**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*

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 7

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# EXHIBIT 9

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
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| BRAHMA GROUP, INC., a Nevada Corporation,<br><br>Plaintiff,<br>vs.<br><br>TONOPAH SOLAR ENERGY, LLC, a Delaware Limited Liability Company; DOES I through X; and ROE CORPORATIONS I through X,<br><br>Defendants.<br><br>AND ALL RELATED MATTERS | CASE NO.: 2:18-CV-01747-RFB-GWF<br><br>**BRAHMA GROUP, INC.'S RESPONSE TO TONOPAH SOLAR ENERGY, LLC'S MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO STRIKE [ECF No. 16]** |

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

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

Dated this 5 day of November, 2018.

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

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## MEMORANDUM OF POINTS & AUTHORITIES

### I. INTRODUCTION.[2]

In filing its Motion, TSE's goal is clear—it seeks to (i) deprive Brahma of its statutory rights under Nevada's mechanic's lien statute, and (ii) delay paying Brahma the nearly $13 Million[3] it owes to Brahma for the Work (defined below) Brahma furnished to TSE's Project. Along with its Motion, TSE has also filed its Nye County Motion asking the Nye County Court to stay the entire case, including Brahma's (i) right to an award of attorneys' fees and costs under NRS 108.2275 for defeating TSE's Second Motion to Expunge, (ii) mechanic's lien foreclosure action against the Brahma Surety Bond, and (iii) Brahma's right to a preferential trial setting against the Brahma Surety Bond, Cobra (as principal) and AHAC (as Surety).

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

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

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

[2] The defined terms set forth in this Section 1, are defined below in this Response.
[3] A significant portion of which represents amounts owed to Brahma's subcontractors and suppliers.

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

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

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

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

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

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

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## II. STATEMENT OF FACTS

### A. The Work of Improvement.

TSE is the owner of the Crescent Dunes Solar Energy Project constructed on certain real property located in Nye County, Nevada (the "Work of Improvement"). On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with Brahma,[4] whereby Brahma agreed to provide (on a time and material basis), certain work, materials, and equipment (collectively, the "Work") for the Work of Improvement. Even though Brahma has provided the Work for the Work of Improvement, TSE has failed to fully pay Brahma for such Work.

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

Because of TSE's failure to fully pay Brahma for its Work, Brahma caused a notice of lien ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as Document No. 890822 against the Work of Improvement.[5] Seven days later, on April 17, 2018, Brahma, through prior counsel, Jones Lovelock, filed a complaint in the Fifth Judicial District Court ("Nye County Court") as Case No. CV39237 (the "First Complaint"), to foreclose against the Original Lien, among other causes of action.[6] Brahma filed with the Nye County Court a Notice of Lis Pendens and Notice of Foreclosure of Mechanic's Lien and recorded the same against the Work of Improvement.[7] Two days later, on April 19, 2018, TSE, through its counsel, Weinberg Wheeler Hudgins Gunn & Dial, sent Jones Lovelock a letter (the "Demand Letter") demanding that Brahma (i) discharge and release its Original Lien, and (ii) participate in mediation before filing for litigation (see Section 24 of the Agreement).[8] Finally, TSE threatened to file (i) a motion to expunge under NRS 108.2275 if Brahma did not voluntarily release its Original Lien by noon the next day, and (ii) a motion to dismiss under NRS 108.237(3), if Brahma did not immediately dismiss its First Complaint without prejudice.[9]

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

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[4] A true and correct copy of the Agreement is attached hereto as **Exhibit 1**.
[5] A true and correct copy of the Original Lien is attached hereto as **Exhibit 2**.
[6] A true and correct copy of the First Complaint is attached hereto as **Exhibit 3**.
[7] A true and correct copy of the Notice of Foreclosure and Lis Pendens are attached hereto as **Exhibit 4** and **Exhibit 5**, respectively.
[8] A true and correct copy of this correspondence is attached hereto as **Exhibit 6**.
[9] *Id.*

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

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

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

At Brahma's request and in compliance with Nevada law, Cobra caused the Penal Sum of the Brahma Surety Bond to be increased by AHAC to $19,289,366.61 (or 1.5 times the amount of the Brahma Lien) by causing a Rider to the Brahma Surety Bond (the "Brahma Surety Bond Rider") to be recorded on October 9, 2018 with the Nye County Recorder's Office as Document No. 900303.[15]

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

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

[10] A true and correct copy of the First Motion to Expunge is attached hereto as **Exhibit 7**.
[11] A true and correct copy of the Voluntary Dismissal is attached hereto as **Exhibit 8**.
[12] True and correct copies of Brahma's First Amended Lien, Second Amended Lien, Third Amended Lien and Fourth Amended Lien are attached hereto as **Exhibits 9, 10, 11 and 12**, respectively. Brahma's Original Lien and the amendments and restatements thereto, including the Fourth Amended Lien are referred to collectively herein as the "Brahma Lien."
[13] Further, TSE has advised Brahma and its counsel that Cobra is contractually responsible to TSE to pay for the Work that TSE contracted with Brahma to perform.
[14] A true and correct copy of the Brahma Surety Bond is attached hereto as **Exhibit 13**.
[15] A true and correct copy of the Brahma Surety Bond Rider is attached hereto as **Exhibit 14.** The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as the "Brahma Surety Bond."

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(the "H&E Lien").[16] On June 8, 2008, TSE filed in Case No. CV 39347, a motion to expunge the H&E Lien in the Nye County Court which was assigned to the Honorable Kimberly Wanker in Department 1, and which was later withdrawn by TSE before Judge Wanker held a hearing on the same.[17] On September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County Recorder's Office as Document No. 898975 (the "H&E Surety Bond"), to replace the Work of Improvement as security for the H&E Lien.[18] The H&E Surety Bond (i) was issued by AHAC on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) is in the amount of $716,741.10.[19]

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

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

On or about June 1, 2018, TSE, as plaintiff, commenced a new action in Nye County as Case No. CV 39348 (the "Nye County Action"), seeking to expunge the Brahma Lien from the Work of Improvement, by filing a motion to expunge Brahma Group, Inc.'s Mechanic's Lien (the "Second Motion to Expunge").[20] On August 14, 2018, Judge Lane, entered an Order of Reassignment, assigning that Case to Senior Judge Steven Elliot based on the stipulated agreement of counsel for TSE and Brahma (at the August 6, 2018 hearing) that the Case should be assigned to Judge Elliot because he "has familiarity with the parties and the facts due to his involvement in a previous case."[21] Notably, the Order indicates that the case would be assigned to Judge Elliot "for hearing or decision on the pending motions ***and for future handling of the case***."[22]

[16] A true and correct copy of the H&E Lien is attached hereto as **Exhibit 15.**
[17] A true and correct copy of TSE's Motion to Expunge the H&E Lien is attached hereto as **Exhibit 16.**
[18] A true and correct copy of the H&E Surety Bond is attached hereto as **Exhibit 17.**
[19] It should be noted that (i) AHAC is the surety on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the "Surety," and (ii) Cobra is identified as the principal on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the "principal."
[20] A true and correct copy of TSE's Second Motion to Expunge the Brahma Lien is attached hereto as **Exhibit 18.**
[21] A true and correct copy of the Reassignment Order is attached hereto as **Exhibit 19.** Indeed, Judge Elliot (i) previously presided over extensive litigation involving the construction of the Work of Improvement, and (ii) is very familiar with the Work of Improvement. see [Case No. CV-36323 titled Helix Electric of Nevada, LLC v. Cobra Thermosolar Plants, Inc.; Tonopah Solar Energy LLC et. al.; see also, Case No. 35217 titled *Merlin Hall dba Mt. Grant Electric v. Cobra Thermosolar Plants, Inc.; Tonopah Solar Energy, LLC, et. al.*]
[22] *Id.*

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

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

Based on the mistaken belief that Section 24 of the Agreement required it to pursue its contract-based claims in Clark County, Nevada, and after (i) Richard Peel and Ronnie Cox (counsel for Brahma) had consulted with Lee Roberts (counsel for TSE) about the possibility of stipulating to have the parties' claims filed in one action and one forum, and (ii) TSE declining to do so,[26] Brahma filed a complaint on July 17, 2018 in the Eighth Judicial District Court of Nevada (the "Clark County Action"), against TSE for breach of contract, unjust enrichment, and violation of NRS Chapter 624.[27]

On September 10, 2018, TSE removed the Clark County Action to Federal Court (Case No.: 2:18-CV-01747-RFB-GWF) based on diversity jurisdiction only (the "Federal Action"). On September 17, 2018, TSE filed its Answer and Counterclaim against Brahma in the Federal Action alleging the following state law causes of action, (i) Breach of Contract, (ii) Breach of the Implied Covenant of Good Faith and Fair Dealing, (iii) Declaratory Relief, (iv) Unjust Enrichment, (v) Fraudulent/Intentional Misrepresentation, and (vi) Negligent Misrepresentation.

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

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

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

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

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

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

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

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

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

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

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

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

## III. LEGAL ARGUMENT

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

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

[28] A true and correct copy of the Mechanic's Lien Foreclosure Complaint is attached hereto as **Exhibit 23**.
[29] In pertinent part, NRS 108.239(1) states, "A notice of lien may be enforced by an action in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located …."
[30] A true and correct copy of the First Amended Counter-Complaint and Third-Party Complaint is attached hereto as **Exhibit 24**.
[31] A true and correct copy of TSE's Motion to Strike, Motion to Dismiss or Motion to Stay is attached hereto as **Exhibit 25**.
[32] A true and correct copy of Brahma's Opposition to TSE's Nye County Motion for Stay is attached hereto as **Exhibit 26**.

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

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

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

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

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

Specifically, NRS 108.2421 states in relevant part:

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

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

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

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

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

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

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

Specifically, NRS 108.2421(3) provides:

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

NRS 108.2421(6) further provides:

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

By enacting Nevada's mechanic's lien statutes, the Nevada Legislature has created a means to provide contractors with secured payment for their work, materials and equipment furnished to construction projects in Nevada inasmuch as "contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor and materials into a project; and have any number of works vitally depend upon them for eventual payment." *Wilmington Trust FSB v. A1 Concrete Cutting & Demolition, LLC (In re Fontainebleau Las Vegas Holdings, LLC),* 289 P.3d 1199, 1210 (Nev. 2012).

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

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

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

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

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

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

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

While it is true that Brahma initially filed its contract claims against TSE in Clark County based on its mistaken belief that the forum selection clause required it to do so, after further review of the matter, Brahma has determined that the forum selection clause is inapplicable to this Case because (i) NRS 13.010 requires any action between TSE and Brahma to be filed in Nye County since the Agreement was performed entirely in Nye County, (ii) the forum selection clause is permissive only and not mandatory, (iii) NRS 108.2421(1) expressly authorizes and requires Brahma to file its Claims against TSE, the Debtor, in Nye County, and (iv) the forum selection clause violates Brahma's rights under Nevada's Mechanic's Lien Statute and is against public policy, void and unenforceable pursuant to NRS 108.2453.[36]

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

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

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

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

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

arising out of this Agreement."[37]

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

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

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

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

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

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

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

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

[37] *See* Exhibit "1"

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

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

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

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

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

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

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

[39] NRS 108.2453(1) states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[41] *Id.* at 287, 234

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***a. The Nye County Action was not "later filed" than the Clark County Action.***

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

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

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

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

Bond.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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state law and certain federal discrimination claims under 42 USC § 1983. *Id.* The employer removed the case to federal court based on federal subject matter jurisdiction. *Id.* at *1. Plaintiff filed a motion to dismiss some of her claims[44], which the court granted without opposition. *Id.* Plaintiff then filed a second action in state court asserting the same state constitutional and defamation claims originally removed to the federal court. *Id.* Defendants sought an injunction of the second state court action, alleging that such action constituted a subversion of the federal court's removal jurisdiction. *Id.* at * 2. In response, Plaintiff claimed that the state court action should not be enjoined absent evidence of fraud. *Id.* In granting the motion for injunction, the federal court held, "the absence of fraud...is not relevant to the inquiry...as the KPERS court noted, fraud is relevant in cases based on diversity jurisdiction, not when, as here, based on federal question jurisdiction." *Id.* Hence, because this was a federal question case and not based on diversity, the court did not analyze the fraud factor required under the case law in the Ninth Circuit. Therefore, this case is not only inapplicable because it is outside the Ninth Circuit, but it is also inapplicable because that court did not undertake the relevant fraud analysis.

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

Numerous federal courts[45], including the Ninth Circuit Court of Appeals, have explicitly disapproved of certain tactics engaged in by litigants while still finding injunctive relief improper.

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

[44] The motion to dismiss appears to be akin to a motion to amend.

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

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

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

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

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

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

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

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

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

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

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

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

## IV. CONCLUSION

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

Dated this 5 day of November, 2018.

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**CERTIFICATE OF SERVICE**

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

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

to be served as follows:

X By CM/ECF Filing – with the United States District Court of Nevada. I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the attorney(s) and/or party(ies) listed below.

☐ By Facsimile Transmission at or about _____ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the persons) served as set forth below.

☐ By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, NV, addressed as set forth below.

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# EXHIBIT 10

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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

| | |
|---|---|
| BRAHMA GROUP, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company,<br><br>Defendant. | CASE NO. 2:18-cv-01747-RFB-GWF<br><br>**REPLY IN SUPPORT OF TONOPAH SOLAR ENERGY, LLC'S MOTION FOR AN INJUNCTION AND TO STRIKE** |
| TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company; DOES I through X; and ROE CORPORATIONS I through X,<br><br>Counterclaimant,<br><br>vs.<br><br>BRAHMA GROUP, INC., a Nevada corporation,<br><br>Counterdefendant. | |

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

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

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

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

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

## II. LEGAL ARGUMENT

In its Motion for Injunction, TSE explained that federal courts enjoin plaintiffs from prosecuting claims in later filed state court actions under the first exception to the Anti-Injunction Act—expressly authorized by an Act of Congress—when the plaintiff has filed claims in a state court action in an effort to subvert the court's federal removal jurisdiction. ECF No. 16, pp. 8-12. TSE demonstrated that the claim splitting scheme employed by Brahma warrants the entry of such an injunction—one that enjoins Brahma from prosecuting its copycat claims—breach of the Agreement, breach of the implied covenant of good faith and fair dealing, and violation of Nevada's prompt payment act—in its first amended counter-complaint in the Nye County Special Proceeding. *Id.* at pp. 12-13. TSE further demonstrated that because Brahma's first amended complaint in this action was part of its effort to subvert this Court's federal removal jurisdiction it should be struck. *Id.* at pp. 13-14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

With the focus properly placed on the copycat claims, there is no question that Brahma filed the copycat claims in the Nye County Special Proceeding after this Court acquired federal removal jurisdiction over the claims. The Nye County Special Proceeding was opened by TSE's Second Motion to Expunge on June 11, 2018. ECF No. 16-9. Brahma filed the copycat claims in the Clark County Action on July 17, 2018. *See* ECF No. 1-1. TSE timely removed the copycat claims to this Court on September 10, 2018. *See* ECF No. 1. Brahma dropped the copycat claims from this action and filed them into the Nye County Special Proceeding via a first amended counter-complaint on September 25, 2018.[2] *See* ECF No. 8; ECF No. 16-14. Thus, the copycat claims filed by Brahma in the Nye County Special Proceeding are "later filed."

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

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

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

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

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

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

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

Brahma again improperly focuses on the Nye County Special Proceeding instead of the copycat claims. The claims that TSE is seeking to enjoin Brahma from prosecuting in the Nye County Special Proceeding are identical to the claims that this Court has federal removal jurisdiction over, *i.e.*, the copycat claims—breach of the Agreement, breach of the implied covenant of good faith and fair dealing, and violation of Nevada's prompt payment act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[6] Brahma also alludes to a pending lawsuit from H&E, a subcontractor to Brahma. The implications of this lawsuit are difficult to assess as it has not been filed yet. But, if H&E were to file claims against Brahma, as suggested by Brahma, it would do so in a separate action. According to Brahma, those "claims are derivative of Brahma's claims against TSE." ECF No. 20, p. 6:10-11. Thus, the H&E action will be the same whether or not this case is in state court or federal court; H&E's claims against Brahma will either be litigated simultaneously in a separate action, or, as H&E's claims are derivative, its case would most likely be stayed pending resolution of this case.

## III. CONCLUSION

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

DATED this 16th day of November 2018.

*/s/ Colby Balkenbush*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 16 day of November, 2018, a true and correct copy of the foregoing **REPLY IN SUPPORT OF TONOPAH SOLAR ENERGY, LLC'S MOTION FOR AN INJUNCTION AND TO STRIKE** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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**FIFTH JUDICIAL DISTRICT COURT**

**NYE COUNTY, NEVADA**

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

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

**BRAHMA GROUP, INC.'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND ITS FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT**

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

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BRAHMA GROUP, INC., a Nevada corporation,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm of Peel Brimley LLP, hereby submits its Reply in Support of its Motion for Leave to Amend First Amended Counter-complaint and Third-Party Complaint ("Reply").

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

Dated this 30th day of November, 2018.

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## MEMORANDUM OF POINTS & AUTHORITIES

### I. INTRODUCTION.

Instead of actually opposing Brahma's Motion to Amend ("Motion"), Tonopah Solar Energy, LLC ("TSE") simply regurgitates the same arguments provided in its Motion to Strike Brahma's First Amended Counter-Complaint ("Motion to Strike").[1] Each of those arguments (i) are addressed in Brahma's Opposition to the Motion to Strike and are fully incorporated herein by this reference, and (ii) do not actually address the legal merits regarding a motion for leave to amend.

The caselaw is clear that reasons to deny a motion to amend a pleading include undue delay, bad faith or dilatory motives. TSE does not allege that Brahma is seeking an amendment for any of those reasons. While TSE does argue that the Motion should be denied because the proposed amendment would be futile, TSE ignores the Courts' holdings regarding futility and instead applies its own standard, which is not supported by caselaw.

Finally, it is unclear why TSE is actually opposing the amendment. Should this Court not grant the amendment, Brahma's First Amended Counter-Complaint is the operative pleading in this matter, which pleading has a cause of action against TSE for foreclosure of Brahma's Lien. As part of the amendment, Brahma removed the lien foreclosure action against TSE, which benefits TSE.

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[1] The complete name of TSE's Motion to Strike is Tonopah Solar Energy, LLC's Motion to Strike Brahma Group, Inc.'s First Amended Counter-Complaint, or, In the Alternative, Motion to Dismiss Counter-Complaint, or, in the Alternative, Motion to Stay This Action Until the Conclusion of the Proceedings In Federal Court.

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## II. LEGAL ARGUMENT

### A. Brahma's Counter-Complaint was Properly Filed in this Action.

Although TSE's argument is irrelevant to a motion seeking leave to amend a pleading, Brahma will nonetheless address the same. Brahma's Counter-Complaint is properly filed in this Action and should not be stricken inasmuch as:

- The Nevada Legislature contemplated that foreclosure actions and motions to expunge liens should be filed in the same action, and the Counter-Complaint filed into this Action accomplishes the Legislature's goal (*see* NRS 108.2275(5));
- The Counter-Complaint was properly served on TSE through a Summons and gives TSE notice of Brahma's claims against it;
- Contrary to TSE's representations, this Action is not closed and will remain open while this Court determines Brahma's Fee Motion, since Brahma was the prevailing party under NRS 108.2275(6)(c);
- The Court can sever the Counter-Complaint and then consolidate it with this Action should it believe the Counter-Complaint was improperly filed; and
- The Counter-Complaint does not violate a rule or statute and is therefore not void.

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

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

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

In fact, had Brahma filed its Counter-Complaint as a standalone case (as TSE claims it should have), that case would have likely been assigned to a different Judge, requiring Brahma to file a Motion to Consolidate that action with this Action to ensure that the same Judge heard both matters. Filing the Counter-Complaint in an Action that TSE had already commenced, maximizes judicial economy, eliminates unnecessary delays and embraces the court's mandate to apply the Nevada Rules of Civil Procedure to (i) "secure the just, speedy and inexpensive determination of every action,"[3] and (ii) construe all pleadings "to do substantial justice".[4]

In a case where a creditor attempted to revive a judgement by filing a new complaint into the same case number as the original judgment, the debtor filed a motion for summary judgment arguing that the relevant statute required the creditor to file an independent action. *H.W. Polk v.*

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[2] When Brahma first filed its pleading in this Action on September 20, 2018, it was styled as a "Lien Foreclosure Complaint" and not a "Counter-Complaint." It was only after it was amended that Brahma named it, perhaps in artfully, a "Counter-Complaint."

[3] *See* NRCP 1

[4] *See* NRCP 8(f).

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*Tully*, 97 Nev. 27, 29, 623 P.2d 972, 973 (1981). In denying the motion, the Court held "in the absence of a specific statute requiring an independent action, the procedure followed by [the creditor] was not improper" because the debtor was served with a summons and complaint and had notice of the action. *Id.* The Court further reasoned, "to hold otherwise would exalt form over substance." *Id.* While the creditor in the *Polk* case filed its new complaint into the old case number and the old case was technically closed, the Nevada Supreme Court took a more practical approach and determined that the new action still provided the debtor with all the protections it would have received had the action been filed independently. In other words, no harm, no foul!

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

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

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

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

Further, there is nothing novel about the filing. Brahma's counsel has filed this exact pleading numerous times in situations where an owner or general contractor has first initiated the action by filing a motion to expunge under NRS 108.2275.[5] Thus, TSE's argument that it "has conducted an extensive search of Nevada case law and has been unable to find any situation similar to this one...," [6] demonstrates Brahma's point—the lack of case law only supports Brahma's contention that litigants and district courts throughout Nevada consider the filing of a foreclosure action within the same case as a first filed motion to expunge to be proper.

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

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[5] *See e.g.* the W&W-AFCO Steel Case, attached hereto as **Exhibit 1.** In that case, the general contractor, Austin General, commenced the Action by filing a Motion to Expunge. W&W-AFCO Steel then filed its Complaint to Foreclose upon its Lien in that same Action. This is a recognized procedure and has been done dozens of times over the years by Peel Brimley LLP and other recognized construction litigation firms in Nevada.

[6] *See* Motion to Strike at pg. 11:18-21.

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

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

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

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

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

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

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

Additionally, the *Smith* Case upon which TSE relies in its Opposition, is unavailing. *See Smith v. Eighth Judicial District Court*, 113 Nev. 1343, 950 P.2d 280 (1997). In that case, the *Smith* court found that the cross-claim plaintiff filed against respondents was improper because under NRCP 12(a), it should have been served along with the answer (within 20 days of being served with the complaint), and not as a standalone pleading. In support of its rationale, the Court held, "we do not suggest that dismissal of Chang's cross-claim was mandated because of a

technical defect in pleading...there is, however, nothing technical about the defect in Chang's cross-claim; ***the document simply is not a pleading and does not itself put the matters asserted therein at issue***." *Id.* at 1348, 283. Unlike the cross-claim in the *Smith* case which was time barred and required by an express rule to be filed with an answer, Brahma's Counter-Complaint was timely filed and there is no requirement that it be filed with an answer. Hence, the holding in *Smith* does not control this matter.

***3. The Counter-Complaint is not void.***

TSE argues that the Counter-Complaint is void as it allegedly violates a rule or statue. TSE relies on *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. City of Clark,* 127 Nev. 593, 260 P. 3d 408 (2011) and claims it is similar to the instant action. However, *Otak* is not similar to the instant case as there was a statute requiring dismissal of the pleading.

In *Otak,* a party filed and served a third-party complaint against a design architect. *Otak Nevada, LLC,* 127 Nev. at 596. However, in violation of NRS 11.258, no attorney affidavit or expert report was included with the third-party complaint. *Id.* A motion to dismiss was filed and the trial court denied the same and granted leave to amend the complaint.

The *Otak* Court stated:

> NRS 11.259(1) provides that the district court "shall dismiss" a party's initial pleading alleging nonresidential construction malpractice if it is served without the party filing the required attorney affidavit and expert report. Because the phrase "shall dismiss" is clear and unambiguous, we must give 'effect to that meaning and will not consider outside sources beyond that statute.' *City of Reno v Citizens for Cold Springs,* 126 Nev. __, __, 236 P.3d 10 16 (2010) (quoting *NAIW v. Nevada Self-Insurers Association,* 126 Nev. __, __, 225 P.3d 1265, 1271 (2010)).

*Otak Nevada, LLC,* 127 Nev. at 598 (2011). The *Otak* Court further stated:

> Thus, the Legislature's use of "shall" in NRS 11.259 demonstrates its intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if the pleading is served without the complaining party concurrently filing the required affidavit and

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report.

*Id.* The *Otak* Court further held that a "pleading filed under NRS 11.258 without the required affidavit and expert report is void ab initio and of no legal effect, the party's failure to comply with NRS 11.258 cannot be cured by amendment." *Id.*

TSE mispresents the holding in *Otak* by leaving very important language out of the block quote on Page 5 of its Opposition. The *Otak* court stated the following:

> The provision of NRSCP 15(a) that allows 'a party to amend the party's pleading once as a matter of course at any time before a responsive pleading is served' is inapplicable when that pleading is void ***for not complying with NRS 11.258***, because a void pleading does not legally exist and thus cannot be amended. [emphasis added]

*Id.*

Despite what TSE claims, the holding in *Otak* clearly only extends to pleadings filed pursuant to NRS 11.258.

Brahma's Counter-Complaint was not filed pursuant to NRS 11.258 and therefore *Otak* is not controlling. Additionally, TSE points to no authority that states that Brahma's Counter-Complaint (i) is void ab initio, (ii) "shall be dismissed," or (iii) cannot be amended.

**B. Brahma's Proposed Amendment is Not Futile.**

Although TSE is correct that a motion to amend may be denied if the amendment is futile, TSE fails to identify the standards the courts must look at to determine futility.

In *Halcrow, Inc.* (the case relied on by TSE), contractors sued a design firm for negligence, equitable indemnity, and contribution and apportionment for certain alleged defects on a construction project. *Halcrow Inc. v. Eighth Jud. Dist. Ct.,* 129 Nev. 394, 396, 302 P.3d 1148, 1150 (2013). The design firm filed a motion to dismiss for failure to state a claim based on the economic loss doctrine and the trial court granted the same. *Id.* at 397. The contractors then sought leave to amend their complaints to allege a claim for negligent misrepresentation and the design

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firm opposed the same, again based on the economic loss doctrine. *Id.* The trial court granted leave to amend an appeal was filed. *Id.* The *Halcrow* Court held:

> Negligent misrepresentation is an unintentional tort and cannot form the basis of liability solely for economic damages in claims against commercial construction design professionals. Consequently, PCS and Century ***cannot assert claims*** of negligent misrepresentation against Halcrow. Therefore, leave to amend should not have been granted because the amendment to PCS's and Century's pleadings was futile. [Emphasis added].

*Id.* at 402.

Two years after the *Halcrow* case, the Nevada Court of Appeals provided insight into how the futility exception should be applied, and stated the following:

> Few Nevada cases explain precisely how the futility exception is to be properly applied. In theory, the exception is intended to mean that an amendment should not be allowed if it inevitably will be considered to be a waste of time and resources on which the movant has no realistic chance of prevailing at trial.

*Nutton v. Sunset Station, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 973 (Nev. App. 2015). The court further stated:

> A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under NRCP 12(b)(5) or a "last-second amendment alleging meritless claims in an attempt to save a case from summary judgment."

*Id.*

The Nevada Supreme Court has further explained that "futility is a question of law reviewed de novo because it is essentially an NRCP 12(b)(5) inquiry, asking whether the plaintiff could plead facts that would entitle her to relief." *Anderson v. Mandalay Corp.,* 131 Nev. Ad. Op. 82, 358 P.3d 242, 247 (2015).

Brahma's proposed amendment removes a foreclosure cause of action against TSE and includes a claim against a surety bond rider, which rider was recorder subsequent to the filing of the Counter-Complaint. Brahma has plead facts that would entitle Brahma to relief, and TSE has

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not claimed such facts would not entitle Brahma to relief. Therefore, Brahma's proposed amendment is not futile and leave to amend should be granted.

**C. Courts Should Err on the Side of Caution.**

If this Court has any hesitation as to whether it should grant Brahma leave to amend its Counter-Complaint, the *Nutton* Court has guided lower courts to "err on the side of caution and permit amendments." *Nutton,* 131 Nev. Adv. Op. 34, 357 P.3d 966, 975 (Nev. App. 2015). Indeed, that Court stated:

> The liberality embodied in NRCP 15(a) ***requires*** courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had. [Emphasis added].

*Id.*

This Court should allow Brahma to file its proposed amendment to (i) remove its foreclosure cause of action as against TSE, and (ii) include the surety bond rider in the claim against the surety bond. The proposed amendment does not only arguable states a claim (or is borderline), but actually states a claim on which it can succeed.

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## III. CONCLUSION

Based on the foregoing, this Court should grant Brahma's Motion to Amend.

### AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 30th day of November, 2018.

**PEEL BRIMLEY LLP**

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**CERTIFICATE OF SERVICE**

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 30th day of November, 2018, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO AMEND ITS FIRST AMENDED COUNTER-COMPLAINT AND THIRD-PARTY COMPLAINT** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ Wiznet, the Court's electronic filing system;

☐ pursuant to EDCR 7.26, to be sent **via facsimile;**

☐ to be hand-delivered; and/or

☒ other – electronic mail

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

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An Employee of Peel Brimley LLP

# EXHIBIT 1

COMP
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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
|---|---|
| AUSTIN GENERAL CONTRACTING, INC., a Nevada corporation,<br><br>Plaintiff,<br><br>vs.<br><br>W&W-AFCO STEEL LLC, a Delaware limited liability company; VALLEY STEEL, LLC, a Nevada limited liability company.<br><br>Defendants. | CASE NO.: A-16-743285-C<br>DEPT. NO.: IX<br><br>**MECHANIC'S LIEN FORECLOSURE COMPLAINT**<br><br>**[Arbitration Exemption: Title to Real Property]** |
| W&W-AFCO STEEL LLC, a Delaware limited liability company,<br><br>Lien Claimant,<br><br>vs.<br><br>AUSTIN GENERAL CONTRACTING, INC., a Nevada corporation; PARBALL NEWCO, LLC, a Delaware limited liability company; WARM SPRINGS ROAD CVS, L.L.C., a Nevada limited liability company; ARMSTRONG DEVELOPMENT PROPERTIES, INC., a Pennsylvania corporation; WESTERN SURETY COMPANY, a surety; BOE BONDING COMPANIES I through X; DOES I through X; LOE LENDERS I through X; ROE CORPORATIONS I through X; TOE TENANTS I through X, inclusive,<br><br>Defendants, | |

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

## THE PARTIES

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

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

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

| | |
|---|---|
| Common Address: | 3645 S. Las Vegas Blvd.<br>Las Vegas, NV 89109 |
| County Assessor Description: | Parcel Map File 81 Page 21<br>PT Lot 2<br>& 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,

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

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

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

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

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

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

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

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

## FIRST CAUSE OF ACTION
## (Breach of Contract Against AGC)

10. 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:

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

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

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

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

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

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

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

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

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

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

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

17. 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.

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

18. 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:

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

20. AGC 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 W&W's justified expectations.

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

22. 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.

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## 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.

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

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

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

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

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

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

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

41. 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:

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

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

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

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

45. 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:

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

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

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

49. 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 interests therefor.

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

50. 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 16th day of January, 2017.

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**In the Matter Of:**

Tonopah Solar Energy, LLC. vs Brahma Group, Inc.

# MOTION HEARING

*December 11, 2018*

*Job Number: 514280*

CASE NO. CV 39348

DEPT NO. 2

IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT

COUNTY OF NYE, STATE OF NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

MOTION HEARING

BEFORE THE HONORABLE STEVEN ELLIOTT, DISTRICT COURT JUDGE

1520 EAST BASIN AVENUE

PAHRUMP, NEVADA 89060

ON TUESDAY, DECEMBER 11, 2018

AT 10:04 A.M.

Reported by: Deborah Ann Hines, CCR #473, RPR

Job Number: 514280

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TUESDAY, DECEMBER 11, 2018

---oOo---

THE COURT: Good morning. You may be seated. This morning we're here in the Tonopah Solar Energy versus Brahma Group case, and we're here for motions. I guess maybe I should make a record, first of all, as to this issue. The parties have stipulated to an order to continue hearing date for H & E Equipment Services, Incorporated's motion to intervene only. So I have signed that stipulation today so that can be moved on.

And then there's just a whole bunch of things that, you know, are probably to be considered today, and I'm not sure the order and how the parties want to do it, but we do have the attorney's fees issue. And then we have Tonopah Solar Energy has filed the motion to strike, motion to dismiss, or motion for stay, so all that's potentially on for a ruling.

MR. ZIMBELMAN: If I may, your Honor, we did confer just before you came in about the order of hearing the motions.

THE COURT: Good.

MR. ZIMBELMAN: We have a plan. The plan would be, if you approved, it would be motion for

fees heard first, then have Tonopah Solar's motion to strike, et cetera, and leave the motion to amend for the last.

THE COURT: Okay. All right.

MR. ROBERTS: Your Honor knows our opposition to the motion to amend is based on the fact that you can't amend a void pleading. And if the court -- which way the court goes in the dismiss may really move the issue for ruling on the motion for leave to amend. Thank you, your Honor.

THE COURT: Okay. Great. Thank you. Well, Brahma Group then has the motion for attorney's fees, so I suppose you would be the first one to speak as to the motion.

MR. ZIMBELMAN: Ready to hear that, your Honor?

THE COURT: Yes, sir.

MR. ZIMBELMAN: Thank you. Good morning, your Honor. My name is Eric Zimbelman. You may recall from the last time we were here, given that I argued the motion to expunge, which was the underlying motion, it seems appropriate that I argue in support of our motion for attorney fees and costs arising from that proceeding.

As you know, that's a proceeding arising

under NRS 108.2275, particularly subsection 6 permits -- it requires the court to award reasonable attorney's fees and costs to the prevailing lien claimant, and that's us. The Tonopah Solar doesn't dispute that we're entitled to fees, they simply don't like the number. Now, granted it's a fairly large number, and I guess I'm not surprised that they are opposing it. Nonetheless, it's --

THE COURT: So the number is $78,417 plus whatever it costs to --

MR. ZIMBELMAN: I estimated approximately $7500 for the reply brief, which was fairly extensive, responding to a number of their arguments, and obviously coming up here and appearing today. And presumably there's going to be an order involved and so forth. So that's a rough estimate. That's what I can give the court today.

You know, the total dollars spent may seem significant, but we're talking about a proceeding that we didn't ask for to defend against an attempt to expunge to eliminate the only security that my client had for a lien of in excess of $12.8 million.

And Nevada public policy is extremely sensitive to the importance of mechanics liens. That is it recognizes that the contractors are in a

vulnerable position. And this is directly out of the Fontainebleau case. Vulnerable position, they extend large blocks of credit, significant time, labor and materials, have any number of workers vitally dependent upon them. This is why mechanics liens are important. It's why mechanics liens statute exists, and more importantly it's why NRS 108.2275 has an internal attorney fees provision, right, because the lien statute itself has a fee provision. But 2275 says, look, if you're going to bring that motion, you better be prepared to prevail, because if you don't, you're going to have to pay the other side's reasonable attorney's fees and costs for defending that motion.

And you don't have to bring a motion to expunge under 2275, you have other options. You can proceed to discovery. If you feel you have a legitimate basis, you can file a motion for summary judgment. You can proceed to trial and argue that the lien is invalid for some reason. But they chose to engage in that proceeding. And, frankly, it would have been malpractice for us not to pull out all the stops to try to defeat that petition.

Now, that doesn't mean acting unreasonably or spending unreasonable dollars, and we don't

believe we did, but in general I compare this case to some of the cases they cited in their opposition, which are effectively discovery motions, and I don't see any comparison whatsoever. This is a vastly different case with vastly different stakes, and, you know, again the result was it's expensive. And our client has incurred and paid those fees and they're entitled to have them reimbursed.

Now, obviously the court has to engage in a Brunzell analysis. That's in every case we read. You know, if you don't say that you looked at the Brunzell cases, well, you're going to be reversed. But if you do, and you analyze them, your decision is subject to great discretion. It can be tempered only by reason and fairness as long as it's supported by substantial evidence. I represent to the court that you have substantial evidence in front of you to support the award that we have requested.

Now, let's look at some of the Brunzell factors, if you don't mind. The first one is the advocate's qualities, including ability, training, education, experience, professional standing, and skill. Now, they aren't disputing that we are quality attorneys, but by the same token, Tonopah Solar's attorneys are excellent lawyers. Mr. Roberts

is a terrific attorney and a heck of an advocate. And when you are presented with both a party that is sophisticated and high quality attorneys, you don't -- and you never would -- do a slop job, right? You need to present your best case. You need to put it out there, and I believe that we did that. I believe that we did that appropriately.

Another Brunzell factor is the character of the work by which the courts may -- the difficulty, the intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation. Well, the complexity, your Honor, was driven part by not just the issues that were brought to the court, but the way in which they came here. Because initially their motion was based upon the following arguments, that the lien attached to the BLM property, remember that, and we demonstrated that that wasn't the case, that the lien was void for that reason and it couldn't be amended. Again we demonstrated the liberality of the lien statute as far as amendments are concerned.

They argued that Brahma could only lien parcels on which it worked, and we made a lot of

arguments about the right to lien the work of improvement, the project as a whole. That no notice of right to lien, a pre-lien notice wasn't given. We showed you that, yes, indeed it was, even though we didn't believe it was necessary.

Then on reply they made the argument about sovereign immunity. They argued effectively that our lien impaired the government's security interest. You remember that. And we talked about that for a very long period of time, when we were here last. We didn't brief that initially because that wasn't an argument they made in our initial motion. They argued sovereign immunity only as it related to the land and their argument that we couldn't lien the property.

Well, on reply we -- or in response to their reply I prepared a supplemental statement of authorities where I showed the court the cases that we would be talking about when I got up here in front of you. We didn't make legal argument, we just presented the cases. They responded with a reply brief. So both parties had some time to go back and look at that and analyze, synthesize, develop, prepare. We both did that. I certainly did that. And so we spent a good deal of time on that issue,

and it's an important issue and it's certainly not a simple issue. The I guess long story short, this isn't a discovery motion, right. This is a big deal, and it's a complex deal.

Another Brunzell factor is the prominence and character of the parties. I mentioned previously, Tonopah Solar is obviously a highly sophisticated company doing these solar projects. These are big deals. And we certainly have an important -- a big player on the other side, but consider this: Given the sovereign immunity arguments, we were arguing against in effect the United States of America, right, because they're arguing the government's interest. We had to respond to those arguments. We had to respond to the argument, not made by the government itself, but by somebody who purports to speak for the government, but the government's interest were impaired. So we had to deal with that as well.

The importance of the litigation I mentioned. Obviously a $13 million lien claim. It's a big deal. It's an important thing. And it's, you know, effectively malpractice not to bring out your best case, and I feel that we did that. I know it's everything to Brahma. And Brahma didn't pick this

fight. They obviously have their lien. We obviously had their claims. But they didn't pick to engage in this proceeding and this special proceeding.

And I'd ask you when you consider all of these factors and you put them all together and you consider where we were at and why we did what we did and how we responded, you know, put yourself in Brahma's shoes for a second. Your lien is at risk. Your only security. You aren't thinking about hiring Joe off the street. You're not thinking about putting in, you know, a short brief with a few citations and hope it goes well. That's not going to work, not against Mr. Roberts, not against frankly anybody.

I'd also suggest that the importance of the litigation extends beyond just our lien, right. There are other potential lien claimants out at that project. This isn't the first case to arise from that project, it certainly won't be the last. And Nevada public policy itself is obviously implicated here, and I think this is a perfect example of where Nevada public policy fits into this case and where this case fits into Nevada public policy. It's a perfect plan.

The next factor is the time, skill, and

attention given to the work. Frankly, their argument is we spent too much time. We spent too much effort, overstaffing, redundancy and the like. And I'll talk about those issues in a moment. Well, respectfully I believe that we gave the appropriate amount of staffing, appropriate amount of redundancy, appropriate amount.

And obviously the results is the last factor. And of course we won. And, yeah, it's a big deal. And what we won was the preservation of a nearly $13 million lien claim. That's a lot more important than whether somebody provided appropriate responses to an interrogatory or request for production.

So let's talk about their biggest complaints and concerns. They argue that our rates are too high, that there is a prevailing rate in the state of Nevada that is lower than what we billed. Well, I would -- frankly, I would dispute that there's such a thing as a prevailing rate. It's a market economy. Attorneys can charge what their clients will pay them for the work they feel they're being appropriately provided.

Now, that said, we haven't submitted the court with rates request of $700 or something, some

crazy number, and I've seen those kinds of things. That's not out of the -- maybe a little bit out of the ordinary, but it's certainly not unheard of. Our rate requests were between 250 and $425 an hour, $425 being from my partner, Mr. Peel, who is obviously a widely recognized expert in Nevada lien law, somebody who wrote the right to work -- right to stop work statute, someone who effectively rewrote the Nevada lien statute in 2003 and 2005, who knows more about lien law than I would suggest anybody in the state of Nevada.

And you'll remember that Mr. Peel grabbed the microphone from me at one point in our argument here last time, and I'm glad that he did because he can provide a perspective, a historical perspective of how these statutes came about and why certain changes were made that nobody can do besides him, in my view. He was there from the beginning. He saw it through. He was involved in the legislative process. So, you know, important, and, frankly, that he only bills $425 an hour, and I've always felt he was under-billing. Myself, $400 an hour. I've been practicing law for 20-plus years, construction law for 20-plus years. And, you know, no one wants to brag about themselves. I feel it's an appropriate

rate for the work that I've performed and provided to our client.

Their biggest beef is with our associates, but our associates are highly trained, highly skilled and very experienced associates, particularly Mr. Cox, who they raised a complaint about, but Mr. Cox is near partner level. He's not a partner but he's near that, and he brings a great deal to the table, was very, very important to our team approach. So we feel like he's a highly skilled, highly trained person.

THE COURT: As I recall, one of the factors that they felt was overbilling concerning Mr. Cox was they said, well, some recent case that there was a charge for $250 for his services --

MR. ZIMBELMAN: Right.

THE COURT: -- versus the 350 you're asking for, and maybe you can talk about that.

MR. ZIMBELMAN: Are you talking about the other case that we had recently submitted a fee request on?

THE COURT: Well, I forgot what the other case was, but they just --

MR. ZIMBELMAN: Yeah, so what they did is --

THE COURT: Some other case fairly recently.

MR. ZIMBELMAN: We went dumpster diving for prior fee motions that we had filed, and we had done one in a case called Manhattan lien litigation, but that case dates back to 2008, your Honor. It involved -- it went up to the supreme court, it came back down, it bounced, and finally went to trial for a number of the remaining lien claims, the ones who survived that gauntlet, and there were only a few of them, went to trial and we prevailed against one or both of the general contractors on that project.

Now, those rates that we submitted, they're legacy rates. They date back. They're reduced. And so, you know, to me this is not that, right. Every case is different. And particularly the time they were citing about Mr. Cox it's from more than two years ago, so, you know, I'm not sure what bearing that has on anything.

And, you know, they cited to some cases saying, well, here are some ranges and so forth, and we cited some cases saying here's some ranges, but really it's up to you. And the rates that we charge are the rates that we feel are appropriate and the rates that our client feels is appropriate, and, you know, at the end of the day it achieved an effective, positive result for our client. So getting down to

the weeds, but I don't think that that's really what we need to do. I think we need to look at the bigger analysis and the bigger picture about where we're at.

Overstaffing is an argument that they make. And, you know, I think my response, you probably saw my reply, collaboration isn't redundancy. I mean, teamwork requires you to work together. It requires you sometimes to do work that is reflected on your billing statements that may seem similar, but it's not the same thing. It's not doing the exact same thing. And even when it is, right, reviewing a brief and revising the brief, for example, well, the edits that Mr. Peel makes are different than the edits that I make and they're different than the drafting that Mr. Cox provided initially. And we all have a process and an input.

You know, we have a company motto which is, "There's no pride in authorship." That's the best way to approach a work product, mind you. You think you're right, you really aren't paying attention, because somebody else has some good ideas and they need to be considered and they need to be incorporated, and that's how we work, and we think it works for us and we think it works for our clients.

They argue as well that we engaged in block

billing. Well, you know, outside of insurance company attorneys, say that virtually everybody I know engages in some form of block billing. It's almost impossible to --

THE COURT: Maybe you have to describe block billing.

MR. ZIMBELMAN: I think the argument is --

THE COURT: Actually, I never worked for firms like you, the two of you have where you're, you know, high end, you know, corporate counsel people. You know, I don't understand the billing.

MR. ZIMBELMAN: So I think block billing, it's like saying, okay, I spoke on the telephone about X, Y and Z, point 02, okay. And on that same day, 20 minutes later, I reviewed a letter from opposing counsel, point 3. And on that same day, 20 minutes later, I began working on a brief, and I worked on that brief for 2.3 hours. And then on that same day -- well, what we do is we say, look, on the 21st of October, I did these things.

Now, where that could create a problem is if I was working on the brief in support of opposition to the motion to expunge, and I also added some time for preparing a lien amendment, right, not, strictly speaking, related to this motion to expunge. But you

will not see that in the invoices that we submitted to your Honor because we opened a sub matter, the 03A motion to expunge matter where we billed only the time pertaining to this motion to expunge in that matter. All other time that we spent we billed on another matter.

So there is no time in those billings that is not pertaining to this motion to expunge. In my view that's the most important issue when you're talking about block billing is can the court evaluate whether and to what extent this work was done for on behalf of the proceeding for which fees are being requested, right. Sometimes at the end of a case they'll argue, well, you should be entitled to fees for this claim that you prevailed on but not this claim that you prevailed on, and yet your block bill contains some time for both. We don't have that problem here, your Honor. Our time is one hundred percent in response to the motion to expunge. So from my view that's really not an issue that the court should be worried about.

In addition, they make kind of a fuzzy math argument that, hey, 80 percent of their time entries are block billing. I didn't go fine-toothed comb and try to determine whether that was, you know, whether

it was 68 or 72. I don't think they're right about that, but even if they are right, they're asking you to reduce our fees by 30 percent across the board, even though, by their own admission, not all of our time is block billed, so that doesn't make any sense.

And, you know, more importantly, and I've cited to the Wells versus Metro Life case in my brief, it's once of the cases they cited, and that case actually rejected the U.S. district court's across the board reduction of 20 percent and remanded to the district court to explain how or why the reduction fairly balances those hours that were actually billed in block format. In other words, you can't just say, well, it's block billing, therefore I'm going to whack a big chunk of this. There has to be an analysis. They made no effort to provide that analysis to your Honor. I see no reason why your Honor should try to make their arguments for them.

You know, they made some of what I consider really nitpicks, and I added those at the end of my reply brief. And they argued about things like the allegation that we spent 41 hours purely drafting a brief. Well, it's inconsistent with their argument that we engaged in block billing, in other words, that there are more than one thing on a particular

entry. So if it says 5.5 hours, and part of that was working on a brief and part of that was doing some other things pertaining to this motion that that was purely drafting. That's just not correct. So technically incorrect.

Even if it's true, this was some pretty extensive, intense briefing, your Honor. And I, you know, I feel very strongly that we have spent an appropriate amount of time, not more and not less than was necessary to achieve the result that was required for our client.

They argued similarly that we spent 59.9 hours to prepare for and attend a hearing. But, remember, we came here the first time before the case was assigned to you by Judge Lane, and we had to prepare then, and I had to be ready to go. And Judge Lane assigned the case to your Honor, we went back and during that period of time was when the supplemental briefly happened about the sovereign immunity, right. So there was a lot of stuff that happened in between and even more things to prepare for when we came back to see you. So we spent -- yeah, we spent a good deal of time getting ready. I am not going to apologize for that. It's factually detailed, legally detailed, as was the order that we

prepared that they disputed, and they submitted their own countervailing order. You signed our order.

And then, you know, they're arguing about the time we spent on the motion, this motion for fees. I mean, I guess you can do a mini Brunzell analysis, but our initial request was for nearly $80,000 in fees. Again, you need to do a fair job of presenting your basis and your arguments for why you're entitled to those fees, and I think we've done that. And particularly on the reply I think we've, you know, we've addressed their concerns in great detail. I actually didn't draft the initial motion because I was preparing for trial in another case, but I got an opportunity to prepare the reply, and it really gave me a chance to tell you how I feel about this. And I really do feel very strongly that we did everything we can, and we did it appropriately.

There's some argument about non-permitted briefs. I mean, again, if you raise something on reply, it shouldn't be a surprise that we submit a supplemental statement of authorities. And, by the way, they filed their own reply brief, sort of sur-reply to those authorities.

And, finally, they argue that there's inadequate documentation. You know, I think that our

billing statements reflect fairly what we've done and advised our clients fairly what they're getting for the money. Could you do better here or there? I mean, everybody can do better. We can all do better. But I believe that this isn't just a worked-on case, thought-about case, right. We provide detail, and you'll see that in our billing statements. And, you know, if there's some lack of clarity or there's some -- you know, I apologize, but we really do our best and we think we've done a good job generally.

Your Honor, TSE concludes its opposition by asking you to make a 70 percent across the board reduction to give us 30 percent of the fees that we have incurred on behalf of our client that our client has paid defending the motion they brought. I submit that that is wrong, that it's absurd, it's unfair. You have a great deal of discretion today. I trust that you'll exercise that appropriate and fairly. We feel that we -- we feel we did it right. We feel that we did nothing that we weren't supposed to do, that we've billed for nothing that we weren't entitled to, and that our client got good value for the money they spent. And that, in my view, ought to be the analysis the court engages in, that they provide the value that they're asking for today, and

I submit that we did. Thank you. Any questions for me, your Honor?

THE COURT: Thank you, Mr. Zimbelman.

All right. Let me get your brief here. Okay.

MR. ROBERTS: Good morning, your Honor. Lee Roberts for Tonopah Solar Energy.

THE COURT: Okay.

MR. ROBERTS: I want to start by saying that we do not dispute that Mr. Peel and his legal team are exceptionally skillful and very experienced in these matters. And we're not arguing that it's unreasonable for his client to be paying 425 for Mr. Peel, 400 for Mr. Zimbelman. That's not the point we're trying to make. In fact, I'll disclose to the court that my rate on this matter is a little higher than Mr. Peel's.

The argument that we're making is that when you attempt to shift costs under a fee shifting statute like this, the court is charged with setting a reasonable rate and reasonable fees. The statute doesn't give carte blanche. It only awards reasonable fees. And I was thinking about it on the drive here, I was stuck in traffic on the mountain, about maybe a parallel for how I could put this in

context, and it came to me another place that the law uses the term "reasonable" is in the duty of reasonable care. And there's a little bracket in the Nevada jury instruction for the duty of reasonable care which says that the person whose conduct we set up as a standard is not the extraordinarily cautious individual nor the exceptionally skillful one, but a person of reasonable and ordinary prudence.

So when you talk about reasonable attorney's fees and reasonable rates, we're not talking about the highest rate that an exceptionally skillful lawyer can charge, it's a reasonable rate. And the cases that we've cited to the court which talk about the maximum rates that courts have awarded in the past set up what is a reasonable rate, what's an average rate for someone who can do this type of work. And we would suggest that the average rate, the reasonable rate, the rate that would customarily be shifted in a case like this is much lower than the actual rate charged, even though the actual rate charged was higher.

And it's the same thing with the hours. The court doesn't have to find that Peel Brimley acted improperly, that they overcharged their client, that they overworked the case in order to reduce the fees.

206 hours, they felt it was necessary to spend that much to prepare for this hearing? We're not saying that was malpractice or it was improper, but we are saying that a reasonable attorney could have prepared for that hearing with substantially less time invested and with substantially less duplication of effort.

And the Helix Electric motion for attorney's fees that we cited the court was just filed in June of 2018. It was just filed this year and had that 250 associate rate in for one of the same attorneys on this case. And all the cases and the fees did start in 2009, they continued until shortly before that motion was filed, and that was the rate they were charging for that case shortly before it was filed in June of 2018.

So we do think that the court has the discretion and should reduce the amount billed to something that's more in line with what the average attorney of ordinary prudence would have billed on this case. And although out rates were higher, we did bill substantially less time preparing for this same hearing.

The block billing, an example I could give to your Honor, the issue with block billing is that

in order to exercise your discretion, you're required to review their bills and determine if the amount of time they spent was reasonable for the task they performed. But when you block bill, and you include multiple tasks with only one time, it becomes then impossible for the court to determine if the time spent was reasonable because you can't tell how much time was spent on each one of those activities.

Just by way of example, your Honor, September 12 of 2018, continue preparations for oral argument regarding TSE motion to expunge, travel to Pahrump and participate in same, meeting with client regarding decision, status and things to do, office conference with Richard and Ronny regarding same, and then one time entry of 8.5 hours. Well, let's say the court decided it's improper to ask us to pay for meeting with client regarding decision, status and things to do, that we shouldn't pay for their meeting with their client because that's not necessary work to defeat the motion to expunge, and the court wanted to eliminate that. It's now impossible for the court to take that out of the fee calculation because there's only one lump sum of 8.5 hours.

And that's the issue that we believe necessitates some sort of an across the board

reduction for block billing. And this is something that there is Nevada precedent to do to reduce time when there is a block billing simply because of the impossibility for the court to then determine the reasonableness of the time spent on the individual activities.

THE COURT: Mr. Roberts, hang on. I certainly don't know the ins and outs of billing the way you all understand it, because I didn't really have to do that as a government lawyer and judge, but it sounds like you're saying an example would be meeting with your client, and I suspect that you're probably going to have to bill something for meeting with clients, particularly if your client is bugging you a lot, I don't know, wants you to hold their hand all the time, you know, you want to discourage that because it's time that you could do other work. Wouldn't you bill for that?

MR. ROBERTS: Absolutely I would bill for that, my client would pay me for it, but if I was seeking to recover for my opposition to a motion to expunge, I don't think I could bill the other side for that time. And I'm not saying this is an improper way for them to bill their clients. I have clients that do not allow block billing and require a

time for every entry, and I also have clients that allow block billing like this, and it's perfectly acceptable, with the agreement of the client.

The issue, and the sticking point, becomes if you're trying to shift a portion of that time to another party. And this is not attorney's fees under the prevailing party where everything they did could be tied to the attorney fee motion. This is a very narrow entitlement only to attorney fees for opposing the motion to expunge, and that that's why it's a little bit different than a prevailing party type of determination.

Regarding a few of the other arguments that they've made, we do acknowledge this was complex, and it was complicated, and there were a lot of issues. But some of those issues were of their own doing, and it was not us that increased some of the complexity and time spent. For example, they justified the 59 hours to prepare for a couple of hours of our oral argument by saying that we came here prepared to argue before Judge Lane and then it was transferred to you and we had to come back again. Well, what they failed to point out is that I also showed up to that hearing, I was prepared to move forward, they asked to have it transferred to Judge Lane. They

asked to come back to him. I didn't oppose it but I'm not the one who asked to transfer it to Judge Lane, I mean to you from Judge Lane and increase that time. This is something they asked for, and now I'm being asked to pay for it. So I don't think it's as simple as they pointed out.

There were five different lien amendments. That complicated things.

THE COURT: But isn't it true that they wouldn't have known that Judge Lane was going to bounce it out to a senior judge? I assume that wasn't in the thought process of doing that.

MR. ROBERTS: Well, your Honor, they're the ones who asked Judge Lane to bounce it to you. We were all here ready to argue, and they asked Judge Lane to bounce it to you because of his prior involvement with the underlying facts and disputes. Now, we didn't oppose that, but I think if they said, "And we're going to ask you to pay for it and we're going to ask you to pay for our time in coming today," I might have opposed it back then.

But the amendments, the complexity of the repeated amendments, that was not created by us. The court found, as you recall, in one of the central issues was whether Brahma had intentionally attached

BLM land in their early lien filings such that is was precluded from amending. That was a key part of the issues. Well, they ultimately did file amendments which clarified what they were seeking to attach through their lien, but their first amendment attached BLM land and said BLM was the owner, and they created that issue. And the court may have found they didn't intentionally create it, but this was a mess of their own doing that created this complexity.

And certainly we were justified under these facts where the initial lien filings had intentionally -- had, excuse me, had at least nominally attached to BLM land and where there was Nevada case law talking about void pleadings, it was a good faith argument. And I do feel that awarding the totality of the fees, given how high they are in connection with this single motion, would be somewhat punitive. We agree they're owed fees, and a reasonable amount of fees, but we would ask the court to exercise its discretion to reduce that amount. Thank you, your Honor.

THE COURT: I don't want to be like a president who, you know, just says whatever is on his mind without a lot of thought, but I'm thinking about

this issue of, you know, well, you follow different paths, you know, during the course of a really very complex litigation that went on here in this case, and, you know, sometimes you follow a dead end, you know, you have to backtrack.

And I was just thinking about the movie about Howard Hughes, the Aviator, and, you know, at the end of the war they brought Howard Hughes to Congress when he was probably already insane, but, you know, he, you know, defended a project. They were saying, well, this project really didn't go anywhere so we don't think the government should have to pay for it. And he pointed out, well, you know, these were exigent times during World War II and, you know, many projects were looked at that weren't ultimately built and, you know, gone through fruition as we tried to get the best, you know, war machinery out there that we could in as short a period of time as possible, and a lot of work had to go into that, and the government paid.

And I'm sort of thinking that, well, litigation is sort of an exigent circumstance. You have a certain limited amount of time and, you know, when I draft orders, I, you know, put out things that ultimately I read over and decide that maybe I don't