IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Tonopah Solar Energy, LLC,
Petitioner

v.

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

and

Brahma Group, Inc.,
Real Party in Interest.

REPLY IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION, OR, ALTERNATIVELY, MANDAMUS

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

Attorneys for Petitioner
Tonopah Solar Energy, LLC

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I. INTRODUCTION

Petitioner Tonopah Solar Energy, LLC's ("TSE") Writ Petition presents three issues. They arise out of the district court's partial denial of TSE's motion to dismiss, strike, or stay in the underlying Nye County proceeding—Case No. 39348. The three issues are: (1) whether the district court erred by concluding that NRS 108.2275(5) permitted Real Party in Interest Brahma Group, Inc. ("Brahma") to initiate a civil action by filing its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge, (2) whether the district court erred by exercising subject matter jurisdiction over Brahma's claims that had been previously removed to federal court pursuant to 28 U.S.C. § 1446(d) and were never remanded, and (3) whether the district court abused its discretion by failing to stay the entire state court proceeding under the first-to-file rule. On a more holistic basis, TSE seeks to undo the procedural forum shopping efforts that Brahma undertook in order to evade federal jurisdiction and undermine a foreign defendant's constitutional right to removal.

After the Writ Petition was filed, the Honorable Richard F. Boulware, in a parallel proceeding in federal court, enjoined a certain aspect of the underlying district court proceedings. *See* 3 Petitioner's Reply Appendix ("PRA") 199-207. TSE filed a copy of this injunction with this Court on October 4, 2019. The injunction specifically enjoins Brahma from litigating the following claims against

TSE in the underlying Nye County proceeding: (i) breach of contract, (ii) breach of the implied covenant of good faith and fair dealing, and (iii) violation of NRS 624. In reaching this conclusion, the federal district court stated, in pertinent part, the following:

> The Court finds that there is considerable evidence of forum shopping on the part of Brahma here.
>
> . . .
>
> By amending its complaint in this case and reasserting identical claims in the Nye Court action, the Court finds that Brahma was attempting to subvert removal of this case. The Court also finds that there would be immediate and irreparable injury to TSE for which there would not be an adequate remedy at law if Brahma's behavior is rewarded. The Court therefore grants TSE's motion and enjoins Brahma from litigating its contract claims in the Nye County Action.
>
> . . .
>
> IT IS FURTHER ORDERED that Plaintiff [Brahma] is enjoined from litigating the following claims alleged against Defendant [TSE] in any state court action: 1) breach of contract, 2) breach of implied covenant of good faith and fair dealing and 3) violation of NRS 624.

3 PRA 206-207.

The federal injunction does not impact this proceeding in the way that Brahma has suggested. TSE is still a party to the underlying Nye County proceeding. Although Brahma is enjoined from prosecuting its claims against TSE in the underlying Nye County proceeding, the Nye County district court is still

exercising subject matter jurisdiction over Brahma's claims against TSE. Further, TSE is still being treated as a party by other parties to the underlying proceeding—including Brahma. And, this Court and the Nye County district court still have authority to dismiss Brahma's claims.

It is under this current procedural posture that Brahma filed its answer to TSE's Writ Petition. The answer primarily raises three arguments. All three arguments lack merit.

First, Brahma argues that the issues presented by TSE's Writ Petition are moot. This is not so. Brahma engaged in an extensive forum shopping effort to move its claims into its preferred forum of Nye County. In furtherance of this goal, Brahma filed pleadings and briefs in the underlying proceeding (Case No. 39348), its other Nye County case (the one Brahma refers to as being consolidated with Case No. 39348, which is Case No. 39799), and the federal court action (the one that entered the injunction order). Obtaining the injunction in the federal court action was only one piece of the puzzle to undo Brahma's procedural maneuverings. TSE's Writ Petition seeks to correct Brahma's procedural maneuverings in the underlying proceeding (Case No. 39348). TSE anticipates that it may also have to take additional action to correct Brahma's procedural maneuverings in Case No. 39799.

Despite Brahma's protestations, all three issues presented by the Writ Petition are still ripe for review. TSE is still a party to the underlying Nye County proceeding. TSE still has an interest in the outcome of the underlying Nye County proceeding. And resolution of all three issues will affect the matter before this Court and the district court moving forward. Brahma's mootness arguments should be rejected.

Second, Brahma argues that this Court should not entertain TSE's Writ Petition on the merits. Brahma premises this argument on platitudes like "piecemeal review" and "speedy and adequate remedy." But, Brahma's reliance on such platitudes is misplaced. All of the justifications for entertaining TSE's Writ Petition on the merits that were set forth in the Writ Petition still hold true. The writ concerns questions of jurisdiction. The writ features all of the considerations that have previously motivated this Court to entertain writ petitions under similar circumstances. And, given the early stage and nature of the issues, the potential availability of a direct appeal does not actually constitute "an adequate and speedy remedy." The writ should be entertained on the merits.

Third and finally, Brahma argues that TSE's Writ Petition fails on the merits. Brahma premises its substantive arguments on the theme of "no harm, no foul." But while such a theme sounds nice, it rings hollow. The federal district court saw through this theme when it found that Brahma's procedural

maneuverings resulted in "immediate and irreparable injury" to TSE. The same is true here. Each of Brahma's actions subject to this Court's review was taken by Brahma in furtherance of its forum shopping efforts. Such procedural gamesmanship, and Brahma's subsequent efforts to cover its tracks, cannot go uncorrected.

For the reasons stated in the Writ Petition and below, the relief requested by TSE's Writ Petition should be issued. Brahma's original complaint in the underlying proceeding should be dismissed as improper. Brahma's claims against TSE in the underlying proceeding should be dismissed with prejudice for lack of subject matter jurisdiction. And, alternatively, the underlying proceeding should be stayed pending resolution of the parallel federal action pursuant to the first-to-file rule.

II. ARGUMENT

A. The issues presented by TSE's Writ Petition are not moot.

Brahma's arguments with respect to mootness implicate the related doctrines of both standing and mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (explaining that confusion between the two doctrines is "understandable"). "Standing is the legal right to set judicial machinery in motion." *Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460–61, 93 P.3d 746, 749 (2004). To establish standing, a petitioner must demonstrate

a "beneficial interest" in obtaining the relief sought, which means "a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." *Id.* A petitioner does not have standing to pursue a writ if it will gain no direct benefit from its issuance and suffer no direct detriment from its denial. *Id.*

Mootness, on the other hand, looks to whether a case features a "live controversy." *Majuba Mining v. Pumpkin Copper*, 129 Nev. 191, 193, 299 P.3d 363, 364 (2013). A case is moot if it seeks to "determine an abstract question which does not rest upon existing facts or rights." *Nat'l Collegiate Athletic Ass'n v. Univ. of Nev., Reno*, 97 Nev. 56, 58, 624 P.2d 10, 11 (1981). Courts have a duty to only "decide actual controversies by a judgment, which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before [it]." *Majuba Mining*, 129 Nev. at 193, 299 P.3d at 364.

Yet, even when an issue is moot, this Court may consider it "if it involves a matter of widespread importance that is capable of repetition, yet evading review." *Personhood Nevada v. Bristol*, 126 Nev. 599, 602–03, 245 P.3d 572, 574 (2010). Courts apply this exception when a situation presents an "important question of law [that] could not be decided because of its timing." *Langston v. State, Dep't of Motor Vehicles*, 110 Nev. 342, 343–44, 871 P.2d 362, 363 (1994). Generally, the

exception applies when three criteria are satisfied: (1) the duration of the challenged action must be "relatively short," (2) there must be a likelihood that a similar issue will arise in the future, and (3) the matter must be one of public importance. *Newell v. Nevada Dep't of Corrections*, 2019 WL 6999888, at *1 (Nev., Dec. 19, 2019) (unpublished) (citing *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 329, 334-35, 302 P.3d 1108, 1113 (2013).

Here, TSE has standing to pursue all three issues presented in its Writ Petition. Further, none of those issues are moot.

1. The first issue is not moot.

In the first issue, TSE asks that this Court issue a writ that compels the Nye County district court to dismiss Brahma's lien foreclosure complaint that Brahma filed into the special proceeding created by TSE's motion to expunge.

TSE has standing to pursue this issue because it is still a party to the underlying Nye County proceeding. TSE will gain a direct benefit from the issuance of a writ on this issue because it would reduce Case No. 39348 to its appropriate scope, which is only TSE's pending appeal of the district court's denial of TSE's motion to expunge under NRS 108.2275(8) (Supreme Court Case No. 78092). Further, this issue is not moot for largely the same reasons. There is an actual controversy over the appropriateness of Brahma filing its original lien

foreclosure complaint into the special proceeding created by TSE's motion to expunge.

Brahma argues that this issue is moot for two reasons: (1) by Cobra Thermosolar Plants, Inc. ("Cobra") recording the surety bond and Brahma amending its complaint to state a claim on the surety bond, Brahma's lien foreclosure claim was released, and any issues related to Brahma's original lien foreclosure complaint became moot and (2) Brahma's "consolidation scheme" also cured any issues related to Brahma's original lien foreclosure complaint. Answer 12-16. Both arguments fail.

1. Brahma's first argument misses the point. The first issue in TSE's Writ Petition focuses on the procedural rules that Brahma violated in filing its original lien foreclosure complaint into the special proceeding created by TSE's motion to expunge. As a result of these violations, Brahma's original lien foreclosure complaint was not a permissible pleading under NRCP 7. *See* Writ Petition 27-30 (explaining this in more detail). Thus, it and any amendments thereto are not "legally cognizable." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 283 (1997). The recording of the surety bond or Brahma's amendments to its original pleading could do nothing to change this.

Moreover, even if the recording of the surety bond or Brahma's amendments to its original pleading *could* render the first issue moot, it is clear that neither

actually rendered the first issue moot under the facts of this case. Brahma greatly overstates the impact of recording a surety bond. Recording a surety bond does not entirely eliminate the underlying lien from the equation in the manner Brahma suggests. The lien and the bond are interrelated. The lien amount serves as the basis for a surety bond. As a result, even after a bond is recorded, if the underlying lien is expunged, the bond would be released.

If a bond acted the way that Brahma suggests, a party with an obligation to keep a project lien free would always lose its right under NRS 108.2275(8) to appeal the denial of motion to expunge because it would have to obtain a surety bond while the appeal was pending. According to Brahma, recording the bond would render the appeal of the denial of the motion to expunge moot. Nothing in NRS 108 supports this result. Indeed, the language of the statute that governs surety bond claims, NRS 108.2421, supports the opposite result. NRS 108.2421(1) states that the "***lien claimant*** is entitled to bring an action against the principal and surety on the surety bond and the ***lien claimant's debtor*** in any court of competent jurisdiction . . . ." NRS 108.2421(1) (emphasis added). If the surety bond completely removed the lien from the equation, as Brahma suggests, then there would be, by definition, no "lien claimant" or "lien claimant's debtor." This is not the case. Even after a bond is recorded, there is still a "lien claimant" and a "lien claimant's debtor," because the lien serves as the underlying basis for the bond

claim. *See also* NRS 108.2421(2) (envisioning that a lien foreclosure claim and a surety bond claim can co-exist); NRS 108.2433 (the recording of a surety bond does not "discharge" a notice of lien in accordance with this statute).

In addition, even if Brahma's position was correct (which it is not), then this issue still would not be moot because it would constitute an important issue "capable of repetition, yet evading review," *Personhood Nevada*, 126 Nev. at 602–03, 245 P.3d at 574, "because of its timing," *Langston*, 110 Nev. at 343–44, 871 P.2d at 363. Parties often have an obligation to keep a project lien free. If a party loses a motion to expunge, it cannot wait until the resolution of an appeal under NRS 108.2275(8) to record a bond to clear title. As a result, according to Brahma, all issues related to the motion to expunge would become moot whenever a bond is recorded. If this were true (which it is not), this issue would fall within the scope of the "capable of repetition, yet evading review" exception to mootness.

2. Brahma's "consolidation scheme" does not moot the first issue. Brahma's "consolidation scheme" was improper on multiple levels and did not serve as a cure all for Brahma's improper filing of its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge.

Brahma's "consolidation scheme" consisted of the following: Brahma filed a lien foreclosure complaint into the special proceeding created by TSE's motion to expunge, which obstructed TSE's ability to remove the foreclosure action.

Brahma, upon realizing this was improper and could eventually result in dismissal and the running of the statute of limitations on its surety bond claim, filed a completely new proceeding, which was entirely duplicative of its lien foreclosure complaint (which was amended by then to state a surety bond claim). *See* Writ Petition 12, n.7. The district court then allowed Brahma to consolidate the new duplicative action with its original improper foreclosure action, over TSE's opposition. *See* 1 PRA 1, 13, 23, 32; 2 PRA 43, 82, 90, 105; 3 PRA 117, 124, 137.

This procedural gamesmanship cannot stand. This Court should decide that the district court erred and compel it to dismiss Brahma's initial filing into the special proceeding. While beyond the scope of this writ, the law is exceedingly clear that a party cannot file a duplicative action as a safety net against procedural errors in an earlier filed action and then consolidate that duplicative action with the earlier filed action.[1] While clever, courts have seen such a consolidation scheme

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[1]*See Smith v. Hutchins*, 93 Nev. 431, 432, 566 P.2d 1136, 1137 (1977) (providing that the "single cause of action rule" requires that "all forms of injury or damage sustained by a plaintiff as a consequence of the defendant's wrongful act be recovered in one action rather than in multiple actions"); *Reno Club, Inc. v. Harrah*, 70 Nev. 125, 129, 260 P.2d 304, 306 (1953) ("This principle of res judicata has also found expression in the rule against splitting of causes of action, to the effect that a single cause of action or entire claim or demand cannot be split up or divided and separate suits maintained for the various parts thereof."); *Clayton v. D.C.*, 36 F. Supp. 3d 91, 94 (D.D.C. 2014) (providing that "a plaintiff should not engage in 'claimsplitting,' in which the plaintiff seeks to maintain two actions on the same subject in the same court, against the same defendant at the same time");

before and rejected it. *See, e.g., Clayton*, 36 F. Supp. 3d at 96 (providing that dismissal of the duplicative complaint is warranted). Thus, the first issue presents a live controversy and is not moot.

2. The second issue is not moot.

In the second issue, TSE asks that this Court issue a writ that compels the Nye County district court to dismiss Brahma's claims against TSE in the Nye County action for lack of subject matter jurisdiction.

TSE has standing to pursue this issue because it is still a party to the underlying Nye County proceeding and the claims against it are still in place, despite the fact that Brahma is enjoined from prosecuting them. TSE will gain a direct benefit from the issuance of a writ on this issue because TSE would no longer be a party to the underlying Nye County proceeding. Further, the issuance of a writ on this issue would correct the district court's error of exercising jurisdiction over claims where it has no subject matter jurisdiction. This issue is not moot for largely the same reasons. There is an actual controversy over whether the district court has subject matter jurisdiction over Brahma's claims against TSE.

Curtis v. Citibank, N.A., 226 F.3d 133, 139 (2d Cir. 2000) ("[P]laintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time.").

Brahma argues that this issue is moot because "pursuant to the Federal Injunction, the Nevada State Courts are no longer exercising jurisdiction over those claims." Answer 9. That is not accurate.

TSE is still a party to the underlying proceeding. The Nye County district court is still wrongly exercising subject matter jurisdiction over Brahma's claims against TSE. The federal injunction simply enjoined Brahma from prosecuting its three claims against TSE in the underlying Nye County proceeding. Indeed, this is the exact relief that the federal injunction provided:

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

3 PRA 207.

Interpreting the scope of the injunction in accordance with its plain language is not a matter of reading the federal court's injunction too literally or ignoring the "context" of the federal court's injunction. *See* Fed. R. Civ. P. 65(d)(1) (providing that an injunction must state its terms "specifically"). A close inspection of the injunction briefing and the law underlying the injunction shows that the specific relief issued by the injunction is the relief sought by TSE and the only relief that the federal court could provide. *See U.S. v. Christie Industries, Inc.*, 465 F.2d 1002, 1007 (3rd Cir. 1972) ("The language of an injunction must be read in the

light of the circumstances surrounding its entry: the relief sought by the moving party, the evidence produced at the hearing on the injunction, and the mischief that the injunction seeks to prevent."); *Arbuckle v. Robinson*, 134 So.2d 737, 741 (Miss. 1961) (providing that an injunction must be interpreted "in view of the relief sought and the issues made in the case before the court which rendered it, and the injunction will not be given a wider scope than is warranted by such construction").[2]

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[2] In the federal action, TSE moved for an injunction under an exception to the Anti-Injunction Act, 28 U.S.C. § 2283, which generally prohibits federal courts from enjoining ongoing state court proceedings. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Negrete v. Allianz Life Ins. Co. of North America*, 523 F.3d 1091, 1098 (9th Cir. 2008); *Sandpiper Village Condominium Ass'n v. Louisian-Pacific Corp.*, 428 F.3d 831, 842 (9th Cir. 2005). This Act has a clear singular purpose: "prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances." *Sandpiper*, 428 F.3d at 842. The exception under which the injunction was issued provides that a federal court may enjoin ongoing state court proceedings if the injunction is expressly authorized by an Act of Congress. 28 U.S.C. § 2283; *Vendo Co v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977); *Chick Kam Choo*, 486 U.S. at 146. Under this exception, the Ninth Circuit, and other circuits, have held that the removal statute, 28 U.S.C. § 1446, constitutes such an act, and authorizes federal courts to "enjoin later filed state cases that were filed for the purpose of subverting federal removal jurisdiction." *Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1378 (9th Cir. 1997). These injunctions are limited to enjoining the party that acted to subvert federal jurisdiction from prosecuting its later filed claims in the state court action. *See Faye v. High's of Baltimore*, 541 F. Supp. 2d 752, 760 (D. Md. 2008); *Cottingham v. Tutor Perini Bldg. Corp.*, No. CV 14-2793, 2016 WL 54916, at *5 (E.D. Pa. Jan. 5, 2016); *Cross v. City of Liscomb*, No. 4:03-CV-30172, 2004 WL 840274, at *4 (S.D. Iowa Mar. 2, 2004).

If the federal court had gone further, such as enjoin the entire state court action or dismiss Brahma's claims from the state court action, it would have acted not only in violation of binding precedent, it would have acted in contravention to principles of federalism. Said another way, the federal court had jurisdiction over Brahma. The federal court did not have jurisdiction over this Court or the Nye

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If there is any doubt as to what TSE requested in the federal action and what was ultimately issued, this Court need not look any further than TSE's reply in support of its very motion for injunction. Brahma attempted to misconstrue the relief sought by TSE then, just as it does now. There, TSE wrote:

> Each of Brahma's arguments is premised on the idea that TSE moved to enjoin the Nye County Special Proceeding. But, that is not permitted, nor is it accurate.
>
> When a federal court issues an injunction under the first exception to the Anti-Injunction Act, as requested by TSE's Motion for Injunction, it does not enjoin the later filed state court action, it enjoins the plaintiff from prosecuting its later filed claims in the state court action. (Citation to 3 cases omitted). This difference, while slight, is critical. It changes the focus of the analysis from the state court action to the later filed claims.
>
> Accordingly, TSE requested that this Court enjoin 'Brahma from prosecuting its copycat claims . . . in its first amended counter-complaint in the Nye County Special Proceeding.' (Citing the motion, p. 14:10-13).

7 PA 650. And, in the end, the federal district court entered the exact relief requested by TSE. *See* 3 PRA 207.

County district court. Thus, the federal court's injunction is limited to controlling what Brahma can do, not what this Court or the Nye County district court can do.

There are practical implications as well to the fact that TSE is still a party to the underlying Nye County proceeding, which necessitate resolution of the second issue presented by TSE's Writ Petition. One, the Nye County district court is still exercising subject matter jurisdiction over TSE and the claims against it when it has no authority to do so. Two, other parties to the action are treating TSE like a party. In fact, Cobra recently served TSE with requests for production under Rule 34 (a discovery device used with regards to a party, not a non-party). 5 PRA 312. Three, down the road it appears that the parallel proceedings (the Nye County action and the federal action) might lead to complicated claim and issue preclusion questions. TSE's technical party status to the Nye County action will further complicate those questions.

Finally, Brahma's continued opposition of TSE's writ seeking dismissal is *itself* proof that the issue is not moot. If TSE would gain nothing (above and beyond the federal injunction) from dismissal, why would Brahma continue to oppose it? Thus, the second issue presents a live controversy and is not moot.

3. The third issue is not moot.

In the third issue, TSE asks, in the alternative, that this Court issue a writ that compels the Nye County district court to stay its proceeding pending the resolution of the federal court action under the first-to-file rule.

TSE has standing to pursue this issue because it is still a party to the underlying Nye County proceeding. TSE will gain a direct benefit from the issuance of a writ on this issue because it would stay the underlying Nye County proceeding until resolution of the federal action. Further, this issue is not moot for largely the same reasons. There is an actual controversy over whether the district court abused its discretion in ignoring the first-to-file rule.

Brahma argues that this issue is moot because "TSE has no standing to demand a stay of proceedings from any state court because it is no longer a party to such state court proceedings." Answer 11. But, as explained above, TSE is still a party to the underlying Nye County proceeding. Thus, the third issue in TSE's writ petition presents a live controversy and is not moot.

B. TSE's Writ Petition should be entertained on the merits for all of the reasons stated therein.

The Writ Petition lays out a number of reasons why it should be entertained on the merits. *See* Writ Petition 13-20. Namely, the petition must be considered because given the stage and nature of this litigation and the nature of removal,

appeal does not constitute a speedy or adequate remedy. *See* NRS 34.170; NRS 34.330; Writ Petition 17-19 (explaining both of these arguments).

Moreover, the petition should be considered because it concerns questions of jurisdiction and features all of the considerations that have previously motivated this Court to entertain writ petitions challenging the denial of a motion to dismiss, such as: (i) no factual disputes, (ii) the district court acted contrary to clear authority, (iii) an important issue of law needs clarification, (iv) the petition gives the Court an opportunity to define the parameters of a statute, (v) public policy will be served by the Court's invocation of its original jurisdiction, and (vi) sound judicial economy and administration favor entertaining the petition. *See* Writ Petition 14-17 (explaining these arguments) (citing to, *inter alia*, *Nevada Power Co. v. Eighth Judicial Dist. Court*, 120 Nev. 948, 954, 102 P.3d 578, 582 (2004) and *Otak Nevada, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 593, 597, 260 P.3d 408, 410 (2011)).

In response, Brahma raises two arguments why this Court should not entertain TSE's Writ Petition on the merits: (1) avoid piecemeal review and (2) because "the Federal Court Injunction has already afforded TSE a plain, speedy and adequate remedy." *See* Answer 16-19. Both arguments lack merit.

1. Brahma's piecemeal review argument is essentially a rehashing of its mootness argument. *See* Answer 16-18. Brahma cites generic law regarding

avoiding piecemeal review, which ignores all of the points raised in TSE's Writ Petition that justify entertaining the petition. *See id.* at 16. Brahma then rehashes the same arguments from its mootness section: the federal injunction bars this Court and/or the district court from taking action, the surety bond acted as a cure all, and its "consolidation scheme" acted as a cure all. *Id.* at 17-18. As previously explained, these arguments fail. TSE is still a party to the underlying Nye County proceeding; Brahma's claims against TSE still exist in the underlying Nye County proceeding; the injunction does not bar this Court or the district court from dismissing Brahma's claims against TSE; the recording of the surety bond did not moot the issues presented by TSE's Writ Petition; and Brahma's "consolidation scheme" was improper and did nothing to cure the district court's errors. Moreover, none of these arguments undermine the reasons that justify entertaining TSE's Writ Petition on the merits.

2. Next, Brahma's plain, speedy, and adequate remedy argument suffers from the same defects. It relies on generic law, the injunction argument, and the "consolidation scheme" argument. *See* Answer 18-19.

Again, TSE has standing to pursue the issues in its Writ Petition and those issues are not moot. Without this Court's intervention at this stage, those legal errors will persist. TSE has not been afforded an adequate or speedy remedy through the federal injunction or the recording of the surety bond. The fact that the

federal court issued the injunction, that Cobra recorded a surety bond, and that Brahma engaged in its bad faith "consolidation scheme" has not cured the errors presented by TSE's Writ Petition or their negative effect—only this Court can cure them. For the reasons set forth in the Writ Petition, this Court should undertake that effort now.

C. The relief sought by TSE's Writ Petition should be issued.

1. By filing its lien foreclosure action into the special proceeding, Brahma acted in contravention of the controlling statute, Nevada law, and the Nevada Rules of Civil Procedure, and prejudiced TSE.

In the Writ Petition, TSE explained how the district court erred by permitting Brahma to file its lien foreclosure complaint into the special proceeding created by TSE's motion to expunge. Writ Petition 21-31. The decision violated the plain terms of NRS 108.2275(5), the maxim *expressio unius est exclusio alterius*, and basic civil procedure. *Id.* at 21-30. It was also not a matter of mere technicalities. Brahma's actions obstructed TSE's right to removal, which conveniently furthered Brahma's forum-shopping efforts. *Id.* at 30-31. The Writ Petition further pointed out how this Court previously held in *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1346, 950 P.2d 280, 282 (1997) that such defects are not merely technicalities that can be cured by amendment or a later filing. *Id.* at 23-24, 27-30.

In response, Brahma mostly ignores these arguments. Instead, Brahma raises three separate arguments: (1) its contested filing accomplished the "goal" of NRS 108.2275(5), which Brahma describes as "consolidating motions to expunge with foreclosure actions"; (2) TSE's argument elevates "form over substance"; and (3) its "consolidation scheme" served as a cure all. Answer 26-31. Each argument fails.

1. Brahma's argument that the "goal" of NRS 108.2275(5) is to facilitate the consolidation of motions to expunge with foreclosure actions is wrong. If such a "goal" existed, it would have been reflected in the language of NRS 108.2275(5), which it is not. The exclusion of such language when viewed in conjunction with the Rules of Civil Procedure shows that what Brahma did violates both the controlling statute, the maxim *expressio unius est exclusio alterius*, and basic civil procedure.

2. TSE's argument does not elevate "form over substance." One, Brahma's actions obstructed TSE's ability to remove Brahma's foreclosure complaint. Two, Brahma's actions violated critical procedural rules. This Court rejected the "form over substance" argument in *Smith*. 113 Nev. at 1348, 950 P.2d at 283 ("There is, however, nothing technical about the defect in Chang's cross-claim; the document simply is not a pleading, and does not itself put the matters asserted therein at issue."). Failing to follow NRS 108.2275(5) and the basic rules governing civil

procedure so as to obstruct a party's ability to remove an action to federal court is the furthest thing from "form over substance."

3. Finally, Brahma's "consolidation scheme" has no impact on the district court's erroneous decision to allow Brahma to file its foreclosure complaint into the special proceeding created by TSE's motion to expunge. Yes, a party can file a separate foreclosure action while a motion to expunge special proceeding is pending and move to consolidate both of them. This is what the much-discussed *Mead* treatise envisions. This is not, however, what Brahma did. Brahma filed a foreclosure action into a special proceeding in violation of NRS 108.2275(5) and basic civil procedure, which obstructed TSE's ability to remove the foreclosure action. Brahma then filed a new proceeding, which was duplicative of its foreclosure action, and consolidated both actions. *See* 1 PRA 1, 13, 23, 32; 2 PRA 43, 82, 90, 105; 3 PRA 117, 124, 137. As described above, this cannot stand.

Brahma cannot be permitted to manipulate the Rules of Civil Procedure so as to guard against any negative repercussions that might arise as a result of its forum shopping efforts. Thus, the relief sought by the Writ Petition on the first issue should be granted. Brahma's original lien foreclosure complaint in the underlying Nye County proceeding is fatally defective, and thus, it and any amendments thereto, should be dismissed.

2. Brahma's claims against TSE in the underlying Nye County proceeding must be dismissed because the district court lacks subject matter jurisdiction over them.

In the Writ Petition, TSE shows that Brahma's claims against TSE in the Nye County action must be dismissed because the district court lost subject matter jurisdiction over them when TSE removed them to federal court. Writ Petition 32-34. It is hornbook law that if a district court lacks subject matter jurisdiction over claims, the claims must be dismissed. *Id.* at 34-35.

In response, Brahma raises two arguments: (1) the federal court already addressed this issue in entering the injunction and (2) neither this Court nor the Nye County district court can dismiss the claims due to the injunction. Answer 20-21. Notably, Brahma does not dispute that the Nye County district court lost subject matter jurisdiction over the claims upon removal. Brahma also does not dispute that if the Nye County district court lacks subject matter jurisdiction over the claims, they must be dismissed. *See* NRCP 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

1. Brahma's first argument goes as follows: "[a]lthough the Federal Court granted TSE's Motion for Injunction, it did not expressly adopt TSE's argument that the removal divested the District Court of jurisdiction. Rather, the Federal Court concluded that Brahma filed the Removed Claims in Nye County 'in an

attempt to subvert the removal of a prior case.' . . . As discussed above, no purpose is served by revisiting the precise question presented (whether the District Court had subject matter jurisdiction over the Removed Claims) because those claims now firmly reside in the Federal Court." Answer 20-21.

This argument is wrong on multiple fronts. One, TSE never asked the federal court to find that removal of the claims to federal court divested the state court of subject matter jurisdiction. While law was included to this effect to tangentially support the arguments TSE made to the federal court, clearly, the federal court could not enter an order dismissing the claims from the state court action. A federal court does not have the authority to do so. Rather, as previously explained in detail, TSE asked the federal court to enjoin Brahma from litigating its claims against TSE in Nye County because Brahma had attempted to subvert removal jurisdiction. *See, supra,* footnote 2. The federal court agreed and entered the injunction. *Id.* This relief accords with the applicable law. *Id.* Thus, by addressing this issue, this Court is not "revisiting the precise question presented" to the federal court. Indeed, this issue was never presented to the federal court.

Two, simply because Brahma's claims against TSE reside in federal court, does not mean that this issue should not be addressed. Brahma's claims for breach of contract, breach of the implied covenant, and violation of NRS 624 still also reside in the Nye County proceeding. Yes, they are still stayed by the Nye County

district court; and yes, Brahma is enjoined from prosecuting them in the Nye County proceeding. But, that has not stopped Cobra from serving TSE with Rule 34 requests for production of documents (notably, the federal court could only enjoin Brahma from proceeding against TSE in state court—Cobra was not a party to the federal action). *See* 5 PRA 312. The same questions regarding TSE's party or non-party status in the Nye County action will continue to arise when it comes to depositions and other matters. In addition, because the Nye County district court has refused to stay the entire action in light of the federal action (which this Court should fix through the first-to-file rule argument below), this case and the federal action are headed on a parallel track, which will eventually result in complex claim and issue preclusion questions. Those questions will be complicated by the fact that TSE is still a party to the underlying Nye County proceeding. That issue, however, should be resolved now by instructing the district court to dismiss Brahma's claims against TSE for lack of subject matter jurisdiction, which would result in the actual removal of TSE from the underlying Nye County proceeding.

2. Brahma's next argument that neither this Court nor the district court can dismiss Brahma's claims against TSE "because to do so requires an enjoined state court to litigate the Removed Claims" is also wrong. Answer 21. As previously explained, the federal court injunction enjoins Brahma from litigating its claims

against TSE in the Nye County proceeding. The injunction does not prevent this Court or the Nye County district court from dismissing those claims. Thus, this Court should instruct the Nye County district court to dismiss Brahma's claims against TSE for lack of subject matter jurisdiction.

3. Alternatively, the Nye County proceeding must be stayed pursuant to the first-to-file rule because its issues are substantially similar to the federal action's issues and the federal action was filed first.

TSE's Writ Petition lays out a textbook scenario of when the first-to-file rule applies. *See* Writ Petition 36-40. The issues in the underlying proceeding, Nye County Case No. 39348, are substantially similar to the issues in a previously filed action, namely, the much-discussed federal court action. The facts are not in dispute, the issues are straightforward, and all of the concerns related to comity, convenience, and the necessity for an orderly procedure apply. Moreover, Brahma brought the situation upon itself through its forum shopping efforts. This is the optimal scenario for this Court to recognize and apply the first-to-file rule.

In response, Brahma does not contend that the federal court action was not filed first. It is indisputable that the federal court action originated on July 17, 2018—the date that Brahma filed its Clark County complaint, which TSE removed to federal court—and that Brahma's claims in the underlying proceeding were first brought by Brahma on September 20, 2018.

Rather, Brahma makes two arguments: (1) TSE is asking this Court to go beyond the federal court injunction, which the federal court already "expressly rejected," and (2) the issues presented in the underlying Nye County proceeding and in the federal action are not substantially similar. *See* Answer 21-26. Both arguments must be rejected.

1. Brahma's first argument fails for multiple reasons. To be clear, TSE never requested that the federal court stay the underlying Nye County proceeding. *See supra,* footnote 2 above. And, the federal court never rejected such a request, either expressly or implicitly, nor was such a request even addressed. 3 PRA 199-207 (order); 6 PA 603 (motion); 7 PA 645 (reply). Thus, in no way is TSE asking this Court to address an issue already addressed or rejected by the federal court.

Brahma's argument that "TSE's request was expressly rejected by the Federal Court such that no resolution by this Court is possible or, at a minimum, advisable," is wrong. Answer 21. As previously explained, TSE's request in the federal court was exceedingly clear: it requested the federal court to enjoin Brahma from prosecuting its three claims against TSE in the underlying Nye County proceeding pursuant to an exception to the Anti-Injunction Act. *See supra,* footnote 2 above. This was the only form of relief available under the applicable law. *Id.* Ultimately, this was the exact relief the federal court entered. *Id.* TSE did not seek any other form of relief and the federal court did not reject any other

form of relief. *Id.* TSE never argued, the federal court never addressed, and the federal court certainly never rejected, either expressly or implicitly, any argument related to the first-to-file rule issue before this Court.

Two, Brahma asserts that the federal court "could have enjoined all proceedings in Nye County but did not do so, choosing only to enjoin Brahma from proceeding in state court on the TSE Claims." Answer 21. That is also wrong. As discussed, TSE never requested such relief because it would have been in direct contravention of Supreme Court precedent, Ninth Circuit precedent, federal statutes, and principles of federalism. Contrary to Brahma's suggestion, federal courts cannot do whatever they please when it comes to controlling parallel state court litigation.

Three, Brahma asserts that the federal court "could have enjoined Brahma from proceeding on any claim (including its claim against the Cobra Parties and the Surety Bond) arising out of or relating to the acts and occurrences giving rise to Brahma's claims against TSE" and chose not to. Answer 21. Wrong again. The exception to the Anti-Injunction Act under which TSE sought relief is limited to staying the prosecution of claims that were filed in state court for the purposes of subverting federal removal jurisdiction. *See supra,* footnote 2 above. Brahma's surety bond claim had never been removed to federal court. Thus, the federal court

could not enjoin Brahma from prosecuting its surety bond claim, nor was this relief ever requested.

Four, Brahma asserts that "[n]o good reason exists for this Court to expand the reach of the Federal Court Injunction." Answer 22. But, this too is a mischaracterization. The relief sought from this Court with respect to the first-to-file rule does not overlap with the federal court's injunction, and in no way could it be considered an "expansion" of the federal court's injunction. This Court should be confident that compelling the Nye County district court to stay the underlying proceeding will not overlap, interfere, contradict, or undermine the federal court's injunction in any way.

2. Brahma's second argument against application of the first-to-file-rule also fails. Brahma contends that the issues in the federal action and the underlying Nye County proceeding are not "identical." Answer 22. This argument is misleading. The issues do not have to be identical. They only have to be substantially similar. *See Kohn Law Grp., Inv. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015) (providing that in determining substantial similarity, courts look to the similarity of the parties and issues, exact similarity of the parties and issues is not necessary, only substantial similarity). Here, the analysis is simple, however,

because the issues in the federal action and the underlying Nye County proceeding completely overlap.[3]

Before delving into the argument as to why the issues overlap, there is another reason Brahma should lose on this front. This Court should conclude that Brahma is judicially estopped from arguing that the issues are not substantially similar. On multiple other occasions, Brahma has contended that its surety bond claim in the underlying proceeding and the claims in the federal court action *are* substantially similar.

Judicial estoppel is a question of law. *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). It exists to "protect the judiciary's integrity." *Id.* Courts, including appellate courts, may invoke the doctrine at their discretion. *Id.* The doctrine generally applies when (1) the same party has taken

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[3] In the federal action, Brahma has asserted claims of breach of contract, breach of the implied covenant of good faith and fair dealing, violation of NRS 624, and unjust enrichment against TSE. TSE has asserted counterclaims against Brahma for breach of contract, breach of the implied covenant of good faith and fair dealing, declaratory relief, unjust enrichment, fraud, and negligent misrepresentation. In the state court action, Brahma has asserted claims of breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of NRS 624 against TSE (which it is enjoined from prosecuting). 3 PRA 124. Brahma has also asserted a surety bond claim against Cobra and its Surety. *Id.* H&E has asserted four derivative claims in intervention: (1) breach of contract against Brahma, (2) breach of the implied covenant against Brahma, (3) violation of NRS 624 against Brahma, and (4) surety bond claim against Cobra and its Surety.

two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Id.* Judicial estoppel should only be applied when "a party's inconsistent position arises from intentional wrongdoing or an attempt to obtain an unfair advantage." *Id.*

Here, Brahma should be judicially estopped from arguing that the issues in the underlying proceeding are not substantially similar to the issues in the federal court action.

First, satisfying the first, second, and fourth element, Brahma has repeatedly taken the exact opposite position in previous judicial proceedings. In fact, in Brahma's opposition to the motion underlying this writ petition, Brahma took the opposite position, arguing that the issues presented by its surety bond claim in the underlying proceeding and the issues presented by its contractual claims against TSE, which are in the federal action, are substantially similar:

- "Because these claims ["Brahma's claims against Cobra, AHAC"] must proceed in Nye County, this Court must necessarily preside over and decide (i) Brahma's contract claims against TSE, and (ii) H&E's contract claims against

Brahma, to determine the amount owed Brahma under its contract with TSE and the amount owed H&E under its contract with Brahma." 3 PA 277 (lines 18-21).

- "On October 16, 2018, Brahma filed in the Federal Action a Motion for Stay . . . based on the *Colorado River* Doctrine, which requests that the Federal Court abstain from hearing the Federal Action in favor of this Court proceeding with this Action since, (i) the Federal Action involved the same transaction and occurrences as those that are the subject of this Action, and . . ." 3 PA 285 (lines 5-9).

- "Therefore, because Brahma's Third-Party Complaint cannot be stayed, the Court must not stay Brahma's contract claims against TSE either. Because all claims arise out of the same transaction and occurrence (i.e., unpaid invoice for Work rendered on a time and material basis by Brahma)." 3 PA 295 (lines 1-4).

- "Here, Cobra is the principal on the Brahma Surety Bond, and AHAC is the surety who issued the Brahma Surety Bond. However, TSE is the lien claimant's debtor, not Cobra or AHAC. Therefore, the statute expressly authorizes Brahma to file its contract claims against TSE (its debtor) in Nye County, irrespective of the language contained in the parties' Agreement or otherwise. This makes good sense since Cobra's and the Surety's liability to Brahma is dependent on TSE's liability to Brahma." 3 PA 297 (lines 8-14).

- "This Court will need to resolve the contract dispute between TSE and Brahma at the same time it proceeds on Brahma's claim against the Brahma Surety Bond . . . ." 3 PA 301 (lines 19-21).

Brahma also argued in the federal action that the issues presented by its surety bond claim in the underlying proceeding and the issues presented by its contractual claims against TSE, which are in the federal action, are substantially similar:

- "[W]e're [referring to Brahma] going to make the same arguments there that we make here. And [Cobra] may make some of the same arguments that TSE is going to make here in defense of our lien claim. But, you know, fundamentally the causes – the claims, the dispute, is the same. The facts are the same. And some facts maybe would not be elucidated over there that might be here and vice versa, but by in large the facts are going to be the same." *See* 3 PRA 176 line 20-177 line 2 (Brahma's counsel arguing at the June 25, 2019 hearing in federal court with respect to the motion which eventually resulted in the injunction order).

- "[B]ut in fact our lien is going to be based upon the unpaid balance of the contract owed to us less all just offsets and credits. Right. What are those just offsets and credits? They make all kinds of arguments about our invoicing being incorrect and they've even stretched that to allege fraud. It's absurd, but that's

their allegation. Those same arguments would be made in defense of our lien claim over in Nye County and presumably will be." 3 PRA 178, lines 1-9 (Brahma's counsel arguing at the June 25, 2019 hearing in federal court with respect to the motion which eventually resulted in the injunction order).

Second, satisfying the third element for judicial estoppel, Brahma succeeded in asserting this position in its opposition to TSE's motion to stay, strike, or dismiss (the very opposition that gave rise to this writ petition).

Lastly, satisfying the fifth and final element for judicial estoppel, Brahma did not take its first position— that the issues presented by its surety bond claim in the underlying proceeding and the issues presented by its contractual claims against TSE, which are in the federal action, are substantially similar—by ignorance, fraud, or mistake. Thus, this Court should find that Brahma is judicially estopped from arguing that the issues in the underlying proceeding and the federal action are not substantially similar.

Next, even if the Court does not find that Brahma is judicially estopped from making this argument, there is no doubt that the issues in the underlying proceeding and the federal action are substantially similar for the purposes of the first-to-file rule. Brahma tries to argue around this by pointing to the statutes giving rise to its surety bond claim. But the simple truth is that Brahma cannot

collect on the bond without resolution of the questions at issue in the federal action.

Brahma seeks recovery under the bond under NRS 108.222(1)(b), which only permits Brahma to collect an "amount equal to the fair market value of such work, material or equipment . . . including a reasonable allowance for overhead and profit." NRS 108.222(1)(b). *See also* NRS 108.237(1) (providing that "[t]he court shall award to a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due to the lien claimant by the court . . . ."). The only way to determine the fair market value of Brahma's work on the project is through litigation of the breach of contract and fraud claims and counterclaims at issue in the federal action. Said another way, to determine "the fair market value of such work" under NRS 108.222(1)(b), Brahma must necessarily litigate all of the claims at issue in the federal action. As quoted above, Brahma has repeatedly admitted as much. There is no way around it.[4] Thus, this Court should conclude that the first-to-file rule's substantial similarity requirement is satisfied.

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[4] In addition, the parties to the underlying proceeding and the federal court action are similar. Currently, the underlying proceeding includes Brahma, TSE, Cobra, the Surety, and H&E (on claims that are derivative of Brahma's claims against TSE). The federal action currently includes Brahma and TSE. But, Cobra and its Surety have recently moved to intervene into the federal action. The matter is fully briefed. 4 PRA 223 (motion), 4 PRA 261 (TSE's joinder to motion), 4 PRA 280 (Brahma's response), v PRA 303 (reply). It appears that Cobra and the Surety will

In its opposition to the Writ Petition and other filings, Brahma has elected to play the victim. It proffers that TSE (and Cobra in other filings) has tried to interfere with its supposed statutory right to proceed on its surety bond claim however and wherever it wishes. It further continuously contends that TSE is placing "form over substance" and other such platitudes. The federal court rightly saw through these arguments when it called out Brahma's forum shopping efforts and issued the injunction. TSE has been consistent in its legal positions. Brahma, on the other hand, changes its legal positions when convenient and has created this unwieldy procedural mess through its forum shopping efforts. The both legally correct and appropriate result is for the underlying Nye County proceeding to be dismissed, or if not, alternatively, stayed pursuant to the first-to-file rule until resolution of the previously filed federal court action.

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be permitted to intervene. Once the motion to intervene is resolved, TSE will file the resulting order with this Court.

III. CONCLUSION

Based on the foregoing, the relief sought by TSE's Writ Petition should be issued.

Dated: January 6, 2020

/s/ D. Lee Roberts, Jr.

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 COMPLIANCE

I hereby certify that I have read this Reply in Support of Petition for Writ of Prohibition, or, Alternatively, Mandamus and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Reply complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires that every assertion in this Reply regarding matters in the record be supported by a reference to the record on appeal.

Dated: January 6, 2020

/s/ D. Lee Roberts, Jr.
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

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on January 6, 2020, I filed a Reply in Support of Petition for Writ of Prohibition, or, Alternatively, Mandamus with the Clerk of the Nevada Supreme Court and served a copy of the Reply to the addresses shown below (in the manner indicated below). The accompanying 5 Volume Appendix will be electronically filed in the court under NRAP 30(f)(2).

VIA THE COURT'S ELECTRONIC FILING SYSTEM:

Richard L. Peel. Esq.
Eric B. Zimbelman, Esq.
Cary B. Domina, Esq.
Ronald J. Cox, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
cdomina@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, 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

Richard E. Haskin, Esq.
Daniel M. Hansen, Esq.
Gibbs Giden Locher Turner
Senet & Wittbrodt LLP

1140 N. Town Center Drive, Suite 300
Las Vegas, Nevada 89144
rhaskin@gibbsgiden.com
dhansen@gibbsgiden.com
Attorneys for H&E Equipment Services, Inc.

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

Kelly L. Pierce