

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Electronically Filed  
Jan 06 2020 04:12 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Tonopah Solar Energy, LLC,  
*Petitioner*

v.

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

and

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

**PETITIONER'S REPLY APPENDIX  
VOLUME I**

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## **CHRONOLOGICAL INDEX**

<b>Date Filed</b>	<b>Description</b>	<b>Bates Number</b>	<b>Volume(s)</b>
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12/21/2018	Brahma Group, Inc.'s Motion to Consolidate Case CV39799 with Case CV39348	PRA 13-22	I
01/07/2019	TSE's Opposition to Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 23-31	I
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02/21/2019	Defendants Cobra Thermosolar Plants, Inc.'s and American Home Assurance Company's Motion to Dismiss Plaintiff Brahma Group, Inc.'s First Amended Complaint in Case No. CV39799	PRA 43-81	II
03/13/2019	Notice of entry of Order Granting Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 82-89	II
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<b>Date Filed</b>	<b>Description</b>	<b>Bates Number</b>	<b>Volume(s)</b>
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11/01/2019	Brahma Group, Inc.'s Opposition to Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Motion to Stay (without exhibits)	PRA 247-260	IV
01/14/2019	Brahma Group, Inc.'s Reply to Tonopah Solar Energy, LLC's Opposition to Motion to Consolidate Case No. CV39799 with Case No. CV39348 (without exhibits)	PRA 32-42	I
11/15/2019	Brahma Group, Inc.'s Response to Motion to Intervene (without exhibits)	PRA 280-296	IV
04/22/2019	Brahma Group, Inc.'s (1) Second Amended Complaint; and (2) First Amended Third Party Complaint	PRA 124-136	III
12/21/2018	Brahma Group, Inc.'s Motion to Consolidate Case CV39799 with Case CV39348	PRA 13-22	I
04/15/2019	Brahma Group, Inc.'s Reply to Tonopah Solar Energy's Opposition to Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint	PRA 117-123	III
12/21/2018	Brahma Mechanic's Lien Foreclosure Complaint Against Surety Bond and Summons	PRA 1-12	I

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12/11/2019	Cobra Thermosolar Plants, Inc.'s and American Home Assurance Company's First Set of Requests for Production to Plaintiff and Counter-Defendants Tonopah Solar Energy, LLC	PRA 312-323	V
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10/18/2019	Motion to Intervene as Defendants	PRA 223-246	IV
03/13/2019	Notice of entry of Order Granting Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 82-89	II
09/25/2019	Order	PRA 199-207	III
04/22/2019	Order Granting Brahma's Countermotion for Leave to File a Single Consolidated Amended Complaint	PRA 137-154	III
12/09/2019	Reply in further Support of Motion to Intervene as Defendants	PRA 303-311	V
11/01/2019	Tonopah Solar Energy, LLC's Joinder,	PRA 261-265	IV

### **APHABETICAL INDEX**

	or Alternatively, Response to Cobra's and AHAC's Motion to Intervene and Defendants		
06/25/2019	Transcript from Hearing on 06/25/2019	PRA 155-198	III
11/18/2019	TSE's Joinder to Cobra's and AHAC's Motion to Stay	PRA 297-302	V
04/10/2019	TSE's Opposition to Brahma's Countermotion for Leave to File a Single Consolidated Complaint	PRA 105-116	II
01/07/2019	TSE's Opposition to Brahma's Motion to Consolidate Case No. CV39799 with Case No. CV39348	PRA 23-31	I

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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  
21 BONDING COMPANIES I through X; DOES I  
through X; ROE CORPORATIONS I through X,  
22 inclusive,

23 Defendants,

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]**

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 2018

NYE COUNTY DEPUTY CLERK  
DEPUTY

Marianne Yoffee



**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").<sup>1</sup>

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").<sup>2</sup>

4. TONOPAH SOLAR ENERGY, LLC ("TSE")<sup>3</sup> 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");

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

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 <sup>4</sup> 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

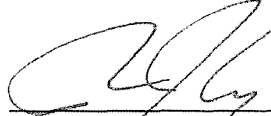
9 4. For such other and further relief as this Honorable Court deems just and proper in  
10 the premises.

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 14<sup>th</sup> day of December 2018.

15 **PEEL BRIMLEY LLP**

16 

17 RICHARD L. PEEL, ESQ.

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27 *Attorneys for Brahma Group, Inc.*

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11 *Attorneys for Brahma Group, Inc.*

12 **FIFTH JUDICIAL DISTRICT COURT**

13 **NYE COUNTY, NEVADA**

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

16 vs.

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

22 Defendants,

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

**SUMMONS**

(Cobra Thermosolar Plants, Inc.)

23 **NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU**  
24 **WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ**  
25 **THE INFORMATION BELOW.**

26 TO THE DEFENDANT:

27 **COBRA THERMOSOLAR PLANTS, INC.**

28 ///

///

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PRA000007

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1 A civil Complaint has been filed by the Plaintiff against you for the relief set forth in its Complaint.

2 1. If you intend to defend this lawsuit, within 20 days after this Summons is served  
3 on you exclusive of the day of service, you must do the following:

4 a. File with the Clerk of this Court, whose address is shown below, a formal  
5 written response to the Complaint in accordance with the rules of the Court,  
6 with the appropriate filing fee.

7 b. Serve a copy of your response upon the attorney whose name and address  
8 is shown below.

9 2. Unless you respond, your default will be entered upon application of the plaintiff  
10 and this Court may enter a judgment against you for the relief demanded in the Complaint, which  
11 could result in the taking of money or property or other relief requested in the Complaint.

12 3. If you intend to seek the advice of an attorney in this matter, you should do so  
13 promptly so that your response may be filed in time.

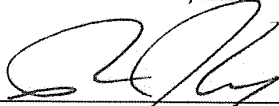
14 4. The State of Nevada, its political subdivisions, agencies, officers, employees, board  
15 members, commission members and legislators each have 45-days after service of this Summons  
16 within which to file an Answer or other responsive pleading to the Complaint.

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

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

20 Issued at the direction of:

21 **PEEL BRIMLEY, LLP**

22   
23 \_\_\_\_\_  
24 RICHARD L. PEEL, Esq. (SBN 4359)  
25 ERIC B. ZIMBELMAN, ESQ. (SBN 9407)  
26 CARY B. DOMINA, ESQ. (SBN 10567)  
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*Attorneys for Brahma Group, Inc.*

**Nye County Clerk of the Court**

By 

Deputy Clerk

12/14/10  
Date

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11 *Attorneys for Brahma Group, Inc.*

12 **FIFTH JUDICIAL DISTRICT COURT**

13 **NYE COUNTY, NEVADA**

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

16 vs.

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

21 Defendants,  
22

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

23 **SUMMONS**

(American Home Assurance Company)

24 **NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU  
WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN 20 DAYS. READ  
THE INFORMATION BELOW.**

25 TO THE DEFENDANT:

26 **AMERICAN HOME ASSURANCE COMPANY**

27 ///

28 ///

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PRA000009



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1 A civil Complaint has been filed by the Plaintiff against you for the relief set forth in its Complaint.

2 1. If you intend to defend this lawsuit, within 20 days after this Summons is served  
3 on you exclusive of the day of service, you must do the following:

4 a. File with the Clerk of this Court, whose address is shown below, a formal  
5 written response to the Complaint in accordance with the rules of the Court,  
6 with the appropriate filing fee.

7 b. Serve a copy of your response upon the attorney whose name and address  
8 is shown below.

9 2. Unless you respond, your default will be entered upon application of the plaintiff  
10 and this Court may enter a judgment against you for the relief demanded in the Complaint, which  
11 could result in the taking of money or property or other relief requested in the Complaint.

12 3. If you intend to seek the advice of an attorney in this matter, you should do so  
13 promptly so that your response may be filed in time.

14 4. The State of Nevada, its political subdivisions, agencies, officers, employees, board  
15 members, commission members and legislators each have 45-days after service of this Summons  
16 within which to file an Answer or other responsive pleading to the Complaint.

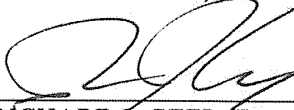
17 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

20 Issued at the direction of:

Nye County Clerk of the Court

21 **PEEL BRIMLEY, LLP**

22   
23 \_\_\_\_\_  
24 RICHARD L. PEEL, Esq. (SBN 4359)  
25 ERIC B. ZIMBELMAN, ESQ. (SBN 9407)  
26 CARY B. DOMINA, ESQ. (SBN 10567)  
27 RONALD J. COX, ESQ. (SBN 12723)  
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*Attorneys for Brahma Group, Inc.*

By  \_\_\_\_\_ Date 12/14/18  
Deputy Clerk

COURTESY COPY

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*Attorneys for Brahma Group, Inc.*

**FIFTH JUDICIAL DISTRICT COURT**

**NYE COUNTY, NEVADA**

BRAHMA GROUP, INC., a Nevada Corporation,  
  
Plaintiff,

vs.

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

Defendants.

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

**RECEIPT OF COPY**

Receipt of copy of the following documents is hereby acknowledged this \_\_\_\_ day of  
December, 2018:

1. **BRAHMA GROUP, INC.'S MECHANIC'S LIEN FORECLOSURE  
COMPLAINT;**
2. **SUMMONS – COBRA THERMOSOLAR PLANTS, INC.; and**

///

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

3. SUMMONS – AMERICAN HOME ASSURANCE COMPANY

WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC

*Colby Balkenbush 1/14/16 3:30 pm*

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[rcox@peelbrimley.com](mailto: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.

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.

FILED  
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BY TP  
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CASE NO. : CV 39348  
DEPT. NO. : 2

**BRAHMA GROUP, INC.'S MOTION  
TO CONSOLIDATE CASE NO.  
CV39799 WITH CASE NO. CV 39348**

Hearing Date:  
Hearing Time:

PRA000013

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

**BRAHMA GROUP, INC.'S MOTION TO CONSOLIDATE CASE NO. CV39799 WITH  
CASE NO. CV 39348**

Pursuant to NRCP 42, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, respectfully moves this Honorable Court for an Order Consolidating Case No. CV 39799 with Case No. CV 39348.

This Motion is based on the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, and any oral argument which may be heard at the hearing set for this matter.

Dated this 17 day of December, 2018.

**PEEL BRIMLEY LLP**



RICHARD L. PEEL, ESQ.  
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Nevada Bar No. 9407  
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3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074-6571

*Attorneys for Brahma Group, Inc.*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION AND STATEMENT OF FACTS**

On September 21, 2018, Brahma filed in this Case (i.e., Case No. CV39348) its Mechanic's Lien Foreclosure Complaint against TSE asserting a Cause of Action for Foreclosure of Mechanic's Lien.

On September 25, 2018, Brahma filed its Amended Complaint against TSE, and Third-Party Complaint against COBRA THERMOSOLAR PLANTS, INC. ("Cobra") and AMERICAN HOME ASSURANCE COMPANY ("AHAC") asserting a cause of action for Claim Against Surety, the Surety Bond and the Principal thereon.

///

1           Instead of filing an Answer to the Amended Complaint, TSE filed a Motion to Strike or  
2   Dismiss (“Motion to Dismiss”) wherein it alleged that Brahma’s Amended Complaint (i) violates  
3   NRCPP 7(a) because it is not a “pleading,” and (ii) should not have been filed into this Case, because  
4   it is a special proceeding that TSE commenced under NRS 108.2275.

5           At the December 11, 2018 hearing on TSE’s Motion to Dismiss, this Court (i) denied TSE’s  
6   Motion to Dismiss, and (ii) agreed with Brahma that its Amended Complaint was properly filed in  
7   this Case. At the conclusion of the hearing, TSE threatened to file a Writ Petition with the Nevada  
8   Supreme Court.

9           Assuming (i) TSE follows through with its threat and files a Writ Petition before the  
10   Nevada Supreme Court, and (ii) the Nevada Supreme Court agrees with TSE’s claims that the  
11   Amended Complaint was improper and should have been filed as a separate action, on remitter,  
12   TSE would undoubtedly argue that the deadline for Brahma to foreclose against the Surety Bond  
13   has expired since NRS 108.2421 requires a lien claimant to commence a foreclosure action against  
14   the surety bond within 9 months of the posting of a surety bond.

15           Because of the foregoing and out of an abundance of caution, Brahma (i) has filed a  
16   standalone Complaint in Case No. CV 39799 to foreclose against the Surety Bond that TSE  
17   required Cobra to procure and provide, and (ii) seeks to consolidate Case No. CV 39799 into Case  
18   No. CV 39348 as both cases relate to and arise out of the same transaction and occurrence.

19   **II.     LEGAL ARGUMENT**

20           **A.     NRCPP 42 Authorizes this Court to Consolidate the Cases.**

21           Pursuant to NRCPP 42, Brahma requests the Court to consolidate Case No. CV 39779 into  
22   Case No. CV39348.

23           NRCPP 42 states in relevant part:

24                   when actions involving a common question of law or fact are pending  
25                   before the court, it may order a joint hearing or trial of any or all the  
26                   matters in issue in the actions; it may order all the actions  
27                   consolidated; and it may make such orders concerning proceedings  
28                   therein as may tend to avoid unnecessary costs or delay.

///

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(702) 990-7272 ♦ FAX (702) 990-7273

1           “Hearing and trial procedures, such as consolidation and the scheduling of hearings, so  
2 long as within the parameters of the governing rules, are matters vested in the sound discretion of  
3 the trial court.” *Zupancic v. Sierra Vista Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181  
4 (1981). Here, the governing rule, NRCP 42, permits consolidation and this Court should exercise  
5 its discretion to consolidate Case No. CV 39799 into Case No. CV 39799. In fact, Brahma’s  
6 Motion seeks to do exactly that which TSE argued Brahma should have done in the first place—  
7 file an independent action and then move the Court to consolidate that action with the Motion to  
8 Expunge. Therefore, TSE should be estopped from any attempt to oppose this Motion.

9           **B.       Judicial Economy Requires Consolidation of these Cases.**

10           Consolidation of these two cases is within the parameters of the governing rules, promotes  
11 judicial economy and saves attorney’s fees and costs for all parties involved. Each of these Cases  
12 relate to the same project and dispute and involve the same parties. Therefore, consolidation is  
13 appropriate and necessary here to promote judicial economy and efficiency as well as to allow the  
14 Court to make consistent judgments on all claims involved.

15           **III.     CONCLUSION**

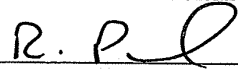
16           For the foregoing reasons, Brahma respectfully requests this Court consolidate Case No.  
17 CV 39799 into Case No. CV 39799.

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

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

21           Dated this 17 day of December, 2018.

22           **PEEL BRIMLEY LLP**

23             
24           \_\_\_\_\_  
25           RICHARD L. PEEL, ESQ.  
26           Nevada Bar No. 4359  
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              Attorneys for Brahma Group, Inc.

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**CERTIFICATE OF SERVICE**

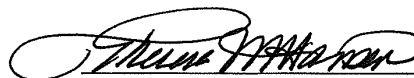
Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 21st day of December, 2018, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S MOTION TO CONSOLIDATE CASE NO. CV39799 WITH CASE NO. CV 39348** to be served as follows:

- ☐ 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
- ☐ 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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*Attorneys for Cobra Thermosolar  
Plants, Inc.*



An Employee of Peel Brimley LLP



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*Attorneys for Brahma Group, Inc.*

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NYE COUNTY CLERK  
BY P  
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

**NOTICE OF HEARING**

///

///

PEEL BRIMLEY LLP  
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(702) 990-7272 ♦ FAX (702) 990-7273

1 NOTICE OF HEARING

2 TO: ALL PARTIES IN INTEREST:

3 Please take notice that the undersigned will bring the foregoing **MOTION TO**  
4 **CONSOLIDATE CASE NO. CV39799 WITH CASE NO. CV 39348** on for hearing on  
5 January 3,, 2019 at 10:00 (a.m./p.m. before the Honorable Judge  
6 Elliott in Department 2 of the Nye County, Nevada District Court, located at 1520 E. Basin Ave.,  
7 Pahrump, Nevada, 89060.

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

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

11 DATED this 7<sup>th</sup> day of December, 2018.

12 **PEEL BRIMLEY LLP**

13 R. P. O.  
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*Attorneys for Brahma Group, Inc.*

1/24/19  
Hearing

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(702) 990-7272 ♦ FAX (702) 990-7273

**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 21<sup>st</sup> day of December, 2018, I caused the above and foregoing document entitled

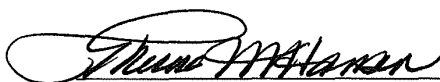
**NOTICE OF HEARING** to be served as follows:

- ☒ 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.*



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*Attorneys for Brahma Group, Inc.*

## FIFTH JUDICIAL DISTRICT COURT

### NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counter-Defendant,

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

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**RECEIPT OF COPY**

Receipt of copy of the following documents is hereby acknowledged this \_\_\_\_ day of  
December, 2018:

1. **BRAHMA GROUP, INC.'S MOTION TO CONSOLIDATE CASE NO.  
CV39799 WITH CASE NO. CV 39348); and**
2. **NOTICE OF HEARING**

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

Colby Balkenbush /c/b 3:30 pm  
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*Attorneys for Defendant*  
*Tonopah Solar Energy, LLC*

**COPY**

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FIFTH JUDICIAL DISTRICT COURT

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Marianne Yoffe

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9 Attorneys for Tonopah Solar Energy, LLC

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  
limited liability company,

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

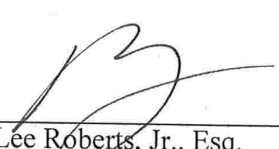
17 Defendant.

Case No. CV 39348  
Dept. No. 2

**TSE'S OPPOSITION TO BRAHMA'S  
MOTION TO CONSOLIDATE CASE NO.  
CV 39799 WITH CASE NO. CV 39348**

18 On December 21, 2018, Brahma Group, Inc. ("Brahma") served its motion to consolidate  
19 Case No. CV39799 with Case No. CV39348 ("Motion to Consolidate"). Tonopah Solar Energy,  
20 LLC ("TSE"), by and through its undersigned counsel, hereby opposes the motion. Based on the  
21 following Memorandum of Points and Authorities, Brahma's Motion to Consolidate should be  
22 denied.

23 DATED this 4<sup>th</sup> day of January, 2019.

24  
25   
26 D. Lee Roberts, Jr., Esq.  
Colby L. Balkenbush, Esq.  
Ryan T. Gormley, Esq.  
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27 6385 S. Rainbow Blvd., Suite 400  
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28 Attorneys for Tonopah Solar Energy, LLC





## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

In its Motion to Consolidate, Brahma seeks to consolidate a new complaint with the proceeding that has been pending before this Court. The new complaint is identical to a pleading<sup>1</sup> that Brahma has already filed in this proceeding. In fact, the new complaint is Brahma's seventh pleading in this dispute. With each new pleading, Brahma continues to add unnecessary procedural complexity to this matter. Brahma has filed this new duplicative complaint for one purpose: to guard against a potential procedural defect with its prior pleading.

Brahma's course of action, filing duplicative complaints in separate actions, seems inappropriate on its face; courts agree—the rule against claim splitting has developed to prevent this very conduct. The rule instructs that where a plaintiff files a duplicative complaint in order to expand its legal rights, *as done by Brahma here*, the duplicative complaint should be dismissed. The Nevada Supreme Court recognizes this rule.

Moreover, Brahma's conduct violates both the letter and the spirit of the Nevada Rules of Civil Procedure. A party cannot fix a defect with a complaint by filing a new duplicative complaint in a separate action and consolidating the actions. By doing so, Brahma has run afoul of Rule 1—filing multiple actions and seeking to consolidate is not just, speedy, or inexpensive. Brahma has also run afoul of the amendment process governed by Rule 15—if a court ever denied a party leave to amend, under Brahma's course of action, the party could simply file a new action including the amendment and consolidate it with the already pending action to get around the denial of leave to amend. And Brahma has run afoul of the general rules against duplicity and redundancy in litigation. Brahma's new complaint epitomizes a redundant pleading, and, thus, should be struck under Rule 12(f). All of these deficiencies lead to the

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<sup>1</sup> In this Opposition, TSE refers to the documents filed by Brahma into the special proceeding created by TSE's motion to expunge (CV 39348), namely, Brahma's Mechanic's Lien Foreclosure Complaint, its First Amended Counter-Complaint and Third-Party Complaint, and its Second Amended Counter-Complaint and Amended Third-Party Complaint as pleadings for ease of reference. Yet, the usage of the word "pleadings" should not be construed as a waiver of TSE's argument that these pleadings are improper and do not constitute legitimate pleadings.

conclusion that Brahma's new complaint is futile and cannot be consolidated. Brahma's Motion to Consolidate must be denied. To the extent that this Court disagrees, Brahma's new action should be stayed pending resolution of Brahma's previously filed duplicative claims.

## II. STATEMENT OF PERTINENT FACTS

Brahma has already filed seven pleadings in this matter:

- *First pleading*: April 17, 2018 complaint in Nye County—Brahma voluntarily dismissed this pleading.
- *Second pleading*: July 17, 2018 complaint in Clark County asserting breach of contract, breach of the implied covenant, unjust enrichment, and violation of NRS Chapter 624 against TSE. TSE removed this pleading to federal court.
- *Third pleading*: September 20, 2018 complaint in Nye County Case No. CV 39348 asserting lien foreclosure against TSE. Nye County Case No. CV 39348 was a special proceeding initiated by the filing of TSE's motion to expunge the mechanic's lien recorded by Brahma.
- *Fourth pleading*: September 25, 2018 first amended complaint in federal court asserting merely unjust enrichment against TSE (i.e., dropping the other three claims so that Brahma could bring them in Nye County instead).
- *Fifth pleading*: September 25, 2018 first amended counter-complaint and third party complaint in Nye County Case No. CV 39348 asserting breach of contract, breach of the implied covenant, violation of NRS 624, and lien foreclosure against TSE and claim on the bond against Cobra Thermosolar Plants, Inc. and its surety.
- *Sixth pleading*: This Court has permitted Brahma leave to file its second amended counter-complaint and amended third party complaint in Nye County Case No. CV 39348 asserting breach of contract, breach of the implied covenant, and violation of NRS 624 against TSE and claim on the bond against Cobra and its surety. Brahma has not yet filed this pleading.
- *Seventh pleading*: December 14, 2018 complaint in Nye County Case No. CV 39799, which is identical to its sixth pleading—its amended third party complaint in Nye County



Case No. CV 39348.

TSE previously moved to dismiss, strike, or stay the third and fifth pleadings filed by Brahma, arguing that they should be dismissed or struck because, among other reasons, Brahma could not file them into a special proceeding created by the filing of TSE's motion to expunge. Brahma argued that it was appropriate to file the pleadings into the special proceeding. On December 11, 2018, at a hearing on the motion, the Court denied TSE's motion to dismiss, strike, or stay, agreeing with Brahma that it could file its pleadings into the special proceeding.<sup>2</sup> TSE plans to file a writ petition with the Nevada Supreme Court challenging this decision.

### III. LEGAL ARGUMENT

Brahma seeks to consolidate its seventh pleading into this proceeding—Nye County CV 39348, a special proceeding created by the filing of TSE's motion to expunge. *See* Motion to Consolidate. Brahma wishes to do this in order to fix any potential statute of limitations issues that its third, fifth, and sixth pleadings might suffer from if the Nevada Supreme Court grants TSE's writ petition. *Id.* at p. 3, ll. 9-18. But, this is not a legitimate reason to file a duplicative civil action and seek to consolidate it into this proceeding. Brahma's Motion to Consolidate should be denied for two reasons: (A) Brahma's seventh pleading is futile and cannot be consolidated and (B) Brahma cannot consolidate a complaint into a special proceeding. Alternatively, to the extent that the Court permits the consolidation, Brahma's new action should be stayed pending resolution of Brahma's previously filed duplicative claims.

#### A. Brahma's seventh pleading is futile and cannot be consolidated.

Just as a party cannot file an amended pleading that is futile, a party cannot consolidate a complaint that is futile. *See Halcrow, Inc. v. Eighth Jud. District Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013); *Cheatham v. Muse*, No. 1:13CV320 (CMH/TRJ), 2013 WL 12155209, at \*1 (E.D. Va. Apr. 12, 2013) (explaining that consolidation would be futile where the complaint to be consolidated should be dismissed). A complaint is futile if it is "impermissible"

<sup>2</sup> The Court also ordered that Brahma's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of NRS Chapter 624 would be stayed pending the federal court's handling of certain motions.



1 or subject to dismissal. *Halcrow*, 129 Nev. at 398, 302 P.3d at 1152. Brahma cannot fix a defect  
2 with its current pleadings by filing a new duplicative complaint and consolidating it into this  
3 proceeding. Brahma's seventh pleading is futile for the four reasons set forth below.

4       First, Brahma's seventh pleading is futile because it violates the rule against claim-  
5 splitting. The Nevada Supreme Court recognizes the rule against claim splitting. *Reno Club,*  
6 *Inc. v. Harrah*, 70 Nev. 125, 129, 260 P.2d 304, 306 (1953) ("This principle of res judicata has  
7 also found expression in the rule against splitting of causes of action, to the effect that a single  
8 cause of action or entire claim or demand cannot be split up or divided and separate suits  
9 maintained for the various parts thereof."). The rule against claim-splitting provides that "a  
10 plaintiff should not engage in 'claimsplitting,' in which the plaintiff seeks to maintain two  
11 actions on the same subject in the same court, against the same defendant at the same time."  
12 *Clayton v. D.C.*, 36 F. Supp. 3d 91, 94 (D.D.C. 2014). "[T]he law requires that a plaintiff must  
13 assert all the grounds of recovery he may have against the defendant, arising from a single cause  
14 of action, in one lawsuit." *Piagentini v. Ford Motor Co.*, 901 N.E.2d 986, 991 (Ill. App. 2009);  
15 *Harbinger Capital Partners LLC v. Ergen*, 103 F. Supp. 3d 1251, 1259 (D. Colo. 2015). "[I]t is  
16 well settled that a plaintiff may not file duplicative complaints in order to expand their legal  
17 rights." *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841 (11th Cir. 2017). "[P]laintiffs have  
18 no right to maintain two actions on the same subject in the same court, against the same  
19 defendant at the same time." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2d Cir. 2000). A  
20 plaintiff "is not at liberty to split up his demand and prosecute it by piecemeal, or present only a  
21 portion of the grounds upon which special relief is sought, and leave the rest to be presented in a  
22 second suit, if the first fail." *Stark v. Starr*, 94 U.S. 477, 485, 24 L. Ed. 276 (1876). Where a  
23 plaintiff engages in claim-splitting, dismissal of the duplicative complaint is warranted. *See,*  
24 *e.g., Clayton*, 36 F. Supp. 3d at 96.

25       Here, Brahma has engaged in claim-splitting. Brahma is maintaining two actions on the  
26 same subject in the same court, against the same defendants at the same time. Brahma filed the  
27 duplicative complaint "in order to expand [its] legal rights" in relation to a potential statute of  
28 limitations argument. *Vanover*, 857 F.3d at 841. Brahma has "no right" to do this. *Curtis*, 226

1 F.3d at 139. Thus, Brahma's seventh pleading must be dismissed.

2 *Second*, Brahma's seventh pleading is futile because it is redundant and should be struck.  
3 Nevada Rule of Civil Procedure 12(f) provides that a court may strike "redundant" matter from  
4 any pleading. Brahma's seventh pleading is completely redundant of its fifth and sixth  
5 pleadings. Thus, Brahma's seventh pleading is futile and cannot be consolidated.

6 *Third*, Brahma's seventh pleading is futile because it runs afoul of Rule 1. Rule 1  
7 provides that the Nevada Rules of Civil Procedure "shall be construed and administered to secure  
8 the just, speedy, and inexpensive determination of every action." Allowing Brahma to  
9 consolidate its seventh pleading would not be just—Brahma filed the initial pleading into the  
10 special proceeding in order to interfere with TSE's right of removal; Brahma defended this  
11 course of action; the Court agreed; now, faced with a writ petition challenging this course of  
12 action, Brahma, apparently having lost confidence in its prior argument, has now filed and seeks  
13 to consolidate the seventh pleading into the current proceeding to protect against any downside  
14 with its prior strategy. Brahma cannot have it both ways. Allowing Brahma to consolidate its  
15 seventh pleading is also neither speedy nor inexpensive. Consolidation does not merge claims or  
16 complaints, it keeps them alive in separate proceedings. *See Matter of Estate of Sarge*, 134 Nev.  
17 Adv. Op. 105 (2018) (explaining that consolidated cases do not merge together but retain their  
18 separate identities, as explained by the United States Supreme Court in *Hall v. Hall*, 138 S. Ct.  
19 1118 (2018)). Maintaining two separate actions featuring the same claims, but each with a  
20 different goal—the first to prevent removal; the second to avoid missing a statute of  
21 limitations—leads to more expensive duplicative litigation. *See 3637 Corp. v. City of Miami*,  
22 314 F. Supp. 3d 1320, 1333 (S.D. Fla. 2018) (explaining that the rule against claim-splitting  
23 promotes judicial economy).

24 *Fourth and finally*, Brahma's seventh pleading is futile because it runs afoul of Rule 15.  
25 Rule 15 sets forth the guidelines for amending a pleading and for the relation back of  
26 amendments for the purposes of a statute of limitations. Rule 15 does not provide that a party  
27 can file a new complaint in a new action and consolidate it with a prior pleading in order to  
28 alleviate statute of limitation concerns. If Brahma is concerned with a statute of limitations

argument, it could take a variety of actions, but this claim-splitting scheme is not one of them.

**B. Brahma cannot consolidate a complaint into a special proceeding.**

Although this argument is mostly duplicative of the argument that this Court denied in TSE's motion to dismiss, strike, or stay, TSE briefly raises it again in this context for the purposes of issue preservation. As discussed in TSE's motion to dismiss, strike, or stay, NRS 108.2275 does not permit a party to file a pleading into a special proceeding created by the filing of a motion to expunge under NRS 108.2275(5). For this same reason, there is no statutory basis upon which a party can consolidate a complaint into a special proceeding created by the filing of a motion to expunge under NRS 108.2275(5). A special proceeding created by the filing of a motion to expunge is limited to resolving the motion and any accompanying attorney fees award. *See* NRS 108.2275(6). Once those two tasks are complete, the special proceeding is complete. *See id.*

Here, Brahma is seeking to consolidate a complaint into a special proceeding created by TSE's motion to expunge. There is no legal basis for this filing. Further, the special proceeding is completely adjudicated as the Court denied TSE's motion to expunge and granted Brahma's accompanying motion for attorney fees. Thus, Brahma should not be permitted to consolidate its seventh pleading into this now completed special proceeding.

In addition, Brahma argues in passing that TSE "should be estopped" from opposing its Motion to Consolidate. *See* Motion to Consolidate at p. 4, ll. 6-8. This argument is wrong. TSE sought to dismiss or strike Brahma's third, fifth, and sixth pleadings because they were, among other reasons, procedurally improper and purposefully filed by Brahma in that manner in order to interfere with TSE's right to removal. Now Brahma is simply attempting to add another procedurally improper but strategically advantageous filing on top of those. If allowed, the result would not even remotely resemble the relief sought by TSE in its previous motion.

**C. Alternatively, Brahma's new action should be stayed.**

A court has the inherent power to control its docket by issuing stays when appropriate. *Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 217, 510 P.2d 627, 629 (1973). Here, Brahma has already asserted a bond claim against Cobra and the Surety in its fifth pleading and

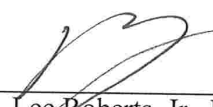


1 sought and obtained leave to file its sixth pleading asserting the same. Brahma's new action—its  
2 seventh pleading—which also asserts a bond claim against Cobra and the Surety, should be  
3 stayed pending resolution of the duplicative claims previously filed by Brahma in this  
4 proceeding. *See Bojorquez v. Abercrombie & Fitch, Co.*, 193 F. Supp. 3d 1117, 1127 (C.D. Cal.  
5 2016) (opting to dismiss a claim with prejudice for violating the rule against claim splitting, but  
6 also pointing out that a stay of the later filed action can be appropriate as well).

7 **IV. CONCLUSION**

8 Based on the foregoing, Brahma's Motion to Consolidate should be denied. The rule  
9 against claim-splitting and Rules 1, 12, and 15 prohibit the course of action undertaken by  
10 Brahma. Alternatively, if Brahma is permitted to consolidate its new duplicative action into  
11 this proceeding, the new action should be stayed pending resolution of the duplicative claims  
12 previously filed by Brahma in this proceeding.

13 DATED this 9<sup>th</sup> day of January, 2019.

14   
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28



**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th day of January, 2019, a true and correct copy of the foregoing **TSE'S OPPOSITION TO BRAHMA'S MOTION TO CONSOLIDATE CASE NO. CV 39799 WITH CASE NO. CV 39348** was served by mailing a copy of the foregoing document via Federal Express, to the following:

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9 *Attorneys for Brahma Group, Inc.*

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

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

18 Defendant.

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

21 Lien/Bond Claimant,

22 vs.

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

27 Defendants.  
28

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"),<sup>1</sup> 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,"<sup>2</sup> and (ii) "The proper procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate the two matters."<sup>3</sup>

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.<sup>4</sup>

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<sup>1</sup> 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."

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

<sup>3</sup> 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

<sup>4</sup> 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,<sup>5</sup> but without waiving any rights it may possess, Brahma (i) filed a standalone complaint  
4 on December 14, 2018 in the Separate Action<sup>6</sup> 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 NRC 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.<sup>7</sup>

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 <sup>5</sup> 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.

<sup>6</sup> See Exhibit C hereto.

<sup>7</sup> 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.”<sup>8</sup> 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,<sup>9</sup> 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”,<sup>10</sup> 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 amended<sup>11</sup> (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.

23 ///

24 ///

25 \_\_\_\_\_  
<sup>8</sup> See Opposition p. 7.

26 <sup>9</sup> See **Exhibit D** hereto, Notice of Entry of Fee Award.

27 <sup>10</sup> 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 <sup>11</sup> 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 claims<sup>12</sup> 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.<sup>13</sup>

24     ///

25     ///

26     ///

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27     <sup>12</sup> See Opposition p. 5.

28     <sup>13</sup> 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 Restatement<sup>14</sup> and adopted by Nevada in the *Boca Park* Court decision<sup>15</sup> 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  
10 forms of relief in a single action, and the plaintiff desires in the second  
11 action to rely on that theory or to seek that remedy or form of relief;

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

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

26 ///

27 ///

28 ///

<sup>14</sup> When such exceptions apply, “the general rule of [against claim-splitting] does not apply to extinguish the claim, 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)

<sup>15</sup> 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.<sup>16</sup> 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)<sup>17</sup> 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).<sup>18</sup>

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)<sup>19</sup> arising out of a separate agreement and work performed  
16 for Cobra.<sup>20</sup> 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.<sup>21</sup> 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       <sup>16</sup> See Opposition p. 6.

24       <sup>17</sup> 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       <sup>18</sup> 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       <sup>19</sup> 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       <sup>20</sup> See Exhibit E hereto.

<sup>21</sup> 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  
4 inexpensive determination of every action.

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

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

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

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26 <sup>22</sup> NRCP 42 states in relevant part:

27 [W]hen actions involving a common question of law or fact are pending before the court, it may  
28 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.

<sup>23</sup> *See* Opposition p. 6.

<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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 <sup>25</sup> See Exhibit C.

<sup>26</sup> 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.

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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 1/18/19 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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