proposed Consolidated Pleading also creates no prejudice to any party. Nothing in the Proposed Consolidated Pleading prevents or precludes TSE from maintaining (i) its appeal of the Court's denial of its Motion to Expunge or (ii) its Writ Petition seeking review of this Court's denial of TSE's Motion to Dismiss or Strike. Similarly, those claims already stayed pending the outcome of the motions pending in the federal court will remain stayed. Unlike Cobra and TSE, Brahma seeks no procedural advantage other than the judicial economy the Proposed Consolidated Pleading will afford all parties.

B. Conclusion.

Based on the foregoing, the Court should grant Brahma leave to file and serve the Proposed Consolidated Pleading in substantially the form set forth in this Motion.

Dated this 25 day of March, 2019.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 25th day of March, 2019, I caused the above and foregoing document entitled, **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**, to be served as follows:

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

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

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EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

FEB 19 2019

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10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

13 Plaintiff,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Defendant.

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

**ORDER GRANTING BRAHMA'S
MOTION TO CONSOLIDATE CASE
NO. CV39799 WITH CASE NO. CV
39348**

17 This matter came on for hearing January 24, 2019 (the "Hearing") before the Honorable
18 Senior Judge Steven Elliott on the Motion to Consolidate Case No. CV39799 with Case No. CV
19 39348 ("Motion") filed by BRAHMA GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of
20 PEEL BRIMLEY LLP appeared on behalf of Brahma. Colby L. Balkenbush, Esq. of
21 WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of Plaintiff
22 TONOPAH SOLAR ENERGY, LLC ("TSE").

23 The Court having considered all the pleadings and papers on file, and having heard
24 argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
25 bench on January 24, 2019:

26 **I. BASIS FOR CONSOLIDATION**

27 Brahma seeks to consolidate Case No. CV39799 with Case No. CV 39348 pursuant to
28 NRCP 42, which provides in relevant part:

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1 [W]hen actions involving a common question of law or fact are pending before the
2 court, it may order a joint hearing or trial of any or all the matters in issue in the
3 actions; it may order all the actions consolidated; and it may make such orders
concerning proceedings therein as may tend to avoid unnecessary costs or delay.

4 Consolidation is vested in the sound discretion of the trial court. (*Zupancic v. Sierra Vista*
5 *Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981).

6 **II. FINDINGS AND CONCLUSIONS.**

7 1. The Court finds (i) the two cases involve common questions of law or fact, and
8 (ii) consolidation would “avoid unnecessary costs or delay” and provide judicial economy.

9 2. TSE opposed the Motion on several grounds. First, TSE argues that it was
10 procedurally improper for Brahma to file Case No. CV39799 when Case No. CV 39348 is
11 pending in this Court with similar or identical claims. However, in its Motion to Strike Brahma
12 Group, Inc.’s (“Brahma”) First Amended Counter-Complaint (“Motion to Strike”),¹ TSE argued
13 that Brahma’s proposed amended pleading was improper because “one cannot file a Counter-
14 Complaint into a special proceeding such as this.” In support of its position, TSE relied on what
15 it claimed to be “the leading Nevada construction law treatise,” LEON F. MEAD II,
16 CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) “it is improper legal
17 procedure to file a counter-claim to a petition under NRS 108.2275,” and (ii) “the proper
18 procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate
19 the two matters.”

20 3. As discussed in the Court’s Order Denying Motion to Strike, the Court does not
21 agree with Mr. Mead’s premise and found that there was nothing improper with Brahma filing
22 its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge
23 Brahma’s Lien. Additionally, the Court has now come to the conclusion that had Brahma filed a
24 standalone complaint as an independent action and then moved the Court to consolidate that
25 action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they
26 currently find themselves in.

27
28 ¹ The complete title of that motion was “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.”

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4. In any event, and especially where TSE has stated its intention to file a Writ Petition to the Nevada Supreme Court with respect to this Court's denial of TSE's Motion to Strike, it was appropriate for Brahma to file Case No. CV39799 and for this Court to consolidate that action into the present action. Specifically, but without limitation, if the Supreme Court were to ultimately overrule this court and determine that it was improper for Brahma to file a counter-claim to a petition under NRS 108.2275, Brahma's time to file a complaint against the applicable surety bond would by then have lapsed pursuant to NRS 108.2421. If, on the other hand, the Nevada Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure claim filed in Case No. CV39799 is (at worst) moot with no prejudice having been suffered by any party by way of consolidation.

5. The Court also rejects TSE's contention that Case No. CV39799 and Brahma's Motion to Consolidate is futile. The Court finds that Brahma's Complaint filed in Case No. CV39799 is not impermissible claim-splitting and does not violate NRCP 1 or NRCP 15.

6. Based on the foregoing, the Court hereby concludes that Case No. CV39799 may be and is hereby consolidated with Case No. CV 39348.

NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion to Consolidate is **GRANTED** and Case No. CV39799 is hereby consolidated with Case No. CV 39348.

Dated this 12th day February 2019.

 2-14-19
Senior Judge Steven Elliott

Submitted by:
PEEL BRIMLEY LLP

/s/
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EXHIBIT 2

ORIGINAL

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11 **FIFTH JUDICIAL DISTRICT COURT**

12 **NYE COUNTY, NEVADA**

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.

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

19 **ORDER**

- 20 (I) **DENYING TONOPAH
SOLAR ENERGY, LLC'S
MOTION TO STRIKE AND
DISMISS; AND**
- 21 (II) **GRANTING IN PART
TONOPAH SOLAR
ENERGY, LLC'S MOTION
FOR STAY**
- 22 (III) **GRANTING BRAHMA
GROUP, INC'S MOTION TO
AMEND**
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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Counterclaimant/Lien Claimant,

3 vs.

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

8 Counter-Defendant,

9 BRAHMA GROUP, INC., a Nevada corporation,

10 Third-Party Plaintiff,

11 vs.

12 COBRA THERMOSOLAR PLANTS, INC., a
13 Nevada corporation; AMERICAN HOME
14 ASSURANCE COMPANY, a surety; BOE
15 BONDING COMPANIES I through X; DOES I
16 through X; ROE CORPORATIONS I through X,
inclusive,

17 Third-Party Defendants.

18 **ORDER**

19 These matters came on for hearing December 11, 2018 (the "Hearing") before the
20 Honorable Senior Judge Steven Elliott on the Motion to Strike, Motion to Dismiss and Motion
21 for Stay ("Motion to Strike") filed by Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE")
22 and Motion to Amend filed by Defendant, Brahma Group, Inc. ("Brahma"). D. Lee Roberts,
23 Esq., and Ryan Gormley, Esq. of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
24 appeared on behalf of TSE. Richard Peel, Esq., Eric B. Zimbelman, Esq. and Cary Domina, Esq.
25 of PEEL BRIMLEY LLP appeared on behalf of Brahma.

26 The Court having considered all the pleadings and papers on file, and having heard
27 argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
28 bench on December 11, 2018:

1 The Court finds that Brahma's Amended Counter-Complaint does not violate NRCP 7(a)
2 because it (i) acts as a standalone complaint, (ii) was served on TSE, and (iii) provides adequate
3 notice of the claims that are at issue between Brahma and TSE. While incorrectly styled as a
4 "Counter-Complaint," the Court finds that it is really a "Complaint" and complies with NRCP
5 7(a) as it "puts the matters asserted therein at issue." In fact, the initial pleading Brahma filed in
6 this Action was identified as a "Mechanic's Lien Foreclosure Complaint" and was not called an
7 Amended Counter-Complaint until Brahma amended the initial Complaint.

8 The Court further finds that there was nothing improper with Brahma filing its Counter-
9 Complaint in the same Case TSE commenced when it filed its Motion to Expunge Brahma's
10 Lien. First, NRS 108.2275(5) establishes the Nevada Legislature's intent to combine mechanic's
11 lien foreclosure actions with motions to expunge liens. ~~Had Brahma filed a standalone complaint~~
12 ~~as an independent action and then moved the Court to consolidate that action with Case No. CV~~
13 ~~39348 as TSE suggests, the Parties would be in the same position they currently find themselves~~
14 ~~in. Also,~~ ^{SPE} at the time Brahma filed its Amended Counter-Complaint in this Action, the Court had
15 not yet ruled on Brahma's Motion for Attorney's Fees and Costs under NRS 108.2275, so that
16 Case was still open.

17 The Court further finds that the following three Causes of Action asserted by Brahma
18 against TSE are stayed: (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith
19 and Fair Dealing; and (iii) Violations of NRS 624 until such time as the federal court rules on
20 Brahma's and TSE's pending motions filed in the federal action. With respect to all remaining
21 causes of action (as may be further amended), nothing herein is intended to be a stay of such
22 claims and causes of action and Brahma is entitled to proceed with the prosecution of such
23 claims.

24 Finally, the Court finds that Brahma shall be permitted to amend its Amended Counter-
25 Complaint to (i) withdraw the mechanic's lien foreclosure action against TSE's Work of
26 Improvement; (ii) identify the Rider to the Bond (as defined in the Parties' Briefing); and (iii)
27 increase its mechanic's lien foreclosure action against the Bond and Rider to \$19,289,366. The
28 three stayed Causes of Action shall be included in the Second Amended Complaint but shall

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1 remain stayed as set forth above.

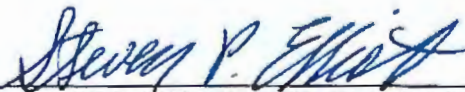
2 **THEREFORE, IT IS HEREBY ORDERED** that TSE's Motion to Strike Brahma's
3 Amended Counter-Compliant is DENIED;

4 **IT IS FURTHER ORDERED** that TSE's Motion to Dismiss Brahma's Amended
5 Counter-Complaint is DENIED; and

6 **IT IS FURTHER ORDERED** that TSE's Motion for Stay is DENIED in part and
7 GRANTED in part. The Motion for Stay is granted only as to the following three Causes of
8 Action which TSE initially removed to federal court: (i) Breach of Contract; (ii) Breach of
9 Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624. These three
10 Causes of Action shall be stayed until such time as the Federal Court rules on whether this Court
11 has proper jurisdiction over these claims. Brahma may prosecute its remaining claims and causes
12 of action as amended. TSE's Motion for Stay is DENIED as to all other claims.

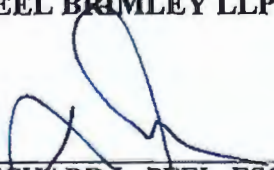
13 **IT IS FURTHER ORDERED** that Brahma shall be permitted to amend its Amended
14 Counter-Complaint.

15 Dated this 24 day of January, 2019.

16 

17 SENIOR JUDGE STEVEN ELLIOTT

18
19
20 Respectfully submitted by:
21 PEEL BRIMLEY LLP

22 

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24 ERIC B. ZIMBELMAN, ESQ. (9407)
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