

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

**Supreme Court Case No. 78256  
District Court Case No. CV 39348**

Tonopah Solar Energy, LLC,  
*Petitioner*

Electronically Filed  
Mar 06 2019 02:49 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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.*

**PETITIONER'S APPENDIX  
VOLUME 3**

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	Exhibit 6 – Notice of Voluntary Dismissal Without Prejudice	PA000068	1
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# **EXHIBIT 1**

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*Attorneys for Brahma Group, Inc.*

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

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

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

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

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

8 Third-Party Defendants.  
9

10  
11 **SECOND AMENDED COUNTER-COMPLAINT**

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

18 **THE PARTIES**

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

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

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

24 2. Counterdefendant TONOPAH SOLAR ENERGY, LLC ("TSE") is and was at all  
25 times relevant to this Action, a Delaware limited liability company authorized to do business in  
26 Nye County, Nevada.

27 ///

28 ///

3. Brahma does not know the true names of the individuals, corporations, partnerships and entities identified and named as Counterdefendants by the fictitious names of (collectively, the "Doe Defendants"), (i) DOES I through X, (ii) ROE CORPORATIONS I through X, (iii) BOE BONDING COMPANIES I through X, and (iv) TOE TENANTS I through X. Brahma alleges that such Doe Defendants are responsible for damages suffered by Brahma as more fully discussed under the claims for relief set forth below. Brahma will request leave of this Honorable Court to amend this Second Amended Counter-Complaint to show the true names and capacities of each such fictitious Defendant when Brahma discovers such information.

4. TSE and the Doe Defendants are collectively referred to in this Second Amended Counter-Complaint as the "Counterdefendants."

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

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

6. On or about February 1, 2017, BGI entered a Services Agreement (the "Agreement") with TSE, wherein BGI agreed to provide a portion of the work, materials and/or equipment (the "Work") for the Crescent Dunes Solar Energy Facility (the "Project").

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

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

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

///



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

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

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

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

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

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

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

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

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

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

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

- c. Furthermore, and even if the Agreement allowed TSE to withhold retention from monthly payments (which it does not), TSE's withholding of retention amounts retroactively

1 aggregated from Payment Applications issued (and, in some cases, payments previously made)  
2 long ago constitutes extreme bad faith.

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

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

9 **THIRD CAUSE OF ACTION**  
**(Violation of NRS 624)**

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

13 20. NRS 624.609 and NRS 624.610 (the "Statute") requires owners (such as TSE as  
14 defined by the Statute) to, among other things, (i) timely pay their prime contractors (such as BGI  
15 as defined by the Statute), and (ii) respond to payment applications and change order requests, as  
16 provided in the Statute.

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

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

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

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

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

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

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

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

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

12           Dated this \_\_\_\_ day of October 2018.

13                           **PEEL BRIMLEY LLP**

14  
15  
16                           \_\_\_\_\_  
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26  
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28

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

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

**THE PARTIES**

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

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

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

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

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

4. TONOPAH SOLAR ENERGY, LLC ("TSE")<sup>3</sup> is and was at all times relevant to this Third-Party Action:

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

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

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

<sup>3</sup> While TSE is a party to Brahma's Counterclaim, TSE is not a party to the Third-Party Action.



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

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

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

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

ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty Parcels.<sup>4</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

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

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

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

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

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

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

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

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

///

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

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

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

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

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

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

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

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

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

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///

///



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

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

Dated this \_\_\_\_ day of October 2018.

**PEEL BRIMLEY LLP**

---

RICHARD L. PEEL, ESQ.  
Nevada Bar No. 4359  
ERIC ZIMBELMAN, ESQ.  
Nevada Bar No. 9407  
RONALD J. COX, ESQ.  
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3333 E. SERENE AVENUE, STE. 200  
HENDERSON, NEVADA 89074  
(702) 990-7272 ♦ FAX (702) 990-7273

# **EXHIBIT 2**

## Ronnie Cox

---

**From:** Richard Peel  
**Sent:** Wednesday, October 17, 2018 2:15 PM  
**To:** Geoffrey Crisp; Roberts, Lee  
**Cc:** Richard Peel; Balkenbush, Colby; Cary Domina; Ronnie Cox; Eric Zimbelman  
**Subject:** Our File No. 0630-003 (Brahma vs. TSE and Cobra)

**Importance:** High

Geoff and Lee,

On today's date, Brahma has caused its Notice of Vacating Hearing (i.e., the November 2, 2018 hearing) and Withdrawing (i) Petition to Except to the Sufficiency of Surety Bond, and (ii) Petition to Compel the Increase of the Amount of the Surety Bond, or alternatively, the Provision of Additional Security ("Notice"), to be sent to and filed with the Nye County Court. A copy of the Notice will be served on the two of you separately.

So Brahma can now (i) remove its foreclosure action, (ii) dismiss its lis pendens recorded against the Work of Improvement, and (iii) increase and replace its claim against Surety Bond (as amended by the Surety Rider Bond provided by Geoff's office on October 9, 2018), Brahma will need to amend its First Amended Counter-Complaint and Third Party Complaint filed against your respective clients. Would you please let me know by no later than Friday of this week whether your respective clients will stipulate to allow Brahma to amend such pleadings?

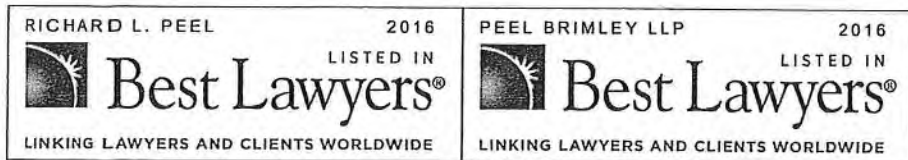
Thank you.

Sincerely,

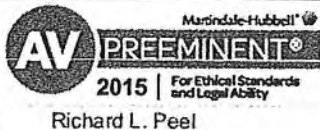
**Richard L. Peel, Esq.**  
**MANAGING PARTNER**



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URL: [www.peelbrimley.com](http://www.peelbrimley.com)



**Super Lawyers**  
2015



Richard L. Peel



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

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# **EXHIBIT 3**

## Ronnie Cox

---

**From:** Balkenbush, Colby <CBalkenbush@wwhgd.com>  
**Sent:** Thursday, October 18, 2018 4:53 PM  
**To:** Richard Peel; Geoffrey Crisp; Roberts, Lee  
**Cc:** Cary Domina; Ronnie Cox; Eric Zimbelman; Gormley, Ryan  
**Subject:** RE: Our File No. 0630-003 (Brahma vs. TSE and Cobra)

Hi Richard,

TSE will not stipulate to allow such an amendment.



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](http://www.wwhgd.com) | vCard

---

**From:** Richard Peel [mailto:rpeel@peelbrimley.com]  
**Sent:** Wednesday, October 17, 2018 2:15 PM  
**To:** Geoffrey Crisp; Roberts, Lee  
**Cc:** Richard Peel; Balkenbush, Colby; Cary Domina; Ronnie Cox; Eric Zimbelman  
**Subject:** Our File No. 0630-003 (Brahma vs. TSE and Cobra)  
**Importance:** High

Geoff and Lee,

On today's date, Brahma has caused its Notice of Vacating Hearing (i.e., the November 2, 2018 hearing) and Withdrawing (i) Petition to Except to the Sufficiency of Surety Bond, and (ii) Petition to Compel the Increase of the Amount of the Surety Bond, or alternatively, the Provision of Additional Security ("Notice"), to be sent to and filed with the Nye County Court. A copy of the Notice will be served on the two of you separately.

So Brahma can now (i) remove its foreclosure action, (ii) dismiss its lis pendens recorded against the Work of Improvement, and (iii) increase and replace its claim against Surety Bond (as amended by the Surety Rider Bond provided by Geoff's office on October 9, 2018), Brahma will need to amend its First Amended Counter-Complaint and Third Party Complaint filed against your respective clients. Would you please let me know by no later than Friday of this week whether your respective clients will stipulate to allow Brahma to amend such pleadings?

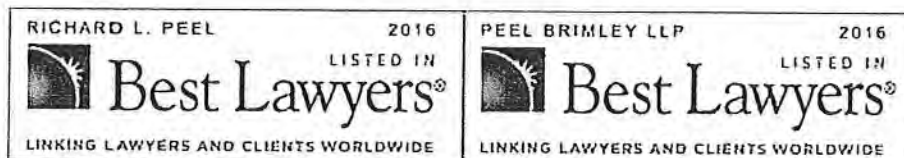
Thank you.

Sincerely,

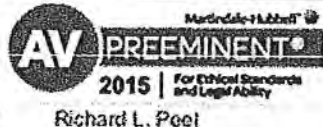
**Richard L. Peel, Esq.**  
**MANAGING PARTNER**



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*Super Lawyers*  
2015



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

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200.690, and may also be protected under the Attorney/Client Work Product or other privilege. If you are not the intended recipient of this communication, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone, fax or e-mail, and delete the original message and any attachments.

The information contained in this message may contain privileged client confidential information. If you have received this message in error, please delete it and any copies immediately.



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Nevada Bar No. 9407  
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Nevada Bar No. 12723  
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[ezimbelman@peelbrimley.com](mailto:ezimbelman@peelbrimley.com)  
[rcox@peelbrimley.com](mailto:rcox@peelbrimley.com)  
*Attorneys for Brahma Group, Inc.*

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

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

**NOTICE OF ENTRY OF ORDER**

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

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

8 Third-Party Defendants.  
9

10  
11 **NOTICE OF ENTRY OF ORDER**

12 PLEASE TAKE NOTICE that an Order Denying Tonopah Solar Energy, LLC's Motion to  
13 Expunge Brahma Group, Inc.'s Mechanic's Lien was filed on **October 29, 2018** a copy of which  
14 is attached as Exhibit A.

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

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

18 Dated this 30<sup>th</sup> day of October, 2018.

19 **PEEL BRIMLEY LLP**

20 

21 RICHARD L. PEEL, ESQ.

22 Nevada Bar No. 4359

23 ERIC ZIMBELMAN, ESQ.

Nevada Bar No. 9407

24 RONALD J. COX, ESQ.

Nevada Bar No. 12723

25 3333 E. Serene Avenue, Suite 200

Henderson, Nevada 89074-6571

26 *Attorneys for Brahma Group, Inc.*  
27  
28



**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 1st day of November, 2018, I caused the above and foregoing document entitled

**NOTICE OF ENTRY OF ORDER** to be served as follows:

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

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

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

Geoffrey Crisp, Esq.  
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[gcrisp@weildrage.com](mailto:gcrisp@weildrage.com)  
*Attorneys for Cobra Thermosolar  
Plants, Inc.*



An Employee of Peel Brimley LLP

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

# **EXHIBIT A**

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

1 **ORDR**  
2 RICHARD L. PEEL, ESQ.  
3 Nevada Bar No. 4359  
4 ERIC B. ZIMBELMAN, ESQ.  
5 Nevada Bar No. 9407  
6 RONALD J. COX, ESQ.  
7 Nevada Bar No. 12723  
8 **PEEL BRIMLEY LLP**  
9 3333 E. Serene Avenue, Suite 200  
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11 Telephone: (702) 990-7272  
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13 rpeel@peelbrimley.com  
14 ezimbelman@peelbrimley.com  
15 rcox@peelbrimley.com  
16 *Attorneys for Brahma Group, Inc.*

**FILED**  
FIFTH JUDICIAL DISTRICT

OCT 29 2018

Nye County Clerk  
**AMY DOWERS** Deputy

FIFTH JUDICIAL DISTRICT COURT  
NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

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

**ORDER DENYING TONOPAH  
SOLAR ENERGY, LLC'S MOTION  
TO EXPUNGE BRAHMA GROUP,  
INC.'S MECHANIC'S LIEN**

This matter came on for hearing September 12, 2018 (the "Hearing") before the Honorable Senior Judge Steven Elliott on the Motion to Expunge ("Motion") filed by Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE"). D. Lee Roberts, Esq., and Colby L. Balkenbush, Esq. of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of TSE. Eric B. Zimbelman, Esq., Richard Peel, Esq. and Ronnie Cox, Esq. of PEEL BRIMLEY LLP appeared on behalf of BRAHMA GROUP, INC. ("Brahma").

The Court having considered all the pleadings and papers on file, and having heard argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the bench on September 12, 2018:

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///

///



1    **I. SUMMARY OF STANDARD OF PROOF.**

2        TSE commenced this proceeding by filing the present motion pursuant to NRS 108.2275  
3 seeking an order to expunge Brahma's original notice of lien and the several amendments thereto  
4 (collectively, the "Notice of Lien"), recorded by Brahma against the Crescent Dunes Solar  
5 Energy Facility in Tonopah, Nevada (the "Work of Improvement"). NRS 108.2275(6) requires  
6 the Court to "make an order releasing the lien" if the Court determines "the notice of lien is  
7 frivolous and was made without reasonable cause." Because the Court finds the Notice of Lien  
8 (i) was not frivolous, and (ii) was made with reasonable cause, the Court denies the Motion.

9    **II. THE COURT'S DECISION.**

10        In its moving papers and at the Hearing, TSE made the following arguments in support  
11 of its Motion, each of which the Court rejects for the following reasons:

12        A.    Brahma's Notice of Right to Lien was Properly Given.

13            1.    NRS 108.245 generally requires a lien claimant who claims the benefit of  
14 NRS 108.221 to 108.246, inclusive (hereinafter, the "Lien Statute" or the "Statute") to deliver in  
15 person or by certified mail to the owner of the property a notice of right to lien in the form  
16 prescribed by the Statute.

17            2.    In its briefing and at the Hearing TSE argued that:

18                • Brahma failed to give a Notice of Right to Lien to the Bureau of Land  
19 Management ("BLM"); and

20                • Brahma's Notice of Right to Lien is void because Brahma identified  
21 Solar Reserve as the party with whom it contracted, rather than TSE.

22            3.    In its Supplement to its Opposition, Brahma provided copies of and  
23 demonstrated that it timely gave its Notice of Right to Lien (by certified mail, return receipt  
24 requested) to: (i) the BLM, the fee simple interest owner of certain parcels of land on which the  
25 Work of Improvement was constructed, and (ii) TSE, the fee simple interest owner of certain  
26 other parcels of land that comprise the Work of Improvement, as well as owner of the Work of  
27 Improvement.

28    ///



1                   4.     At the Hearing, (i) TSE's counsel admitted that Solar Reserve (identified  
2 on the Notice of Right to Lien as the "person who contracted such labor, services, equipment or  
3 material") has an indirect ownership interest in TSE and shared the same address as TSE in Santa  
4 Monica, California to which the Notice of Right to Lien was mailed by certified mail, return  
5 receipt requested,<sup>1</sup> and (ii) the Court confirmed that the Notice of Right to Lien identifies the  
6 "Project Owner" of the Work of Improvement as "Tonopah Solar Energy c/o Solar Reserve" at  
7 that same address.

8                   5.     Based on the foregoing, Brahma demonstrated that it timely and properly  
9 caused it's Notice of Right to Lien to be given as required by the Statute.

10                B.     Brahma's Notice of Lien is not Barred by the Statute.

11                1.     NRS 108.22188 identifies a "work of improvement" as: "[T]he entire  
12 structure or scheme of improvement as a whole, including, without limitation, all work, materials  
13 and equipment to be used in or for the construction, alteration or repair of the property or any  
14 improvement thereon, whether under multiple prime contracts or a single prime contract."

15                2.     NRS 108.229(1) permits a lien claimant to "record an amended notice of  
16 lien to correct or clarify the lien claimant's notice of lien" "at any time before or during the trial  
17 of any action to foreclose a lien." The Statute further provides that a "variance between a notice  
18 of lien and an amended notice of lien does not defeat the lien and shall not be deemed material  
19 unless the variance: (a) Results from fraud or is made intentionally; or (b) Misleads an adverse  
20 party to the party's prejudice, but then only with respect to the adverse party who was  
21 prejudiced." NRS 108.229(1).

22                3.     In its Motion, TSE initially argued that "[t]he Property on which the  
23 [Work of Improvement] is located consists of the following parcels: 012-031-04, 012-131-03,  
24 012-131-04, 012-140-01, 012-141-01, 012-150-01, 012-151-01, 012-431-06, 612-141-01." In its  
25 supplemental briefing and at the Hearing, TSE then argued that the Property on which the Work  
26 of Improvement is located consists of the following two BLM owned parcels: 012-141- 01, 012-  
27 151-01, and without providing any proof (ii), that the remaining Assessor's Parcel Numbers

28                <sup>1</sup> The address to which notice was sent is the address identified in the TSE/BGI Services Agreement to which BGI  
was to send notices.



1 ("APNs") against which Brahma's Lien were recorded were a) parcels owned by TSE purely for  
2 water rights on which Brahma never performed any work, and/or b) not parcels of land on which  
3 the Work of Improvement was constructed, but rather APNs associated with rights of  
4 way/easements, and/or c) parcels of land on which Brahma never performed any work that were  
5 owned by third parties.

6 4. In its Motion and at the Hearing, TSE also argued that:

7 • Brahma's Notice of Lien was "void" and cannot be amended because  
8 it attempted to illegally lien federally owned land (specifically land owned by the BLM), on  
9 which some of the improvements that are the subject of the Work of Improvement were  
10 constructed;

11 • Because Brahma "intentionally" liened BLM land, its Notice of Lien  
12 could not be amended. Specifically, TSE relies on the fact that the original Notice of Lien,  
13 identifies one of the "owners of the property" to be liened as "Bureau of Land Management and  
14 Tonopah Solar Energy, LLC" and Exhibit A to the Notice of Lien, identifies the Land to be  
15 encumbered as including APNs 012-141-01, 012-015-01, which belong to the BLM; and

16 • Brahma had no right to lien three parcels owned by TSE to which,  
17 TSE contends, Brahma furnished no work, materials, or equipment.

18 5. In response, Brahma:

19 • Disputed that its original Notice of Lien was intended to attach to  
20 BLM land and that it simply completed the statutory form required in NRS 108.226;

21 • Argued that its Notice of Lien (i) also attached to land owned by TSE,  
22 and (ii) to the Work of Improvement, including improvements constructed on land owned by the  
23 BLM;

24 • The Notice of Lien also identifies the "property to be charged with the  
25 lien" as "Crescent Dunes Solar Energy Project more fully described in Exhibit A." Further, as  
26 Brahma argued at Hearing, the Exhibit A more specifically identifies the improvements as  
27 follows: "The Crescent Dunes Solar Energy Project is a 110 MW plant constructed on the Land  
28 in Tonopah, Nevada." By necessity, the "Land" on which the Project was constructed is then



1 identified by parcel number and legal description; and

2 • Demonstrated that it caused its original Notice of Lien to be amended  
3 several times to, among other things, clarify that Brahma's lien did not attach BLM land.

4 6. The Court concludes as follows:

5 • Brahma did not "intentionally" attach BLM land such that it is  
6 precluded from amending its Notice of Lien;

7 • TSE is estopped from arguing that the Notice of Lien is void simply  
8 because the BLM's land was allegedly implicated in the Notice of Lien; and

9 • Whether or not Brahma worked on the TSE-owned parcels is  
10 irrelevant because the Statute permits a lien claimant to record a notice of lien against the Work  
11 of Improvement as a whole.

12 C. Brahma's Notice of Lien is not Barred by Sovereign Immunity.

13 1. At the Hearing, TSE contended that:

14 • Brahma's Notice of Lien is barred by the doctrine of sovereign  
15 immunity because the United States Department of Energy ("DOE") provided a \$737 Million  
16 loan guarantee, and is, through PNC Bank as its collateral agent, the beneficiary of a  
17 Construction Deed of Trust pledging all of TSE's right, title, and interest in the Project, and  
18 therefore, the DOE has a financial stake in the Project's continued successful operation by TSE;

19 • "[A] proceeding against property in which the United States has an  
20 interest is a suit against the United States." *United States v. Alabama*, 313 U.S. 274,282, 61 S.Ct.  
21 1011 (1941).

22 2. In response, Brahma demonstrated that:

23 • "[N]ot every lien or action will be void/barred just because it  
24 tangentially affects a federal government security interest." *United States v. Rural Elec.*  
25 *Convenience Co-op. Co.*, 922 F.2d 429, 436 (7th Cir. 1991); and

26 • Nevada law (among other states) recognizes that governmental  
27 immunity does not preclude a mechanic's lien against a leasehold interest on land owned by the  
28 federal government. *Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 298 P.2d 810, 59 A.L.R.2d



1 457 (1956). See also *Crutcher v. Block*, 19 Okl. 246, 91 P. 895, 14 Ann.Cas. 1029 ("it is  
2 immaterial that the legal title to the land in question is in the United States").

3 3. The Court concludes that:

4 • No-one is suing the United States in this action and neither the BLM's  
5 fee simple interest in certain parcels that comprise the Work of Improvement, nor is the DOE's  
6 security interest impaired by Brahma asserting a Notice of Lien; especially if (as TSE contends)  
7 the DOE has first priority over Brahma's Notice of Lien;

8 • Even if Brahma were to eventually foreclose on its Notice of Lien, the  
9 Work of Improvement could still be operated as a solar electric facility; and

10 • The doctrine of sovereign immunity does not bar Brahma's Notice of  
11 Lien.

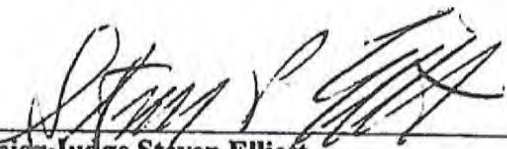
12 **III. CONCLUSION.**

13 1. Based on the foregoing, the Court concludes that Brahma's Notice of Lien is not  
14 frivolous nor was it made without reasonable cause and therefore denies TSE's Motion.

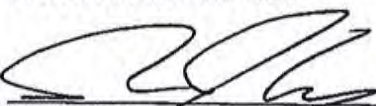
15 2. Nothing in this Order shall prevent or preclude Brahma from applying for an  
16 award of attorney's fees and costs pursuant to NRS 108.2275(6)(c).

17 **NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED**  
18 **that TSE's Motion to Expunge Brahma's Notice of Lien is DENIED.**

19 Dated this 17 day of October, 2018.

20  
21   
22 Senior Judge Steven Elliott

23 Respectfully submitted by:  
24 **PEEL BRIMLEY LLP**

25 

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**BRAHMA GROUP, INC.**

FILED  
FIFTH JUDICIAL DISTRICT

NOV 05 2018

Nye County Clerk  
Deputy  
Veronica Aguilar

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

CASE NO. : CV 39348

DEPT. NO. : 2

**BRAHMA GROUP, INC.'S  
OPPOSITION TO TONOPAH  
SOLAR ENERGY, LLC'S MOTION  
TO STRIKE, MOTION TO DISMISS  
OR MOTION FOR STAY**

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

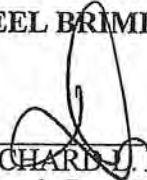
8 Third-Party Defendants.  
9

10 BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm of Peel  
11 Brimley LLP, hereby submits its Opposition to Tonopah Solar Energy, LLC's Motion to Strike,  
12 Motion to Dismiss or Motion for Stay ("Opposition").<sup>1</sup>

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

16 Dated this 5 day of November, 2018.

17 PEEL BRIMLEY LLP

18  
19   
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Nevada Bar No. 4359

CARY B. DOMINA, ESQ.

Nevada Bar No. 10567

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25 Attorneys for Plaintiff

26 BRAHMA GROUP, INC.

27  
28 <sup>1</sup> As used herein:

- "TSE" shall mean Tonopah Solar Energy, LLC; and
- "Motion to Dismiss" shall mean TSE's Motion to Strike, Motion to Dismiss or Motion for Stay.



## MEMORANDUM OF POINTS & AUTHORITIES

### I. INTRODUCTION.

1. TSE Is Engaged In Forum Shopping. By attempting to strike, stay or dismiss this Action in favor of proceeding in Federal Court (defined below), TSE, not Brahma, has engaged and is engaging in forum shopping for the following reasons:

- TSE availed itself of this Court's jurisdiction (first) when it filed its Motion to Expunge under NRS 108.2275 ("Motion to Expunge"); and

- After losing on its Motion to Expunge, TSE now asks the Court to ignore Nevada law and stay the entire Action, including:

- Brahma's pending Fee Motion (defined below), which must be granted under NRS 108.2275(6)(c); and

- Brahma's claims against the following parties, who are not and cannot be parties to the Federal Action (defined below) due to diversity issues:

- Cobra Thermosolar Plants, Inc., a Nevada corporation ("Cobra"), (i) the original general contractor that TSE hired to construct the Work of Improvement, (ii) the principal who caused the a) Brahma Surety Bond (defined below) to be posted as collateral for the Brahma Lien (defined below), and b) the H&E Surety Bond (defined below) to be posted as collateral for the H&E Lien, (iii) an entity that must be prosecuted in the county where the Work of Improvement is located under NRS 108.2421(1), as TSE admits in its Motion to Dismiss, and (iv) an entity that is domiciled in Nevada, the same domicile as Brahma;

- American Home Assurance Company ("AHAC" or "Surety"), (i) the surety who issued the Brahma Surety Bond and the H&E Surety Bond, and (ii) an entity that must be prosecuted in the county where the Work of Improvement is located under NRS 108.2421(1), as TSE admits in its Motion to Dismiss;

- TSE, an entity (i) which is Brahma's debtor, (ii) that is the subject of Brahma's Counter-Complaint, and (iii) which Brahma, under NRS 108.2421(1), is statutorily allowed to prosecute in the county where the Work of Improvement is located;

1                   ▪ H&E Equipment Services Inc., a Delaware Corporation (“H&E”),  
2 is an entity (i) that is domiciled in the state of Delaware (the same state as TSE, (ii) that was a  
3 subcontractor to Brahma with respect to the Work of Improvement, (iii) who has made claims  
4 against Brahma, (iv) who possesses claims against Cobra, as principal and AHAC, as Surety with  
5 respect to the H&E Surety Bond and which claims must be brought in the county where the Work  
6 of Improvement is located under NRS 108.2421(1).<sup>2</sup>

7           Simply put, TSE wants to be in Federal Court because:

8           • The Federal Court has no jurisdiction to decide Brahma’s claims against Cobra (as  
9 principal on the Brahma Surety Bond and the H&E Surety Bond), and AHAC (as Surety for the  
10 Brahma Surety Bond and the H&E Surety Bond); and

11          • The Federal Action will take years for Brahma to have its day in court to recover  
12 the nearly \$13 Million owed by TSE (a significant portion of which is owed to Brahma’s  
13 subcontractors and suppliers).

14          2.    This Action Must Not Be Stayed. Brahma’s claims against Cobra, AHAC and the  
15 Brahma Surety cannot be stayed and cannot be removed to the Federal Court since (as TSE  
16 acknowledges in its Motion) those claims must be pursued in the county where the Work of  
17 Improvement is located—i.e., Nye County. *See* NRS 108.2421(1).

18          Because these claims must proceed in Nye County, this Court must necessarily preside  
19 over and decide (i) Brahma’s contract claims against TSE, and (ii) H&E’s contract claims against  
20 Brahma, to determine the amount owed Brahma under its contract with TSE and the amount owed  
21 H&E under its contract with Brahma.

22          These contract claims are properly before this Court because:

23          • NRS 13.010 requires that they be brought in Nye County since the Agreement was  
24 performed entirely in Nye County;

25          • The forum selection clause in the Agreement is permissive only and not mandatory;  
26

27  
28          <sup>2</sup> These claims were submitted to the Court on or about October 19, 2018 and are the subject of Brahma’s Motion for  
Leave to Amend its First Amended Counter-Complaint and Third-Party Complaint (“Motion to Amend”), which is  
pending before the Court.

- NRS 108.2453 renders the forum selection clause void and unenforceable; and
- By initially filing its contract claims in Clark County, Brahma did not waive its right to file its claims against TSE in this Action, since such rights cannot be waived.

In other words, if this Action is stayed and Brahma is forced to prosecute its contract claims against TSE in Federal Court, Brahma will effectively be deprived of:

- Its claims against Cobra (as principal), AHAC (as Surety) and the Brahma Surety Bond; and
- Its immediate right to file a demand for preferential trial under NRS 108.2421 (which is precisely why TSE wants so badly to be before the Federal Court), while (i) being forced to litigate with H&E in this Court and on an expedited basis under NRS 108.2421, and (ii) Brahma is waiting for the Federal Action to be resolved.

Such a result would necessarily delay Brahma's recovery and force it to return to this Court a second time to assert its claims against Cobra and AHAC.

Further, because all of Brahma's claims in this Action and the Federal Action arise out of the same transaction and occurrence, a single judge should try all claims. The only way to have a single judge hear all disputes between the parties will be to have this Court preside over all matters. This makes the most sense since:

- The Work of Improvement is located in Nye County;
- All of the contracts that are the subject of the dispute were performed in Nye County;
- The Brahma Lien, the Brahma Surety Bond, the H&E Lien and the H&E Surety Bond were all recorded with the Nye County Recorder's Office; and
- This Court is the most familiar with the Project.

If the Court grants TSE's requested relief, Brahma would be stripped of its sacrosanct right under the mechanic's lien statute to file a demand for preferential trial setting, which statutorily entitles Brahma the right to proceed to trial within 60 days of the filing of such demand. *See* NRS 108.2421.

3. Brahma's Counter-Complaint Is Proper. To further its objective of thwarting

1 Brahma's efforts to prosecute this Action, TSE claims that Brahma's Counter-Complaint is  
2 improper and should be stricken. However, Brahma's Counter-Complaint is proper because:

3 • The Counter-Complaint accomplishes the same goals contemplated by Nevada's  
4 motion to expunge statute (NRS 108.2275(5)), which recognizes and allows the consolidation of  
5 motions to expunge with lien foreclosure actions;

6 • The Counter-Complaint was properly served on TSE and gives TSE notice of  
7 Brahma's claims; and

8 • Despite TSE's misrepresentations, this Action remains open given Brahma's  
9 pending Motion for Attorneys' Fees and Costs.

10 Notwithstanding the foregoing, should the Court find that the Counter-Complaint is  
11 procedurally improper, this Court could exercise its discretion and sever the Counter-Complaint  
12 and immediately consolidate it again in this Action under NRCP 42.

13 4. Brahma Has Not Engaged In Fraud. Moreover, by filing its contract claims in Nye  
14 County, Brahma has not engaged in fraud or attempted to subvert federal jurisdiction. Therefore,  
15 TSE's motion for preliminary injunction filed before the Federal Court must fail.

16 5. Brahma's Motion to Amend Is Pending. Finally, TSE's Motion to Dismiss  
17 Brahma's Foreclosure Cause of Action is unnecessary as Brahma has filed a Motion to Amend its  
18 Counter Complaint, which will remove the Brahma Lien foreclosure action and replaces the same  
19 with a claim against the Brahma Surety Bond, as collateral for the Work of Improvement.<sup>3</sup>

20 In Sum, TSE's Motion to Dismiss must be denied and this Court should proceed with this  
21 Action to ensure that Brahma and H&E are timely compensated for the Work they furnished for  
22 TSE's Work of Improvement.

23 ///

24 ///

25 ///

26 ///

27 <sup>3</sup> When Brahma asked TSE to stipulate to allow Brahma to file a Second Amended Counter-Complaint and Amended  
28 Third-Party Complaint, TSE refused. Clearly, TSE is hoping that this Court will dismiss all or portions of Brahma's  
Counter-Complaint, allowing TSE to argue that the two-dismissal rule has been triggered (which argument would be  
legally and factually incorrect). See a true and correct copy of Richard L. Peel, Esq.'s Declaration attached hereto.



1     **II.     STATEMENT OF FACTS.**

2             **A.     The Work of Improvement.**

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

5             On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with  
6     Brahma,<sup>4</sup> whereby Brahma agreed to provide (on a time and material basis), certain work,  
7     materials, and equipment (collectively, the "Work") for the Work of Improvement. Brahma  
8     provided the Work for the Work of Improvement and TSE has failed to fully pay Brahma for such  
9     Work.

10            **B.     The Brahma Lien, the First Complaint and the Brahma Surety Bond.**

11            Because of TSE's failure to fully pay Brahma for its Work, Brahma caused a notice of lien  
12     ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as Document No.  
13     890822 against the Work of Improvement.<sup>5</sup>

14            Seven days later, on April 17, 2018, Brahma, through prior counsel, Jones Lovelock, filed  
15     a complaint in the Fifth Judicial District Court ("Nye County Court") as Case No. CV39237 (the  
16     "First Complaint"), to foreclose against the Original Lien, among other causes of action.<sup>6</sup> Brahma  
17     filed with the Nye County Court a Notice of Lis Pendens and Notice of Foreclosure of Mechanic's  
18     Lien and recorded the same against the Work of Improvement.<sup>7</sup>

19            Two days later, on April 19, 2018, TSE, through its counsel, Weinberg Wheeler Hudgins  
20     Gunn & Dial, sent Jones Lovelock a letter (the "Demand Letter") demanding that Brahma (i)  
21     discharge and release its Original Lien, and (ii) participate in mediation before filing for litigation  
22     (see Section 24 of the Agreement).<sup>8</sup>

23            Finally, TSE threatened to file (i) a motion to expunge under NRS 108.2275 if Brahma did  
24     not voluntarily release its Original Lien by noon the next day, and (ii) a motion to dismiss under  
25

26     <sup>4</sup> A true and correct copy of the Agreement is attached hereto as Exhibit 1.

27     <sup>5</sup> A true and correct copy of the Original Lien is attached hereto as Exhibit 2.

28     <sup>6</sup> A true and correct copy of the First Complaint is attached hereto at Exhibit 3.

<sup>7</sup> True and correct copies of Brahma's First Notice of Foreclosure and Notice of Lis Pendens are attached hereto as  
      Exhibits 4 and 5, respectively.

<sup>8</sup> A true and correct copy of this correspondence is attached hereto at Exhibit 6.

1 NRS 108.237(3), if Brahma did not immediately dismiss its First Complaint without prejudice. *Id.*

2 On April 24, 2018, TSE filed in Case No. CV39237, a Motion to Expunge Brahma's Lien  
3 ("First Motion to Expunge").<sup>9</sup> Before Brahma received notice of TSE's First Motion to Expunge,  
4 and to avoid extensive motion practice with TSE regarding the ripeness of the First Complaint,  
5 Brahma voluntarily dismissed its First Complaint on April 24, 2018, but declined to discharge and  
6 release its Original Lien.<sup>10</sup> Even though it had officially appeared in that Case by filing the First  
7 Motion to Expunge and Brahma had not released its Lien, TSE decided to withdraw its First  
8 Motion to Expunge instead of proceeding in that Case.

9 The Original Lien was amended and/or restated on several occasions and ultimately  
10 increased to \$12,859,577.74, when Brahma caused its Fourth Amended Notice of Lien ("Fourth  
11 Amended Lien") to be recorded on September 14, 2018 with the Nye County Recorder as  
12 Document No. 899351.<sup>11</sup>

13 To replace the Work of Improvement as security for the Brahma Lien, TSE demanded that  
14 Cobra, the original general contractor for the Work of Improvement,<sup>12</sup> bond around the Brahma  
15 Lien. Per TSE's demand, Cobra, as principal, caused a surety bond to be recorded with the Nye  
16 County Recorder's Office on September 6, 2018, as Document No. 898974 (the "Brahma Surety  
17 Bond").<sup>13</sup> The Brahma Surety Bond (i) was issued by American Home Assurance Company  
18 ("AHAC" or "Surety") on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) was in the  
19 amount of \$10,767,580.00.

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

24  
25 <sup>9</sup> A true and correct copy of the First Motion to Expunge is attached hereto at Exhibit 7.

<sup>10</sup> A true and correct copy of the Voluntary Dismissal is attached hereto at Exhibit 8.

26 <sup>11</sup> True and correct copies of Brahma's First Amended Lien, Second Amended Lien, Third Amended Lien and Fourth  
27 Amended Lien are attached hereto as Exhibits 9, 10, 11 and 12, respectively. Brahma's Original Lien and the  
28 amendments and restatements thereto, including the Fourth Amended Lien are referred to collectively herein as the  
"Brahma Lien."

<sup>12</sup> An affiliate of Cobra possesses an indirect ownership interest in TSE. Further, TSE has advised Brahma and its  
counsel that Cobra is contractually responsible to TSE to pay for the Work that TSE contracted with Brahma to perform.

<sup>13</sup> A true and correct copy of the Brahma Surety Bond is attached hereto at Exhibit 13.

1 900303.<sup>14</sup>

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

3 On May 15, 2018, H&E (one of Brahma's suppliers for the Work of Improvement) caused  
4 a notice of lien to be recorded with the Nye County Recorder as Document No. 892768 in the  
5 amount of \$477,831.40 (the "H&E Lien").<sup>15</sup> On June 8, 2008, TSE filed in Case No. CV 39347, a  
6 motion to expunge the H&E Lien in the Nye County Court which was assigned to the Honorable  
7 Kimberly Wanker in Department 1, and which was later withdrawn before Judge Wanker held a  
8 hearing on the same.

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

13 Because TSE failed to fully pay Brahma, and Brahma has not paid H&E, H&E has filed  
14 (or is in the process of filing) a foreclosure action against the H&E Surety Bond in Nye County  
15 and has also asserted breach of contract claims against Brahma in this Action, which claims are  
16 derivative of Brahma's claims against TSE.<sup>17</sup>

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

19 On or about June 1, 2018, TSE, as plaintiff, commenced this Action in Nye County as Case  
20 No. CV 39348 (the "Action"), seeking to expunge the Brahma Lien from the Work of  
21 Improvement, by filing its motion to expunge.

22 On August 14, 2018, Judge Lane, entered an Order of Reassignment, assigning this Case  
23 to Senior Judge Steven Elliot based on the stipulated agreement of counsel for TSE and Brahma

24 <sup>14</sup> A true and correct copy of the Brahma Surety Bond Rider is attached hereto as Exhibit 14.

25 <sup>15</sup> A true and correct copy of the H&E Lien is attached hereto as Exhibit 15.

26 <sup>16</sup> A true and correct copy of the H&E Surety Bond is attached hereto as Exhibit 16. It should be noted that (i) AHAC  
27 is the surety on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the  
28 "Surety," and (ii) Cobra is identified as the principal on both the Brahma Surety Bond and the H&E Surety Bond and  
is sometimes referred to herein as the "principal."

<sup>17</sup> At the time of this filing, a copy of the H&E Complaint was not available, but H&E's counsel notified Brahma's  
counsel that it would be filed on or before November 6, 2018. By the time this matter is heard, H&E's Complaint will  
be filed in this Action.



1 (at the August 6, 2018 hearing) that the Case should be assigned to Judge Elliot because he “has  
2 familiarity with the parties and the facts due to his involvement in a previous case.”<sup>18</sup> Indeed, Judge  
3 Elliot (i) previously presided over extensive litigation involving the construction of the Work of  
4 Improvement, and (ii) is very familiar with the Work of Improvement. *see* [Case No. CV-36323  
5 titled *Helix Electric of Nevada, LLC v. Cobra Thermosolar Plants, Inc.; Tonopah Solar Energy*  
6 *LLC et. al.*; *see also*, Case No. 35217 titled *Merlin Hall dba Mt. Grant Electric v. Cobra*  
7 *Thermosolar Plants, Inc.; Tonopah Solar Energy, LLC, et. al.*] Notably, the Order indicates that  
8 the case would be assigned to Judge Elliot “for hearing or decision on the pending motions and  
9 for future handling of the case.”<sup>19</sup>

10 At a hearing held on September 12, 2018 (the “September 12 Hearing”), Judge Elliot  
11 denied TSE’s Second Motion to Expunge and entered a written order regarding on October 29,  
12 2018 (the “Order”). Since Brahma was the prevailing party at the September 12 Hearing, Brahma  
13 filed a motion for an award of attorney’s fees and costs pursuant to NRS 108.2275(6)(c) (“Fee  
14 Motion”).<sup>20</sup> NRS 108.2275(6)(c) provides that when the court finds a prevailing lien claimant’s  
15 notice of lien is not frivolous and was made with reasonable cause (which is what the Court found  
16 here), the court must award to such prevailing lien claimant the costs and reasonable attorney’s  
17 fees it incurred to defend the motion.

18 Because this Court (i) has jurisdiction over the Work of Improvement, Brahma’s Lien, the  
19 Brahma Surety Bond, Cobra, AHAC and the claims of H&E and (ii) heard the arguments presented  
20 at the September 12 Hearing, the Fee Motion must necessarily be heard by this Court and cannot  
21 be stayed.

22 Based on the mistaken belief that Section 24 of the Agreement required Brahma to pursue  
23 its contract-based claims in Clark County, Nevada, and after (i) Richard Peel and Ronnie Cox  
24 (counsel for Brahma) had consulted with Lee Roberts (counsel for TSE) about the possibility of  
25 stipulating to have the parties’ claims filed in one action and one forum, and (ii) TSE declining to  
26 do so,<sup>21</sup> Brahma filed a complaint on July 17, 2018 in the Eighth Judicial District Court of Nevada

27 <sup>18</sup> A true and correct copy of the Notice of Reassignment is attached hereto as Exhibit 17.

28 <sup>19</sup> *Id.*

<sup>20</sup> Brahma’s Fee Motion was filed with this Court on November 1, 2018.

<sup>21</sup> *See* Declaration of Richard L. Peel, Esq. attached hereto.

1 (the "Clark County Action"), against TSE for breach of contract, unjust enrichment, and violation  
2 of NRS Chapter 624.<sup>22</sup>

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

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

9 For the reasons discussed above and after Cobra had caused the Brahma Surety Bond to be  
10 posted (discussed more fully below), Brahma filed its First Amended Complaint in the Federal  
11 Action on September 25, 2018, and removed all causes of action against TSE except for its Unjust  
12 Enrichment claim so that those claims could be properly pursued in this Action in conjunction with  
13 Brahma's claim against Cobra, AHAC, the Brahma Surety Bond and TSE, required and allowed  
14 in NRS 108.2421(1).

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

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

18 **E. Brahma Filed an Action to Foreclose on the Brahma Lien in this Action.**

19 Because the Nye County Court had already ruled on the validity of the Brahma Lien and  
20 is well acquainted with the facts of this case, Brahma filed its Mechanic's Lien Foreclosure  
21 Complaint in this Action (i.e., Case No. CV 39348) on September 21, 2018, as required by NRS  
22 108.239(1).<sup>23</sup>

23 On September 25, 2018, Brahma filed (in this Action) its, (i) First Amended Counter-  
24 Complaint and included therein its contract-based claims against TSE, and (ii) a Third-Party  
25 Complaint asserting claims against AHAC, the Brahma Surety Bond and Cobra, as principal.  
26

27 <sup>22</sup> A true and correct copy of Brahma's Complaint filed in the Clark County Action is attached hereto as **Exhibit 18**.

28 <sup>23</sup> In pertinent part, NRS 108.239(1) states, "A notice of lien may be enforced by an action in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located ...."

1 H&E has also brought (or is in the process of bringing) (in this Action) its, (i) contract-  
2 based claims against Brahma, and (ii) claims against the Surety, the H&E Surety Bond and Cobra,  
3 as Principal.

4 **F. Brahma Filed a Motion to Stay the Federal Action.**

5 On October 16, 2018, Brahma filed in the Federal Action a Motion for Stay (the “Brahma  
6 Motion to Stay”) based on the *Colorado River* Doctrine, which requests that the Federal Court  
7 abstain from hearing the Federal Action in favor of this Court proceeding with this Action since,  
8 (i) the Federal Action involves the same transaction and occurrences as those that are the subject  
9 of this Action, and (ii) this Court already has familiarity with this Case and has ruled on a  
10 dispositive motion in this matter.<sup>24</sup> The Brahma Motion to Stay has yet to be scheduled for a  
11 hearing by the Federal Court.

12 **III. LEGAL ARGUMENT**

13 **A. Brahma’s Counter-Complaint was Properly Filed in this Action.**

14 Brahma’s Counter-Complaint is properly filed in this Action and should not be stricken  
15 inasmuch as:

16 • The Nevada Legislature contemplated that foreclosure actions and motions  
17 to expunge liens should be filed in the same action, and the Counter-Complaint filed into this  
18 Action accomplishes the Legislature’s goal (*see* NRS 108.2275(5));

19 • The Counter-Complaint was properly served on TSE through a Summons  
20 and gives TSE notice of Brahma’s claims against it;

21 • Contrary to TSE’s representations, this Action is not closed and will remain  
22 open while this Court determines Brahma’s Fee Motion, since Brahma was the prevailing party  
23 under NRS 108.2275(6)(c); and

24 • The Court can sever the Counter-Complaint and then consolidate it with this  
25 Action should it believe the Counter-Complaint was improperly filed.

26 **1. *The Counter-Complaint accomplishes the same goal contemplated***  
27 ***under NRS 108.2275(5) of consolidating motions to expunge with***  
28 ***foreclosure actions.***

<sup>24</sup> A true and correct copy of Brahma’s Motion for Stay without exhibits is attached hereto as Exhibit 19.



1 TSE's argument that the Counter-Complaint is improper and must be stricken places form  
2 over substance. Filing the Counter-Complaint<sup>25</sup> into this Action puts the parties in the same  
3 procedural posture that would have existed had the Counter-Complaint been filed first, followed  
4 by the Motion to Expunge.

5 Notably, under "Rule 2" of the Rules of the District Courts of Nevada, the term "Case"  
6 "shall include and apply to any and all actions, proceedings and other court matters, however  
7 designated." Therefore, as a practical matter, whether the Counter-Complaint is styled as a  
8 "Complaint", "Counter-Claim" or "Counter-Complaint," makes little difference to the validity of  
9 this Case.

10 In fact, had Brahma filed its Counter-Complaint as a standalone case (as TSE claims it  
11 should have), that case would have likely been assigned to a different Judge, requiring Brahma to  
12 file a Motion to Consolidate that action with this Action to ensure that the same Judge heard both  
13 matters. Filing the Counter-Complaint in an Action that TSE had already commenced, maximizes  
14 judicial economy, eliminates unnecessary delays and embraces the court's mandate to apply the  
15 Nevada Rules of Civil Procedure to (i) "secure the just, speedy and inexpensive determination of  
16 every action,"<sup>26</sup> and (ii) construe all pleadings "to do substantial justice".<sup>27</sup>

17 In a case where a creditor attempted to revive a judgement by filing a new complaint into  
18 the same case number as the original judgment, the debtor filed a motion for summary judgment  
19 arguing that the relevant statute required the creditor to file an independent action. *H.W. Polk v.*  
20 *Tully*, 97 Nev. 27, 29, 623 P.2d 972, 973 (1981). In denying the motion, the Court held "in the  
21 absence of a specific statute requiring an independent action, the procedure followed by [the  
22 creditor] was not improper" because the debtor was served with a summons and complaint and  
23 had notice of the action. *Id.* The Court further reasoned, "to hold otherwise would exalt form over  
24 substance." *Id.* While the creditor in the *Polk* case filed its new complaint into the old case number  
25 and the old case was technically closed, the Nevada Supreme Court took a more practical approach

26  
27 <sup>25</sup> When Brahma first filed its pleading in this Action on September 20, 2018, it was styled as a "Lien Foreclosure  
Complaint" and not a "Counter-Complaint." It was only after it was amended that Brahma named it, perhaps in artfully,  
a "Counter-Complaint."

28 <sup>26</sup> See NRCP 1

<sup>27</sup> See NRCP 8(f).

1 and determined that the new action still provided the debtor with all the protections it would have  
2 received had the action been filed independently. In other words, no harm, no foul!

3 Here, this Action is no different—TSE argues that Brahma was required to file its  
4 complaint as an independent action instead of in the same Case Number as the Motion to Expunge.  
5 However, just like the debtor in *Polk*, TSE was served with the Summons and Counter-Complaint  
6 just as it would have been had the Counter-Complaint been filed in a standalone complaint with  
7 an independent case number. Further, just like the situation in *Polk*, there is nothing in the  
8 Mechanic's Lien Statute that prohibits a lien claimant from seeking to foreclose against its  
9 mechanic's lien by filing its complaint in the same case number commenced by an owner who  
10 previously filed a motion to expunge under NRS 108.2275.

11 Indeed, NRS 108.2275(5) (the motion to expunge statute) expressly establishes the  
12 Legislature's intent to combine lien foreclosure actions with motions to expunge the lien so both  
13 matters are heard by the same judge. That section states:

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

19 Hence, because the First Complaint was dismissed without prejudice and there was no  
20 foreclosure action pending at the time TSE filed its Second Motion to Expunge, TSE filed the new  
21 Action independent of the dismissed action. When it came time for Brahma to file its mechanic's  
22 lien foreclosure complaint and claim against Brahma Surety Bond, Brahma decided to conserve  
23 judicial resources and file in the pending Action instead of commencing a new independent action  
24 that would then have to be consolidated with the instant Action. From a practical standpoint, there  
25 is absolutely no difference whether the Motion to Expunge was filed first or the Counter-  
26 Complaint—the result is the same—this Court will preside over both matters.

27 Further, there is nothing novel about the filing. Brahma's counsel has filed this exact  
28 pleading numerous times in situations where an owner or general contractor has first initiated the



1 action by filing a motion to expunge under NRS 108.2275.<sup>28</sup> Thus, TSE's argument that it "has  
2 conducted an extensive search of Nevada case law and has been unable to find any situation similar  
3 to this one..."<sup>29</sup> demonstrates Brahma's point—the lack of case law only supports Brahma's  
4 contention that litigants and district courts throughout Nevada consider the filing of a foreclosure  
5 action within the same case as a first filed motion to expunge to be proper.

6 To support its claim that Brahma's Counter-Complaint should not have been filed in this  
7 Action, TSE improperly cites to the *Crestline* case wherein the Nevada Supreme Court held that  
8 during a hearing on a motion to expunge brought under NRS 108.2275, the district court can only  
9 take one of three actions (i) determine the lien is frivolous and expunge it, (ii) determine the lien  
10 is excessive and reduce it, or (iii) determine the lien is not frivolous or excessive, and deny the  
11 motion. *Crestline Inv. Grp., Inc. v. Lewis*, 119 Nev. 365, 371, 75 P.3d 363, 367 (2003).

12 In *Crestline* and at the hearing on the property owner's motion to expunge, the district court  
13 decided to increase the lien amount, which the Court found to be improper. *Id.* However, the  
14 *Crestline* Court did not address whether a lien claimant who was seeking to foreclose on a lien  
15 could file its foreclosure action in the same case number assigned to the owner's action to expunge  
16 the lien. *Id.* So long as the court limited the expungement hearing to the three inquiries set forth  
17 under *Crestline*, there is nothing wrong with allowing a lien claimant to file a foreclosure action  
18 in the same case number after-the-fact, for the sake of judicial economy and to ensure that the two  
19 related matters remain consolidated before the same judge. In fact, had Brahma filed its Counter-  
20 Complaint first, TSE would have filed its Second Motion to Expunge in that same Case Number,  
21 effectively creating the same procedural posture currently before the Court.

22 Moreover, NRS 108.2275(7) ensures that "proceedings conducted pursuant to [NRS  
23 108.2275] do not affect any other rights and remedies otherwise available to the parties," which  
24 includes the right for Brahma to file its Complaint to foreclose against the Work of Improvement  
25 and the Bond under NRS 108.239(1) and NRS 108.2421(1).

26  
27 <sup>28</sup> See e.g. the W&W-AFCO Steel Case, attached hereto as Exhibit 20. In that case, the general contractor, Austin  
28 General, commenced the Action by filing a Motion to Expunge. W&W-AFCO Steel then filed its Complaint to  
Foreclose upon its Lien in that same Action. This is a recognized procedure and has been done dozens of times over  
the years by Peel Brimley LLP and other recognized construction litigation firms in Nevada.

<sup>29</sup> See Motion to Dismiss at pg. 11:18-21.

1                                   2.     *The Counter-Complaint was properly served on TSE and gives TSE*  
2   *notice of Brahma's claims.*

3           Pursuant to NRCP 8(a), "a pleading which sets forth a claim for relief, whether an original  
4           claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement  
5           of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the  
6           relief the pleader seeks." Brahma's Counter-Complaint does exactly that.

7           Additionally, Nevada is a notice-pleading jurisdiction and pleadings should be liberally  
8           construed to allow issues that are fairly noticed to the adverse party. *See* NRCP 8; *see also, Nevada*  
9           *State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801, 801 P.2d 1377, 1383 (1990). There  
10          is no question that Brahma's Counter-Complaint which was served on TSE by personal service  
11          and includes four causes of action directly against TSE, "places into issue matters which are fairly  
12          noticed" to TSE. *See Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984). In fact, there is no question  
13          that TSE acknowledges that the Counter-Complaint asserts claims against it, as it has previously  
14          asked for several extensions to file its answer to the Counter-Complaint.

15          Accordingly, to the extent the Counter-Complaint was inartfully styled, the Court should  
16          look past this technicality and allow the Counter-Complaint to stand as an independent action in  
17          this Case. *See State Dept. of Taxation v. Masco Builder Cabinet Group*, 127 Nev. 730, 738, 265  
18          P.3d 666, 671 (Nev. 2011)("procedural technicalities that would bar claims...will be looked upon  
19          with disfavor").

20          Additionally, the *Smith* Case upon which TSE relies in its Motion, is unavailing. *See Smith*  
21          *v. Eighth Judicial District Court*, 113 Nev. 1343, 950 P.2d 280 (1997). In that case, the *Smith* court  
22          found that the cross-claim plaintiff filed against respondents was improper because under NRCP  
23          12(a), it should have been served along with the answer (within 20 days of being served with the  
24          complaint), and not as a standalone pleading. In support of its rationale, the Court held, "we do not  
25          suggest that dismissal of Chang's cross-claim was mandated because of a technical defect in  
26          pleading...there is, however, nothing technical about the defect in Chang's cross-claim; the  
27          document simply is not a pleading and does not itself put the matters asserted therein at issue."  
28          *Id.* at 1348, 283. Unlike the cross-claim in the *Smith* case which was time barred and required by

1 an express rule to be filed with an answer, Brahma's Counter-Complaint was timely filed and there  
2 is no requirement that it be filed with an answer. Hence, the holding in *Smith* does not control this  
3 matter.

4 Finally, NRCPP 81(a) states, "these rules do not govern procedure and practice in any  
5 special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and  
6 practice provided by the applicable statute." To the extent the Court finds that it was improper  
7 under NRCPP 7(a) for Brahma to file the Counter-Complaint in this Action because it is a special  
8 statutory proceeding, NRCPP 81(a) exempts NRCPP 7(a) from a proceeding filed under NRS  
9 108.2275. Indeed, the procedure under NRS 108.2275(5) which contemplates that foreclosure  
10 actions and motions to expunge liens should be brought in the same Action appears to conflict  
11 with NRCPP 7(a), and therefore, to the extent there is a conflict, NRS 108.2275(5) controls based  
12 on NRCPP 81(a).

13 **3. *Contrary to TSE's Representations, this Action remains open given***  
14 ***Brahma's pending Motion for Attorney's Fees and Costs.***

15 TSE argues that when the Court denied its Second Motion to Expunge on September 12,  
16 2018, "that ruling should have been the end of this limited special proceeding."<sup>30</sup> Curiously, as of  
17 the date TSE filed its Second Motion to Expunge, the Court had yet to (i) enter its Order, and (ii)  
18 entertain Brahma's Fee Motion pursuant to NRS 108.2275(6)(c), which Fee Motion was  
19 contemplated in the Order and the award of which is statutorily mandated.

20 Thus, this Action was and is still very much open and will require additional briefing and  
21 oral argument relating to the Fee Motion before the Court can arguably be in a position to close  
22 the same.

23 Therefore, based on the foregoing, TSE's Motion to Strike the Counter-Complaint should  
24 be denied because it was proper for Brahma to file the same in this Action.

25 **4. *In the event the Court finds the Counter-Complaint to be improperly***  
26 ***filed in this Action, the Court can, under its own authority, sever the***  
27 ***Counter-Complaint and then consolidate it with this Action under***  
28 ***NRCPP 42.***

Should the Court determine that it was an error for Brahma to file its Counter-Complaint

<sup>30</sup> See Motion to Dismiss at pg. 5:9.



1 in this Action, the Court need not strike the Counter-Complaint to resolve any procedural hiccups.  
2 Rather, this Court may under NRCP 42, sever the Counter-Complaint from this Action by  
3 assigning it a separate Case Number, then consolidate that Case Number back into this Action to  
4 ensure that all disputes (between Brahma and TSE) are heard by this Court, which Brahma requests  
5 the Court to do, should such a determination be made.

6 **B. Brahma's Claim for Attorney's Fees Against TSE and Cause of Action**  
7 **Against the Brahma Surety Bond Cannot be Stayed or Removed to Federal**  
8 **Court.**

9 By way of its Motion, TSE brazenly argues "the stay should apply not only to the three  
10 claims that were previously removed to Federal Court but to this entire action."<sup>31</sup> In other words,  
11 TSE seeks to stay Brahma's (i) statutory right under NRS 108.2275(6)(c) to pursue attorney's fees  
12 and costs against TSE for defeating the Motion to Expunge, and (ii) claims directly against the  
13 Brahma Surety Bond, Cobra (as principal) and AHAC (as Surety).<sup>32</sup> As a preliminary matter TSE  
14 should not be allowed to avail itself of this Court's jurisdiction by filing its Second Motion to  
15 Expunge under NRS 108.2275, lose that motion, and then move the Court to stay the Case before  
16 the Court awards Brahma its attorney's fees and costs as mandated under the statute. TSE's  
17 attempt to stay the impending fee award against it clearly highlights its forum shopping efforts.

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

20 TSE admits in its Motion that under NRS 108.2421, Brahma was required to bring its claim  
21 against the Brahma Surety Bond in Nye County.<sup>33</sup>

22 Specifically, NRS 108.2421 states in relevant part:

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

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

<sup>31</sup> *Id.* at pg. 23:1-2.

<sup>32</sup> *Id.* at pg. 23:1-2.

<sup>33</sup> *Id.* at pg. 19:3-7.

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

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

13 2. *Brahma’s right to a Preferential Trial under NRS 108.2421 cannot be*  
14 *stayed.*

15 Additionally, because the Brahma Surety Bond now stands as the collateral for the Brahma  
16 Lien, Brahma intends to file a Demand for Preferential Trial Setting under NRS 108.2421, which  
17 is a right that cannot be taken away, abrogated or stayed. In deciding whether to grant a stay, courts  
18 must consider “the possible damage which may result from the granting of the stay, the hardship  
19 or inequity which a party may suffer in being required to go forward, and the orderly course of  
20 justice measured in terms of the simplifying or complicating of issues, proof and questions of law  
21 which could be expected to result from a stay.” *PHH Mortgage Corp. v. SFR Investments Pool 1,*  
22 *LLC*, 2018 WL 547230 \*1 (D.Nev. January 24, 2018)(citing *Lockyer v. Mirant Corp.*, 398 F.3d  
23 1098, 1110 (9thCir. 2005)).

24 The Nevada Legislature has afforded mechanic’s lien claimants special rights to a just and  
25 speedy trial because of the value they add to real property and to the economy in general, as well  
26 as the vulnerable position they find themselves in when an owner fails to pay for work, materials  
27 and equipment furnished to a construction project, just as TSE has done here. In 2003 and 2005,  
28 and in response to the Venetian lien litigation, the Nevada Legislature substantially revised the

1 mechanic's lien statutes with the intent to facilitate payments to lien claimants in an expeditious  
2 manner. *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 245 P.3d 1149, 1156 (2010). One of  
3 those revisions was to arm lien claimants with the right to petition the Court for a summary trial  
4 on their mechanic's lien claims.

5 Specifically, NRS 108.2421(3) provides:

6 Each lien claimant in the action may serve upon the adverse party a  
7 "demand for preferential trial setting" and file the demand with the  
8 clerk of the court. Upon filing, the clerk of the court shall, before the  
9 Friday after the demand is filed, vacate a case or cases in a  
10 department of the court and set the lien claimant's case for hearing,  
on a day or days certain, to be heard within 60 days after the filing of  
the "demand for preferential trial setting."

11 NRS 108.2421(6) further provides:

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

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

18 The Nevada Supreme Court has recognized the Legislature's intent to provide lien  
19 claimants with special rights designed to provide them with a speedy remedy on their lien claims.  
20 See *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 67 P.3d 328 (2003); See also,  
21 *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032 (Nev.  
22 2008)(acknowledging that the object of the lien statutes is to secure payment to those who perform  
23 work or furnish material to improve the property of the owner). Among the protections afforded  
24 lien claimants is the statutory right to a preferential trial setting. By enacting Nevada's mechanic's  
25 lien statutes, the Nevada Legislature has created a means to provide contractors with secured  
26 payment for their work, materials and equipment furnished to construction projects in Nevada  
27 inasmuch as "contractors are generally in a vulnerable position because they extend large blocks  
28 of credit; invest significant time, labor and materials into a project; and have any number of works



1 vitally depend upon them for eventual payment.” *Wilmington Trust FSB v. AI Concrete Cutting*  
2 *& Demolition, LLC (In re Fontainebleau Las Vegas Holdings, LLC)*, 289 P.3d 1199, 1210 (Nev.  
3 2012).

4 Moreover, courts in Nevada recognize that this sacrosanct right to demand a preferential  
5 trial setting cannot be stayed. *See Lehrer McGovern Bovis, Inc., v. Maui One Excavating, Inc.*, 124  
6 Nev. 1487, 238 P.3d 832 (2008). In the *Maui One* case, the district court entered a Case  
7 Management Order which granted a limited stay to some proceedings, but expressly provided that  
8 “the parties may continue to file demands for preferential lien hearings before the Court as  
9 provided in NRS 108.2421...” *Id.* While the issue on appeal dealt with whether the case should  
10 be dismissed for failure to prosecute the claim within the five-year rule under NRCP 41(e), both  
11 the lower court and the Nevada Supreme Court recognized that a lien claimant’s right to a  
12 preferential trial setting under NRS 108.2421 could not be stayed or infringed. Specifically, the  
13 Nevada Supreme Court held “because CMO 10 expressly permitted the lien claimants to seek  
14 hearing dates, we conclude that it did not constitute a court-ordered stay of Maui’s action.” *Id.*

15 Accordingly, Brahma (as a lien and bond claimant) is entitled to a preferential trial setting  
16 pursuant to NRS 108.2421 against the Brahma Surety Bond. Preferential trial rights in this Action  
17 mean this case will be handled expeditiously, thereby reducing delay where Brahma has fronted  
18 money for the Work.<sup>34</sup> By contrast, because (i) the Brahma Lien, the Brahma Surety Bond and  
19 Brahma’s claims against AHAC and Cobra are not before the Federal Court, and (ii) Cobra cannot  
20 be brought into the Federal Action because it is of the same domicile as Brahma, there would be  
21 no preferential trial mechanism in the Federal Action, nor does the Federal Court have jurisdiction  
22 over this claim.

23 Further, because (i) the Brahma Surety Bond claim, (ii) Brahma’s claims against Cobra  
24 and AHAC, and (ii) the H&E Lien claim, the H&E Surety Bond claim and H&E’s claims against  
25 Brahma (claims that are derivative of Brahma’s claims against TSE), will be litigated in this  
26 Action, H&E’s claims will also be litigated in the same action.

27 <sup>34</sup> A significant portion of Brahma’s lienable amount is attributable to the work, materials or equipment furnished by  
28 Brahma’s subcontractors and suppliers, several of which TSE directed Brahma to contract with for TSE’s convenience.  
For example, TSE directed Brahma to contract with CTEH and CTEH is now seeking a claim against Brahma of more  
than \$1 Million. TSE’s failure to pay Brahma is also affecting Brahma’s Dunn & Bradstreet score.

Therefore, because Brahma's Third-Party Complaint cannot be stayed, the Court must not stay Brahma's contract claims against TSE either. Because all claims arise out of the same transaction and occurrence (i.e., unpaid invoices for Work rendered on a time and material basis by Brahma), a single judge should try all claims. The only way to have a single judge hear all disputes between the parties will be to have this Court preside over all matters. This makes the most sense since (i) the Work of Improvement is located in Nye County, (ii) all of the contracts that are the subject of the dispute were performed in Nye County, (iii) the liens and bonds are recorded with the Nye County recorder's office, and (iv) this Court is the most familiar with the Project.

**C. Brahma's Contract Claims Against TSE are Properly Brought in this Court.**

As part of its Motion to Dismiss, TSE asks this Court to enforce the forum selection clause and require Brahma to litigate its claims in Clark County.<sup>35</sup> However, the forum selection clause is inapplicable to this Case because:

- NRS 13.010 requires any action between TSE and Brahma to be filed in Nye County since the Agreement was performed entirely in Nye County;
- The forum selection clause is permissive only and not mandatory;
- NRS 108.2421 expressly authorizes and requires Brahma to file its Claims against TSE, the Debtor, in Nye County; and
- The forum selection clause violates Brahma's rights under Nevada's Mechanic's Lien Statute and is against public policy, void and unenforceable pursuant to NRS 108.2453.<sup>36</sup>

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

Because the Agreement between TSE and Braham was entirely performed in Nye County, NRS 13.010 requires the Action to be commenced in Nye County. When a person has contracted

<sup>35</sup> See Motion to Dismiss at pg. 8:6-8.

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



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

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

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

Based on the reasoning of the *Am. First Federal Credit Union* Court, the forum selection clause contained in Section 24 of the parties' Agreement is "permissive" and "does not require" the parties to resolve their contract claims in Las Vegas, Nevada.

Rather, Section 24 allows Brahma to bring such claims in this Action along with Brahma's claims against the Brahma Surety Bond, which it has done by way of its Counter-Complaint.

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1                   3.     *NRS 108.2421 expressly authorizes Brahma to file its Claims against*  
2                   *TSE, the Debtor, in Nye County.*

3                   Now that the Brahma Lien has been replaced by the Brahma Surety Bond, pursuant to NRS  
4                   108.2421, Brahma is expressly authorized to pursue its contract claims against TSE in Nye County.

5                   Specifically, NRS 108.2421 states in relevant part:

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

10                  Here, Cobra is the principal on the Brahma Surety Bond, and AHAC is the surety who  
11                  issued the Brahma Surety Bond. However, TSE is the lien claimant's debtor, not Cobra or AHAC.  
12                  Therefore, the statute expressly authorizes Brahma to file its contract claims against TSE (its  
13                  debtor) in Nye County, irrespective of the language contained in the parties' Agreement or  
14                  otherwise. This makes good sense since Cobra's and the Surety's liability to Brahma is dependent  
15                  on TSE's liability to Brahma.

16                  Venue statutes such as NRS 108.2421 "serve important public interests, including avoiding  
17                  costs to taxpayers of defending actions in other communities, maintaining actions where relevant  
18                  official records are kept, and reducing forum shopping." *Nevada Civil Practice Manual*, §  
19                  3.01. Venue statutes should be applied strictly. *Lyon County v. Washoe Medical Ctr.*, 104 Nev. 765,  
20                  768, 766 P.2d 902, 904 (1988). "Statutes that contain exclusive venue and jurisdiction provisions  
21                  also accomplish the objective of conserving court resources and avoiding judicial collision and  
22                  conflicts involving the same parties and controversies." *Nevada Civil Practice Manual*, § 3.01. *See*  
23                  *Pub. Serv. Comm'n v. S.W. Gas Corp.*, 103 Nev. 307, 308, 738 P.2d 890, 891 (1987).

24                  NRS 108.2421 conserves judicial resources and avoids conflicting judgments by allowing  
25                  Brahma to pursue all claims against all defendants before a single judge in Nye County, the County  
26                  where TSE chose to (i) construct its Work of Improvement; (ii) seek relief by filing the Motion to  
27                  Expunge; and (iii) compel Cobra to record the Brahma Surety Bond.

28                               *a) NRS 108.2453, renders the forum selection clause void and*  
  *unenforceable.*

                  To the extent this Court finds that the forum selection clause is mandatory and requires

1 Brahma to file its claims against TSE in Clark County, that contract provision is against public  
2 policy, void and unenforceable under NRS 108.2453(1) & (2) which states in relevant part:

- 3 (1) A person may not waive or modify a right, obligation or liability  
4 set forth in the provisions of NRS 108.221 to 108.246, inclusive.  
5 (2) A condition, stipulation or provision in a contract or other  
6 agreement for the improvement of property or for the  
7 construction, alteration or repair of a work of improvement in this  
8 State that attempts to do any of the following is contrary to public  
9 policy and is void and unenforceable: (a) Require a lien  
10 claimant to waive rights provided by law to lien claimants or  
11 to limit the rights provided to lien claimants, other than as  
12 expressly provided in NRS 108.221 to 108.246, inclusive.

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

20 *b) By filing its contract claims in Clark County, Brahma did not  
21 waive its right to file its claims against TSE in this Action.*

22 Further, because the forum selection clause found in the Agreement is against public  
23 policy, void and unenforceable under NRS 108.2453, Brahma did not waive its right to file claims  
24 against TSE in Nye County when it (i) signed the Agreement, or (ii) filed the Clark County Action.

25 In a case involving the application of NRS 108.2453, the Nevada Supreme Court held that  
26 a subordination agreement which required lien claimants to waive prospective mechanic's lien  
27 rights, (i) violated NRS 108.2453, (ii) was against public policy, and (iii) was void and  
28 unenforceable. *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. 556, 289 P.3d 1199  
(2012). In that case, certain bank lenders who provided construction financing to the owners of a  
multi-billion-dollar construction project on the Las Vegas Strip, required as a condition precedent  
to providing financing, that the owner's contractor and all of its subcontractors sign subordination  
agreements which would allow the lenders' deeds of trust to have priority over any lien claims



1 recorded on the project. *Id.* Hence, even though the lien claimants executed the subordination  
2 agreement and acknowledged that their lien rights were subordinate to certain lenders, the Nevada  
3 Supreme Court found such a provision to be against public policy, void and unenforceable since  
4 NRS 108.222 gave priority to lien claimants over all later-in-time recorded encumbrances,  
5 including deeds of trust. *Id.*

6 Therefore, while TSE may argue that by filing the Clark County Action, Brahma waived  
7 its (i) right to file its contract claims in this Action, or (ii) claim that the forum selection clause  
8 violates NRS 108.2453, the Nevada Supreme Court would find that Brahma cannot waive rights  
9 under the mechanic's lien statute, including, the right to pursue its contract claims against its  
10 debtor, TSE, in Nye County as provided for under NRS 108.2421.

11 **D. By Filing its Contract Claims Against TSE in this Action, Brahma has Not**  
12 **Engaged in Fraud or Attempted to Subvert Federal Jurisdiction, So the**  
13 **Federal Court Cannot Enjoin this Action.**

14 As explained above, because Brahma did not file its contract claims against TSE in this  
15 Action to fraudulently subvert federal jurisdiction, the Federal Court will likely deny TSE's  
16 Motion for Preliminary Injunction wherein it asks the Federal Court to enjoin this Court from  
17 proceeding with this Case.

18 The Anti-Injunction Act found under 28 USC § 2283 generally prohibits federal courts from  
19 enjoining or staying state court proceedings unless (i) expressly authorized by an Act of Congress,  
20 (ii) where necessary in aid of its jurisdiction, or (iii) to protect or effectuate its judgments. *See* 28  
21 USC § 2283. Exceptions to the Anti-Injunction Act "must be construed narrowly and doubts as to  
22 the propriety of a federal injunction against a state court proceeding should be resolved in favor of  
23 permitting the state action to proceed." *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987)(citing *Vendo*  
24 *Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977)). "Unless  
25 one of the statutory exceptions applies, a federal injunction restraining prosecution of a lawsuit in  
26 state court is absolutely prohibited." *Lou*, 834 F.2d at 740 (citing *Mitchum v. Foster*, 407 U.S. 225,  
27 228-29, 92 S.Ct. 2151, 2154-56, 32 L.Ed.2 705 (1972)).

28 A federal court may enjoin the continued prosecution of the same case in state court after its  
removal. *Lou*, 834 F.2d at 740. "A more difficult problem is presented when a new action is filed

1 in state court.” *Id.* In *Lou*, the Ninth Circuit Court of Appeals agreed with the Fifth Circuit Court  
2 of Appeals in holding, “where a second state court suit is fraudulently filed in an attempt to subvert  
3 the removal of a prior case, a federal court may enter an injunction.” *Id.*; *see also*, *Frith v. Blazon-*  
4 *Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975)(holding, “where no fraud is found, the  
5 second action brought in state court should not be enjoined”). The Court found that the injunction  
6 was improper because there “was no finding that the second state court action was fraudulent or  
7 an attempt to subvert the purposes of the removal statute.” *Id.* In reaching its conclusion that “the  
8 preliminary injunction was not authorized by section 1446(e),” the Court noted that the state court  
9 case “involved different plaintiffs, additional counsel, additional defendants, and only state  
10 claims.” *Id.*

11 Notably, in the *Frith* case, the Fifth Circuit Court of Appeals found that it was improper to  
12 issue the injunction because “the second suit was not brought in an attempt to subvert the purpose  
13 of the removal statute and was not aimed at defeating federal jurisdiction” since “the joinder of the  
14 resident defendant in the state court suit was not fraudulent.” *Frith*, 512 F.2d at 901.

15 Like the Plaintiff in *Lou*, here Brahma did not file its contract claims against TSE in this  
16 Action fraudulently or to subvert the purposes of the removal statute.

17 First, the Federal Action was removed from Clark County, not Nye County. As TSE  
18 acknowledges, this Action has not been removed to Federal Court.<sup>37</sup> Second, this Action was  
19 commenced by TSE before the Federal Action was filed, so Brahma filed into an existing Case,  
20 not a new state case. Accordingly, TSE’s “first in time” argument fails because this Action was  
21 the first action commenced, not the Clark County Action or Federal Action. Third, because  
22 Brahma’s claims against Cobra, AHAC and the Brahma Surety Bond must necessarily remain  
23 before this Court, Brahma’s contract claims must be litigated before this Court as well to ensure  
24 that its right to file a demand for preferential trial setting is not hindered. Fourth, H&E has now  
25 filed (or is in the process of filing) litigation in Nye County against Brahma asserting contract  
26 claims which are derivative of Brahma’s contract claims against TSE. Fifth, by filing its contract  
27 claims in this Action, Brahma does not escape the jurisdiction of the Federal Court and remains a  
28

<sup>37</sup> See Motion to Dismiss at pg. 19:11-13.



1 party in that Action. Finally, Brahma has not engaged in forum shopping because it does not seek  
2 to avoid a negative judgment from the Federal Court as the Federal Court has made absolutely no  
3 rulings in that case.

4 In other words, the purpose of filing its breach of contract claims against TSE in this Action  
5 was not aimed at defeating federal jurisdiction. Rather, these claims were filed in this Action out  
6 of necessity to allow this Court to rule on Brahma's claim against the Brahma Surety Bond, which  
7 was not removed to Federal Court, and which cannot be stayed as discussed previously. In fact,  
8 in the event the Federal Court denies Brahma's Motion for Stay under the *Colorado River*  
9 Doctrine, Brahma has sought leave of the Federal Court to re-assert its contract claims against TSE  
10 in the Federal Action which, if it occurs, would not prevent this Court from proceeding with  
11 Brahma's claims brought against TSE in the Counter-Complaint.

12 Moreover, while the contract claims brought in this Action overlap with the contract claims  
13 previously brought in the Federal Action, this Action (i) is more comprehensive, (ii) includes  
14 different plaintiffs (i.e. H&E), (iii) different defendants (i.e. Cobra and AHAC), and (iii) state law  
15 claims only.

16 Therefore, because Brahma has not engaged in fraud or attempted to subvert the Federal  
17 Court's jurisdiction, the Federal Court cannot enjoin this Action from proceeding. In any event,  
18 TSE's Motion for Preliminary Injunction may not be heard for several months, so this Court should  
19 proceed with hearing the entire case unless and until the Federal Court rules otherwise. This Court  
20 will need to resolve the contract dispute between TSE and Brahma at the same time it proceeds on  
21 Brahma's claim against the Brahma Surety Bond, so there will be no prejudice to either party if  
22 the Court allows Brahma to pursue its contract claims against TSE.

23  
24 **E. The Motion to Dismiss is Unnecessary Because Brahma Has Filed a Motion**  
25 **to Amend its Counter-Complaint to Remove its Foreclosure Action Against**  
26 **the Work of Improvement Now that the Brahma Surety Bond Secures the**  
27 **Brahma Lien.**

28 Because Brahma has filed a motion to amend its Counter-Complaint to remove the  
Foreclosure Cause of Action against the Work of Improvement, TSE's Motion to Dismiss is  
unnecessary and will likely be moot by the time this Motion is heard. Now that the Brahma Surety

1 Bond secures the Brahma Lien, Brahma's Counter-Complaint will be amended to remove the  
2 Foreclosure Cause of Action against TSE's Work of Improvement. In its place will be Brahma's  
3 claims against the Brahma Surety Bond.

4 **IV. CONCLUSION**

5 Based on the foregoing, this Court should deny TSE's Motion to Strike, Motion to Dismiss  
6 and Motion for Stay.

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

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

10 Dated this 5 day of November, 2018.

11 **PEEL BRIMLEY LLP**

12   
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## CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 5th day of November, 2018, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S OPPOSITION TO TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE, MOTION TO DISMISS OR MOTION FOR STAY** to be served as follows:

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

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

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

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

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

18 Defendant.

19 BRAHMA GROUP, INC., a Nevada corporation,

20 Counterclaimant/Lien Claimant,

21 vs.

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

26 Counterdefendant,  
27  
28

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

**DECLARATION OF RICHARD L.  
PEEL, ESQ. IN SUPPORT OF  
BRAHMA GROUP, INC.'S  
OPPOSITION TO TONOPAH  
SOLAR ENERGY, LLC'S MOTION  
TO STRIKE, MOTION TO DISMISS  
OR MOTION FOR STAY**

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

10 Third-Party Defendants.

11 I, Richard L. Peel, Esq. hereby declare under penalty of perjury under the laws of the State  
12 of Nevada that the following is true and correct:

13 1. I am the managing partner at Peel Brimley LLP, counsel of record for Brahma  
14 Group, Inc. ("Brahma") in this matter, and I make this Declaration in support of Brahma's  
15 Opposition to Tonopah Solar Energy, LLC's ("TSE") Motion to Strike, Motion to Dismiss or  
16 Motion for Stay.

17 2. I have personal knowledge of the facts stated herein, except as stated upon  
18 information and belief, and as to those matters, I believe them to be true, and I am competent to  
19 testify to their truthfulness if called upon to do so.

20 3. On July 3, 2018, Ronnie Cox and I (both counsel for Brahma) consulted with  
21 attorney Lee Roberts (counsel for TSE) about the possibility of stipulating to have Brahma's and  
22 TSE's claims (including Brahma's mechanic's lien foreclosure action which had yet to be filed), in  
23 one forum.

24 4. On July 9, 2018 and prior to filing the Clark County Complaint, I again reached out  
25 to attorney Roberts to see if he had heard back from his client regarding Brahma's request.

26 5. On July 10, 2018, attorney Roberts advised me that he had yet to confer with his  
27 client.

28 6. Several weeks thereafter and prior to filing the Clark County Action, I again reached  
out to attorney Roberts to see if he had a chance to speak to his client about Brahma's request. I



1 understood from that conversation that TSE was not willing to stipulate to have the parties' claims  
2 filed in one action and in one forum.

3 7. As a result and based on a mistaken interpretation of the parties' Services  
4 Agreement, Brahma caused the Clark County Action to be filed for Brahma's contract related  
5 claims only.

6 I declare under penalty of perjury that the foregoing is true and correct.

7  
8 DATED this 5 day of November 2018.

9   
10 Richard L. Peel, Esq.

# **EXHIBIT 1**

## SERVICES AGREEMENT

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

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

AND

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

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

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

(c) Contractor shall provide to TSE on the 5<sup>th</sup> day of each calendar month an invoice for Services rendered by the Contractor during the relevant monthly period terminating five (5) days prior to the date of such invoice. Except with respect to disputed amounts, each invoice shall be due and payable within forty-five (45) days following TSE's receipt of such invoice accompanied by all applicable Payment Deliverables (as defined in Exhibit D).

(d) TSE will reimburse the Contractor for its reasonable out-of-pocket incidental expenses that are necessary and reasonable for performance of the Services, provided such expenses are approved in advance by TSE's Authorized Representative (designated in Exhibit A). Contractor shall provide TSE within five (5) days after the end of each calendar month a written request for reimbursement of such expenses for that month, using a format acceptable to TSE, together with all documentation and receipts supporting each individual expense item. TSE is under no obligation to reimburse the Contractor for any requests for reimbursement not meeting the conditions of this paragraph.

5. Work Policy. Personnel.

(a) The scope of the Services to be performed hereunder by Contractor shall be coordinated with the Authorized Representative at all times; TSE is interested only in the results to be achieved, and the conduct and control of the Services and Contractor's workmen will lie solely with Contractor. Though Contractor, in performance of the Services, is an independent contractor with the sole authority and responsibility to control and direct the performance of the details of the Services, the final product and result of the Services must meet the approval of TSE and shall be subject to TSE's general rights of inspection and supervision to secure the satisfactory completion of the Services. TSE may change the Authorized Representative at any time upon written notice to Contractor.

(b) Contractor shall observe and comply with TSE's and applicable TSE Affiliate's security procedures, rules, regulations, policies, working hours and holiday schedules. Contractor shall use commercially reasonable efforts to minimize any disruption to TSE's and any TSE Affiliate's normal business operations at all times.

(c) Contractor agrees to comply with TSE's safety programs and all safety requirements promulgated by any local or Federal governmental authority, including without limitation, the requirements of the Occupational Safety and Health Act of 1970 and the Construction Safety Act of 1969 and all standards and regulations which have been and shall be promulgated by the agencies which administer such or similar acts. Contractor shall prevent the use, planned release, or other introduction onto the Plant site, or the exposure to persons and property, of any toxic or hazardous substance, whether subject to regulation or not. Contractor shall clean up and abate any spills or contamination, and restore the affected area to its prior condition and as required by applicable governmental authorities. To the fullest extent allowed by law (and no further),



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

6. Representations and Warranties: Undertakings.

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

7. Intellectual Property Rights.

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

8. Confidentiality Provisions.

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

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

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

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

- (b) Upon TSE's request at any time, Contractor agrees promptly to furnish such statements, certificates and documents in form and substance satisfactory to TSE, in its sole discretion, which statements, certificates and/or other documents shall include, without limitation, names of Contractor's any permitted subcontractors and suppliers, their addresses, amounts due or to become due or previously paid to such subcontractors and suppliers, information concerning any Lien claims, Lien releases and/or Lien waivers or receipted bills evidencing payment, estimates of the cost of the Services performed to the date of such certificate, and estimates of the cost of completing such Services.

11. Remedies for Breach. Contractor understands and agrees that money damages would not be sufficient remedy for any breach of this Agreement and that TSE or applicable TSE Affiliate shall be entitled to seek injunctive or otherwise equitable relief to remedy or forestall any such breach or threatened breach. Such remedy shall be in addition to all other rights and remedies available at law or in equity.
12. No Consequential Damages. Notwithstanding any other provision in this Agreement, under no circumstances will either party or any affiliate of a party be liable to the other for any consequential, indirect, special, punitive or incidental damages. Each party hereby waives and releases any and all rights which it has, or may have in the future which arises out of or relates to the non-continuation or termination of this Agreement by TSE for any reason, except, however for any rights which Contractor may have for compensation due and payable in accordance with the terms of this Agreement.
13. Right of Publicity. Contractor may not use the name, logo, trademarks or service marks of TSE or TSE Affiliates or any part thereof in any publicity, advertisement or brochure without their prior written consent.
14. Equal Employment. TSE does not discriminate in employment on the basis of sex, age, race, creed, color, religion, sexual orientation, national origin, marital status, disability or any other basis that is prohibited by law. Contractor agrees in providing the Services not to discriminate on any basis and, if an entity, represents that it is an equal employment opportunity firm.



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


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

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

[Signature page follows]

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

**TONOPAH SOLAR ENERGY, LLC**

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

**BRAHMA GROUP, INC.**

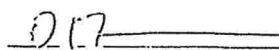
By:   
Name: David Z. Berman  
Title: V.P. General Counsel  
Address: 1132 South 500 West  
Salt Lake City, UT 84101  
Email: David.Z.Berman@gmail.com  
Fax: \_\_\_\_\_



EXHIBIT A

Start Date: XX

End Date: XX

Hourly Rate: See Exhibit C

Total Not to Exceed (NTE) amount: \$200,000.00

Authorized Representative: Rob Howe, Project Director

**Schedule and Description of Objectives, Deliverables and Specifications:**

## EXHIBIT B

### INSURANCE REQUIREMENTS

#### Insurance Requirements

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

#### MINIMUM SCOPE AND LIMIT OF INSURANCE

Coverage shall be at least as broad as:

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

### Insurance Policy Provisions

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

#### *Additional Insured*

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

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

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

#### *Separation of Insureds*

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

#### *Notice of Cancellation*

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

#### *Waiver of Subrogation*

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

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

*Acceptability of Insurers*

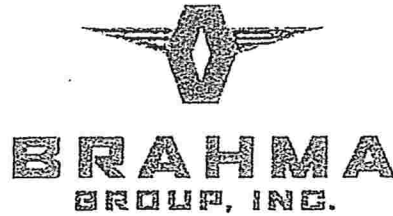
Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A: VII, unless otherwise acceptable to TSE.

*Verification of Coverage*

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



EXHIBIT C  
BILLING RATES

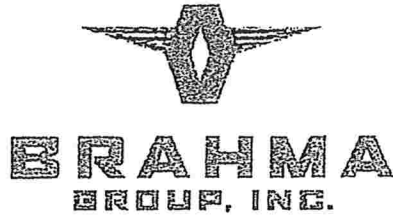


CRAFT LABOR RATES  
General Conditions - Support  
**Crescent Dunes Solar Energy Project**  
Tonopah, NV

CLASSIFICATION		Straight Time	Overtime	Double Time
Project Manager	X	130.76	X 199.45	
Field Engineer	X	134.71	X 179.19	
Cost Scheduler	S	131.72	X 179.19	
Superintendent	S	134.71	X 179.19	
QA/QC Manager	X	92.49	X 127.33	
Safety Manager	S	93.49	X 127.33	
Field Safety	X	68.91	X 91.65	
CWI	X	68.91	X 91.65	
Admstr	X	57.98	X 76.28	

\* Per Diem Will be billed in addition to rates noted above.

11-000-16



CRAFT LABOR RATES  
Field  
**Crescent Dunes Solar Energy Project**  
Tonopah, NV

CLASSIFICATION		Straight Time	Overtime	Double Time
General Foreman	\$	91.26	\$	125.50
Foreman	\$	90.36	\$	120.18
Iron Worker	\$	85.43	\$	115.62
Carpenter	\$	71.02	\$	98.32
Electrician	\$	57.91	\$	81.00
Operator	\$	79.82	\$	105.76
Millwright	\$	85.43	\$	115.62
Pipe Fitter	\$	80.50	\$	112.99
Laborer	\$	58.02	\$	79.97

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

11-Nov-16



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

Tropicana, NV

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

CLASSIFICATION		Straight Time	Overtime	Double Time
Project Manager	\$	176.78	\$	235.12
Field Engineer	\$	158.50	\$	210.81
Cost Scheduler	\$	138.50	\$	210.81
Superintendent	\$	158.50	\$	210.81
QA/QC Manager	\$	112.81	\$	150.92
Safety Manager	\$	112.81	\$	150.92
Field Safety	\$	81.07	\$	107.82
CWI	\$	81.07	\$	107.82
Admin.	\$	67.12	\$	89.27

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

11-Rev-16





**CRAFT LABOR RATES**

Field

**Crescent Dunes Solar Energy Project**

Tropic, NV

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

CLASSIFICATION		Straight Time	Overtime	Double Time
General Foreman	\$	110.89	\$	147.88
Foreman	\$	106.31	\$	141.39
Iron Worker	\$	100.50	\$	133.67
Carpenter	\$	86.97	\$	113.97
Electrician	\$	98.72	\$	131.30
Operator	\$	91.55	\$	121.42
Millwright	\$	100.50	\$	133.67
Painter	\$	101.72	\$	135.29
Laborer	\$	65.41	\$	87.02

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

11-26-16

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

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

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

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

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

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

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

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

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

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

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