

**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 02:50 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 5**

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

*Attorneys for Petitioner  
Tonopah Solar Energy, LLC*

## **CHRONOLOGICAL INDEX**

<b>Date Filed</b>	<b>Description</b>	<b>Bates Number</b>	<b>Volume(s)</b>
<b>06/11/2018</b>	<b>TSE's Motion to Expunge</b>	<b>PA000001</b>	<b>1</b>
	Exhibit 1 – Services Agreement	PA000014	1
	Exhibit 2 – Notice of Lien	PA000036	1
	Exhibit 3 – Notice of First Amended and Restated Lien	PA000044	1
	Exhibit 4 – Notice of First Amended and Restated Lien	PA000048	1
	Exhibit 5 – Notice of Second Amended and Restated Lien	PA000058	1
	Exhibit 6 – Notice of Voluntary Dismissal Without Prejudice	PA000068	1
	Exhibit 7 – Affidavit of Justin Pugh	PA000079	1
<b>10/18/2018</b>	<b>TSE's Motion to Strike/Dismiss/Stay</b>	<b>PA000084</b>	<b>1</b>
	Exhibit 1 – Brahma's Lien Foreclosure Complaint	PA000109	2
	Exhibit 2 – Brahma's First Amended Counter-Complaint and Third-Party Complaint	PA000116	2
	Exhibit 3 – Brahma's Complaint in the Eighth Judicial District Court	PA000131	2
	Exhibit 4 – Services Agreement	PA000137	2
	Exhibit 5 – Notice of Removal to Federal Court	PA000159	2
	Exhibit 6 – TSE's Answer and	PA000169	2

## **CHRONOLOGICAL INDEX**

	Counterclaim in the Federal Action		
	Exhibit 7 – Brahma’s First Amended Complaint in the Federal Action	PA000189	2
	Exhibit 8 – Brahma’s Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000194	2
	Exhibit 9 – Fourth Amended and/or Restated Notice of Lien	PA000214	2
	Exhibit 10 – Certificate of Service of Surety Bond Rider	PA000225	2
<b>10/23/2018</b>	<b>Brahma’s Motion for Leave to Amend filed on October 23, 2018</b>	<b>PA000237</b>	<b>2</b>
	Exhibit 1 – Brahma’s Second Amended Counter-Complaint and Amended Third-Party Complaint	PA000244	3
	Exhibit 2 – October 17, 2018 Email	PA000257	3
	Exhibit 3 – October 18, 2018 Email	PA000260	3
<b>11/1/2018</b>	<b>Notice of Entry of Order, served on November 1, 2018, denying TSE’s Motion to Expunge</b>	<b>PA000264</b>	<b>3</b>
	Exhibit A – Order Denying TSE’s Motion to Expunge	PA000267	3
<b>11/05/2018</b>	<b>Brahma’s Opposition to TSE’s Motion to Strike/Dismiss/Stay</b>	<b>PA000274</b>	<b>3</b>
	Exhibit 1 – Services Agreement	PA000307	3
	Exhibit 2 – Notice of Lien	PA000329	4
	Exhibit 3 – Complaint, dated April 17, 2018	PA000337	4

## **CHRONOLOGICAL INDEX**

	Exhibit 4 – Notice of Foreclosure of Mechanic’s Lien	PA000344	4
	Exhibit 5 – Notice of Lis Pendens	PA000352	4
	Exhibit 6 – April 19, 2018 Correspondence	PA000360	4
	Exhibit 7 – TSE’s Motion to Expunge, dated April 24, 2018	PA000364	4
	Exhibit 8 – Notice of Voluntary Dismissal Without Prejudice	PA000377	4
	Exhibit 9 – Notice of First Amended and Restated Lien	PA000380	4
	Exhibit 10 – Notice of Second Amended and Restated Lien	PA000393	4
	Exhibit 11 – Third Amended and/or Restated Notice of Lien	PA000403	4
	Exhibit 12 – Fourth Amended and/or Restated Notice of Lien	PA000412	4
	Exhibit 13 – NRS 108.2415 Surety Bond	PA000421	5
	Exhibit 14 – Certificate of Service of Surety Bond Rider	PA000426	5
	Exhibit 15 – Notice of Lien	PA000437	5
	Exhibit 16 – NRS 108.2415 Surety Bond	PA000440	5
	Exhibit 17 – Order of Reassignment	PA000445	5
	Exhibit 18 – Complaint in the Eighth Judicial District Court	PA000448	5

## **CHRONOLOGICAL INDEX**

	Exhibit 19 – Brahma’s Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000454	5
	Exhibit 20 – Mechanic’s Lien Foreclosure Complaint in Case No. A-16-743285-C	PA000474	5
<b>11/05/2018</b>	<b>TSE’s Opposition to Brahma’s Motion for Leave to Amend</b>	<b>PA000485</b>	<b>5</b>
<b>11/30/2018</b>	<b>TSE’s Reply in Support of its Motion to Strike/Dismiss/Stay</b>	<b>PA000492</b>	<b>5</b>
	Exhibit 1 – TSE’s First Set of Interrogatories to Brahma and TSE’s First Set of Requests for Production to Brahma	PA000507	6
	Exhibit 2 – Brahma’s Motion to Stay Discovery Pending Determination of Dispositive Motion in the Federal Action	PA000522	6
	Exhibit 3 – Brahma’s Responses to TSE’s First Set of Requests for Production of Documents and First Set of Interrogatories	PA000535	6
	Exhibit 4 – Nevada Construction Law 2016 Edition by Leon F. Mead II	PA000551	6
	Exhibit 5 – Scheduling Order in the Federal Action	PA000562	6
	Exhibit 6 – TSE’s Response to Brahma’s Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000565	6

## **CHRONOLOGICAL INDEX**

	Exhibit 7 – Brahma’s Reply in Support of Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000589	6
	Exhibit 8 – TSE’s Motion for Injunction and to Strike in the Federal Action	PA000603	6
	Exhibit 9 – Brahma’s Response to TSE’s Motion for Injunction and to Strike in the Federal Action	PA000619	7
	Exhibit 10 – Reply in Support of TSE’s Motion for Injunction and to Strike in the Federal Action	PA000645	7
<b>12/03/2018</b>	<b>Brahma’s Reply in Support of its Motion for Leave to Amend</b>	<b>PA000661</b>	<b>7</b>
	Exhibit 1 – Mechanic’s Lien Foreclosure Complaint in Case No. A-16-743285-C	PA000676	7
<b>12/11/2018</b>	<b>Hearing Transcript from December 11, 2018 hearing</b>	<b>PA000687</b>	<b>7-8</b>
<b>01/25/2019</b>	<b>Notice of Entry of Order, served on January 25, 2019, Denying in part and Granting in part TSE’s Motion to Strike/Dismiss/Stay and Granting Brahma’s Motion for Leave to Amend</b>	<b>PA000870</b>	<b>8</b>
	Exhibit 1 – Order Denying in part and Granting in part TSE’s Motion to Strike/Dismiss/Stay and Granting Brahma’s Motion for Leave to Amend	PA000874	8
<b>NA</b>	<b>Docket for the Federal Action</b>	<b>PA000878</b>	<b>8</b>

**CHRONOLOGICAL INDEX**

<b>NA</b>	<b>Docket for the Nye County special proceeding</b>	<b>PA000886</b>	<b>8</b>
-----------	---	-----------------	----------

## **ALPHABETICAL INDEX**

<b>Date Filed</b>	<b>Description</b>	<b>Bates Number</b>	<b>Volume(s)</b>
<b>10/23/2018</b>	<b>Brahma's Motion for Leave to Amend filed on October 23, 2018</b>	<b>PA000237</b>	<b>2</b>
	Exhibit 1 – Brahma's Second Amended Counter-Complaint and Amended Third-Party Complaint	PA000244	3
	Exhibit 2 – October 17, 2018 Email	PA000257	3
	Exhibit 3 – October 18, 2018 Email	PA000260	3
<b>11/05/2018</b>	<b>Brahma's Opposition to TSE's Motion to Strike/Dismiss/Stay</b>	<b>PA000274</b>	<b>3</b>
	Exhibit 1 – Services Agreement	PA000307	3
	Exhibit 2 – Notice of Lien	PA000329	4
	Exhibit 3 – Complaint, dated April 17, 2018	PA000337	4
	Exhibit 4 – Notice of Foreclosure of Mechanic's Lien	PA000344	4
	Exhibit 5 – Notice of Lis Pendens	PA000352	4
	Exhibit 6 – April 19, 2018 Correspondence	PA000360	4
	Exhibit 7 – TSE's Motion to Expunge, dated April 24, 2018	PA000364	4
	Exhibit 8 – Notice of Voluntary Dismissal Without Prejudice	PA000377	4
	Exhibit 9 – Notice of First Amended and Restated Lien	PA000380	4
	Exhibit 10 – Notice of Second	PA000393	4



## **ALPHABETICAL INDEX**

	Amended and Restated Lien		
	Exhibit 11 – Third Amended and/or Restated Notice of Lien	PA000403	4
	Exhibit 12 – Fourth Amended and/or Restated Notice of Lien	PA000412	4
	Exhibit 13 – NRS 108.2415 Surety Bond	PA000421	5
	Exhibit 14 – Certificate of Service of Surety Bond Rider	PA000426	5
	Exhibit 15 – Notice of Lien	PA000437	5
	Exhibit 16 – NRS 108.2415 Surety Bond	PA000440	5
	Exhibit 17 – Order of Reassignment	PA000445	5
	Exhibit 18 – Complaint in the Eighth Judicial District Court	PA000448	5
	Exhibit 19 – Brahma’s Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000454	5
	Exhibit 20 – Mechanic’s Lien Foreclosure Complaint in Case No. A-16-743285-C	PA000474	5
<b>12/03/2018</b>	<b>Brahma’s Reply in Support of its Motion for Leave to Amend</b>	<b>PA000661</b>	<b>7</b>
	Exhibit 1 – Mechanic’s Lien Foreclosure Complaint in Case No. A-16-743285-C	PA000676	7
<b>NA</b>	<b>Docket for the Federal Action</b>	<b>PA000878</b>	<b>8</b>

## **ALPHABETICAL INDEX**

<b>NA</b>	<b>Docket for the Nye County special proceeding</b>	<b>PA000886</b>	<b>8</b>
<b>12/11/2018</b>	<b>Hearing Transcript from December 11, 2018 hearing</b>	<b>PA000687</b>	<b>7-8</b>
<b>01/25/2019</b>	<b>Notice of Entry of Order, served on January 25, 2019, Denying in part and Granting in part TSE's Motion to Strike/Dismiss/Stay and Granting Brahma's Motion for Leave to Amend</b>	<b>PA000870</b>	<b>8</b>
<b>11/1/2018</b>	<b>Notice of Entry of Order, served on November 1, 2018, denying TSE's Motion to Expunge</b>	<b>PA000264</b>	<b>3</b>
<b>06/11/2018</b>	<b>TSE's Motion to Expunge</b>	<b>PA000001</b>	<b>1</b>
	Exhibit 1 – Services Agreement	PA000014	1
	Exhibit 2 – Notice of Lien	PA000036	1
	Exhibit 3 – Notice of First Amended and Restated Lien	PA000044	1
	Exhibit 4 – Notice of First Amended and Restated Lien	PA000048	1
	Exhibit 5 – Notice of Second Amended and Restated Lien	PA000058	1
	Exhibit 6 – Notice of Voluntary Dismissal Without Prejudice	PA000068	1
	Exhibit 7 – Affidavit of Justin Pugh	PA000079	1
<b>10/18/2018</b>	<b>TSE's Motion to Strike/Dismiss/Stay</b>	<b>PA000084</b>	<b>1</b>
	Exhibit 1 – Brahma's Lien Foreclosure Complaint	PA000109	2

## **ALPHABETICAL INDEX**

	Exhibit 2 – Brahma’s First Amended Counter-Complaint and Third-Party Complaint	PA000116	2
	Exhibit 3 – Brahma’s Complaint in the Eighth Judicial District Court	PA000131	2
	Exhibit 4 – Services Agreement	PA000137	2
	Exhibit 5 – Notice of Removal to Federal Court	PA000159	2
	Exhibit 6 – TSE’s Answer and Counterclaim in the Federal Action	PA000169	2
	Exhibit 7 – Brahma’s First Amended Complaint in the Federal Action	PA000189	2
	Exhibit 8 – Brahma’s Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000194	2
	Exhibit 9 – Fourth Amended and/or Restated Notice of Lien	PA000214	2
	Exhibit 10 – Certificate of Service of Surety Bond Rider	PA000225	2
<b>11/05/2018</b>	<b>TSE’s Opposition to Brahma’s Motion for Leave to Amend</b>	<b>PA000485</b>	<b>5</b>
<b>11/30/2018</b>	<b>TSE’s Reply in Support of its Motion to Strike/Dismiss/Stay</b>	<b>PA000492</b>	<b>5</b>
	Exhibit 1 – TSE’s First Set of Interrogatories to Brahma and TSE’s First Set of Requests for Production to Brahma	PA000507	6
	Exhibit 2 – Brahma’s Motion to Stay Discovery Pending Determination of Dispositive Motion in the Federal	PA000522	6

## **ALPHABETICAL INDEX**

	Action		
	Exhibit 3 – Brahma’s Responses to TSE’s First Set of Requests for Production of Documents and First Set of Interrogatories	PA000535	6
	Exhibit 4 – Nevada Construction Law 2016 Edition by Leon F. Mead II	PA000551	6
	Exhibit 5 – Scheduling Order in the Federal Action	PA000562	6
	Exhibit 6 – TSE’s Response to Brahma’s Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000565	6
	Exhibit 7 – Brahma’s Reply in Support of Motion for Stay, or in the alternative, Motion to Amend Complaint in the Federal Action	PA000589	6
	Exhibit 8 – TSE’s Motion for Injunction and to Strike in the Federal Action	PA000603	6
	Exhibit 9 – Brahma’s Response to TSE’s Motion for Injunction and to Strike in the Federal Action	PA000619	7
	Exhibit 10 – Reply in Support of TSE’s Motion for Injunction and to Strike in the Federal Action	PA000645	7

# **EXHIBIT 13**

**DOC #898974**

Official Records Nye County NV

Deborah Beatty - Recorder

09/06/2018 11:58:11 AM

Requested By: WEIL & DRAGE APC

Recorded By: MJ RPTT:\$0

Recording Fee: \$35.00

Non Conformity Fee: \$

Page 1 of 4

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

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

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

APN 612-141-01.

Recording Requested By:

Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

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

Title of Document (required)

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

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

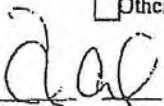
I the undersigned hereby affirm that this document submitted for recording does contain personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information.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

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

☐ Judgment - NRS 17.150(4)

☐ Military Discharge - NRS 419.020(2)

☐ Other \_\_\_\_\_

  
Signature

Ana M. Maldonado, Paralegal

Name Typed or Printed

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

PA000422

NRS 108.2415 Form of surety bond posted to release lien:

Bond #854481

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

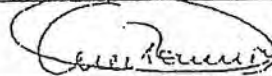
WHEREAS, Cobra Thermosolar Plant Inc. (name of principal), located at 11 Miles North Gabbs Pole Line Road, Tonopah, NV 89049 (address of principal), desires to give a bond for releasing the following described property owned by Tonopah Solar Energy, LLC (name of owners) from that certain notice of lien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

## Crescent Dunes Solar Energy Project

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

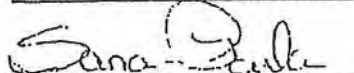
IN TESTIMONY WHEREOF, the principal and surety have executed this bond at Houston, Texas on the 15th day of August, 2018.

Cobra Thermosolar Plant, Inc.



(Signature of Principal) Carlos Ramirez Vissal

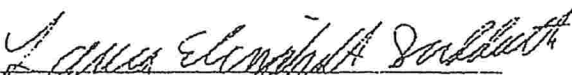
American Home Assurance Company



Sandra Parker, Attorney-in-Fact

State of Texas )  
 ) ss.  
County of Harris )

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

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





## POWER OF ATTORNEY

American Home Assurance Company  
National Union Fire Insurance Company of Pittsburgh, PA.  
Practical Book Office, 175 Wall Street, New York, NY 10039

Power No. 2115

ឥ. ១១.៥.២០២១

...KNOW ALL MEN BY THESE PRESENTS,

Prof. Abraham J. Heller, Assistant Company, a New York corporation, and Helmut, Union Fire Insurance Company of Pittsburgh, Pa., a Pennsylvania corporation, also each hereby appear.

Henry Addington, Elizabeth Borton, Maria Shepherd, Tertius Morrison, Laura Sutherland,  
Sister Patrick, Ursula Redington, Thomas McKim, Maria Aguirre, Obediah Aguirre, of Houston, Texas.

His (her) and loved ones (relatives) in Fort Bliss will continue to exercise vigilance (watch, evidence), report and/or discuss the nature, contents of indignity and various challenges in the human condition, faced in the context of its (her) journey, and to bind the respective community thereby.

IN WITNESS WHEREOF, American Home Assurance Company and the City of New York, the Insurance Company of Pittsburgh, PA, have each caused these presents

[illegible]

Mitchell Young, Vice President

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

[illegible]

**JULIANA HALLENBECK**  
 Deputy Public Defender  
 124 N. 1st St.  
 Ocala, FL 32101  
 352/349-1234

**CERTIFICATE**

Script of *Headlongs* adapted by the Division of Library of American Life Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA: 1932-1935, 1970c

"RESOLVED, that the Chairman of the Board, the President, every Vice President, and every Officer, authorized to represent the Company, in fact or apparent, at any time and on behalf of the Company, in executing bonds, indentures, recognizances and other instruments of financing and obtaining mortgages on the estate mortgaged to such persons the corporate seal of the Company, in the transaction of its entire business.

"RESOLVED, that the signatories and officers of each office and the Board of the Company may be allowed to pay such Power of Attorneys to any persons relating thereto by facsimile, and any such Power of Attorney in conflict herewith shall be void and binding upon the Company when it is filled with respect to any bond, undertaking, guarantee and other contract of indemnity and with any employees in the future thereof;

\*RESOLVED, that any such Attorney-in-Fact delivering a second or further affidavit in this foregoing proceeding will be held liable in damages to the satisfaction of the court thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact.

J. Martin Wagner, Assistant Secretary of American Home Assurance Company and of National Housing Institute, crapsy of Pittsburgh, Pa. emphatically said that the foregoing example of legislation passed by the House of Deputies of that Government, and the House of Assembly of Puerto Rico, are not and cannot, and that both the Republic and the Power of America are in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and added the seal of my office, at Washington, D.C., this 11th day of May, 1964.

**Marlin King: America's Seafood**

**Marlin King: America's Sexiest**

# **EXHIBIT 14**

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

9 FIFTH JUDICIAL DISTRICT COURT

10 NYE COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

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

17 Defendant. )

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

20 Counterclaimant/Lien Claimant, )

21 vs. )

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

27 Counterdefendant, )

CERTIFICATE OF SERVICE

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

{01467320;1}

1 CERTIFICATE OF SERVICE

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

4 1. 10/09/2018 Recorded Doc #900303

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

6 2. 09/24/2018 Affidavit of Service of 09/06/2018 Recorded Doc #898974

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

8 to be served as follows:

9 By placing same to be deposited for mailing in the United States Mail, in a sealed envelope  
10 upon which first class postage was prepaid in Henderson, Nevada; and

11 By facsimile; and

12 By email transmission

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

14 Richard L. Peel, Esq.  
15 Eric B. Zimbelman, Esq.  
16 Ronald J. Cox, Esq.  
17 Terri Hansen, Paralegal  
18 PEEL BRIMLEY LLP  
19 3333 E. Serene Avenue, Suite 200  
20 Henderson, Nevada 89074-6571  
21 (702) 990-7273 Fax

22 [Peel@PeelBrimley.com](mailto:Peel@PeelBrimley.com)  
23 [Zimbelman@PeelBrimley.com](mailto:Zimbelman@PeelBrimley.com)  
24 [RCox@PeelBrimley.com](mailto:RCox@PeelBrimley.com)  
25 [thansen@peelbrimley.com](mailto:thansen@peelbrimley.com)

26 Attorneys for  
27 BRAHMA GROUP, INC.

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

28 /s/ Ana M. Maldonado

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

**DOC #900303**

Official Records Nye County NV

Deborah Beatty - Recorder

10/09/2018 11:13:27 AM

Requested By: WEIL & DRAGE APC

Recorded By: kd RPTT:\$0

Recording Fee: \$35.00

Non Conformity Fee: \$

Page 1 of 3

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

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

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

APN612-141-01.

Recording Requested By:

Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, NV 89052

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

Title of Document (required)

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

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

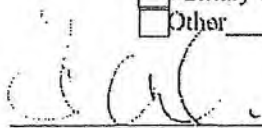
I the undersigned hereby affirm that this document submitted for recording does contain personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information.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

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

☐ Judgment - NRS 17.150(4)

☐ Military Discharge - NRS 419.020(2)

☐ Other \_\_\_\_\_



Signature

Ana M. Maldonado

Name Typed or Printed

This page is added to provide additional information required by NRS 111.312 Sections 1-2.

This cover page must be typed or printed.

PA000429

SURETY RIDER

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

Bond No. 854481

dated 03/15/2018  
effective (MONTH-DAY-YEAR)

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

and by American Home Assurance Company , as Surety,

in favor of Brahma Group, Inc.  
(OBLIGEE)

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

The Bond Amount as follows:

From \$10,767,580.00

To \$19,289,366.61

and

The Lien Amount as follows:

From \$7,178,385.94

To \$12,859,577.74

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

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

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

Cobra Thermosolar Plants, Inc.  
(PRINCIPAL)

By: \_\_\_\_\_  
(PRINCIPAL)

José Antonio Fernández

American Home Assurance Company

By: \_\_\_\_\_  
(SURETY)

Tannis Mattson, Attorney-in-Fact

## POWER OF ATTORNEY

American Home Assurance Company  
 National Union Fire Insurance Company of Pittsburgh, PA  
 Principal Road Office: 125 Water Street, New York, NY 10038

Power No. 7212

No. 31-E-002418

## KNOW ALL MEN BY THESE PRESENTS:

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

Blary Ann Gage, Gloria Jackson, Mercedes Shepherd, Terri Morrison, Lamin Sudduth,  
 Sandra Parker, Gina A. Rodriguez, Tamiis Macklin, Maria Arzamasidis, Infante Aguirre, of Houston, Texas

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

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

This 26th day of May, 2018



Michael Vargo, Vice President

STATE OF NEW YORK

COUNTY OF NEW YORK ss:

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

*Juliana Hallenbeck*  
 JULIANA HALLENBECK  
 Notary Public - State of New York  
 No. 01968871  
 Expires 12/31/2021  
 My Commission Expires April 15, 2021

## CERTIFICATE

Excerpts of Resolutions adopted by the Board of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA on May 18, 1976:

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

**RESOLVED**, that the signatures and attestations of such officers and the seal of the Company may be affixed to any such Power of Attorney or any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof.

**RESOLVED**, that any such Attorney-in-Fact delivering a secret written attestation that the foregoing resolutions will be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact.

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

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



the 25th day of September, 2018

Martin Bogue, Assistant Secretary

651661486



Attorney or Party without Attorney: Weil & Drage, APC 2500 Anthem Village Drive, 2nd Floor Henderson, NV 89052 Telephone No: (702) 314-1905 Attorney For:				For Court Use Only	
Ref. No. or File No.: 2803.001 CRESCENT DUNES					
Insert name of Court, and Judicial District and Branch Court:					
Plaintiff: Defendant:					
AFFIDAVIT OF SERVICE		Hearing Date:	Time:	Dept/Div:	Case Number: DOC #898974

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

Fee for Service: \$0.00

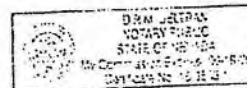
I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

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

24 Sept 18 (Date)      Toni L Ruckman (Signature)

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

Amber-Rose Aparicio  
 (Notary Signature)



2641854  
(55090504)



AFFIDAVIT OF SERVICE

PA000432



**DOC #898974**

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

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

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

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

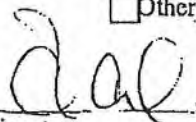
Title of Document (required)

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

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

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

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

  
\_\_\_\_\_  
Signature

Ana M. Maldonado, Paralegal  
\_\_\_\_\_  
Name Typed or Printed

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

PA000433

NRS 108.2415 Form of surety bond posted to release lien:

Bond #854481

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


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

**Crescent Dunes Solar Energy Project**

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

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

Cobra Thermosolar Plant, Inc.



(Signature of Principal) Carlos Ramirez Visser

American Home Assurance Company



Sandra Parker, Attorney-in-Fact

State of Texas }  
 } ss.  
 County of Harris }

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

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



## POWER OF ATTORNEY

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

Power No. 7188

No. 31-0-002318

## KNOW ALL MEN BY THESE PRESENTS:

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

—Mary Ann Gerola, Gloria Johnson, Marissa Shepherd, Teri Morrison, Laurie Sutcliffe,  
 Sandra Parker, Gina A. Rodriguez, Thomas Mathison, Mark Arzonoff, Orlando Aguilar, of Houston, Texas

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

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



This 15th day of May, 2018

Michael Yang, Vice President

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

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

*Juliana Hallenbeck*  
 JULIANA HALLENBECK  
 Notary Public, State of New York  
 No. 016428271  
 Expires: 12/31/2021  
 My Commission Expires April 18, 2021

## CERTIFICATE

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

"RESOLVED, that the Chairman of the Board, the President, or any Vice President, be, and hereby is, authorized to appoint Attorney(s) in fact to represent and act for and on behalf of the Company to execute bonds, undertakings, recognizances and other contracts of indemnity and warranty obligatory in the nature thereof, and to affix thereto the corporate seal of the Company, in the transaction of its storey business.

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

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

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the desimile seal of such corporation



This 15th day of August, 2018

Martin Hogue, Assistant Secretary

65165 (4/96)

# **EXHIBIT 15**

# DOC #892768

Official Records Nye County NV  
Deborah Beatty - Recorder  
05/15/2018 10:36:11 AM  
Requested By: NATIONWIDE NOTICE INC  
Recorded By: kd - RPTT: \$0  
Recording Fee: \$35.00  
Non Conformity Fee: \$  
Page 1 of 2

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

Recorded at the Request of and  
Return Recorded Document to:  
LUANN BERTRAND  
H & E Equipment Services  
4899 West 2100 South  
Salt Lake City, UT 84120  
702-320-6597

## NOTICE OF LIEN

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

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

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

STATE OF NEVADA  
COUNTY OF CLARK

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

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

By: Luann Bertrand

LUANN BERTRAND, Agent

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

Kathleen A. Bostitz  
NOTARY PUBLIC STATE OF NEVADA

My commission expires: 1-1-2019



# **EXHIBIT 16**



**DOC #898975**

Official Records Nye County NV

Deborah Beatty - Recorder

09/06/2018 11:58:41 AM

Requested By: WEIL & DRAGE-APC

Recorded By: MJ-RPTT:\$0

Recording Fee: \$35.00

Non Conformity Fee: \$

Page 1 of 4

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

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

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

APN 612-141-01.

Recording Requested By:

Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

NRS 108.2415 Surety Bond 854482 Posted to Release Lien with Power of Attorney

Title of Document (required)

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

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

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

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

☐ Judgment - NRS 17.150(4)

☐ Military Discharge - NRS 419.020(2)

☐ Other

Signature

Ana M. Maldonado, Paralegal

Name Typed or Printed

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

PA000441

NRS 108.2415 Form of surety bond posted to release lien:

Bond #854482

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

WHEREAS, Cobra Thermosolar Plant Inc. (name of principal), located at 11 Miles North Gabbs Pole Line Road, Tonopah, NV 89049 (address of principal), desires to give a bond for releasing the following described property owned by U.S. Department of the Interior - Bureau of Land Management (name of owners) from that certain notice of lien in the sum of \$477,831.40 recorded May (month) 15 (day) 2018, (year), in the office of the recorder in Nye County (name of county where the property is located):

**Crescent Dunes Solar Energy Project**

NOW, THEREFORE, the undersigned principal and surety do hereby obligate themselves to the lien claimant named in the notice of lien, H&E Equipment Services, (name of lien claimant) under the conditions prescribed by NRS 108.2413 to 108.2425, inclusive, in the sum of \$716,741.10 (1 1/2 x lienable amount), from which sum they will pay the lien claimant that amount as a court of competent jurisdiction may adjudge to have been secured by the lien, including the total amount awarded pursuant to NRS 108.237, but the liability of the surety may not exceed the penal sum of the surety bond.

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

Cobra Thermosolar Plant, Inc.

(Signature of Principal) Carlos Ramirez Visser

American Home Assurance Company

Tannis Mattson, Attorney-in-Fact

State of Texas

} ss.

County of Harris

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

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



Unofficial

## POWER OF ATTORNEY

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

Power No. 7182

No. 31-1F-002346

## KNOW ALL MEN BY THESE PRESENTS:

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

Mary Ann Garcia, Gloria Molloy, Marissa Shepherd, Terri Morrison, Laura Sudduth,  
 Sandra Parker, Gina A. Rodriguez, Tannis Matson, Mario Arzamendi, Orlando Aguilar, of Houston, Texas

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

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

This 16th day of May, 2018



Michael Yang, Vice President

STATE OF NEW YORK  
 COUNTY OF NEW YORK

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

*Juliana Hallenbeck*  
 JULIANA HALLENBECK  
 Notary Public - State of New York  
 No. 0148125071  
 Office in West County  
 My Commission Expires April 18, 2021

## CERTIFICATE

Excerpts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA, on May 18, 1976:

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

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

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

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

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

This 15th day of August, 2018

Martin Bogue, Assistant Secretary

6316614261



# **EXHIBIT 17**

FILED  
FIFTH JUDICIAL DISTRICT

AUG 14 2018

Nye County Clerk  
Terri Pemberlopp

1  
2 - CV 39348  
3 Dept. No. 2

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

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

8 Plaintiff,

9 vs.

10 BRAHMA GROUP, INC., a Nevada Corp.

11 Defendant.  
12

ORDER OF REASSIGNMENT

13 Plaintiff filed a Motion to Expunge Brahma Group Inc.'s Mechanic's Lien on  
14 June 11, 2018. A hearing was held in the matter on August 6, 2018. Both parties were  
15 present at the hearing and indicated to the Court that Senior Judge Steven Elliott has  
16 familiarity with the parties and the facts due to his involvement in a previous case.  
17 Defendant then requested that this matter be heard before the Senior Judge. As such, the  
18 Court finds it appropriate to reassign the case to Senior Judge Steven Elliott for hearing  
19 or decision on the pending motions and for future handling of the case. Good cause  
20 appearing,  
21

22 IT IS FURTHER ORDERED that this matter be reassigned to Senior Judge  
23 Steven Elliot for further proceedings.  
24

25 DATED this 8<sup>th</sup> day of August, 2018.

26  
27 District Court Judge  
28

FIFTH JUDICIAL DISTRICT COURT  
ESMERALDA AND NYE COUNTIES



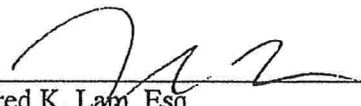


CERTIFICATION OF SERVICE

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

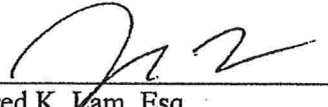
WEINBERG WHEELER HUDGINS  
GUNN & DIAL  
6385 South Rainbow Boulevard, Suite 400  
Las Vegas, NV 89118

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

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

AFFIRMATION

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

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

# **EXHIBIT 18**



*Steven D. Grierson*

1 COMP  
2 RICHARD L. PEEL, ESQ.  
3 Nevada Bar No. 4359  
4 ERIC B. ZIMBELMAN, ESQ.  
5 Nevada Bar No. 9407  
6 PEEL BRIMLEY LLP  
7 3333 E. Serene Avenue, Suite 200  
8 Henderson, Nevada 89074-6571  
9 Telephone: (702) 990-7272  
10 Facsimile: (702) 990-7273  
11 [rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
12 [ezimbelman@peelbrimley.com](mailto:ezimbelman@peelbrimley.com)  
13 Attorneys for Plaintiff  
14 BRAHMA GROUP, INC.

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

vs.

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

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

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

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

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

THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. BGI is owed an amount in excess of Eleven Million Nine Hundred Thousand U.S. Dollars (\$11,900,000) (the "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. BGI repeats and realleges each and every allegation contained in the preceding paragraphs of this 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 asserting pre-textual, extra-contractual and inaccurate reasons for withholding payments long after the time required by the Agreement and Nevada law has elapsed. Also, and as part of the Outstanding Balance, TSE has improperly withheld moneys totaling in excess of 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 is it not. 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 aggregated from invoices issued (and, in some cases, payments previously made) long ago constitutes extreme bad faith.

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

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

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

4 THIRD CAUSE OF ACTION  
5 (Unjust Enrichment)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PEEL BRIMLEY LLP

PA000453

# **EXHIBIT 19**



1 RICHARD L. PEEL, ESQ.  
Nevada Bar No. 4359  
2 CARY B. DOMINA, ESQ.  
Nevada Bar No. 10567  
3 RONALD J. COX, ESQ.  
Nevada Bar No. 12723  
4 **PEEL BRIMLEY LLP**  
3333 E. Serene Avenue, Suite 200  
5 Henderson, Nevada 89074-6571  
Telephone: (702) 990-7272  
6 Facsimile: (702) 990-7273  
[rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
7 [cdomina@peelbrimley.com](mailto:cdomina@peelbrimley.com)  
[rcox@peelbrimley.com](mailto:rcox@peelbrimley.com)  
8 *Attorneys for Plaintiff*  
9 **BRAHMA GROUP, INC.**

10 UNITED STATES DISTRICT COURT  
11 DISTRICT OF NEVADA

12 BRAHMA GROUP, INC., a Nevada Corporation,

13 Plaintiff,

14 vs.

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

17 Defendants.

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

20 Counterclaimant,

21 vs.

22 BRAHMA GROUP, INC., a Nevada corporation

23 Counterdefendant.

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

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

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

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

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

4 Dated this 16 day of October, 2018.

5 **PEEL BRIMLEY LLP**

6   
7  
8 RICHARD L. PEEL, ESQ.  
9 Nevada Bar No. 4359  
10 CARY B. DOMINA, ESQ.  
11 Nevada Bar No. 10567  
12 RONALD J. COX, ESQ.  
13 Nevada Bar No. 12723  
14 3333 E. Serene Avenue, Suite 200  
15 Henderson, Nevada 89074-6571  
16 Telephone: (702) 990-7272  
17 [rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
18 [ezimbelman@peelbrimley.com](mailto:ezimbelman@peelbrimley.com)  
19 Attorneys for Plaintiff  
20 BRAHMA GROUP, INC.

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

23 **I. INTRODUCTION**

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

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

///

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



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

5 **II. STATEMENT OF FACTS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 ///

23 ///

24 ///

25

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

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

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

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

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

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

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

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

///

///

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ///

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



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

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

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

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

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

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

21 **III. LEGAL ARGUMENT**

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

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

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

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

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

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

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

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

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

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

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

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

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

26 ///

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

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

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

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

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

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

27     ///

28     ///

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



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

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

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

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

23  
24 **3. The Inconvenience of the Federal Forum.**

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

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

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

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

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

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

15 Specifically, NRS 108.239(8) provides:

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

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

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

21 NRS 108.239(7) provides:

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

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

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

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

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

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

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

28 ///

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

25 ///

26 ///

27 ///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 *1. No Undue Delay*

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

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

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

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

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

8 IV. CONCLUSION

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

13 Dated this 16 day of October, 2018.

14 PEEL BRIMLEY LLP

15   
16 RICHARD L. PEEL, ESQ.  
17 Nevada Bar No. 4359  
18 CARY B. DOMINA, ESQ.  
19 Nevada Bar No. 10567  
20 RONALD J. COX, ESQ.  
21 Nevada Bar No. 12723  
22 3333 E. Serene Avenue, Suite 200  
23 Henderson, Nevada 89074-6571  
24 Telephone: (702) 990-7272  
25 [rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
26 [cdomina@peelbrimley.com](mailto:cdomina@peelbrimley.com)  
27 [rcox@peelbrimley.com](mailto:rcox@peelbrimley.com)  
28 Attorneys for Plaintiff  
BRAHMA GROUP, INC.

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



**CERTIFICATE OF SERVICE**

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

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

to be served as follows:

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

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

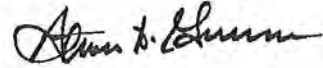
D. Lee Roberts, Jr., Esq. (NV Bar No. 8877)  
Colby L. Balkenbush, Esq. (NV Bar No. 13066)  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
Telephone: (702) 938-3838  
[lroberts@wwhgd.com](mailto:lroberts@wwhgd.com)  
[cbalkenbush@wwhgd.com](mailto:cbalkenbush@wwhgd.com)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

/s/ Theresa M. Hansen

An employee of PEEL BRIMLEY LLP

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

# **EXHIBIT 20**

  
CLERK OF THE COURT

1 **COMP**  
2 CARY B. DOMINA, ESQ.  
3 Nevada Bar No. 10567  
4 RONALD J. COX, ESQ.  
5 Nevada Bar No. 12723  
6 **PEEL BRIMLEY LLP**  
7 3333 E. Serene Avenue, Suite 200  
8 Henderson, Nevada 89074-6571  
9 Telephone: (702) 990-7272  
10 Fax: (702) 990-7273  
11 [cdomina@peelbrimley.com](mailto:cdomina@peelbrimley.com)  
12 [rcox@peelbrimley.com](mailto:rcox@peelbrimley.com)  
13 Attorneys for W&W-AFCO Steel, LLC

8 **EIGHTH JUDICIAL DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

10 AUSTIN GENERAL CONTRACTING, INC., a  
11 Nevada corporation,

12 Plaintiff,

13 vs.

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

17 Defendants.

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

20 Lien Claimant,

21 vs.

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

Defendants,

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

**MECHANIC'S LIEN FORECLOSURE  
COMPLAINT**

[Arbitration Exemption: Title to Real  
Property]

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

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

**THE PARTIES**

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

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

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

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

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

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

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

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

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

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

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

19 20 9. W&W does not know the true names of the individuals, corporations, partnerships  
21 and entities sued and identified in fictitious names as BOE BONDING COMPANIES I through  
22 X, DOES I through X, LOE LENDERS I through X, ROE CORPORATIONS I through X and  
23 TOE TENANTS I through X (collectively, "Doe Defendants"). W&W alleges that such Doe  
24 Defendants claim an interest in or to the Project and/or are responsible for damages suffered by  
25 W&W as more fully discussed under the claims for relief set forth below. W&W will request  
26  
27  
28

1 leave of this Honorable Court to amend this Complaint to show the true names and capacities of  
2 each such fictitious Doe Defendant when W&W discovers such information.

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

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

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

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

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

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

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

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

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

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

25 d. Failing and/or refusing to comply with the Agreement and Nevada law; and  
26  
27  
28



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

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

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

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

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

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

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

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

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

26 ///

27 ///

28 ///

**THIRD CAUSE OF ACTION**  
**(Unjust Enrichment Against All Defendants)**

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

14           40. W&W is entitled to an award of its attorney's fees, costs and interest on the  
15 Outstanding Balance, as provided in Chapter 108 of the Nevada Revised Statutes.  
16

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

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

21           42. W&W is informed and believes and therefore alleges that the Work of  
22 Improvement commenced before the recording of Lenders and the Doe Defendants' Deeds of  
23 Trust and/or other interest(s) in the Work of Improvement and/or any leasehold estate claimed by  
24 and of the Doe Defendants.  
25

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

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

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

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

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

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

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

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

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

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

23 51. W&W is informed and believes and therefore alleges that prior to the events  
24 giving rise to the Complaint, Western issued Contractors License Bond No. 929397782 (the  
25 "Bond").  
26  
27  
28

1           52.    The Bond is in the sum of Fifty Thousand and No/100 Dollars (“\$50,000.00”).

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

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

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

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

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

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

12           **WHEREFORE**, W&W prays that this Honorable Court:

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

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

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

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

23           5.    Adjudge a lien upon the Work of Improvement and the Property for the  
24 Outstanding Balance, plus reasonable attorneys’ fees, costs and interest thereon, and that this  
25


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

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

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

7 Dated this 16<sup>th</sup> day of January, 2017.

8 PEEL BRIMLEY LLP

9  
10   
11 CARY B. DOMINA, ESQ.  
12 Nevada Bar No. 10567  
13 RONALD J. COX, ESQ.  
14 Nevada Bar No. 12723  
15 3333 E. Serene Avenue, Suite 200  
16 Henderson, Nevada 89074-6571  
17 Attorneys for W&W-AFCO Steel, LLC  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NOV 05 2018

Nye County Clerk  
**Terri Pemberton** Deputy

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

10 **IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA**

11 **IN AND FOR THE COUNTY OF NYE**

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

Case No. CV 39348  
Dept. No. 2

**TONOPAH SOLAR ENERGY, LLC'S  
OPPOSITION TO BRAHMA GROUP,  
INC.'S MOTION FOR LEAVE TO  
AMEND ITS FIRST AMENDED  
COUNTER-COMPLAINT AND THIRD-  
PARTY COMPLAINT**

21 Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through  
22 its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,  
23 hereby opposes Brahma Group, Inc.'s Motion for Leave to Amend its First Amended Counter-  
24 Complaint and Third Party Complaint ("Motion"). Brahma's Motion should be denied for all the  
25 reasons set forth in TSE's October 18, 2018 Motion to Strike/Dismiss/Stay. TSE further requests  
26 that the Court hear TSE's Motion to Strike/Dismiss/Stay prior to hearing the instant Motion as  
27 the outcome of TSE's Motion will likely determine the outcome of this Motion.  
28

WEINBERG WHEELER  
HUDGINS GUNN & DIAL





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

DATED this 5th day of November, 2018.

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

Brahma's Motion should be denied for all the reasons set forth in TSE's pending Motion to Strike/Dismiss/Stay that was filed on October 18, 2018.<sup>1</sup> TSE suggests that, for purposes of efficiency, its Motion to Strike/Dismiss/Stay should be heard before the instant Motion to Amend as if TSE's Motion is granted, Brahma's Motion to Amend becomes moot.

TSE incorporates by reference all of the arguments raised in the Motion to Strike/Dismiss/Stay into this Opposition but will reiterate some of those arguments here. First, Brahma is seeking to amend a "Counter-Complaint" that is void and should never have been filed in a special proceeding such as this one in the first place. A "Counter-Complaint" is not a permitted pleading under NRCP 7(a) and NRS 108.2275 proceedings are strictly limited to the adjudication of mechanic's liens.

Second, Brahma has significant additional problems. The Parties' Contract contains a venue selection clause requiring venue in Clark County rather than Nye County. Brahma recognized the validity of this clause by initially filing its substantive claims against TSE (i.e.

<sup>1</sup> The full title of TSE's prior motion is "Motion to Strike Brahma Group Inc.'s First Amended Counter-Complaint, or, in the Alternative, Motion to Dismiss Counter-Complaint, or, in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in Federal Court."



breach of contract, breach of the implied covenant, violation of NRS 624) in the Eighth Judicial District Court in Clark County on July 17, 2018. On September 10, 2018, TSE removed those claims to Nevada Federal District Court in Clark County. Unhappy with that turn of events, Brahma attempted an improper back door remand by amending its federal court complaint (without leave of court) and dropping three of its claims against TSE. Brahma then simultaneously filed the "Counter-Complaint" in this Nye County action adding the three dropped federal court claims (the same claims that Brahma originally filed in state court in Clark County) to this action. As set forth in TSE's Motion to Dismiss/Strike/Stay, this constitutes improper forum shopping and this Court lacks jurisdiction over claims that have previously been removed to federal court.

Thus, it would make no sense for this Court to permit Brahma to amend its "Counter-Complaint" when the Court lacks jurisdiction over this dispute due to both the venue selection clause and Brahma's claims having been previously removed to federal court. TSE requests that this Court deny Brahma leave to amend as such an amendment would be futile and instead strike/dismiss Brahma's Counter-Complaint.

## II. LEGAL ARGUMENT

### A. The "Counter-Complaint" Cannot be Amended and Must Be Stricken Because It Does Not Comply with NRCP 7(a)

NRCP 7(a) provides as follows:

There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. **No other pleading shall be allowed**, except that the court may order a reply to an answer or a third-party answer.

(emphasis added). In *Smith*, the Nevada Supreme Court provided an extensive explanation of this rule. *Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997). There, the first pleading filed was plaintiff Lee's complaint against defendant Chang for injuries incurred in a car accident. Defendant Chang then filed a separate



1 document entitled “cross-claim” that alleged that a different defendant (Smith) was responsible  
2 for Chang’s injuries in the accident.

3 The Nevada Supreme Court explained that the district court should have stricken the  
4 defendant’s “cross-claim” under NRCP 7(a) because “the only pleadings allowed are  
5 complaints, answers and replies” and a “cross-claim” or “counter-claim” was not a permitted  
6 pleading. *Id.* (emphasis added). “Counterclaims and cross-claims are not separate pleadings, but  
7 are claims for relief that may be set forth in answers and complaints.” *Id.* Thus, because the  
8 defendant had failed to assert the cross-claim in his answer (a permitted pleading), the court was  
9 obligated to strike the rogue “cross-claim” as an impermissible pleading under NRCP 7(a). *Id.*  
10 (“[c]ounterclaims and cross-claims must be set forth in pleadings authorized by NRCP 7,  
11 because ‘[n]o other pleading shall be allowed.’”).

12 The Nevada Supreme Court further explained that the fact that Nevada is a notice-  
13 pleading jurisdiction that liberally construes pleadings could not save the defendant’s rogue  
14 pleading from being stricken. “There is, however, nothing technical about the defect in Chang’s  
15 cross-claim; the document simply is not a pleading, and does not itself put the matters asserted  
16 therein at issue.” *Id.* at 283 (emphasis added).

17 Here, like defendant Chang in the *Smith* case, Brahma has attempted to file a pleading  
18 that is not permitted under NRCP 7(a). Brahma’s “Counter-Complaint” filed on September 25,  
19 2018 is not one of the three permitted pleadings under Nevada law (i.e. a “complaint,” “answer”  
20 or “reply.”). Thus, under NRCP 7(a) and *Smith*, Brahma’s Counter-Complaint constitutes a  
21 rogue pleading that must be stricken. To permit Brahma to amend the Counter-Complaint and  
22 then immediately thereafter strike the amended Counter-Complaint would be pointless and  
23 unnecessary. Instead, this Court should simply strike/dismiss the original Counter-Complaint  
24 and deny Brahma’s Motion to Amend as moot.

25 **B. When a Pleading is Void Because it Violates a Rule or Statute, a Court Lacks**  
26 **Discretion to Permit an Amendment**

27 In *Otak*, the Nevada Supreme Court faced a situation similar to this one. Pursuant to  
28 NRS 11.258, a party must concurrently file an attorney affidavit and an expert report with any





1 complaint against a design professional. The general contractor filed a complaint against the  
2 architect without the required affidavit and expert report. Once the contractor realized its  
3 error, it quickly amended its complaint and added the affidavit and expert report. However,  
4 the Nevada Supreme Court held that amendment was not permitted because a complaint filed  
5 in violation of a clear rule is “void ab initio.” *Otak Nevada, LLC v. Eighth Judicial Dist. Court*  
6 *of State, ex rel. Cty. of Clark*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011)

7 In so holding, the Nevada Supreme Court pointed out that NRCP 15(a) does not even  
8 apply to situations where an impermissible pleading has been filed:

9 The provision of NRCP 15(a) that allows ‘a party to amend the party's  
10 pleading once as a matter of course at any time before a responsive pleading  
11 is served’ is inapplicable when that pleading is void . . . because a void  
12 pleading does not legally exist and thus cannot be amended.

13 *Id.*

14 Key to the Court’s holding in *Otak* was that NRS 11.258 contains the word “shall” in  
15 regard to the requirement that an affidavit and report accompany a complaint against an  
16 architect. This language was deemed to deprive the district court of discretion to permit an  
17 amendment. Here, NRCP 7(a) also states that no pleading other than a complaint, answer or  
18 reply “shall be allowed.” Thus, if this Court finds that Brahma’s “Counter-Complaint”  
19 violates NRCP 7(a), which it does, the Counter-Complaint is “void ab initio” and the Court  
20 lacks discretion to permit an amendment.

21 **C. This is a Limited Special Proceeding in Which the “Counter-Complaint”  
22 and Third Party Complaint Should Never Have Been Filed**

23 As pointed out more fully in TSE’s Motion to Dismiss/Strike/Stay, NRS 108.2275  
24 proceedings were not intended to address parties’ substantive claims against each other. This  
25 proceeding was initiated by the filing of TSE’s Motion to Expunge. Thus, the sole  
26 jurisdictional basis for this proceeding is NRS 108.2275 (governing motions to expunge  
27 mechanic’s liens). The Nevada Supreme Court has indicated that proceedings to expunge a  
28 lien under NRS 108.2275 are special limited proceedings. *See e.g., Crestline Inv. Grp., Inc. v.*  
*Lewis*, 119 Nev. 365, 371, 75 P.3d 363, 367 (2003) (superseded by statute on unrelated



1 grounds). Importantly, nothing in NRS 108.2275 permits a party to broaden those proceedings  
2 by filing a “counter-complaint” or a third party complaint. Thus, an additional ground for  
3 denying Brahma leave to amend is that Brahma’s Counter-Complaint and Third Party  
4 Complaint are both outside the limited jurisdictional scope of NRS 108.2275 proceedings.

5 **D. Brahma’s Proposed Amendment is Futile**


6 Brahma correctly points out that leave [to amend] shall be freely given when justice so  
7 requires.” NRCP 15(a). “However, leave to amend should not be granted if the proposed  
8 amendment would be futile.” *Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 398, 302  
9 P.3d 1148, 1152 (2013); *see also Allum v. Valley Bank of Nevada*, 109 Nev. 280, 287, 849  
10 P.2d 297, 302 (1993).

11 Here, granting leave to amend would be futile in light of all the arguments set out in  
12 TSE’s Motion to Strike/Dismiss/Stay. As set forth more fully in TSE’s Motion to  
13 Strike/Dismiss/Stay, the Parties’ Contract contains a venue selection clause requiring venue in  
14 Clark County. Moreover, this Court lacks subject matter jurisdiction over all of the remaining  
15 claims in Brahma’s Counter-Complaint as those claims were first removed to federal court by  
16 TSE before Brahma improperly filed them with this Court. Thus, allowing Brahma’s  
17 amendment would be futile as this entire action, at least as it relates to TSE, must be dismissed  
18 so the parties can litigate the remainder of their dispute in federal court.

19 **III. CONCLUSION**

20 For all the above reasons and the reasons set forth in TSE’s Motion to  
21 Strike/Dismiss/Stay, TSE requests that the Court deny Brahma’s Motion and instead  
22 strike/dismiss Brahma’s Counter-Complaint and Third-Party Complaint.

23 DATED this 5th day of November, 2018.

24   
25 D. Lee Roberts, Jr., Esq.  
26 Colby L. Balkenbush, Esq.  
27 Ryan T. Gormley, Esq.  
28 WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
Attorneys for Tonopah Solar Energy, LLC



CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of November, 2018, a true and correct copy of the foregoing TONOPAH SOLAR ENERGY, LLC'S OPPOSITION TO BRAHMA GROUP, INC.'S MOTION FOR LEAVE TO AMEND ITS FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

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

Cynthia S. Bauman

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



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

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

Case No. CV 39348  
Dept. No. 2

**TONOPAH SOLAR ENERGY, LLC'S  
REPLY TO BRAHMA GROUP, INC.'S  
OPPOSITION TO TONOPAH SOLAR  
ENERGY, LLC'S MOTION TO STRIKE  
BRAHMA GROUP, INC.'S FIRST  
AMENDED COUNTER-COMPLAINT,  
OR, IN THE ALTERNATIVE, MOTION  
TO DISMISS COUNTER-COMPLAINT,  
OR, IN THE ALTERNATIVE, MOTION  
TO STAY THIS ACTION UNTIL THE  
CONCLUSION OF THE PROCEEDINGS  
IN FEDERAL COURT**


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



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

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

8 DATED this 30th day of November, 2018.

9   
10 D. Lee Roberts, Jr., Esq.  
Colby L. Balkenbush, Esq.  
Ryan T. Gormley, Esq.  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 S. Rainbow Blvd., Suite 400  
Las Vegas, NV 89118  
Attorneys for Tonopah Solar Energy, LLC

11  
12  
13  
14  
15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

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

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

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



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

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

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



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

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

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

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





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

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

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

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

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



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

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

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

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

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

21 The other cases cited by Brahma in its Opposition do not help its argument because they  
22 do not address NRCP 7(a) or *Smith* and merely support the idea that Nevada is a notice pleading  
23 jurisdiction, which no one disputes. Brahma cites *Nevada State Bank v. Jamison Family P'ship*,  
24 106 Nev. 792, 800, 801 P.2d 1377, 1383 (1990) and *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d  
25 672, 674 (1984) for the basic proposition that Nevada is a notice pleading jurisdiction. Brahma's  
26 reliance on *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d  
27 666, 671 (2011) is misplaced because this case has nothing to do with the current issue before the  
28 court, as it pertains to equitable tolling in the context of a statute of limitation for tax refunds.



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

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

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

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

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

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

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

---

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



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

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

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

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

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

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



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

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

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

11 In its Motion, TSE cited extensive case law demonstrating that once an action is removed  
12 to federal court, the state courts lose jurisdiction of all removed claims unless/until the federal  
13 court issues an order remanding the case back to state court. TSE further demonstrated that this  
14 rule divests all courts in the state of jurisdiction over the removed claims, not just the particular  
15 state court from which the action was originally removed. *See* Motion at pp. 15-19. Among  
16 others, the *Hollandsworth*, *General Handkerchief Corp.* and the *Leffall* cases<sup>2</sup> have nearly  
17 identical facts to this case and resulted in the state court dismissing the later filed state court  
18 action that sought to assert claims that were duplicative of those that were first removed to  
19 federal court.

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

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



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

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

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

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

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

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



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

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

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

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





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

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

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

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

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

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



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

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

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

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

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

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

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




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

### VIII. CONCLUSION

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

DATED this 30th day of November, 2018.

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



**CERTIFICATE OF SERVICE**

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

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

*Kelly L. Pierce*

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