

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78256

Electronically Filed
Nov 22 2019 10:25 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

TONOPAH SOLAR ENERGY, LLC,

Appellant,

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 BRAHMA GROUP, INC.'S APPENDIX OF
EXHIBITS TO ITS ANSWERING BRIEF TO APPELLANT'S WRIT OF
PROHIBITION (Volume 1, Part 1)**

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CHRONOLOGICAL APPENDIX OF EXHIBITS

<u>Exhibit</u>	<u>Date</u>	<u>Description</u>	<u>Bates Range</u>	<u>Volume</u>
1.	12-14-18	Brahma Group, Inc.'s Mechanic's Lien Foreclosure Complaint Against Surety Bond	RPI000001 – RPI000006	1
2.	01-09-19	Notice of Entry of Order	RPI000007 – RPI000019	1
3.	01-14-19	Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Opposition to Motion to Consolidate Case No. CV39799 with Case No. 39348	RPI000020 – RPI000079	1
4.	02-05-19	TSE's Notice of Appeal	RPI000080 – RPI000083	1
5.	03-15-19	Notice of Entry of Order	RPI000084 – RPI000091	1
6.	04-22-19	Brahma Group, Inc.'s (I) Second Amended Complaint; and (II) First Amended Third-Party Complaint	RPI000092 – RPI000104	1
7.	04-22-19	Order Granting Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint	RPI000105 – RPI000122	1
8.	10-04-19	Notice of Order in Related Case	RPI000123 – RPI000136	1
9.	10-30-18	Tonopah Solar Energy, LLC's Response to Brahma's Motion for Stay, or in the Alternative, Motion to Amend Complaint [ECF 18]	RPI000137 – RPI000159	1

EXHIBIT 1

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FILED
FIFTH JUDICIAL DISTRICT COURT

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NYE COUNTY DEPUTY CLERK
DEPUTY

Marianne Yoffee

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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Lien/Bond Claimant,

17 vs.

18
19 COBRA THERMOSOLAR PLANTS, INC., a
20 Nevada corporation; AMERICAN HOME
21 ASSURANCE COMPANY, a surety; BOE
22 BONDING COMPANIES I through X; DOES I
23 through X; ROE CORPORATIONS I through X,
24 inclusive,

25 Defendants,

CASE NO. : CV 39799
DEPT. NO. : 1

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

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

26 Lien/Bond Claimant, BRAHMA GROUP, INC. ("Brahma"), by and through its
27 attorneys of record, the law firm of PEEL BRIMLEY LLP, as and for its Complaint in this
28 action (the "Action") against the above-named Defendants, 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. 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 **FIRST CAUSE OF ACTION**
7 **(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.

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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

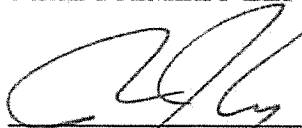
9 4. For such other and further relief as this Honorable Court deems just and proper in
10 the premises.

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 
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27 *Attorneys for Brahma Group, Inc.*
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EXHIBIT 2

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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,

Counter-Defendant.

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

NOTICE OF ENTRY OF ORDER

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RPI000007

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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
8 through X; ROE CORPORATIONS I through X,
9 inclusive,

10 Third-Party Defendants.

11 **NOTICE OF ENTRY OF ORDER**

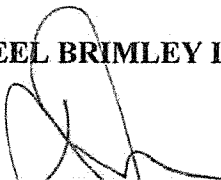
12 PLEASE TAKE NOTICE that an **Order Granting Brahma's Motion for Attorney's Fees**
13 **and Costs Pursuant to NRS 108.2275(6)(C)** was filed on January 8, 2019, a copy of which is
14 attached as Exhibit1.

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 9 day of January, 2019.

19 **PEEL BRIMLEY LLP**

20 
21 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 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:

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An Employee of Peel Brimley LLP

EXHIBIT 1

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

JAN 08 2019

Nye County Clerk
Deputy

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**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;
- 2) 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;
- 3) 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.

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

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

III. CONCLUSION.

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

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

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

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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)
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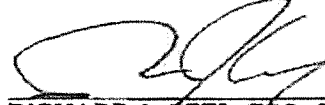
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EXHIBIT A

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1 **ORDR**

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Attorneys for Brahma Group, Inc.

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

13 Plaintiff,

14 vs.

15 **BRAHMA GROUP, INC.**, a Nevada corporation,

16 Defendant.

CASE NO. : CV 39348

DEPT. NO. : 2

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

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

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

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

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

28 **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);

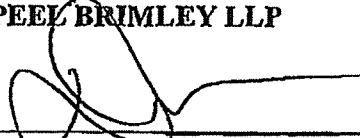
2 Now therefore,

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 
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26 *Inc.*

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

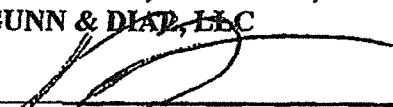
14 
15 _____
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EXHIBIT 3

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FILED
FIFTH JUDICIAL DISTRICT

JAN 14 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.

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.

CASE NO. : CV 39348

DEPT. NO. : 2

**BRAHMA GROUP, INC.'S REPLY
TO TONOPAH SOLAR ENERGY,
LLC'S OPPOSITION TO MOTION
TO CONSOLIDATE CASE NO.
CV39799 WITH CASE NO. CV 39348**

Hearing Date: January 24, 2019

Hearing Time: 9:00 a.m.

REPLY POINTS AND AUTHORITIES

I. TSE HAS ALREADY ADMITTED THAT BRAHMA CAN (AND SHOULD) CONSOLIDATE A COMPLAINT INTO A SPECIAL PROCEEDING.

In its Motion to Strike Brahma Group, Inc.'s ("Brahma") First Amended Counter-Complaint ("Motion to Strike"),¹ Tonopah Solar Energy, LLC ("TSE") argued that Brahma's proposed amended pleading was improper because "one cannot file a Counter-Complaint into a special proceeding such as this." In support of its position, TSE relied on what it claimed to be "the leading Nevada construction law treatise," LEON F. MEAD II, CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) "it is improper legal procedure to file a counter-claim to a petition under NSR 108.2275,"² and (ii) "The proper procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate the two matters."³

In defending TSE's Motion to Strike, Brahma argued (and this Court agreed) that Brahma had a right to file a complaint in the special proceeding that TSE had commenced to expunge Brahma's lien. Among other things, this Court concluded that (i) NRS 108.2275(5) establishes the Nevada Legislature's intent to combine mechanic's lien foreclosure actions with motions to expunge liens, (ii) had Brahma filed a standalone complaint as an independent action in Case No. CV 39799 ("Separate Action") and then moved the Court to consolidate the standalone action with the present Case No. CV 39348 ("Action"), the Parties would be in the same position they currently find themselves, and (iii) 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.⁴

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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."

² See Exhibit A hereto, TSE Reply to Brahma's Opposition to Motion to Strike (exhibits omitted for brevity), p. 7.

³ See Exhibit B hereto, excerpt from Mead treatise as submitted to this Court by TSE as Exhibit 4 to its Reply to Brahma's Opposition to Motion to Strike

⁴ As of this writing, Brahma has submitted a proposed Order Denying Motion to Strike to the Court, which is awaiting the Court's review, that contains these findings as made orally by the Court at the December 11, 2018 hearing.

1 TSE continues to threaten to file a Writ Petition with the Nevada Supreme Court seeking
2 discretionary review of this Court's denial of TSE's Motion to Strike. Out of an abundance of
3 caution,⁵ but without waiving any rights it may possess, Brahma (i) filed a standalone complaint
4 on December 14, 2018 in the Separate Action⁶ to foreclose against the Surety Bond and Rider that
5 TSE required Cobra to record, and (ii) now seeks to consolidate the Separate Action into this
6 Action pursuant to NRCP 42 because both cases relate to and arise out of the same transaction and
7 occurrence. Stated differently, Brahma did exactly as TSE prescribed.

8 Even though Brahma has now done exactly what TSE claimed Brahma should have done
9 (i.e., filed a claim against the Surety Bond issued by Cobra Thermosolar Plants, Inc. ("Cobra") in
10 the Separate Action, then move to consolidate the Separate Action with this Action), TSE now
11 argues (i) "there is no legal basis" for Brahma's current Motion to Consolidate, and (ii) Brahma
12 may not pursue this course of action.⁷

13 TSE's newly adopted position (i) is contradictory to the position it took in its Motion to
14 Strike, and (ii) is incorrect because consolidation is indeed available and appropriate whether or
15 not TSE successfully appeals this Court's denial of the Motion to Strike. For this reason, this Court
16 should reject TSE's Opposition to Brahma's Motion to Consolidate on grounds of estoppel and
17 issue an Order consolidating the Separate Action (Case No. CV39799) with this Action (Case No.
18 CV 39348).

19 Further, should the Nevada Supreme Court conclude that Brahma had no right to file a
20 complaint in the special proceeding, then (following Leon Mead's analysis) Brahma would have
21 been right to file the Separate Action and move to consolidate. If, on the other hand, the Nevada
22 Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure
23 claim of the Separate Action is (at worst) moot with no prejudice having been suffered by any
24 party by way of consolidation.

25
26 ⁵ If the Nevada Supreme Court agrees with TSE's claims that the Amended Complaint was improper and should have
27 been filed as a separate action, on remand, TSE would undoubtedly argue that the deadline for Brahma to foreclose
28 against the Surety Bond has expired because NRS 108.2421 requires a lien claimant to commence a foreclosure action
against the surety bond within nine (9) months of the posting of a surety bond. While anything is possible, it is at best
unlikely that any appellate proceeding would be concluded within that time period.

⁶ See Exhibit C hereto.

⁷ See TSE Opposition to Motion to Consolidate p. 7.

1 TSE also argues that consolidation is improper because “the special proceeding is
2 completely adjudicated as the court denied TSE’s motion to expunge and granted Brahma’s
3 accompanying motion for attorneys (sic) fees.”⁸ TSE’s argument is factually and legally incorrect
4 for the following reasons:

5 • First, TSE has yet to comply with the Court’s Order Granting Brahma’s Motion for
6 Attorney’s Fees and Costs Pursuant to NRS 108.2275(6)(c) (“Fee Award”), which makes such
7 fees and costs due and payable within 10 days of notice of entry of the Order – i.e., no later than
8 January 28, 2019,⁹ which means the special proceeding is not “completely adjudicated;”

9 • Second, TSE has stated its intention by way of several letters to this Court to defy
10 the Court’s Fee Award, which will necessitate further motion practice (i.e., Brahma will file a
11 motion to hold TSE in contempt), which (again) means the special proceeding is not “completely
12 adjudicated”;¹⁰ and

13 • Third, and more fundamentally, the present action is most certainly not “complete”
14 because Brahma (i) has filed a complaint in this Action, which this Court has allowed to stand and
15 be amended¹¹ (with certain claims stayed), and (ii) has now moved to consolidate the Separate
16 Action into this Action, which Motion to Consolidate has yet to be ruled on by this Court. Stated
17 differently, while this Action began as a special proceeding it is now no longer that.

18 **II. BRAHMA’S CONSOLIDATION IS NOT “FUTILE.”**

19 TSE next argues that the Separate Action is futile and may not be consolidated into this
20 Action. Specifically, TSE argues that Brahma’s Complaint filed in the Separate Action (which
21 TSE misleadingly refers to as “Brahma’s seventh pleading”) is (i) impermissible claim-splitting,
22 (ii) “redundant,” (iii) violates NRCP 1, and (iv) violates NRCP 15. TSE is wrong on all counts.

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25 ⁸ See Opposition p. 7.

26 ⁹ See Exhibit D hereto, Notice of Entry of Fee Award.

27 ¹⁰ After this section was first written, the parties appear to have reached an agreement in principle as to a timeline for
payment of the fees and costs awarded to Brahma. Despite this agreement, those fees have not yet been paid and the
matter therefore remains open.

28 ¹¹ The amended pleading will be filed once the Court issues the Order Denying Motion to Strike. See also footnote 4
hereto.

1 A. **Brahma Has Not Engaged in Impermissible Claim-Splitting.**

2 Even though no judgment has been entered, TSE incorrectly claims¹² that Brahma has
3 engaged in impermissible claim-splitting, a concept grounded in the doctrine of claim preclusion,
4 formerly called *res judicata*. See *Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*,
5 407 P.3d 761, 763 (Nev. 2017) (the rule against claim-splitting “underlies claim preclusion”). In
6 *Boca Park*, the Nevada Supreme Court noted that “[e]xceptions to the doctrine have been created
7 to address situations in which barring a later-filed claim does not advance the doctrine’s underlying
8 policies or conflicts with a statutory scheme, constitutional rights, or the agreed-upon or stated
9 limits of the first proceeding.” 407 P.3d at 763 citing Restatement (Second) of Judgments § 26
10 (Am. Law Inst. 1982).

11 Nothing in the Separate Action “conflicts with a statutory scheme, constitutional rights, or
12 the agreed-upon or stated limits of the first proceeding” and TSE makes no effort to show how this
13 might be. This is especially (though not exclusively) true if (as TSE argued in its Motion to Strike)
14 Brahma had no legal right to file a foreclosure complaint in this Action and the proper statutory
15 procedure is for Brahma to file a foreclosure action (i.e., the Separate Action), then move to
16 consolidate the same into the present Action. See *supra* and LEON F. MEAD II,
17 CONSTRUCTION LAW 286 (2016 Ed.).

18 Similarly, nothing in the Separate Action conflicts with the “policy-driven doctrine” of
19 claim preclusion, which is “designed to promote finality of judgments and judicial efficiency by
20 requiring a party to bring all related claims against its adversary in a single suit, on penalty of
21 forfeiture.” See *Boca Park*, 407 P.3d at 763, citing *Weddell v. Sharp*, 131 Nev. ___, 350 P.3d 80,
22 83–85 (2015). Indeed, the entire purpose of the Motion to Consolidate is to ensure that all related
23 claims are brought in a single suit.¹³

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27 ¹² See Opposition p. 5.

28 ¹³ Ironically, while purporting to stand for the proposition that all claims should be combined in the same action, TSE continues to assert that some of the claims between the parties must be heard in an entirely different jurisdiction – i.e., the U.S. District Court.

1 In any event, among the numerous exceptions to the rule against claim-splitting, as
2 enumerated in the Restatement¹⁴ and adopted by Nevada in the *Boca Park* Court decision¹⁵ are the
3 following:

4 (a) The parties have agreed in terms or in effect that the plaintiff may split his
5 claim, or the defendant has acquiesced therein; and

6 (c) The plaintiff was unable to rely on a certain theory of the case or to seek a
7 certain remedy or form of relief in the first action because of the limitations
8 on the subject matter jurisdiction of the courts or restrictions on their
9 authority to entertain multiple theories or demands for multiple remedies or
forms of relief in a single action, and the plaintiff desires in the second
action to rely on that theory or to seek that remedy or form of relief;

10 Restatement (Second) of Judgments § 26 (Am. Law Inst. 1982).

11 Here, and although TSE's Opposition now contradicts its earlier position, TSE plainly
12 agreed or acquiesced to the course of action Brahma has now pursued and which Brahma is now
13 asking the Court to bless – i.e., doing exactly as Leon Mead suggested by filing a separate action
14 and seeking to consolidate the separate action into the special proceeding. More to the point, the
15 reason why Mr. Mead recommends this course of action (adopted *in toto* by TSE in support of its
16 Motion to Strike) is that it is (allegedly) improper for Brahma to file a foreclosure complaint in
17 this Action in the first place. Stated differently, if TSE is correct in asserting that Brahma had no
18 right to file a complaint in this Action because it was a special proceeding, then Brahma was
19 “unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the
20 first action [i.e., foreclosure] because of the limitations on the subject matter jurisdiction of” the
21 special proceeding. *See* Restatement (Second) of Judgments § 26(1)(c) (Am. Law Inst. 1982).
22 Accordingly, even if Brahma has engaged in “claim-splitting” (which it has not), the facts of this
23 case fit squarely within recognized exceptions to the general rule.

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27 ¹⁴ When such exceptions apply, “the general rule of [against claim-splitting] does not apply to extinguish the claim,
28 and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant.” *See*
Restatement (Second) of Judgments § 26 (Am. Law Inst. 1982)

¹⁵ 407 P.3d at 763.

1 **B. The Separate Action Is Not Impermissibly “Redundant”**

2 TSE next argues, without analysis, that the Separate Action violates NRCP 12(f) because
3 it is “redundant” of prior pleadings.¹⁶ While NRCP 12(f) allows a court to strike from a pleading
4 “any redundant, immaterial, impertinent, or scandalous matter,” TSE offers no case authority (or
5 rationale of any kind) for rejecting the Separate Action purely on the grounds of redundancy.
6 Indeed, the only Nevada case the undersigned has located in which NRCP 12(f) was cited (an
7 unpublished decision)¹⁷ involved the dismissal of an amended pleading because it “was nearly
8 identical, and therefore redundant, to the original complaint,” which the court had previously
9 dismissed. See *Angel v. Eldorado Casino, Inc.*, No. 59401, 2013 WL 1116822, at *1 (Nev. Mar.
10 15, 2013).¹⁸

11 Here, Brahma’s foreclosure claim in this Action survived TSE’s Motion to Dismiss and
12 even if the claims in the Separate Action are redundant, the claims may easily be merged by way
13 of consolidation. Furthermore, and for unrelated reasons, Brahma has now amended the claims
14 brought in this Action to include additional claims against Cobra Thermosolar Plants, Inc.
15 (“Cobra” - the Surety Bond principal)¹⁹ arising out of a separate agreement and work performed
16 for Cobra.²⁰ Accordingly, the Separate Action is not redundant of this Action.

17 **C. The Separate Action Does Not Violate NRCP 1.**

18 TSE also argues that the Separate Action violates NRCP 1.²¹ NRCP 1 simply defines the
19 scope of the Nevada Rules of Procedure and dictates how those rules should be construed and
20 administered:

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23 ¹⁶ See Opposition p. 6.

24 ¹⁷ Brahma in no way means to violate NRAP 36(c) by citing this unpublished decision. Rather, the lack of any non-
abrogated published decisions is evidence enough that TSE’s reliance on NRCP 12(f) is thin.

25 ¹⁸ The only published decision found has been abrogated (on other grounds) and cited Rule 12(f) merely for the
proposition that abuse could be found when a litigant “persistently files documents that are unintelligible, redundant,
26 immaterial, impertinent, or scandalous.” See *Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety*, 121 Nev.
44, 61, 110 P.3d 30, 43 (2005), abrogated by *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d 670
(2008).

27 ¹⁹ As the Court may recall, at TSE’s insistence, Cobra posted a Surety Bond pursuant to NRS 108.2415(1) to release
Brahma’s lien from the work of improvement.

28 ²⁰ See Exhibit E hereto.

²¹ See Opposition p. 6.

1 These rules govern the procedure in the district courts in all suits of a civil nature
2 whether cognizable as cases at law or in equity, with the exceptions stated in Rule
3 81. They shall be construed and administered to secure the just, speedy, and
inexpensive determination of every action.

4 TSE offers no coherent explanation as to why consolidation of the Separate Action into
5 this Action would deter the “just, speedy, and inexpensive determination” of the parties’ dispute.
6 To the contrary, the express purpose of consolidation pursuant to NRCP 42 is “to avoid
7 unnecessary costs or delay.”²² Consolidation of these actions would do just that and provide
8 obvious judicial economy. Because consolidation is vested in the sound discretion of the trial
9 court” (*Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981)),
10 Brahma respectfully submits that the Court should grant Brahma’s Motion to Consolidate.

11 **D. The Separate Action Does Not Violate NRCP 15.**

12 Finally, and apparently grasping at straws, TSE argues that the Separate Action is futile
13 “because it runs afoul of Rule 15.”²³ Again without any substantive analysis, TSE implies that the
14 relation back provisions of NRCP 15(c)²⁴ somehow render the Separate Action and this Motion to
15 Consolidate void. However, resort to the relation back provisions of NRCP 15(c) is only necessary
16 when a claim in an amended pleading is filed after the statute of limitations on such claim has run.
17 See e.g., *Costello v. Casler*, 127 Nev. 436, 440, 254 P.3d 631, 634 (2011) (allowing claim in
18 amended pleading to relate back to the date of the original pleading if “the proper defendant (1)
19 receives actual notice of the action; (2) knows that it is the proper party; and (3) has not been
20 misled to its prejudice by the amendment”) citing *Echols v. Summa Corp.*, 95 Nev. 720, 722, 601
21 P.2d 716, 717 (1979).

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²² NRCP 42 states in relevant part:

[W]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the 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.

²³ See Opposition p. 6.

²⁴ NRCP 15(c) provides: “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

1 Here, there is no allegation that any claim filed by Brahma in either the Separate Action or
2 this Action is outside the applicable statute of limitations. Indeed, pursuant to NRS
3 108.2421(2)(b)(1), a “lien claimant may bring an action against the principal and the surety not
4 later than 9 months after the date that the lien claimant was served with notice of the recording of
5 the surety bond.” Here, as alleged in the Separate Action, Cobra (as principal) first caused an
6 (inadequate) Surety Bond to be recorded on September 6, 2018 and subsequently recorded a Rider
7 to increase the amount of the Surety Bond on October 9, 2018.²⁵ Even if the Surety Bond and Rider
8 were properly served pursuant to the Statute immediately after recording (which they were not),
9 the Separate Action was commenced on December 14, 2018, well within the nine month period.²⁶

10 In any event, NRCP 15(c) is to be liberally construed to allow relation back of the amended
11 pleading where the opposing party will be put to no disadvantage. *Costello*, 127 Nev. at 441 citing
12 *E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1396 (9th Cir.1989) (“[C]ourts
13 should apply the relation back doctrine of [Federal] Rule 15(c) liberally.”); *University & Cmty.*
14 *Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 18–19 (2004) (noting the liberal policy
15 underlying NRCP 15). Thus, even if resort to NRCP 15(c) were necessary here (it is not), it is
16 unlikely that the rule would serve to bar Brahma’s claim(s).

17 III. CONCLUSION

18 For the foregoing reasons, Brahma respectfully requests this Court consolidate Case No.
19 CV 39799 into Case No. CV 39799.

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28 ²⁵ See Exhibit C.

²⁶ See *Id.*

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AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 14 day of January, 2019.

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 18th day of January, 2019, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S REPLY TO TONOPAH SOLAR ENERGY, LLC'S OPPOSITION TO MOTION TO CONSOLIDATE CASE NO. CV39799 WITH CASE NO. CV 39348** 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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EXHIBIT A

RPI000031



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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

Case No. CV 39348
Dept. No. 2

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


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



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

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

8 DATED this 30th day of November, 2018.

9 
10 D. Lee Roberts, Jr., Esq.
11 Colby L. Balkenbush, Esq.
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18 MEMORANDUM OF POINTS AND AUTHORITIES

19 I. INTRODUCTION

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

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

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



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

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

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



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

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

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

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



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

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

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

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

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



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

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

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

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

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

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



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

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

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

[a] foreclosure suit cannot be filed as a counter-claim to a petition to expunge or reduce under NRS 108.2275, however. Since a petition is not a "complaint," it cannot commence an action under Nevada Rules of Civil Procedure (NRCP) 4. Likewise, a "petition" is not a proper "pleading" under NRCP Rule 7(a), to which a counter-claim may be filed. Rather, it is a "motion" under NRCP Rule 7(b). As such, it is improper legal practice to file a counter-claim to a petition under NRS 108.2275.¹

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

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

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

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



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

6 E. NRCP 42 Has No Application Here

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

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

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

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



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

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

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

11 In its Motion, TSE cited extensive case law demonstrating that once an action is removed
12 to federal court, the state courts lose jurisdiction of all removed claims unless/until the federal
13 court issues an order remanding the case back to state court. TSE further demonstrated that this
14 rule divests all courts in the state of jurisdiction over the removed claims, not just the particular
15 state court from which the action was originally removed. See Motion at pp. 15-19. Among
16 others, the *Hollandsworth*, *General Handkerchief Corp.* and the *Leffall* cases² have nearly
17 identical facts to this case and resulted in the state court dismissing the later filed state court
18 action that sought to assert claims that were duplicative of those that were first removed to
19 federal court.

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

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



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

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

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

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

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

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



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

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

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

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



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

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

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

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

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

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



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

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

7 To further distract this Court from the merits of TSE's Motion, Brahma attached its
8 Motion to Stay the federal court action to its Opposition and argued that the federal court is
9 likely to grant that motion. Brahma also argued that TSE's Motion requesting that the federal
10 court issue an injunction enjoining Brahma from litigating this action any further is likely to be
11 denied.⁵ Brahma is wrong. The *Colorado River* abstention doctrine on which Brahma relies for
12 its Motion to Stay is disfavored. Further, federal courts regularly issue injunctions when parties
13 like Brahma seek to subvert their jurisdiction by re-filing removed claims in a different state
14 court action. In an abundance of caution and to defeat Brahma's attempt to give this Court only
15 one side of the story, TSE has attached hereto (1) TSE's Opposition to Brahma's Motion to Stay
16 the federal action, (2) Brahma's Reply to same, (3) TSE's Motion for Injunction in the federal
17 action, (4) Brahma's Opposition to same, and (5) TSE's Reply to the Motion for Injunction. See
18 Exhibits 6-10.⁶

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

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

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

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




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

VIII. CONCLUSION

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

DATED this 30th day of November, 2018.


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



CERTIFICATE OF SERVICE

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

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

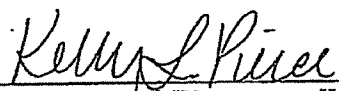

An employee of WEINBERG, WHEELER, HUDGINS
GUNN & DIAL, LLC

EXHIBIT B

RPI000047

es--affidavits are sufficient to
er a District Court's refusal to
e 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 *Id.*, 240 P.3d 1033, 126 Nev. Adv. Op. No. 36 (Nev. 2010).

⁷⁸³ NRS 108.2275(8).

⁷⁸⁴ See Section 8:22, Foreclosing the claim of lien.

⁷⁸⁵ NRS 108.2275(9).

EXHIBIT C

RPI000049

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11 Attorneys for Brahma Group, Inc.

12
13 FIFTH JUDICIAL DISTRICT COURT
14 NYE COUNTY, NEVADA

15 BRAHMA GROUP, INC., a Nevada corporation,
16
17 Lien/Bond Claimant,

18 vs.

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

23 Defendants,

24 Lien/Bond Claimant, BRAHMA GROUP, INC. ("Brahma"), by and through its
25 attorneys of record, the law firm of PEEL BRIMLEY LLP, as and for its Complaint in this
26 action (the "Action") against the above-named Defendants, complains, avers and alleges as
27 follows:
28

///

FILED
FIFTH JUDICIAL DISTRICT COURT

DEC 14 2016

NYE COUNTY DEPUTY CLERK
DEPUTY

Marianne Yoffee

CASE NO. : CV39799
DEPT. NO. : 1

BRAHMA GROUP, INC.'S
MECHANIC'S LIEN
FORECLOSURE COMPLAINT
AGAINST SURETY BOND

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

PEEL BRIMLEY LLP
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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.

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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.

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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 **FIRST CAUSE OF ACTION**
7 **(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 (v) 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.

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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 Lienable 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 Lienable
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

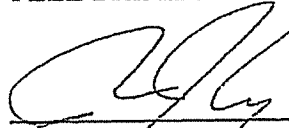
9 4. For such other and further relief as this Honorable Court deems just and proper in
10 the premises.

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.

EXHIBIT D

RPI000056

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9 *Attorneys for Brahma Group, Inc.*

10
11 **FIFTH JUDICIAL DISTRICT COURT**

12 **NYE COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

18 BRAHMA GROUP, INC., a Nevada corporation,

19 Counterclaimant/Lien Claimant,

20 vs.

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

24 Counter-Defendant.

25 ///

26 ///

27 ///

28

FILE

2019 JAN -9 A 11:56

NYE COUNTY CLERK

BY JP
DEPUTY

CASE NO. : CV 39348

DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

PEEL BRIMLEY LLP
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HENDERSON, NEVADA 89074
(702) 990-7272 • FAX (702) 990-7273

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

10 Third-Party Defendants.

11 **NOTICE OF ENTRY OF ORDER**

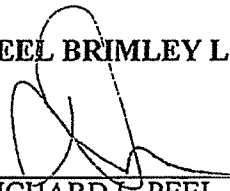
12 PLEASE TAKE NOTICE that an Order Granting Brahma's Motion for Attorney's Fees
13 and Costs Pursuant to NRS 108.2275(6)(C) was filed on January 8, 2019, a copy of which is
14 attached as Exhibit 1.

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 9 day of January, 2019.

19 **PEEL BRIMLEY LLP**

20 
21 RICHARD L. PEEL, ESQ. (4359)
22 ERIC ZIMBELMAN, ESQ. (9863)
23 CARY B. DOMINA, ESQ. (10567)
24 RONALD J. COX, ESQ. (12723)
25 3333 E. Serene Avenue, Suite 200
26 Henderson, Nevada 89074-6571
27 Attorneys for Brahma Group, Inc.
28

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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:

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gcrisp@weildrage.com
Attorneys for Cobra Thermosolar Plants, Inc.



An Employee of Peel Brimley LLP

EXHIBIT 1

PEEL BRIMLEY LLP
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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.**
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16 Attorneys for Brahma Group, Inc.

FILED
FIFTH JUDICIAL DISTRICT

JAN 03 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.

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)**

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

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

26 **I. STATUTORY BASIS FOR AWARD OF FEES AND COSTS.**

27 On October 17, 2018, this Court signed an Order¹ Denying TSE's Motion to Expunge
28

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

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.

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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 ///

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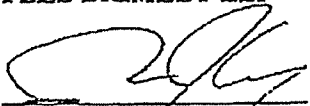
NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion For Attorney's Fees And Costs Pursuant To NRS 108.2275(6)(c) is GRANTED and Brahma is awarded the sum of \$88,417.34 which shall be due and payable by TSE within ten (10) days of a notice of entry of this order being filed.

Dated this _____ day December 2018.

Senior Judge Steven Elliott

Submitted by:

PEEL BRIMLEY LLP



RICHARD I. PEEL, ESQ. (NV Bar No. 4359)
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RONALD J. COX, ESQ. (NV Bar No. 12723)
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Attorneys for Brahma Group, Inc.

EXHIBIT A

RPI000067

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1 **ORDR**
2 **RICHARD L. PEEL, ESQ.**
3 Nevada Bar No. 4359
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13 ezimbelman@peelbrimley.com
14 cox@peelbrimley.com
15 *Attorneys for Brahma Group, Inc.*

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

14 **Plaintiff,**

15 **vs.**

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

17 **Defendant.**

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

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

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

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

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

25 **WHEREAS**, at a hearing on December 11, 2018 the Court orally ruled that Brahma was
26 entitled to an award of fees and costs of \$78,417.34 plus additional fees incurred for appearance
27 of counsel at oral argument and preparation of the Order ("Additional Fees") and directed
28 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);

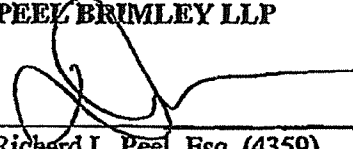
2 Now therefore,

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 21st day of December, 2018.

12
13 PEEL BRIMLEY LLP

14 
15 Richard L. Peel, Esq. (4359)
16 Eric B. Zimbelman, Esq. (9407)
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24 Attorneys for Defendant Brahma Group,
25 Inc.

WEINBERG, WHEELER, HUDGINS,
GUNN & DIAP, LLC

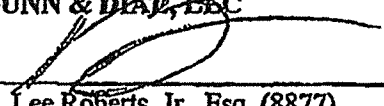
14 
15 D. Lee Roberts, Jr., Esq. (8877)
16 Colby L. Balkenbush, Esq. (13066)
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22 cbalkenbush@wwhgd.com
23 rgormley@wwhgd.com
24 Attorneys for Plaintiff Tonopah Solar Energy,
25 LLC

EXHIBIT E

RPI000070

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11 *Attorneys for Brahma Group, Inc.*

12
13 **FIFTH JUDICIAL DISTRICT COURT**
14 **NYE COUNTY, NEVADA**

15 BRAHMA GROUP, INC., a Nevada corporation,

16
17 Plaintiff,

18 vs.


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

23 Defendants,
24
25
26
27
28

FILE

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NYE COUNTY CLERK

BY  DEPUTY

CASE NO. : CV39799
DEPT. NO. : 1

**BRAHMA GROUP, INC.'S FIRST
AMENDED COMPLAINT FOR
(AMONG OTHER THINGS):**

**(I) FORECLOSURE OF NOTICE OF
LIEN AGAINST SURETY BOND;
AND**

**(II) BREACH OF SETTLEMENT
AGREEMENT.**

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

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1 This First Amended Complaint for (Among Other Things) (i) Foreclosure of Notice of Lien
2 Against Surety Bond, and (ii) Breach of Settlement Agreement ("Amended Complaint"), amends
3 that certain Mechanic's Lien Foreclosure Complaint Against Surety Bond ("Original Complaint")
4 filed with the Court on December 14, 2018 in this action (the "Action"), by Plaintiff, BRAHMA
5 GROUP, INC. ("Brahma").

6 By way of this Amended Complaint against the above-named Defendants, Brahma, by and
7 through its attorneys of record, the law firm of PEEL BRIMLEY LLP, complains, avers, and alleges
8 as follows:

9 THE PARTIES

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

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

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

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

20 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
21 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
22 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
23 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
24 06 (the "Liberty Parcel").²

25
26
27 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.

28 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.

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1 4. TONOPAH SOLAR ENERGY, LLC ("TSE")³ is and was at all times relevant to
2 this Action:

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

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

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

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

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

14 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
15 Parcels.⁴

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

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

22 a. Is and was at all times relevant to this Action a company duly licensed and
23 qualified to issue surety bonds and do business in Nevada;

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

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

27 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.

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.

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

3 a. Is and was at all times relevant to this Action a Nevada corporation;
4 b. Is the principal on the Surety Bond and the Rider; and
5 c. Is a party to a negotiated settlement between Cobra and Brahma for the
6 payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra
7 Work") at the Project.

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

16 9. Cobra, AHAC and the Doe Defendants, are sometimes referred to in the First Cause
17 of Action of this Amended Complaint (below), (i) individually, as a "Defendant," and (ii)
18 collectively, as the "Defendants".

19 10. Cobra and the Does Defendants, are sometimes referred to in the Second through
20 Fourth Causes of Action (below), (i) individually, as a "Defendant," and (ii) collectively, as the
21 "Defendants".

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

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

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

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13. 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.

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

15. 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.

16. 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").

17. 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").

18. 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").

19. 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").

20. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv) Third Amended Lien, and (v) Fourth Amended Lien, collectively, referred to herein as the "Lien," were:

- a. in writing;
- b. recorded against the Work of Improvement; and

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1 c. given or served on the authorized agents of the BLM and TSE, or the BLM
2 and/or TSE knew of the existence of the Lien.

3 21. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
4 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
5 (\$12,859,577.74 — “Lienable Amount”).

6 22. The Lienable Amount is due and owing Brahma as of the date of this Amended
7 Complaint.

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

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

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

15 26. NRS 108.2421(1) authorizes Brahma, as lien claimant, to bring an action against
16 the principal (Cobra) and the surety (AHAC) on the Surety Bond and Rider within this Court.

17 27. Brahma makes claim against the Defendants and AHAC is obligated to Brahma for
18 the Lienable Amount plus interest, costs, and attorney’s fees up to the penal sum of the Surety
19 Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

20 **SECOND CAUSE OF ACTION**

21 **(Breach of Settlement Agreement Against Cobra)**

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

24 29. Prior to the commencement of the Work of Improvement, Brahma previously
25 contracted directly with Cobra to perform the Cobra Work at the Project.

26 30. Brahma performed the Cobra Work and a dispute over payment arose between
27 Brahma and Cobra (the “Cobra Dispute”).
28

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1 31. Brahma and Cobra (i) negotiated a resolution of the Cobra Dispute, and (ii) agreed
2 to certain terms, which terms were memorialized in writing ("Settlement Agreement").

3 32. Pursuant to the Settlement Agreement, Cobra was to make (i) a first payment to
4 Brahma in the amount of \$2,881,397.67 ("First Payment") upon Brahma providing certain
5 documentation/information concerning the Cobra Work (the "Documentation"), and (ii) a second
6 payment to Brahma in the amount of \$412,224.62 ("Second Payment") upon Brahma providing
7 additional documentation/information ("Additional Documentation").

8 33. Brahma provided the Documentation and Cobra paid Brahma the First Payment.

9 34. Brahma tendered and/or provided Cobra the Additional Documentation to receive
10 the Second Payment, but Cobra has failed to pay Brahma the Second Payment.

11 35. Brahma has tendered and/or performed its duties and obligations as required by the
12 Settlement Agreement.

13 36. The Defendants have breached the Settlement Agreement by failing to tender
14 payment of the Second Payment to Brahma, which Second Payment is due and owing.

15 37. Brahma has been required to engage the services of an attorney to collect the
16 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
17 interest therefore.

18 **THIRD CAUSE OF ACTION**

19 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against Cobra)**

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

22 39. There is a covenant of good faith and fair dealing implied in every agreement,
23 including the Settlement Agreement.

24 40. The Defendants breached their duty to act in good faith by performing the
25 Settlement Agreement in a manner that was unfaithful to the purpose of the Settlement Agreement,
26 thereby denying Brahma's justified expectations.

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1 41. Due to the actions of the Defendants, Brahma suffered damages in an amount more
2 than the Second Payment, for which Brahma is entitled to judgment in an amount to be determined
3 at trial.

4 42. Brahma has been required to engage the services of an attorney to collect the
5 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
6 interest therefore.

7 **FOURTH CAUSE OF ACTION**
8 **(Unjust Enrichment Against Cobra)**

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

11 44. This cause of action is being pled in the alternative.

12 45. Brahma tendered and/or provided the Additional Documentation for the benefit
13 and/or at the specific instance and request of the Defendants.

14 46. The Defendants accepted, used, and enjoyed the benefit of the Additional
15 Documentation.

16 47. Brahma has demanded payment of the Second Payment.

17 48. To Date, the Defendants have failed, neglected, and/or refused to pay the Second
18 Payment.

19 49. The Defendants have been unjustly enriched, to the detriment of Brahma.

20 50. Brahma has been required to engage the services of an attorney to collect the
21 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
22 interest therefore.

23 ~~WHEREFORE~~, with respect to the First Cause of Action, Brahma prays that this
24 Honorable Court:

25 1. Enters judgment against the Defendants, and each of them, jointly and severally in
26 the Liable Amount;

27
28
RPI000078

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

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

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

WHEREFORE, with respect to the Second through Fourth Causes of Action, Brahma prays that this Honorable Court:

1. Enters judgment against the Defendants and each of them, jointly and severally, in the amount of the Second Payment, plus Brahma's reasonable costs and attorney's fees incurred in the collection of the Second Payment; and

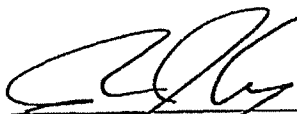
2. For such other and further relief as this Honorable Court deems just and proper in the premises.

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 11th day of January 2019.

PEEL BRIMLEY LLP



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ERIC ZIMBELMAN, ESQ.

Nevada Bar No. 9407

CARY B. DOMINA, ESQ.

Nevada Bar No. 10567

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Henderson, Nevada 89074-6571

Attorneys for Brahma Group, Inc.

EXHIBIT 4

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78256

TONOPAH SOLAR ENERGY, LLC,

Appellant,

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 BRAHMA GROUP, INC.'S APPENDIX OF
EXHIBITS TO ITS ANSWERING BRIEF TO APPELLANT'S WRIT OF
PROHIBITION (Volume 1, Part 2)**

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*Attorneys for Real Party in Interest,
Brahma Group, Inc.*

CHRONOLOGICAL APPENDIX OF EXHIBITS

<u>Exhibit</u>	<u>Date</u>	<u>Description</u>	<u>Bates Range</u>	<u>Volume</u>
1.	12-14-18	Brahma Group, Inc.'s Mechanic's Lien Foreclosure Complaint Against Surety Bond	RPI000001 – RPI000006	1
2.	01-09-19	Notice of Entry of Order	RPI000007 – RPI000019	1
3.	01-14-19	Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Opposition to Motion to Consolidate Case No. CV39799 with Case No. 39348	RPI000020 – RPI000079	1
4.	02-05-19	TSE's Notice of Appeal	RPI000080 – RPI000083	1
5.	03-15-19	Notice of Entry of Order	RPI000084 – RPI000091	1
6.	04-22-19	Brahma Group, Inc.'s (I) Second Amended Complaint; and (II) First Amended Third-Party Complaint	RPI000092 – RPI000104	1
7.	04-22-19	Order Granting Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint	RPI000105 – RPI000122	1
8.	10-04-19	Notice of Order in Related Case	RPI000123 – RPI000136	1
9.	10-30-18	Tonopah Solar Energy, LLC's Response to Brahma's Motion for Stay, or in the Alternative, Motion to Amend Complaint [ECF 18]	RPI000137 – RPI000159	1



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Attorneys for Tonopah Solar Energy, LLC
9

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

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

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

15 Movant,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Respondent.

19 BRAHMA GROUP, INC., a Nevada corporation,

20 Counterclaimant,

21 vs.

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

25 Counterdefendant.

26 BRAHMA GROUP, INC., a Nevada corporation,

27 Third-Party Plaintiff,
28

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

TSE'S NOTICE OF APPEAL



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
9 Third-Party Defendants.
10
11 H&E EQUIPMENT SERVICES, INC., a
12 Delaware corporation,
13
14 Plaintiff-In-Intervention,
15
16 vs.
17
18 BRAHMA GROUP, INC., a Nevada corporation,
19 TONOPAH SOLAR ENERGY LLC, a Delaware
20 limited liability company, COBRA
21 THERMOSOLAR PLANTS, INC., a Nevada
22 corporation; AMERICAN HOME ASSURANCE
23 COMPANY, a surety; BOE BONDING
24 COMPANIES I through X; DOES I through X;
25 ROE CORPORATIONS I through X, and TOE
26 TENANTS I through X, inclusive,
27
28 Defendants-In-Intervention.
29
30 BRAHMA GROUP, INC., a Nevada corporation,
31
32 Plaintiff,
33
34 vs.
35
36 COBRA THERMOSOLAR PLANTS, INC., a
37 Nevada corporation; AMERICAN HOME
38 ASSURANCE COMPANY, a surety; BOE
39 BONDING COMPANIES I through X; DOES I
40 through X; ROE CORPORATIONS I through X,
41 inclusive,
42
43 Defendants.
44
45

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:




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• 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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Attorneys for Tonopah Solar Energy, LLC



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:

Richard L. Peel, Esq.
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Cynthia S. Benson
An employee of WEINBERG, WHEELER, HUDGINS
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EXHIBIT 5

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FILED
FIFTH JUDICIAL DISTRICT

MAR 15 2019

Nye County Clerk

Marianne Yoffee Deputy

FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

19 BRAHMA GROUP, INC., a Nevada corporation,

20 Counterclaimant/Lien Claimant,

21 vs.

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

26 Counterdefendant,

CASE NO. : CV 39348
Consolidated with CV39799
DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

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 H&E EQUIPMENT SERVICES, INC., a 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
THERMOSOLAR PLANTS, INC., a Nevada
16 Corporation; AMERICAN HOME ASSURANCE
COMPANY, a surety; BOE BONDING
17 COMPANIES I through X; DOES I through X;
18 ROE CORPORATIONS I through X, and TOE
TENANTS I through X, inclusive,

19 Defendants-in-Intervention.

20 BRAHMA GROUP, INC. a Nevada corporation,

21 Plaintiff,

22 vs.

23
24 COBRA THERMOSOLAR PLANTS, INC., a
Nevada corporation; AMERICAN HOME
25 ASSURANCE COMPANY, a surety; BOE
BONDING COMPANIES 1 through X; DOES I
26 through X; ROE CORPORATIONS I through X,
inclusive,

27 Defendants.
28

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NOTICE OF ENTRY OF ORDER

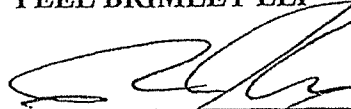
PLEASE TAKE NOTICE that an Order Granting Brahma's Motion to Consolidate Case No. 39799 with Case No. 39348 was filed on February 19, 2019, a copy of which is attached as Exhibit 1.

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 13th day of March, 2019.

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 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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Plants, Inc. and American Home
Assurance Company*

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An Employee of Peel Brimley LLP

EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

FEB 19 2019

Nye County Clerk

~~Marianne Yoffe~~ Deputy

1 **ORDR**

2 RICHARD L. PEEL, ESQ.

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4 ERIC B. ZIMBELMAN, ESQ.

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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:

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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 counterclaim 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)
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Attorneys for Brahma Group, Inc.

EXHIBIT 6

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

APR 22 2019

Nye County Clerk
Deputy

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rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

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]**

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RP1000092

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.

28 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

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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 **SECOND CAUSE OF ACTION**
10 **(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 ///

26

27

28

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HENDERSON, NEVADA 89074
(702) 990-7272 • FAX (702) 990-7273

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

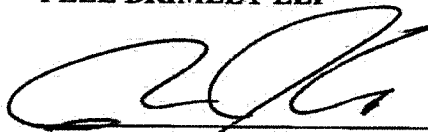
7 3. For such other and further relief as this Honorable Court deems just and proper in
8 the premises.

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.

1 property located in Nye County, Nevada, and more particularly described as Nye County Parcel
2 Number 012-431-06 (the "Liberty Parcel").⁵

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

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

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

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

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

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

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

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

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

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

26
27 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.

28 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

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

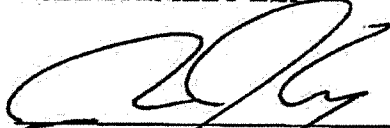
- 2 1. Enters judgment against the Third-Party Defendants and each of them, jointly and
3 severally in the Liable Amount;
- 4 2. Enters a judgment against the Third-Party Defendants (as defined therein) and each
5 of them, jointly and severally, for Brahma's reasonable costs and attorney's fees incurred 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 7

ORIGINAL

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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11 Telephone: (702) 990-7272
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13 rpeel@peelbrimley.com
14 ezimbelman@peelbrimley.com
15 *Attorneys for Brahma Group, Inc.*

FILED
FIFTH JUDICIAL DISTRICT

APR 22 2019


Nye County Clerk
Deputy

9 **FIFTH JUDICIAL DISTRICT COURT**

10 **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
21 TONOPAH SOLAR ENERGY LLC, a Delaware
22 limited liability company; BOE BONDING
23 COMPANIES I through X; DOES I through X;
24 ROE CORPORATIONS I through X; and TOE
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**
SINGLE CONSOLIDATED AMENDED COMPLAINT

12 This matter came on for hearing April 17, 2019 (the "Hearing") before the Honorable
13 Senior Judge Steven Elliott on the Countermotion for Leave to File a Single Consolidated
14 Amended Complaint ("Countermotion")¹ filed by Defendant/Lien Bond Claimant, BRAHMA
15 GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of PEEL BRIMLEY LLP appeared on
16 behalf of Brahma. Colby L. Balkenbush, Esq. of WEINBERG, WHEELER, HUDGINS, GUNN
17 & DIAL, LLC appeared on behalf of Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE"),
18 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

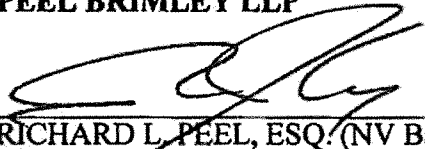
Order Granting Brahma's Countermotion

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)
RONALD J. COX, ESQ. (NV Bar No. 12723)
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Brahma Group, Inc.

Tonapah Solar v. Brahma Group

Case No: CV 39348

Order Granting Brahma's Countermotion

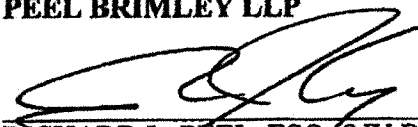
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Dated this 22 day April 2019.


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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3333 E. Serene Avenue, Suite 200
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Exhibit A

PEEL BRIMLEY LLP
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1 RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
2 ERIC B. ZIMBELMAN, ESQ.
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8 rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
rcox@peelbrimley.com
9 *Attorneys for Brahma Group, Inc.*

10
11 **FIFTH JUDICIAL DISTRICT COURT**
12 **NYE COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

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

20 Lien/Bond Claimant,

21 vs.

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

26 Counterdefendants,
27
28

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
9 through X; ROE CORPORATIONS I through X,
10 inclusive,

11 Third-Party Defendants.

12 **SECOND AMENDED COMPLAINT**

13 Lien/Bond Claimant, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys
14 of record, the law firm of PEEL BRIMLEY LLP, and by way of this Second Amended Complaint
15 ("Second Amended Complaint"), hereby (i) amends all previously filed claims and causes of
16 action filed in this Action, (ii) brings this Second Amended Complaint against the above-named
17 Counterdefendants, and (iii) complains, avers and alleges as follows:

18 **THE PARTIES**

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

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

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

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

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.

28 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.

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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 **FIRST CAUSE OF ACTION**
10 **(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 ///

1 b. Otherwise failing and/or refusing to comply with the Agreement and
2 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.

111

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 ///

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

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

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

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

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

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

12 Dated this ____ day of 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

///

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

2 Lien/Bond Claimant and Third-Party Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by
3 and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, and by way of this First
4 Amended Third-Party Complaint ("Amended Third-Party Complaint"), hereby (i) amends all
5 previously filed claims and causes of action filed in this Third-Party Action, (ii) brings this
6 Amended Third-Party Complaint against the above-named Third-Party Defendants, and (iii)
7 complains, avers and alleges as follows:

8 **THE PARTIES**

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

- 10 a. A Nevada corporation, duly authorized and qualified to do business in the
11 State of Nevada;
12 b. A duly licensed contractor holding a Nevada State Contractor's License,
13 which license is in good standing; and
14 c. Is a party to a negotiated settlement between Cobra and Brahma for the
15 payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra
16 Work") at the Project.

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

22 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
23 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
24 Third-Party Action, an owner or reputed owner of the fee simple title to all or portions of real
25
26

27 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
28 the BLM Parcels by way of this Action.

1 property located in Nye County, Nevada, and more particularly described as Nye County Parcel
2 Number 012-431-06 (the "Liberty Parcel").⁵

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

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

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

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

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

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

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

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

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

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

26 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
27 Liberty Parcel by way of this Action.

28 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.

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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").

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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.

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27 ///

28

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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 8

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Tonopah Solar Energy, LLC,
Petitioner

Electronically Filed
Oct 04 2019 03:54 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

The Fifth Judicial District Court, State of Nevada, Nye County, and
the Honorable Steven P. Elliott, Senior Judge,
Respondent

and

Brahma Group, Inc.,
Real Party in Interest.

NOTICE OF ORDER IN RELATED CASE

D. LEE ROBERTS, JR., ESQ.
Nevada Bar No. 8877
COLBY L. BALKENBUSH, ESQ.
Nevada Bar No. 13066
RYAN T. GORMLEY, ESQ.
Nevada Bar No. 13494
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Attorneys for Petitioner
Tonopah Solar Energy, LLC

Please take notice that the attached order has been issued in a related proceeding in Federal Court, on September 25, 2019. A copy of the Order is attached hereto as Exhibit 1.

Dated: October 4, 2019

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

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on October 4, 2019, I submitted the foregoing **NOTICE OF ORDER IN RELATED CASE** via the Nevada Supreme Court's eFlex electronic filing system and served a copy to the addresses shown below (in the manner indicated below). Electronic notification will be sent to the following:

VIA EFLEX ELECTRONIC FILING SYSTEM:

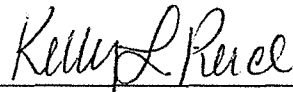
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Attorneys for Cobra Thermosolar Plants, Inc.

VIA U.S. MAIL:

The Honorable Judge Steven B. Elliott
Fifth Judicial District Court, Department No. 2
1520 E. Basin Ave. #105
Pahrump, Nevada 89060



An Employee of Weinberg, Wheeler,
Hudgins, Gunn & Dial, LLC

EXHIBIT 1

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BRAHMA GROUP, INC., a Nevada
Corporation,

Plaintiff,

v.

TONOPAH SOLAR ENERGY, LLC, a
Delaware limited liability company

Defendant.

TONOPAH SOLAR ENERGY, LLC, a
Delaware limited liability company

Counter Claimant

v.

BRAHMA GROUP, INC., a Nevada
Corporation,

Counter Defendant

Case No. 2:18-cv-01747-RFB-GWF

ORDER

Two motions are pending before the Court. First, Plaintiff Brahma Group, Inc. ("Brahma" or "Plaintiff") moves to stay this matter or, alternatively, to amend the complaint. ECF No. 13. Second, Defendant Tonopah Solar Energy, LLC ("TSE" or "Defendant") moves this Court for a permanent injunction. ECF No. 16. For the reasons stated below, the Court denies Brahma's motion and grants TSE's motion.

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///

1 **I. PROCEDURAL BACKGROUND**

2 Brahma sued TSE in state court on July 17, 2018, asserting claims for breach of contract,
3 breach of the implied covenant of good faith and fair dealing, unjust enrichment, and a violation
4 of Nevada Revised Statutes (“NRS”) 624.609 and 624.610. ECF No. 1-1. TSE removed the matter
5 to this Court on September 10, 2018. ECF No. 1. TSE then answered the complaint and asserted
6 counterclaims against Brahma. ECF No. 4.

7 Brahma amended the complaint on September 25, 2018. ECF No. 8. In the amended
8 complaint, Brahma asserted a single claim for unjust enrichment. Id. TSE answered the amended
9 complaint on October 9, 2018. ECF No. 11.

10 Brahma now moves to stay the case or, alternatively, to amend the complaint for a second
11 time. ECF No. 13. TSE opposed the motion, and Brahma replied. ECF Nos. 18, 24.

12 Additionally, TSE seeks an injunction. ECF No. 16. Brahma opposed, and TSE filed a
13 reply. ECF Nos. 20, 28.

14 The Court entertained oral arguments on the two motions on June 25, 2019. ECF No. 50.
15 This order now follows.

16
17 **II. FACTUAL BACKGROUND**

18 The Court makes the following factual findings. TSE owns the Crescent Dunes Solar
19 Energy Project, which is constructed on real property located in Nye County, Nevada (the “Work
20 of Improvement”). On February 1, 2017, TSE entered into a services agreement (“Agreement”)
21 with Brahma. Under the Agreement, Brahma agreed to provide specific work, materials, and
22 equipment for the Work of Improvement. Brahma fulfilled its obligations under the Agreement.
23 However, a dispute arose concerning performance of the Agreement and TSE failed to fully pay
24 Brahma for its services.

25 In response to TSE failing to pay Brahma in full, Brahma recorded a notice of lien on April
26 9, 2018 with the Nye County Recorder. On April 17, 2018, Brahma filed a complaint in the Fifth
27 Judicial District Court in Nye County (Case No. CV39237) to foreclose against the lien and to

28 ///

1 assert additional claims. Brahma also filed with the Nye County Court a notice of lis pendens and
2 notice of foreclosure of mechanic's lien and recorded the same against the Work of Improvement.

3 On April 24, 2018, TSE filed a motion to expunge Brahma's lien in the Nye County Court.
4 Before Brahma received notice of the motion to expunge, Brahma voluntarily dismissed its
5 complaint the same day. But Brahma declined to discharge and release its lien. TSE decided to
6 withdraw its first motion to expunge rather than proceed in that case.

7 On June 11, 2018, TSE filed a second motion to expunge the lien pursuant to NRS
8 108.2275(1). Because there was no complaint pending, the second motion to expunge created a
9 special proceeding in the Fifth Judicial District Court, Nye County, Nevada, ("Nye County Special
10 Proceeding") in accordance with NRS 108.2275(5) which provides that "[i]f, at the time the
11 [motion] is filed, an action to foreclose the notice of lien has not been filed, the clerk of the court
12 shall assign a number to the [motion] and obtain from the [moving party] a filing fee of \$85." NRS
13 108.2275(5).

14 On July 17, 2018, while the motion to expunge in the Nye County Special Proceeding was
15 still pending, Brahma filed a new complaint in the Eighth Judicial District Court, Clark County
16 Nevada ("Clark County Action"). This complaint asserted the same claims against TSE as the
17 previously dismissed Nye County Action, with the exception of the lien foreclosure claim: (1)
18 breach of the Agreement, (2) breach of the implied covenant of good faith and fair dealing, (3)
19 unjust enrichment, (4) and violation of Nevada's prompt payment act (together "contract claims").
20 TSE removed the Clark County Action to federal court on the basis of diversity jurisdiction on
21 September 10, 2018.

22 In September and October of 2018, nonparty Cobra Thermosolar Plant, Inc., ("Cobra")
23 recorded surety bonds that detached Brahma's mechanic's lien and the mechanic's lien of nonparty
24 H&E Equipment Services, Inc, (one of Brahma's suppliers) from the Work of Improvement
25 pursuant to NRS 108.2415(6).

26 On September 12, 2018, state court Judge Elliott heard and denied from the bench the
27 second motion to expunge filed by TSE. A written order later issued in October 2018. Shortly after
28 the hearing on the motion to expunge, on September 20, 2018, Brahma filed a lien foreclosure

1 complaint within the same Nye County Special Proceeding. The complaint asserted a single claim
2 for foreclosure of notice of lien against TSE. The complaint also named nonparties Cobra and
3 H&E as third-party defendants in that action. Brahma then filed an amended complaint in this
4 case on September 25, 2018. The amended complaint removed Brahma's three other previously
5 asserted claims for (1) breach of the Agreement, (2) breach of the implied covenant of good faith
6 and fair dealing, and (3) violation of Nevada's prompt payment act. Brahma then filed an amended
7 counter-complaint and third-party complaint in the Nye County Special Proceeding, asserting the
8 contract claims that had been dropped from its complaint in the Federal Action.

9 10 III. LEGAL STANDARD

11 a. Colorado River Abstention

12 "Abstention from the exercise of federal jurisdiction is the exception, not the rule." Colo.
13 River Water Conservation Dist v. U.S., 424 U.S. 800, 813 (1976). Nevertheless, the Supreme Court
14 has recognized that there may be "exceptional circumstances," that warrant federal abstention from
15 concurrent federal and state proceedings. Id. at 813. As developed by Colorado River and its
16 progeny, federal courts use a multi-pronged test that includes eight factors to consider when
17 assessing the appropriateness of a Colorado River stay: (1) which court first assumed jurisdiction
18 over any property at stake; (2) the inconvenience of the federal forum (3) the desire to avoid
19 piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal
20 law or state law provides the rule of decision on the merits; (6) whether the state court proceedings
21 can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping;
22 and (8) whether the state court proceedings will resolve all issues before the federal court. Seneca
23 Ins. Co. Inc. v. Strange Land, Inc., 862 F.3d 835, 841– 42 (9th Cir. 2017) (internal citations
24 omitted). "These factors are not a 'mechanical checklist,'" and may not always be applicable to
25 any given case. Id. at 842 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S.
26 1, 16 (1983). Rather, the Court must examine them "in a pragmatic, flexible manner with a view
27 to the realities of the case at hand." Seneca, 862 F.3d at 842. "The underlying principle guiding
28 this review is a strong presumption against federal abstention." Id.

1 **b. Anti-Injunction Act and Permanent Injunction**

2 The Anti-Injunction Act, 28 U.S.C. § 2283, forbids a federal court from staying
3 proceedings in state court “except as expressly authorized by Act of Congress, or where necessary
4 in aid of its jurisdiction, or to protect or effectuate its judgments.” 28 U.S.C. § 2283. “Any doubts
5 as to the propriety of a federal injunction against state court proceedings should be resolved in
6 favor of permitting the state courts to proceed.” Montana v. BNSF Ry. Co., 623 F.3d 1312, 1315
7 (9th Cir. 2010) (internal citations omitted). Removal pursuant to 28 U.S.C. § 1446 is a law
8 expressly authorizing the federal court to stay state proceedings when necessary. Lou v. Belzberg,
9 834 F.2d 730, 740 (9th Cir. 1987) (“It is thus clear that a federal court may enjoin the continued
10 prosecution of the same case in state court after its removal.”).

11 A court may issue a permanent injunction if it finds that there is (1) a likelihood of
12 substantial and irreparable injury, and (2) inadequate remedies at law. G.C. & K.B. Invs., Inc. v.
13 Wilson, 326 F.3d 1096, 1107 (9th Cir. 2003) (internal citations omitted).

14 **IV. DISCUSSION**

15 Both Brahma and TSE urge the Court to decide their respective motions first. However,
16 the Court finds that the order in which it decides the motions is immaterial. Based on the facts
17 alleged, the Court finds that the Colorado River factors do not support federal abstention and that,
18 by amending its complaint and asserting its contract claims against TSE in the state court action,
19 Brahma was attempting to subvert removal of this action. The Court thus denies Brahma’s motion
20 for a stay and grants TSE’s motion to enjoin Brahma from litigating its contract claims against
21 TSE in state court.

22 **a. Colorado River Abstention**

23 The Court first examines the Colorado River factors and explains why they do not favor
24 federal abstention.

25 **i. Jurisdiction Over a Res**

26 Both parties confirmed at the hearing on this matter that there is no lien currently attached
27 to TSE’s property. Tr. Hr’g on June 25, 2019 at 7. Although Brahma has recorded mechanics’
28 liens against the Work of Improvement, all such liens are no longer attached after surety bonds

1 were recorded releasing the liens pursuant to NRS 108.2415(6). Furthermore, this Court has only
2 ever had contractual and quasi-contractual claims before it, so there is no possibility that the
3 parallel proceedings will result in inconsistent dispositions of a single res. Seneca, 862 F.3d at 842.
4 The Court thus finds that this factor leans against abstention.

5 **ii. Inconvenience of the Federal Forum**

6 In considering this factor, the Court must consider “whether the inconvenience of the
7 federal forum is so great” that it favors abstention. Travelers Indem. Co. v. Madonna, 914 F.2d
8 1364, 1368 (9th Cir. 1990). As this Court and the Nye County Court are located less than an hour’s
9 drive from each other, the Court finds that this factor does not favor abstention.

10 **iii. Avoidance of Piecemeal Litigation**

11 “Piecemeal litigation occurs when different tribunals consider the same issue, thereby
12 duplicating efforts and possibly reaching different results.” Am. Int’l Underwriters (Philippines)
13 Inc. v. Cont’l Ins. Co., 843 F.2d 1253, 1258 (9th Cir. 1988). While piecemeal litigation is to be
14 avoided when possible, a “general preference for avoiding piecemeal litigation is insufficient to
15 warrant abstention.” Seneca, 862 F.3d at 842. Brahma argues that this factor favors abstention
16 because the Nye County Court will necessarily need to determine issues pertinent to the contract
17 claims, such as the agreed upon contract value of the work. The Court is unconvinced by this
18 argument. Multiple defendants, claims, and cross-claims are routine in diversity cases. Seneca,
19 862 F.3d at 843. Brahma fails to identify any special or important rationale or legislative preference
20 for having these issues be resolved in a single proceeding, and so the Court finds that this factor
21 does not favor abstention.

22 **iv. The Order In Which the Fora Obtained Jurisdiction**

23 “In determining the order in which the state and federal courts obtained jurisdiction, district
24 courts are instructed not simply to compare filing dates but to analyze the progress made in each
25 case.” Seneca, 862 F.3d at 843. As a preliminary matter, the Court notes that Brahma did not bring
26 its contract claims to the Nye County action until after this case had already been filed in Clark
27 County and subsequently removed to this Court. Thus while the Court will do more than compare
28 filing dates under this factor, the filing dates indicate that *this* Court, rather than the Nye County

1 Court, first had jurisdiction over the contract claims at issue in this case. Brahma argues that
2 because TSE filed its motion to expunge in Nye County prior to Brahma filing its complaint in
3 Clark County, that the Nye County case was filed first. But while Brahma is correct that the Nye
4 County proceeding began prior to this case, it was this Court that first obtained jurisdiction over
5 the contract claims. The Court also finds that the cases are progressing commensurately. Discovery
6 has commenced in this case, and per the parties' reports at the hearing on this matter, discovery
7 has also just begun in the Nye County Action. Tr. Hr'g on June 25, 2019 at 40. The Court thus
8 finds this factor neutral.

9 **v. Rule of Decision**

10 While the presence of federal law issues will always be a major consideration weighing
11 against abstention, the presence of state law issues may favor abstention only in rare cases. Seneca,
12 862 F.3d at 844. "Cases implicating only routine issues of state law—misrepresentation, breach of
13 fiduciary duty, and breach of contract—which the district court is fully capable of deciding—do
14 not entail rare circumstances." Id. (internal citations omitted). This case was brought before this
15 Court pursuant to diversity jurisdiction only, so there are no federal law issues in this case. The
16 claims alleged are routine issues of state law. There is no issue before the Court that is so complex
17 or difficult that it is better resolved by a state court. Thus this factor weighs against abstention.

18 **vi. Adequacy of the State Forum and Parallel Suits**

19 This factor has two components: the "adequacy" factor, which examines whether the state
20 court proceedings can adequately protect the rights of the federal litigants, and the "parallelism"
21 factor which considers whether the state courts will resolve all issues before the federal court.
22 Seneca, 862 F.3d at 845.¹ The adequacy factor looks to whether the state court can enforce federal
23 rights, while the parallelism factor looks to whether the proceedings address substantially similar
24 claims. Id. Each factor is more relevant when it counsels against abstention, because inadequacy
25

26 ¹ The parallelism factor is often considered separately as the eighth factor under the
27 Colorado River doctrine. However because the analysis is similar, the Court will consider them
28 together. Compare Seneca Ins. Co. Inc. v. Strange Land, Inc., 862 F.3d 835, 845 (9th Cir. 2017)
(discussing adequacy of state forum and parallelism together) with Montanore Minerals Corp. v.
Bakie, 867 F.3d 1160, 1169 (9th Cir. 2017) (discussing parallelism and adequacy of state forum
separately).

1 of state forum or insufficient parallelism may preclude abstention, but the alternatives do not
2 compel it. Id. The Court finds these factors to be neutral. There are no federal rights at issue so
3 the adequacy factor is not really at play here. Regarding parallelism, it is true that the claims at
4 issue are not just substantially similar, but indeed identical to the contract claims that had been
5 brought before this Court prior to Brahma amending its complaint. But substantially similar claims,
6 while necessary, are not enough, absent more, to weigh in favor of abstention. Id. Thus the Court
7 finds these factors neutral.

8 **vii. Avoidance of Forum Shopping**

9 Under this factor, the Court considers whether “either party improperly sought more
10 favorable rules in its choice of forum or pursued suit in a new forum after facing setbacks in the
11 original proceeding.” Seneca, 862 F.3d at 846. The Court finds that there is considerable evidence
12 of forum shopping on the part of Brahma here. Brahma filed its complaint asserting its contract
13 claims against TSE in Clark County Court. It was only after receiving a favorable ruling on its
14 motion to expunge in Nye County that Brahma then sought to amend its complaint in this case and
15 reassert those same claims before Judge Elliot in Nye County. Brahma spends considerable time
16 in its briefing insisting that it filed the case in Clark County based on a misreading of a forum
17 selection clause in the Services Agreement between the parties. That argument, however, carries
18 little weight. The plaintiff is master of its complaint, and this plaintiff chose to file in Clark County.
19 Holmes Grp. Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 831 (2002). Presumably
20 Brahma was aware that TSE was not a Nevada citizen, and so there was a possibility that TSE
21 would seek to remove the case to federal court. The Court cannot assist Brahma in undoing what
22 it now alleges was an error of filing by granting a meritless stay.

23 All of the factors considered under the Colorado River doctrine are neutral or favor the
24 district court’s exercise of jurisdiction. Seneca, 862 F.3d at 847. In light of the strong presumption
25 against abstention, the Court will not grant federal abstention pursuant to Colorado River.

26 **b. TSE’s Permanent Injunction**

27 Next the Court examines TSE’s request for a permanent injunction. The Court has the
28 power to enjoin state court proceedings if it finds that the state court action was “fraudulently filed

1 in an attempt to subvert the removal of a prior case.” Lou v. Belzberg, 834 F.2d 730, 741 (9th Cir.
2 1987). By amending its complaint in this case and reasserting identical claims in the Nye Court
3 action, the Court finds that Brahma was attempting to subvert removal of this case. The Court also
4 finds that there would be immediate and irreparable injury to TSE for which there would not be an
5 adequate remedy at law if Brahma’s behavior is rewarded. The Court therefore grants TSE’s
6 motion and enjoins Brahma from litigating its contract claims in the Nye County Action.

7
8 **V. CONCLUSION**

9 **IT IS ORDERED** that Plaintiff’s Motion for Stay, or in the alternative, Motion to Amend
10 Complaint (ECF No. 13) is DENIED.

11 **IT IS FURTHER ORDERED** that Defendant’s Motion for an Injunction and to Strike
12 (ECF No. 16) is GRANTED. The Court strikes Plaintiff’s amended complaint (ECF No. 8), and
13 reinstates Plaintiff’s original complaint (ECF No. 1-1) as the operative complaint in this matter.

14 **IT IS FURTHER ORDERED** that Plaintiff is enjoined from litigating the following
15 claims alleged against Defendant in any state court action: 1) breach of contract, 2) breach of
16 implied covenant of good faith and fair dealing and 3) violation of NRS 624.

17
18 DATED: September 25, 2019.

19
20 

21 **RICHARD F. BOULWARE, II**
22 **UNITED STATES DISTRICT JUDGE**
23
24
25
26
27
28

EXHIBIT 9

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10
11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 BRAHMA GROUP, INC., a Nevada corporation,
14 Plaintiff,
15 vs.
16 TONOPAH SOLAR ENERGY, LLC, a Delaware
17 limited liability company,
18 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

19 TONOPAH SOLAR ENERGY, LLC, a Delaware
20 limited liability company; DOES I through X; and
21 ROE CORPORATIONS I through X,
22 Counterclaimant,
23 vs.
24 BRAHMA GROUP, INC., a Nevada corporation,
25 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



1 dispositive and defeats Brahma's argument. Yet, beyond that, five of the seven additional
2 factors weigh against abstention, one is neutral, and one is inconsequential under the case law.
3 And the suits do not present the type of exceptional circumstances that warrant a stay under the
4 doctrine. Rather, Brahma's actions warrant the issuance of an injunction that enjoins Brahma
5 from prosecuting its dropped claims in the later filed Nye County special proceeding, as
6 requested by TSE's motion for injunction in this action (ECF No. 16).

7 Moreover, this Court should not permit Brahma leave to amend its complaint. Instead,
8 the appropriate result would be to strike Brahma's amended complaint, as requested by TSE's
9 motion for injunction in this action (ECF No. 16). Accordingly, Brahma's Motion for Stay
10 should be denied in its entirety.

11 II. STATEMENT OF PERTINENT FACTS

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

17 While Brahma's statement of facts includes many of the pertinent facts, it downplays the
18 nature of its forum shopping efforts and does not include some of the more recent filings.

19 A. Brahma maneuvers to try to move its claims out of this Court and into Nye County.

20 In April 2018, Brahma recorded a mechanic's lien concerning the Project. Brahma has
21 amended the lien multiple times and is now on its fourth iteration of the lien.

22 Also in April, Brahma filed a complaint in the Fifth Judicial District Court, Nye County,
23 Nevada ("Nye County Action"). A week later, TSE filed a motion to expunge the mechanic's
24 lien in that action. The same day TSE filed the motion to expunge, Brahma voluntarily
25 dismissed its complaint, which resulted in the withdrawal of TSE's motion.

26 On June 11, 2018, TSE filed a second motion to expunge the lien under NRS
27 108.2275(1). *See* Second Motion to Expunge, ECF No. 16-9. As there was no complaint
28 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 _____
27 ² A "counter-complaint" is not a permitted pleading under Nev. R. Civ. P. 7(a) and based on the
28 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 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

divest this Court of jurisdiction. *See* ECF No. 16. TSE's motion in the Nye County Special Proceeding seeks, among other relief, (1) the striking of Brahma's counter-complaint in the Nye County Special Proceeding because it is an impermissible pleading under both NRCP 7(a) and NRS 108.2275, (2) dismissal of Brahma's copycat claims in the Nye County Special Proceeding because the state court lacks jurisdiction over them in accordance with the case law cited above, and (3) a stay of the Nye County Special Proceeding under the "first to file" rule. *See Exhibit 1* (Motion to Dismiss). These motions will restore both cases to a more correct procedural posture.

It would be inappropriate to perform the *Colorado River* abstention doctrine analysis prior to the resolution of TSE's Motion for Injunction. Although the stay requested by Brahma should be denied under all potential forms of the pleadings, performing the *Colorado River* analysis prior to resolution of TSE's Motion for Injunction could encourage parties to make impermissible last-second filings in order to arrange the pleadings in a more advantageous manner. Further, it could lead to strange and inconsistent results. For instance, this Court could stay this case (although that would be inappropriate as discussed below), enjoin Brahma from prosecuting the copycat claims in the Nye County Special Proceeding, and the Nye County Court could dismiss Brahma's claims so that they can be litigated in this Court. To avoid such inconsistent results, the *Colorado River* analysis should be performed after the resolution of TSE's Motion for Injunction.⁴

⁴ In the Motion for Stay, Brahma contends that "[t]o 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*." ECF No. 13, p. 8:26-28. In support of this notion, Brahma cites to *FDIC v. Nichols*, 885 F.2d 633, 638 (9th Cir. 1989). *Nichols*, however, 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.

1 **B. A stay of this action under the *Colorado River* abstention doctrine is not appropriate**
 2 **regardless of whether this Court performs the analysis before or after the resolution**
 3 **of TSE's Motion for Injunction.**

4 Brahma argues that this Court should stay this action under the *Colorado River*
 5 abstention doctrine because seven of the factors that courts consider in deciding whether to issue
 6 such a stay weigh in favor of issuing a stay here. *See* ECF No. 13, pp. 7-16.

7 As explained below, Brahma is mistaken. First, Brahma overlooks the most important
 8 threshold question—are the concurrent state and federal actions “parallel.” They are not.
 9 Second, Brahma fundamentally misapplies the factors. When viewed through the proper lens,
 10 the factors weigh against the issuance of a stay. Third and finally, Brahma ignores that this case
 11 does not present the exceptional circumstances necessary to warrant a stay under *Colorado*
 12 *River*. The stay sought by Brahma must be denied.

13 **1. This action and the Nye County Special Proceeding are not parallel because**
 14 **resolution of the Nye County Special Proceeding would not completely**
 15 **resolve this action.**

16 In the Motion for Stay, Brahma overlooks “[t]he threshold question in deciding whether
 17 *Colorado River* abstention is appropriate”—“whether there are parallel federal and state suits.”
 18 *ScriptsAmerica, Inc. v. Ironridge Glob. LLC*, 56 F. Supp. 3d 1121, 1147 (C.D. Cal. 2014)
 19 (quoting *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005));
 20 *see Intel Corp v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 (9th Cir. 1993); *Summit*
 21 *Contracting Grp., Inc. v. Ashland Heights, LP*, 187 F. Supp. 3d 893, 897 (M.D. Tenn. 2016);
 22 *DDR Const. Servs., Inc. v. Siemens Indus., Inc.*, 770 F. Supp. 2d 627, 644 (S.D.N.Y. 2011). In
 23 deciding whether concurrent federal and state suits are parallel, exact parallelism between the
 24 two suits is not required. *Nakash v. Marciano*, 882 F.2d 1411, 1416 (9th Cir. 1989).

25 For concurrent federal and state suits to qualify as “parallel,” the suits must be
 26 “substantially similar.” *Nakash*, 882 F.2d at 1416. Determining substantial similarity requires
 27 looking to whether the suits involve the same parties, claims, and facts. *See ScriptsAmerica*, 56
 28 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



1 set of circumstances.” *DDR Construction*, 770 F.Supp.2d at 645 (internal quotation marks
2 omitted).

3 Further, for concurrent federal and state suits to qualify as “parallel,” a court must have
4 “full confidence that the parallel state proceeding will end the litigation.” *ScriptsAmerica*, 56 F.
5 Supp. 3d at 1148 (quoting *Intel*, 12 F.3d at 913). A court may only enter a stay under the
6 *Colorado River* abstention doctrine if it “necessarily contemplates that the federal court will have
7 nothing further to do in resolving any substantive part of the case.” *Intel*, 12 F.3d at 913
8 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 28
9 (1983)). Any “substantial doubt as to whether the state proceedings will resolve the federal
10 action precludes the granting of [such] a stay.” *Intel*, 12 F.3d at 913. Granting a stay in the face
11 of such doubt “would be a serious abuse of discretion.” *Id.* (quoting *Moses H. Cone*, 460 U.S.
12 at 28). In *Intel*, the Ninth Circuit reversed a district court’s stay under the *Colorado River*
13 doctrine because it had doubts as to whether the concurrent state court action would completely
14 resolve the federal court action. 12 F.3d at 913. In reaching this decision, the Ninth Circuit did
15 not consider any other factors. *Id.*

16 Courts that have faced the question whether a concurrent state court action featuring a
17 foreclosure claim on a mechanics’ lien and a federal court action featuring contractual claims
18 qualify as “parallel” have concluded that they do not.⁵ The Middle District of Tennessee’s
19 discussion on this issue in *Summit Contracting* is comprehensive and on point. 187 F. Supp. 3d
20 at 893-899. There, a general contractor filed a state court action against a project owner to
21 enforce a mechanic’s lien and a federal court action against the project owner asserting claims
22 for breach of contract, violation of Tennessee’s prompt pay act, and violation of Tennessee’s
23 retainage laws. *Id.* at 896. In response to the concurrent suits, the project owner moved for
24 dismissal of the federal court action under the *Colorado River* abstention doctrine. *Id.* at 897.

25
26 ⁵ *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 535 (8th Cir. 2009); *Gannett Co. v. Clark*
27 *Const. Grp., Inc.*, 286 F.3d 737, 740 (4th Cir. 2002); *Titan Wrecking & Envtl., LLC v. Vestige*
28 *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).

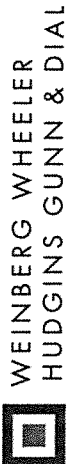


1 While a claim to foreclose a mechanic's lien may constitute a *quasi in rem* proceeding
 2 because it determines the interests of certain persons in a piece of property, *see Andersen Const.*
 3 *Co. v. Employee Painters' Tr.*, No. C13-0580-JCC, 2013 WL 3305475, at *2 (W.D. Wash. June
 4 28, 2013), 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

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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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