IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

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 5

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
ezimbelman@peelbrimley.com
rpeel@peelbrimley.com
Attorneys for Respondent
Brahma Group, Inc.

CHRONOLOGICAL APPENDIX OF EXHIBITS

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EXHIBIT 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.
District Court Case No. CV 39348

Tonopah Solar Energy, LLC,
Petitioner

v.

The Fifth Judicial District Court, State of Nevada, Nye County, and the Honorable Steven P. Elliott, Senior Judge,
Respondent

and

Brahma Group, Inc.,
Real Party in Interest.

PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS

D. LEE ROBERTS, JR., ESQ.
Nevada Bar No. 8877
COLBY L. BALKENBUSH, ESQ.
Nevada Bar No. 13066
RYAN T. GORMLEY, ESQ.
Nevada Bar No. 13494
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
cbalkenbush@wwhgd.com
rgormley@wwhgd.com

Attorneys for Petitioner
Tonopah Solar Energy, LLC

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following is an entity as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner Tonopah Solar Energy, LLC does not possess any parent corporations and no publicly held company owns ten percent or more of its stock. Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC is the only law firm that has appeared on behalf of Petitioner in this case or is expected to appear on behalf of Petitioner in this Court.

Dated: March 5, 2019

/s/ D. Lee Roberts, Jr.
D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorneys for Petitioner
Tonopah Solar Energy, LLC

ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals because the first issue presented arises under NRS Chapter 108. *See* NRAP 17(b)(8). The second and third issues presented, however, constitute questions of first impression involving the common law which the Supreme Court may wish to address. *See* NRAP 17(a)(11). And all three issues presented raise a question of statewide public importance. *See* NRAP 17(a)(12).

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I. ISSUES PRESENTED AND RELIEF SOUGHT

Petitioner Tonopah Solar Energy, LLC ("TSE") is the project developer and owner of improvements constituting a near billion-dollar thermal solar energy project located outside Tonopah, Nevada on land belonging to the federal government and under lease to TSE. TSE entered into a services agreement with Real Party in Interest Brahma Group, Inc. ("Brahma") for Brahma to perform certain work on the project. Brahma and TSE have asserted competing claims against each other arising out of this relationship: Brahma contends that TSE owes it millions of dollars for work it performed on the project; TSE contends that it does not owe any additional money and that much of the money that it had already paid to Brahma was based on fraudulent invoices.

This petition arises out of the district court's recent denial of TSE's motion to dismiss, strike, or stay a "First Amended Counter-Complaint" filed by Brahma in a limited Nye County special proceeding instituted by the filing of a motion to expunge under Nevada's Mechanic's Lien statutes. The district court entered the order on January 24, 2019, and notice of entry was filed on January 25, 2019. By denying TSE's motion, the district court erred with respect to three significant issues, as further explained below, and is now acting outside the scope of its subject matter jurisdiction and in contravention of both Nevada's mechanic's lien statutes and federal law governing removal jurisdiction.

Through a brief but tortured procedural history, this much is clear. Brahma initiated a civil action against TSE in Clark County by filing a complaint. TSE timely removed Brahma's Clark County lawsuit to federal court. Brahma did not want its claims in federal court, but instead of moving to remand on proper grounds, Brahma simply dropped 3 out of its 4 claims from the federal lawsuit and re-filed them in Nye County. They were not re-filed as a complaint that could be removed. Instead they were re-filed in a pending special proceeding as a "Counter-Complaint," a pleading that does not even exist under the Nevada Rules of Civil Procedure. Despite all of this, the district court refused to dismiss the rogue pleadings. It cannot be this easy to evade federal jurisdiction and frustrate a foreign defendant's constitutional right to removal.

TSE has no plain, speedy and adequate remedy at the conclusion of this action. Now is the appropriate time to remedy these jurisdictional and legal errors, which, if allowed to run their natural course, will lead to unnecessary and duplicative litigation in both state and federal court—perhaps for years. Without writ relief, the real party in interest will be rewarded for its outrageous procedural gamesmanship. Writ relief is necessary to avoid such manifest injustice.

In its motion to dismiss, strike, or stay, TSE requested, in pertinent part, that the Nye County district court (1) dismiss or strike the pleading filed by Brahma into the special proceeding created by TSE's motion to expunge because such a

filing violates the rules governing pleadings and is not permitted under NRS Chapter 108, (2) dismiss or strike the claims that Brahma self-remanded from federal to state court because the state court lacks subject matter jurisdiction over the claims, or (3) alternatively, stay the entire state court proceeding until resolution of the federal court action under the first-to-file rule because the federal court action was filed first and features substantially the same parties and issues.

The Nye County district court granted the motion in part and denied the motion in part. Pertinent here, the district court (1) did not dismiss or strike the "Counter-Complaint" filed by Brahma because it found that NRS 108.2275(5) permitted Brahma to file a lien foreclosure complaint into a special proceeding created by the filing of a motion to expunge, (2) merely stayed the claims that Brahma self-remanded from federal to state court instead of dismissing them pending resolution of motions pending in federal court on the subject, and (3) refused to stay the entire state court proceeding under the first-to-file rule without explanation. These decisions give rise to the following three issues:

First issue: While NRS 108.2275(5) expressly allows a party to file a motion to expunge in a civil action initiated by the filing of a lien foreclosure complaint, it is silent on whether a party can file a counter-complaint into a special proceeding created by the filing of a motion to expunge, and somehow convert the special proceeding into a civil action. The district court interpreted this silence as

permitting such an act—which would otherwise be improper under the Nevada Rules of Civil Procedure. Was this interpretation erroneous?

Second issue: When a party removes claims to federal court, all state courts lose subject matter jurisdiction over those claims until the claims are remanded or resolved. The Nye County district court is exercising subject matter jurisdiction over removed claims, which have not been remanded or resolved, by refusing to dismiss the claims. Did the district court err by staying the claims instead of dismissing or striking them?

Third issue: Courts stay later filed proceedings under the first-to-file rule when the proceeding features substantially the same issues and parties as a previously filed case. The Nye County district court did not stay its proceedings even though the federal action was first filed and features substantially the same issues and parties. Did the district court abuse its discretion in making this decision?

Based on these issues, *TSE seeks the following relief.* As to the first issue, TSE seeks a writ of prohibition preventing the Nye County district court from exercising jurisdiction over the claims asserted by Brahma in the Nye County special proceeding, or, alternatively, a writ of mandamus compelling the district court to vacate its order and hold that Brahma's pleadings in the special proceeding

should be dismissed or struck because a party cannot file a counter-complaint into a special proceeding created by the filing of a motion to expunge.

As to the second issue, TSE seeks a writ of prohibition preventing the Nye County district court from exercising subject matter jurisdiction over the three claims that Brahma transferred via self-help from federal court back to state court, or, alternatively, a writ of mandamus compelling the district court to vacate the stay and dismiss Brahma's self-transferred claims for lack of subject matter jurisdiction.

As to the third issue, TSE seeks a writ of mandamus compelling the district court to vacate its order and stay the entire state court proceeding pending resolution of the federal court action under the first-to-file rule.

II. STATEMENT OF PERTINENT FACTS

This section includes a short background, the facts pertaining to Brahma's backdoor remand attempt, and a detailed summary of the relief entered by the district court that is the focus of this petition. For ease of reference, a timeline highlighting the key filing dates discussed below is attached as **Addendum A**.

A. Background

TSE is the project developer of the Crescent Dunes Solar Energy Facility ("Project"). The Project is a thermal reserve solar energy project located outside Tonopah, Nevada designed to produce 110 megawatts of electricity. TSE entered

into an agreement as of February 1, 2017, with Brahma for Brahma to perform services and related work on the Project. *See* 2 PA 138.[1] Disputes arose between TSE and Brahma concerning payment and performance under the agreement. Brahma asserts that TSE failed to pay it for work performed on the Project; TSE asserts that it has overpaid Brahma based on fraudulent misrepresentations made by Brahma in its invoices.[2] *See, e.g.*, 2 PA 132-36; 2 PA 170-88.

B. TSE opens a special proceeding in Nye County by moving to expunge a mechanic's lien recorded by Brahma.

In April 2018, Brahma recorded a mechanic's lien pertaining to the Project. 4 PA 330. Brahma would go on to amend the lien four times, increasing its claim amount from $6,982,186 in its original lien to over $12.8 million in its Fourth Amended Lien, an increase that cannot be explained by work performed after the filing of the first Notice of Lien. *See* 4 PA 381-420.

[1] "PA" refers to the Petitioner's Appendix submitted in conjunction with this writ petition. The number preceding PA indicates the volume, while the number following PA indicates the bates number.

[2] For instance, TSE has alleged that Brahma personnel billed TSE for excessive time and to already completed work orders. *See* 2 PA 177-87. In addition, TSE alleges that Brahma defrauded TSE by misusing a contractual term in its time and materials agreement with TSE which allowed for a ten percent mark-up charge for work performed by Brahma's subcontractors. *Id.* It is alleged that Brahma fraudulently billed its affiliates as subcontractors, without disclosing this relationship, allowing it to add an extra ten percent mark-up to its labor charges. *Id.*

On June 11, 2018, TSE filed a motion to expunge Brahma's mechanic's lien in Nye County under NRS 108.2275(1). 1 PA 01. As there was no complaint pending at the time,[3] the filing of this motion to expunge resulted in the opening of a special proceeding in accordance with NRS 108.2275(5), which provides that "[i]f, at the time the [motion] is filed, an action to foreclose the notice of lien has not been filed, the clerk of the court shall assign a number to the [motion] and obtain from the [moving party] a filing fee of $85." The motion to expunge was set to be heard on September 12, 2018.

C. While TSE's motion to expunge was pending, TSE removes Brahma's Clark County complaint to federal court.

While TSE's motion to expunge was still waiting to be heard in Nye County, on July 17, 2018, Brahma filed a complaint in Clark County against TSE.[4] 2 PA 132-36. The Clark County complaint asserted four claims against TSE: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) and violation of NRS Chapter 624. *See id.* All of these

[3] Prior to the filing of this motion to expunge, Brahma had voluntarily dismissed a complaint it had filed in Nye County under Nev. R. Civ. P. 41(a)(1)(A)(i) because the complaint was premature under NRS 108.244, which prohibits lien claimants from filing a lien foreclosure action until 30 days have passed from the date the notice of lien was recorded. *See* 1 PA 69; 4 PA 361. Brahma had also failed to satisfy a contractual condition precedent to mediate prior to filing the complaint. *Id.*

[4] The agreement between Brahma and TSE required Brahma to bring any legal action in Las Vegas. 2 PA 145 (Section 24).

claims related to the parties' dispute over the work Brahma allegedly performed on the Project. *See id.*

On September 10, 2018, TSE timely removed Brahma's Clark County complaint to federal court. 2 PA 160-68. TSE subsequently answered the removed complaint and asserted counterclaims against Brahma, including breach of contract and fraudulent misrepresentation. 2 PA 170-88.

D. Brahma performs a backdoor remand to evade federal jurisdiction.

On September 12, 2018, after the Clark County action had been removed to federal court, the Nye County district court heard and denied the motion to expunge filed by TSE. *See* 3 PA 268-273. As a result of the denial, the only remaining issue properly pending in the district court special proceeding was the matter of the amount of attorney fees Brahma could recover under NRS 108.2275(6).

Rather than allow the special proceeding to conclude, Brahma started taking steps to self-remand its claims from the federal court action to the Nye County special proceeding. On September 20, 2018, Brahma filed into the Nye County special proceeding a document entitled "Mechanic's Lien Foreclosure Complaint." 2 PA 110-15. In the filing, Brahma asserted a single claim: foreclosure of notice of lien against TSE, who the filing identified as both a "plaintiff" in the special proceeding and "counterdefendant" as to the claims asserted by Brahma. *Id.* at

110-11. Although facially entitled as a "Foreclosure Complaint", Brahma identifies itself as the "Counterclaimant/Lien Claimant."[5] *Id.* By filing the foreclosure complaint into the special proceeding, Brahma eliminated TSE's opportunity to remove the case to federal court. If Brahma had filed the new complaint as an independent action, as required by the Nevada Rules of Civil Procedure, TSE would have been able to remove the complaint to federal court—just as it had done with the Clark County action.

Five days later, on September 25, 2018, Brahma filed a first amended complaint in the federal court action (leave to amend was not required at the time). 2 PA 190-93. In its first amended complaint, Brahma asserted a single claim: unjust enrichment against TSE. *See id.* Brahma dropped the three other claims that TSE had removed to the federal action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) violation of NRS Chapter 624. *See id.*

On the same day, September 25, 2018, Brahma completed its backdoor remand by filing a document entitled "First Amended Counter-Complaint and Third-Party Complaint" in the Nye County special proceeding. 2 PA 117-30. This creatively titled pleading attempted to add to the Nye County special proceeding

[5] The filing begins, "Counterclaimant/Lien Claimant BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, as and for its Complaint in this action (the "Action") against the above-named Counterdefendants, ...". 2 PA 110-11.

the three claims that Brahma had dropped that same day in the federal action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) violation of NRS Chapter 624. *Id.* The First Amended Counter-Complaint and Third-Party Complaint also continued to assert a counterclaim for lien foreclosure. *Id.* The first three claims, which are still pending in Nye County, are identical to the three claims that Brahma had dropped from the federal court action after removal. *Compare id. with* 2 PA 132-36 *and* 2 PA 190-93. The third-party complaint also asserted one claim against Cobra Thermosolar Plant, Inc. ("Cobra") and American Home Assurance Company: claim on the surety bond. 2 PA 126-30.[6]

E. TSE moves to undo the effect of Brahma's backdoor remand and restore the case to the correct procedural posture.

Brahma's backdoor remand effort led to the filing of three motions. In the federal court action, TSE moved to (i) enjoin Brahma from prosecuting its improperly self-transferred claims in the Nye County special proceeding under the All Writs Act, 28 U.S.C. § 1651 and (ii) strike the amended pleading filed by Brahma in federal court that accomplished the self-transfer. *See* 6 PA 604-618

[6] On September 6, 2018, Cobra recorded a surety bond issued by American Home Assurance Company, which released Brahma's mechanic's lien pursuant to NRS 108.2415(6). *See* NRS 108.2415; 5 PA 422-44. Cobra was the prime contractor that TSE had contracted with to complete the Project prior to contracting with Brahma. Cobra obtained the surety bond to release Brahma's lien in accordance with its contractual relationship with TSE. *Id.* Cobra is identified as the principal on the surety bond; Brahma is the obligee. *Id.*

(Motion); 7 PA 620-644 (Response); 7 PA 646-660 (Reply). Brahma filed a motion asking the federal court to abstain from exercising its federal removal jurisdiction under the *Colorado River Abstention Doctrine*. *See* 2 PA 195-213 (Motion); 6 PA 566-88 (Response); 6 PA 590-602 (Reply). Those motions remain pending. *See* 8 PA 878-885 (docket from the federal court action).

In the Nye County special proceeding, TSE moved to dismiss, strike, or stay Brahma's claims. 1 PA 84-108. Pertinent here, the motion made three primary assertions. One, the motion asserted that Brahma's claims should be dismissed or struck because Brahma could not file a complaint or "counter-complaint" into the Nye County special proceeding. *See id.* Two, the motion asserted that the three claims that Brahma dropped from the federal court action and asserted in the Nye County special proceeding should be dismissed or struck for lack of subject matter jurisdiction because the federal court retained subject matter jurisdiction over the claims. *See id.* Three, in the alternative, the motion asserted that the entire state court proceeding should be stayed until resolution of the federal court action under the first-to-file rule because the federal court action was filed first and features substantially the same parties and issues. *See id.*

F. The Nye County district court improperly accepts jurisdiction over the federal claims.

The Nye County district court heard argument on TSE's motion to dismiss, strike, or stay on December 11, 2018. *See* 7 PA 687 (hearing transcript). The

district court granted in part and denied in part the motion. 8 PA 870-877 (order). Pertinent here, the court reached the following conclusions:

- The district court concluded that Brahma's pleading should not be struck or dismissed because NRS 108.2275(5) allows a motion to expunge (i.e., a motion filed under NRS 108.2275(1)) to be filed into an action initiated by a foreclosure complaint (which is not disputed), so the district court reasoned that the statute also permits a party to file a foreclosure complaint into a special proceeding initiated by a motion to expunge. 8 PA 876; 8 PA 777 (hearing transcript, lines 14-20); 809 (hearing transcript, lines 17-25); 810 (hearing transcript, lines 1-19).

- The district court stayed the three claims that Brahma self-transferred from federal court to the Nye County special proceeding pending resolution of the motions pending in federal court. 8 PA 876. By staying the claims and not dismissing them, the court accepted jurisdiction over the claims.

- Finally, the district court did not stay the entire state court proceeding under the first-to-file rule without explanation. *See* 8 PA 870-77.[7]

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[7] Notably, at the same hearing, the district court resolved two additional motions. *See generally* 7 PA 687-8 PA 818 (hearing transcript). The court heard arguments on Brahma's motion for attorney fees under NRS 108.2275(6)(c), which pertained to the district court's denial of TSE's motion to expunge Brahma's mechanic's lien. The district court granted the fee motion, awarding Brahma one hundred percent of its attorney fees for defeating the motion to expunge—nearly $80,000. After the hearing, an additional $10,000 was added to the fee award pursuant to stipulation related to the time spent by Brahma's counsel at the hearing and in preparing the order. This ruling, and the resulting order, brought the special

III. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

By denying TSE's motion to dismiss, strike, or stay, the district court (1) erred in its interpretation of NRS 108.2275(5), (2) erred in concluding that it possessed the subject matter jurisdiction necessary to stay Brahma's self-transferred claims, and (3) abused its discretion in ignoring the first-to-file rule. As a result, the district court is presently acting beyond the scope of its jurisdiction. Remedying these errors now is warranted under Nevada precedent. Accordingly, this Court should entertain this petition on the merits and issue a writ of prohibition, or, of mandamus.

A. This writ petition should be entertained on the merits.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second*

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proceeding to a close pending appeal. Also at the hearing, the district court granted a motion for leave to amend filed by Brahma. 8 PA 876-77. Brahma moved for leave to amend its complaint or "counter-complaint" in order to remove the lien foreclosure claim (because the lien had been bonded off) and increase the amount of the bond claim. Since the hearing, however, apparently fearful that the district court's order partially denying TSE's motion to dismiss, strike, or stay would be reversed, Brahma filed a completely new complaint in Nye County, which opened a new civil action. The new pleading asserted the same surety bond claim that Brahma had already asserted in this action, so that in case of reversal of the district court's order partially denying TSE's motion to dismiss, strike, or stay, Brahma could argue that its new pleading satisfied the nine-month statute of limitation associated with its surety bond claim. *See* NRS 108.2421. Brahma then moved to consolidate the new duplicative case with this special proceeding, which the district court allowed despite TSE's opposition.

Judicial Dist. Court, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citing NRS 34.160). Conversely, a writ of prohibition is available to arrest proceedings where a district court has acted in excess of its jurisdiction. NRS 34.320; *Las Vegas Sands v. Eighth Judicial Dist. Court*, 130 Nev. 643, 649, 331 P.3d 905, 909 (2014).

This Court has discretion whether to entertain a writ petition on its merits and issue a writ of mandamus or prohibition. *See Okada v. Eighth Judicial Dist. Court*, 408 P.3d 566, 569 (Nev. 2018). Nevada courts must entertain writ petitions when a plain, speedy, and adequate remedy in the ordinary course of law does not exist. *See* NRS 34.170; NRS 34.330. A right to direct appeal is generally considered a plain, speedy, and adequate remedy in the ordinary course of law. *See Rawson v. Ninth Judicial Dist. Court*, 396 P.3d 842, 847 (Nev. 2017). But, despite the availability of a direct appeal, Nevada courts consider writ petitions under a variety of circumstances. Here, this writ petition should be entertained on the merits for the following reasons.

1. This writ petition concerns questions of jurisdiction.

The fact that an appeal is available from the final judgment does not preclude issuance of the writ, particularly in circumstances where, as here, "the trial court is alleged to have exceeded its jurisdiction and the challenged order is not appealable." *See G. & M. Properties v. Second Judicial Dist. Court*, 95 Nev. 301, 303–04, 594, P.2d 714, 715–16 (1979). For this reason, writ petitions

challenging a district court's exercise of subject-matter jurisdiction are often entertained on the merits. *See Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 954, 102 P.3d 578, 582 (2004) ("A petition for a writ of prohibition is an appropriate means of challenging the district court's exercise of [subject-matter] jurisdiction").

Here, the first and second issues presented by this writ petition pertain to questions of jurisdiction. The first issue turns on the scope of the district court's jurisdiction under the special proceeding created by the filing of TSE's motion to expunge. The second issue turns on the scope of the district court's subject-matter jurisdiction in light of the federal court's removal jurisdiction.

2. This writ petition features all of the considerations that have previously motived the Court to entertain writ petitions under similar circumstances despite the availability of a direct appeal.

Despite the availability of a direct appeal, writ petitions are entertained where all or some of the following considerations are present: (i) there are no factual disputes, (ii) the district court acted contrary to clear authority, (iii) an important issue of law needs clarification, (iv) the petition gives the Court an opportunity to define the parameters of a statute, (v) public policy will be served by the Court's invocation of its original jurisdiction, and (vi) sound judicial economy and administration favor entertaining the petition. *See, e.g., Okada*, 408 P.3d at 569; *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 383 P.3d

246, 248 (Nev. 2016); *International Game Technology*, 124 Nev. at 197, 179 P.3d at 559.

The Nevada Supreme Court has relied upon these considerations to entertain writ petitions challenging the denial of a motion to dismiss. *See Otak Nevada, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 593, 597, 260 P.3d 408, 410 (2011); *International Game Technology*, 124 Nev. at 198, 179 P.3d at 559; *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). In *Otak*, the Court entertained a writ petition challenging whether a pleading was void because the determination of the issue was "not fact-bound and [involved] an unsettled question of law that [was] likely to recur, and because [the] case [was] in the early stages of litigation and resolving [the] question now [would] promote[ ] judicial economy." 127 Nev. at 597, 260 P.3d at 410.

All of these considerations are present here. The issues presented by this petition do not feature any factual disputes. The issues presented require clarification of important issues of law: the first issue will define the parameters of a special proceeding created under NRS 108.2275(5), the second issue will define the scope of a district court's subject matter jurisdiction over claims that were previously removed but not remanded, and the third issue will define the scope of the first-to-file rule under Nevada law. All of these issues are likely to recur, especially considering that Brahma argued in the district court that its counsel has

previously utilized this same improper course of conduct. *See* 3 PA 287-88 (Brahma's Opposition, lines 26-1); 5 PA 475-84 (Exhibit cited to by Brahma in support of this argument).

Moreover, sound judicial economy and administration favor addressing the issues at this point. The case has not yet entered discovery in the Nye County district court. 8 PA 886-92 (Nye County special proceeding docket). A long drawn out litigation over tens of millions of dollars in both state and federal court should not take place, only for the state court proceeding to potentially be reversed and remanded on appeal because the district court did not possess subject matter jurisdiction.

3. Given the stage and nature of this litigation, appeal does not constitute an adequate and speedy remedy.

Under certain circumstances, the Nevada Supreme Court has held that "the availability of a direct appeal from a final judgment may not always be an adequate and speedy remedy." *Okada*, 408 P.3d at 569. "Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 475, 168 P.3d 731, 736 (2007). In fact, in *International Game Technology*, the Court, in entertaining a writ petition challenging the denial of a motion to dismiss, noted that "an appeal is not an

adequate and speedy remedy, given the early stages of litigation and policies of judicial administration." 124 Nev. at 198, 179 P.3d at 559. *See also G. & M. Properties*, 95 Nev. at 303–04, 594 P.2d at 715–16 ("Furthermore, the fact that an appeal is available from the final judgment does not preclude issuance of the writ, particularly in circumstances where, as here, the trial court is alleged to have exceeded its jurisdiction and the challenged order is not appealable") (internal citations omitted).

Given the early stages of this litigation and the jurisdictional nature of the issues presented by this writ petition, the potential availability of a direct appeal on the issues does not, as found in *International Game Technology*, actually constitute "an adequate and speedy remedy."

4. Given the nature of removal, appeal does not constitute an adequate remedy.

A petitioner does not have an adequate remedy in the ordinary course of law where waiting to resolve the issue until appeal of a final judgment undermines protections afforded by the Constitution. *See Sweat v. Eighth Judicial Dist. Court*, 403 P.3d 353, 355-56 (Nev. 2017). In *Sweat*, the petitioner, Sweat, claimed that the district court erred by denying his motion to dismiss on double jeopardy grounds. *Id.* at 356. Although Sweat had another remedy because he could have raised the double jeopardy issue on appeal from a judgment of conviction, *id.* (citing NRS 177.015; NRS 177.045), the Supreme Court concluded that Sweat's

right to appeal *was not adequate* because it did not protect the right afforded to him by the Double Jeopardy Clause—to not be placed twice in jeopardy. *Id.*

Forcing TSE to defend Brahma's claims in state court, after those claims had been removed to federal court and not remanded, similarly undermines TSE's constitutional rights. The purpose of Section 2, Article III of the United States Constitution is to protect non-residents from prejudice and bias whether they appear as plaintiffs or defendants in state courts. *See, e.g., Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 (5th Cir. 1975) (providing that the "very purpose of federal diversity jurisdiction is to avoid bias against parties from outside the forum state"); *accord, Szanty v. Beech Aircraft Corp.*, 349 F.2d 60, 65 (4th Cir. 1965) (explaining that the purpose of diversity jurisdiction is "to avoid discrimination against non-residents") (citing The Federalist No. 80 (Hamilton) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (Story, J)).

The United States Supreme Court has held that foreign corporations have a "constitutional right to resort to the federal courts." *Terral v. Burke Const. Co.*, 257 U.S. 529, 532, 42 S. Ct. 188, 189, 66 L. Ed. 352 (1922). Because "the federal Constitution confers upon citizens of one state the right to resort to federal courts in another..., state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void ...." *Id.*

Under the facts of this case, TSE exercised its constitutional right to remove Brahma's claims to federal court. By refusing to dismiss those same claims even though they had not been remanded, the Nye County district court is currently curtailing TSE's free exercise of its right of removal. As a result, the right of appeal at the conclusion of this matter does not constitute an "adequate remedy." For all of these reasons, now is the appropriate time to resolve the issues presented by this petition.

B. This Court should issue a writ of prohibition, or, of mandamus to correct the district court's erroneous decisions.

1. Standard of Review

The Nevada Supreme Court has long held that in the context of a writ petition, a district court order is generally reviewed "for an arbitrary or capricious abuse of discretion," while questions of law, such as questions of statutory interpretation and subject matter jurisdiction, are reviewed de novo. *See Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. Adv. Op. 91, 362 P.3d 91, 94 (2015) (statutory interpretation); *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) (subject matter jurisdiction).

Here, the first issue presented below concerns a question of statutory interpretation and is reviewed de novo; the second issue presented below concerns a question of subject matter jurisdiction and is reviewed de novo; the third issue presented below concerns the application of the first-to-file rule and is reviewed

for an abuse of discretion, *see Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1239 (9th Cir. 2015) (providing that a decision to stay proceedings under the first-to-file rule is reviewed for an abuse of discretion).

2. The district court erred by concluding that NRS 108.2275(5) permitted Brahma to initiate a civil action by filing its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge.

By failing to dismiss or strike the complaint filed by Brahma into the Nye County special proceeding created by TSE's motion to expunge, the district court is acting in excess of its jurisdiction. As explained below, first, under its plain terms and the maxim *expressio unius est exclusio alterius*, NRS 108.2275(5) did not permit Brahma to file its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge. The district court erred by concluding otherwise. Second, the course of action taken by Brahma leads to jurisdictional defects, and, if allowed, would contravene basic civil procedure because Brahma's "lien foreclosure complaint," later amended as its "First Amended Counter-Complaint", is not a permissible pleading under NRCP 7. Third and finally, these errors are not a matter of mere technicalities; Brahma ignored the rules and standard practice in order to defeat TSE's removal rights and keep this matter in its preferred forum.

Therefore, this Court should issue a writ of prohibition preventing the Nye County district court from exercising jurisdiction over the claims asserted by

Brahma in the Nye County special proceeding, or, alternatively, issue a writ of mandamus compelling the district court to vacate its order and hold that Brahma's pleadings in the special proceeding should be dismissed or struck because Brahma could not file its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge.

a. NRS 108.2275(5) did not permit Brahma to file its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge.

NRS Chapter 108 governs mechanic's liens. Procedural rules and statutes in Nevada are subject to the same rules of statutory interpretation. *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139, 1142 (2015). Under these rules, when the language of a statute or rule is "plain and unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning." *Rural Tel. Co. v. Pub. Utilities Comm'n*, 398 P.3d 909, 911 (Nev. 2017) (internal quotation marks omitted).

Under Chapter 108, a person can record a lien against property, entitling that person to certain rights. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573-75, 289 P.3d 1199, 1210-11 (2012) (discussing the history of Nevada's mechanic's lien statutes). Under NRS 108.2275(1), the debtor of the lien claimant or a party in interest in the property "may apply by motion to the district court for the county where the property or some part thereof is located for an order directing

the lien claimant to appear before the court to show cause why the relief requested should not be granted." This motion is commonly referred to as a motion to expunge.

NRS 108.2275(5) provides the following guidance on where the debtor can file the motion to expunge:

> If, at the time the application is filed, an action to foreclose the notice of lien has not been filed, the clerk of the court shall assign a number to the application and obtain from the applicant a filing fee of $85. If an action has been filed to foreclose the notice of lien before the application was filed pursuant to this section, the application must be made a part of the action to foreclose the notice of lien.

NRS 108.2275(5).

The filing of a motion to expunge under NRS 108.2275(5) does not constitute the initiation of a civil action. This is clear for three reasons. One, while NRS Chapter 108 uses "action" in the context of "action to foreclose the notice of lien," it does not use the word "action" in the context of the proceeding created by the separate filing of the motion to expunge. Two, the special proceeding has a limited scope. NRS 108.2275(6) envisions all of the results of the motion to expunge: grant the motion and release the lien, grant the motion and reduce the lien, or deny the motion. Three and most importantly, in Nevada, a civil action can only be initiated by the filing of a complaint, *see* NRCP 3, which a motion to expunge is not. *See* NRCP 7(a) (identifying the only allowed pleadings); *Smith v.*

Eighth Judicial Dist. Court, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997) (providing that NRCP 7(a) identifies the only allowed pleadings). Thus, the filing of a motion to expunge under NRS 108.2275(5) does not result in the opening of a civil action, but rather it results in the opening of a special proceeding limited to resolving the motion to expunge.[8]

Because filing a motion to expunge opens a limited special proceeding, not a civil action, for a lien claimant to be able to file a lien foreclosure complaint into an already pending special proceeding, statutory authority would have to specifically provide for such an act; otherwise, such a filing would directly contravene the process for initiating a civil action. *See* NRCP 3 (providing that a "civil action is commenced by filing a complaint with the court"). Yet, no such statutory authority exists.

By its plain terms, NRS 108.2275(5) does not permit the filling of a lien foreclosure complaint into an already pending special proceeding. NRS 108.2275(5) specifically provides that a party can initiate a special proceeding by separately filing a motion to expunge if a foreclosure action has not yet been initiated. While the statute requires a party to file a motion to expunge into a

[8] In addition, the statutory fee of $85 charged to the applicant under NRS 108.2275(5) is also evidence that filing a motion to expunge does not initiate a civil action. The filing fee for initiating a civil action through the filing of a complaint is $245. *See* https://www.nyecounty.net/DocumentCenter/View/30588/Fee-List-070117-Amended-092517.

foreclosure action if the foreclosure action has already been initiated, the statute does not provide for the filing of a foreclosure action into a special proceeding created by the filing of a motion to expunge. *See* NRS 108.2275(5). This silence must be viewed as intentional, which leads to the conclusion that such a filing is not allowed. *See Cramer v. State, DMV*, 126 Nev. 388, 394, 240 P.3d 8, 12 (2010) (providing that "omissions of subject matters from statutory provisions are presumed to have been intentional") (internal quotation marks omitted).

This interpretation aligns with the maxim *expressio unius est exclusio alterius*, which Nevada courts have long followed in interpreting the plain language of statutes. *See Cramer*, 126 Nev. at 393, 240 P.3d at 11; *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009). This maxim means that "the mention of one thing implies the exclusion of another," *id.*, or "'when the Legislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any?'" *Rural Telephone Company,* 398 P.3d at 911 (quoting *Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920). Thus, NRS 108.2275(5) cannot be interpreted as permitting a person to file a lien foreclosure complaint into a special proceeding created by the filing of a motion to expunge.

A Nevada construction law treatise, an earlier edition of which the Nevada Supreme Court has previously relied upon, *see In re Fontainebleau*, 128 Nev. at 575, 289 P.3d at 1211, reached the same conclusion. *See* Leon F. Mead II, *Nevada Construction Law*, p. 286 (2016 ed.); 6 PA 552-61. There, it is written that

> [a] foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) 4. Likewise, a 'petition' is not a proper 'pleading' under NRCP 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.

Id.; 6 PA 561.

Here, the district court reached the opposite conclusion. The district court interpreted NRS 108.2275(5) as permitting Brahma to file a lien foreclosure complaint into the special proceeding created by TSE's motion to expunge. 8 PA 876 (order); 8 PA 777 (hearing transcript, lines 14-20); 809 (hearing transcript, lines 17-25); 810 (hearing transcript, lines 1-19). The district court reasoned that if NRS 108.2275(5) authorizes the filing of a motion to expunge into a civil action initiated by the filing of a lien foreclosure complaint (which it does), it would necessarily permit the filing of a lien foreclosure complaint into a special proceeding created by the filing of a motion to expunge. *Id.* As explained above, however, this reasoning is patently wrong. By its plain terms, NRS 108.2275(5)

does not authorize the filing of a lien foreclosure complaint into a special proceeding created by the filing of a motion to expunge. The statute does not contemplate this result, and its silence cannot be interpreted as permitting such a result. The district court's conclusion to the contrary violates the statute's plain language and the maxim *expressio unius est exclusio alterius*. The statute did not permit Braham to file its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge. Thus, Brahma's lien foreclosure complaint should have been struck or dismissed.[9]

b. The course of action taken by Brahma leads to jurisdictional defects, and, if allowed, would contravene basic civil procedure.

NRCP 7 sets forth all of the types of permissible pleadings: "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served." *See Smith v. Eighth*

[9] While Brahma might argue that the mechanic's lien statutes "should be liberally construed to protect the rights of claimants and promote justice," there is no question that "claimants must substantially comply with the statutes' requirements." *I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1204 (2013). Filing a lien foreclosure action into a special proceeding created by the filing of a motion to expunge does not substantially comply with the requirements of NRS Chapter 108 because, as explained above, there is no statutory authority for such an act.

Judicial Dist. Court, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997) ("Thus, the only pleadings allowed are complaints, answers, and replies."). A complaint commences a civil action. *See* NRCP 3; Black's Law Dictionary (10th ed. 2014) (defining "complaint" as "[t]he initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief"). An answer responds to a complaint and a reply responds to a counterclaim made in an answer. *See* NRCP 12(a).

The Nevada Supreme Court has previously held that for claims, such as Brahma's lien foreclosure claim, to be "legally cognizable," they "must be asserted in a pleading." *Smith*, 113 Nev. at 1343, 950 P.2d at 282. In *Smith*, the Nevada Supreme Court issued a writ of mandamus compelling the district court to evaluate under a different legal standard whether it had a duty to strike the real party in interest's "cross-claim" because it was not a pleading. *Id.* at 1348, 950 P.2d at 283. The Court explained that such a defect was not merely technical: "[t]here is . . . nothing technical about the defect in Chang's cross-claim; the document simply is not a pleading, and does not itself put the matters asserted therein at issue." *Id.*

Here, Brahma's lien foreclosure complaint, 2 PA 110-15, is not a permissible pleading under Rule 7. Although Brahma refers to its lien foreclosure complaint as a "complaint," it is not a "complaint." By filing its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge,

Brahma's lien foreclosure complaint did not commence a civil action; thus, it does not constitute a "complaint." Moreover, it is clear that Brahma's lien foreclosure complaint is not an answer, a reply to a counterclaim, or any of the other types of pleadings set forth in Rule 7. *See id.* Brahma itself recognized this, and in the body of the pleading identifies itself as the "Counterclaimant/Lien Claimant". 2 PA 111. Similarly, when Brahma amended the "Lien Foreclosure Complaint," it called the amended pleading its First Amended Counter-Complaint—what it really was. 2 PA 117-18.

In summary, Brahma has conceded that it attempted to assert a Counterclaim against TSE in the special proceeding as an independent pleading. This brings the filing directly under the rule established in *Smith*, which held that "Counterclaims and cross-claims must be set forth in pleadings authorized by NRCP 7, because "[n]o other pleading shall be allowed." *Smith*, 113 Nev. at 1347, 950 P.2d at 282 (citing NRCP 7(a) and *Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 808–11 (3d Cir.1992) (filing a cross-claim as a separate document instead of asserting it in an answer was a violation of Rule 11 warranting sanctions)). It was therefore impossible under the Nevada Rules of Civil Procedure for Brahma to properly file its counter-claims in the special proceeding. A counter-claim can only be asserted in an answer, and because TSE had not filed a complaint, Brahma could not file an answer.

Because Brahma's lien foreclosure complaint, which turned into its First Amended Counter-Claim, is not a permissible pleading, its claims asserted therein are not "legally cognizable." *Smith*, 113 Nev. at 1343, 950 P.2d at 282. As explained in *Smith*, this is not merely a technical defect. As a result of this defect, Brahma's lien foreclosure complaint (and its amendments thereto) "does not itself put the matters asserted therein at issue." *Id.* at 1343, 950 P.2d at 283. This is a fatal defect that cannot be cured by amendment. *See id.* Thus, permitting Brahma to file its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge not only violates NRS 108.2275(5), it violates the basic tenets of civil procedure governing the filing of pleadings. Accordingly, Brahma's lien foreclosure complaint should have been struck or dismissed.

c. These errors are not a matter of mere technicalities but furthered Brahma's forum shopping efforts.

Brahma appears to have followed this strange procedural process in order to keep this case in its preferred forum of Nye County. Brahma's refrain in the district court of the adage "no harm, no foul" is misplaced. By using these tactics, Brahma interfered with TSE's right to removal and attempted to create an argument against staying the Nye County state court action despite the first-filed Clark County action which was removed by TSE to federal court.

Brahma filed its lien foreclosure complaint on September 20, 2018. 2 PA 110-15. It named only TSE as a defendant. *Id.* If Brahma would have properly

filed the complaint as a new civil action, TSE could have removed the complaint on the basis of diversity as it had previously removed Brahma's Clark County complaint. *See* 2 PA 160-68 (Notice of Removal). But, TSE could not remove the lien foreclosure complaint because it was not a defendant, but rather a supposed "plaintiff" and "counterdefendant," as Brahma phrased it. 2 PA 110-11; *see* 28 U.S.C. § 1446(a) (stating that only "[a] defendant or defendants" can remove a civil action from state court to federal court).

In addition, Brahma later linked the filing date of its lien foreclosure complaint with the filing date of TSE's motion to expunge in order to argue that a stay under the first-to-file rule was inappropriate because TSE's motion to expunge was filed prior to Brahma's removed Clark County complaint (an argument that lacks merit as explained below). Brahma should not stand to benefit from such improper maneuvering. The relief sought herein is warranted.

3. The district court erred by exercising subject matter jurisdiction over Brahma's claims that are still subject to the federal court's removal jurisdiction.

The Nye County district court does not possess subject matter jurisdiction over Brahma's self-transferred claims. As explained below, when TSE removed the Clark County complaint to federal court, all state courts lost subject matter jurisdiction over those claims unless they were remanded. And, when a state court lacks subject matter jurisdiction over a claim, the only option is dismissal. Thus,

because the removed claims were never remanded, the Nye County district court erred when it exercised subject matter jurisdiction over the claims by staying them instead of dismissing them.

a. When a defendant removes claims to federal court, all state courts lose subject matter jurisdiction over those claims unless the federal court remands the claims.

The Ninth Circuit has held that under the federal removal statute, 28 U.S.C. § 1446(d), state courts lose jurisdiction over claims when a defendant files a petition for removal. *See Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir. 1994) (providing that "the clear language of the general removal statute provides that the state court loses jurisdiction upon the filing of the petition for removal"). In fact, in *California ex. rel. Sacramento*, the Ninth Circuit stated that "it is impossible to obtain judicial remedies and sanctions in state and local courts once an action is removed to federal court. The removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute." *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000); *see also* Wright & Miller, *Federal Practice & Procedure* § 3736 (4th ed.) (stating that, following removal, any further proceedings in a state court are considered *coram non judice* and will be vacated even if the case is later remanded).

State courts across the country have reached the same conclusion, holding

that once a defendant removes claims to federal court, all state courts, not just the court from where the claims were removed, lack subject matter jurisdiction over the claims. In California, it has been held that removal of an action may "be viewed as a transfer of the proceeding from the courts of one sovereign (a state) to the courts of another (the United States)" because "states are separate sovereigns with respect to the federal government." *See In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007).

The Idaho Supreme Court has upheld the district court's dismissal of a complaint that was filed in state court after a separate action was already pending in federal court, and stated the following:

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

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

In New York, the state's high court reached the same conclusion in *Fire Ass'n of Philadelphia v. Gen. Handkerchief Corp.*, 107 N.E.2d 499, 500 (N.Y. 1952). There, an insured brought an action in state court against its insurer. *Id.* The insurer subsequently removed the action to federal court. *Id.* Later, the insurer initiated a separate action against the insured in state court. *Id.* The insured filed a counterclaim in the second state court action, which was identical to

one of the claims removed to federal court. *Id.* The state court dismissed the counterclaim based on lack of subject matter jurisdiction due to the prior removal. *Id.* The Court of Appeals affirmed the dismissal, concluding that upon removal, the state court lost subject matter jurisdiction over the claim. *Id.*

Texas courts have also reached the same conclusion. In *Meyerland*, the Texas Supreme Court found a state court's order void because it occurred after the case had been removed. *Meyerland Co. v. F.D.I.C.*, 848 S.W.2d 82, 83 (Tex. 1993). In *Leffall*, the Texas appellate court affirmed the trial court's dismissal of an action because the plaintiff filed the action after a previous suit filed by the plaintiff concerning the same facts and injury had been removed to federal court. *Leffall v. Johnson*, No. 09-01-177 CV, 2002 WL 125824, at *2 (Tex. App. Jan. 31, 2002) (not designated for publication); *see also Riley v. Carson Pirie Scott & Co.*, 946 F. Supp. 716, 718 (E.D. Wis. 1996) (criticizing a plaintiff for creating a "procedural mess" by amending a complaint in state court to assert claims that had already been removed); *Crummie v. Dayton-Hudson Corp.*, 611 F. Supp. 692, 693 (E.D. Mich. 1985) (rejecting a plaintiff's attempt to transfer jurisdiction from federal court to state court by filing an amended complaint in state court with the federal question claim deleted while the federal action was still pending).

b. If a district court lacks subject matter jurisdiction over claims, the claims must be dismissed.

If a court lacks subject matter jurisdiction over claims, it has no option but to

dismiss the claims. NRCP 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court ***shall*** dismiss the action." (emphasis added)); *see Alabama Dep't of Pub. Safety v. Ogles*, 14 So. 3d 121, 123 (Ala. 2009) ("[I]f a trial court lacks subject-matter jurisdiction, it has no power to take any action other than to dismiss the complaint"). "[A]ny judgment or order rendered by a court lacking subject matter jurisdiction is void on its face" because the court lacks "the inherent authority . . . to deal with the case." *Lefebvre v. S. California Edison*, 244 Cal. App. 4th 143, 151, 198 Cal. Rptr. 3d 114, 120 (2016) (internal quotation marks omitted)); *see Landreth v. Malik,* 127 Nev. 175, 179, 251 P.3d 163, 166 (2011) ("[I]f a district court lacks subject matter jurisdiction, the judgment is rendered void."); *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838) (providing that a court may exercise judicial power only when it has subject matter jurisdiction).

c. The district court should have dismissed Brahma's self-transferred claims because it lacks subject matter jurisdiction over them.

The district court erred by staying the claims that Brahma self-removed from federal court to state court instead of dismissing them. Brahma originally filed the self-removed claims—breach of contract, breach of the implied covenant, and violation of NRS Chapter 624—in Clark County. 2 PA 132-36. TSE removed those claims to federal court. 2 PA 160-68. Brahma then filed an amended

complaint in federal court dropping the claims, 2 PA 190-93, and, on the same day, filed an amended complaint in state court asserting the same claims, 2 PA 117-25. Yet, because the claims were never remanded, the federal court still retains jurisdiction over them. As a result, the district court lacks subject matter jurisdiction over Brahma's self-transferred claims.

Because the district court lacks subject matter jurisdiction over Brahma's self-transferred claims, it only had one option: dismissal. Instead, the district court stayed the claims until the resolution of motions pending in federal court. 8 PA 876. The district court, however, does not possess the jurisdiction or authority to stay the claims. Accordingly, this Court must issue a writ of prohibition preventing the district court from exercising jurisdiction over Brahma's self-transferred claims, or a writ of mandamus, compelling the district court to vacate the stay and dismiss Brahma's self-transferred claims for lack of subject matter jurisdiction.

4. Alternatively, the district court abused its discretion by failing to stay the entire state court proceeding under the first-to-file rule because the district court ignored the rule even though this case presents the optimal scenario to apply the rule.

It does not appear that Nevada has recognized the "first-to-file" rule in a published decision.[10] But, it is a widely recognized doctrine that permits a court to

[10] The Nevada Supreme Court has discussed the first-to-file rule in unpublished decisions. *See for neither authority nor persuasive value Sherry v. Sherry,* No.

dismiss or stay an action that is (1) substantially similar to an action that had (2) already been filed in another court. *See Pacesetter Sys., Inc. v. Medtronic*, Inc., 678 F.2d 93, 95 (9th Cir. 1982); *SAES Getters S.p.A. v. Aeronex*, Inc., 219 F. Supp. 2d 1081, 1089 (S.D. Cal. 2002); *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006); *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 294 (Tex. 2016); *Wamsley v. Nodak Mut. Ins. Co.*, 178 P.3d 102, 110 (Mont. 2008); *Ryan v. Gifford*, 918 A.2d 341, 349 (Del. Ch. 2007). In determining which action was filed first, "courts focus on the date upon which the party filed its original, rather than its amended complaint." *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994). In determining whether the actions are substantially similar, courts look to the similarity of the parties and the similarity of the issues. *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015). Exact similarity of the parties and issues is not necessary, only substantial similarity. *Id.* For instance, a party cannot "skirt the first-to-file rule merely by omitting one party from a second lawsuit." *Id.*

The "first-filed rule flows from principles of comity, convenience, and the necessity for an orderly procedure in the trial of contested issues." *In re J.B.*, 492

62895, 2015 WL 1798857, at *1 (Nev. Apr. 16, 2015) (unpublished); *Uber Techonologies, Inc. v. Second Judicial Dist. Court*, No. 66875, 2014 WL 6680785, at *1 (Nev. Nov. 24, 2014) (unpublished); *Gabrielle v. Eighth Judicial Dist. Court*, No. 66762, 2014 WL 5502460, at *1 (Nev. Oct. 30, 2014) (unpublished); *Tenas v. Progressive Preferred Ins. Co.*, 124 Nev. 1513, 238 P.3d 860 (2008) (unpublished).

S.W.3d at 294 (internal quotation marks omitted). The Ninth Circuit has instructed that it "should not be disregarded lightly." *Kohn Law Group*, 787 F.3d at 1239 (internal quotation marks omitted).

Here, the district court abused its discretion by ignoring the first-to-file rule. *See* 8 PA 874-77. The district court provided no explanation for why it chose not to apply the first-to-file rule, *see id.*, which renders the decision arbitrary and capricious. *See Nunnery v. State,* 127 Nev. 749, 766, 263 P.3d 235, 247 (2011) (providing that an "abuse of discretion occurs if the district court's decision is arbitrary or capricious"); *Boonsong Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) (explaining that a decision without explanation hampers appellate review).

Moreover, this case presents the optimal scenario for application of the first-to-file rule. There are no disputed facts. The claims in federal court were filed before the claims in Nye County. Brahma's federal court claims date back to July 17, 2018—the date it filed its Clark County complaint. 2 PA 132-36. The claims at issue in the Nye County special proceeding were first brought by Brahma months later on September 20, 2018. 2 PA 110.[11] In fact, discovery is already

[11] In the district court, Brahma has attempted to argue that its state court claims date back to the date that TSE filed the motion to expunge. But this argument lacks merit and further highlights why a party cannot file a complaint into a special proceeding created by a motion to expunge. The first-to-file rule looks at the date a pleading was filed, not the date a motion was filed. *See Ward v. Follett Corp.,*

underway in the federal court action. *See* 6 PA 563-64 (scheduling order); 6 PA 507-21 (first set of written discovery served on Brahma in the federal action).

Next, the claims in the federal court action and state court proceeding feature substantially the same parties and issues. The federal court action includes Brahma and TSE and, pre-backdoor remand, Brahma's breach of contract, breach of the implied covenant, unjust enrichment, and violation of NRS Chapter 624 claims and TSE's contractual and tortious counterclaims. 2 PA 132-36; 2 PA 160-68; 2 PA 170-87. The state court proceeding includes the same parties and Cobra and the Surety and the same claims along with the surety bond claim. 3 PA 244-56. The surety bond claim, however—the only claim that pertains to Cobra and the Surety—turns on the same issues as Brahma's and TSE's competing breach of contract claims. For Brahma to recover on the surety bond claim, it must rely on the terms of the contract and show that TSE breached the contract by failing to make certain payments to it. Thus, the issues are identical in both actions.

Further, in conjunction with the federal action being filed first and featuring the same parties and issues, a stay of the entire state court proceeding pending complete resolution of the federal court action would defeat Brahma's improper

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158 F.R.D. 645, 648 (N.D. Cal. 1994). As explained previously, a motion to expunge does not constitute a pleading. *See* NRCP 7(a); *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997). Thus, the date for the purposes of the first-to-file rule for the Nye County special proceeding is the date that Brahma actually filed a pleading—September 20, 2018, 2 PA 110.

maneuvering. Brahma created this procedural quagmire by attempting to move its claims from federal court to the Nye County special proceeding following the Nye County district court's denial of TSE's motion to expunge. Brahma's forum shopping efforts should not be rewarded. By ignoring the factors under the first-to-file rule and this reality, the district court abused its discretion. Consequently, this Court should issue a writ of mandamus compelling the district court to vacate its order and stay the entire state court proceeding pending resolution of the federal court action.[12]

IV. CONCLUSION

Based on the foregoing, this Court should entertain this petition on the merits and issue the relief requested herein. The district court's erroneous denial of TSE's motion to dismiss, strike, or stay should be corrected. The district court is acting outside the scope of its subject matter jurisdiction and in contravention of both Nevada's mechanic's lien statutes and federal law governing removal jurisdiction. Now is the appropriate time to remedy these errors. Writ relief is warranted.

[12] To clarify, TSE is not seeking to stay the order denying its motion to expunge or the order awarding Brahma attorney fees under NRS 108.2275(6)(c). Those orders properly fell within the scope of the special proceeding created by TSE's motion to expunge and have been separately appealed under NRS 108.2275(8). *See* Supreme Court Case No. 78092.

Dated: March 5, 2019

/s/ D. Lee Roberts, Jr.

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorneys for Petitioner
Tonopah Solar Energy, LLC

VERIFICATION

1. I, the undersigned, declare as follows:

2. I am a lawyer duly admitted to practice before the courts of this State and I represent Petitioner Tonopah Solar Energy, LLC in this proceeding.

3. I verify that I have read the foregoing Petition for Writ of Prohibition, or, Alternatively, of Mandamus and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated: March 5, 2019

/s/ D. Lee Roberts, Jr.
D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorneys for Petitioner
Tonopah Solar Energy, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Petition for Writ of Prohibition, or, Alternatively, Mandamus and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires that every assertion in this Petition regarding matters in the record be supported by a reference to the record on appeal.

Dated: March 5, 2019

/s/ D. Lee Roberts, Jr.

D. Lee Roberts, Jr., Esq.
Colby L. Balkenbush, Esq.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Attorneys for Petitioner
Tonopah Solar Energy, LLC

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on March 5, 2019, I filed a Petition for Writ of Prohibition, or, Alternatively, Mandamus with the Clerk of the Nevada Supreme Court and served a copy of the Writ to the addresses shown below (in the manner indicated below). The accompanying 8 Volume Appendix will be electronically filed in the court under NRAP 30(f)(2).

VIA U.S. MAIL:

The Honorable Judge Steven B. Elliott
Fifth Judicial District Court, Department No. 2
1520 E. Basin Ave. #105
Pahrump, Nevada 89060

VIA E-MAIL AND U.S. MAIL:

Richard L. Peel. Esq.
Eric B. Zimbelman, Esq.
Cary B. Domina, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
cdomina@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

Richard E. Haskin, Esq.
Daniel M. Hansen, Esq.
Gibbs Giden Locher Turner
Senet & Wittbrodt LLP

1140 N. Town Center Drive, Suite 300
Las Vegas, Nevada 89144
rhaskin@gibbsgiden.com
dhansen@gibbsgiden.com
Attorneys for H&E Equipment Services, Inc.

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

/s/ Cindy S. Bowman

Addendum A – Procedural Timeline

Date	Event	Bates Number in Petitioner's Appendix
April 9, 2018	Brahma records a notice of lien against the Property in the amount of $6,982,186.24.	1 PA000037
April 16, 2018	Brahma records a first amended and restated lien against the Property in the amount of $7,178,376.94.	1 PA000045
April 17, 2018	Brahma files a complaint in the Fifth Judicial District Court, Nye County, against TSE alleging claims of (1) breach of contract, (2) breach of the implied covenant, (3) unjust enrichment, (4) violation of NRS Chapter 624, and (5) lien foreclosure, which results in the opening of Case No. CV 39237.	1 PA000338
April 18, 2018	Brahma records another first amended and restated lien against the Property to correct its failure to attach an exhibit that described the Property to its prior lien.	1 PA000049
April 24, 2018	Brahma records a second amended and restated lien against the Property for $7,178,376.94.	1 PA000059
April 24, 2018	Brahma files a Notice of Voluntary Dismissal without prejudice of Case No. CV 39237.	1 PA000069
June 11, 2018	TSE files a Motion to Expunge Brahma's Mechanic's Lien in the Fifth Judicial District Court, Nye County, which results in the opening of Case No. CV 39348 ("Nye County Special Proceeding).	1 PA000001
July 17, 2018	Brahma files a complaint in the Eighth Judicial District Court, Clark County, against TSE alleging claims of (1) breach of	2 PA000132

Addendum A – Procedural Timeline

	contract, (2) breach of the implied covenant, (3) unjust enrichment, and (4) violation of NRS Chapter 624, which results in the opening of Case No. A-18-777815-B ("Clark County Action").	
July 19, 2018	Brahma records a third amended and restated lien against the Property in the amount of $11,902,474.75.	4 PA000404
September 10, 2018	In the Clark County Action, TSE files a Notice of Removal, removing the Clark County Action to the United States District Court, District of Nevada, which results in the opening of Case No. 2:18-cv-01747-RFB-GWF ("Federal Court Action"). ECF No. 1.	2 PA000160
September 12, 2018	In the Nye County Special Proceeding, the district court hears arguments on TSE's Motion to Expunge Brahma's Mechanic's Lien. The district court denies the motion.	3 PA000264
September 14, 2018	Brahma records a fourth amended and restated lien against the Property in the amount of $12,859,577.74.	4 PA000215
September 17, 2018	In the Federal Court Action, TSE files its Answer and Counterclaim against Brahma. ECF No. 4.	2 PA000170
September 20, 2018	In the Nye County Special Proceeding, Brahma files a "Lien Foreclosure Complaint," which only asserts a claim for lien foreclosure.	2 PA000110
September 25, 2018	In the Federal Court Action, Brahma files its First Amended Complaint, which drops its claims for (1) breach of contract, (2) breach of the implied covenant and (3) violation of NRS Chapter 624. Brahma's	2 PA000190

Addendum A – Procedural Timeline

	only remaining claim is for unjust enrichment. ECF No. 8.	
September 25, 2018	In the Nye County Special Proceeding, Brahma files a First Amended Counter-Complaint and Third Party Complaint. The Amended Complaint adds claims against TSE for (1) breach of contract, (2) breach of the implied covenant, and (3) violation of NRS Chapter 624. The Third Party Complaint adds a bond claim against American Home Assurance Company (Cobra's surety) and Cobra (the principal on the bond).	2 PA000117
October 5, 2018	In the Federal Court Action, Brahma answers TSE's counterclaims. ECF No. 10.	8 PA000881
October 16, 2018	In the Federal Court Action, Brahma moves for a stay under the *Colorado River Doctrine*, or, in the alternative leave to amend its complaint. ECF No. 13. This motion is currently pending.	2 PA000195
October 18, 2018	In the Federal Court Action, TSE moves for an injunction and to strike. ECF No. 16. This motion is currently pending.	6 PA000603
October 18, 2018	In the Nye County Special Proceeding, TSE moves to strike Brahma's first amended counter-complaint, or, in the alternative, dismiss the counter-complaint, or stay the entire action until resolution of the Federal Court Action.	1 PA000084
October 23, 2018	In the Nye County Special Proceeding, Brahma moves for leave to amend its first amended counter-complaint and third-party complaint.	2 PA000237
November	In the Nye County Special Proceeding,	3 PA000264

Addendum A – Procedural Timeline

1, 2018	Brahma serves notice of entry of the district court's order denying TSE's Motion to Expunge Brahma's Mechanic's Lien, executed on October 17, 2018.	
December 11, 2018	In the Nye County Special Proceeding, the district court hears arguments on TSE's motion to strike, dismiss, or stay, Brahma's motion for leave to amend, and Brahma's motion for attorney fees and costs pursuant to NRS 108.2275(6)(c).	7 PA000688
January 25, 2019	In the Nye County Special Proceeding, Brahma serves notice of entry of the district court's order denying TSE's motion to strike and dismiss, granting in part TSE's motion for stay, and granting Brahma's motion to amend, executed on January 24, 2019.	8 PA000870

EXHIBIT 4

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
cbalkenbush@wwhgd.com
Ryan T. Gormley, Esq.
Nevada Bar No. 13494
rgormley@wwhgd.com
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Tonopah Solar Energy, LLC

IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	Case No. CV 39348 Dept. No. 2 **TONOPAH SOLAR ENERGY, LLC'S REPLY TO BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE BRAHMA GROUP, INC.'S FIRST AMENDED COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO DISMISS COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO STAY THIS ACTION UNTIL THE CONCLUSION OF THE PROCEEDINGS IN FEDERAL COURT**

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

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

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

DATED this 30th day of November, 2018.

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

WEINBERG WHEELER HUDGINS GUNN & DIAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [a] foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) 4. Likewise, a "petition" is not a proper "pleading" under NRCP Rule 7(a), to which a counter-claim may be filed. Rather, it is a "motion" under NRCP Rule 7(b). As such, it is improper legal practice to file a counter-claim to a petition under NRS 108.2275.[1]

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

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

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

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

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

E. NRCP 42 Has No Application Here

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

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

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

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

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[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

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

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

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

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

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

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

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

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

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

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[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

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[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.

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

VIII. CONCLUSION

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

DATED this 30th day of November, 2018.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S REPLY TO BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE BRAHMA GROUP, INC.'S FIRST AMENDED COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO DISMISS COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO STAY THIS ACTION UNTIL THE CONCLUSION OF THE PROCEEDINGS IN FEDERAL COURT** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

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

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

WEINBERG WHEELER HUDGINS GUNN & DIAL

EXHIBIT 5

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

ocess 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
he 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
e made upon affidavits and

v. Adv. Op. No. 36 (Nev. 2010).

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 6

Eric Zimbelman

From: Richard Peel
Sent: Wednesday, February 6, 2019 4:27 PM
To: Roberts, Lee
Cc: Balkenbush, Colby; Eric Zimbelman
Subject: Our File No. 0630-003 (Brahma vs. TSE)
Attachments: 190206 Second Amended Complaint and Amended Third-Party Complaint (clean).pdf

Importance: High

Lee,

I hope this email finds you well.

As you know, Judge Elliott has granted Brahma's motions to:

- Amend its First Amended Counter-Complaint and Third Party Complaint filed in CV 39348 (the "Expungement Action"); and
- Consolidate the claims and causes of action previously pending in CV 39799 (the "Separate Action") into the Expungement Action.

Because a lot has transpired since Brahma filed its Motion to Amend, we would like to file "one" clean document (see attached—"Proposed Second Amended Complaint") that amends Brahma's:

- First Amended Counter-Complaint filed in the Expungement Action (against TSE); and
- Third-Party Complaint filed in the Expungement Action (against Cobra, and its surety, AHAC).

To do this, we would:

- Need to file a document that differs from the proposed Second Amended Counter-Complaint and Amended Third Party Complaint that was attached to Brahma's Motion to Amend; and
- Like to obtain your stipulation allowing us to file such a document in the Expungement Action ("Requested Stipulation").

In exchange for your stipulation, we are willing to stipulate to the following in the Requested Stipulation:

- Brahma be allowed to file the attached Proposed Second Amended Complaint;
- The Parties do not waive, and expressly reserve their respective positions regarding the proper jurisdiction and venue for the Parties' dispute as more fully set forth in the Parties' briefs filed in the Federal Court (the "Federal Motions"). I.e.:
    - BGI's Motion for Stay, or in the Alternative, Motion to Amend Complaint, filed on October 16, 2018 [ECF 13];
    - TSE's Motion for an Injunction and Motion to Strike), filed on October 18, 2018 [ECF 16];
- TSE does not waive and expressly reserves the right to seek an appeal (as allowed by NRS 108.2275), and Brahma does not waive and expressly reserves all objections thereto;
- Once filed, TSE shall not be required to file an answer to the Proposed Second Amended Complaint until after the Federal Court has ruled on the Federal Motions; and
- Nothing in the Stipulation shall be deemed to modify the parties' stipulation that was recently filed with the Federal Court.

Please let us know whether your client can agree to enter the Requested Stipulation as discussed above.

Sincerely,

Richard L. Peel, Esq.
MANAGING PARTNER

Peel Brimley

: NEVADA: 3333 E. Serene Avenue - Suite 200 - Henderson - Nevada - 89074
: WASHINGTON: 1215 Fourth Avenue - Suite 1235 - Seattle – Washington - 98161
: (702) 990-7272
: (702) 561-7272
: (702) 990-7273
: rpeel@peelbrimley.com
URL: www.peelbrimley.com

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Martindale-Hubbell AV PREEMINENT 2015 | For Ethical Standards and Legal Ability
Richard L. Peel

Richard L. Peel Best Lawyers Lawyer of the Year 2012 Construction Law - Las Vegas Area

(Attorneys licensed to practice in: Nevada ▪ Washington ▪ California ▪ Utah ▪ Arizona ▪ Hawaii ▪ North Dakota ▪ US Court of Federal Claims)

EXHIBIT 7

Eric Zimbelman

From:	Balkenbush, Colby <CBalkenbush@wwhgd.com>
Sent:	Thursday, February 7, 2019 5:20 PM
To:	Richard Peel
Cc:	Eric Zimbelman; Roberts, Lee; Gormley, Ryan
Subject:	RE: Our File No. 0630-003 (Brahma vs. TSE)

Richard,

Thank you for sending this over. Our primary concern with your proposed stipulation and amended pleading is that it seemingly is an attempt to merge the two actions (CV39799 and CV39348) into each other (i.e. by having one complaint cover both actions). In the first paragraph of the proposed Second Amended Complaint Brahma states that the complaint "hereby amends all previously filed claims and causes of action filed in this consolidated action." Footnote 1 also states that the cases have been consolidated "into" each other.

Procedurally, this would be inappropriate as courts view two cases as continuing to exist separately even after consolidation. Federal courts have long held this and the Nevada Supreme Court adopted the federal position on this issue in a December 2018 decision. *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) ("We thus overrule our decision in *Mallin* to the extent it holds that cases consolidated in the district court become a single case for all appellate purposes. Consolidated cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1)"); *see also Wright & Miller*, 9A FED. PRAC. & PROC. CIV. § 2382 (3d ed.) ("federal courts have held that actions do not lose their separate identity because of consolidation under Rule 42(a)(2) . . . actions consolidated under Rule 42(a)(2) retain their separate identity.").

If you were to agree to merely seek to amend the expungement action complaint (with the amendment only applying to CV39348) we might be able to stipulate to that. If you believe we have misunderstood the intent/effect of your proposed amendment or have missed something in the case law let us know. We agree that it would benefit both sides if we can resolve this without motion work.

Best,

Colby

WEINBERG WHEELER
HUDGINS GUNN & DIAL
TRIAL LAWYERS

Colby Balkenbush, Attorney

Weinberg Wheeler Hudgins Gunn & Dial

6385 South Rainbow Blvd. | Suite 400 | Las Vegas, NV 89118

D: 702.938.3821 | F: 702.938.3864

www.wwhgd.com | vCard

From: Richard Peel [mailto:rpeel@peelbrimley.com]
Sent: Thursday, February 07, 2019 9:26 AM
To: Roberts, Lee
Cc: Balkenbush, Colby; Eric Zimbelman; Richard Peel
Subject: RE: Our File No. 0630-003 (Brahma vs. TSE)
Importance: High

Lee,

Thank you for considering this. While I certainly understand that TSE has no obligation to accommodate Brahma's request, it will save a lot of time, effort and money for both parties if we can agree to terms that will allow us to file one clean document, rather than having two separate complaints (one from the separate action and one from the Expungement Action) in play. We look forward to hearing from you.

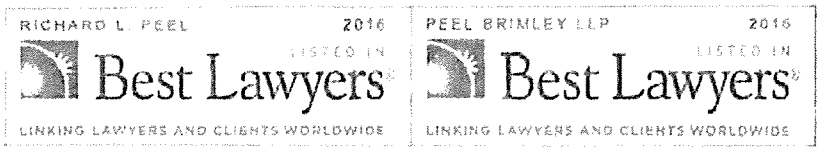
Sincerely,

Richard L. Peel, Esq.
MANAGING PARTNER

Peel Brimley

: NEVADA: 3333 E. Serene Avenue - Suite 200 - Henderson - Nevada - 89074
: WASHINGTON: 1215 Fourth Avenue - Suite 1235 - Seattle – Washington - 98161
☎: (702) 990-7272
: (702) 561-7272
: (702) 990-7273

rpeel@peelbrimley.com
URL: www.peelbrimley.com



(Attorneys licensed to practice in: Nevada • Washington • California • Utah • Arizona • Hawaii • North Dakota • US Court of Federal Claims)

EXHIBIT 8

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
cbalkenbush@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Defendant/Counterclaimant Tonopah Solar Energy, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada corporation, Plaintiff, vs. TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Defendant.	CASE NO. 2:18-cv-01747-RFB-GWF **DEFENDANT TONOPAH SOLAR ENERGY, LLC'S ANSWER TO BRAHMA GROUP, INC'S COMPLAINT AND COUNTERCLAIM AGAINST BRAHMA**

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

GENERAL ALLEGATIONS

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

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

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

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

FIRST CAUSE OF ACTION

(Breach of Contract)

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

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

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

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

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

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

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

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

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SECOND CAUSE OF ACTION

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

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

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

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

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

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

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

THIRD CAUSE OF ACTION

(Unjust Enrichment)

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

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

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION

(Violation of NRS 624)

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

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

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

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

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

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

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

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AFFIRMATIVE DEFENSES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

TSE'S COUNTERCLAIM

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

JURISDICTION AND PARTIES

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

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

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

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

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

GENERAL ALLEGATIONS

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

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

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

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

Energy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23. BGI billing TSE for improper equipment charges.

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF

(Breach of Contract)

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

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

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

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

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

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

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SECOND CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

THIRD CLAIM FOR RELIEF

(Declaratory Relief)

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

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

charges that are not supported by backup documentation.

50. The actions of BGI are unilateral and unauthorized.

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

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

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

FOURTH CLAIM FOR RELIEF

(Unjust Enrichment/Quantum Meruit)

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

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

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

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

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

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

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

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

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FIFTH CLAIM FOR RELIEF

(Fraudulent/Intentional Misrepresentation)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SIXTH CLAIM FOR RELIEF

(Negligent Misrepresentation)

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

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

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

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

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

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

WHEREFORE, TSE prays for relief as follows:

1. Dismissal of Plaintiff's Complaint with prejudice;

2. For judgment in favor of TSE and against BGI on all claims asserted herein;

3. For actual, compensatory, and consequential damages in an amount in excess of $75,000.00;

4. For pre- and post-judgment interest on any money judgment;

5. For an award of attorneys' fees and court costs incurred herein;

6. For punitive damages under NRS 42.005 for BGI's malice/implied malice and

conscious disregard of TSE's rights; and

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

DATED this 17th day of September 2018.

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

Attorneys for Defendant/Counterclaimant
Tonopah Solar Energy, LLC

CERTIFICATE OF SERVICE

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

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

Cynthia S. Bowman

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

WEINBERG WHEELER HUDGINS GUNN & DIAL

EXHIBIT 9

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
cbalkenbush@wwhgd.com
Ryan T. Gormley, Esq.
Nevada Bar No. 13494
rgormley@wwhgd.com
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Tonopah Solar Energy, LLC

IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	Case No. CV 39348 Dept. No. 2 **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.
Ryan T. Gormley, Esq.
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, NV 89118
Attorneys for Tonopah Solar Energy, LLC

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 pleading[1] 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

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[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.

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

II. STATEMENT OF PERTINENT FACTS

Brahma has already filed seven pleadings in this matter:

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

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[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.

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

DATED this 4th day of January, 2019.

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

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:

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

Kelley R. Reece

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

WEINBERG WHEELER HUDGINS GUNN & DIAL

EXHIBIT 10

RICHARD L. PEEL, Esq.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
peel@peelbrimley.com
zimbelman@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

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

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.

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

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]

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[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.

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

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

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

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

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[5] If the Nevada Supreme Court agrees with TSE's claims that the Amended Complaint was improper and should have been filed as a separate action, on remand, TSE would undoubtedly argue that the deadline for Brahma to foreclose 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.

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(702) 990-7272 • FAX (702) 990-7273

TSE also argues that consolidation is improper because "the special proceeding is completely adjudicated as the court denied TSE's motion to expunge and granted Brahma's accompanying motion for attorneys (sic) fees."[8] TSE's argument is factually and legally incorrect for the following reasons:

- First, TSE has yet to comply with the Court's Order Granting Brahma's Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(c) ("Fee Award"), which makes such fees and costs due and payable within 10 days of notice of entry of the Order – i.e., no later than January 28, 2019,[9] which means the special proceeding is not "completely adjudicated;"
- Second, TSE has stated its intention by way of several letters to this Court to defy the Court's Fee Award, which will necessitate further motion practice (i.e., Brahma will file a motion to hold TSE in contempt), which (again) means the special proceeding is not "completely adjudicated";[10] and
- Third, and more fundamentally, the present action is most certainly not "complete" because Brahma (i) has filed a complaint in this Action, which this Court has allowed to stand and be amended[11] (with certain claims stayed), and (ii) has now moved to consolidate the Separate Action into this Action, which Motion to Consolidate has yet to be ruled on by this Court. Stated differently, while this Action ***began*** as a special proceeding it is now no longer that.

II. BRAHMA'S CONSOLIDATION IS NOT "FUTILE."

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

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[8] *See* Opposition p. 7.

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

[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.

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

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

Even though no judgment has been entered, TSE incorrectly claims[12] that Brahma has engaged in impermissible claim-splitting, a concept grounded in the doctrine of claim preclusion, formerly called *res judicata*. *See Boca Park Martketplace Syndications Grp., LLC v. Higco, Inc.*, 407 P.3d 761, 763 (Nev. 2017) (the rule against claim-splitting "underlies claim preclusion"). In *Boca Park*, the Nevada Supreme Court noted that "[e]xceptions to the doctrine have been created to address situations in which barring a later-filed claim does not advance the doctrine's underlying policies or conflicts with a statutory scheme, constitutional rights, or the agreed-upon or stated limits of the first proceeding." 407 P.3d at 763 *citing* Restatement (Second) of Judgments § 26 (Am. Law Inst. 1982).

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

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

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[12] *See* Opposition p. 5.

[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.

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3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 • FAX (702) 990-7273

In any event, among the numerous exceptions to the rule against claim-splitting, as enumerated in the Restatement[14] and adopted by Nevada in the *Boca Park* Court decision[15] are the following:

> (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; and
>
> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their 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;

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

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

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[14] When such exceptions apply, "the general rule of [against claim-splitting] does not apply to extinguish the claim, 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.

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

B. The Separate Action Is Not Impermissibly "Redundant"

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

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

C. The Separate Action Does Not Violate NRCP 1.

TSE also argues that the Separate Action violates NRCP 1.[21] NRCP 1 simply defines the scope of the Nevada Rules of Procedure and dictates how those rules should be construed and administered:

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[16] *See* Opposition p. 6.

[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.

[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, 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).

[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.

[20] *See* Exhibit E hereto.

[21] *See* Opposition p. 6.

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

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

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

D. The Separate Action Does Not Violate NRCP 15.

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

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[22] NRCP 42 states in relevant part:

> [W]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the 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.

[23] *See* Opposition p. 6.

[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."

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

Here, there is no allegation that any claim filed by Brahma in either the Separate Action or this Action is outside the applicable statute of limitations. Indeed, pursuant to NRS 108.2421(2)(b)(1), a "lien claimant may bring an action against the principal and the surety not later than 9 months after the date that the lien claimant was served with notice of the recording of the surety bond." Here, as alleged in the Separate Action, Cobra (as principal) first caused an (inadequate) Surety Bond to be recorded on September 6, 2018 and subsequently recorded a Rider to increase the amount of the Surety Bond on October 9, 2018.[25] Even if the Surety Bond and Rider were property served pursuant to the Statute immediately after recording (which they were not), the Separate Action was commenced on December 14, 2018, well within the nine month period.[26]

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

III. CONCLUSION

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

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[25] *See* Exhibit C.

[26] *See Id.*

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

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.

PEEL BRIMLEY LLP

R. P

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Brahma Group, Inc.

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

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

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 15th 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:

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 A

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
lroberts@wwhgd.com
Colby L. Balkenbush, Esq.
Nevada Bar No. 13066
cbalkenbush@wwhgd.com
Ryan T. Gormley, Esq.
Nevada Bar No. 13494
rgormley@wwhgd.com
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Telephone: (702) 938-3838
Facsimile: (702) 938-3864

Attorneys for Tonopah Solar Energy, LLC

WEINBERG WHEELER HUDGINS GUNN & DIAL

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,

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

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

DATED this 30th day of November, 2018.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> [a] foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) 4. Likewise, a "petition" is not a proper "pleading" under NRCP Rule 7(a), to which a counter-claim may be filed. Rather, it is a "motion" under NRCP Rule 7(b). As such, it is improper legal practice to file a counter-claim to a petition under NRS 108.2275.[1]

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

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

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

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

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

E. NRCP 42 Has No Application Here

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

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

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

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

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[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

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

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

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

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

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

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

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

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

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

[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

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[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.

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

VIII. CONCLUSION

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

DATED this 30th day of November, 2018.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S REPLY TO BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE BRAHMA GROUP, INC.'S FIRST AMENDED COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO DISMISS COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO STAY THIS ACTION UNTIL THE CONCLUSION OF THE PROCEEDINGS IN FEDERAL COURT** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

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

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

WEINBERG WHEELER HUDGINS GUNN & DIAL