

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78256

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Elizabeth A. Brown
Clerk of Supreme Court

TONOPAH SOLAR ENERGY, LLC,

Appellant,

v.

BRAHMA GROUP, INC.,

Respondent.

Petition for Writ of Prohibition, or, Alternatively, Mandamus
Fifth Judicial District Court
The Honorable Steven Elliott, District Court Judge
District Court Case No. **CV 39348**

MOTION TO STAY BRIEFING (RE-SUBMITTED)

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I. INTRODUCTION

Real Party in Interest, Brahma Group, Inc. (“Brahma”) hereby moves the Court to stay briefing on Petitioner Tonopah Solar Energy. LLC’s (“TSE”) Writ Petition (the “Petition”) pending the outcome of two motions heard on June 25, 2019 before the United States District Court for the District of Nevada (the “Federal Court Motions” described more fully below).¹ The Federal Court Motions directly relate to, and may significantly impact and/or render moot, some or all of the grounds asserted by TSE in support of its Petition. Further, the Order from which this Petition arises granted TSE’s request for a stay of the claims against it in Nye County “until such time as the federal court rules on the [Federal Court Motions].”

Once the US District Court rules on the Federal Court Motions, this Court will likely benefit from the Federal Court’s analysis and Brahma will be better able to address any such remaining issues in its Answer to the Petition. Accordingly, Brahma respectfully requests that the Court stay Brahma’s obligation to Answer the Petition until no sooner than 30 days after the US District Court rules on the Federal Court Motions.

II. STATEMENT OF FACTS

A. The Federal Court Action.

The Petition arises from consolidated case nos. CV39348 and CV39799 in the Fifth Judicial District Court of Nevada (the “Nye County Action”). A parallel and closely related action is also pending in the United States District Court for the District of Nevada, Case No. 2:18-cv-01747-RFB-GWF (the “Federal Court Action”), on the basis of diversity jurisdiction only. [**Exhibit 1**]. TSE’s counterclaims against Brahma arise out of the same underlying dispute and contract that forms the basis of the Nye County Action. [**Exhibit 2**].

¹ This Motion is re-submitted to comply with the page limitation of NRAP 27(d)(2).

Brahma filed a motion asking the Federal Court to abstain and stay proceedings pursuant to the *Colorado River* Doctrine [**Exhibit 3**, the “*Colorado River* Abstention Motion”²], which requires a federal court to abstain in favor of a concurrent state court proceeding where necessary to promote “wise judicial administration, conservation of judicial resources, and comprehensive disposition of litigation.” *Southwest Circle Group, Inc. v. Perini Building Company*, 2010 WL 2667335 *2 (D. Nev. June 29, 2010) (citing *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989)). The doctrine is designed to avoid piecemeal litigation and to prevent inconsistent results. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In response, TSE filed a Motion for an Injunction and to Strike [**Exhibit 4**, the “Motion for Injunction”]³ asking the Federal Court to, among other things, (i) “enjoin Brahma from prosecuting claims” in the Nye County Action and (ii) strike Brahma’s First Amended Complaint based on its contention that “Brahma attempted to deprive [the Federal Court] of jurisdiction over this removed action.” [*Id.*]. TSE makes many of the same arguments in the Federal Court Motions that it presents to this Court in the Petition. Brahma’s Answer to the Petition will also overlap its positions set forth in the Federal Court Motions.

B. The Underlying Dispute and Nye County Proceedings.

The parties’ underlying dispute arises from the more than \$26 million of work, materials and equipment (“the Work”) that Brahma provided to TSE at the Crescent Dunes Solar Energy Project (“the Project”) in Tonopah, Nevada. Because TSE failed to pay Brahma in full, Brahma stopped work and recorded a mechanic’s lien in the amount of \$12,859,577.74 (the “Lien”). [See *e.g.*, Exhibit 3, *supra* pp. 3-4].

² Voluminous exhibits supporting the *Colorado River* Abstention Motion (and all other briefs submitted as exhibits herein) are omitted for brevity.

³ Collectively, the *Colorado River* Abstention Motion and the Motion for Injunction are referred to herein as the “Federal Court Motions.”

TSE commenced Nye County Case No. CV39348 on June 1, 2018 when it filed a motion seeking expungement of Brahma's Lien pursuant to NRS 108.2275, which Nye County Court denied. [**Exhibit 5**, "Order Denying Motion to Expunge"].⁴ Brahma then filed a Mechanic's Lien Foreclosure Complaint in that action (Case No. CV39348) [**Exhibit 8**, "Lien Complaint"] which it later amended to (i) include additional claims against TSE (ii) commence a third-party action against TSE's affiliate, Cobra Thermosolar Plants, Inc. ("Cobra"), a surety, and the surety bond they recorded to (ineffectively) release Brahma's Lien from the Project (the "Surety Bond"). [**Exhibit 9**, "First Amended Lien Complaint"].⁵

TSE next filed its "Motion to Strike [Brahma's First Amended 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." [**Exhibit 10**, "Motion to Strike or Dismiss"]. The Nye County Court's denial (in part) of the Motion to Strike or Dismiss forms the basis of TSE's Petition. [See *e.g.*, **Exhibit 11**, "Order Re: Motion to Strike or Dismiss," Petition p. 1]. As it does in the Federal Court Motions, TSE argued to the Nye County Court that when a party removes claims to a federal court, all state courts lose subject matter jurisdiction over those claims until the claims are remanded or resolved. [See Petition p. 4; Exhibit 10, *supra*, pp. 15-16; **Exhibit 12**, TSE Response to Motion to Stay p. 7].

TSE also argues there and here that it was improper for Brahma to file a complaint in the same action that TSE commenced with its Motion to Expunge. [See

⁴ Pursuant to NRS 108.2275(8), TSE appealed that Order [**Exhibit 6**, "Notice of Appeal"] and a subsequent Order granting Brahma an award of attorney's fees [**Exhibit 7**, "Order Granting Motion for Fees" p. 2], which appeal is pending in this Court as Case No. 78092.

⁵ The Surety Bond failed to meet the requirements of NRS 108.2415(1) because it was not in an amount that is 1 ½ times the amount of Brahma's Lien. [See Exhibit 9, *supra*, p. 13].

Petition pp. 22-27]. TSE relies on a treatise by Leon F. Mead II⁶ for the proposition that “a foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275.” [See Exhibit 10, *supra*, p. 7; Petition pp. 26-27]. Yet the Mead Treatise also opines that “[t]he proper procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate the two matters.” [Exhibit 13, Mead Treatise excerpt]. That is exactly what Brahma did.

Out of an abundance of caution, Brahma filed a stand-alone complaint as an independent action in Nye County, Case No. CV 39799 [Exhibit 14, the “Separate Action”] and moved the Court to consolidate the Separate Action with Case No. CV 39348 (“the NRS 108.2275 Special Proceeding”). The Nye County Court: (i) reiterated its conclusion that Brahma’s Complaint in the NRS 108.2275 Special Proceeding was proper, (ii) came to the conclusion that had Brahma instead filed the standalone complaint the Parties would be in the same position they currently find themselves in,” and (iii) found the filing and consolidation to be appropriate “where TSE has stated its intention to file a Writ Petition.” [Exhibit 15, p. 2].

The Nye County Court permitted Brahma to “amend its Amended Counter-Complaint to (i) withdraw the mechanic’s lien foreclosure action against TSE’s Work of Improvement; (ii) identify the Rider to the Bond (as defined in the Parties’ Briefing); and (iii) increase its mechanic’s lien foreclosure action against the Bond and Rider to \$19,289,366.” [See Exhibit 11, *supra*, p. 3].⁷ Brahma did so by way of an amended consolidated pleading that the Nye County Court expressly authorized. [Exhibit 16, “Order Granting Countermotion for Leave to File Single Consolidated

⁶ LEON F. MEAD II, NEVADA CONSTRUCTION LAW 286 (2016 ed.) [the “Meade Treatise”].

⁷ Brahma’s Motion to Amend was heard concurrently with the hearing on TSE’s Motion Strike or Dismiss.

Amended Complaint”; **Exhibit 17**, Brahma Group, Inc.’s (I) Second Amended Complaint; and (II) First Amended Third-Party Complaint”].

III. ARGUMENT

A. A Decision on the Federal Court Motions is Pending.

The Federal Court held a hearing on the Federal Court Motions on June 25, 2019 and is taking the matters under advisement. [**Exhibit 18**, June 25, 2019 Minutes]. Even if the Federal Court had already issued a written decision, Brahma would have had insufficient time to adequately brief its Answer to the Petition in light of the impact such a ruling will likely have on the issues presented in the Petition. It is also likely that the Federal Court’s decision will render some or all of the issues presented in the Writ Petition moot or significantly impact this Court’s threshold analysis as to whether it should consider those issues at this time in this writ setting. At the very least, it is highly likely that ruling will affect Brahma’s Answer and this Court’s analysis.

B. A Stay of Briefing Will Promote Judicial Economy.

Generally, this Court will not exercise its discretion to consider writ petitions challenging district court orders denying motions to dismiss, “unless pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action ... or an important issue of law requires clarification.” *W. Cab Co. v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 390 P.3d 662, 666–67 (Nev. 2017). As a general principle, this Court will “practice judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand.” *Id.* at 666–67 citing *Miller v. Burk*, 124 Nev. 579, 588–89, 188 P.3d 1112, 1118–19 (2008).

The issues presented for argument in the Petition substantially overlap with those under consideration in the Federal Court Motions. Indeed, TSE sought and obtained from the Nye County Court (in the very Order from which this Petition

arises) a stay of proceedings related to the claims against it “until such time as the federal court rules on the [Federal Court Motions].” [Exhibit 11, *supra*, p. 3]. Particularly where the Federal Court Motions involve the permissible and appropriate reach of federal court jurisdiction, and the effect of removal, this Court should exercise judicial restraint and stay briefing and consideration of the issues presented until the Federal Court rules on the Federal Court Motions.

C. The Federal Court Motions Provide TSE a Plain, Speedy and Adequate Remedy.

In its Petition, TSE makes three basic arguments that are directly pending before the Federal Court, subject to factual determinations there or in the Nye County District Court, and/or moot by virtue of the Separate Action and consolidation. Specifically, TSE contends that (i) upon removal, all state courts lose subject matter jurisdiction over those claims until the claims are remanded or resolved [Petition p. 4], (ii) the federal action was “filed first” (which it was not – see *infra*) [*Id.*], and (iii) Brahma’s mechanic’s lien foreclosure complaint was improperly filed in the NRS 108.2275 Special Proceeding [*Id.* p. 3].

This Court generally will not consider petitions for extraordinary relief when there is a “plain, speedy and adequate remedy in the ordinary course of law.” *A.J. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 394 P.3d 1209, 1212 (Nev. 2017), reh’g denied (July 27, 2017), reconsideration *en banc* denied (Dec. 19, 2017). In addition, when disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this Court. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

1. TSE’s Primary Position Is Directly Pending in the Federal Court Motions.

TSE's Petition argues that the Nye County Court should have dismissed Brahma's claims because "when a party removes claims to federal court, all state courts lose subject matter jurisdiction over those claims until the claims are remanded or resolved." [Petition pp. 4, 32 citing *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir. 1994)]. TSE has also sought relief from the Federal Court making these same arguments including: "This divestiture of jurisdiction applies to all state courts—not just the particular state court from which the case was removed." [Exhibit 12, *supra*, p. 7 citing *In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007); *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980)].

Brahma disputes all of TSE's positions as more fully set forth in its Opposition to the Motion for Injunction. [**Exhibit 19**]: By way of its *Colorado River* Abstention Motion, Brahma also is asking the Federal Court to abstain and permit the entirety of the parties' dispute be litigated in Nye County to promote "wise judicial administration and conserve judicial resources and comprehensive disposition of litigation." *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989). [See Exhibit 3, *supra*, p. 9].

In any event, because *Colorado River* abstention and the scope of removal divestiture are fundamentally issues of federal court jurisdiction, the Federal Court should consider those questions in the first instance. Having requested and received a stay from the Nye County Court "until such time as the federal court rules on the [Federal Court Motions]," TSE apparently agrees even though it nonetheless filed the present Petition. [See Exhibit 11, *supra*, p. 3].

2. Factual Disputes Must First Be Resolved.

In addition, as Brahma has argued to the Federal Court, important factual disputes must first be resolved before the Federal Court (or this Court) may reach a conclusion as to TSE's assertion that its removal of the Clark County Action

divested all state courts (e.g., the Nye County Court) of jurisdiction over the parties' dispute. See *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (the discretion of this court to entertain a petition for a writ of mandamus when important public interests are involved "will not be exercised unless legal, rather than factual, issues are presented.").

Brahma argues in Federal Court, as it will show here, the mere fact that one action has been removed does not necessarily divest all other courts of the same state of jurisdiction or permit the Federal Court to enjoin the state court proceedings. Specifically, under the Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, federal injunctions may only issue against state cases that are: (i) "later filed," *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997); (ii) "refiling of essentially the same suit in state court," *Lou v. Belzberg*, 834 F.2d 730, 740 (9th Cir. 1987), and (iii) filed "for the purpose of subverting federal removal jurisdiction." *Quackenbush*, 121 F.3d at 1378. 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* 512 F.2d at 901 (holding, "where no fraud is found, the second action brought in state court should not be enjoined").

Brahma has done nothing to suggest – and no court has ruled – that it has engaged in any "fraudulent" conduct. To the contrary, the Nye County Court has instead repeatedly adopted Brahma's positions, granted its motions to amend and consolidate, and approved the filing of its consolidated amended pleading in full view of and despite TSE's objections on the same jurisdictional grounds asserted here and in the Federal Court Motions. Indeed, Brahma's motivation was preservation of its right to pursue its contract claims against TSE in conjunction with its claim against the Surety Bond, which claims must be decided together. [See Exhibit 19, pp. 18-19]. Importantly, because there is no diversity as between Brahma

and Cobra, those Surety Bond claims may not be removed to Federal Court and, if tried separately, could lead to inconsistent results. Brahma's legitimate concerns about the preclusive effects of pre-existing state court litigation in a non-removed case constitutes proper advocacy, not subversion of federal jurisdiction. See *Quackenbush*, 121 F.3d at 1379 (denying injunction where the state court had jurisdiction over liquidation proceedings even though state-law issues implicated by those proceedings could have preclusive effect on otherwise available defenses in federal court).

A factual finding is also necessary to evaluate TSE's contention that the removed action was "filed first" when in fact the consolidated Nye County Action was commenced (by TSE) on June 1, 2018, more than one month before the Federal Action was filed (in Clark County, then removed). Accordingly, Brahma filed into an existing case (the NRS 108.2275 Special Proceeding), not a new state case. TSE's "first in time" argument fails because the Nye County Action was the first action commenced, not the Clark County Action or Federal Action.

3. TSE's Third Contention Is Moot.

Lastly, and as discussed above, because Brahma filed the Separate Action (Case No. 39799), which has been consolidated with the NRS 108.2275 Special Proceeding (Case No. 39348), exactly as the Mead Treatise opines should be done, the final grounds asserted by TSE in support of its Petition is moot because Brahma timely commenced an action on the Surety Bond, whether by way of the NRS 108.2275 Proceeding or the Separate Action.⁸ Further, and since these pleadings

⁸ Pursuant to NRS 108.2421(2)(a)(1), if an action by a lien claimant to foreclose upon a lien has been brought before the surety bond is recorded, the lien claimant "may amend the complaint to state a claim against the principal and the surety on the surety bond." Alternatively, under NRS 108.2421(2)(b)(1), if the action to foreclose is brought after the surety bond is recorded, "the lien claimant may bring

have now been consolidated and amended [see Exhibit 17, *supra*], TSE's continued reliance on a meaningless technicality is utterly futile. Even if it were not always so, it is definitely now a case of "no harm, no foul."

IV. CONCLUSION

Based on the foregoing, Brahma respectfully requests that the Court stay briefing for, and subsequent consideration of the Petition, until no earlier than 30 days after the Federal Court issues a written decision on the Federal Court Motions. Alternatively, and to the extent the Court denies the present Motion, Brahma respectfully requests that it be granted an extension of 30 days after any such denial in which to file its Answer to the Petition.

Respectfully submitted this 28th day of June, 2019.

PEEL BRIMLEY LLP

/s/ Eric B. Zimbelman

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an action against the principal and the surety not later than 9 months after the date that the lien claimant was served with notice of the recording of the surety bond."

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFCR 9(f), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 28th day of June, 2019, I caused the above and foregoing document, **MOTION TO STAY BRIEFING**, to be served as follows:

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

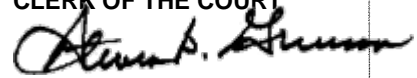
to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

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EXHIBIT 1

Notice of Removal to Federal Court



NOTC

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DISTRICT COURT

CLARK COUNTY, NEVADA

BRAHMA GROUP, INC., a Nevada corporation,

Plaintiff,

vs.

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

Defendants.

Case No. A-18-777815-B

Dept. No. 11

**NOTICE OF REMOVAL TO FEDERAL
COURT**

TO THE EIGHTH JUDICIAL DISTRICT COURT:

PLEASE TAKE NOTICE THAT a Notice of Removal of this action was filed by
Defendant Tonopah Solar Energy, LLC on September 10, 2018 in Nevada Federal District Court.
A copy of the Notice of Removal is attached to this Notice as **Exhibit 1**, and is served and filed
herewith.

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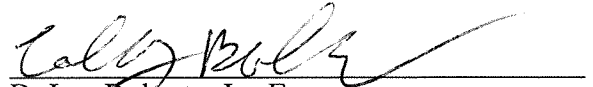
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1 NOTICE IS FURTHER GIVEN that the filing of the Notice of Removal, together with a
2 copy of the notice with the Clerk of this Court, effectuates the removal of this action in
3 accordance with 28 U.S.C. § 1446(d).

4 DATED this th10 day of September, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that on the 10 day of September, 2018, a true and correct copy of the foregoing **NOTICE TO STATE COURT OF REMOVAL TO FEDERAL COURT** was electronically filed and served on counsel through the Court's electronic service system pursuant to Administrative Order 14-2 and N.E.F.C.R. 9, via the electronic mail addresses noted below, unless service by another method is stated or noted:

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EXHIBIT 1

EXHIBIT 1

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada corporation,

Plaintiff,

vs.

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

Defendants.

Case No.

**DEFENDANT TONOPAH SOLAR
ENERGY, LLC'S NOTICE OF
REMOVAL**

PLEASE TAKE NOTICE that Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby removes this action from the Eighth Judicial District Court for Clark County, Nevada, Case No. A-18-777815-B, to the United States District Court for the District of Nevada. Federal jurisdiction exists over these proceedings pursuant to 28 U.S.C. §§ 1332, 1441, and 1446 because there is complete diversity between the parties and because the amount in controversy exceeds \$75,000.00. In support of removal, TSE states:

I. INTRODUCTION AND BACKGROUND

This action arises from a dispute between Plaintiff BRAHMA GROUP, INC. ("Brahma") and Defendant TSE regarding a services agreement whereby Brahma agreed to perform certain

work at the Crescent Dunes Solar Energy Project for TSE. *See* Plaintiff's Complaint at ¶¶ 5–6, attached hereto as **Exhibit 1**. Plaintiff filed its Complaint on July 17, 2018 in the Eighth Judicial District Court, Clark County, Nevada, case number A-18-777815-B. Plaintiff alleges causes of action for (1) Breach of Contract; (2) Breach of Implied Covenant of Good Faith and Fair Dealing; (3) Unjust Enrichment; and (4) Violation of NRS 624. Plaintiff alleges it is owed an amount in excess of \$11,900,000.00. *See* Plaintiff's Complaint at ¶ 11.

As more fully set forth below, this case is properly removed to this Court pursuant to 28 U.S.C. § 1441 because TSE has satisfied the procedural requirements for removal and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a).

II. REMOVAL IS PROPER IN THIS CASE

A. Complete Diversity Exists Between Plaintiff and Defendant.

Plaintiff is a Nevada corporation with its principal place of business in Utah, and for jurisdictional purposes, is a citizen of both Nevada and Utah. *See* U.S.C. § 1332(c)(1) (“a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business”).

Defendant TSE is a limited liability company. Tonopah Solar Energy Holdings II, LLC (“TSEH II”) is the sole member of TSE. TSEH II's members are Capital One, National Association (“Capital One”), and Tonopah Solar Energy Holdings I, LLC (“TSEH I”). Capital One is a national banking association with its main office located in McClean, Virginia, making it a citizen of Virginia.¹ TSEH I's members are Tonopah Solar I, LLC and Tonopah Solar Investments, LLC. Tonopah Solar I, LLC's members are Banco Santander, S.A and Inversiones Capital Global, S.A. Banco Santander, S.A. is an international banking institution with its

¹ *See* 28 U.S.C. § 1348 (“All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.”); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 303, 126 S. Ct. 941, 942, 163 L. Ed. 2d 797 (2006) (holding that a national banking association is only a citizen of the state in which its main office is located rather than a citizen of every state where it operates or has a branch office).





headquarters and principal place of business in Madrid, Spain, making it a citizen of Spain. Inversiones Capital Global, S.A. is a subsidiary of Banco Santander, S.A. with its principal place of business also in Spain, making it a citizen of Spain. Tonopah Solar Investments, LLC's members are SolarReserve CSP Holdings, LLC and Cobra Energy Investment, LLC. SolarReserve CSP Holdings, LLC's sole member is SolarReserve CSP Finance, LLC. SolarReserve CSP Finance, LLC's sole member is SolarReserve, LLC. The sole member of SolarReserve, LLC is SolarReserve, Inc., which is a corporation formed in Delaware with its principal place of business in Santa Monica, California, making it a citizen of Delaware and California. Cobra Energy Investment, LLC's sole member is Cobra Energy Investment Finance, LLC. Cobra Energy Investment Finance, LLC's sole member is Cobra Industrial Services, Inc., which is a Delaware corporation with its principal place of business in Texas, making it a citizen of Delaware and Texas.

In sum, TSE is a citizen of Spain, Delaware, California, Texas, and Virginia for purposes of diversity jurisdiction. *See Johnson v. Columbia Properties Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("an LLC is a citizen of every state of which its owners/members are citizens."). Since Plaintiff is not citizen of any the states Defendant is a citizen of, complete diversity exists.

B. The Amount in Controversy Exceeds \$75,000.00.

A preponderance of evidence supports that the amount in controversy exceeds \$75,000. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-404 (9th Cir. 1996); *Guglielmino v. McKee Foods Corp.*, 2007 WL 2916193 (9th Cir. Oct. 9, 2007). Here, Plaintiff expressly alleges it is owed an amount in excess of \$11,900,000.00 for work performed. *See Plaintiff's Complaint* ¶ 11, attached hereto as **Exhibit 1**. Based on these allegations, it is clear Plaintiff's claimed damages are in excess of \$75,000. *See Guglielmino*, 2007 WL 2916193, slip op. at n.5. Accordingly, the jurisdictional amount is satisfied in this case.

III. TSE HAS SATISFIED THE PROCEDURAL REQUIREMENT FOR REMOVAL

This notice is timely filed within 30 days of service of the Complaint and summons. 28 U.S.C. § 1446(b). Specifically, the Complaint was filed July 17, 2018, and Counsel for TSE accepted service on behalf of TSE on August 21, 2018.

Venue, for removal purposes, properly lies in the United States District Court for the District of Nevada pursuant to 28 U.S.C. § 1446(a) because it encompasses the Eighth Judicial District Court, where this action was originally brought.

TSE will file a copy of this Notice of Removal with the Clerk of the Eighth Judicial District Court and will serve a copy on Plaintiff's counsel as required by 28 U.S.C. § 1446(d).

Pursuant to 28 U.S.C. § 1446(a), a copy of all process, pleadings and orders that were filed in the state court action are attached hereto as **Exhibit 1**.

IV. CONCLUSION

For all the above reasons, it is proper for TSE to remove this action from the Eighth Judicial District Court for Clark County, Nevada to the United States District Court for the District of Nevada.

DATED this 10th day of September, 2018.

/s/ Colby Balkenbush

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



CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2018, a true and correct copy of the foregoing **DEFENDANT TONOPAH SOLAR ENERGY, LLC'S NOTICE OF REMOVAL** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

Richard L. Peel, Esq.
Eric B. Zimbelman, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
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Attorneys for Plaintiff Brahma Group, Inc.

/s/ Cynthia S. Bowman

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

WEINBERG WHEELER
HUDGINS GUNN & DIAL



EXHIBIT 2

**Defendant Tonopah's Answer to Brahma's
Complaint and Counterclaim Against Brahma**

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7

8 *Attorneys for Defendant/Counterclaimant*
Tonopah Solar Energy, LLC
9

10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA

12 BRAHMA GROUP, INC., a Nevada corporation,
13 Plaintiff,
14 vs.
15 TONOPAH SOLAR ENERGY, LLC, a Delaware
16 limited liability company,
17 Defendant.

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

DEFENDANT TONOPAH SOLAR
ENERGY, LLC'S ANSWER TO BRAHMA
GROUP, INC'S COMPLAINT AND
COUNTERCLAIM AGAINST BRAHMA

18
19 Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through
20 its attorneys of the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC, hereby
21 submits its Answer to Plaintiff's Complaint ("Complaint").

22 **GENERAL ALLEGATIONS**

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

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



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

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

FIRST CAUSE OF ACTION

(Breach of Contract)

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

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

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

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

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

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

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

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

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SECOND CAUSE OF ACTION

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

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

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

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

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

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

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

THIRD CAUSE OF ACTION

(Unjust Enrichment)

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

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

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION

(Violation of NRS 624)

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

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

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

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

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

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

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

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AFFIRMATIVE DEFENSES

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

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

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

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

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





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

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

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

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

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

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

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

28 ///



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

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

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

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

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

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

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

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

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

TSE'S COUNTERCLAIM

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

JURISDICTION AND PARTIES

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

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





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

8 3. Jurisdiction is proper in this Court under 28 U.S.C. § 1332(a) and 28 U.S.C. §
9 1441 because there is complete diversity of citizenship between Plaintiff and Defendant, and
10 the amount in controversy, exclusive of interest, costs, and attorneys' fees, exceeds the sum of
11 \$75,000.00.

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

14 GENERAL ALLEGATIONS

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

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

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

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



1 Energy.

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

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

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

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

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

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

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

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

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

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

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

WEINBERG WHEELER
HUDGINS GUNN & DIAL



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

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

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

23. BGI billing TSE for improper equipment charges.

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

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

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

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

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

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

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

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

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



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

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

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

12 **FIRST CLAIM FOR RELIEF**

13 **(Breach of Contract)**

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

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

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

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

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

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

27 ///

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SECOND CLAIM FOR RELIEF

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

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

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

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

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

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

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

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

THIRD CLAIM FOR RELIEF

(Declaratory Relief)

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

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





1 charges that are not supported by backup documentation.

2 50. The actions of BGI are unilateral and unauthorized.

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

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

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

9 **FOURTH CLAIM FOR RELIEF**

10 **(Unjust Enrichment/Quantum Meruit)**

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

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

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

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

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

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

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

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

26 ///

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28 ///

FIFTH CLAIM FOR RELIEF**(Fraudulent/Intentional Misrepresentation)**

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

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

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

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

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

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

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





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

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

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

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

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

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

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

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

///

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

(Negligent Misrepresentation)

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

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

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

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

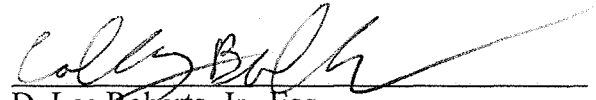
WHEREFORE, TSE prays for relief as follows:

1. Dismissal of Plaintiff's Complaint with prejudice;
2. For judgment in favor of TSE and against BGI on all claims asserted herein;
3. For actual, compensatory, and consequential damages in an amount in excess of \$75,000.00;
4. For pre- and post-judgment interest on any money judgment;
5. For an award of attorneys' fees and court costs incurred herein;
6. For punitive damages under NRS 42.005 for BGI's malice/implied malice and

conscious disregard of TSE's rights; and

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

DATED this 17th day of September 2018.



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*Attorneys for Defendant/Counterclaimant
Tonopah Solar Energy, LLC*

WEINBERG WHEELER
HUDGINS GUNN & DIAL



CERTIFICATE OF SERVICE

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

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An employee of WEINBERG, WHEELER, HUDGINS
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EXHIBIT 3

Brahma's Motion for Stay, or in the Alternative, Motion to Amend Complaint

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BRAHMA GROUP, INC.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRAHMA GROUP, INC., a Nevada Corporation,

Plaintiff,

vs.

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

Defendants.

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

Counterclaimant,

vs.

BRAHMA GROUP, INC., a Nevada corporation

Counterdefendant.

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

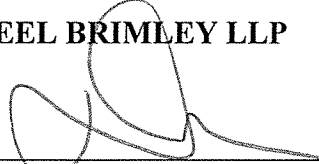
**BRAHMA GROUP, INC.'S MOTION
FOR STAY, OR IN THE
ALTERNATIVE, MOTION TO
AMEND COMPLAINT**

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

This Motion 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 16 day of October, 2018.

PEEL BRIMLEY LLP


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

I. INTRODUCTION

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

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

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

II. STATEMENT OF FACTS

A. The Work of Improvement.

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company ("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,¹ whereby Brahma agreed to provide on a time and material basis, certain work, materials, and equipment (collectively, the "Work") for the Work of Improvement. Brahma provided the Work for the Work of Improvement and TSE has failed to fully pay Brahma for such Work.

B. The Brahma Lien 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.²

Thereafter, 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. 899351.³ Brahma's Original Lien and the amendments and restatements thereto, including the Fourth Amended Lien are referred to collectively herein as the "Brahma Lien."

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

¹ A copy of the Agreement is attached hereto as Exhibit 1.

² A copy of the Original Lien is attached hereto as Exhibit 2.

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

⁴ An affiliate of Cobra possesses an indirect ownership interest in TSE.

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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, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal ("Principal"), and (iii) was in the amount of \$10,767,580.00.⁵

At Brahma's request and in compliance with Nevada law, Cobra caused the Penal Sum of the Surety Bond to be increased to \$19,289,366.61 or 1.5 times the amount of Brahma's Fourth Amended Lien by causing a Rider to the Surety Bond (the "Brahma Surety Bond Rider") to be recorded on October 9, 2018 with the Nye County Recorder's Office as Document No. 900303.⁶ The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as the "Brahma Surety Bond."

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

On May 15, 2018, H & E Equipment Services Inc., a Delaware Corporation and 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 (the "H&E Lien").

To replace the Work of Improvement as security for the H&E Lien, 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"). The H&E Surety Bond (i) was issued by American Home Assurance Company, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal ("Principal"), and (iii) is in the amount of \$716,741.10.⁷

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

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⁵ A true and correct copy of the Brahma Surety Bond is attached hereto as **Exhibit 7**.

⁶ A true and correct copy of the Brahma Surety Bond Rider is attached hereto as **Exhibit 8**.

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

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

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

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

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

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

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⁸ A true and correct copy of TSE’s Motion to Expunge is attached hereto as **Exhibit 10**.

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

¹⁰ A true and correct copy of Brahma’s Complaint filed in the Clark County Action is attached hereto as **Exhibit 11**.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 **III. LEGAL ARGUMENT**

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

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

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

28 ¹² 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"

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

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

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

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

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

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

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

///

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

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

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

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

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

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

27 ///

28 ///

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

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

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

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

3. *The Inconvenience of the Federal Forum.*

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

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

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

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 can find themselves in when an owner fails to pay for work, materials and equipment furnished to a construction project. In 2003 and 2005, and in response to the Venetian lien litigation, 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 108.239(8) provides:

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

- (a) the court **shall give preference** in setting a date for the trial **of an action brought pursuant to this section**; and
- (b) if a lien action is designated as complex by the court, the court may take into account the rights and claims of all lien claimants in setting a date for the preferential trial.

NRS 108.239(7) provides:

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

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

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

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

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

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

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

28 ///

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4. *Desirability of Avoiding Piecemeal Litigation*

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

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

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

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

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

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

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

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

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

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

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

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

25 ///

26 ///

27 ///

28 _____
¹⁶ A true and correct copy of TSE’s October 15, 2018 Letter is attached hereto as **Exhibit 14**.

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

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

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

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

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

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

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

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

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

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

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

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

27 *I. No Undue Delay*

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

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

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

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

8 **IV. CONCLUSION**

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

13 Dated this 16 day of October, 2018.

14 **PEEL BRIMLEY LLP**

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EXHIBIT 4

Tonopah's Motion for an Injunction and to Strike

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada corporation,

Plaintiff,

vs.

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

Defendant.

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

**TONOPAH SOLAR ENERGY, LLC'S
MOTION FOR AN INJUNCTION AND
TO STRIKE**

ORAL ARGUMENT REQUESTED

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

Counterclaimant,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Counterdefendant.



1 Tonopah Solar Energy, LLC (“TSE”), by and through its undersigned counsel, moves for
2 two forms of relief to remedy Brahma Group, Inc.’s (“Brahma”) forum shopping efforts: (1) an
3 injunction enjoining Brahma from prosecuting claims in a later filed state court action and (2) the
4 striking of Brahma’s first amended complaint in this action. As explained in the following
5 Memorandum of Points and Authorities, both forms of relief, as requested herein, are warranted.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 This motion seeks two forms of relief pertaining to Brahma’s willful attempt to subvert
9 this Court’s jurisdiction over the claims at issue in this case through forum shopping.

10 First, this Court should enjoin Brahma from prosecuting claims in a later filed state court
11 action. Courts can enjoin a state court action filed for the purposes of subverting federal removal
12 jurisdiction. After TSE removed this action to this Court, Brahma dropped certain claims from
13 this action via amendment and refiled the same claims in a later filed state court action. Courts
14 have recognized such claim splitting schemes as a quintessential attempt to subvert federal
15 removal jurisdiction. Therefore, the injunction requested herein is warranted.

16 Second, this Court should strike Brahma’s amendment to its complaint in this action.
17 Courts can strike amendments to complaints that attempt to deprive the court of jurisdiction over
18 a removed action. By amending its complaint in this action as part of its claim splitting scheme,
19 Brahma attempted to deprive this Court of jurisdiction over this removed action. Thus,
20 Brahma’s amendment should be stricken.

21 **II. STATEMENT OF PERTINENT FACTS**

22 This case concerns disputes over the performance of and payments for construction work
23 on the Crescent Dunes Solar Energy Facility (“Project”). The Project is a solar energy project
24 located outside Tonopah, Nevada designed to produce 110 megawatts of electricity. TSE is the
25 project developer. TSE entered into an agreement as of February 1, 2017 with Brahma
26 (“Agreement”) pertaining to the Project.

27 The Agreement governs the relationship between TSE and Brahma. Under the
28 Agreement, TSE agreed to issue work orders to Brahma describing the work to be performed by



1 Brahma and the hourly rates Brahma could charge for the work. Notably, the Agreement also
 2 featured a venue selection clause, under which Brahma agreed to “submit[] to the jurisdiction of
 3 the Courts in such State, with a venue in Las Vegas, Nevada, for any action or proceeding
 4 directly or indirectly arising out of this Agreement.” *See* Agreement, attached hereto as **Exhibit**
 5 **1**, (Section 24).

6 As explained in more detail below, disputes arose concerning performance under the
 7 Agreement. These disputes led to the recording of a mechanic’s lien and the needlessly
 8 complicated procedural actions taken by Brahma, which are the focus of this motion.

9 **A. TSE moves to expunge a mechanic’s lien filed by Brahma, which features**
 10 **multiple amendments, and results in two Nye County Actions**

11 On April 9, 2018, Brahma recorded a mechanic’s lien concerning the Project. *See* Notice
 12 of Lien in the Official Records of Nye County, Nevada, as Document No. 890822, attached
 13 hereto **Exhibit 2**. On April 16, 2018, Brahma amended the lien. *See* Notice of First Amended
 14 and Restated Lien in the Official Records of Nye County, Nevada, as Document No. 891073,
 15 attached hereto as **Exhibit 3**. On April 18, 2018, Brahma re-recorded the first amended lien.
 16 *See* Notice of First Amended and Restate Lien in the Official Records of Nye County, Nevada,
 17 as Document No. 891507, attached hereto as **Exhibit 4**.

18 On April 17, 2018, Brahma filed a complaint in the Fifth Judicial District Court, Nye
 19 County, Nevada, Case Number 39237 (“Nye County Action”). *See* Complaint, attached hereto
 20 as **Exhibit 5**. The complaint asserted five claims against TSE: (1) breach of the Agreement, (2)
 21 breach of the implied covenant of good faith and fair dealing, (3) unjust enrichment, (4) violation
 22 of Nevada’s prompt payment act, and (5) foreclosure of the mechanic’s lien. *Id.*

23 On, April 24, 2018, TSE filed a motion to expunge the mechanic’s lien under NRS
 24 108.2275(1), which provides that “[t]he debtor of the lien claimant . . . may apply by motion to
 25 the district court for the county where the property or some part thereof is located for an order
 26 directing the lien claimant to appear before the court to show cause why the relief requested
 27 should not be granted.” *See* First Motion to Expunge, attached hereto as **Exhibit 6**. TSE filed
 28 the motion into the Nye County Action in accordance with NRS 108.2275(5), which provides



1 that “[i]f an action has been filed to foreclose the notice of lien before the [motion] was filed
2 pursuant to this section, the [motion] must be made a part of the action to foreclose the notice of
3 lien.”

4 Due to defects with the lien, on the same day that TSE filed the motion to expunge, April
5 24, 2018, Brahma voluntarily dismissed the entire complaint in the Nye County Action without
6 prejudice under Nevada Rule Civil Procedure 41(a)(1)(A)(i). Notice of Voluntary Dismissal,
7 attached hereto as **Exhibit 7**. That same day, Brahma also recorded a second amendment to the
8 lien. *See* Notice of Second Amended and Restated Lien in the Official Records of Nye County,
9 Nevada, as Document No. 891766, attached hereto as **Exhibit 8**. As a result, TSE withdrew its
10 motion to expunge.

11 On June 11, 2018, TSE filed a second motion to expunge the lien under NRS
12 108.2275(1). *See* Second Motion to Expunge, attached hereto as **Exhibit 9**. As there was no
13 complaint pending, this second motion resulted in the opening of a special proceeding in the
14 Fifth Judicial District Court, Nye County Nevada in accordance with NRS 108.2275(5), which
15 provides that “[i]f, at the time the [motion] is filed, an action to foreclose the notice of lien **has**
16 **not been filed**, the clerk of the court shall assign a number to the [motion] and obtain from the
17 [moving party] a filing fee of \$85.” (“Nye County Special Proceeding”) (emphasis added). *See*
18 *id.* The Nye County court would eventually hear arguments on the motion on September 12,
19 2018.

20 **B. Brahma files a complaint against TSE in the Eighth Judicial District Court,**
21 **Clark County, Nevada**

22 While the motion to expunge in the Nye County Special Proceeding was waiting to be
23 heard, on July 17, 2018, Brahma filed a complaint in the Eighth Judicial District Court, Clark
24 County, Nevada against TSE (“Clark County Action”) in accordance with the Agreement’s
25 venue selection clause. *See* ECF No. 1-1. The complaint in the Clark County Action asserted
26 the same claims against TSE as the previously dismissed complaint, with the exception of the
27 lien foreclosure claim: (1) breach of the Agreement, (2) breach of the implied covenant of good
28

1 faith and fair dealing, (3) unjust enrichment, (4) and violation of Nevada's prompt payment act.
2 *See id.*

3 Two days later, on July 19, 2018, Brahma recorded a third amendment to the lien. *See*
4 Third Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada,
5 as Document No. 896269, attached hereto as **Exhibit 10**.

6 On September 6, 2018, Cobra Thermosolar Plant, Inc. ("Cobra")¹ recorded a bond issued
7 by American Home Assurance Company, which released Brahma's mechanic's lien pursuant to
8 NRS 108.2415(6). *See* NRS 108.2415; Surety Bond 854481 Posted to Release Lien with Power
9 of Attorney in the Official Records of Nye County, Nevada, as Document No. 898974, attached
10 hereto as **Exhibit 11**.

11 **C. TSE removes the Clark County Action to this Court and files a counterclaim.**

12 On September 10, 2018, TSE timely removed the Clark County Action to this Court. *See*
13 ECF No. 1. Thus, the Clark County Action converted to this action—the Federal Court Action.

14 Meanwhile, back in Nye County, on September 12, 2018, Judge Elliott heard and denied
15 the second motion to expunge filed by TSE.

16 Two days after the motion was denied, on September 14, 2018, Brahma recorded a fourth
17 amendment to the lien. *See* Fourth Amended and/or Restated Notice of Lien in the Official
18 Records of Nye County, Nevada as Document No. 899351, attached hereto as **Exhibit 12**. Due
19 to Brahma's mechanic's lien being increased by this amendment, Cobra increased the amount of
20 its surety bond to over \$19 million, which is 1.5 times the amount of Brahma's lien. Due to the
21 posting of this bond by Cobra, Brahma's mechanic's lien no longer attaches to TSE's property in
22 Nye County. *See* NRS 108.2415(6).

23 Three days later, on September 17, 2018, TSE filed an answer and counterclaim against
24 Brahma in the Federal Court Action. *See* ECF No. 4. The counterclaim asserted six claims
25 against Brahma: (1) breach of the Agreement, (2) breach of the implied covenant of good faith
26

27 ¹ Cobra was the original prime contractor that TSE had contracted with to complete the Project.
28 It obtained the bond to release Brahma's lien pursuant to its contractual relationship with TSE.





and fair dealing, (3) declaratory relief, (4) unjust enrichment/quantum meruit, (5) fraudulent misrepresentation, and (6) negligent misrepresentation. *Id.*

D. Brahma attempts to subvert this Court’s removal jurisdiction over the claims in the Federal Court Action

On September 20, 2018, Brahma filed a Lien Foreclosure Complaint in the Nye County Special Proceeding, despite the fact that the Nye County Special Proceeding was a special proceeding limited to TSE’s motion to expunge. *See* Mechanic’s Lien Foreclosure Complaint, attached hereto as **Exhibit 13**. In the complaint, Brahma asserted a single claim: foreclosure of notice of lien against TSE. *Id.*

Five days later, on September 25, 2018, Brahma initiated its claim splitting scheme in an effort to get out of federal court. Brahma filed a first amended complaint in the Federal Court Action. *See* ECF No. 8. In this first amended complaint, Brahma asserted a single claim: unjust enrichment against TSE. *See id.* As a result of the amendment, Brahma dropped its three other previously asserted claims: (1) breach of the Agreement, (2) breach of the implied covenant of good faith and fair dealing, and (3) violation of Nevada’s prompt payment act. *See id.*

At the same time, Brahma filed a first amended counter-complaint and third-party complaint in the Nye County Special Proceeding, again, despite the fact that the Nye County Special Proceeding was a special proceeding limited to TSE’s motion to expunge. *See* First Amended Counter-Complaint and Third-Party Complaint, attached hereto as **Exhibit 14**. This first amended counter-complaint asserted four claims against TSE—three of which were the same three claims that Brahma had just dropped from the Federal Court Action (i.e., the copycat claims)—(1) breach of the Agreement, (2) breach of the implied covenant of good faith and fair dealing, (3) foreclosure of notice of lien, and (4) violation of Nevada’s prompt payment act. *Id.*² The third-party complaint asserted one claim against Cobra and American Home Assurance Company: claim on the surety bond. *Id.*

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”).

1 On October 9, 2018, TSE answered Brahma's first amended complaint in the Federal
2 Court Action. *See* ECF No. 11.

3 On October 8, 2018, TSE's counsel sent a letter to Brahma's counsel explaining that its
4 claim splitting scheme ran astray of state and federal law. *See* Letter, attached hereto as **Exhibit**
5 **15**. In response, Brahma stood by its actions. *See* Response to Letter, attached hereto as **Exhibit**
6 **16**.³

7 Filed concurrently with this motion, on October 18, 2018, TSE moved in the Nye County
8 Special Proceeding to dismiss Brahma's first amended counter-complaint, or, in the alternative,
9 to stay the action until this Court resolves this motion. Among other things, that motion argues
10 that the Nye County District Court should dismiss Brahma's first amended counter-complaint as

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14 ³ On October 16, 2018, Brahma filed a Motion for Stay, or in the alternative, Motion to Amend
15 Complaint in this Court, *see* ECF No. 13, in an apparent effort to justify its forum shopping
16 efforts. The timing of this filing warrants discussion. TSE wrote to Brahma informing Brahma
17 that its forum shopping efforts ran astray of federal and state law and revealing an intent to move
18 to remedy those efforts. Brahma requested an extension of time to respond to the letter, which
19 TSE granted as a courtesy. Brahma apparently used that additional time to draft the motion for
stay and attempt to "get out in front" of their forum shopping efforts. Such gamesmanship is
evidenced by the fact that Brahma responded to the letter and filed the motion for stay
simultaneously after 9:00 p.m. on October 16, 2018. Yet, Brahma's motion for stay serves as
further evidence of its forum shopping efforts, as it confirms Brahma's intent to move the
copycat claims out of this Court to the Nye County Special Proceeding in an improper manner
(i.e. without seeking a remand from this Court).

20 Indeed, the motion for stay is just one more frivolous filing by Brahma. By way of example, in
21 the motion for stay, Brahma contends that TSE has engaged in forum shopping by properly
22 removing the Clark County Action to this Court "to avoid the effects of the adverse ruling by
23 Judge Elliot." ECF No. 13 at 16:23. While it is remarkable to assert that a proper removal
24 constitutes forum shopping, it is more remarkable to assert that TSE engaged in forum shopping
25 to avoid the effects of a ruling that had not yet occurred at the time of removal. TSE removed
26 this action on **September 10, 2018**. Judge Elliott ruled on the motion to expunge on **September**
27 **12, 2018**. Judge Elliott was able to rule after removal because the Nye special lien expungement
28 proceeding pending before Judge Elliott was never removed. This action now pending in federal
court was removed from the Clark County District Court and Judge Gonzales. It was Brahma
who chose to initiate a new lawsuit in Clark County on their contract claims even though the
special proceeding to expunge was already pending in Nye County before Judge Elliott. The
removed action was never before Judge Elliott and he never had jurisdiction of the removed
claims. This is just one example of the frivolous assertions and gross mischaracterizations that
run throughout Brahma's motion to stay. TSE will respond to the motion for stay in a separate
filing, but it is safe to say that its frivolous assertions and mischaracterizations should not impact
this motion.





TSE's removal of this action deprived the state court of subject matter jurisdiction and because Brahma has engaged in transparent forum shopping.⁴

III. LEGAL ARGUMENT

By dropping its claims in the Federal Court Action and asserting the same claims in the Nye County Special Proceeding, Brahma has engaged in the classic forum shopping scheme of claim splitting. Case law has developed to provide specific remedies for such unjustified behavior. As explained below, this Court should enjoin Brahma from prosecuting the copycat claims asserted in its first amended counter-complaint in the Nye County Special Proceeding and strike Brahma's amendment of its complaint in the Federal Court Action.

A. **This Court should enjoin Brahma from prosecuting its copycat claims in the first amended counter-complaint in the Nye County Special Proceeding because Brahma brought those claims to subvert this Court's removal jurisdiction**

The Ninth Circuit has held that federal courts can enjoin state court actions that were filed for the purposes of subverting federal removal jurisdiction under the All Writs Act. The facts outlined above demonstrate that Brahma amended its complaint in this action and filed the first amended counter-complaint in the Nye County Special Proceeding in order to subvert this Court's removal jurisdiction over the copycat claims.

1. **Federal courts can enjoin state court actions that were filed for the purposes of subverting federal removal jurisdiction under the All Writs Act**

The All Writs Act, 28 U.S.C. § 1651, confers a broad grant of authority to federal courts. *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1098 (9th Cir. 2008). It provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and

⁴ TSE has brought the instant motion on a non-emergency basis. TSE does not believe that emergency status is warranted at this time because TSE has moved to, among other relief, dismiss/stay the inappropriate claims asserted by Brahma in the Nye County Special Proceeding until this Court decides this motion. If, however, Nye County denies the stay and that case proceeds to discovery, TSE reserves the right to modify this motion to emergency status in order to limit the time in which TSE will have to incur costs in both this action and the Nye County Special Proceeding.



principles of law.” *Id.* (quoting 28 U.S.C. § 1651(a)). Under this authority, courts may issue injunctions to enjoin state court proceedings. *See Sandpiper Vill. Condo. Ass'n., Inc. v. Louisiana-Pac. Corp.*, 428 F.3d 831, 842 (9th Cir. 2005); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

The Anti-Injunction Act, 28 U.S.C. § 2283, however, restricts the authority conferred on federal courts by the All Writs Act, by generally prohibiting federal courts from enjoining ongoing state court proceedings. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Negrete*, 523 F.3d at 1098; *Sandpiper*, 428 F.3d at 842. The Act has a simple purpose: “prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances.” *Sandpiper*, 428 F.3d at 842.

This restriction—prohibiting federal courts from enjoining ongoing state court proceedings—is subject to three exceptions. 28 U.S.C. § 2283; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977). A federal court may enjoin ongoing state court proceedings if the injunction is (1) expressly authorized by an Act of Congress, (2) necessary in aid of jurisdiction, or (3) necessary to protect or effectuate judgments. 28 U.S.C. § 2283; *Vendo*, 433 U.S. at 630; *Chick Kam Choo*, 486 U.S. at 146. An injunction under one of these exceptions requires “a strong and unequivocal showing” that such relief is necessary. *Sandpiper*, 428 F.3d at 842.

Only the first exception—expressly authorized by an Act of Congress—is at issue here. The removal statute, 28 U.S.C. § 1446, constitutes such an act, as it “provides express authorization to enjoin state proceedings in removed cases.” *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997) (citing *Mitchum v. Foster*, 407 U.S. 225, 237 (1972)).

As a result, the Ninth Circuit has held that the removal statute authorizes federal courts to “enjoin later filed state cases that were filed for the purpose of subverting federal removal jurisdiction.” *Quackenbush*, 121 F.3d at 1378 (quoting *Kansas Pub. Employees Retirement Sys. (“KPERs”) v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063, 1068 (8th Cir. 1996)). This makes sense, as “[i]t would be of little value to enjoin continuance of a state case after removal and then permit the refile of essentially the same suit in state court.” *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987). Other circuits agree. *See Davis Int’l, LLC v. New Start Group Corp.*, 488



1 F.3d 597 (3d Cir. 2007) (providing that “[c]ourts considering the question have unanimously
2 held that a plaintiff’s fraudulent attempt to subvert the removal statute implicates the ‘expressly
3 authorized’ exception to the Anti-Injunction Act and may warrant the granting of an anti-suit
4 injunction.”); *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 251 (4th Cir. 2013) (providing that
5 “courts have concluded that, under certain circumstances, [the removal statute] also authorizes
6 injunctions against separate ‘copycat’ actions—actions involving essentially the same parties and
7 claims that are filed in state court after removal of the original action.”).

8 To determine whether to issue an injunction enjoining a later filed state court “copycat”
9 action, the focus is on whether there is evidence of an attempt to “subvert the rulings and
10 jurisdiction of the district court.” *Quackenbush*, 121 F.3d at 1379. In *Quackenbush*, the Ninth
11 Circuit concluded that the district court did not abuse its discretion by declining to enjoin a later
12 filed state court action because the later filed state court action was “entirely distinct” from the
13 federal court action. 121 F.3d at 1378.

14 Yet, courts across the country have recognized that the splitting of claims between a
15 federal court action and a later filed state court action, such as that done by Brahma here, serves
16 as evidence of an attempt to subvert federal removal jurisdiction, and thus warrants an
17 injunction. See *KPERS*, 77 F.3d at 1068; *Faye v. High’s of Baltimore*, 541 F. Supp. 2d 752, 760
18 (D. Md. 2008); *Davis Int’l, LLC v. New Start Grp. Corp.*, No. CIV.A. 04-1482GMS, 2009 WL
19 1321900, at *3 (D. Del. May 13, 2009), *aff’d*, 367 F. App’x 334 (3d Cir. 2010); *Cross v. City of*
20 *Liscomb*, No. 4:03-CV-30172, 2004 WL 840274, at *4 (S.D. Iowa Mar. 2, 2004).

21 In *KPERS*, the Eighth Circuit affirmed the issuance of an injunction based on a claim
22 splitting scheme. *Id.* at 1071. There, the district court granted an injunction under the All Writs
23 Act enjoining the plaintiff from pursuing a later filed state court action against a defendant. 77
24 F.3d at 1067. On appeal, the plaintiff argued that the Anti-Injunction Act barred the injunction.
25 *Id.* at 1068. The Eighth Circuit reasoned, however, that substantial evidence supported the
26 district court’s finding that the later filed state court action “was substantially identical to the old
27 [federal court action] and that [the plaintiff] had merely tried to carve up what was one case into
28 separate cases with separate claims, all leading to a subversion of [a defendant’s] right to remove



1 the entire case.” *Id.* at 1070 (internal quotation marks omitted). As a result, the Eighth Circuit
2 concluded that the injunction enjoining the plaintiff from prosecuting its later filed state court
3 action was “expressly authorized” by Congress and permitted under the Anti-Injunction Act. *Id.*
4 at 1071.

5 *Faye* is particularly instructive when it comes to a claim splitting scheme. There, a
6 plaintiff filed a complaint in state court. *Faye*, 541 F. Supp. 2d at 754. A defendant removed the
7 case to federal court. *Id.* The plaintiff then moved for leave to amend the complaint. *Id.* at 755.
8 The proposed amended complaint eliminated certain claims and re-styled the remaining claims
9 as a Collective Action. *Id.* While the motion for leave was pending, the plaintiff filed a second
10 lawsuit against the same defendant in state court. *Id.* In the state court complaint, the plaintiff
11 alleged the same claims as the previously removed complaint. *Id.* The state court complaint was
12 served after the federal court granted the plaintiff leave to amend the complaint. *Id.* When faced
13 with these facts, the district court concluded “I have no doubt that the second-filed suit
14 constituted an attempt to subvert this Court’s supplemental jurisdiction and defendant’s right to
15 removal.” *Id.* at 760. Thus, the court enjoined the plaintiff from prosecuting the later filed state
16 court action. *Id.*

17 In *Davis*, the plaintiffs filed a complaint in state court. 2009 WL 1321900, at *1. The
18 defendants removed the action and filed a motion to dismiss. *Id.* While the motion was pending,
19 the plaintiffs, on the same day, filed an amended complaint, which dropped certain claims from
20 the removed complaint, and asserted the same dropped claims in a new state court action. *Id.*
21 The district court recognized that the plaintiffs were attempting to subvert federal removal
22 jurisdiction by splitting their claims, and, thus, enjoined them from proceeding with the later
23 filed state court action. *Id.*

24 In *Cross*, the plaintiff filed a complaint in state court. 2004 WL 840274, at *1. The
25 defendant removed the action to federal court. *Id.* The plaintiff then voluntarily dismissed
26 certain claims and filed a complaint in a new state court action asserting the same dropped
27 claims. *Id.* The court recognized the plaintiff’s attempt at subverting removal jurisdiction:
28

1 When [the plaintiff's] motion to stay this [federal] lawsuit in favor
2 of the state lawsuit is considered [the plaintiff's] purpose to subvert
3 removal jurisdiction is unmistakable. Her plan is to split her causes
4 of action between state and federal courts, proceed to judgment
5 first on the state claims while putting the federal action on the back
6 burner in the hope the result will trump the federal action,
7 reserving the federal option if in her interest to proceed later.
8 Defendants' right to remove the first state case would thus be
9 eviscerated. The Court finds the subsequent state action is
10 substantially identical to this action and that it was filed to subvert
11 removal to this Court of the state claims in the earlier state case.

12 *Id.* at *4. Thus, the court enjoined the plaintiff from prosecuting the later filed state court action.

13 *Id.*

14 **2. Brahma executed a claim splitting scheme in order to subvert this**
15 **Court's removal jurisdiction over the copycat claims**

16 There is no doubt that Brahma has engaged in a classic claim splitting scheme in order to
17 subvert this Court's removal jurisdiction. Indeed, Brahma's actions align with the actions of the
18 plaintiffs in *KPERS*, *Faye*, *Davis*, and *Cross*, all of which warranted injunctive relief.

19 Based on the timeline of Brahma's actions, it is clear that Brahma attempted to subvert
20 this Court's removal jurisdiction over the copycat claims. Brahma recorded a mechanic's lien.
21 TSE then moved to expunge the mechanic's lien. By moving to expunge the mechanic's lien,
22 TSE opened a special proceeding in Nye County—the Nye County Special Proceeding.⁵ While
23 the motion was pending, Brahma filed a complaint in the Eighth Judicial District Court, Clark
24 County, Nevada in accordance with the Agreement's venue selection clause. TSE properly
25 removed that action to this Court, answered the complaint, and filed counterclaims against
26 Brahma. Brahma then improperly filed a complaint into the Nye County Special Proceeding
27 asserting lien foreclosure. Five days later, Brahma filed both a first amended complaint in this
28 action, which dropped three claims, and a first amended counter-complaint in the Nye County
Special Proceeding, which asserted the three dropped claims.

⁵ TSE filed its motion to expunge in Nye County District Court as NRS 108.2275 requires that motions to expunge should be brought in the county where the property subject to the mechanic's lien is located.





1 There is no legitimate justification for the course of action taken by Brahma. For
2 instance, there is no reason to split the unjust enrichment claim from the claims for breach of the
3 Agreement, breach of the implied covenant of good faith and fair dealing, and violation of
4 Nevada's prompt payment act. Indeed, all of the claims arise from the same set of facts.
5 Moreover, by leaving the unjust enrichment claim behind, Brahma demonstrates its motivation to
6 litigate its copycat claims outside of this Court, despite this Court's removal jurisdiction over the
7 claims. As Brahma's claims appear to entirely or predominately originate out of the Agreement,
8 Brahma's left behind claim of unjust enrichment claim appears to be nothing more than a mere
9 placeholder.

10 Thus, there is no doubt that Brahma attempted to subvert this Court's removal
11 jurisdiction over the copycat claims. An injunction enjoining Brahma from prosecuting the
12 copycat claims asserted in its first amended counter-complaint in the Nye County Special
13 Proceeding is warranted.

14 **B. This Court should strike Brahma's first amended complaint in this action**
15 **because it constitutes an attempt to deprive this Court of jurisdiction over a**
16 **removed action**

17 Under Rule 15(a), a party may amend its pleading once as a matter of course within 21
18 days after serving it, or within 21 days after service of a responsive pleading or a motion under
19 Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a). Rule 15(a), however, "cannot be used to deprive
20 the Court of jurisdiction over a removed action." *Winner's Circle of Las Vegas, Inc. v. AMI*
21 *Franchising, Inc.*, 916 F. Supp. 1024, 1026 (D. Nev. 1996). Courts strike amendments that are
22 used as a basis to deprive a court of jurisdiction over a removed action. *Clinco v. Roberts*, 41 F.
23 Supp. 2d 1080, 1088 (C.D. Cal. 1999) (striking an amended complaint filed under Rule 15(a) in
24 a removed action because it attempted to destroy diversity).

25 Courts have recognized that the claim splitting scheme used by Brahma here constitutes
26 an attempt at depriving a federal court of removal jurisdiction via amendment. *See Faye*, 541 F.
27 Supp. 2d at 754; *Cross*, 2004 WL 840274, at *3 ("what she has done amounts to the same
28 thing"). As a result, in *Faye*, the court struck the plaintiff's amended complaint. 541 F. Supp. 2d
at 758.



Here, Brahma has attempted to deprive this Court of removal jurisdiction through the amendment process. By filing the first amended complaint in this action, Brahma dropped claims and then reasserted the same claims in the Nye County Special Proceeding, which, as found in *Faye* and *Cross*, constitutes a clear attempt at depriving this Court of jurisdiction over the claims. Thus, Brahma's amendment to its complaint in the Federal Court Action, *see* ECF No. 8, should be stricken.⁶

IV. CONCLUSION

As set forth above, Brahma has engaged in forum shopping in an effort to subvert this Court's removal jurisdiction over the claims at issue in this case. Therefore, TSE respectfully requests that this Court grant this motion and (1) enter an injunction enjoining 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 and (2) strike Brahma's first amended complaint in this action (ECF No. 8). Brahma's actions warrant such a result. This result will restore this case to the same procedural posture as existed before Brahma took such actions.

DATED this 18th day of October 2018.

/s/ Colby Balkenbush

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Colby L. Balkenbush, Esq.

Ryan T. Gormley, Esq.

WEINBERG, WHEELER, HUDGINS,

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Attorneys for Defendant/Counterclaimant

Tonopah Solar Energy, LLC

⁶ In fact, courts have found that "blatant forum shopping," such as that done by Brahma here, warrants sanctions under both a court's inherent power and 28 U.S.C. § 1927. *See Robertson v. Cartinhour*, 883 F. Supp. 2d 121, 130 (D.D.C. 2012), *aff'd*, 554 F. App'x 3 (D.C. Cir. 2014) (sanctioning an attorney under 28 U.S.C. § 1927 for increasing expenses due to forum shopping); *Boyer v. BNSF Ry. Co.*, 832 F.3d 699, 701 (7th Cir. 2016) (sanctioning a party under the court's inherent power for forum shopping); *John Akridge Co. v. Travelers Companies*, 944 F. Supp. 33, 34 (D.D.C. 1996), *aff'd*, No. 95-7237, 1997 WL 411654 (D.C. Cir. June 30, 1997) (sanctioning a party under the court's inherent power for "blatant forum shopping").

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2018, a true and correct copy of the foregoing **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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/s/ Cynthia S. Bowman

An employee of WEINBERG, WHEELER, HUDGINS
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WEINBERG WHEELER
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EXHIBIT 5

Notice of Entry of Order

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Attorneys for Brahma Group, Inc.

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

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,

FILED
FIFTH JUDICIAL DISTRICT

NOV - 1 2018

Nye County Clerk

~~Sarah Westfall~~ Deputy

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

NOTICE OF ENTRY OF ORDER

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

8 Third-Party Defendants.
9

10
11 **NOTICE OF ENTRY OF ORDER**


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

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

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

18 Dated this 30th day of October, 2018.

19 **PEEL BRIMLEY LLP**

20 

21 RICHARD L. PEEL, ESQ.

22 Nevada Bar No. 4359

23 ERIC ZIMBELMAN, ESQ.

24 Nevada Bar No. 9407

25 RONALD J. COX, ESQ.

26 Nevada Bar No. 12723

27 3333 E. Serene Avenue, Suite 200

28 Henderson, Nevada 89074-6571

Attorneys for Brahma Group, Inc.

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 1st day of ~~October~~ ^{November}, 2018, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

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

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

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EXHIBIT A

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FILED
FIFTH JUDICIAL DISTRICT
OCT 29 2018
AMY DOWERS Nye County Clerk
Deputy

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

17 **TONOPAH SOLAR ENERGY, LLC, a Delaware**
18 **limited liability company,**
19 **Plaintiff,**
20 **vs.**
21 **BRAHMA GROUP, INC., a Nevada corporation,**
22 **Defendant.**

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

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

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

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

///
///
///

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

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

9 **II. THE COURT'S DECISION.**

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

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

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

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

- 18 • Brahma failed to give a Notice of Right to Lien to the Bureau of Land
19 Management ("BLM"); and
20 • Brahma's Notice of Right to Lien is void because Brahma identified
21 Solar Reserve as the party with whom it contracted, rather than TSE.

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

28 ///

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

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

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

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

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

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

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

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

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

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

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

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

18 5. In response, Brahma:

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

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

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

1 identified by parcel number and legal description; and

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

4 6. The Court concludes as follows:

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

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

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

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

13 1. At the Hearing, TSE contended that:

14 • Brahma's Notice of Lien is barred by the doctrine of sovereign
15 immunity because the United States Department of Energy ("DOE") provided a \$737 Million
16 loan guarantee, and is, through PNC Bank as its collateral agent, the beneficiary of a
17 Construction Deed of Trust pledging all of TSE's right, title, and interest in the Project, and
18 therefore, the DOE has a financial stake in the Project's continued successful operation by TSE;
19 • "[A] proceeding against property in which the United States has an
20 interest is a suit against the United States." *United States v. Alabama*, 313 U.S. 274,282, 61 S.Ct.
21 1011 (1941).

22 2. In response, Brahma demonstrated that:

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

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

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

3 3. The Court concludes that:

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

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

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

12 **III. CONCLUSION.**

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

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

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

19 Dated this 17 day of October, 2018.

20
21
22 
Senior Judge Steven Elliott

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


25 
26 **RICHARD L. PEEL, ESQ.** (NV Bar No. 4359)
27 **ERIC B. ZIMBELMAN, ESQ.** (NV Bar No. 9407)
28 **RONALD J. COX, ESQ.** (NV Bar No. 12723)
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Brahma Group, Inc.

EXHIBIT 6

Notice of Entry of Order

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

RICHARD L. PEEL, Esq.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
CARY B. DOMINA, ESQ.
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Attorneys for Brahma Group, Inc.

FILED

2019 JAN -9 A 11:56

NYE COUNTY CLERK

BY JP
DEPUTY

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

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,

Counter-Defendant.

CASE NO. : CV 39348

DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

///

///

///

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

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.

NOTICE OF ENTRY OF ORDER

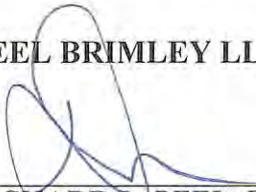
PLEASE TAKE NOTICE that an **Order Granting Brahma's Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(C)** was filed on January 8, 2019, a copy of which is attached as Exhibit1.

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 9 day of January, 2019.

PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ. (4359)
ERIC ZIMBELMAN, ESQ. (9863)
CARY B. DOMINA, ESQ. (10567)
RONALD J. COX, ESQ. (12723)
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Attorneys for Brahma Group, Inc.

PEEL BRIMLEY LLP
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 9th day of December 2018, I caused the above and foregoing document entitled

NOTICE OF ENTRY OF ORDER to be served as follows:

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

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

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

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



An Employee of Peel Brimley LLP

EXHIBIT 1

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

JAN 08 2019

Alye County Clerk
Deputy

1 ORDER
2 RICHARD L. PEEL, ESQ.
3 Nevada Bar No. 4359
4 ERIC B. ZIMBELMAN, ESQ.
5 Nevada Bar No. 9407
6 RONALD J. COX, ESQ.
7 Nevada Bar No. 12723
8 PEEL BRIMLEY LLP
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13 rpeel@peelbrimley.com
14 ezimbelman@peelbrimley.com
15 rcoc@peelbrimley.com
16 Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

19 Plaintiff,

20 vs.

21 BRAHMA GROUP, INC., a Nevada corporation,

22 Defendant.

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

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

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

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

I. STATUTORY BASIS FOR AWARD OF FEES AND COSTS.

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

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

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

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

6 ***

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

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

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

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

27 ² The *Brunzell* factors are:

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

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

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

15 **III. FINDINGS.**

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

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

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

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

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

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

12
13 **III. CONCLUSION.**

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

18 1. As presented by way of the Declaration of Richard L. Peel, Esq., for fees and
19 costs incurred in defending the Underlying Motion and submitting the Fee Motion the sum of
20 \$78,417.34; and

21 2. As agreed by the parties by a separate Stipulation attached hereto as Exhibit A,
22 for fees incurred in preparing Brahma's Reply to TSE's Opposition to the Fee Motion, for
23 appearance of counsel at oral argument and preparation of this Order, the additional sum of
24 \$10,000.00.

25 ///

26 ///

27 ///

28 ///

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

6 Dated this 31 day December 2018.

7
8 
9 Senior Judge Steven Elliott

10 Submitted by:
11 PEEL BRIMLEY LLP

12 
13 RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
14 ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
15 RONALD J. COX, ESQ. (NV Bar No. 12723)
16 3333 E. Serene Avenue, Suite 200
17 Henderson, Nevada 89074-6571
18 Attorneys for Brahma Group, Inc.
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Dated this _____ day December 2018.

Senior Judge Steven Elliott



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

EXHIBIT A

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

17 **FIFTH JUDICIAL DISTRICT COURT**

18 **NYE COUNTY, NEVADA**

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

21 Plaintiff,

22 vs.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Defendant.

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

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

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

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

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

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

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

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

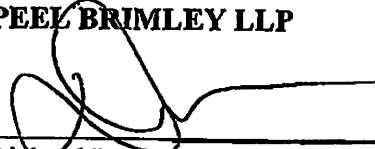
2 Now therefore,

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

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

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

12
13 **PEEL BRIMLEY LLP**

14 
15 _____
16 Richard L. Peel, Esq. (4359)
17 Eric B. Zimbelman, Esq. (9407)
18 Cary B. Domina, Esq. (10567)
19 3333 E. Serene Avenue, Suite 200
20 Henderson, NV 89074-6571
21 Telephone: (702) 990-7272
22 rpeel@peelbrimley.com
23 ezimbelman@peelbrimley.com
24 cdomina@peelbrimley.com
25 *Attorneys for Defendant Brahma Group,*
26 *Inc.*

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

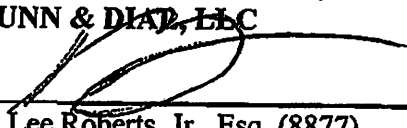
15 
16 _____
17 D. Lee Roberts, Jr., Esq. (8877)
18 Colby L. Balkenbush, Esq. (13066)
19 Ryan T. Gormley, Esq. (13494)
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24 cbalkenbush@wwhgd.com
25 rgormley@wwhgd.com
26 *Attorneys for Plaintiff Tonopah Solar Energy,*
27 *LLC*

EXHIBIT 7

TSE's Notice of Appeal



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Attorneys for Tonopah Solar Energy, LLC

IN THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Movant,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Respondent.

Case No. CV 39348
Consolidated with
Case No. CV 39799
Dept. No. 2

TSE'S NOTICE OF APPEAL

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant,

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.

BRAHMA GROUP, INC., a Nevada corporation,

Third-Party Plaintiff,



1 vs.

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

8 Third-Party Defendants.

9 H&E EQUIPMENT SERVICES, INC., a
10 Delaware corporation,

11 Plaintiff-In-Intervention,

12 vs.

13 BRAHMA GROUP, INC., a Nevada corporation,
14 TONOPAH SOLAR ENERGY LLC, a Delaware
15 limited liability company, COBRA
16 THERMOSOLAR PLANTS, INC., a Nevada
17 corporation; AMERICAN HOME ASSURANCE
18 COMPANY, a surety; BOE BONDING
19 COMPANIES I through X; DOES I through X;
20 ROE CORPORATIONS I through X, and TOE
21 TENANTS I through X, inclusive,

22 Defendants-In-Intervention.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Plaintiff,

25 vs.

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

Defendants.

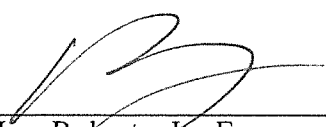
26 Tonopah Solar Energy, LLC ("TSE"), by and through its undersigned counsel, hereby
27 files this Notice of Appeal. TSE appeals to the Supreme Court of Nevada the following orders
28 entered by this Court in Case No. CV 39348:



• Order Denying Tonopah Solar Energy, LLC's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien, Notice of Entry served November 1, 2018, attached hereto as **Exhibit 1**.

• Order Granting Brahma's Motion for Attorney's Fees and Costs Pursuant to NRS 108.2275(6)(C), Notice of Entry served January 9, 2019, attached hereto as **Exhibit 2**.

DATED this 5th day of February 2019.



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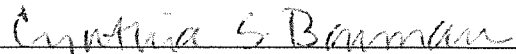
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of February 2019, a true and correct copy of the foregoing **TSE'S NOTICE OF APPEAL** was served by mailing a copy of the foregoing document via US Mail, to the following:

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Peel Brimley, LLP
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Attorneys for Cobra Thermosolar Plants, Inc.



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

EXHIBIT 8

Brahma's Mechanic's Lien Foreclosure Complaint

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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

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,

FILED
FIFTH JUDICIAL DISTRICT

SEP 21 2018

Nye County Clerk
Sarah Westfall Deputy

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

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

**[Arbitration Exemption: Action
Concerning Title to Real Estate]**

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

THE PARTIES

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

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

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

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

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

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

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

///

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

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

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

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

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

- i. Commonly known as the *Crescent Dunes Solar Energy Project*; and
- ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty Parcels.³

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

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

7. TSE and the Doe Defendants are collectively referred to in this Complaint as the "Counterdefendants."

///

///

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

FIRST CAUSE OF ACTION
(Foreclosure of Notice of Lien)

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

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

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

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

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

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

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

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

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

///

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

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

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

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

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

WHEREFORE, Brahma prays that this Honorable Court:

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

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

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

4. Adjudge a lien upon the Work of Improvement for the Outstanding Balance, plus reasonable attorneys' fees, costs and interest thereon, and that this Honorable Court enter an Order that the Work of Improvement, and improvements, such as may be necessary, be sold pursuant to

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1 the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of
2 sums due Brahma herein;

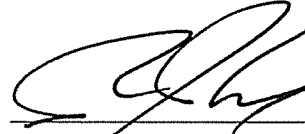
3 5. For such other and further relief as this Honorable Court deems just and proper in
4 the premises.

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

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

8 Dated this 20th day of September 2018.

9
10 **PEEL BRIMLEY LLP**

11 

12 RICHARD L. PEEL, ESQ.

13 Nevada Bar No. 4359

14 ERIC ZIMBELMAN, ESQ.

15 Nevada Bar No. 9407

16 RONALD J. COX, ESQ.

17 Nevada Bar No. 12723

18 3333 E. Serene Avenue, Suite 200

19 Henderson, Nevada 89074-6571

20 *Attorneys for Brahma Group, Inc.*

EXHIBIT 9

**Brahma's (i) First Amended Counter-Complaint;
and (ii) Third-Party Complaint**

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Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

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,

FILED
FIFTH JUDICIAL DISTRICT

SEP 25 2018

Terri Pemberton
Nye County Clerk
Deputy

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

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

**[Arbitration Exemption: Action
Concerning Title to Real Estate]**

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

10 Third-Party Defendants.

11 **FIRST AMENDED COUNTER-COMPLAINT**

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

18 **THE PARTIES**

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

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

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

24 ///

25 ///

26 ///

27

28

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

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

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

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

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

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

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

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

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

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

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

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

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

7. TSE and the Doe Defendants are collectively referred to in this Amended Counter-Complaint as the “Counterdefendants.”

FIRST CAUSE OF ACTION
(Breach of Contract)

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

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

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

///

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

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

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

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

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

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

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

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

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

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

2 a. Asserting pre-textual, extra-contractual and inaccurate reasons for

3 withholding payment long after the time required by the Agreement and Nevada law had elapsed.

4 b. TSE has improperly withheld moneys totaling more than One Million U.S.

5 Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1). While that statutory

6 provision permits withholding (on a payment-by-payment basis) a retention amount, not to exceed

7 five percent (5%), such retention must be authorized pursuant to the Agreement, which it is not.

8 c. Furthermore, and even if the Agreement allowed TSE to withhold retention

9 from monthly payments (which it does not), TSE's withholding of retention amounts retroactively

10 aggregated from Payment Applications issued (and, in some cases, payments previously made)

11 long ago constitutes extreme bad faith.

12 20. Due to the actions of TSE, BGI suffered damages in the amount of or exceeding

13 the Outstanding Balance for which BGI is entitled to judgment in an amount to be determined at

14 trial.

15 21. BGI has been required to engage the services of an attorney to collect the

16 Outstanding Balance, and BGI is entitled to recover its reasonable costs, attorney's fees and

17 interest therefor.

THIRD CAUSE OF ACTION
(Foreclosure of Notice of Lien)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOURTH CAUSE OF ACTION
(Violation of NRS 624)

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

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

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

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

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

WHEREFORE, Brahma prays that this Honorable Court:

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

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

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

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

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


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

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

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

14 Dated this 24 day of September 2018.

15 **PEEL BRIMLEY LLP**

16 
17 _____
18 RICHARD L. PEEL, ESQ.
19 Nevada Bar No. 4359
20 ERIC ZIMBELMAN, ESQ.
21 Nevada Bar No. 9407
22 RONALD J. COX, ESQ.
23 Nevada Bar No. 12723
24 3333 E. Serene Avenue, Suite 200
25 Henderson, Nevada 89074-6571
26 *Attorneys for Brahma Group, Inc.*
27
28

BRAHMA GROUP, INC.'S THIRD-PARTY COMPLAINT

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

THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Is the principal on the Surety Bond.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 40. The Surety Bond fails to meet the requirements of NRS 108.2415(1), because it is
27 not in an amount that is 1 ½ times the amount of Brahma's Lien.
28

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

42. Brahma makes claim against and Cobra and AHAC are obligated to Brahma for the Outstanding Balance plus interest, costs and attorney's fees up to the penal sum⁸ of the Surety Bond as provided in Chapter 108 of the Nevada Revised Statutes.

WHEREFORE, Brahma prays that this Honorable Court:

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

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

8. Enters judgment against AHAC up to the penal sum of the Surety Bond.


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

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 24 day of September 2018.

PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ.
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ERIC ZIMBELMAN, ESQ.
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Attorneys for Brahma Group, Inc.

⁸ Brahma has separately excepted to the sufficiency of the penal sum of the Surety Bond under NRS 108.2425. Nothing herein shall be deemed a waiver of any rights and claims that Brahma may possess under contract, at law or in equity.

EXHIBIT 10

Tonopah's Motion to Strike



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Attorneys for Tonopah Solar Energy, LLC

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

Case No. CV 39348
Dept. No. 2

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

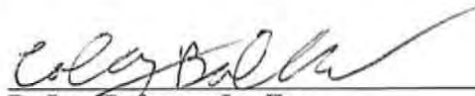
Defendant **TONOPAH SOLAR ENERGY, LLC** (hereinafter "TSE"), by and through
its attorneys of record, the law firm of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC,
hereby moves to strike and/or dismiss Brahma Group, Inc.'s (hereinafter "Brahma") First
Amended Counter-Complaint ("Counter-Complaint") that was filed on September 25, 2018. The
Counter-Complaint is a transparent attempt by Brahma to avoid the jurisdiction of the Nevada
Federal District Court over the Parties' dispute.



In the alternative, this Court should stay this action until the Parties' litigation in Nevada Federal District Court is complete. The federal action was filed first and thus, under principles of comity, and in order to not reward Brahma's forum shopping strategy, this action should be stayed.

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

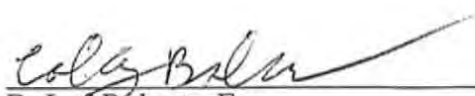
DATED this 18th day of October, 2018.


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

NOTICE OF MOTION

PLEASE TAKE NOTICE that **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** will come on for hearing in Department No. _____ of the above-entitled Court on the _____ day of _____ 2018, at _____ a.m./p.m.

DATED this 18th day of October, 2018.


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



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

TSE is the project developer for the Crescent Dunes Solar Energy Facility located outside Tonopah, Nevada ("Project"). TSE contracted with Brahma to perform certain warranty work on the Project. The Parties are currently in the midst of a dispute over the sufficiency of certain invoices Brahma has submitted to TSE for payment. In essence, Brahma contends that TSE owes it additional money for work Brahma performed on the Project. TSE contends that Brahma is not owed any additional money and that many of Brahma's invoices are fraudulent.

This Motion is necessary as Brahma has improperly attempted to move the substantive portion of the Parties' dispute (i.e. who owes who what) out of federal court, where it was first filed, and into this Court. Brahma first filed a complaint against TSE on July 17, 2018 in the Eighth Judicial District Court in Las Vegas. On September 10, 2018, TSE removed that action to Nevada Federal District Court.

Brahma, apparently unhappy with its new federal forum, has turned this case into a procedural quagmire in an attempt to avoid federal jurisdiction. On September 25, 2018, Brahma filed a First Amended Complaint in federal court that dropped all but one of its claims against TSE. On the exact same day, Brahma filed a "Counter-Complaint" in this proceeding that added the dropped federal court claims to this case. In other words, Brahma has affected a stunning "back-door remand" of its federal court claims to this Court without even filing a motion to remand with the federal court. However, there are numerous problems with Brahma's forum shopping that should result in this Court either (1) striking/dismissing the Counter-Complaint or (2) staying this proceeding until the parallel action in federal court is complete.

First, Brahma's stand-alone "Counter-Complaint" is not a recognized pleading under NRCP 7(a) and thus should be stricken. Pursuant to NRCP 7(a) and the Nevada Supreme Court's *Smith* decision, the only permissible pleadings are complaints, answers and replies. Further, this is a special proceeding under NRS 108.2275 that was created solely to address TSE's Motion to Expunge Brahma's Mechanic's Lien. Thus, the jurisdictional basis for this proceeding ceased to exist once the Court denied TSE's Motion to Expunge on September 12,

1 2018. There is no Nevada authority permitting a “Counter-Complaint” to be filed into a special
2 proceeding such as this.

3 Second, the Parties’ Contract requires that “any action or proceeding directly or indirectly
4 arising out of this Agreement” be venued in Las Vegas. Indeed, Brahma initially filed its
5 substantive claims in the Eighth Judicial District Court but now, after it has received a favorable
6 ruling from this Court, seeks to move the litigation to the Fifth Judicial District in Pahrump. The
7 Court should enforce the venue selection clause and require Brahma to re-file its claims in a Las
8 Vegas court.

9 Third, a substantial body of state and federal case law holds that once an action is
10 removed to federal court, state courts lack subject matter jurisdiction over the parties’ dispute
11 until the matter is remanded back to state court. Thus, this Court should dismiss Brahma’s
12 claims that were removed to federal court and then re-filed with this Court based on lack of
13 subject matter jurisdiction.

14 Fourth, in regard to Brahma’s Lien Foreclosure claim against TSE, that claim is now
15 moot and should be dismissed as an over \$19 million bond has been posted as security for
16 Brahma’s mechanic’s lien. NRS 108.2415(6) provides that a surety bond replaces the property
17 as security for the lien once it is posted.

18 Finally, in the alternative, assuming *arguendo* that the Court disagrees with all of TSE’s
19 above arguments, the Court should at least stay this proceeding until the first filed federal action
20 is completed. Under the “first to file rule,” a stay is appropriate if there is a substantially similar
21 action pending before a different court. Here, Brahma has admitted in a recent federal court
22 filing that this proceeding is a “duplicative dispute” and that it fulfills the “substantial similarity”
23 requirement for a stay.¹ Thus, a stay is appropriate because the federal action was filed on July
24

25 ¹ Brahma agrees with TSE that this dispute is duplicative of the first filed federal court action but the
26 parties disagree over which action should be stayed, this proceeding or the federal one. Brahma has filed
27 a motion to stay with the federal court arguing that that court should stay the federal action under the
28 *Colorado River* abstention doctrine. For reasons TSE will not go into in detail here, the *Colorado River*
doctrine is completely inapplicable to this matter and Brahma’s motion to stay is unlikely to be granted.
Brahma’s motion to stay misrepresents key facts to the federal court (a matter TSE will bring to that
court’s attention in its opposition which is not yet due). For example, Brahma represents that its claims
against TSE were first brought in Nye County rather than federal court (a misrepresentation) and

17, 2018 but Brahma did not file a complaint in this proceeding until September 20, 2018.

2 II. PROCEDURAL HISTORY OF THIS NYE COUNTY ACTION

3 This proceeding was created not by the filing of a complaint but rather by TSE's filing of
4 its Motion to Expunge Brahma's Mechanic's Lien on June 11, 2018. NRS 108.2275 creates a
5 statutory exception to NRCP 3 (requiring the filing of a complaint to institute a civil action)
6 permitting parties to institute special limited proceedings with the mere filing of a motion to
7 expunge. TSE's Motion to Expunge was heard by this Court on September 12, 2018 and denied
8 in full.

9 That ruling should have been the end of this limited special proceeding. Instead, Brahma
10 has now filed a Complaint and First Amended Counter-Complaint, seeking to broaden the scope
11 of this proceeding beyond NRS 108.2275. On September, 20, 2018, Brahma filed a "Lien
12 Foreclosure Complaint" against TSE asserting a single cause of action for lien foreclosure in this
13 Nye County proceeding. **Exhibit 1** (Lien Foreclosure Complaint). On September 25, 2018,
14 Brahma filed a "First Amended Counter-Complaint" in this proceeding that added three
15 additional claims against TSE that had already been asserted in a first filed federal court action.
16 **Exhibit 2** (First Amended Counter-Complaint). Those claims were (1) Breach of Contract, (2)
17 Breach of the Implied Covenant of Good Faith and Fair Dealing and (3) Violation of NRS 624.

18 In addition, on September 25, 2018, Brahma filed a Third Party Complaint against
19 American Home Assurance Company ("American Home") and Cobra Thermosolar Plants, Inc.
20 ("Cobra"), asserting a claim against the surety bond those entities had posted in satisfaction of
21 Brahma's mechanic's lien.

22 To reiterate, the original jurisdictional basis for this action no longer exists. First, TSE's
23 Motion to Expunge was denied in full by this Court. Second, subsequent to the denial of TSE's
24 Motion to Expunge, American Home and Cobra posted a surety bond in the amount of
25 \$19,289,366.61. As required by NRS 108.2415(1), this bond is 1.5 times the amount of

26
27 represents that TSE is the one seeking a friendly judge by engaging in forum shopping, even though TSE
28 removed the Eighth Judicial District Court action to federal court **BEFORE** this Court denied TSE's
Motion to Expunge.

Brahma's most recent Fourth Amended Mechanic's Lien (\$12,859,577.74.). As a result of that bond being posted Brahma's mechanic's lien that was the subject of TSE's Motion to Expunge has been released.

III. STATEMENT OF FACTS

A. Brahma's Contract and NRS 624 Claims Have Been Removed to Federal Court, Thus Divesting this Court of Jurisdiction

On July 17, 2018, while this special proceeding was still ongoing in this Court, Brahma filed a Complaint in the Eighth Judicial District Court asserting claims against TSE for (1) Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair Dealing, (3) Violation of NRS 624 and (4) Unjust Enrichment. **Exhibit 3** (Clark County Complaint). Brahma's decision to file its substantive claims against TSE in Clark County rather than Nye County was appropriate as the Parties' Contract contains a clause requiring venue in Las Vegas. **Exhibit 4** at p. 8 (Contract). TSE then removed that action to Nevada Federal District Court on September 10, 2018 based on diversity.² **Exhibit 5** (Notice of Removal). As detailed more fully in Section VI below, this removal divested all Nevada state courts of jurisdiction over the removed claims. *See* 28 U.S.C. § 1446(d) (stating that upon the filing of the Notice of Removal, "the State court shall proceed no further unless and until the case is remanded.").

On September 17, 2018, TSE filed an Answer and Counterclaim to Brahma's removed Complaint. **Exhibit 6** (TSE's Answer and Counterclaim). TSE's Counterclaim asserts six claims against Brahma in the federal court action including (1) Breach of Contract, (2) Breach of the Implied Covenant, (3) Declaratory Relief, (4) Unjust Enrichment/Quantum Meruit, (5) Fraud and (6) Negligent Misrepresentation. All of these counterclaims were properly before the federal court before Brahma attempted a back-door remand to this Court that has created a procedural quagmire.

² TSE's removal was timely as TSE was not served with the Clark County Complaint until August 21, 2018.



1 **B. In an Attempt to Avoid the Federal Court's Jurisdiction, Brahma Dropped**
2 **Three Claims from its Federal Court Complaint and Re-filed Those Claims**
3 **in a Nye County Counter-Complaint in this Court**

4 After this Court denied TSE's Motion to Expunge on September 12, 2018, Brahma
5 apparently had a change of heart and decided that, rather than litigating its substantive claims in
6 Las Vegas (where it had first filed them), it preferred to litigate those claims before this Court in
7 Pahrump. Thus, on September 25, 2018, Brahma (1) filed a First Amended Complaint in federal
8 court that dropped its claims for Breach of Contract, Breach of the Implied Covenant of Good
9 Faith and Fair Dealing and Violation of NRS 624³ and (2) filed a First Amended Counter-
10 Complaint in Nye County that added those same three dropped federal claims to this proceeding.
11 See **Exhibit 7** (First Amended Federal Court Complaint filed on September 25, 2018); **Exhibit 2**
12 (First Amended Nye County Counter-Complaint filed on September 25, 2018).

13 Brahma's attempt at a back-door remand of the removed federal action was not subtle.
14 The three claims dropped from Brahma's federal court Complaint on September 25, 2018 are the
15 exact same claims that were simultaneously added to this Nye County proceeding that same day.
16 The allegations that make up the three new claims in Nye County are also identical to those
17 asserted in the removed federal action. Thus, there can be no question that Brahma is engaged in
18 transparent and impermissible forum shopping.

19 **C. The Parties' Contract Contains a Venue Selection Clause Requiring that this**
20 **Matter be Litigated in Las Vegas, Nevada**

21 The Parties' substantive claims against each other belong in Las Vegas Federal District
22 Court not only because the claims were first filed there by Brahma, but also because the Parties'
23 Contract requires a Las Vegas venue. The Contract provides as follows:

24

25 ³ This Court should not mistake Brahma's dropping of its three federal court claims via the First
26 Amended Federal Court Complaint as court sanctioned behavior. Under FRCP 15(a)(1), a party has a
27 right to amend its complaint without leave of court within 21 days after a responsive pleading is filed.
28 Since TSE filed its Answer to Brahma's removed Complaint on September 17, 2018, Brahma was able to
 drop the three claims via its First Amended Complaint without seeking leave from the federal court.
 However, TSE has brought a motion in federal court seeking to have that court strike Brahma's
 amendment as it was done as part of a bad faith effort to defeat the federal court's exclusive jurisdiction
 over all removed claims.

This Agreement shall be governed by the laws of the State of Nevada. Contractor (i.e. Brahma) submits to the jurisdiction of the courts in such State, with a venue in Las Vegas, Nevada, for any action or proceeding directly or indirectly arising out of this Agreement.

Exhibit 4 at p. 8 (Contract) (emphasis added). Brahma was apparently aware of this clause as it decided to first file its substantive claims against TSE in the Eighth Judicial District Court on July 17, 2018. Now, for whatever reason, Brahma has decided to ignore this clause and seeks to unilaterally move three of its federal court claims to Nye County. TSE requests that this Court enforce the venue selection clause and require Brahma to litigate its claims where they were originally brought—Las Vegas.

IV. LEGAL STANDARD FOR MOTION TO STRIKE AND MOTION TO DISMISS

TSE brings this Motion pursuant to NRCP 12(f), NRCP 12(b)(1) and NRCP 12(b)(5). Under NRCP 12(f), it is appropriate to bring a motion to strike “any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Further, the Nevada Supreme Court has stated that when a pleading other than those expressly permitted in NRCP 7(a) is filed, the appropriate remedy is a motion to strike that pleading. *Smith v. Eighth Judicial Dist. Court In & For Cty. of Clark*, 113 Nev. 1343, 1348, 950 P.2d 280, 283 (1997).

Under NRCP 12(b)(1), lack of subject matter jurisdiction is appropriately raised in a motion to dismiss. Similarly, NRCP 12(h)(3) provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” In general, the party moving to dismiss an action bears the burden of persuasion. However, when the defense of lack of subject matter jurisdiction is raised “[t]he burden of proving the jurisdictional requirement is properly placed on the plaintiff.” *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d 982, 983 (2000) (emphasis added). The district court can take evidence on the claim that the court lacks subject matter jurisdiction and such evidence is not necessarily confined to the allegations of the complaint. *Id.* Thus, the burden is on Brahma rather than TSE to prove that this Court can still retain jurisdiction of claims that have been removed to federal court.



Under NRCP 12(b)(5), a defendant may request that a court dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." In deciding a motion to dismiss, a court should treat the factual allegations in the complaint as true and it should draw all inferences in favor of the plaintiff. *See Simpson v. Mars, Inc.*, 113 Nev. 188, 190 (1997). If, after crediting the factual allegations in the plaintiff's complaint as true the plaintiff cannot prove a set of facts that would entitle him to relief, then a court should dismiss the plaintiff's lawsuit. *See id.*

V. **BRAHMA'S COUNTER-COMPLAINT SHOULD BE DISMISSED BECAUSE A "COUNTER-COMPLAINT" IS NOT A RECOGNIZED PLEADING AND CANNOT BE FILED IN A SPECIAL ACTION SUCH AS THIS ONE**

A. **Brahma's "Counter-Complaint" is Not One of the Three Permitted Pleadings Under NRCP 7(a) and Thus Must be Stricken/Dismissed**

NRCP 7(a) provides as follows:

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

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

The Nevada Supreme Court explained that the district court should have stricken the defendant's "cross-claim" under NRCP 7(a) because **"the only pleadings allowed are complaints, answers and replies"** and a "cross-claim" or "counter-claim" was not a permitted pleading. *Id.* (emphasis added). "Counterclaims and cross-claims are not separate pleadings, but are claims for relief that may be set forth in answers and complaints." *Id.* Thus, because the defendant had failed to assert the cross-claim in his answer (a permitted pleading), the court was



1 obligated to strike the rogue “cross-claim” as an impermissible pleading under NRCP 7(a). *Id.*
2 (“[c]ounterclaims and cross-claims must be set forth in pleadings authorized by NRCP 7,
3 because ‘[n]o other pleading shall be allowed.’”).

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

9 Here, like defendant Chang in the *Smith* case, Brahma has filed a pleading that is not
10 permitted under NRCP 7(a). Brahma’s “Counter-Complaint” filed on September 25, 2018 is not
11 one of the three permitted pleadings under Nevada law (i.e. a “complaint,” “answer” or “reply.”).
12 Thus, under NRCP 7(a) and *Smith*, Brahma’s Counter-Complaint constitutes a rogue pleading
13 that must be stricken.

14 Brahma may argue in response that, even if it is styled as a “Counter-Complaint,” its
15 pleading should be construed as a “complaint” which is a permitted pleading under NRCP 7(a).
16 However, such an argument would be without merit as, by definition, a “complaint” is a pleading
17 that initiates an action. BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a “Complaint” as
18 “[t]he initial pleading that starts a civil action and states the basis for the court’s jurisdiction.”);
19 *see also* NRCP 3. Since this action was initiated by TSE’s June 11, 2018 Motion to Expunge,
20 there is no way to construe Brahma’s “Counter-Complaint” as a “complaint.”

21 Brahma’s Counter-Complaint also cannot be construed as an “answer” or a “reply.” By
22 definition, an “answer” responds to the allegations in a plaintiff’s complaint yet TSE has not
23 filed a complaint in this action. Similarly, a “reply” responds to the allegations in a counter-
24 claim yet TSE has not filed a counter-claim in this action. *See* NRCP 7(a) (identifying proper
25 pleadings and expressly stating that “No other pleading shall be allowed . . .”); NRCP 12(a);
26 BLACK’S LAW DICTIONARY (10th ed. 2014). In sum, since Brahma’s “Counter-Complaint” is not
27 a “complaint,” “answer” or “reply,” and, pursuant to Rule 7(a), “[n]o other pleading shall be
28



1 allowed . . . ,” it must be stricken.⁴

2 **B. This is a Special Proceeding With a Limited Focus. The Court Lacks**
3 **Jurisdiction to Hear Matters Beyond TSE’s Already Decided Motion to**
4 **Expunge**

5 Brahma’s failure to file one of the pleadings permitted by NRCP 7(a) points to a broader
6 problem with Brahma’s strategy of attempting to bring its substantive claims before this court—
7 NRS 108.2275 proceedings were not intended to address parties’ substantive claims against each
8 other. This proceeding was initiated by the filing of TSE’s Motion to Expunge. Thus, the sole
9 jurisdictional basis for this proceeding is NRS 108.2275 (governing motions to expunge
10 mechanic’s liens). The Nevada Supreme Court has indicated that proceedings to expunge a lien
11 under NRS 108.2275 are special proceedings. In these proceedings, a district court’s authority is
12 strictly limited to making one of three findings: (1) that a lien is frivolous, (2) that a lien is
13 excessive or (3) that a lien is neither frivolous nor excessive. *See e.g., Crestline Inv. Grp., Inc. v.*
14 *Lewis*, 119 Nev. 365, 371, 75 P.3d 363, 367 (2003) (finding that district court exceeded its
15 authority by going beyond making one of the above 3 findings) (superseded by statute on
16 unrelated grounds). Importantly, nothing in NRS 108.2275 permits a party to broaden those
17 proceedings by filing a “counter-complaint.”

18 Counsel for TSE has conducted an extensive search of Nevada case law and has been
19 unable to find any situation similar to this one (i.e. where a proceeding was initiated by the filing
20 of a motion to expunge and was later broadened by the party opposing the motion to expunge
21 filing a “counter-complaint” that brought its substantive claims before the court.).⁵ Thus, a
22 second independent ground for striking/dismissing Brahma’s Counter-Complaint is that such a
23 filing simply does not fall within the limited scope of NRS 108.2275 proceedings.

24
25
26 ⁴ The Nevada Supreme Court’s decision in *Smith* indicates that striking the pleading rather than
dismissing it is the appropriate remedy when NRCP 7(a) is violated.

27 ⁵ Conversely, if this action had been initiated by the filing of a complaint rather than a motion to expunge,
28 the court’s jurisdiction would be broader. *See e.g., J.D. Constr. v. IBEX Int’l Grp.*, 126 Nev. 366, 370,
240 P.3d 1033, 1036 (2010) (plaintiff first filed complaint then later filed a motion to expunge).

VI. BRAHMA'S "COUNTER-COMPLAINT" SHOULD BE DISMISSED BECAUSE THE PARTIES' CONTRACT CONTAINS A VENUE SELECTION CLAUSE REQUIRING THAT THIS MATTER BE LITIGATED IN LAS VEGAS, NEVADA

A. The Venue Clause is Reasonable and Enforceable

The Nevada Supreme Court has held that venue selection clauses will be enforced so long as they are reasonable and do not offend due process. *Tandy Computer Leasing, a Div. of Tandy Elecs., Inc. v. Terina's Pizza, Inc.*, 105 Nev. 841, 843, 784 P.2d 7, 8 (1989). Further, when a party seeks to set aside a venue selection clause, the burden is on that party to make a "strong showing" that the clause should not be enforced. *Id.* at 844, 784 P.2d at 8 (emphasis added); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) ("in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside."). In *Bremen*, which the Nevada Supreme Court cited with approval to in *Tandy*, the U.S. Supreme Court held that anyone seeking to avoid the enforcement of a venue selection clause has a "heavy burden of proof." *M/S Bremen*, 407 U.S. at 17.

Here, section 24 of the Parties' contract provides in clear normal size font that venue shall be in Las Vegas, Nevada "for any action or proceeding directly or indirectly arising out of this Agreement." **Exhibit 4** at p. 8. The title of this section is "GOVERNING LAW-SUBMISSION TO JURISDICTION-WAIVER OF JURY TRIAL." *Id.* (emphasis in original). Thus, Brahma knew it was agreeing to litigate all disputes with TSE in Las Vegas rather than Pahrump when it signed the contract. Further, Brahma is a sophisticated entity that regularly negotiates multi-million dollar construction contracts all over the country.⁶ There is nothing unfair about forcing Brahma to litigate this dispute in Las Vegas, a much more convenient location for both parties, rather than Pahrump. **Indeed, Brahma originally filed its substantive claims against TSE in the Eighth Judicial District Court in Las Vegas.** **Exhibit 3** (Clark County Complaint). Brahma should not be permitted to dance back and forth between different

⁶ See e.g., <https://brahmagroupinc.com>.

forums depending on which way it thinks the winds are blowing on a given day.

B. Brahma is Estopped from Arguing Against a Venue in Federal Court Located in Las Vegas Because it Chose to File the First Lawsuit in the Eighth Judicial District Court in Las Vegas

TSE anticipates that Brahma will argue that the clause in this case is “permissive” rather than “mandatory” and thus venue is permitted in Las Vegas but not required. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 107 (2015) (discussing the difference between mandatory and permissive venue clauses). While TSE believes the clause is mandatory, the Court need not reach this issue as Brahma waived its right to raise this argument when Brahma voluntarily filed its first Complaint in Las Vegas. “Waiver requires the intentional relinquishment of a known right. If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention. Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished.” *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007).

Here, Brahma elected to file a Complaint in the Eighth Judicial District Court in Las Vegas on July 17, 2018 rather than in this Court. Further, Brahma took this action with full knowledge that the forum selection clause may have been “permissive”⁷ rather than “mandatory” since “[e]very one is presumed to know the law and this presumption is not even rebuttable.” *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915). TSE, in turn, relied on Brahma’s actions and removed the Complaint filed in Las Vegas to federal court. TSE, in reliance on Brahma first filing its substantive claims in Las Vegas, has also filed an Answer and Counterclaim in the federal action. Brahma’s argument that it was confused about whether the forum selection clause was permissive or mandatory at the time it filed the July 17 suit in Las Vegas is not

⁷ Again, TSE makes this argument “in the alternative,” assuming for the sake of argument that the forum selection clause is permissible rather than mandatory, which it is not.



credible.⁸

Moreover, Courts have held that even if a forum selection clause is permissive (as Brahma contends), it serves to waive any objection the party has to the listed venue. *Structural Pres. Sys., LLC v. Andrews*, 931 F. Supp. 2d 667, 673 (D. Md. 2013) (“permissive forum-selection clauses are sometimes referred to as ‘consent to jurisdiction’ clauses because such clauses specify one court empowered to hear the litigation which, in effect, waives any objection to personal jurisdiction or venue in that jurisdiction”) (emphasis added) (internal citation omitted); *see also Am. Airlines, Inc. v. Rogerson ATS*, 952 F. Supp. 377, 384 (N.D. Tex. 1996) (holding that a forum selection clause waives a party’s right to contest venue in the forum specified).

In other words, now that suit has been brought in a Las Vegas court (the federal action), Brahma is barred from contesting that some other court (i.e. this Court) is a more appropriate venue. This “consent to jurisdiction” rule is particularly appropriate here as it was not TSE that chose to file the first lawsuit in Las Vegas but rather Brahma.

C. TSE Did Not Relinquish its Right to Enforce the Forum Selection Clause by Filing the Motion to Expunge with the Nye County Court. TSE Merely Complied with Nevada Law

TSE anticipates that Brahma may also argue that TSE’s filing of the Motion to Expunge with the Nye County Court results in a waiver of TSE’s right to enforce the forum selection clause. However, such an argument would be misplaced. The only reason TSE initiated this proceeding in Nye County (which has now been resolved) was that Nevada law requires that a motion to expunge a mechanic’s lien be brought in the county where the land affected by the lien is located. *See* NRS 108.2275(1) (providing that a motion to expunge must be brought in “the district court for the county where the property or some part thereof is located.”). Critically, the filing of a special proceeding such as this one does not waive a party’s right to enforce a forum selection clause for other claims. *Pirola Bros. v. Angelo Maffei & Figli, SAS*, No. 87 CIV. 7561

⁸ In Brahma’s Motion to Stay filed with the federal court on October 16, 2018, Brahma makes this argument.



(MBM), 1989 WL 20945, at *2 (S.D.N.Y. Mar. 2, 1989) (“when a party disregards a forum selection clause and sues on a contract in an unauthorized forum, it waives the forum selection clause only for the specific claim that it pursues”).

Now that this Court has decided TSE’s Motion to Expunge, the venue selection clause should be enforced and the remainder of this proceeding⁹ sent back to federal court in Clark County.

VII. THIS COURT LACKS JURISDICTION OVER THE THREE BRAHMA CLAIMS IN THE “COUNTER-COMPLAINT” THAT WERE REMOVED TO FEDERAL COURT

A. Once a Matter Has Been Removed to Federal Court, States Courts Lose Jurisdiction Over the Dispute

Even assuming this Court were to (1) decline to strike Brahma’s “Counter-Complaint” and (2) decline to enforce the Contract’s venue selection clause, there are additional grounds for dismissal. The federal removal statute expressly bars any further proceedings in state court once a notice of removal has been filed. The statute provides as follows:

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal **and the State court shall proceed no further unless and until the case is remanded.**

28 U.S.C. § 1446(d) (emphasis added). In interpreting the above language, the Ninth Circuit stated that “the clear language of the general removal statute provides that the state court loses jurisdiction upon the filing of the petition for removal.” *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir.1994); *see also California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000) (“it is impossible to obtain judicial remedies and sanctions in state and local courts once an action is removed to federal court. The removal of an action to federal court necessarily divests state and local courts

⁹ Brahma’s Lien Foreclosure claim is addressed in Section VIII, *supra*. That claim must be dismissed on separate grounds since a surety bond has been posted in 1.5 times the amount of Brahma’s most recent mechanic’s lien. *See* NRS 108.2415(6) (providing that lien on land is released upon posting of bond).



1 of their jurisdiction over a particular dispute.”); Wright & Miller, *Federal Practice & Procedure*
2 § 3736 (4th ed.) (stating that, following removal, any further proceedings in a state court are
3 considered *coram non judice* and will be vacated even if the case is later remanded).

4 Moreover, it is not just the particular state court from which the case was removed that is
5 divested of jurisdiction over the dispute but all courts in the state. *See In re M.M.*, 154 Cal. App.
6 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007) (“states are separate sovereigns with respect to the
7 federal government. Removal of an action may therefore be viewed as a transfer of the
8 proceeding from the courts of one sovereign (a state) to the courts of another (the United
9 States).”).

10 In *Hollandsworth*, the Idaho Supreme Court upheld the district court’s dismissal of a
11 complaint that was filed in state court after a separate action was already pending in federal
12 court, stating as follows:

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

17 *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980).

18 In *General Handkerchief Corp.*, an insured brought an action in New York state court
19 against its insurer to recover on a policy issued to it. The insurer subsequently removed the
20 action to federal court. Later, the insurer brought a separate action against the insured in New
21 York state court (i.e. a second subsequent state court action) for the recovery of insurance
22 premiums. The insured filed a counterclaim in the second state court action (i.e. similar to the
23 “Counter-Complaint” filed by Brahma here) that was nearly identical to its complaint that had
24 been previously removed to federal court. The state court dismissed the counterclaim based on
25 lack of subject matter jurisdiction due to the prior removal of the same claims to federal court
26 and the New York Court of Appeals upheld the dismissal. *Fire Ass’n of Philadelphia v. Gen.*
27 *Handkerchief Corp.*, 304 N.Y. 382, 385, 107 N.E.2d 499, 500 (1952).

28 In *Leffall*, an inmate brought an action against staff members for injuries he received in

1 slip and fall accident. That action was removed to federal court. The inmate then filed a second
2 suit in state court against the same defendants. The court found that because the theories of
3 causation and damages in the second state court suit were “substantively identical” to those in
4 the removed federal case, dismissal of the second state court suit was required. *Leffall v.*
5 *Johnson*, No. 09-01-177 CV, 2002 WL 125824, at *2 (Tex. App. Jan. 31, 2002).

6 In *Riley*, the plaintiff filed her complaint in state court and the defendant then removed to
7 federal court based on federal question jurisdiction. The plaintiff then filed a motion to remand
8 which the federal court denied. Unhappy with being stuck in a federal forum, plaintiff then filed
9 an amended complaint in state court. The federal court severely criticized plaintiff’s actions:

10 [Plaintiff], however, has created a procedural mess. After the court denied
11 her original motion to remand, she filed an amended complaint in state
12 court; the court has no idea why she did this. Once removed, this court, not
13 the state court, had jurisdiction until this court remanded the case or
14 dismissed it without prejudice. This concept is not subtle; it is basic to the
15 law of jurisdiction. [plaintiff] had no basis for filing the amended complaint
16 in state court.

17 *Riley v. Carson Pirie Scott & Co.*, 946 F. Supp. 716, 718 (E.D. Wis. 1996) (emphasis added).
18 Similarly, in *Crummie*, the plaintiff filed an amended complaint in state court after the action
19 was removed to federal court. The federal court found the amended state court complaint was
20 void and of no effect because the state court lacked jurisdiction. *Crummie v. Dayton-Hudson*
21 *Corp.*, 611 F. Supp. 692, 693 (E.D. Mich. 1985) (“After a removal of an action, a federal court
22 acquires total, exclusive jurisdiction over the litigation . . . Applying the foregoing precepts to
23 the matter at bar, it is evident that Plaintiff’s filing of an amended complaint in state court
24 subsequent to the removal of the cause was of no effect.”).

25 The rule that removal divests all state courts of jurisdiction over a dispute is both
26 necessary and logical. Without such a rule, any party could defeat federal jurisdiction by simply
27 re-filing its case in a different state court than the one the case was removed from without ever
28 even having to file a motion to remand expressly challenging the federal court’s jurisdiction.
Such an outcome would be directly contrary to both the letter and spirit of 28 U.S.C. § 1446(d)
and make removal meaningless. Indeed, not only do state courts lack jurisdiction once a matter

1 is removed to federal court, but federal courts have authority to issue injunctions to enjoin state
2 court litigation that is filed after removal in an attempt to defeat federal jurisdiction.¹⁰

3 **B. This Court Lacks Jurisdiction Over the Three Brahma Claims in the**
4 **Counter-Complaint that Were Removed to Federal Court**

5 As set out above, state and federal courts from around the country have held that
6 plaintiffs will not be permitted to defeat federal jurisdiction by simply re-filing the same claims
7 in a second state court action after those claims have been removed to federal court. In
8 determining whether this court lacks jurisdiction to hear Brahma's three federal court claims, the
9 only question is whether the claims asserted in Brahma's Counter-Complaint are substantially
10 similar to the claims that were previously removed to federal court by TSE.

11 Here, Brahma has already admitted in a recent filing in federal court that this proceeding
12 is "duplicative" of the federal action and that it fulfills the "substantial similarity" requirement.
13 **Exhibit 8** (Brahma's Motion to Stay Federal Action at pp. 7, 9 (emphasis added). In fact, the
14 three claims against TSE that Brahma recently added to this action via the filing of its "Counter-
15 Complaint" are the exact same three claims that TSE previously removed to federal court. Those
16 claims are (1) Breach of Contract, (2) Breach of the Implied Covenant of Good Faith and Fair
17 Dealing and (3) Violation of NRS 624. The allegations that make up these claims are the same
18 allegations that were asserted in the federal court action. *Compare Exhibit 3* 2:11-28 – 5:1-5
19 (Brahma's July 17, 2018 Complaint filed in the Eighth Judicial District Court and removed to
20 Nevada Federal District Court on September 10, 2018) with **Exhibit 2** at 4:17-28 – 8:1-19
21 (Brahma's September 25, 2018 First Amended Counter-Complaint filed with the Nye County
22 District Court). Thus, pursuant to 28 U.S.C. § 1446(d), this Court lacks jurisdiction over those
23 three claims and "shall proceed no further unless and until the case is remanded." 28 U.S.C. §
24 1446(d) (emphasis added). TSE requests that these three claims be dismissed.

25 As an aside, TSE does not contend that this Court lacks jurisdiction over Brahma's lien
26

27 ¹⁰ *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997); *Kansas Pub. Employees Ret.*
28 *Sys. v. Reimer & Koger Assocs., Inc.*, 77 F.3d 1063, 1070 (8th Cir. 1996). TSE will be filing a motion
seeking to have the federal court enjoin this litigation.

foreclosure claim against TSE or over Brahma's third party bond claim against third party defendants American Home Assurance Company ("American Home") and Cobra Thermosolar Plants, Inc. ("Cobra"). NRS 108.239 (governing lien foreclosure claims) and NRS 108.2421 (governing bond claims) indicate that proceedings on those statutory claims must be brought in the county where the property at issue is located. Further, unlike the three claims TSE is seeking dismissal of, the lien foreclosure and bond claims were not previously removed to federal court by TSE. However, as set forth more fully below, Brahma's lien foreclosure claim against TSE should be dismissed on other grounds and the surety bond claim should be stayed.

VIII. BRAHMA'S LIEN FORECLOSURE CLAIM MUST BE DISMISSED BECAUSE A BOND HAS BEEN POSTED AS SECURITY FOR THE LIEN

Brahma's third cause of action is for Foreclosure of Notice of Lien and seeks to foreclose on the TSE owned improvements to which its mechanic's lien attaches. This is the only claim before this Court that has not already been removed to federal court. NRS 108.2415 provides that if a surety bond is provided in the amount of 1.5 times the notice of lien, the mechanic's lien is released from the land/improvements and attaches instead to the bond. NRS 108.2415(6) ("the recording and service of the surety bond . . . releases the property described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien."). See also NRS 108.2413 ("[a] lien claimant's lien rights or notice of lien may be released upon the posting of a surety bond in the manner provided in NRS 108.2415 to 108.2425, inclusive."); *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 551, 331 P.3d 850, 857-58 (2014) (" . . . each surety bond replaced its corresponding property as security for the lien. This means that a judgment awarded to respondent for one of those four properties would not be against the property, but against the respective surety, up to the amount of the bond, and against the principal for any amounts in excess of the bond amount.").

Here, Brahma's Fourth Amended Notice of Lien¹¹ was in the amount of \$12,859,577.74.

¹¹ The Fourth Amended Notice of Lien was recorded on September 14, 2018 with the Nye County Recorder. This is the most recent lien recorded by Brahma.



1 **Exhibit 9.** 1.5 times this amount is \$19,289,366.61. On October 9, 2018, Cobra¹² caused a bond
2 in this amount to be recorded against the property/improvements encumbered by Brahma's lien.
3 **Exhibit 10** (surety bond). Thus, under NRS 108.2415(6), Brahma's lien against the
4 property/improvements owned by TSE has been released and now attaches to Cobra's bond. As
5 such, it is appropriate to dismiss Brahma's Lien Foreclosure claim as there is no set of facts
6 under which Brahma could be permitted to foreclose on TSE's property.

7 **IX. IN THE ALTERNATIVE, THE COURT SHOULD STAY THIS ACTION UNTIL**
8 **THE COMPLETION OF THE PARALLEL FEDERAL COURT PROCEEDINGS**
9 **BASED ON THE "FIRST TO FILE RULE" AND PRINCIPLES OF COMITY**

10 **A. Legal Standard for Staying Proceedings Under the First to File Rule**

11 In the event this Court (1) declines to strike Brahma's Counter-Complaint under NRCP
12 7(a), (2) declines to enforce the Contract's clause requiring venue in Las Vegas, (3) declines to
13 dismiss the Counter-Complaint for lack of subject matter jurisdiction, and (4) declines to dismiss
14 Brahma's Lien Foreclosure claim based on the posting of Cobra's \$19 million bond, this Court
15 should at least stay this action until the first filed parallel proceedings in federal court are
16 complete.

17 "The power to stay proceedings is incidental to the power inherent in every court to
18 control the disposition of the causes on its docket with economy of time and effort for itself, for
19 counsel, and for litigants. How this can best be done calls for the exercise of judgment which
20 must weigh competing interests and maintain an even balance." *Maheu v. Eighth Judicial Dist.*
21 *Court In & For Clark Cty., Dep't No. 6*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973); *see also*
22 *Jordan v. State ex rel. DMV and Public Safety*, 110 P.3d 30, 41 (Nev. 2005) ("Nevada courts
23 possess inherent powers of equity and of control over the exercise of their jurisdiction.")
24 (overruled on other grounds).

25 Under the "first to file rule," a stay is particularly appropriate where there is a
26 substantially similar prior action pending before a different court. *Pacesetter Sys., Inc. v.*

27 ¹² Due to certain contractual obligations that are not pertinent to the instant Motion, Cobra was obligated
28 to TSE to post this bond to keep the property/improvements free of liens.



1 *Medtronic, Inc.*, 678 F.2d 93, 94–95 (9th Cir. 1982) (holding that it is appropriate for the “district
2 court to decline jurisdiction over an action when a complaint involving the same parties and
3 issues has already been filed in another district”). The two actions need not be identical, only
4 “substantially similar.” *Inherent.com v. Martindale–Hubbell*, 420 F.Supp.2d 1093, 1097
5 (N.D.Cal.2006);¹³ see also *McWane Cast Iron Pipe Corp. v. McDowell, Wellman Eng'g Co.*, 263
6 A.2d 281, 283 (Del. 1970) (stating that courts generally exercise that discretion “freely in favor
7 of the stay when there is a prior action pending elsewhere, in a court capable of doing prompt
8 and complete justice, involving the same parties and the same issues.”); *Diet Ctr., Inc. v.*
9 *Basford*, 124 Idaho 20, 22, 855 P.2d 481, 483 (Ct. App. 1993) (“Where two actions between the
10 same parties, on the same subject, and to test the same rights, are brought in different courts
11 having concurrent jurisdiction, the court which first acquires jurisdiction, its power being
12 adequate to the administration of complete justice, retains its jurisdiction and may dispose of the
13 whole controversy, and no court of coordinate power is at liberty to interfere with its action.”);
14 21 C.J.S. Courts § 280 (“a state court should refuse to exercise jurisdiction over an action once it
15 is apprised of the fact that the federal court has assumed jurisdiction of an earlier suit based on
16 the same cause of action.”).

17 The *Schwartz* case is directly on point. In *Schwartz*, the plaintiff sued the defendants in
18 state court, the defendants removed the case to federal court and plaintiff then filed a separate
19 second action in state court. The second state court action involved identical claims to those
20 pending in the first filed federal action. The defendants filed a motion to stay the second state
21 court action which was denied. The Florida appellate court reversed and granted the stay,
22 holding that “[t]he [district] court's ruling has the effect of circumventing federal removal
23 jurisdiction and requires the petitioners to defend against the same causes of action in two
24 forums.” *Schwartz v. DeLoach*, 453 So. 2d 454, 456 (Fla. Dist. Ct. App. 1984) (emphasis
25 _____)

26 ¹³ The *Inherent.com* decision was cited to with approval by the Nevada Supreme Court in the *Gabrielle*
27 decision. *Gabrielle v. Eighth Judicial Dist. Court of State, ex rel. Cty. of Clark*, No. 66762, 2014 WL
28 5502460, at *1 (Nev. Oct. 30, 2014) (unpublished). In *Gabrielle*, the Nevada Supreme Court held that it
was an abuse of discretion for a district court to not stay a state court action that was filed subsequent to a
federal court action involving the same claims and parties. *Id.*

added). Just like the court did in *Schwartz*, this Court should stay this action and refuse to allow Brahma to circumvent federal removal jurisdiction

B. Brahma's Claims Were First Filed in the Federal Court Action and Thus This Action Should be Stayed Until the Federal Action is Resolved

It is hard to imagine a more compelling set of facts justifying a stay than those presented in this case. Brahma's claims for (1) Breach of Contract, (2) Breach of the Implied Covenant and (3) Violation of NRS 624 were first filed in the Eighth Judicial District Court on July 17, 2018. TSE then removed those claims to federal court on September 10, 2018. It was not until September 20, 2018 that Brahma filed its original Complaint in this proceeding asserting a Lien Foreclosure claim and not until September 25, 2018 that Brahma filed its Counter-Complaint adding the three federal court claims to this proceeding.¹⁴ Thus, whether this Court looks at the date of Brahma's original Complaint or Counter-Complaint in this proceeding, Brahma's substantive claims against TSE were first asserted in the federal court action.

Moreover, the timing of Brahma's actions indicates a calculated attempt to undermine the federal court's jurisdiction and forum shop. On September 25, 2018, Brahma filed its First Amended Complaint in federal court dropping three claims from that action. That same day, Brahma filed the Counter-Complaint adding the exact same three claims to this action. Clearly, after this Court denied TSE's Motion to Expunge on September 12, 2018, Brahma decided that this Court was a more advantageous venue and proceeded to attempt to move its federal court claims here via any means necessary. The "first to file rule" exists precisely to prevent parties like Brahma from switching between different forums on a whim and should be enforced here. In sum, if this Court is not inclined to strike/dismiss Brahma's Counter-Complaint, the Court should stay this proceeding until the resolution of the first filed federal court litigation.

¹⁴ Brahma may attempt to argue that the present action was the one "first filed" as TSE did file its Motion to Expunge (which created this action) on June 11, 2018 which is prior to the July 17, 2018 Complaint Brahma filed in Clark County state court. However, the case law is clear that, for purposes of the first filed rule, the filing date of an action is derived from the filing date of the complaint. *See* NRCP 3 ("a civil action is commenced by the filing of a complaint"); *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 96 n. 3 (9th Cir.1982) (filing date of respective complaints was all that mattered for purposes of the first filed rule); *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994).



1 Importantly, the stay should apply not only to the three claims that were previously
2 removed to federal court but to this entire action. Brahma's claim for Lien Foreclosure (against
3 TSE) and its third party Surety Bond Claim (against Cobra and American Home) both involve
4 the exact same issues and subject matter as Brahma's contract and NRS 624 claims. Both of
5 these claims boil down to allegations that TSE owes Brahma money for work Brahma performed
6 on the Project. If Brahma were permitted to proceed in this Court with its Lien Foreclosure and
7 Surety Bond claim, TSE would be forced to litigate the same issue in two forums and there
8 would be the possibility of multiple inconsistent judgments. *Barapind v. Reno*, 72 F. Supp. 2d
9 1132, 1146 (E.D. Cal. 1999) (noting that one justification for applying the first to file rule is that
10 it "avoids the embarrassment of conflicting judgments"). As such, TSE requests that the Court
11 stay this action until the first filed federal action is complete.

12 **X. CONCLUSION**

13 TSE requests the following relief from the Court:

14 1.) Strike Brahma's September 25, 2018 Counter-Complaint because it is an
15 impermissible pleading under both NRCP 7(a) and NRS 108.2275;

16 2.) Dismiss Brahma's Counter-Complaint because it was filed in violation of the
17 Contract's requirement that venue be in Las Vegas, Nevada;

18 3.) Dismiss Brahma's claims for (1) Breach of Contract, (2) Breach of the Implied
19 Covenant of Good Faith and Fair Dealing and (3) Violation of NRS 624 because this Court lacks
20 subject matter jurisdiction over those claims. Since those claims were removed to federal court
21 prior to being filed in this action, this Court lacks jurisdiction under 28 U.S.C. § 1446(d).

22 4.) Dismiss Brahma's Lien Foreclosure claim since Cobra has now posted an over
23 \$19 million bond as security for Brahma's lien. NRS 108.2415(6) provides that a lien on
24 property is released once a surety bond is posted; and

25 ///

26 ///


27 ///

28 ///



1 5.) In the alternative, stay this action until the lawsuit pending in Nevada Federal
2 District Court is resolved. A stay is appropriate under the "first to file rule" because the
3 complaint in the federal court action was filed before the Complaint and First Amended Counter-
4 Complaint in this action.

5 DATED this 18th day of October, 2018.

6
7 
8 D. Lee-Roberts, Jr., Esq.
9 Colby L. Balkenbush, Esq.
10 Ryan T. Gormley, Esq.
11 WEINBERG, WHEELER, HUDGINS,
12 GUNN & DIAL, LLC
13 6385 S. Rainbow Blvd., Suite 400
14 Las Vegas, NV 89118
15 *Attorneys for Tonopah Solar Energy, LLC*
16
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18
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21
22
23
24
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26
27
28



CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of October, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S MOTION TO STRIKE BRAHMA GROUP, INC.'S FIRST AMENDED COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO DISMISS COUNTER-COMPLAINT, OR, IN THE ALTERNATIVE, MOTION TO STAY THIS ACTION UNTIL THE CONCLUSION OF THE PROCEEDINGS IN FEDERAL COURT** was served by mailing a copy of the foregoing document in the United States Mail, postage fully prepaid, to the following:

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

Cynthia S. Bauman

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

EXHIBIT 11

**Notice of Entry of Order (i) Denying Tonopah's
Motion to Strike and Dismiss; (ii) Granting in
Part Tonopah's Motion for Stay; and (iii)
Granting Brahma's Motion to Amend**

JAN 28 2019

Nye County Clerk

Deputy

Veronica Aguilar

1 **NEO**
2 RICHARD L. PEEL, ESQ.
3 Nevada Bar No. 4359
4 ERIC B. ZIMBELMAN, ESQ.
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19 *Attorneys for Brahma Group, Inc.*

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.

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

NOTICE OF ENTRY OF ORDER

- (I) **DENYING TONOPAH
SOLAR ENERGY, LLC'S
MOTION TO STRIKE AND
DISMISS; AND**
- (II) **GRANTING IN PART
TONOPAH SOLAR
ENERGY, LLC'S MOTION
FOR STAY**
- (III) **GRANTING BRAHMA
GROUP, INC'S MOTION TO
AMEND**

24 **AND ALL RELATED CROSS-ACTIONS.**

25 ///

26 ///

27 ///

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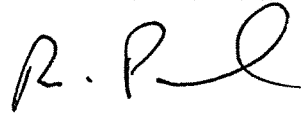
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NOTICE OF ENTRY OF ORDER

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

Dated this 28th day of January, 2019.

PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ. (4359)
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP
and that on this 25th day of January, 2019, I caused the above and foregoing document entitled

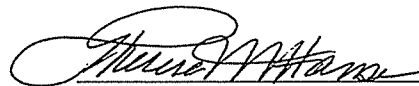
NOTICE OF ENTRY OF ORDER to be served as follows:

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

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

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Plants, Inc.*



An Employee of Peel Brimley LLP

EXHIBIT 1

ORIGINAL

FILE

2019 JAN 24 A 10:37

NYE COUNTY CLERK

BY Bennett
DEPUTY

1 **ORDR**

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3 Nevada Bar No. 4359

4 ERIC B. ZIMBELMAN, ESQ.

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19 *Attorneys for Brahma Group, Inc.*

20 **FIFTH JUDICIAL DISTRICT COURT**

21 **NYE COUNTY, NEVADA**

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

24 Plaintiff,

25 vs.

26 BRAHMA GROUP, INC., a Nevada corporation,

27 Defendant.

CASE NO. : CV 39348

DEPT. NO. : 2

ORDER

- (I) DENYING TONOPAH
SOLAR ENERGY, LLC'S
MOTION TO STRIKE AND
DISMISS; AND
- (II) GRANTING IN PART
TONOPAH SOLAR
ENERGY, LLC'S MOTION
FOR STAY
- (III) GRANTING BRAHMA
GROUP, INC'S MOTION TO
AMEND

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Counterclaimant/Lien Claimant,

3 vs.

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

8 Counter-Defendant,

9 BRAHMA GROUP, INC., a Nevada corporation,

10 Third-Party Plaintiff,

11 vs.

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

17 Third-Party Defendants.

18 **ORDER**

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

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

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

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

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

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

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1 remain stayed as set forth above.

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

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

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

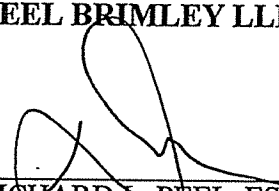
13 **IT IS FURTHER ORDERED** that Brahma shall be permitted to amend its Amended
14 Counter-Complaint.

15 Dated this 24 day of January, 2019.

16
17 
18 SENIOR JUDGE STEVEN ELLIOTT

19
20 Respectfully submitted by:
21 PEEL BRIMLEY LLP

22
23 Approved as to form and Content
24 WEINBERG, WHEELER, HUDGINS,
25 GUNN & DIAL, LLC

26
27 
28 RICHARD L. PEEL, ESQ. (4359)
ERIC B. ZIMBELMAN, ESQ. (9407)
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EXHIBIT 12

**Tonopah's Response to Brahma's Motion for
Stay, or in the Alternative, Motion to Amend
Complaint**



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Tonopah Solar Energy, LLC

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada corporation,

Plaintiff,

vs.

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

Defendant.

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

**TONOPAH SOLAR ENERGY, LLC'S
RESPONSE TO BRAHMA'S MOTION
FOR STAY, OR IN THE ALTERNATIVE,
MOTION TO AMEND COMPLAINT**

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

Counterclaimant,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Counterdefendant.

On October 16, 2018, Brahma Group, Inc. (“Brahma”) filed a Motion for Stay, or in the Alternative, Motion to Amend Complaint (“Motion for Stay”). See ECF No. 13. Tonopah Solar Energy, LLC (“TSE”), by and through its undersigned counsel, opposes the Motion for Stay. As explained in the following Memorandum of Points and Authorities, the Motion should be denied.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Brahma brings the Motion for Stay in an effort to benefit from a procedural quagmire of its own making. In short, Brahma filed a state court action in Clark County, which TSE properly removed, and answered with counterclaims against Brahma. Brahma then filed a lien foreclosure action into a special proceeding in Nye County. Faced with litigating its claims in this Court, Brahma dropped all but one of its claims from this action via a Rule 15(a)(1) amendment and asserted the dropped claims into the Nye County special proceeding. To remedy this maneuvering, TSE moved in this action for an injunction and to strike Brahma’s amended complaint and in the Nye County special proceeding for, among other relief, dismissal.

In the Motion for Stay, Brahma, in an effort to litigate the remaining claims in this action in its favored forum of Nye County, asks that this Court stay this action under the *Colorado River* abstention doctrine. Alternatively, Brahma seeks leave to amend its complaint to re-assert its previously dropped claims. Neither form of relief is warranted.

As a preliminary matter, this Court should resolve the motion for injunction filed by TSE in this action (ECF No. 16) prior to resolving Brahma’s Motion for Stay, so as to avoid inconsistent results and not encourage the type of impermissible maneuvering undertaken by Brahma.

Regardless of the order in which this Court resolves the pending motions, this action should not be stayed. The *Colorado River* abstention doctrine warrants staying a federal action only in exceptional circumstances. In determining whether such circumstances exist, courts must determine whether the concurrent state and federal suits are “parallel,” and, if so, weigh additional factors. Here, the two suits at issue are not “parallel,” as resolution of the Nye County special proceeding will not completely resolve the claims in this action. This consideration is





dispositive and defeats Brahma's argument. Yet, beyond that, five of the seven additional factors weigh against abstention, one is neutral, and one is inconsequential under the case law. And the suits do not present the type of exceptional circumstances that warrant a stay under the doctrine. Rather, Brahma's actions warrant the issuance of an injunction that enjoins Brahma from prosecuting its dropped claims in the later filed Nye County special proceeding, as requested by TSE's motion for injunction in this action (ECF No. 16).

Moreover, this Court should not permit Brahma leave to amend its complaint. Instead, the appropriate result would be to strike Brahma's amended complaint, as requested by TSE's motion for injunction in this action (ECF No. 16). Accordingly, Brahma's Motion for Stay should be denied in its entirety.

II. STATEMENT OF PERTINENT FACTS

This case concerns disputes over the performance of and payments for construction work on the Crescent Dunes Solar Energy Facility ("Project"). The Project is a solar energy project located outside Tonopah, Nevada designed to produce 110 megawatts of electricity. TSE is the project developer. TSE entered into an agreement as of February 1, 2017 with Brahma ("Agreement") pertaining to the Project.

While Brahma's statement of facts includes many of the pertinent facts, it downplays the nature of its forum shopping efforts and does not include some of the more recent filings.

A. Brahma maneuvers to try to move its claims out of this Court and into Nye County.

In April 2018, Brahma recorded a mechanic's lien concerning the Project. Brahma has amended the lien multiple times and is now on its fourth iteration of the lien.

Also in April, Brahma filed a complaint in the Fifth Judicial District Court, Nye County, Nevada ("Nye County Action"). A week later, TSE filed a motion to expunge the mechanic's lien in that action. The same day TSE filed the motion to expunge, Brahma voluntarily dismissed its complaint, which resulted in the withdrawal of TSE's motion.

On June 11, 2018, TSE filed a second motion to expunge the lien under NRS 108.2275(1). *See* Second Motion to Expunge, ECF No. 16-9. As there was no complaint pending, this second motion to expunge resulted in the opening of a special proceeding in the



1 Fifth Judicial District Court, Nye County, Nevada in accordance with NRS 108.2275(5), which
2 provides that “[i]f, at the time the [motion] is filed, an action to foreclose the notice of lien **has**
3 **not been filed**, the clerk of the court shall assign a number to the [motion] and obtain from the
4 [moving party] a filing fee of \$85.” (“Nye County Special Proceeding”) (emphasis added). *See*
5 *id.* The motion to expunge challenged Brahma’s lien on the basis of notice and recording issues.
6 *See id.*

7 On July 17, 2018, while the motion to expunge in the Nye County Special Proceeding
8 was waiting to be heard, Brahma filed a new complaint in the Eighth Judicial District Court,
9 Clark County, Nevada against TSE (“Clark County Action”) in accordance with the Agreement’s
10 venue selection clause. *See* ECF No. 1-1. The complaint in the Clark County Action asserted
11 the same claims against TSE as the previously dismissed Nye County Action, with the exception
12 of the lien foreclosure claim: (1) breach of the Agreement, (2) breach of the implied covenant of
13 good faith and fair dealing, (3) unjust enrichment, (4) and violation of Nevada’s prompt payment
14 act. *See id.*

15 On September 6, 2018, Cobra Thermosolar Plants, Inc. (“Cobra”)¹ recorded a bond to
16 bond around Brahma’s mechanics lien pursuant to NRS 108.2415. The bond, which was issued
17 by American Home Assurance Company, thereby released Brahma’s mechanic’s lien pursuant to
18 NRS 108.2415(6). The amount of the Bond was later increased.

19 On September 10, 2018, TSE timely removed the Clark County Action to this Court. *See*
20 ECF No. 1. Thus, the Clark County Action converted to this action—the Federal Court Action.

21 Meanwhile, back in Nye County, on September 12, 2018, Judge Elliott heard and denied
22 the second motion to expunge filed by TSE.

23 Five days later, on September 17, 2018, TSE filed an answer and counterclaim against
24 Brahma in the Federal Court Action. *See* ECF No. 4. The counterclaim asserted six claims
25 against Brahma: (1) breach of the Agreement, (2) breach of the implied covenant of good faith
26

27 ¹ Cobra was the original prime contractor that TSE had contracted with to complete the Project.
28 It obtained the bond to release Brahma’s lien pursuant to its contractual relationship with TSE.



1 and fair dealing, (3) declaratory relief, (4) unjust enrichment/quantum meruit, (5) fraudulent
2 misrepresentation, and (6) negligent misrepresentation. *Id.*

3 Shortly thereafter, on September 20, 2018, Brahma filed a Lien Foreclosure Complaint in
4 the Nye County Special Proceeding, despite the fact that the Nye County Special Proceeding was
5 a special proceeding limited to TSE's motion to expunge. *See* Mechanic's Lien Foreclosure
6 Complaint, ECF No. 16-13. In the complaint, Brahma asserted a single claim: lien foreclosure
7 against TSE. *Id.*

8 Five days later, on September 25, 2018, Brahma initiated its claim splitting scheme in an
9 effort to get out of federal court. Brahma filed a first amended complaint in the Federal Court
10 Action under Rule 15(a)(1). *See* ECF No. 8. In this first amended complaint, Brahma asserted a
11 single claim: unjust enrichment against TSE. *See id.* As a result of the amendment, Brahma
12 dropped its three other previously asserted claims: (1) breach of the Agreement, (2) breach of the
13 implied covenant of good faith and fair dealing, and (3) violation of Nevada's prompt payment
14 act. *See id.* Therefore, the only claims that remain in the Federal Court Action are Brahma's
15 claim of unjust enrichment and TSE's counterclaims.

16 At the same time, Brahma filed a first amended counter-complaint and third-party
17 complaint in the Nye County Special Proceeding, again, despite the fact that the Nye County
18 Special Proceeding was a special proceeding limited to TSE's motion to expunge. *See* First
19 Amended Counter-Complaint and Third-Party Complaint, ECF No. 16-14. This first amended
20 counter-complaint asserted four claims against TSE—three of which were the same three claims
21 that Brahma had just dropped from the Federal Court Action (i.e., the copycat claims)—(1)
22 breach of the Agreement, (2) breach of the implied covenant of good faith and fair dealing, (3)
23 foreclosure of notice of lien, and (4) violation of Nevada's prompt payment act. *Id.*² The third-

24
25 _____
26 ² A "counter-complaint" is not a permitted pleading under Nev. R. Civ. P. 7(a) and based on the
27 nature of the filing, Brahma's counter-complaint does not constitute a poorly named complaint or
28 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").



1 party complaint asserted one claim against Cobra and American Home Assurance Company:
2 claim on the surety bond. *Id.*

3 **B. Brahma's impermissible maneuverings led to the filing of multiple motions.**

4 On October 8, 2018, TSE's counsel sent a letter to Brahma's counsel explaining that its
5 claim splitting scheme ran afoul of state and federal law and indicating an intent to move for
6 relief. *See* Letter, ECF No. 16-15. In response, Brahma stood by its actions. *See* Response to
7 Letter, ECF No. 16-16. Brahma requested an extension of time in which to respond to the letter
8 and appears to have used that time to file the Motion for Stay in order to get "out in front" of its
9 forum shopping efforts.

10 On October 18, 2018, TSE filed two motions: one in this court and one in the Nye
11 County Special Proceeding. In this Court, TSE filed a Motion for an Injunction and to Strike
12 ("Motion for Injunction"), which seeks (1) to enjoin Brahma from prosecuting its copycat claims
13 in the Nye County Special Proceeding under the All Writs Act and (2) to strike Brahma's first
14 amended complaint in this action (ECF No. 8) because it constitutes a bad faith amendment
15 intended to divest this Court of jurisdiction over the claims. *See* ECF No. 16.

16 In the Nye County Special Proceeding, TSE filed a Motion to Strike Brahma's First
17 Amended Counter-Complaint, or, in the alternative, Motion to Dismiss Counter-Complaint, or in
18 the alternative, Motion to Stay this Action until the Conclusion of the Proceedings in Federal
19 Court ("Motion to Dismiss"). *See* Motion to Dismiss (without exhibits), attached as **Exhibit 1**.

20 On October 19, 2018, in the Nye County Special Proceeding, Brahma sought leave to
21 amend its complaint to remove its lien foreclosure claim because the Bond released its lien. *See*
22 Motion for Leave to Amend, attached as **Exhibit 2**. Notably, in its motion for leave to amend,
23 Brahma argued that the amendment was proper "at this early stage of the litigation" and that the
24 "litigation is in its infancy" because the "Initial Complaint was filed only 28 days ago and the
25 Amended Complaint was filed 24 days ago." *Id.* at p. 5.³

26 _____
27 ³ This characterization contradicts Brahma's characterization of the Nye County Special
28 Proceeding in its Motion for Stay where Brahma states that the Nye County Court is "well
acquainted with the facts of the case." *See* ECF No. 13 at p. 7.



III. LEGAL ARGUMENT

In its Motion for Stay, Brahma asks that this Court abstain from exercising its jurisdiction in this case by entering a stay under the *Colorado River* abstention doctrine. Alternatively, Brahma asks for leave to amend its complaint. Neither result is warranted. But, before addressing those arguments, it is critical to identify what pleadings this Court should consider in performing its analysis. Due to Brahma's forum shopping efforts, there are multiple motions pending right now that could impact the nature of the pleadings. As explained below, this Court should perform its *Colorado River* analysis after the resolution of TSE's Motion for Injunction (ECF No. 16), so as to avoid inconsistent results and discourage improper maneuvering.

A. The *Colorado River* abstention doctrine analysis should be performed after the resolution of TSE's Motion for Injunction.

Once a party removes a case, the federal removal statute bars any further proceedings in state court because "the state court loses jurisdiction upon the filing of the petition for removal." *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir. 1994); *see* 28 U.S.C. § 1446(d). In fact, the Ninth Circuit has stated that "it is impossible to obtain judicial remedies and sanctions in state and local courts once an action is removed to federal court . . . [because] removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute." *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000); *see also* Wright & Miller, *Federal Practice & Procedure* § 3736 (4th ed.) (providing that, following removal, any further proceedings in a state court are considered *coram non judice* and will be vacated even if the case is later remanded). This divestiture of jurisdiction applies to all state courts—not just the particular state court from which the case was removed. *See, e.g., In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007); *Roberts v. Hollandsworth*, 101 Idaho 522, 525, 616 P.2d 1058, 1061 (1980).

At least two federal district court have addressed conduct strikingly similar to the actions taken by Brahma in this case. In *Riley*, where the plaintiff filed an amended complaint in state

1 court after the federal court denied her motion to remand, the federal court issued a strong rebuke
2 of the plaintiff's actions:

3 [Plaintiff], however, has created a procedural mess. After the court
4 denied her original motion to remand, she filed an amended
5 complaint in state court; the court has no idea why she did this.
6 Once removed, this court, not the state court, had jurisdiction until
7 this court remanded the case or dismissed it without prejudice.
8 This concept is not subtle; it is basic to the law of jurisdiction.
9 [Plaintiff] had no basis for filing the amended complaint in state
10 court.

11 *Riley v. Carson Pirie Scott & Co.*, 946 F. Supp. 716, 718 (E.D. Wis. 1996). In *Crummie*, where
12 the plaintiff filed an amended complaint in state court after the action was removed to federal
13 court, the federal court found the amended state court complaint void and of no effect:

14 After removal of an action, a federal court acquires total, exclusive
15 jurisdiction over the litigation . . . Applying the foregoing precepts
16 to the matter at bar, it is evident that Plaintiff's filing of an
17 amended complaint in state court subsequent to the removal of the
18 cause was of no effect.

19 *Crummie v. Dayton-Hudson Corp.*, 611 F. Supp. 692, 693 (E.D. Mich. 1985).

20 Here, Brahma has created a "procedural mess." Brahma filed the Clark County Action
21 asserting claims for breach of contract, breach of the implied covenant of good faith and fair
22 dealing, unjust enrichment, and violation of Nevada's prompt payment act. TSE properly
23 removed the case to this Court and asserted counterclaims against Brahma. Brahma then filed a
24 lien foreclosure action into the Nye County Special Proceeding. When Brahma decided it did
25 not want to litigate its claims in this Court it filed a Rule 15(a)(1) amendment in this action
26 dropping the copycat claims—breach of contract, breach of the implied covenant of good faith
27 and fair dealing, and violation of Nevada's prompt payment act—and, *on the same day*, refiled
28 those same claims in the Nye County Special Proceeding. Thus, Brahma created the current
procedural posture by forum shopping and disregarding basic tenets of jurisdiction.

TSE has moved in this action and the Nye County Special Proceeding to fix Brahma's
"procedural mess." TSE's motion in this Court seeks (1) an injunction enjoining Brahma from
prosecuting its copycat claims in the Nye County Special Proceeding and (2) the striking of
Brahma's first amended complaint in this action because the amendment was done in bad faith to





1 divest this Court of jurisdiction. *See* ECF No. 16. TSE’s motion in the Nye County Special
2 Proceeding seeks, among other relief, (1) the striking of Brahma’s counter-complaint in the Nye
3 County Special Proceeding because it is an impermissible pleading under both NRCP 7(a) and
4 NRS 108.2275, (2) dismissal of Brahma’s copycat claims in the Nye County Special Proceeding
5 because the state court lacks jurisdiction over them in accordance with the case law cited above,
6 and (3) a stay of the Nye County Special Proceeding under the “first to file” rule. *See Exhibit 1*
7 (Motion to Dismiss). These motions will restore both cases to a more correct procedural posture.

8 It would be inappropriate to perform the *Colorado River* abstention doctrine analysis
9 prior to the resolution of TSE’s Motion for Injunction. Although the stay requested by Brahma
10 should be denied under all potential forms of the pleadings, performing the *Colorado River*
11 analysis prior to resolution of TSE’s Motion for Injunction could encourage parties to make
12 impermissible last-second filings in order to arrange the pleadings in a more advantageous
13 manner. Further, it could lead to strange and inconsistent results. For instance, this Court could
14 stay this case (although that would be inappropriate as discussed below), enjoin Brahma from
15 prosecuting the copycat claims in the Nye County Special Proceeding, and the Nye County Court
16 could dismiss Brahma’s claims so that they can be litigated in this Court. To avoid such
17 inconsistent results, the *Colorado River* analysis should be performed after the resolution of
18 TSE’s Motion for Injunction.⁴

19
20
21
22
23
24 ⁴ In the Motion for Stay, Brahma contends that “[t]o determine whether contemporaneous,
25 concurrent state and federal litigation exists, the Court must look to the point in time when the
26 party moved for its stay under *Colorado River*.” ECF No. 13, p. 8:26-28. In support of this
27 notion, Brahma cites to *FDIC v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989). *Nichols*, however,
28 does not provide this. There, the Ninth Circuit simply concluded that it was an abuse of
discretion by the district court to decline jurisdiction under the *Colorado River* doctrine because
“there was no concurrent or pending state court proceeding” when the party moved for
abstention under the doctrine. *Id.* at 638. This is a far cry from a steadfast rule that a court must
perform a *Colorado River* analysis based on the state of the case when the motion is filed.



B. A stay of this action under the *Colorado River* abstention doctrine is not appropriate regardless of whether this Court performs the analysis before or after the resolution of TSE’s Motion for Injunction.

Brahma argues that this Court should stay this action under the *Colorado River* abstention doctrine because seven of the factors that courts consider in deciding whether to issue such a stay weigh in favor of issuing a stay here. *See* ECF No. 13, pp. 7-16.

As explained below, Brahma is mistaken. First, Brahma overlooks the most important threshold question—are the concurrent state and federal actions “parallel.” They are not. Second, Brahma fundamentally misapplies the factors. When viewed through the proper lens, the factors weigh against the issuance of a stay. Third and finally, Brahma ignores that this case does not present the exceptional circumstances necessary to warrant a stay under *Colorado River*. The stay sought by Brahma must be denied.

1. This action and the Nye County Special Proceeding are not parallel because resolution of the Nye County Special Proceeding would not completely resolve this action.

In the Motion for Stay, Brahma overlooks “[t]he threshold question in deciding whether *Colorado River* abstention is appropriate”—“whether there are parallel federal and state suits.” *ScriptsAmerica, Inc. v. Ironridge Glob. LLC*, 56 F. Supp. 3d 1121, 1147 (C.D. Cal. 2014) (quoting *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005)); *see Intel Corp v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993); *Summit Contracting Grp., Inc. v. Ashland Heights, LP*, 187 F. Supp. 3d 893, 897 (M.D. Tenn. 2016); *DDR Const. Servs., Inc. v. Siemens Indus., Inc.*, 770 F. Supp. 2d 627, 644 (S.D.N.Y. 2011). In deciding whether concurrent federal and state suits are parallel, exact parallelism between the two suits is not required. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989).

For concurrent federal and state suits to qualify as “parallel,” the suits must be “substantially similar.” *Nakash*, 882 F.2d at 1416. Determining substantial similarity requires looking to whether the suits involve the same parties, claims, and facts. *See ScriptsAmerica*, 56 F. Supp. 3d at 1147-48 (citing *Nakash*, 882 F.2d at 1416). But, “[w]hen the nature of the claims in question differs, cases are not parallel despite the fact that both actions arise out of a similar



set of circumstances.” *DDR Construction*, 770 F.Supp.2d at 645 (internal quotation marks omitted).

Further, for concurrent federal and state suits to qualify as “parallel,” a court must have “full confidence that the parallel state proceeding will end the litigation.” *ScriptsAmerica*, 56 F. Supp. 3d at 1148 (quoting *Intel*, 12 F.3d at 913). A court may only enter a stay under the *Colorado River* abstention doctrine if it “necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case.” *Intel*, 12 F.3d at 913 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 28 (1983)). Any “substantial doubt as to whether the state proceedings will resolve the federal action precludes the granting of [such] a stay.” *Intel*, 12 F.3d at 913. Granting a stay in the face of such doubt “would be a serious abuse of discretion.” *Id.* (quoting *Moses H. Cone*, 460 U.S. at 28). In *Intel*, the Ninth Circuit reversed a district court’s stay under the *Colorado River* doctrine because it had doubts as to whether the concurrent state court action would completely resolve the federal court action. 12 F.3d at 913. In reaching this decision, the Ninth Circuit did not consider any other factors. *Id.*

Courts that have faced the question whether a concurrent state court action featuring a foreclosure claim on a mechanics’ lien and a federal court action featuring contractual claims qualify as “parallel” have concluded that they do not.⁵ The Middle District of Tennessee’s discussion on this issue in *Summit Contracting* is comprehensive and on point. 187 F. Supp. 3d at 893-899. There, a general contractor filed a state court action against a project owner to enforce a mechanic’s lien and a federal court action against the project owner asserting claims for breach of contract, violation of Tennessee’s prompt pay act, and violation of Tennessee’s retainage laws. *Id.* at 896. In response to the concurrent suits, the project owner moved for dismissal of the federal court action under the *Colorado River* abstention doctrine. *Id.* at 897.

⁵ *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009); *Gannett Co. v. Clark Const. Grp., Inc.*, 286 F.3d 737, 740 (4th Cir. 2002); *Titan Wrecking & Envtl., LLC v. Vestige Redevelopment Grp. LLC*, No. 1:15-CV-00577, 2016 WL 1028261, at *4 (S.D. Ohio Mar. 15, 2016); *Boccard USA Corp. v. TigPro, Inc.*, No. CIV.A.H-07-0177, 2007 WL 1894154, at *6 (S.D. Tex. July 2, 2007).



1 The district court denied the motion. The court reasoned that it had to first determine “if
2 the concurrent state and federal actions are actually parallel.” *Id.* at 897. The court followed the
3 same analysis set forth above for determining whether the suits are parallel. *See id.* at 897-98.
4 Although the project owner contended that the suits were parallel because they involved “the
5 same parties, litigating identical issues arising out of the same contract,” *id.* at 898, the court
6 followed the reasoning of the Fourth and Eighth Circuits, explaining that “[w]hile [the project
7 owner] may believe that the amount of damages sought by [the general contractor] overlap, it is
8 clear that the State Court Lien Action raises issues not raised in the Federal Court Contract
9 Action . . . [and] that the Federal Court Contract Action raises issues that go beyond that
10 contemplated by the more limited State Court Lien Action.” *Id.* at 899. As a result, the court
11 allowed the federal court action to proceed, concluding that “there is substantial doubt that
12 resolution of the State Court Lien Action would result in a *complete* resolution of the issues
13 between the parties.” *Id.*

14 Here, the Nye County Special Proceeding and this action are not parallel. While they are
15 certainly similar, like the concurrent suits in *Intel*, *DDR Construction*, and *Summit Contracting*,
16 resolution of the Nye County Special Proceeding will not completely resolve this action. Or, at a
17 minimum, substantial doubt exists as to whether resolution of the Nye County Special
18 Proceeding would completely resolve this action. This conclusion applies under both the current
19 state of pleadings and the likely state of the pleadings following resolution of TSE’s Motion for
20 Injunction.

21 If this Court enjoins Brahma from prosecuting its copycat claims in the Nye County
22 Special Proceeding and strikes Brahma’s bad faith amendment to its complaint (which it should),
23 this action will address Brahma’s claims for breach of contract, breach of the implied covenant
24 of good faith and fair dealing, violation of Nevada’s prompt payment act, and unjust enrichment
25 and TSE’s counterclaims for breach of contract, breach of the implied covenant of good faith and
26 fair dealing, declaratory relief, unjust enrichment/quantum meruit, fraudulent misrepresentation,
27 and negligent misrepresentation. The Nye County Special Proceeding would only concern
28 Brahma’s lien foreclosure claim against TSE (which will no longer exist per Brahma’s recently



1 filed motion for leave to amend the complaint in the Nye County Special Proceeding and the fact
 2 that the lien was bonded off) and its surety bond claim against Cobra and American Home
 3 Assurance Company. The resolution of those causes of action in the Nye County Special
 4 Proceeding will not “end” this action, especially taking into TSE’s fraud based counterclaims in
 5 this action. The same is true if this Court denies TSE’s Motion for Injunction, as resolution of
 6 the Nye County Special Proceeding would not necessarily adjudicate Brahma’s unjust
 7 enrichment claim in this court and it certainly would not adjudicate TSE’s counterclaims. Thus,
 8 a stay under the *Colorado River* abstention doctrine is inappropriate.

9 **2. The *Colorado River* abstention doctrine factors weigh against staying this**
 10 **action.**

11 In the Motion for Stay, Brahma misapplies the factors courts consider “for determining
 12 whether ‘exceptional circumstances’ exist warranting federal abstention from concurrent federal
 13 and state proceedings.” *Seneca Ins. Co., Inc. v. Strange Land, Inc.*, 862 F.3d 835, 841 (9th Cir.
 14 2017). Although Brahma discussed seven factors, the Ninth Circuit actually evaluates eight
 15 factors: (1) which court first assumed jurisdiction over any property at stake; (2) the
 16 inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in
 17 which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of
 18 decision on the merits; (6) whether the state court proceedings can adequately protect the rights
 19 of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court
 20 proceedings will resolve all issues before the federal court. *Id.*

21 In evaluating these factors, courts use a flexible balancing test “in which one factor may
 22 be accorded substantially more weight than another depending on the circumstances of the case,
 23 and ‘with the balance heavily weighted in favor of the exercise of jurisdiction.’” *Holder v.*
 24 *Holder*, 305 F.3d 854, 871 (9th Cir. 2002) (quoting *Moses H. Cone*, 460 U.S. at 16) (emphasis
 25 added). Indeed, “[t]he underlying principle guiding [a court’s] review is a strong presumption
 26 against federal abstention.” *Seneca*, 862 F.3d at 841. The court’s “task in cases such as this is
 27 not to find some substantial reason for the exercise of federal jurisdiction by the district court;
 28 rather, the task is to ascertain whether there exist ‘exceptional’ circumstances, the ‘clearest of



justifications,’ that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction.’” *Id.* (quoting *Moses H. Cone*, 460 U.S. at 25-26) (emphasis in original). As a result, “[a]ny doubt as to whether a factor exists should be resolved against a stay, not in favor of one.” *Seneca*, 862 F.3d at 842.

Here, as explained below, the factors weigh against abstention: five weigh against abstention, one is neutral, one is fairly inconsequential, and one precludes abstention. Thus, the stay requested by Brahma must be denied.

a. The *res* factor weighs against abstention.

Brahma argues that this factor weighs in favor of abstention because Nye County “first assumed jurisdiction over the Res.” ECF No. 13, pp. 10-11. This argument is wrong on multiple levels: this action and the Nye County Special Proceeding are not competing for jurisdiction over a *res* and if they are, or ever were, this action would have assumed jurisdiction first.

The first factor—jurisdiction over a *res*—weighs in favor of abstention “when both forums exercise jurisdiction over the same property, and addresses the concern that the parallel proceedings will result in inconsistent dispositions of such property.” *Montanore Minerals Corp. v. Bakie*, 867 F.3d 1160, 1166 (9th Cir. 2017). Where “there is no possibility that the parallel proceedings will result in inconsistent dispositions of a single *res*,” this factor does not apply. *Seneca*, 862 F.3d at 842. Said another way, for this factor to apply, the concurrent proceedings must both be *in rem* or *quasi in rem* proceedings. *40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 589 (9th Cir. 1992). In *Boccard*, the court found that this factor did not weigh in favor of abstention because although the concurrent state court action asserted a mechanic’s lien claim, the concurrent federal court action did not. *Boccard USA Corp. v. TigPro, Inc.*, No. CIV.A. H-07-0177, 2007 WL 1894154, at *7 (S.D. Tex. July 2, 2007). Thus, the court concluded that the suits were “not competing for jurisdiction over a *res*.” *Id.* at *8.⁶

⁶ An *in rem* proceeding is an action against property, which affects the rights of all persons with an interest in the property; a *quasi in rem* proceeding only affects the rights of certain persons in the property; and an *in personam* proceeding merely “determine[s] the personal rights and obligations of the defendant.” *Hanover Ins. Co. v. Fremont Bank*, 68 F. Supp. 3d 1085, 1109 (N.D. Cal. 2014) (citing to multiple Supreme Court cases to support these definitions).



1 While a claim to foreclose a mechanic's lien may constitute a *quasi in rem* proceeding
2 because it determines the interests of certain persons in a piece of property, *see Andersen Const.*
3 *Co. v. Employee Painters' Tr.*, No. C13-0580-JCC, 2013 WL 3305475, at *2 (W.D. Wash. June
4 28, 2013), a claim on a surety bond is an *in personam* proceeding because it does not determine
5 interest in property, *see Welding Techs. v. James Mach. Works, LLC*, No. 3:12-CV-336, 2013
6 WL 1123852, at *3 (S.D. Tex. Mar. 18, 2013). In *Welding Technologies*, in discussing this
7 factor, the parties agreed that there was no *res* under either court's jurisdiction since the
8 defendant "bonded around [the plaintiff's] mechanic's lien on [the property in question]." *Id.*
9 The court reasoned that "[t]he absence of a *res* means that this first factor 'is not, however, a
10 merely neutral item;' instead, it weighs against abstention." *Id.* (quoting *Evanston Ins. Co. v.*
11 *Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988)).

12 Here, the first factor does not weigh in favor of abstention because, as in *Boccard*, the
13 Nye County Special Proceeding and this action are not competing for jurisdiction over a *res*. In
14 fact, neither action is *in rem* or *quasi in rem*. This action has never been *in rem* because none of
15 the claims or counterclaims asserted in this action were or are *in rem* or *quasi in rem* claims.
16 Although at one time the Nye County Special Proceeding qualified as *quasi in rem* due to
17 Brahma's lien foreclosure claim, that claim is moot as the lien has been bonded off. Indeed, for
18 this reason, TSE has moved to dismiss the lien foreclosure claim and Brahma has sought leave to
19 file an amended complaint dropping the lien foreclosure claim. Thus, neither this action nor the
20 Nye County Special Proceeding constitutes an *in rem* or *quasi in rem* proceeding.

21 Moreover, if in some unforeseeable way, both this action and the Nye County Special
22 Proceeding constitute *in rem* or *quasi in rem* proceedings, this action first assumed jurisdiction
23 over the *res*. TSE removed the Clark County Action to this Court on September 10, 2018.
24 Brahma filed the Lien Foreclosure Complaint in the Nye County Special Proceeding on
25 September 20, 2018. Thus, this action was in front of this Court prior to Brahma filing for
26 foreclosure in Nye County.

27 To the extent that Brahma attempts to link its filing in the Nye County Special
28 Proceeding with TSE's motion to expunge, such an attempt fails for three reasons. One, as



1 explained in TSE's Motion to Dismiss in the Nye County Special Proceeding, Brahma's
2 complaint and counter-complaint in the Nye County Special Proceeding are impermissible
3 filings, as they do not comply with Nev. R. Civ. P. 7(a) or NRS 108.2275. Brahma should have
4 filed its lien foreclosure claim in a separate action; the Nye County Special Proceeding was
5 limited to TSE's motion to expunge. Two, even assuming, *arguendo*, that Brahma's "counter-
6 complaint" in the Nye County proceeding was a permissible filing, its date of filing does not
7 relate back to the date TSE filed its motion to expunge. Under the first to file rule, federal courts
8 look to the date the "complaints" were filed to determine which court assumed jurisdiction first.
9 *See Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 96, n. 3 (9th Cir. 1982). Third and
10 finally, even if Brahma could link its foreclosure action to the date TSE filed its motion to
11 expunge, which it cannot, a motion to expunge a mechanic's lien is an *in personam* proceeding
12 not an *in rem* proceeding, as it seeks to establish the rights of the party recording the lien, as
13 opposed to a proceeding against property. *See Commonwealth Trust Co. of Pittsburgh v.*
14 *Bradford*, 297 U.S. 613, 619 (1936) (proceeding to determine rights to funds in a trust was not *in*
15 *rem* because it sought "only to establish rights," rather than to "deal with the property and other
16 distribution"). Therefore, this first factor does not weigh in favor of abstention; rather, as stated
17 in *Welding Technologies*, it weighs against abstention.

18 **b. The convenience of the forum factor weighs against abstention.**

19 Brahma contends that Nye County is a convenient forum. *See* ECF No. 13:26-27. But
20 that is not the test. The test is "whether the inconvenience of the federal forum is so great that
21 this factor points toward abstention." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1368
22 (9th Cir. 1990). Here, the Nevada Federal District Court in Las Vegas is more convenient than
23 the Nye County courthouse in Pahrump, Nevada, as counsel for both parties are located closer to
24 this Court than the Nye County courthouse in Pahrump. Thus, this factor weighs against
25 abstention.

26 Within its discussion on this factor, Brahma shoe-horns in two additional arguments.
27 Neither argument, however, concerns the convenience of the forum. Brahma argues that in
28 federal court it is not afforded the opportunity to obtain a preferential trial setting on its bond

1 claim under NRS 108.237(9).⁷ This argument is a red herring. Brahma's bond claim is not
2 against TSE—it is against Cobra and American Home Assurance Company. Further, Brahma's
3 bond claim will remain in state court as Cobra has the same domicile as Brahma. Next, Brahma
4 argues that H&E cannot intervene to assert claims in this action due to a lack of diversity with
5 TSE. But, as H&E has not yet asserted such claims, such theorizing is premature. Neither
6 argument changes the fact that the convenience factor weighs against abstention.

7 **c. The piecemeal litigation factor appears neutral.**

8 Brahma argues that this factor weighs in favor of abstention because the concurrent
9 proceedings could reach different conclusions on Brahma's lien and that the Nye County Court
10 has already adjudicated TSE's motion to expunge. ECF No. 13, pp. 14-15. This argument is
11 flawed, as Brahma ignores the applicable test and misconstrues its lien and TSE's motion to
12 expunge.

13 For the piecemeal litigation factor “to favor a stay, the case must raise a special concern
14 about piecemeal litigation, which can be remedied by staying or dismissing the federal
15 proceeding, and which the court could not have avoided by other means.” *Montanore*, 867 F.3d
16 at 1167. “The mere possibility of piecemeal litigation does not constitute an exceptional
17 circumstance.” *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011).

18 Here, the lien argument raised by Brahma does not raise a special concern, or any
19 concern for that matter, because the lien has been released. The lien was automatically released
20 upon the recording of the bond. *See* NRS 108.2413. That is why Brahma's proposed amended
21 complaint in the Nye County Special Proceeding drops its lien foreclosure claim. Moreover, the
22 already adjudicated issues in TSE's motion to expunge do not raise a special concern. The
23 arguments made by TSE related to lien notice and recording requirements. The arguments did
24 not relate to the substance of the case. Brahma's reliance on TSE's October 15, 2018 letter to
25 assert otherwise is misplaced. That letter merely sought to alert Judge Elliot to Brahma's bad
26

27 _____
28 ⁷ Brahma cites to the wrong statute. The correct statute is NRS 108.2421(3).



1 faith conduct in unilaterally submitting a proposed order that contained trumped up factual
2 findings that fell outside the scope of the expungement issue.

3 Finally, Brahma ignores the likelihood that its bond claim against Cobra and American
4 Home Assurance Company in the Nye County Special Proceeding will be dismissed or stayed
5 and that the remaining claims will proceed in this action. Thus, there is only the “mere
6 possibility of piecemeal litigation” at this time. As a result, this factor is neutral.

7 **d. The jurisdiction order factor weighs against abstention.**

8 Brahma contends that this factor weighs in favor of abstention because the Nye County
9 Special Proceeding predates this action and is further along. ECF No. 13, p. 11. Brahma is
10 mistaken on both accounts.

11 “In determining the order in which the state and federal courts obtained jurisdiction,
12 district courts are instructed not simply to compare filing dates, but to analyze the progress made
13 in each case in a pragmatic, flexible manner with a view to the realities of the case at hand.”
14 *Seneca*, 862 F.3d at 843.

15 Here, this action was first filed, and is further along than the Nye County Special
16 Proceeding. As mentioned, the first to file rule looks to the date the complaints were filed to
17 determine which court assumed jurisdiction first: Brahma filed the Clark County Action in July
18 2018, and TSE removed it to this Court on September 10, 2018; Brahma filed its lien foreclosure
19 claim on September 20, 2018, and its amended counter-complaint in the Nye County Special
20 Proceeding on September 25, 2018. *See Exhibit 2* (Brahma’s Motion for Leave to Amend)
21 (discussing the infant nature of its case, despite its argument in the Motion that the case is further
22 along).

23 Moreover, this case is further along than the Nye County Special Proceeding. While the
24 Nye County Court ruled on TSE’s motion for expungement, that motion focused only on lien
25 notice and recording issues, which did not impact the merits of Brahma’s claims or TSE’s
26 counterclaims. Indeed, this action has progressed into discovery, while the Nye County Special
27 Proceeding has not. In this action, the parties held a Rule 26(f) conference on October 25, 2018,
28 thus, triggering discovery. TSE served Brahma with an initial round of written discovery on



1 October 29, 2018. The parties have not commenced discovery in the Nye County Special
2 Proceeding, and cannot, until after that court addresses TSE's pending motion to dismiss
3 Brahma's impermissible cross-complaint. The fact that the Nye County Court has addressed
4 mechanic's lien claims pertaining to the Project that are unrelated to the dispute presented here
5 does not change the reality that this action was first filed and is further along. Thus, this factor
6 weighs against abstention.

7 **e. The rule of decision factor weighs against abstention.**

8 Brahma contends that this factor weighs in favor of abstention because there are no
9 federal questions involved in this case and state courts are "better equipped to handle complex
10 lien litigation." ECF No. 13, p. 15. This argument is wrong as Brahma again ignores the law on
11 this issue.

12 While the presence of a federal question is a major consideration weighing against
13 abstention, the presence of state-law issues may only weigh in favor of abstention in "rare
14 circumstances." *Seneca*, 862 F.3d at 844. "That state law provides the rule of decision supports
15 abstention only when the state law questions are themselves complex and difficult issues better
16 resolved by a state court; it is not enough that a state law case is complex because it involves
17 numerous parties or claims." *Id.* Routine state law claims, such as breach of contract and
18 misrepresentation, do not constitute the type of "rare circumstances" that favor abstention. *Id.*
19 In *Seneca*, the Ninth Circuit disagreed with the district court's conclusion that the fact that the
20 case only included state law claims weighed heavily in favor of abstention because the claims
21 "ultimately boil[ed] down to arguments about misrepresentation, fraudulent inducement,
22 detrimental reliance, breach of contract, and rescission, none of which [raised] the 'rare
23 circumstances' required for the rule of decision factor to weigh toward abstention." *Id.*

24 Here, as in *Seneca*, Brahma's claims and TSE's counterclaims do not raise the "rare
25 circumstances" required for this factor to weigh in favor of abstention. Rather, the claims are run
26 of the mill state law claims such as breach of contract, unjust enrichment, and fraud. The one
27 NRS 624 prompt pay act claim asserted by Brahma does not change this. This Court is equipped
28



1 to handle all of the claims presented by this litigation. Thus, this factor weighs against
2 abstention.

3 **f. The right protection factor is fairly inconsequential.**

4 Brahma is correct that a state court proceeding can adequately protect the rights of the
5 parties to this case. *See Madonna*, 914 F.2d at 1370 (“This factor involves the state court’s
6 adequacy to protect federal rights, not the federal court’s adequacy to protect state rights.”). But,
7 Brahma ignores that “this factor is more important when it weighs against a stay.” *Montanore*,
8 867 F.3d at 1169. Thus, while this factor weighs in favor of abstention, it is fairly
9 inconsequential.

10 **g. The forum shopping factor weighs heavily against abstention.**

11 Brahma argues that this factor weighs in favor of abstention because “TSE’s removal of
12 the Clark County Action is nothing more than an effort to engage in forum shopping to avoid the
13 effects of the adverse ruling by Judge Elliott.” ECF No. 13, p. 16:12-23. This is wholly
14 incorrect—Brahma has engaged in forum shopping, not TSE.

15 TSE removed the Clark County Action *prior to* Judge Elliot issuing his ruling denying
16 TSE’s motion to expunge. TSE removed the Clark County Action on September 10, 2018;
17 Judge Elliot issued his ruling on September 12, 2018. Brahma, on the other hand, dropped its
18 claims from this Court and reasserted them in the Nye County Special Proceeding in a backdoor
19 attempt to evade this Court’s jurisdiction without filing a motion to remand. Brahma should not
20 benefit from its forum shopping efforts by obtaining a stay of this action. This factor weighs
21 heavily against abstention. *See Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989)
22 (weighing this factor “strongly” against the party that engaged in forum shopping because the
23 court had “no interest in encouraging [the] practice”).

24 **h. The complete resolution factor precludes abstention.**

25 Brahma did not discuss this factor—the most important factor. This factor is identical to
26 the parallel discussion above. Some courts in the Ninth Circuit treat this as an eighth factor,
27 while others treat it as a threshold issue to address before applying the factors. *Compare Seneca*,
28 862 F.3d at 845 *with Holder v. Holder*, 305 F.3d 854, 868 (9th Cir. 2002); *Intel Corp v.*



1 *Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993); *ScriptsAmerica, Inc. v.*
 2 *Ironridge Glob. LLC*, 56 F. Supp. 3d 1121, 1147 (C.D. Cal. 2014). Regardless of when it is
 3 applied, the rule is the same: “the existence of a substantial doubt as to whether the state
 4 proceedings will resolve the federal action precludes a *Colorado River* stay or dismissal.”
 5 *Seneca*, 862 F.3d at 845 (internal quotation marks omitted). This rule is “dispositive.” *Intel*, 12
 6 F.3d at 913. Here, as explained above, the Nye County Special Proceeding will not resolve all of
 7 the claims asserted in this action. Thus, a stay would be inappropriate.

8 **3. The circumstances presented here are not exceptional enough to warrant a**
 9 **stay under the *Colorado River* abstention doctrine.**

10 In addition to misapplying the factors, Brahma overlooks the narrow and extraordinary
 11 nature of the *Colorado River* abstention doctrine. A federal court has a “‘virtually unflagging
 12 obligation . . . to exercise the jurisdiction given them,’ including in cases involving parallel state
 13 litigation.” *Seneca*, 862 F.3d at 841 (quoting *Colo. River Water Conservation Dist. v. United*
 14 *States*, 424 U.S. 800, 817 (1976)). Abstention from the exercise of federal jurisdiction under the
 15 *Colorado River* doctrine is “‘an extraordinary and narrow exception’” to that obligation. *Am.*
 16 *Int’l Underwriters (Philippines), Inc. v. Cont’l Ins. Co.*, 843 F.2d 1253, 1256-57 (9th Cir. 1988)
 17 (quoting *Colorado River*, 424 U.S. at 813). Such abstention should only be exercised under
 18 “‘exceedingly rare,’” *Seneca*, 862 F.3d at 841, and “‘exceptional’” circumstances, *Nakash*, 882 F.2d
 19 at 1415.

20 The Ninth Circuit’s decision in *Seneca* demonstrates the narrow and extraordinary nature
 21 of the doctrine. There, the district court issued a stay under the doctrine. On appeal, the Ninth
 22 Circuit vacated the stay, stating that “[t]he reasons that the district court offered to justify
 23 abstention—that the parallel proceedings will involve piecemeal disposition of the issues, that
 24 the state law provides the rule of decision, and that the state proceeding is better suited to
 25 promote resolution of all the issues among the parties—are likely to be present in nearly every
 26 instance of concurrent state and federal suits where state law provides the rule of decision.” *Id.*
 27 at 847. The Ninth Circuit concluded that these concerns were not “exceptional” so as to
 28 “warrant disregarding the ‘virtually unflagging obligation’ of a federal court to exercise its



jurisdiction.” *Id.*

Here, the reasoning from *Seneca* applies with equal force. To the extent that this Court believes that any of the factors weigh in favor of abstention, the circumstances presented by this action and the Nye County Special Proceeding are neither exceptional nor extraordinary. It would be an abuse of discretion to issue the stay requested by Brahma.

C. Brahma should not be permitted leave to amend its complaint.

Brahma requests that, to the extent that this Court denies its requested stay, it should be given leave to amend its complaint “to reassert its contract claims against TSE which are currently being litigated in the Nye County Action.” ECF No. 12, pp. 16-18. This request should be denied because the proper remedy is to resort back to Brahma’s original complaint, which included the contract claims, by striking its amended complaint. *See* ECF No. 16 (requesting this relief). Moreover, Brahma failed to attach a proposed amended pleading to the Motion in accordance with LR 15-1.

IV. CONCLUSION

As set forth above, this Court should not abstain from exercising its jurisdiction or permit Brahma leave to amend its complaint. A stay under the *Colorado River* abstention doctrine is not warranted. This action and the Nye County Special Proceeding are not parallel, the factors weigh against the issuance of a stay, and the suits do not present the type of exceptional circumstances that could warrant a stay. Rather, this Court should enjoin Brahma from prosecuting its copycat claims in the Nye County Special Proceeding, strike Brahma’s amendment to its complaint, as requested by TSE’s Motion for Injunction (ECF No. 16), and permit this action to proceed. Brahma’s Motion for Stay should be denied.

DATED this 30th day of October 2018.

/s/ Colby Balkenbush

D. Lee Roberts, Jr., Esq.

Colby L. Balkenbush, Esq.

Ryan T. Gormley, Esq.

WEINBERG, WHEELER, HUDGINS,

GUNN & DIAL, LLC

6385 S. Rainbow Blvd., Suite 400

Las Vegas, NV 89118

Attorneys for Defendant/Counterclaimant

Tonopah Solar Energy, LLC



CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2018, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S RESPONSE TO BRAHMA'S MOTION FOR STAY, OR IN THE ALTERNATIVE, MOTION TO AMEND COMPLAINT** 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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Eric B. Zimbelman, Esq.
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*Attorneys for Plaintiff/Counterdefendant
Brahma Group, Inc.*

/s/ Cynthia S. Bowman

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



EXHIBIT 13

Mead Excerpt

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

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

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

any party with an interest in
t to show cause why the lien
be made upon affidavits and

evidence to support the petitioner's claim. If the court agrees that a hearing should be held, it must give 15 to 30 days notice of the hearing.⁷⁸⁰ Many times the courts will not be aware of this strict mandate and will issue the order to show cause on a shorter time basis, often because the moving party has provided a request for a shortened time period on some pending transaction or date with which the lien is interfering. While the trial courts are often accommodating to that request, there is no basis under the mechanics lien statute for the expedited hearing. Moreover, since the motion is effectively a challenge to the validity of the lien with limited due process, the Courts should be slow to shorten the time for a motion to less than the statutory minimum of 15 days. It should be noted that while the hearing must commence within 15 to 30 days, it need not be completed in that time, so long as the owner's rights to a speeding resolution of the validity or excessiveness of the lien is made expeditiously.⁷⁸¹

A ruling on a motion under NRS 108.2275 is a final order and is immediately appealable, however, a ruling that the lien claim is not frivolous or excessive does not allow a stay to be entered during the time of the appeal's pendency.⁷⁸² As such, the fact that a ruling is being appealed should not be taken by the lien claimant as tolling any statute of limitations on the claim of lien itself. The lien claimant still must file suit to foreclose the mechanics lien timely under NRS 108.233 and NRS 108.239.⁷⁸³ A foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) Rule 4. Likewise, a "petition" is not a proper "pleading" under NRCP Rule 7(a), to which a counter-claim may be filed. Rather, it is a "motion" under NRCP Rule 7(b). As such, it is improper legal practice to file a counter-claim to a petition under NRS 108.2275. **The proper procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate the two matters.**

If the lien is ordered expunged or reduced under NRS 108.2275, the party removing the lien needs merely to record a copy of the certified order reducing or expunging the lien claim to release the property from the lien or reducing the same for all purposes.⁷⁸⁴

⁷⁸⁰ NRS 108.2275(3).

⁷⁸¹ *J.D. Const, Inc. v. IBEX Intern. Group, LLC*, 240 P.3d 1033, 126 Nev. Adv. Op. No. 36 (Nev. 2010).

⁷⁸² NRS 108.2275(8).

⁷⁸³ See Section 8:22, Foreclosing the claim of lien.

⁷⁸⁴ NRS 108.2275(9).

EXHIBIT 14

Brahma's Mechanic's Lien Foreclosure Complaint Against Surety Bond

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Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Defendants,

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

///

FILED
FIFTH JUDICIAL DISTRICT COURT

DEC 14 2018

NYE COUNTY DEPUTY CLERK
DEPUTY

Marianne Yoffee

CASE NO. :
DEPT. NO. :

CV39799
1

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

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

THE PARTIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 WHEREFORE, Brahma prays that this Honorable Court:

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

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

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


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

11 AFFIRMATION PURSUANT TO NRS 239B.030

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

14 Dated this 14th day of December 2018.

15 PEEL BRIMLEY LLP

16 

17 RICHARD L. PEEL, ESQ.

18 Nevada Bar No. 4359

19 ERIC ZIMBELMAN, ESQ.

20 Nevada Bar No. 9407

21 CARY B. DOMINA, ESQ.

22 Nevada Bar No. 10567

23 RONALD J. COX, ESQ.

24 Nevada Bar No. 12723

25 3333 E. Serene Avenue, Suite 200

26 Henderson, Nevada 89074-6571

27 Attorneys for Brahma Group, Inc.

28

EXHIBIT 15

Notice of Entry of Order

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

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Attorneys for Brahma Group, Inc.

FILED
FIFTH JUDICIAL DISTRICT

MAR 15 2019

Nye County Clerk

Marianne Yoffee Deputy

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

CASE NO. : CV 39348
Consolidated with CV39799
DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

10 Third-Party Defendants.

11 H&E EQUIPMENT SERVICES, INC., a Delaware
12 corporation,

13 Plaintiff-in-Intervention,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,
16 TONOPAH SOLAR ENERGY LLC, a Delaware
17 limited liability company, COBRA
18 THERMOSOLAR PLANTS, INC., a Nevada
19 Corporation; AMERICAN HOME ASSURANCE
20 COMPANY, a surety; BOE BONDING
21 COMPANIES I through X; DOES I through X;
22 ROE CORPORATIONS I through X, and TOE
23 TENANTS I through X, inclusive,

24 Defendants-in-Intervention.

25 BRAHMA GROUP, INC. a Nevada corporation,

26 Plaintiff,

27 vs.

28 COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES 1 through X; DOES I
through X; ROE CORPORATIONS I through X,
inclusive,

Defendants.

1 **NOTICE OF ENTRY OF ORDER**

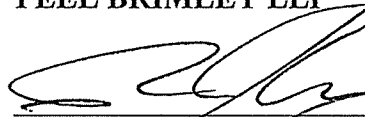
2 PLEASE TAKE NOTICE that an Order Granting Brahma's Motion to Consolidate Case
3 No. 39799 with Case No. 39348 was filed on **February 19, 2019**, a copy of which is attached as
4 Exhibit 1.

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

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

8 Dated this 13th day of March, 2019.

9 **PEEL BRIMLEY LLP**

10 

11 RICHARD L. PEEL, ESQ.

12 Nevada Bar No. 4359

13 ERIC ZIMBELMAN, ESQ.

14 Nevada Bar No. 9407

15 RONALD J. COX, ESQ.

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19 *Attorneys for Brahma Group, Inc.*

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 13th day of March, 2019, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:


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

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

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An Employee of Peel Brimley LLP

EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

FEB 19 2019

Nye County Clerk

~~Marianne Yoffee~~ Deputy

1 **ORDR**

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16 *Attorneys for Brahma Group, Inc.*

17 **FIFTH JUDICIAL DISTRICT COURT**

18 **NYE COUNTY, NEVADA**

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

21 Plaintiff,

22 vs.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Defendant.

CASE NO. : CV 39348

DEPT. NO. : 2

**ORDER GRANTING BRAHMA'S
MOTION TO CONSOLIDATE CASE
NO. CV39799 WITH CASE NO. CV
39348**

25 This matter came on for hearing January 24, 2019 (the "Hearing") before the Honorable
26 Senior Judge Steven Elliott on the Motion to Consolidate Case No. CV39799 with Case No. CV
27 39348 ("Motion") filed by BRAHMA GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of
28 PEEL BRIMLEY LLP appeared on behalf of Brahma. Colby L. Balkenbush, Esq. of
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of Plaintiff
TONOPAH SOLAR ENERGY, LLC ("TSE").

The Court having considered all the pleadings and papers on file, and having heard
argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
bench on January 24, 2019:

I. BASIS FOR CONSOLIDATION

Brahma seeks to consolidate Case No. CV39799 with Case No. CV 39348 pursuant to
NRCP 42, which provides in relevant part:

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

4 Consolidation is vested in the sound discretion of the trial court. (*Zupancic v. Sierra Vista*
5 *Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981).

6 **II. FINDINGS AND CONCLUSIONS.**

7 1. The Court finds (i) the two cases involve common questions of law or fact, and
8 (ii) consolidation would “avoid unnecessary costs or delay” and provide judicial economy.

9 2. TSE opposed the Motion on several grounds. First, TSE argues that it was
10 procedurally improper for Brahma to file Case No. CV39799 when Case No. CV 39348 is
11 pending in this Court with similar or identical claims. However, in its Motion to Strike Brahma
12 Group, Inc.’s (“Brahma”) First Amended Counter-Complaint (“Motion to Strike”),¹ TSE argued
13 that Brahma’s proposed amended pleading was improper because “one cannot file a Counter-
14 Complaint into a special proceeding such as this.” In support of its position, TSE relied on what
15 it claimed to be “the leading Nevada construction law treatise,” LEON F. MEAD II,
16 CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) “it is improper legal
17 procedure to file a counter-claim to a petition under NRS 108.2275,” and (ii) “the proper
18 procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate
19 the two matters.”

20 3. As discussed in the Court’s Order Denying Motion to Strike, the Court does not
21 agree with Mr. Mead’s premise and found that there was nothing improper with Brahma filing
22 its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge
23 Brahma’s Lien. Additionally, the Court has now come to the conclusion that had Brahma filed a
24 standalone complaint as an independent action and then moved the Court to consolidate that
25 action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they
26 currently find themselves in.

27
28 ¹ The complete title of that motion was “Tonopah Solar Energy, LLC’s Motion to Strike Brahma Group, Inc.’s First Amended Counter-Complaint, or, in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative, Motion to Stay this Action until the Conclusion of the Proceedings in Federal Court.”

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4. In any event, and especially where TSE has stated its intention to file a Writ Petition to the Nevada Supreme Court with respect to this Court's denial of TSE's Motion to Strike, it was appropriate for Brahma to file Case No. CV39799 and for this Court to consolidate that action into the present action. Specifically, but without limitation, if the Supreme Court were to ultimately overrule this court and determine that it was improper for Brahma to file a counter-claim to a petition under NRS 108.2275, Brahma's time to file a complaint against the applicable surety bond would by then have lapsed pursuant to NRS 108.2421. If, on the other hand, the Nevada Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure claim filed in Case No. CV39799 is (at worst) moot with no prejudice having been suffered by any party by way of consolidation.

5. The Court also rejects TSE's contention that Case No. CV39799 and Brahma's Motion to Consolidate is futile. The Court finds that Brahma's Complaint filed in Case No. CV39799 is not impermissible claim-splitting and does not violate NRCP 1 or NRCP 15.

6. Based on the foregoing, the Court hereby concludes that Case No. CV39799 may be and is hereby consolidated with Case No. CV 39348.

NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion to Consolidate is **GRANTED** and Case No. CV39799 is hereby consolidated with Case No. CV 39348.

Dated this 12th day February 2019.

 2-14-19
Senior Judge Steven Elliott

Submitted by:
PEEL BRIMLEY LLP

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

EXHIBIT 16

Order Granting Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint

ORIGINAL

1 **ORDR**

2 RICHARD L. PEEL, ESQ.

3 Nevada Bar No. 4359

4 ERIC B. ZIMBELMAN, ESQ.

5 Nevada Bar No. 9407

6 RONALD J. COX, ESQ.

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14 ezimbelman@peelbrimley.com

15 *Attorneys for Brahma Group, Inc.*

FILED
FIFTH JUDICIAL DISTRICT

APR 22 2019

Nye County Clerk
Deputy

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

13 Plaintiff,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Defendant.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Lien/Bond Claimant,

19 vs.

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

25 Counterdefendants,

CASE NO. : CV 39348

Consolidated with:

Case No. CV39799

DEPT. NO. : 2

**ORDER GRANTING BRAHMA'S
COUNTERMOTION FOR LEAVE
TO FILE A SINGLE
CONSOLIDATED AMENDED
COMPLAINT**

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Lien/Bond Claimant and Third-
3 Party Plaintiff,

4 vs.

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

9 Third-Party Defendants.

10
11 **ORDER GRANTING BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A**
12 **SINGLE CONSOLIDATED AMENDED COMPLAINT**

13 This matter came on for hearing April 17, 2019 (the "Hearing") before the Honorable
14 Senior Judge Steven Elliott on the Countermotion for Leave to File a Single Consolidated
15 Amended Complaint ("Countermotion")¹ filed by Defendant/Lien Bond Claimant, BRAHMA
16 GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of PEEL BRIMLEY LLP appeared on
17 behalf of Brahma. Colby L. Balkenbush, Esq. of WEINBERG, WHEELER, HUDGINS, GUNN
18 & DIAL, LLC appeared on behalf of Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE"),
who opposed the Countermotion.

19 The Court having considered all the pleadings and papers on file, and having heard
20 argument of counsel, hereby **ORDERS** as follows:

- 21 1. Brahma's Countermotion is **GRANTED**; and
22 2. Brahma is granted leave to file the Consolidated Amended Pleading (titled "Brahma
23 Group, Inc.'s: (I) Second Amended Complaint; and (II) First Amended Third-Party
24 Complaint") substantially in the form attached hereto as Exhibit "A;" and

25 ///

26 ///

27
28 ¹ Brahma filed its Countermotion in connection with and as part of its Opposition to the Motion to Dismiss
filed by Third-Party Defendant Cobra Thermosolar Plants, Inc. ("Cobra"). By way of a separate
Stipulation and Order for Partial Dismissal, Cobra withdrew its Motion to Dismiss.

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Tonapah Solar v. Brahma Group

Case No: CV 39348

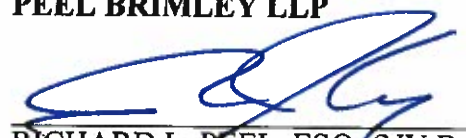
Order Granting Brahma's Countermotion

3. Nothing in this Order shall be deemed to mean that the constituent cases of this consolidated action (Case No. CV39348 and Case No. CV39799) do not "retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) citing *Hall v. Hall*, 138 S. Ct. 1118, 1131, 200 L. Ed. 2d 399 (2018).

Dated this ____ day April 2019.

SENIOR JUDGE STEVEN ELLIOTT

Submitted by:
PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
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Tonapah Solar v. Brahma Group

Case No: CV 39348

Order Granting Brahma's Counter-motion

3. Nothing in this Order shall be deemed to mean that the constituent cases of this consolidated action (Case No. CV39348 and Case No. CV39799) do not "retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) citing *Hall v. Hall*, 138 S. Ct. 1118, 1131, 200 L. Ed. 2d 399 (2018).

Dated this 22 day April 2019.


SENIOR JUDGE STEVEN ELLIOTT

Submitted by:

PEEL BRIMLEY LLP

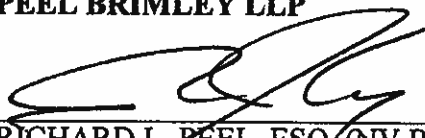

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Exhibit A

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Attorneys for Brahma Group, Inc.

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Counterdefendants,

CASE NO. : CV 39348

Consolidated with:

Case No. CV39799

DEPT. NO. : 2

BRAHMA GROUP, INC.'S:

**(I) SECOND AMENDED
COMPLAINT; AND**

**(II) FIRST AMENDED THIRD-
PARTY COMPLAINT.**

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

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Lien/Bond Claimant and Third-
3 Party Plaintiff,

4 vs.

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

9 Third-Party Defendants.
10

11 **SECOND AMENDED COMPLAINT**

12 Lien/Bond Claimant, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys
13 of record, the law firm of PEEL BRIMLEY LLP, and by way of this Second Amended Complaint
14 ("Second Amended Complaint"), hereby (i) amends all previously filed claims and causes of
15 action filed in this Action, (ii) brings this Second Amended Complaint against the above-named
16 Counterdefendants, and (iii) complains, avers and alleges as follows:

17 **THE PARTIES**

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

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

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

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

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

1 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
2 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
3 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
4 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
5 06 (the "Liberty Parcel").²

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

8 a. A Delaware limited liability company authorized to do business in Nye
9 County and the State of Nevada;

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

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

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

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

19 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
20 Parcels.³

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

25 6. Brahma does not know the true names of the individuals, corporations, partnerships
26 and entities identified and named as Counterdefendants by the fictitious names of (collectively,

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

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

1 the "Doe Defendants"), (i) DOES I through X, (ii) ROE CORPORATIONS I through X, (iii) BOE
2 BONDING COMPANIES I through X, and (iv) TOE TENANTS I through X. Brahma alleges that
3 such Doe Defendants are responsible for damages suffered by Brahma as more fully discussed
4 under the claims for relief set forth below. Brahma will request leave of this Honorable Court to
5 amend this Second Amended Complaint to show the true names and capacities of each such
6 fictitious Defendant when Brahma discovers such information.

7 7. TSE and the Doe Defendants are collectively referred to in this Second Amended
8 Complaint as the "Counterdefendants."

9
10 **FIRST CAUSE OF ACTION**
(Breach of Contract)

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

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

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

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

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

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

27 a. Failing and/or refusing to pay monies owed to BGI for the Work; and

28 ///

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

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

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

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

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

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

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

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

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

b. TSE has improperly withheld moneys totaling more than One Million U.S. Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1).

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

///

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

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

7 **THIRD CAUSE OF ACTION**
8 **(Violation of NRS 624)**

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

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

16 24. TSE violated the provisions of the Statute by failing or refusing to comply with the
17 requirements set forth therein.

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

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

23 ///

24 ///

25 ///

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

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

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

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

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

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

12 Dated this ____ day of April 2019.

13 **PEEL BRIMLEY LLP**

14
15
16 _____
17 RICHARD L. PEEL, ESQ.
18 Nevada Bar No. 4359
19 ERIC ZIMBELMAN, ESQ.
20 Nevada Bar No. 9407
21 RONALD J. COX, ESQ.
22 Nevada Bar No. 12723
23 3333 E. Serene Avenue, Suite 200
24 Henderson, Nevada 89074-6571
25 Attorneys for Brahma Group, Inc.

26
27
28 ///

BRAHMA GROUP, INC.'S FIRST AMENDED THIRD-PARTY COMPLAINT

Lien/Bond Claimant and Third-Party Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, and by way of this First Amended Third-Party Complaint ("Amended Third-Party Complaint"), hereby (i) amends all previously filed claims and causes of action filed in this Third-Party Action, (ii) brings this Amended Third-Party Complaint against the above-named Third-Party Defendants, and (iii) complains, avers and alleges as follows:

THE PARTIES

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

- a. A Nevada corporation, duly authorized and qualified to do business in the State of Nevada;
- b. A duly licensed contractor holding a Nevada State Contractor's License, which license is in good standing; and
- c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY, LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this Third-Party Action, an owner or reputed owner of the fee simple title to all or portions of real

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

property located in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-06 (the "Liberty Parcel").⁵

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

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

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

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

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

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

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

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

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

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

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

⁶ TSE is a party to Brahma's Second Amended Complaint, filed in the Action.

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

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

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

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

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

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

c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

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

FIRST CAUSE OF ACTION

(Claim Against Surety, Surety Bond and Principal thereon)

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

///

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

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

a. The BLM; and

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

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

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

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

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

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

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

///

///

1 19. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
2 Third Amended Lien, and (iv) Fourth Amended Lien, collectively referred to herein as the "Lien,"
3 were:

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

8 20. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
9 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
10 (\$12,859,577.74 - "Lienable Amount").

11 21. The Lienable Amount is due and owing Brahma as of the date of this Amended
12 Third-Party Complaint.

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

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

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

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

22 26. Brahma makes claim against the Third-Party Defendants and AHAC is obligated
23 to Brahma for the Lienable Amount plus interest, costs and attorney's fees up to the penal sum of
24 the Surety Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

25 ///

26 ///

27 ///

28

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

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

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

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

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

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

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

15 Dated this ____ day of April 2019.

16 **PEEL BRIMLEY LLP**

17
18
19 _____
20 RICHARD L. PEEL, ESQ.

21 Nevada Bar No. 4359

22 ERIC ZIMBELMAN, ESQ.

23 Nevada Bar No. 9407

24 RONALD J. COX, ESQ.

25 Nevada Bar No. 12723

26 3333 E. Serene Avenue, Suite 200

27 Henderson, Nevada 89074-6571

28 Attorneys for Brahma Group, Inc.

EXHIBIT 17

**Brahma's (i) Second Amended Complaint; and
(ii) First Amended Third-Party Complaint**

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

APR 22 2019

Nye County Clerk
Deputy

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
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Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Counterdefendants,

CASE NO. : CV 39348

Consolidated with:

Case No. CV39799

DEPT. NO. : 2

BRAHMA GROUP, INC.'S:

**(I) SECOND AMENDED
COMPLAINT; AND**

**(II) FIRST AMENDED THIRD-
PARTY COMPLAINT.**

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

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

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Lien/Bond Claimant and Third-
3 Party Plaintiff,

4 vs.

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

9 Third-Party Defendants.
10

11 **SECOND AMENDED COMPLAINT**

12 Lien/Bond Claimant, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys
13 of record, the law firm of PEEL BRIMLEY LLP, and by way of this Second Amended Complaint
14 ("Second Amended Complaint"), hereby (i) amends all previously filed claims and causes of
15 action filed in this Action, (ii) brings this Second Amended Complaint against the above-named
16 Counterdefendants, and (iii) complains, avers and alleges as follows:

17 **THE PARTIES**

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

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

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

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

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

1 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
2 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
3 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
4 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
5 06 (the "Liberty Parcel").²

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

8 a. A Delaware limited liability company authorized to do business in Nye
9 County and the State of Nevada;

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

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

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

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

19 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
20 Parcels.³

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

25 6. Brahma does not know the true names of the individuals, corporations, partnerships
26 and entities identified and named as Counterdefendants by the fictitious names of (collectively,

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

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

1 the "Doe Defendants"), (i) DOES I through X, (ii) ROE CORPORATIONS I through X, (iii) BOE
2 BONDING COMPANIES I through X, and (iv) TOE TENANTS I through X. Brahma alleges that
3 such Doe Defendants are responsible for damages suffered by Brahma as more fully discussed
4 under the claims for relief set forth below. Brahma will request leave of this Honorable Court to
5 amend this Second Amended Complaint to show the true names and capacities of each such
6 fictitious Defendant when Brahma discovers such information.

7 7. TSE and the Doe Defendants are collectively referred to in this Second Amended
8 Complaint as the "Counterdefendants."

9
10 **FIRST CAUSE OF ACTION**
(Breach of Contract)

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

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

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

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

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

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

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

///
28

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

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

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

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

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

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

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

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

19 a. Asserting pre-textual, extra-contractual and inaccurate reasons for
20 withholding payment long after the time required by the Agreement and Nevada law had elapsed
21 for payment to be made by TSE to BGI.

22 b. TSE has improperly withheld moneys totaling more than One Million U.S.
23 Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1).

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

28 ///

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

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

7 **THIRD CAUSE OF ACTION**
8 **(Violation of NRS 624)**

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

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

16 24. TSE violated the provisions of the Statute by failing or refusing to comply with the
17 requirements set forth therein.

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

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

23 ///

24 ///

25 ///

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

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

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

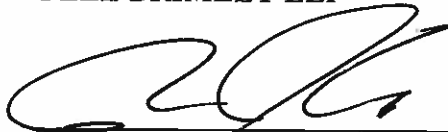
7 3. For such other and further relief as this Honorable Court deems just and proper in
8 the premises.

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

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

12 Dated this 19th day of April 2019.

13 **PEEL BRIMLEY LLP**

14 

15 **RICHARD L. PEEL, ESQ.**

16 Nevada Bar No. 4359

17 **ERIC ZIMBELMAN, ESQ.**

18 Nevada Bar No. 9407

19 **RONALD J. COX, ESQ.**

20 Nevada Bar No. 12723

21 3333 E. Serene Avenue, Suite 200

22 Henderson, Nevada 89074-6571

23 Attorneys for Brahma Group, Inc.

24 ///

BRAHMA GROUP, INC.'S FIRST AMENDED THIRD-PARTY COMPLAINT

Lien/Bond Claimant and Third-Party Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, and by way of this First Amended Third-Party Complaint ("Amended Third-Party Complaint"), hereby (i) amends all previously filed claims and causes of action filed in this Third-Party Action, (ii) brings this Amended Third-Party Complaint against the above-named Third-Party Defendants, and (iii) complains, avers and alleges as follows:

THE PARTIES

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

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

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

c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY, LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this Third-Party Action, an owner or reputed owner of the fee simple title to all or portions of real

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

property located in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-06 (the "Liberty Parcel").⁵

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

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

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

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

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

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

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

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

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

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

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

⁶ TSE is a party to Brahma's Second Amended Complaint, filed in the Action.

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

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

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

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

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

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

9 c. Is a party to a negotiated settlement between Cobra and Brahma for the
10 payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra
11 Work") at the Project.

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

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

23 **FIRST CAUSE OF ACTION**

24 **(Claim Against Surety, Surety Bond and Principal thereon)**

25 10. Brahma repeats and realleges each and every allegation contained in the preceding
26 paragraphs of this Amended Third-Party Complaint, incorporates them by reference, and further
27 alleges as follows:

28 ///

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

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

6 a. The BLM; and

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

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

10 14. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official
11 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
12 \$6,982,186.24.

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

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

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

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

27 ///

28 ///

1 19. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
2 Third Amended Lien, and (iv) Fourth Amended Lien, collectively referred to herein as the "Lien,"
3 were:

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

8 20. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
9 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
10 (\$12,859,577.74 - "Lienable Amount").

11 21. The Lienable Amount is due and owing Brahma as of the date of this Amended
12 Third-Party Complaint.

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

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

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

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

22 26. Brahma makes claim against the Third-Party Defendants and AHAC is obligated
23 to Brahma for the Lienable Amount plus interest, costs and attorney's fees up to the penal sum of
24 the Surety Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

25 ///

26 ///

27 ///

28

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

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

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

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

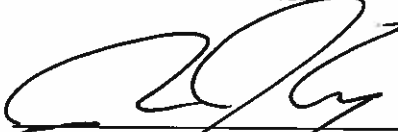
9 4. For such other and further relief as this Honorable Court deems just and proper in
10 the premises.

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

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

15 Dated this 19th day of April 2019.

16 **PEEL BRIMLEY LLP**

17 

18 **RICHARD L. PEEL, ESQ.**

19 Nevada Bar No. 4359

20 **ERIC ZIMBELMAN, ESQ.**

21 Nevada Bar No. 9407

22 **RONALD J. COX, ESQ.**

23 Nevada Bar No. 12723

24 3333 E. Serene Avenue, Suite 200

25 Henderson, Nevada 89074-6571

26 Attorneys for Brahma Group, Inc.

EXHIBIT 18

Minutes of Proceedings

Eric Zimbelman

From: cmecf@nvd.uscourts.gov
Sent: Tuesday, June 25, 2019 6:21 PM
To: cmecfhelpdesk@nvd.uscourts.gov
Subject: Activity in Case 2:18-cv-01747-RFB-GWF Brahma Group, Inc. v. Tonopah Solar Energy, LLC Motion Hearing

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 6/25/2019 at 6:20 PM PDT and filed on 6/25/2019

Case Name: Brahma Group, Inc. v. Tonopah Solar Energy, LLC

Case Number: [2:18-cv-01747-RFB-GWF](#)

Filer:

Document Number: 50(No document attached)

Docket Text:

MINUTES OF PROCEEDINGS - Motion Hearing held on 6/25/2019 before the Honorable Richard F. Boulware, II. Crtrm Administrator: Blanca Lenzi; Pla Counsel: Eric Zimbelman, Esq. Eric Peel, Esq.; Def Counsel: Lee Roberts, Esq., Colby Balkenbush, Esq.; Court Reporter: Patty Ganci; Time of Hearing: 2:42 PM - 3:33 PM; Courtroom: 7C.

The Court makes preliminary statements and hears representations from the parties regarding Plaintiff Brahma Group, Inc.'s [13] Motion for Stay, or in the alternative, Motion to Amend Complaint and Defendant Tonopah Solar Energy, LLC's [16] Motion for an Injunction and to Strike.

**The Court takes the motions under submission. A written order shall issue.
(no image attached) (Copies have been distributed pursuant to the NEF - BEL)**

2:18-cv-01747-RFB-GWF Notice has been electronically mailed to:

Richard Leslie Peel rpeel@peelbrimley.com, jpeel@peelbrimley.com

D. Lee Roberts, Jr lroberts@wwhgd.com, abonney@wwhgd.com, eibarra@wwhgd.com, rtorrenueva@wwhgd.com

Eric Zimbelman ezimbelman@peelbrimley.com, aarmstrong@peelbrimley.com, rjeffrey@peelbrimley.com, thansen@peelbrimley.com

EXHIBIT 19

Brahma's Response to Tonopah's Motion for Preliminary Injunction and Motion to Strike

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rpeel@peelbrimley.com
cdomina@peelbrimley.com
Attorneys for Plaintiff, BRAHMA GROUP, INC.

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRAHMA GROUP, INC., a Nevada Corporation,

Plaintiff,

vs.

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

Defendants.

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

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

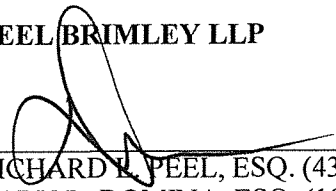
AND ALL RELATED MATTERS

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.

PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ. (4359)
CARY B. DOMINA, ESQ. (10567)
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Plaintiff, BRAHMA GROUP, INC.

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

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION.²

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

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

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

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

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

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

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

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

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

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

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

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

1 **II. STATEMENT OF FACTS**

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

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

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

10 Because of TSE’s failure to fully pay Brahma for its Work, Brahma caused a notice of lien
11 (“Original Lien”) to be recorded on April 9, 2018 with the Nye County Recorder as Document No. 890822
12 against the Work of Improvement.⁵ Seven days later, on April 17, 2018, Brahma, through prior counsel,
13 Jones Lovelock, filed a complaint in the Fifth Judicial District Court (“Nye County Court”) as Case No.
14 CV39237 (the “First Complaint”), to foreclose against the Original Lien, among other causes of action.⁶
15 Brahma filed with the Nye County Court a Notice of Lis Pendens and Notice of Foreclosure of Mechanic’s
16 Lien and recorded the same against the Work of Improvement.⁷ Two days later, on April 19, 2018, TSE,
17 through its counsel, Weinberg Wheeler Hudgins Gunn & Dial, sent Jones Lovelock a letter (the “Demand
18 Letter”) demanding that Brahma (i) discharge and release its Original Lien, and (ii) participate in mediation
19 before filing for litigation (see Section 24 of the Agreement).⁸ Finally, TSE threatened to file (i) a motion
20 to expunge under NRS 108.2275 if Brahma did not voluntarily release its Original Lien by noon the next
21 day, and (ii) a motion to dismiss under NRS 108.237(3), if Brahma did not immediately dismiss its First
22 Complaint without prejudice.⁹

23 On April 24, 2018, TSE filed in Case No. CV39237, a motion to expunge Brahma’s Lien (“First
24

25

⁴ A true and correct copy of the Agreement is attached hereto as **Exhibit 1**.

26 ⁵ A true and correct copy of the Original Lien is attached hereto as **Exhibit 2**.

27 ⁶ A true and correct copy of the First Complaint is attached hereto as **Exhibit 3**.

27 ⁷ A true and correct copy of the Notice of Foreclosure and Lis Pendens are attached hereto as **Exhibit 4** and **Exhibit 5**, respectively.

28 ⁸ A true and correct copy of this correspondence is attached hereto as **Exhibit 6**.

⁹ *Id.*

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Motion to Expunge”) in the Nye County Court.¹⁰ Before Brahma received notice of TSE’s First Motion to Expunge, and to avoid extensive motion practice with TSE regarding the ripeness of the First Complaint, Brahma voluntarily dismissed its First Complaint on April 24, 2018, but declined to discharge and release its Original Lien.¹¹ Even though (i) TSE had officially appeared in that Case by filing the First Motion to Expunge, and (ii) Brahma had not released its Lien, TSE decided to withdraw its First Motion to Expunge instead of proceeding in that Case.

The Original Lien was amended and/or restated on several occasions and ultimately increased to \$12,859,577.74, when Brahma caused its Fourth Amended Notice of Lien (“Fourth Amended Lien”) to be recorded on September 14, 2018 with the Nye County Recorder as Document No. 899351.¹²

To replace the Work of Improvement as security for the Brahma Lien, TSE demanded that Cobra, the original general contractor for the Work of Improvement,¹³ bond around the Brahma Lien. Per TSE’s demand, Cobra, as principal, caused a surety bond to be recorded with the Nye County Recorder’s Office on September 6, 2018, as Document No. 898974 (the “Brahma Surety Bond”). The Brahma Surety Bond (i) was issued by American Home Assurance Company (“AHAC” or “Surety”) on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) was in the amount of \$10,767,580.00.¹⁴

At Brahma’s request and in compliance with Nevada law, Cobra caused the Penal Sum of the Brahma Surety Bond to be increased by AHAC to \$19,289,366.61 (or 1.5 times the amount of the Brahma Lien) by causing a Rider to the Brahma Surety Bond (the “Brahma Surety Bond Rider”) to be recorded on October 9, 2018 with the Nye County Recorder’s Office as Document No. 900303.¹⁵

C. The H&E Lien and the H&E Surety Bond.

On May 15, 2018, H&E (one of Brahma’s suppliers for the Work of Improvement) caused a notice of lien to be recorded with the Nye County Recorder as Document No. 892768 in the amount of \$477,831.40

¹⁰ A true and correct copy of the First Motion to Expunge is attached hereto as **Exhibit 7**.

¹¹ A true and correct copy of the Voluntary Dismissal is attached hereto as **Exhibit 8**.

¹² True and correct copies of Brahma’s First Amended Lien, Second Amended Lien, Third Amended Lien and Fourth Amended Lien are attached hereto as **Exhibits 9, 10, 11 and 12**, respectively. Brahma’s Original Lien and the amendments and restatements thereto, including the Fourth Amended Lien are referred to collectively herein as the “Brahma Lien.”

¹³ Further, TSE has advised Brahma and its counsel that Cobra is contractually responsible to TSE to pay for the Work that TSE contracted with Brahma to perform.

¹⁴ A true and correct copy of the Brahma Surety Bond is attached hereto as **Exhibit 13**.

¹⁵ A true and correct copy of the Brahma Surety Bond Rider is attached hereto as **Exhibit 14**. The Brahma Surety Bond and the Brahma Surety Bond Rider are collectively referred to herein as the “Brahma Surety Bond.”

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(the “H&E Lien”).¹⁶ On June 8, 2008, TSE filed in Case No. CV 39347, a motion to expunge the H&E Lien in the Nye County Court which was assigned to the Honorable Kimberly Wanker in Department 1, and which was later withdrawn by TSE before Judge Wanker held a hearing on the same.¹⁷ On September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County Recorder’s Office as Document No. 898975 (the “H&E Surety Bond”), to replace the Work of Improvement as security for the H&E Lien.¹⁸ The H&E Surety Bond (i) was issued by AHAC on August 15, 2018, (ii) identifies Cobra, as principal, and (iii) is in the amount of \$716,741.10.¹⁹

Because TSE failed to fully pay Brahma, and Brahma has not paid H&E, Brahma understands that H&E has filed or intends to file a foreclosure action against the H&E Surety Bond in the Nye County Court, and has asserted or intends to assert breach of contract claims against Brahma in that action, which claims are derivative of Brahma’s claims against TSE.

D. To Expunge the Brahma Lien, TSE, as the Plaintiff, Commenced a New Action in Nye County Against Brahma, the Defendant.

On or about June 1, 2018, TSE, as plaintiff, commenced a new action in Nye County as Case No. CV 39348 (the “Nye County Action”), seeking to expunge the Brahma Lien from the Work of Improvement, by filing a motion to expunge Brahma Group, Inc.’s Mechanic’s Lien (the “Second Motion to Expunge”).²⁰ On August 14, 2018, Judge Lane, entered an Order of Reassignment, assigning that Case to Senior Judge Steven Elliot based on the stipulated agreement of counsel for TSE and Brahma (at the August 6, 2018 hearing) that the Case should be assigned to Judge Elliot because he “has familiarity with the parties and the facts due to his involvement in a previous case.”²¹ Notably, the Order indicates that the case would be assigned to Judge Elliot “for hearing or decision on the pending motions and for future handling of the case.”²²

¹⁶ A true and correct copy of the H&E Lien is attached hereto as **Exhibit 15**.

¹⁷ A true and correct copy of TSE’s Motion to Expunge the H&E Lien is attached hereto as **Exhibit 16**.

¹⁸ A true and correct copy of the H&E Surety Bond is attached hereto as **Exhibit 17**.

¹⁹ It should be noted that (i) AHAC is the surety on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the “Surety,” and (ii) Cobra is identified as the principal on both the Brahma Surety Bond and the H&E Surety Bond and is sometimes referred to herein as the “principal.”

²⁰ A true and correct copy of TSE’s Second Motion to Expunge the Brahma Lien is attached hereto as **Exhibit 18**.

²¹ A true and correct copy of the Reassignment Order is attached hereto as **Exhibit 19**. Indeed, Judge Elliot (i) previously presided over extensive litigation involving the construction of the Work of Improvement, and (ii) is very familiar with the Work of Improvement. see [Case No. CV-36323 titled *Helix Electric of Nevada, LLC v. Cobra Thermosolar Plants, Inc.*; Tonopah Solar Energy LLC et. al.; see also, Case No. 35217 titled *Merlin Hall dba Mt. Grant Electric v. Cobra Thermosolar Plants, Inc.*; Tonopah Solar Energy, LLC, et. al.]

²² *Id.*

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At a hearing held on September 12, 2018 (the “September 12 Hearing”), Judge Elliot denied TSE’s Second Motion to Expunge and entered a written order on October 29, 2018 (the “Order”).²³ Since Brahma was the prevailing party at the September 12 Hearing, Brahma filed a motion for an award of attorney’s fees and costs pursuant to NRS 108.2275(6)(c) (“Fee Motion”), which Fee Motion is still pending.²⁴

Because the Nye County Court (i) has jurisdiction over the Work of Improvement, Brahma’s Lien, the Brahma Surety Bond, Cobra, AHAC and the claims of H&E,²⁵ and (ii) heard the arguments presented at the September 12 Hearing, the dispute between TSE and Brahma should necessarily be heard by Judge Elliot, rather than this Court.

Based on the mistaken belief that Section 24 of the Agreement required it to pursue its contract-based claims in Clark County, Nevada, and after (i) Richard Peel and Ronnie Cox (counsel for Brahma) had consulted with Lee Roberts (counsel for TSE) about the possibility of stipulating to have the parties’ claims filed in one action and one forum, and (ii) TSE declining to do so,²⁶ Brahma filed a complaint on July 17, 2018 in the Eighth Judicial District Court of Nevada (the “Clark County Action”), against TSE for breach of contract, unjust enrichment, and violation of NRS Chapter 624.²⁷

On September 10, 2018, TSE removed the Clark County Action to Federal Court (Case No.: 2:18-CV-01747-RFB-GWF) based on diversity jurisdiction only (the “Federal Action”). On September 17, 2018, TSE filed its Answer and Counterclaim against Brahma in the Federal Action alleging the following state law causes of action, (i) Breach of Contract, (ii) Breach of the Implied Covenant of Good Faith and Fair Dealing, (iii) Declaratory Relief, (iv) Unjust Enrichment, (v) Fraudulent/Intentional Misrepresentation, and (vi) Negligent Misrepresentation.

For the reasons discussed above, including Brahma’s discovery that the forum selection clause is against public policy, void and unenforceable, and after Cobra had caused the Brahma Surety Bond to be posted (discussed more fully below) but within the timeframe allowed under FRCP 15(a), Brahma filed its

²³ A true and correct copy of Judge Elliot’s Order Denying TSE’s Second Motion to Expunge the Brahma Lien is attached hereto as **Exhibit 20**.

²⁴ A true and correct copy of Brahma’s Fee Motion is attached hereto as **Exhibit 21**. NRS 108.2275(6)(c) provides that when the court finds a prevailing lien claimant’s notice of lien is not frivolous and was made with reasonable cause (which is what the Court found here), the court must award to such prevailing lien claimant the costs and reasonable attorney’s fees it incurred to defend the motion.

²⁵ As acknowledged by TSE in its Motion to Strike, to Dismiss or to Stay filed in the Nye County Action.

²⁶ See Declaration of Richard L. Peel, Esq. attached hereto.

²⁷ A true and correct copy of Brahma’s Complaint filed in the Clark County Action is attached hereto as **Exhibit 22**.

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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**.

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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.

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 statutes such as NRS 108.2421 “serve important public interests, including avoiding costs to taxpayers of defending actions in other communities, maintaining actions where relevant official records

³⁷ See Exhibit “1”

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are kept, and reducing forum shopping.” *Nevada Civil Practice Manual*, § 3.01. Venue statutes 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

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.

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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

1 **a. The Nye County Action was not “later filed” than the Clark County**
 2 **Action.**

3 The Nye County Action is not a “later filed” action. Following federal removal, Brahma ceased
 4 prosecuting its removed Clark County Action in the Eighth Judicial District Court. Instead, Brahma filed its
 5 contract claims against TSE in the Nye County Action—an action TSE commenced on June 11, 2018, before
 6 the Clark County Action was filed, and which has not been removed to federal court. TSE’s proposed
 7 injunction seeks to enjoin the Nye County Action, not the Clark County Action. In the Nye County Action,
 8 TSE brought its Second Motion to Expunge under NRS 108.2275, serving Brahma by personal service, and
 9 naming it as a “defendant” in that Action, all in a failed attempt to summarily extinguish Brahma’s property
 10 interest (i.e. its Lien) in the Work of Improvement.

11 **b. The Nye County Action is similar and parallel to the Federal Action**
 12 **but is broader than the Federal Action as it features additional**
 13 **parties and additional claims.**

14 A predicate to a federal injunction of a state court is that the second case is “refilling of essentially
 15 the same suit in state court.” *Lou*, 834 F.2d at 730. In that case, the Ninth Circuit Court of Appeals reversed
 16 the federal district court’s grant of an injunction against a state court proceeding, concluded that an
 17 injunction was not properly issued to avoid subverting removal jurisdiction (i.e. the third requirement) where
 18 the state case, though parallel, featured “different plaintiffs, additional counsel, additional defendants, and
 19 only state claims.” *Id.* at 741.

20 Brahma acknowledges the federal claims duplicate some of the claims in the state court proceedings;
 21 that is why this Court should grant its Motion for Stay of the federal proceedings that parallel the state court
 22 proceedings. It, however, remains that the Nye County Action, held in a court with versatile general subject-
 23 matter jurisdiction, is more comprehensive than the federal action, a court of limited federal subject-matter
 24 jurisdiction. The Nye County Action involves non-diverse general contractor Cobra and AHAC, additional
 25 parties not in the federal action and their counsel. Notably, Cobra is the principal on the Brahma Surety
 26 Bond which now serves as the collateral for Brahma’s Lien. Under its contract with Cobra, TSE demanded
 27 that Cobra procure the Brahma Surety Bond in order to remove Brahma’s Lien from the Work of
 28 Improvement. The Nye County Action also involves H&E’s (i) contract claims against Brahma (which are
 derivative of Brahma’s claims against TSE); and (ii) claims against Cobra, the Surety and the H&E Surety

1 Bond.

2 Hence, while certainly similar to the Federal Action, the Nye County Action is now broader and
3 includes additional claims, plaintiffs and defendants, all of which can and should be resolved by Judge Elliot,
4 the very Judge who has already (i) presided over litigation involving the Project; and (ii) ruled on a
5 dispositive issue between TSE and Brahma.

6 *c. The Nye County Action was filed with a proper motive, not the purpose*
7 *of subverting federal jurisdiction*

8 The primary purpose of amending its Counter-Complaint in the Nye County Action was not to
9 fraudulently defeat this Court's jurisdiction, but rather, to preserve Brahma's right to pursue its contract
10 claims against TSE in conjunction with its claim against the Brahma Surety Bond which claims must be
11 decided along with Brahma's claims against the Brahma Surety Bond.

12 The potential that another case—here, an earlier filed one—may have issue or claim preclusive
13 effect on a removed case does not make a state court proceeding subversive of federal jurisdiction. In
14 *Quackenbush*, 121 F.3d 1372 (9th Cir. 1997), the Ninth Circuit upheld a federal court's decision *not* to
15 enjoin such a state court proceeding. *Id.* at 1378. The possible preclusive effect of a later filed state court
16 proceeding on a removed federal case did not constitute “subversion” of the removal right. *Id.* at 1379.

17 The Nye County Action was not amended to obtain a favorable decision on an issue this Court has
18 already decided, nor was there any deception in the manner in which Brahma Amended its Counter-
19 Complaint as it did so within the timeframe required under FRCP 15(a). In other words, Brahma did not
20 file its contract claims against TSE in the Nye County Action to fraudulently subvert federal jurisdiction.

21 First, the Federal Action was removed from Clark County, not Nye County. As TSE acknowledges,
22 the Nye County Action has not been removed to Federal Court.⁴² Second, this Action was commenced by
23 TSE before the Federal Action was filed, so Brahma filed into an existing Case, not a new state case.
24 Accordingly, TSE's “first in time” argument fails because this Action was the first action commenced, not
25 the Clark County Action or Federal Action. Third, because Brahma's claims against Cobra, AHAC and the
26 Brahma Surety Bond must necessarily remain before Judge Elliot in the Nye County Action, Brahma's
27 contract claims must be litigated before Judge Elliot as well to ensure that its right to file a demand for
28 preferential trial setting is not hindered. Fourth, H&E has now filed (or will file) litigation in Nye County

⁴² See Exhibit 25, Nye County Motion for Stay at pg. 19:

1 against Brahma asserting contract claims which are derivative of Brahma's contract claims against TSE.
2 Fifth, by filing its contract claims in this Action, Brahma does not escape the jurisdiction of the Federal
3 Court and remains a party in this Action. Finally, Brahma has not engaged in forum shopping because it
4 does not seek to avoid a negative judgment from the Federal Court as the Federal Court has made absolutely
5 no rulings in that case.

6 Therefore, because Brahma has not engaged in fraud or attempted to subvert the Federal Court's
7 jurisdiction, the Federal Court cannot enjoin the Nye County Action from proceeding.

8 *d. The Cases TSE relies upon for the Injunction to issue are*
9 *unavailing.*

10 TSE primarily relies upon four cases for the proposition that the Court should issue the injunction.
11 However, none of those cases are from the Ninth Circuit Court of Appeals, and each is easily distinguishable
12 and has no persuasive value to this Court.

13 • *KPERS v. Reimer & Koger Assoc., Inc.*, 77 F.3d 1063 (1996)

14 First, TSE cites *KPERS*, a decision from the Eighth Circuit Court of Appeals where the Court found
15 a later-filed case in state court was filed with an improper motive of subverting the federal court's
16 jurisdiction. *Id.* In that case the plaintiff filed an action in state court against several defendants, including
17 a failed savings and loan company. *Id.* A receiver for the savings a loan company was brought into the
18 action, and based on a unique statute, removed the case to federal court. *Id.* Plaintiff appealed a ruling from
19 the district court barring its claims under the applicable statute of limitations. On appeal, the Eighth Circuit
20 Court affirmed and held an even shorter statute of limitations was applicable. *Id.* One month following that
21 decision, plaintiff filed two new cases in the state court asserting largely the same claims against the same
22 defendants. *Id.* Notably, Plaintiff's attorney made comments to the press that the new actions were filed to
23 correct what he called "the multitude of problems and issues that are causing delays in federal court, coupled
24 with...an erroneous decision by the Eighth Circuit in interpreting the Kansas statute of limitations." *Id.*
25 Those two cases were removed to federal court and the defendants moved to enjoin plaintiffs from
26 proceeding with any further litigation in any state court. *Id.* In upholding the federal district court's decision
27 to grant the injunction, the Eighth Circuit Court of Appeals held, "the record fully supports these findings
28 as [plaintiff] made clear not only in a brief filed with the district court, but also in a statement to the press,

1 that the purpose of filing the second action was to obtain a favorable decision in the Kansas courts on the
2 statute of limitations issue decided by this court...” *Id.* at 1070.

3 By contrast to the plaintiffs in the *KPERS* case, there has been no adverse federal court ruling from
4 which Brahma is fleeing.⁴³ In fact, this Court has made no rulings in this Case. Moreover, Brahma has done
5 nothing to suggest its removal of state law claims was done for a fraudulent purpose. Instead, Brahma has
6 legitimate concerns about the preclusive effects of pre-existing state court litigation in a *non-removed* case.
7 Protecting Brahma’s rights under the mechanic’s lien statute against preclusive impairment constitutes
8 proper advocacy, not subversion of federal jurisdiction. *Quackenbush*, 121 F.3d at 1379. Certainly, Brahma
9 actions of amending its Complaint does not rise to the level of bad faith or fraudulent conduct engaged in
10 by the *KPERS* Plaintiff.

- 11 • *Faye v. High’s of Baltimore*, 541 F.Supp.2d 752, 754 (2008).

12 TSE also relies on the *Faye* case from the federal district court of Maryland, where that court issued
13 an injunction against a plaintiff who had filed a state court complaint against his former employer asserting
14 certain state law claims and violations of the Fair Labor Standards Act (“FLSA”) which the defendant later
15 removed to federal court based on federal subject matter jurisdiction. *Id.* While before the federal court, the
16 plaintiff moved to amend his complaint which the Court granted, resulting in Plaintiff eliminating the state
17 court claims from the federal complaint. *Id.* at 755. However, while the motion to amend was still pending,
18 the plaintiff filed a second lawsuit against the employer in the same state court where the first complaint had
19 been filed and removed, asserting identical claims as the first complaint, with the exception of the federal
20 claims. *Id.* At no point did the plaintiff notify the Court that the purpose of its motion to amend was to
21 remove state court claims from the federal action and pursue those claims in a new action filed within the
22 same court from which they were previously removed. *Id.* Once served with the second lawsuit, the
23 defendant removed that case to federal court as well. *Id.* The court found that the plaintiff acted in a manner
24 designed to defeat federal jurisdiction over his state claims as he admitted during oral argument that

25 _____
26 ⁴³ Typically, the type of forum shopping that is abusive is where parties seek to vindicate their rights elsewhere only
27 after another court’s adverse rulings and the passage of substantial time. Cf, e.g., *Montanore Minerals Corp. v. Bakie*,
28 867 F.3d 1160, 1169 (9th Cir. 2017) (finding forum shopping when federal court’s jurisdiction is being invoked 6 years
into litigation after an unfavorable state court decision); *Nakash v. Marciano*, 882 F.2d 1411 (9th Cir. 1989) (finding
forum shopping where federal forum sought 3.5 years into case); *American Intern. Underwriters v. Continental Ins.*,
843 F.2d 1253, 1259 (9th Cir. 1988) (finding forum shopping where 2.5 years in, party leaves state court for federal
court because it is believed to be more favorable).

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Maryland courts provide more favorable rulings than the federal court on FLSA claims. *Id.* After analyzing the relevant case law from various circuit courts, the federal court held, there was no good reason for filing the second case, leaving the Court with “no doubt that the second-filed suit constituted an attempt to subvert this Court’s supplemental jurisdiction and defendant’s right to removal.” *Id.* at 760. The decision before that court was an easy one—after all, Plaintiff admitted to the court the sole reason for the amendment was the more favorable treatment of 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 claims⁴⁴, 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 courts⁴⁵, 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)).

“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.

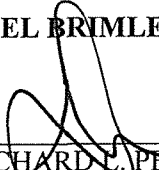
This Court can dismiss as moot TSE’s Motion to Strike Brahma’s Amended Complaint inasmuch as Brahma has already moved this Court as an alternative argument under its *Colorado River* Motion, to amend its Complaint to restore its previously removed claims in the event the Court does not grant its Motion 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.

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

BRAHMA GROUP, INC., a Nevada Corporation,

CASE NO.: 2:18-CV-01747-RFB-GWF

Plaintiff,

vs.

TONOPAH SOLAR ENERGY, LLC, a Delaware
Limited Liability Company; DOES I through X; and
ROE CORPORATIONS I through X,

Defendants.

AND ALL RELATED MATTERS

**DECLARATION OF RICHARD L. PEEL, ESQ. IN SUPPORT OF BRAHMA GROUP, INC.'S
RESPONSE TO TONOPAH SOLAR ENERGY, LLC'S MOTION FOR PRELIMINARY
INJUNCTION AND MOTION TO STRIKE [ECF No. 16]**

I, Richard L. Peel, Esq. hereby declare under penalty of perjury under the laws of the State of Nevada that the following is true and correct:

1. I am the managing partner at Peel Brimley LLP, counsel of record for Brahma Group, Inc. ("Brahma") in this matter, and I make this Declaration in support of Brahma's Response to Tonopah Solar Energy, LLC's ("TSE") Motion for Preliminary Injunction and Motion to Strike.

2. I have personal knowledge of the facts stated herein, except as stated upon information and belief, and as to those matters, I believe them to be true, and I am competent to testify to their truthfulness if called upon to do so.

3. On July 3, 2018, Ronnie Cox and I (both counsel for Brahma) consulted with attorney Lee Roberts (counsel for TSE) about the possibility of stipulating to have Brahma's and TSE's claims (including Brahma's mechanic's lien foreclosure action which had yet to be filed), in one forum.

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