IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78256

TONOPAH SOLAR ENERGY, LLC,

Petitioner,

v.

BRAHMA GROUP, INC.,

Real Party in Interest.

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**

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, ALTERATIVELY, MANDAMUS

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NRAP 26.1 DISCLOSURE

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

Real Party in Interest, Brahma Group, Inc. ("Brahma") is 100% owned by Terra Millennium Corp., Inc. (which is not a publicly held company) and no publicly held company owns ten percent or more of its stock. Peel Brimley, LLP is the only law firm that has appeared on behalf of Brahma in this case or is expected to appear on behalf of Brahma in this Court.

Dated this 21st day of November, 2019.

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I. INTRODUCTION

To the extent Petitioner Tonopah Solar Energy, LLC's ("TSE") Writ Petition (the "Petition") ever presented issues ripe for consideration and/or resolution by this Court, such issues are now moot and the Court should deny and/or dismiss the Petition on such grounds alone. As the Court is aware from previous submissions,[1] TSE and Real Party in Interest, Brahma Group, Inc. ("Brahma") have been involved in a parallel proceeding (the "Federal Court Action" described more fully below) in United States District Court for the District of Nevada (the "Federal Court") in which similar issues were pending at the time TSE filed its Petition.

Recently, and as TSE notified this Court,[2] the Federal Court (on TSE's motion) (i) issued a permanent injunction (the "Federal Court Injunction") prohibiting Brahma from litigating "in any state court action" the only claims Brahma currently asserts against TSE and (ii) reinstated those claims in the Federal Court Action. As such, the Petition seeks relief that this Court cannot give or that would be impossible to carry out – i.e., an order directing the Nye County District Court to dismiss claims that no longer reside in the State Courts of Nevada.

Additionally, any decision this Court might reach with respect to the substantive issues and arguments presented in the Petition would, at best, be advisory only and would in no way "resolve actual controversies by an enforceable judgment." *See Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) citing *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). Finally, and for the reasons discussed below, even if the Court were to consider the substantive issues presented in the Petition, the applicable decision of

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[1] *See e.g.*, Brahma's Motion to Stay Briefing (Re-Submitted), filed June 28, 2019 filed in this action;

[2] *See* TSE's Notice of Order in Related Case, filed October 4, 2019 in this action, included in Respondent's Appendix at 1 RPIA 123-136.

the District Court was either entirely correct or has been resolved by the Federal Court Injunction.

II. STATEMENT OF FACTS

A. The Federal Court Injunction.

The Petition arises from consolidated Case Nos. CV39348 and CV39799 in the Fifth Judicial District Court of Nevada (the "Nye County Action") discussed more fully below. As TSE only partially explained in its Petition, 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"). TSE removed that action from the Eighth Judicial District Court (the "Clark County Action") on the basis of diversity jurisdiction only. 2 PA 159.[3] TSE then filed counterclaims against Brahma arising out of the same underlying dispute and contract that forms the basis of the Nye County Action, discussed more fully below. 2 PA 169.

Shortly after removal, Brahma filed a motion asking the Federal Court to abstain and stay proceedings pursuant to the *Colorado River* Doctrine. *See* 5 PA 454. 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).

[3] On July 17, 2018, Brahma filed a Complaint against TSE in Clark County for, among other things, Breach of Contract (on the mistaken belief that a provision in its contract made such a filing mandatory, which it did not). 2 PA 131. TSE removed that action to Federal Court on September 10, 2018 (hereinafter, the "Federal Court Action"). 2 PA 159. Subsequently, Brahma amended that Complaint to remove all causes of action except unjust enrichment. 2 PA 189.

Shortly thereafter, TSE filed a Motion for an Injunction and to Strike in the Federal Court. *See* 6 PA 603. By way of its Motion for Injunction, TSE asked the Federal Court to (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." 6 PA 605. TSE made many of the same arguments in the Federal Court Motions that it presents to this Court in the Petition. Specifically, but without limitation, TSE's Petition argues that the District 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." *See* Petition pp. 4, 32. TSE asks this Court to prohibit the District Court "from exercising subject matter jurisdiction" over such claims (*see* Petition p. 5) and that "the removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute." *See* Petition p. 32 citing *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000). TSE also relies on *Roberts v. Hollandsworth*, 616 P.2d 1058, 1061 (Idaho 1980) for the proposition that such divestiture of jurisdiction applies to all state courts and not only the court from which the action was removed. *See* Petition p. 32.

On September 5, 2019, the Federal Court granted TSE's Motion (while denying Brahma's Motion to Abstain) and permanently enjoined Brahma "from litigating the following claims alleged against [TSE] in any state court action: 1) Breach of Contract, 2) Breach of Implied Covenant of Good Faith and Fair Dealing and 3) Violation of NRS 624" (hereinafter "the Removed Claims"). 1 RPIA 136. As more fully discussed below, these are the precise claims Brahma asserted in the Nye County District Court and for which TSE sought the Federal Court Injunction.

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 pursuant to the Nevada Right to Stop Work Statute, NRS 624.606 to NRS 624.630, inclusive, and recorded a notice of lien, as amended, pursuant to the Nevada Mechanic's Lien Statute, NRS 108.221 through NRS 108.246, inclusive, in the amount of $12,859,577.74 (the "Lien"). See *e.g.*, 4 PA 412.

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 (the "NRS 108.2275 Special Proceeding"), which the Nye County District Court (hereinafter "District Court") denied. *See* 3 PA 264-273. The District Court also awarded attorney's fees to Brahma pursuant to NRS 108.2275(6)(c) because it concluded that Brahma's Lien was "not frivolous nor was it made without reasonable cause." 3 PA 273; 1 RPIA 12.[4]

After the District Court (orally) denied TSE's Motion to Expunge, Brahma filed a Mechanic's Lien Foreclosure Complaint in the NRS 108.2275 Special Proceeding. *See* 2 PA 109. Brahma later amended that pleading, styled "(I) First Amended Counter-Complaint; and (II) Third-Party Complaint" to (i) include claims against TSE for Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, and Violations of NRS Chapter 624 and (ii) commence a third-party action against TSE's affiliate, Cobra Thermosolar Plants, Inc. ("Cobra"), its surety, American Home Assurance Company ("AHAC"), and the surety bond they recorded

[4] TSE has appealed both of these Orders pursuant to NRS 108.2275(8), 1 RPIA 80-83, which appeal is pending in this Court as Case No. 78092.

to (ineffectively) release Brahma's Lien from the Project (the "Surety Bond"). 2 PA 116.[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." *See* 1 PA 84. The District Court's denial (in part) of the Motion to Dismiss (*see* 8 PA 870-877) forms the basis of TSE's Petition. *See e.g.*, Petition p. 1. As it did in its Petition and in the Federal Court Motions, TSE argued to the District 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. *Compare* Petition p. 4; 2 PA 98-99; 1 RPIA 143.

TSE also argued to the District Court, as it does here, that it was improper for Brahma to file a Complaint in the same action that TSE commenced with its Motion to Expunge. [*See* Petition pp. 22-27]. In denying the Motion to Strike or Dismiss, the District Court found that "there was nothing improper with Brahma filing its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge Brahma's Lien." 8 PA 876. Among other things the District Court concluded that:

- "NRS 108.2275(5) establishes the Nevada Legislature's intent to combine mechanic's lien foreclosure actions with motions to expunge liens." 8 PA 876; and

[5] The Surety Bond was initially ineffective to release the Lien because it 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* 2 PA 129. Cobra and AHAC later recorded a Rider to increase the amount of the Surety Bond. 5 PA 429-36. Brahma's current consolidated amended pleading in the Nye County Action seeks only a claim against the Surety Bond, not foreclosure against the Project or any real property. [*See* discussion *infra*].

- "At the time Brahma filed its Amended Counter-Complaint in this Action, the Court had not yet ruled on Brahma's Motion for Attorney's Fees and Costs under NRS 108.2275, so that Case was still open." 8 PA 876.

Out of an abundance of caution, Brahma later filed a stand-alone Complaint as an independent action in Nye County, Case No. CV 39799 (the "Separate Action"). 1 RPIA 1-6. The Separate Action contains no claims or causes of action against TSE but rather asserts a single cause of action on the Surety Bond and against the bond principal (Cobra) and bond surety (AHAC). *See* 1 RPIA 4-5.[6] Brahma then moved the District Court to consolidate the Separate Action with the NRS 108.2275 Special Proceeding. In granting the Motion to Consolidate, the District Court:

(i) Reiterated its disagreement with the premise of TSE's legal argument and found that "there was nothing improper with Brahma filing its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge Brahma's Lien." 1 RPIA 90;

(ii) "[H]as now come to the conclusion that had Brahma filed a standalone complaint as an independent action and then moved the Court to consolidate that action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they currently find themselves in." 1 RPIA 90; and

(iii) "[W]here 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

[6] By the time Brahma filed the Separate Action, Cobra and AHAC had recorded the Surety Bond Rider such that the Surety Bond was then compliant with NRS 108.2415(1). 5 PA 429-36. Once the Surety Bond was compliant, it was "deemed to replace the property as security for the lien," *see* NRS 108.2415(6)(a), and released Brahma's notice of lien against the Work of Improvement. *See id.*; NRS 108.2413.

CV39799 and for this Court to consolidate that action into the present action. 1 RPIA 91.

Although the District Court denied TSE's request to dismiss or strike Brahma's pleading, it did stay the Removed Claims "until such time as the federal court rules on the [Federal Court Motions]." 8 PA 877.

Finally, the District Court permitted Brahma to "amend its Amended Counter-Complaint to (i) withdraw the mechanic's lien foreclosure action against TSE's Work of Improvement;[7] (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* 8 PA 877.[8] Brahma did so by way of an amended consolidated pleading, *see* 1 RPIA 92-104, that the District Court expressly authorized. *See* 1 RPIA 105-122.

Most recently, and as more fully discussed above [*see* Section II.A, *supra*], the Federal Court issued an Order resolving the Federal Court Motions and enjoining the precise claims that Brahma asserted in the Nye County District Court (i.e., the Removed Claims) that are the subject of the Petition. 1 RPIA 128-136. In granting the Injunction, the Federal Court also reinstated Brahma's original (Clark County) Complaint "as the operative complaint in this matter" such that the Removed Claims now firmly reside in the Federal Court. 1 RPIA 136

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[7] As noted above, once the Surety Bond Rider was recorded and the Surety Bond complied with NRS 108.2415(1), Brahma's Notice of Lien against the work of Improvement was released and the Surety was deemed to replace it as security for Brahma's claim of lien.

[8] Brahma's Motion to Amend was heard concurrently with the hearing on TSE's Motion Strike or Dismiss.

III. ARGUMENT

A. THE WRIT PETITION IS MOOT.

The question of mootness is one of justiciability. This Court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment. *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) citing *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). A controversy must be present through all stages of the proceeding. *Bristol*, 126 Nev. at 602 citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 476–78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Even though a case may present a live controversy at its beginning, subsequent events may render the case moot. *Bristol*, *id.*, citing *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

In *Bristol,* this Court held that an appeal over the timeliness of submission of initiative petition signatures, while previously justiciable, was rendered moot once the general election had concluded such that "this court is unable to grant effective relief with respect to the district court injunction at issue, and this appeal is moot." 126 Nev. at 602 citing *Langston v. State, Dep't of Mtr. Vehicles*, 110 Nev. 342, 344, 871 P.2d 362, 364 (1994).

Here, and as more fully discussed below, the Petition has become moot because the Federal Court Order enjoined the prosecution of the Removed Claims in any Nevada state court, including this Court, and reinstated them in the Federal Court. There is no "effective relief" that this Court can grant to TSE because there are no pending state court claims against TSE to dismiss. Additionally, the underlying substantive question involves the application of NRS 108.2275, which is inapplicable once a Surety Bond replaces the work of improvement.

1. There are no claims against TSE that the District Court could now dismiss.

In its Petition, TSE presents as its "second issue" the following assertion:

> When a party removes claims to federal court, all state courts lose subject matter jurisdiction over those claims until the claims are remanded or resolved. The Nye County district court is exercising subject matter jurisdiction over removed claims, which have not been remanded or resolved, by refusing to dismiss the claims.

[Petition, p. 4]. Based on this assertion, TSE seeks the following relief from this Court:

> [A] writ of prohibition preventing the Nye County district court from exercising subject matter jurisdiction over [the Removed Claims] ... or, alternatively, a writ of mandamus compelling the district court to vacate the stay and dismiss [the Removed Claims] for lack of subject matter jurisdiction.

[Petition, p. 5].

Right or wrong, TSE's contention as to the subject matter jurisdiction of the District Court over the Removed Claims is now entirely moot because, pursuant to the Federal Injunction, the Nevada State Courts are no longer exercising jurisdiction over those claims. Specifically, the Federal Court enjoined Brahma from "litigating the following claims alleged against Defendant in any state court action: 1) Breach of Contract, 2) Breach of Implied Covenant of Good Faith and Fair Dealing and 3) Violation of NRS 624." 1 RPIA 136. Moreover, the Federal Court "reinstate[d] Plaintiff's [Clark County] complaint (ECF No. 1-1) as the operative complaint in this matter." 1 RPIA 136.

The Clark County Complaint (which was removed to and now reinstated in the Federal Court Action) asserts four causes of action against TSE: (1) Breach of Contract, (2) Breach of Implied Covenant of Good Faith & Fair Dealing, (3) Unjust Enrichment,[9] and (4) Violation of NRS 624. 2 PA 133-36. Immediately prior to the issuance of the Federal Injunction, Brahma's operant pleading in the Nye County Action asserted substantially identical claims for (1) Breach of Contract, (2) Breach of Implied Covenant of Good Faith & Fair Dealing, and (3) Violation of NRS 624. 1 RPIA 95-97. Similarly, Brahma's operant pleading at the time the District Court heard TSE's Motion to Dismiss asserted substantially identical claims for (1) Breach of Contract, (2) Breach of Implied Covenant of Good Faith & Fair Dealing, and (3) Violation of NRS 624. 2 PA 120-25.[10] As TSE acknowledges, these claims "are identical to the three claims that Brahma had dropped from the federal court action after removal." [Petition p. 10]. These are also the precise claims the Federal Court (i) enjoined Brahma from litigating in any Nevada state court and (ii) reinstated in the Federal Court Action, where they now reside and where TSE successfully argued they should be litigated. As such, there is no "effective relief that this Court can provide to TSE, even if it agrees with TSE's contentions.

Similarly, TSE's "third issue" presented in the Petition asks this Court to apply the so-called "first-to-file rule" (which it acknowledges this Court has not recognized in any published decision[11]) and require the District Court to stay the

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[9] Brahma's Amended Complaint preserved its claim for unjust enrichment. 2 PA 191-92. Stated differently, that claim did not require reinstatement.

[10] As noted above, at that time Brahma also asserted a cause of action for Foreclosure of Notice of Lien, which was replaced by amendment with a Claim on Surety Bond against Cobra and AHAC. *See* 1 RPIA 99-104.

[11] TSE nonetheless cites to three pre-2016 unpublished cases "for neither authority not persuasive value" because to do so expressly violates NRAP 36(c)(3). Of course, if no such value exists, for what basis (other than to expressly violate the rule) does TSE cite to these unpublished decisions?

entirety of the Nye County proceedings. [See Petition pp. 4-5, 36-40]. However, where Brahma's claims against TSE in the state courts of Nevada have been enjoined and reinstated in the Federal Court, TSE has no standing to demand a stay of proceedings from any state court because it is no longer a party to such state court proceedings. *See Mona v. Eighth Judicial Dist. Court of State in & for Cty. of Clark*, 132 Nev. 719, 725, 380 P.3d 836, 840 (2016) (one who was not a party to the litigation below has no standing to appeal) citing *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 676, 263 P.3d 224, 227 (2011).

Ironically, though not surprisingly, TSE does not seek to stay the Order Denying Motion to Expunge (and the related award of attorney's fees to Brahma) that TSE has separately appealed to this Court in Supreme Court Case No. 78092. [*See* Petition p. 40, n. 12]. Even still, and as more fully discussed *infra* in Section III.A.2, the underlying dispute arising out of the application of NRS 108.2275 is also moot because (1) NRS 108.2275 is irrelevant to a claim on Surety Bond and (2) Brahma's pleading no longer seeks to foreclose its lien against TSE's property or work of improvement.

An injunction should be read "intelligently and in context." Dan B. Dobbs, Law of Remedies § 2.8(7), 220 (2d ed.1993). To give effect to the intent of the court issuing the injunction, an injunction should be reasonably construed and read as a whole. *Norwest Mortgage, Inc. v. Ozuna*, 706 N.E.2d 984, 989 (Ill.App.Ct.1998). And " '[t]o ascertain the meaning of any part of an injunction, the entire injunction must be looked to; and its language, like that of all other instruments, must have a reasonable construction with reference to the subject about which it is employed.' " *Old Homestead Bread Co. v. Marx Baking Co.*, 117 P.2d 1007, 1009–10 (Colo.1941) (quoting 32 CJ 370, § 624).

The Injunction, in its specifics and when read as a whole, plainly precludes the Nevada state courts from considering the Removed Claims and "reinstates" those

claims in the Federal Court Action. Indeed, TSE, whose motion for an injunction was expressly granted, argues here that the District Court "does not possess subject matter jurisdiction" over the Removed Claims [Petition p. 31] because "[t]he removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute." [Petition p. 32 citing *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1011 (9th Cir. 2000)].

While the Federal Court did not expressly adopt such reasoning, it did ***enjoin*** Brahma from "litigating" such claims in the Nevada state courts. The Injunction *ipso facto* also precludes ***TSE*** from litigating such claims in the Nevada state courts and expressly reinstates the Removed Claims to the Federal Court Action. Stated differently, even if this Court were to agree with TSE's analysis, there is nothing this Court can order the District Court to do (e.g., dismiss claims that now reside in the Federal Court Action) that would not be prohibited by the Injunction.

2. The underlying dispute is also moot.

In its "first issue," TSE asks this Court to rule that the District Court erroneously interpreted NRS 108.2275(5) as allowing a party responding to a special proceeding created by the filing of a motion to expunge to also file a lien foreclosure complaint against the party that initiated the special proceeding. *See* Petition pp. 3-4. As more fully discussed below (*see* Section III.D, *infra*), the District Court correctly ruled that such a pleading is allowed. 8 PA 876. However, even if the District Court erred in that decision, the underlying issue has been rendered moot by (i) the Surety Bond, which released the claim of lien TSE sought to expunge, (ii) Brahma's commencement of the Separate Action (against the Surety Bond) and (iii) consolidation of the Separate Action with the NRS 108.2275 Special Proceeding, which placed "the Parties in the same position they currently find themselves in." *See* 1 RPIA 90.

a. The Surety Bond released Brahma's Claim of Lien against TSE's property and work of improvement.

NRS 108.2275 permits "[t]he debtor of the lien claimant or a party in interest in the property subject to the notice of lien who believes the notice of lien is frivolous and was made without reasonable cause" to apply for "an order releasing the lien." NRS 108.2275(1) and (6)(a). If such an order is entered, the applicant may "record a certified copy of the order in the office of the county recorder of the county where the property or some part thereof is located." NRS 108.2275(9). This is precisely the relief TSE sought by way of the NRS 108.2275 Special Proceeding. *See e.g.*, 1 PA 3.

Following the District Court's denial of TSE's Motion to Expunge, Cobra and AHAC recorded the Surety Bond and a subsequent Rider to conform to the statutory requirements. 5 PA 429-36. By statute, 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* NRS 108.2415(6)(a). At that moment, TSE ceased to have an "interest in the property subject to the notice of lien."[12]

Likewise, Brahma ceased to have a claim against TSE's property and the work of improvement and instead became "entitled to bring an action against the principal and surety on the Surety Bond." NRS 108.2421. If an action by a lien claimant to foreclose upon a lien was pending before the surety bond is recorded (as was the case in the NRS 108.2275 Special Proceeding – *compare* 2 PA 110 and 8 PA 889

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[12] NRS 108.22172 defines "property" as "***the land, real property or mining claim*** of an owner for which a work of improvement was provided, ***including all buildings, improvements and fixtures thereon***, and a convenient space on, around and about the same, or so much as may be required for the convenient use and occupation thereof.

with 5 PA 429), the lien claimant "may amend the complaint to state a claim against the principal and the surety on the surety bond" (as Brahma did by filing its Amended Counter-Complaint). NRS 108.2421(2)(a)(1). If, on the other hand, an action is commenced after the surety bond is recorded "the lien claimant may bring an action against the principal and the surety not later than 9 months after the date that the lien claimant was served with notice of the recording of the surety bond" (as Brahma did by commencing the Separate Action – compare 1 RPIA 1 with 5 PA 427-28). *See* NRS 108.2421(2)(b)(1).

b. NRS 108.2275 does not apply to Surety Bonds.

The relief provided by NRS 108.2275 is limited to expunging or reducing a lien recorded against TSE's property and work of improvement. Once a surety bond causes a notice of lien to be released from the property and work of improvement, as occurred here, NRS 108.2275 has no further application. In construing a statute, the court first looks to the plain language of the statute. *Crestline Investment Group, Inc. v. Lewis*, 119 Nev. 365, 75 P.3d 363 (2003) (citing, *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 669, 56 P.3d 887, 890 (2002)). "Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *J.D. Const., Inc. v. IBEX Int'l Group, LLC*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (Nev. 2010). "The plain language of NRS 108.2275 allows ***a property owner*** to challenge a ***lien*** as frivolous or excessive ..." *Id.*

"Lien" means:

> [T]he statutory rights and security interest ***in a construction disbursement account*** established pursuant to NRS 108.2403, ***or***

property or any improvements thereon provided to a lien claimant by NRS 108.221 to 108.246.[13]

"Lien" does ***not*** mean a statutory right or security interest in a ***surety bond***, which is defined by NRS 108.2218 as "a bond issued by a surety ***for the release of a*** prospective or existing ***lien*** pursuant to NRS 108.2413 to 108.2425." As such, and under the plain language of the Nevada Mechanic's Lien Statute, NRS 108.2275 cannot be used as a mechanism to reduce or expunge a claim against a ***surety bond***.

c. Brahma's Separate Action on the Surety Bond renders TSE's Petition moot.

As discussed above, TSE's "first issue" contends that Brahma was not allowed to file an action for lien foreclosure (whether against the property and work of improvement, or as amended, the Surety Bond) in the NRS 108.2275 Proceeding. Yet once Brahma commenced the Separate Action, it perfected its claim on the Surety Bond by bringing "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." *See* NRS 108.2421(2)(b)(1) and discussion *supra*. Brahma also moved to consolidate the NRS 108.2275 Proceeding with the Separate Action.

As such, and even if this Court were to rule that Brahma's initial Complaint in the NRS 108.2275 Proceeding was improper, there is no effective relief this Court can issue to TSE. The foreclosure pleading at issue in the NRS 108.2275 Proceeding is unnecessary, and indeed non-existent, because Brahma (1) amended the initial pleading to replace the foreclosure claim against the property and work of improvement with a claim on Surety Bond, 2 PA 116-130; (2) asserted a claim on Surety Bond in the Separate Action, 1 RPIA 4-5, and (3) consolidated those actions and (with the express permission of the District Court – *see* 1 RPIA 106) filed a

[13] *See* NRS 108.22132

consolidated amended pleading that asserts a claim on Surety Bond and no claim against TSE's property or improvements. 1 RPIA 92-104. For this reason also, and in light of the Federal Court Injunction, there are ***no*** pending claims against TSE in the consolidated case from which this Petition arises. *See e.g.*, 1 RPIA 92-104. Because this Court cannot provide TSE any effective relief, the Court should dismiss or deny the Petition.

B. THE COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO CONSIDER THE ISSUES PRESENTED IN THE PETITION.

Even if the Court does not deem the issues presented for review to be moot, the Court should still exercise its discretion and decline to consider them to avoid piecemeal review and because the Federal Court Injunction has already afforded TSE a plain, speedy and adequate remedy.

1. Piecemeal review should be avoided.

As noted, the Petition arises from the District Court's denial of TSE's Motion to Strike or Dismiss. [See Petition p. 1]. 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) citing *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 658, 188 P.3d 1136, 1140 (2008) (internal quotation marks omitted). The policy behind this hesitation to entertain writ petitions that challenge such orders is "to promote judicial economy and avoid "piecemeal appellate review." *W. Cab Co., 390 P.3d at 666–67* citing *Wells Fargo Bank, N.A. v. O'Brien*, 129 Nev. 679, 680, 310 P.3d 581, 582 (2013). As a general principle, this Court will

"practice judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand." *W. Cab Co., 390 P.3d at 666–67* citing *Miller v. Burk*, 124 Nev. 579, 588–89, 188 P.3d 1112, 1118–19 (2008).

Here, and owing to the Federal Court Injunction, it is entirely unnecessary for this Court, especially by way of a writ petition, to consider the issues presented. As discussed above, the Federal Court Injunction has barred the Nevada state courts (including this Court) from hearing the only claims remaining against TSE in the consolidated action or its constituent cases. Even if, for example, the Court were to agree with TSE's position that the District Court should have dismissed Brahma's claims against TSE on jurisdictional grounds (as opposed to merely staying them while the Federal Court considered similar contentions), the Federal Court Injunction means those claims no longer reside in the District Court. Because those claims lie elsewhere, and because the District Court is enjoined, it has no authority to dismiss them even if this Court could conclude that the District Court should have done so before the Federal Court Injunction was issued.

Similarly, and where the underlying application of NRS 108.2275 is inapplicable to Brahma's claim against Cobra, AHAC and the Surety Bond, this Court should practice judicial restraint and avoid deciding such complex legal issues because it is entirely "unnecessary to resolve the case at hand." *See W. Cab Co., supra* at 666–67. Even if the Court were to deem Brahma's pleading in the NRS 1098.2275 Proceeding improper, such impropriety has been cured and/or rendered irrelevant by Brahma's (i) amendment to replace the foreclosure claim against the property and work of improvement with a claim on surety bond, 2 PA 116-130 (ii) assertion of a claim on surety bond in the Separate Action, 1 RPIA 1-6, and (iii) filing of a consolidated amended pleading that asserts no claim against TSEs property or work of improvement. 1 RPIA 92-104. TSE faces no exposure to its property or work of improvement because (1) the Surety Bond (issued by third

parties, not TSE) released Brahma's claim against TSE's property or work of improvement and (2) Brahma now asserts no claim against TSE, its property or improvements.

Finally, and where the Nye County and Federal Court Actions continue, consideration of the issues presented in the Petition is antithetical to this Court's policy of promoting judicial economy and avoiding piecemeal appellate review. *See W. Cab Co., supra* at 666–67. As noted above, TSE is already pursuing an appeal of the District Court's denial of its Motion to Expunge in Supreme Court Case No. 78092, which is itself arguably moot on similar grounds. Even if that appeal should be deemed justiciable, no good reason exists for this Court to exercise its discretionary authority to consider additional appellate issues in this writ proceeding.

C. THE FEDERAL COURT MOTIONS PROVIDE TSE A PLAIN, SPEEDY AND ADEQUATE REMEDY.

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).

Even if the Federal Court Injunction does not render moot the issues TSE presents in its Petition, the Federal Court Injunction has already provided TSE with a plain, speedy and adequate remedy. Specifically, but without limitation, the Federal Court Injunction provides a remedy for: TSE's assertion that (i) its removal of the Removed Claims to federal court divests all state courts of jurisdiction and (ii)

it was the "first to file" such that no claims should thereafter be asserted against it in state court, by prohibiting litigation of those claims in the Nevada state courts.

TSE has also been afforded an adequate remedy for its assertion that Brahma cannot bring a foreclosure action against TSE's property or work of improvement by (i) Cobra's recording of the Surety Bond, 5 PA 429, (ii) Brahma's action against the Surety Bond, 1 RPIA 1-6, and (iii) Brahma's amended pleading that removes any doubt that Brahma no longer seeks foreclosure against TSE's property or improvements. 1 RPIA 92-104.

For all of the foregoing reasons, Brahma respectfully submits that the Court should exercise its discretion to decline review of the issues presented in the Petition.

D. THE PETITION SHOULD BE DENIED ON THE MERITS.

If, despite the foregoing, this Court reaches the merits of the underlying issues presented for review in the Petition, the Court should reject the Petition on the merits for the following reasons:

1. The Federal Court Injunction resolved TSE's jurisdictional contentions.

TSE seeks a writ of prohibition "preventing the Nye County district court from exercising subject matter jurisdiction over [the Removed Claims] ... or alternatively a writ of mandamus "compelling the district court to vacate the stay and dismiss Brahma's self-transferred claims for lack of subject matter jurisdiction." [Petition p. 5]. In express reliance on *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1238 (9th Cir. 1994), TSE argues that the District 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]. TSE asks this Court to prohibit the District Court "from exercising subject matter jurisdiction" over such claims [*Id.* p. 5] and that "the removal of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute." [*Id.* p. 32 citing *California*

ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States, 215 F.3d 1005, 1011 (9th Cir. 2000). TSE also argues that such divestiture of jurisdiction applies to all state courts and not only the court from which the action was removed. [*Id.* p. 32-33 citing e.g., *Roberts v. Hollandsworth*, 616 P.2d 1058, 1061 (Idaho 1980)].

In seeking the Federal Court Injunction, TSE made these same arguments, as follows:

- "[T]he state court loses jurisdiction upon the filing of the petition for removal." 7 PA 651-52 citing *Resolution Trust Corp.*, 43 F.3d at 1238 and 28 U.S.C. § 1446(d).];
- "This divestiture of jurisdiction applies to all state courts." 7 PA 652 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).
- "[R]emoval of an action to federal court necessarily divests state and local courts of their jurisdiction over a particular dispute," 7 PA 651-52 citing *Resolution Trust Corp.* 43 F.3d at 1238 and *Sacramento Metro*, 215 F.3d at 1011].

Although the Federal Court granted TSE's Motion for Injunction, it did not expressly adopt TSE's argument that the removal divested the District Court of jurisdiction. Rather, the Federal Court concluded that Brahma filed the Removed Claims in Nye Country "in an attempt to subvert the removal of a prior case." 1 RPIA citing *Lou v. Belzberg*, 834 F.2d 730, 741 (9th Cir. 1987)]. It then struck Brahma's Amended Complaint (which had omitted the Removed Claims), reinstated its original Complaint (which included the Removed Claims) and enjoined Brahma from litigating the Removed Claims in any state court action. 1 RPIA 135-36. As discussed above, no purpose is served by revisiting the precise question presented

(whether the District Court had subject matter jurisdiction over the Removed Claims) because those claims now firmly reside in the Federal Court.

For this reason, Brahma respectfully submits that this Court may not even issue the writs TSE has requested because to do so requires an enjoined state court to litigate the Removed Claims. Further, and even if this Court determines that it is exempt from the reach of the Federal Court Injunction and issues a writ directing the District Court to "vacate the stay and dismiss" the Removed Claims, the District Court is clearly bound by the Federal Court Injunction and could not obey such a command without violating the injunction. For these reasons, the Court should decline to grant the Petition

2. The "first to file rule" is inapplicable.

TSE argues that the Court should adopt and apply the so-called "first-to-file rule" and "stay the entire state court proceeding pending complete resolution of the federal court action." [Petition pp. 3, 40]. Stated differently, TSE asks this Court to go beyond the terms of the Federal Court Injunction (which enjoined only litigation of the Removed Claims in state court) and to stay Brahma's remaining Claim on Surety Bond against third parties (Cobra and AHAC). The Court should decline this invitation.

First, Brahma submits that TSE's request was expressly rejected by the Federal Court such that no resolution by this Court is possible or, at a minimum, advisable. Specifically, but without limitation, the Federal Court could have enjoined all proceedings in Nye County but did not do so, choosing only to enjoin Brahma from proceeding in state court on the TSE Claims. 1 RPIA 136. Similarly, the Federal Court could have enjoined Brahma from proceeding on any claim (including its claim against the Cobra Parties and the Surety Bond) arising out of or relating to the acts and occurrences giving rise to Brahma's claims against TSE. Again, however, the Federal Court did not do so. Similarly, while the District Court

did grant TSE a stay of proceedings as to the Removed Claims pending a decision in the Federal Court Action, it did not stay Brahma's Claim on Surety Bond. Brahma respectfully submits that these were conscious and deliberate decisions by experienced and knowledgeable judges. No good reason exists for this Court to expand the reach of the Federal Court Injunction.

Second, TSE is simply wrong in its assertion that the issues presented in the Claim on Surety Bond "are identical" to those presented in the Removed Claims and that that the Claim on Surety Bond "turns on the same issues as Brahma's and TSE's competing breach of contract claims." [Petition p. 39]. To the contrary, by way of its Claim on Surety Bond, Brahma asserts an independent statutory cause of action.

NRS 108.2421(1) provides:

> A 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***.

By posting the Surety Bond, Cobra and AHAC caused Brahma's Notice of Lien against the Work of Improvement to be released.[14] Brahma's lien now attaches to the Surety Bond,[15] which ***entitles***[16] Brahma to bring its action against the Surety

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[14] *See* 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.").

[15] *See* NRS 108.2415(6)(a) ("the surety bond shall be deemed to replace the property as security for the lien.").

[16] *See Savage* v. *Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) ("When examining a statute, a purely legal inquiry, this court should ascribe to its words their plain meaning, unless this meaning was clearly not intended.").

Bond in Nye County where the property and work of improvement is located. This is a ***statutory right***, not merely a privilege.[17]

Further, by posting the Surety Bond, the Cobra and AHAC have submitted themselves to the jurisdiction of the District Court and have appointed the Clerk of the Court as their agent pursuant to NRS 108.2423, which provides in part:

> By entering into a surety bond given pursuant to NRS 108.2415, the ***principal and surety 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 the ***principal and surety irrevocably appoint the clerk of that court as their agent*** upon whom any papers affecting the liability on the surety bond may be served. ***The liability of the principal may be established by the court in the pending action.***

Accordingly, ***Cobra*** (not TSE) is the Surety Bond principal against whom Brahma has a claim and against whom it seeks to obtain a judgment, along with the surety (AHAC) and the Surety Bond, in the county in which the Work of Improvement is located. While Brahma also has claims against TSE, those contract-based claims now reside (over Brahma's objection) in the Federal Court. *See* 1 RPIA 136.

By contrast, Brahma's claim against the Surety Bond seeks an award of "the lienable amount plus the total amount that may be awarded by the court pursuant to NRS 108.237, so long as the liability of the surety is limited to the penal sum of the surety bond."[18] NRS 108.237 requires the Court to "award a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due by the court" plus costs of repairing and recording the notice of lien, interest, and costs of the

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[17] Black's Law Dictionary provides: "to entitle is to **give a right** or title." *See* https://thelawdictionary.org/entitle/ (emphasis added).

[18] *See* NRS 108.2421(6).

proceedings including reasonable attorney's fees."[19] "Lienable amount" means "the principal amount of a lien to which a lien claimant is entitled pursuant to subsection 1 of NRS 108.222."[20]

NRS 108.222(1) provides:

> Except as otherwise provided in subsection 2, a ***lien claimant has a lien upon the property, any improvements for which the work, materials and equipment were furnished or to be furnished***, and any construction disbursement account established pursuant to NRS 108.2403, for:
>
> > (a) If the parties agreed, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of the work, material and equipment furnished or to be furnished by or through the lien claimant, ***the unpaid balance of the price agreed upon for such work, material or equipment,*** as the case may be, whether performed, furnished or to be performed or furnished at the instance of the owner or the owner's agent; ***and***
> >
> > (b) If the parties did not agree, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of the work, material and equipment furnished or to be furnished by or through the lien claimant, including, without limitation, any additional or changed work, material or equipment, ***an amount equal to the fair market value of such work, material or equipment, as the case may be, including a reasonable allowance for overhead and a profit***, whether

[19] *See* NRS 108.237(1).
[20] *See* NRS 108.22136.

performed, furnished or to be performed or furnished at the instance of the owner or at the instance of the owner's agent.[21]

Stated differently, NRS 108.2421 permits a lien claimant, such as Brahma, to prove up its lienable amount, be awarded the same plus interest, costs and reasonable attorney's fees and to have a judgment ***against the Surety Bond*** up to its "penal sum." Such a judgment "is ***immediately enforceable*** and may be appealed regardless of whether any other claims asserted or consolidated actions or suits have been resolved by a final judgment."[22]

TSE's argument notwithstanding, the foregoing statutes plainly demonstrate that Brahma's Claim on Surety Bond is not derivative of or dependent upon its Breach of Contract claim against TSE; rather it is a separate and distinct cause of action with separate and distinct elements of proof. Further, and while there are certainly overlapping facts and considerations in the two actions, the Federal Court has expressly rejected such overlap as a reason to require the claims to be heard in the same proceeding. Specifically, and over Brahma's objection that the claims should be resolved in the same proceeding to avoid duplication and the possibility of inconsistent decisions, the Federal Court was "unconvinced" by this authority and found no "special or important rationale or legislative preference for having these issues be resolved in a single proceeding." 1 RPIA 133.

While Brahma has now been required to pursue the TSE Claims in Federal Court, there is nothing in Nevada's Lien Statute that obligates Brahma to pursue its claim against the Surety Bond in the Federal Court.[23] Similarly, nothing in Nevada's Lien Statute requires Brahma to wait to proceed on its claim against the Surety Bond

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[21] *See* NRS 108.222(1) (emphasis added).
[22] *See* NRS 108.2421(6) (emphasis added).
[23] Because Brahma and Cobra are not diverse, Cobra also cannot remove the action to Federal Court.

and the Cobra Parties while it pursues the TSE Claims against TSE in Federal Court. Because TSE's Petition seeks just that (which the Federal Court declined to grant) the Court should deny the Petition.

3. The District Court correctly ruled that Brahma properly filed its foreclosure action in the NRS 108.2275 Proceeding or cured any defect by filing the Separate Action.

As discussed above, any review of Brahma's action to foreclose on the property or improvements is moot because Brahma amended its pleading(s) to assert the Claim on Surety Bond (as it was required to do), which replaced the foreclosure action. Nonetheless, as its first issue, TSE seeks review of the initial pleading and contends that Brahma should not have been allowed to file that original complaint in the NRS 108.2275 Proceeding. TSE specifically argues that the filing was improper because NRS 108.2275 is "silent on whether a party can file a counter-complaint into a special proceeding created by the filing of a motion to expunge and somehow convert the special proceeding into a civil action." [Petition p. 3].

Even if the Court considers the substantive argument, it should reject the same because, as the District Court correctly ruled, (1) "NRS 108.2275(5) establishes the Nevada Legislature's intent to combine mechanic's lien foreclosure actions with motions to expunge liens," 8 PA 876, (2) "at the time Brahma filed its Amended Counter-Complaint in this Action, the Court had not yet ruled on Brahma's Motion for Attorney's Fees and Costs under NRS 108.2275, so that Case was still open," 8 PA 876, and, as the District Court later came to conclude, (3) "had Brahma filed a standalone complaint as an independent action and then moved the Court to consolidate that action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they currently find themselves in." 1 RPIA 90. Further, the District Court correctly concluded that:

> [W]here 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 [the Separate Action] 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 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 [the Separate Action] is (at worst) moot with no prejudice having been suffered by any party by way of consolidation.[24]

NRS 108.2275(5) provides:

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

Stated differently, the statute expressly requires a motion to expunge to be filed in an existing foreclosure action (if any), and, if no such action is pending, requires the court clerk to assign a case number and collect a filing fee.

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[24] 1 RPIA 91.

Although the statute says nothing of the kind, TSE argues that the statute, "by its plain terms ... does not permit the filing of a lien foreclosure complaint into an already pending special proceeding." [Petition p. 24]. In fact, as TSE acknowledges, the statute is (at worst) "silent" on this issue. [Petition p. 3]. In fact, the most reasonable interpretation of the statute is that, as the District Court concluded, a complaint may be filed in an existing motion to expunge/special proceeding in the same way that a motion to expunge/special proceeding may be filed in an existing foreclosure proceeding.

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

TSE's argument that the Counter-Complaint is improper places form over substance. Filing the Counter-Complaint[25] into the NRS 108.2275 Special Proceeding puts the parties in the same procedural posture that would have existed had the Counter-Complaint been filed first, followed by the Motion to Expunge.

Notably, under Rule 2 of the Rules of the District Courts of Nevada, the term "Case" "shall include and apply to any and all actions, proceedings and other court matters, however designated." Therefore, as a practical matter, whether the Counter-Complaint is styled as a "Complaint", "Counter-Claim" or "Counter-Complaint," makes no difference to the validity of this Case.

In fact, had Brahma filed its Counter-Complaint as a standalone case (as TSE claims it should have – see *infra*), that case would have been a logical candidate for consolidation with the special proceeding. Filing the Counter-Complaint in an existing action arising out of the same facts and circumstances maximized judicial

[25] When Brahma first filed its pleading in this Action on September 20, 2018, it was styled as a "Lien Foreclosure Complaint." 2 PA 109. It was only after it was amended that Brahma named it, perhaps in artfully, a "Counter-Complaint." 2 PA 116.

economy, eliminated unnecessary delays and embraced the Court's mandate to apply the Nevada Rules of Civil Procedure to (i) "secure the just, speedy and inexpensive determination of every action,"[26] and (ii) construe all pleadings "to do substantial justice".[27]

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

This situation is no different. Like the debtor in *Polk,* TSE was served with the Summons and Counter-Complaint just as it would have been had the Counter-Complaint been filed in a standalone complaint with an independent case number. Further, just like *Polk,* there is nothing in the Mechanic's Lien Statute that prohibits a lien claimant from seeking to foreclose against its mechanic's lien by filing its complaint in the same case number commenced by an owner who previously filed a motion to expunge under NRS 108.2275.

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[26] *See* NRCP 1
[27] *See* NRCP 8(f).

Indeed, NRS 108.2275(5) expressly establishes the Legislature's intent to combine lien foreclosure actions with motions to expunge the lien so both matters are heard by the same judge. Specifically, but without limitation, the statute requires an application for order to show cause why the lien should not be expunged to "be made a part of the action to foreclose the notice of lien." From a practical standpoint, there is absolutely no difference whether the Motion to Expunge was filed first or the Counter-Complaint, the clear intent of the statute is that a single judge should preside over both matters.

b. The Mead Treatise contemplates a separate action and consolidation of the same, exactly as occurred here.

As it did before the District Court, TSE relies on a Nevada construction law treatise, LEON F. MEAD II, CONSTRUCTION LAW 286 (2016 Ed.), 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." *Compare* Petition pp. 26-27, 1 PA 92-94. As the District Court noted, this is one attorney's opinion, with which the District Court respectfully disagreed. 1 RPIA 90. Even if Mr. Mead's opinion is correct, which it is not, TSE pointedly neglects to advise this Court of an important corollary in the Mead Treatise analysis. Specifically, the Mead Treatise opines that "[t]he proper procedure is to file a complaint for foreclosure ***and to move the petitioning court to consolidate*** the two matters." 1 RPIA 48. As discussed more fully above, that is exactly what Brahma did by filing the Separate Action, which the District Court later consolidated with the NRS 108.2275 Special Proceeding.

By filing the Separate Action, Brahma perfected its claim on the Surety Bond under NRS 108.2421(2)(b)(1), which since the Federal Court Injunction is the only cause of action remaining in the District Court. Further, and because these pleadings have now been consolidated and amended, *see* 1 RPIA 105-36, TSE's continued

reliance on such a meaningless technicality is absurd. 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 dismiss or deny the Petition.

Respectfully submitted this 21st day of November, 2019.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read **REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, ALTERATIVELY, MANDAMUS,** and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires that every assertion in this Answer regarding matters in the record be supported by a reference to the record on appeal.

Respectfully submitted this 21st day of November, 2019.

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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 21st day of November, 2019, I caused the above and foregoing document, **REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF PROHIBITION OR, ALTERATIVELY, MANDAMUS**, 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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