IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 06 2020 04:13 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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.

PETITIONER'S REPLY APPENDIX
VOLUME III

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

CHRONOLOGICAL INDEX

Date Filed	Description	Bates Number	Volume(s)
12/21/2018	Brahma Mechanic's Lien Foreclosure Complaint Against Surety Bond and Summons	PRA 1-12	I
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
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
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
03/25/2019	Brahma Group, Inc.'s Opposition to Cobra Thermosolar Plants, Inc.'s Motion to Dismiss and Countermotion for leave to File a single Consolidated Amended Complaint (without exhibits)	PRA 90-104	II
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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
11/01/2019	Tonopah Solar Energy, LLC's Joinder, or Alternatively, Response to Cobra's and AHAC's Motion to Intervene and Defendants	PRA 261-265	IV
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12/09/2019	Reply in further Support of Motion to Intervene as Defendants	PRA 303-311	V
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03/25/2019	Brahma Group, Inc.'s Opposition to Cobra Thermosolar Plants, Inc.'s Motion to Dismiss and Countermotion for leave to File a single Consolidated Amended Complaint (without exhibits)	PRA 90-104	II
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
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11/15/2019	Brahma Group, Inc.'s Response to Motion to Intervene (without exhibits)	PRA 280-296	IV
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	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
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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

OPP
RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
rpeel@peelbrimley.com
ezimbelman@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.	CASE NO. : CV 39348 *Consolidated with*: Case No. CV39799 DEPT. NO. : 2 **BRAHMA GROUP, INC.'S REPLY TO TONOPAH SOLAR ENERGY'S OPPOSITION TO BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A SINGLE CONSOLIDATED AMENDED COMPLAINT**
BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant, vs. TONOPAH SOLAR ENERGY LLC, a Delaware limited liability company; BOE BONDING COMPANIES I through X; DOES I through X; ROE CORPORATIONS I through X; and TOE TENANTS I through X, inclusive, Counterdefendants,	

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

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant and Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

BRAHMA GROUP, INC.'S REPLY TO TONOPAH SOLAR ENERGY'S OPPOSITION TO BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A SINGLE CONSOLIDATED AMENDED COMPLAINT

Defendant/Lien Bond Claimant, BRAHMA GROUP, INC. ("Brahma" or "BGI"), by and through its counsel of record, the law firm of Peel Brimley LLP, hereby files its Reply to the Opposition of Tonopah Solar Energy, LLC ("TSE") to Brahma's Countermotion For Leave To File A Single Consolidated Amended Complaint (the "Brahma Opposition and Countermotion").[1] This Reply is supported by the papers and pleadings on file herein, the following memorandum of points and authorities, and any oral argument this Court may entertain.

Dated this 15 day of April, 2019.

PEEL BRIMLEY LLP

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

[1] Brahma's Countermotion was filed in conjunction with and as part of its Opposition to the Motion to Dismiss (the "Motion") filed by Third-Party Defendant Cobra Thermosolar Plants, Inc. ("Cobra") and its Bond Surety, American Home Assurance Company ("AHAC").

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

REPLY MEMORANDUM

In its Opposition and Countermotion, Brahma proposes to file a Consolidated Amended Pleading because a single consolidated pleading:

- Acknowledges and incorporates this Court's reasoning in (i) denying TSE's Motion to Dismiss or Strike, and (ii) granting Brahma's Motion to Consolidate;
- Simplifies the pleadings and reduces needless paperwork in the interest of judicial economy;
- Eliminates arguable redundancies in causes of action appearing in both the Lien Foreclosure Action (Case No. CV 39348) and the Bond Action (Case No. CV39799); and
- Creates no prejudice to any party.[2]

TSE ostensibly opposes the Brahma Opposition and Countermotion on the grounds that it may constitute merger – even if only for purposes of efficient administrative and judicial economy – of the substantially similar causes of action that exist in the constituent cases of this consolidated action. TSE incorrectly and deceptively relies on *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) and the United States Supreme Court case upon which it is based, *Hall v. Hall*, 138 S. Ct. 1118, 1122, 200 L. Ed. 2d 399 (2018) for the proposition that "the *Sarge* case simply prevents the Court from merging the two consolidated cases into a single case."[3] As discussed below this argument is simply incorrect.

Moreover, and while TSE denies coordinating its defenses with Cobra,[4] it bases its Opposition to the Countermotion on the very caselaw that (i) forms the basis for Cobra's Motion to Dismiss, which (ii) is based on the caselaw cited in TSE's Opposition (which this Court rejected) to Brahma's Motion to Consolidate. Irrespective of the obvious coordination designed to drain resources and delay this case from a trial on the merits that Cobra and TSE plainly fear, TSE and Cobra are both wrong.

As explained in Brahma's Opposition and Countermotion, *Sarge* does not preclude merger

[2] See Brahma Opposition and Countermotion pp. 13-14.
[3] See TSE Opposition p. 7.
[4] See *id.* It is worth noting that TSE provides no evidentiary support for this or any other factual assertions set forth by counsel in its brief.

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

"in appropriate circumstances."[5] At its core, *Sarge* involves an issue of ***appellate jurisdiction*** – i.e., whether "an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending."[6] Despite the plain language and clear purpose of the *Sarge* decision, TSE offers no explanation for why an issue of appellate jurisdiction would preclude the trial court from allowing a single consolidated pleading even if doing so constitutes merger in whole or in part for trial court purposes.

As Brahma points out in its Opposition and Countermotion, the *Hall* case upon which *Sarge* and TSE rely, plainly reserves to the trial court the discretion as to whether and to what extent it may consolidate cases. Specifically, *Hall* holds that consolidation under Rule 42(a) does not necessarily constitute merger and, for purposes of appellate jurisdiction does not constitute merger. However, it goes no further and specifically concludes: "***This decision does not mean that district courts may not consolidate cases for all purposes in appropriate circumstances***."[7]

Hall reiterates and explains this conclusion as follows:

> None of this means that district courts may not consolidate cases for "all purposes" in appropriate circumstances. District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases. See 9A Wright & Miller § 2383 (collecting cases). What our decision does mean is that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party. That is, after all, the point at which, by definition, a "district court disassociates itself from a case." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). We thus express no view on any issue arising prior to that time.[8]

Stated differently, Hall confirms the trial court's wide discretion in the manner in which it will consolidate cases while simultaneously allowing that the constituent cases may be appealed from based on final orders applicable to those constituent cases alone. Not only does *Hall* not stand for the proposition that the trial court is "prevented" from merging two consolidated cases into a single case, it expressly leaves that issue to the sound discretion of the trial court ***until a final judgment arises***, at which point the trial court "disassociates itself from the case" and the rule

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[5] See Brahma Opposition and Countermotion pp. 10-11 and *Hall*, 138 S. Ct. at 1122

[6] *Sarge*, 432 P.3d at 720 (holding that, consistent with federal practice, that such an order is immediately appealable as a final judgment).

[7] *Hall*, 138 S. Ct. at 1122.

[8] *Hall* at 1131

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

changes for purposes of appellate jurisdiction.

Sarge similarly goes no further and addresses ***only*** the issue of appellate jurisdiction: "We thus overrule our decision in *Mallin* ***to the extent*** it holds that cases consolidated in the district court become a single case ***for all appellate purposes***."[9]

TSE's opposition relies (in its entirety) on a faulty interpretation of *Sarge* and *Hall* and never addresses or contradicts the logical reasons why, post consolidation, it is appropriate for Brahma to file a single consolidated pleading. TSE would be hard pressed, for example, to explain why it makes sense to force Cobra (as it complained of in Cobra's Motion to Dismiss) to separately respond to Brahma's pleadings in both actions.[10] This same inconvenience applies to TSE, even as it argues for a ruling that requires such lack of economy. As discussed in Brahma's Opposition and Countermotion, such inconvenience exists only because TSE (Cobra's affiliate) refused to allow Brahma to file an amended pleading in the Lien Foreclosure Action, including a Third-Party Complaint Against Surety, Surety Bond and Principal Thereon that would have effectively brought Cobra and AHAC into the Lien Foreclosure Action and consolidated and simplified pleading for both actions.[11]

In asking to file a consolidated amended pleading, Brahma proposes nothing radical or prejudicial, but instead simply seeks to streamline the pleadings for the efficient administration of justice. Because nothing in *Sarge* or *Hall* precludes this proposition, and because TSE can identify no other discernible reason why this should not be, the Court should exercise its substantial discretion and permit Brahma to file its proposed amended consolidated pleading.

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.

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[9] *Sarge*, 432 P.3d at 722 (emphasis added).

[10] *See* Cobra Motion to Dismiss p. 7.

[11] *See* Brahma Opposition and Countermotion p. 9 and Exhibit 3.

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

CONCLUSION

Based on the foregoing, the Court should grant Brahma leave to file and serve the Proposed Consolidated Pleading in substantially the form set forth in its Opposition and Countermotion.

PEEL BRIMLEY LLP

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

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

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(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 15 day of April, 2019, I caused the above and foregoing document entitled, **BRAHMA GROUP, INC.'S REPLY TO TONOPAH SOLAR ENERGY'S OPPOSITION TO BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A SINGLE CONSOLIDATED AMENDED COMPLAINT,** to be served as follows:

☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

☐ Wiznet, the Court's electronic filing system;

☐ pursuant to EDCR 7.26, to be sent **via facsimile;**

☐ to be hand-delivered; and/or

☒ other electronic mail

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

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

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

Richard E. Haskin, Esq.
Daniel M. Hansen, Esq.
GIBBS GIDEN LOCHER TURNER
SENET & WITTBRODT LLP
1140 N. Town Center Drive, Suite 300
Las Vegas, NV 89144
rhaskin@gibbsgiden.com
Attorneys for H&E Equipment Services, Inc.

An Employee of Peel Brimley LLP

ORIGINAL

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

FILED
FIFTH JUDICIAL DISTRICT
APR 22 2019
Nye County Clerk
Deputy

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

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	CASE NO. : CV 39348 *Consolidated with*: Case No. CV39799 DEPT. NO. : 2 **BRAHMA GROUP, INC.'S:** **(I) SECOND AMENDED COMPLAINT; AND** **(II) FIRST AMENDED THIRD-PARTY COMPLAINT.** **[Arbitration Exemption: Amount in Controversy in Excess of $50,000]**
BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant, vs. TONOPAH SOLAR ENERGY LLC, a Delaware limited liability company; BOE BONDING COMPANIES I through X; DOES I through X; ROE CORPORATIONS I through X; and TOE TENANTS I through X, inclusive, Counterdefendants,	

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant and Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

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

SECOND AMENDED COMPLAINT

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

THE PARTIES

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

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

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

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

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

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

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

a. A Delaware limited liability company authorized to do business in Nye County and the State of Nevada;

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

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

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

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

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

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

6. Brahma does not know the true names of the individuals, corporations, partnerships and entities identified and named as Counterdefendants by the fictitious names of (collectively,

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

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

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

the "Doe Defendants"), (i) DOES I through X, (ii) ROE CORPORATIONS I through X, (iii) BOE BONDING COMPANIES I through X, and (iv) TOE TENANTS I through X. Brahma alleges that such Doe Defendants are responsible for damages suffered by Brahma as more fully discussed under the claims for relief set forth below. Brahma will request leave of this Honorable Court to amend this Second Amended Complaint to show the true names and capacities of each such fictitious Defendant when Brahma discovers such information.

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

FIRST CAUSE OF ACTION
(Breach of Contract)

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

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

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

11. As required by the Agreement, BGI has, and in the form and manner required by the Agreement, provided monthly invoices or payment applications (collectively, "Payment Applications") to TSE for the Work in an amount totaling more than Twenty-Six Million U.S. Dollars ($26,000,000.00).

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

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

a. Failing and/or refusing to pay monies owed to BGI for the Work; and

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

b. Otherwise failing and/or refusing to comply with the Agreement and Nevada law.

14. BGI is owed Twelve Million Eight Hundred Fifty-Nine Thousand Five Hundred Seventy-Seven and 74/100 Dollars ($12,859,577,74—"Outstanding Balance") from TSE for the Work.

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

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

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

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

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

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

a. Asserting pre-textual, extra-contractual and inaccurate reasons for withholding payment long after the time required by the Agreement and Nevada law had elapsed for payment to be made by TSE to BGI.

b. TSE has improperly withheld moneys totaling more than One Million U.S. Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1).

c. Furthermore, and even if the Agreement allowed TSE to withhold retention from monthly payments (which it does not), TSE's withholding of retention amounts retroactively aggregated from Payment Applications issued (and, in some cases, payments previously made) long ago constitutes extreme bad faith.

///

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

20. Due to the actions of TSE, BGI suffered damages in the amount of or exceeding the Outstanding Balance for which BGI is entitled to judgment in an amount to be determined at trial.

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

THIRD CAUSE OF ACTION
(Violation of NRS 624)

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

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

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

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

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

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

WHEREFORE, Brahma prays that this Honorable Court:

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

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

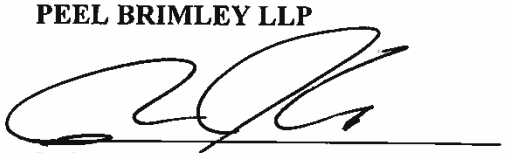
3. For such other and further relief as this Honorable Court deems just and proper in the premises.

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 19th day of April 2019.

PEEL BRIMLEY LLP



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

///

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

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

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

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

THE PARTIES

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

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

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

c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] TSE is a party to Brahma's Second Amended Complaint, filed in the Action.

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

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

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

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

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

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

b. Is the principal on the Surety Bond and the Rider; and

c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

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

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

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

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

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

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

a. The BLM; and

b. TSE, even though it had no statutory duty to do so.

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

14. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of $6,982,186.24.

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

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

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

18. On or about September 14, 2018 (as allowed by NRS 108.229(1)), Brahma recorded a Fourth Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada, as Document 899351 in the amount of $12,859,577.74 (the "Fourth Amended Lien").

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

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

c. In writing;

d. Recorded against the Work of Improvement; and

e. Were given or served on the authorized agents of the BLM and TSE, or the BLM and/or TSE knew of the existence of the Lien.

20. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents. ($12,859,577,74 - "Lienable Amount").

21. The Lienable Amount is due and owing Brahma as of the date of this Amended Third-Party Complaint.

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

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

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

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

26. Brahma makes claim against the Third-Party Defendants and AHAC is obligated to Brahma for the Lienable Amount plus interest, costs and attorney's fees up to the penal sum of the Surety Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

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

WHEREFORE, Brahma prays that this Honorable Court:

1. Enters judgment against the Third-Party Defendants and each of them, jointly and severally in the Lienable Amount;

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

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

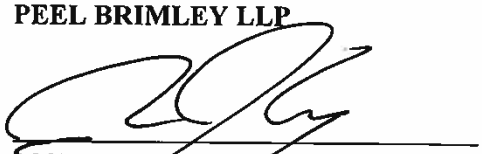
4. For such other and further relief as this Honorable Court deems just and proper in the premises.

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 19th day of April 2019.

PEEL BRIMLEY LLP



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

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

ORIGINAL

ORDR
RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
Attorneys for Brahma Group, Inc.

FILED
FIFTH JUDICIAL DISTRICT
APR 2 2 2019
Nye County Clerk
Deputy

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	CASE NO. : CV 39348 *Consolidated with*: Case No. CV39799 DEPT. NO. : 2 **ORDER GRANTING BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A SINGLE CONSOLIDATED AMENDED COMPLAINT**
BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant, vs. TONOPAH SOLAR ENERGY LLC, a Delaware limited liability company; BOE BONDING COMPANIES I through X; DOES I through X; ROE CORPORATIONS I through X; and TOE TENANTS I through X, inclusive, Counterdefendants,	

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

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant and Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

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

ORDER GRANTING BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A SINGLE CONSOLIDATED AMENDED COMPLAINT

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

The Court having considered all the pleadings and papers on file, and having heard argument of counsel, hereby **ORDERS** as follows:

1. Brahma's Countermotion is **GRANTED;** and
2. Brahma is granted leave to file the Consolidated Amended Pleading (titled "Brahma Group, Inc.'s: (I) Second Amended Complaint; and (II) First Amended Third-Party Complaint") substantially in the form attached hereto as Exhibit "A;" and

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[1] Brahma filed its Countermotion in connection with and as part of its Opposition to the Motion to Dismiss filed by filed by Third-Party Defendant Cobra Thermosolar Plants, Inc. ("Cobra"). By way of a separate Stipulation and Order for Partial Dismissal, Cobra withdrew its Motion to Dismiss.

3. Nothing in this Order shall be deemed to mean that the constituent cases of this consolidated action (Case No. CV39348 and Case No. CV39799) do not "retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) citing *Hall v. Hall*, 138 S. Ct. 1118, 1131, 200 L. Ed. 2d 399 (2018).

Dated this ___ day April 2019.

SENIOR JUDGE STEVEN ELLIOTT

Submitted by:
PEEL BRIMLEY LLP

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

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

3. Nothing in this Order shall be deemed to mean that the constituent cases of this consolidated action (Case No. CV39348 and Case No. CV39799) do not "retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Matter of Estate of Sarge*, 134 Nev. Adv. Op. 105, 432 P.3d 718, 722 (2018) citing *Hall v. Hall*, 138 S. Ct. 1118, 1131, 200 L. Ed. 2d 399 (2018).

Dated this 22 day April 2019.

SENIOR JUDGE STEVEN ELLIOTT

Submitted by:
PEEL BRIMLEY LLP

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

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

Exhibit A

RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RONALD J. COX, ESQ.
Nevada Bar No. 12723
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272
Facsimile: (702) 990-7273
rpeel@peelbrimley.com
ezimbelman@peelbrimley.com
rcox@peelbrimley.com
Attorneys for Brahma Group, Inc.

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

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company, Plaintiff, vs. BRAHMA GROUP, INC., a Nevada corporation, Defendant.	CASE NO. : CV 39348 *Consolidated with*: Case No. CV39799 DEPT. NO. : 2 **BRAHMA GROUP, INC.'S:** **(I) SECOND AMENDED COMPLAINT; AND** **(II) FIRST AMENDED THIRD-PARTY COMPLAINT.** **[Arbitration Exemption: Amount in Controversy in Excess of $50,000]**
BRAHMA GROUP, INC., a Nevada corporation, Lien/Bond Claimant, vs. TONOPAH SOLAR ENERGY LLC, a Delaware limited liability company; BOE BONDING COMPANIES I through X; DOES I through X; ROE CORPORATIONS I through X; and TOE TENANTS I through X, inclusive, Counterdefendants,	

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant and Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

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

SECOND AMENDED COMPLAINT

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

THE PARTIES

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

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

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

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

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

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

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

a. A Delaware limited liability company authorized to do business in Nye County and the State of Nevada;

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

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

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

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

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

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

6. Brahma does not know the true names of the individuals, corporations, partnerships and entities identified and named as Counterdefendants by the fictitious names of (collectively,

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

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

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

the "Doe Defendants"), (i) DOES I through X, (ii) ROE CORPORATIONS I through X, (iii) BOE BONDING COMPANIES I through X, and (iv) TOE TENANTS I through X. Brahma alleges that such Doe Defendants are responsible for damages suffered by Brahma as more fully discussed under the claims for relief set forth below. Brahma will request leave of this Honorable Court to amend this Second Amended Complaint to show the true names and capacities of each such fictitious Defendant when Brahma discovers such information.

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

FIRST CAUSE OF ACTION
(Breach of Contract)

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

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

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

11. As required by the Agreement, BGI has, and in the form and manner required by the Agreement, provided monthly invoices or payment applications (collectively, "Payment Applications") to TSE for the Work in an amount totaling more than Twenty-Six Million U.S. Dollars ($26,000,000.00).

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

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

a. Failing and/or refusing to pay monies owed to BGI for the Work; and

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

b. Otherwise failing and/or refusing to comply with the Agreement and Nevada law.

14. BGI is owed Twelve Million Eight Hundred Fifty-Nine Thousand Five Hundred Seventy-Seven and 74/100 Dollars ($12,859,577,74—"Outstanding Balance") from TSE for the Work.

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

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

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

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

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

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

a. Asserting pre-textual, extra-contractual and inaccurate reasons for withholding payment long after the time required by the Agreement and Nevada law had elapsed for payment to be made by TSE to BGI.

b. TSE has improperly withheld moneys totaling more than One Million U.S. Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1).

c. Furthermore, and even if the Agreement allowed TSE to withhold retention from monthly payments (which it does not), TSE's withholding of retention amounts retroactively aggregated from Payment Applications issued (and, in some cases, payments previously made) long ago constitutes extreme bad faith.

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

20. Due to the actions of TSE, BGI suffered damages in the amount of or exceeding the Outstanding Balance for which BGI is entitled to judgment in an amount to be determined at trial.

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

THIRD CAUSE OF ACTION
(Violation of NRS 624)

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

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

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

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

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

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

WHEREFORE, Brahma prays that this Honorable Court:

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

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

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

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this ____ day of April 2019.

PEEL BRIMLEY LLP

_____

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

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

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

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

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

THE PARTIES

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

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

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

c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] TSE is a party to Brahma's Second Amended Complaint, filed in the Action.

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

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

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

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

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

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

b. Is the principal on the Surety Bond and the Rider; and

c. Is a party to a negotiated settlement between Cobra and Brahma for the payment of monies owed to Brahma for work Brahma performed directly for Cobra ("Cobra Work") at the Project.

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

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

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

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

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

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

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

a. The BLM; and

b. TSE, even though it had no statutory duty to do so.

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

14. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of $6,982,186.24.

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

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

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

18. On or about September 14, 2018 (as allowed by NRS 108.229(1)), Brahma recorded a Fourth Amended and/or Restated Notice of Lien in the Official Records of Nye County, Nevada, as Document 899351 in the amount of $12,859,577.74 (the "Fourth Amended Lien").

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

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

c. In writing;

d. Recorded against the Work of Improvement; and

e. Were given or served on the authorized agents of the BLM and TSE, or the BLM and/or TSE knew of the existence of the Lien.

20. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents. ($12,859,577,74 - "Lienable Amount").

21. The Lienable Amount is due and owing Brahma as of the date of this Amended Third-Party Complaint.

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

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

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

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

26. Brahma makes claim against the Third-Party Defendants and AHAC is obligated to Brahma for the Lienable Amount plus interest, costs and attorney's fees up to the penal sum of the Surety Bond and Rider as provided in Chapter 108 of the Nevada Revised Statutes.

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

WHEREFORE, Brahma prays that this Honorable Court:

1. Enters judgment against the Third-Party Defendants and each of them, jointly and severally in the Lienable Amount;

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

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

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

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 ____ day of April 2019.

PEEL BRIMLEY LLP

_____

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

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

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRAHMA GROUP, INC., a Nevada corporation,	Case No. 2:18-cv-01747-RFB-GWF
Plaintiff,	Las Vegas, Nevada Tuesday, June 25, 2019
vs.	2:42 p.m.
TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company,	MOTION HEARING
Defendant.	

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

Counter-claimant,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Counter-defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE HONORABLE RICHARD F. BOULWARE, II,
UNITED STATES DISTRICT JUDGE

APPEARANCES: See next page

COURT REPORTER: Patricia L. Ganci, RMR, CRR
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

APPEARANCES:

For the Plaintiff:
ERIC ZIMBELMAN, ESQ.
RICHARD LESLIE PEEL, ESQ.
PEEL BRIMLEY, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
(702) 990-7272

For the Defendant:
D. LEE ROBERTS, JR., ESQ.
COLBY BALKENBUSH, ESQ.
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
6385 S. Rainbow Boulevard, Suite 400
Las Vegas, Nevada 89118
(702) 938-3838

LAS VEGAS, NEVADA; TUESDAY, JUNE 25, 2019; 2:42 P.M.

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P R O C E E D I N G S

COURTROOM ADMINISTRATOR: Now calling Brahma Group, Incorporated versus Tonopah Solar Energy, LLC, Case Number 2:18-cv-01747-RFB-GWF. This is the time for the hearing regarding Docket 13, motion to stay case or in the alternative motion to amend complaint, and Docket 16, motion for permanent injunction.

Starting with counsel for plaintiff, please note your appearance for the record.

MR. ZIMBELMAN: Good afternoon, Your Honor. Eric Zimbelman on behalf of Brahma Group, Inc. With me is my partner, Richard Peel.

MR. PEEL: Good afternoon, Your Honor.

MR. ZIMBELMAN: And in the courtroom today is David Zimmerman, who is the vice president and general counsel of Brahma.

THE COURT: Good afternoon.

MR. ROBERTS: Good afternoon, Your Honor. Lee Roberts appearing for Tonopah Solar, and with me is Colby Balkenbush also of Weinberg Wheeler Hudgins, Gunn & Dial.

THE COURT: Good afternoon. So we have a few issues to discuss here. Why don't we start with -- I'm sorry. Who's arguing this on behalf of Brahma?

MR. ZIMBELMAN: I will be, Your Honor.

THE COURT: And, I'm sorry, Mr.?

MR. ZIMBELMAN: Zimbelman.

(Court conferring with courtroom administrator.)

THE COURT: Mr. Zimbelman, I have a basic question. If you're admitting that you made a mistake, why shouldn't I just dismiss this case outright?

MR. ZIMBELMAN: May I approach? Because I'm having a hard time hearing Your Honor.

THE COURT: Sure.

MR. ZIMBELMAN: Please ask that again if you don't mind.

THE COURT: Right. Why aren't you just withdrawing this federal case?

MR. ZIMBELMAN: Why are we not just withdrawing?

THE COURT: Well, I mean, why didn't you dismiss the case? Or because the other thing is there are a couple of arguments here about where the case could be brought.

MR. ZIMBELMAN: Right.

THE COURT: You admit that it was, according to you, a mistake to bring it in Clark County.

MR. ZIMBELMAN: We do. And, well, let me -- let me preface that by saying that Mr. Roberts' clients don't agree with that position.

THE COURT: Well, I'm not asking them. I'm asking you

right now.

MR. ZIMBELMAN: Well, their position is that the --

THE COURT: I'm not asking their position.

MR. ZIMBELMAN: I understand.

THE COURT: So I want you to answer --

MR. ZIMBELMAN: We felt -- we felt that the forum-selection clause, as it were, in paragraph 24 of the agreement is permissive. We believe that.

We initially were under the mistaken impression that it wasn't. And we actually approached Mr. Roberts and we said, "Look, this case has got to be tried together. Right. We have these land claims. We now have bond claims involving other parties who are nondiverse" --

THE COURT: But that wouldn't necessarily defeat diversity jurisdiction later.

MR. ZIMBELMAN: Might not, but it might.

THE COURT: So, I mean, right now the case that I have is an amended complaint --

MR. ZIMBELMAN: Yes.

THE COURT: -- with diverse parties. You don't dispute that?

MR. ZIMBELMAN: No, not at all. In fact, I absolutely 100 percent agree this court has jurisdiction over this action --

THE COURT: Right.

MR. ZIMBELMAN: -- as it stands right now.

THE COURT: Right.

MR. ZIMBELMAN: We are not disputing that 100 percent.

THE COURT: Okay. So I'm trying to clarify that. Okay. But you're now asking me to stay this case.

MR. ZIMBELMAN: That is correct.

THE COURT: Now, I want to make sure I'm understanding. There is not a current lien because there's a bond covering the alleged claimed work, disputed work, correct?

MR. ZIMBELMAN: I'm sorry, Your Honor. I ...

THE COURT: There have been a series of liens that have been filed in this case. However, my understanding is that there is a surety bond that has been posted that has covered the liens and, therefore, there's no current lien against the property. Is that correct?

MR. ZIMBELMAN: There is a -- there are two surety bonds. There is a surety bond that was posted to transfer the lien from the work of improvement, which includes real property, to the surety bond, and that is on behalf of Brahma, the Brahma lien as it were.

THE COURT: Right. Is there any lien against the property now?

MR. ZIMBELMAN: Not by my client.

THE COURT: By anyone?

MR. ZIMBELMAN: Well, I can't answer that question.

THE COURT: But you would be informed about that.

MR. ZIMBELMAN: That I'm aware of, no.

THE COURT: I assume both parties are checking the record to make that determination. So as far as liens, let's start with the part -- on behalf of your client, there's no current lien against that property that had previously been liened. Is that correct?

MR. ZIMBELMAN: Correct, that I'm aware of that we have been notified of in any way.

THE COURT: Okay. All right. So there's no current motion as it relates to those liens as there had been previously for previous liens. Is that correct?

So there's a motion to expunge the lien that was previously addressed by Judge Elliott.

MR. ZIMBELMAN: That's true. That is now on appeal, by the way.

THE COURT: Right, but there's -- but there are no, right, current liens and no current motion practice as it relates to existing liens in Nye County. Is that correct?

MR. ZIMBELMAN: There are no motions pending that relate directly to a lien claim or an attempt to expunge or attempt to reduce or anything like that that is currently pending. That's true.

THE COURT: Okay. So I'm just trying to clarify where we are now.

So ...

MR. ZIMBELMAN: We are pursuing those lien claims.

THE COURT: Well, I understand that.

MR. ZIMBELMAN: Yeah.

THE COURT: So, and I want to understand sort of the lay of the land. Is there any other State Court action that's filed in this case?

MR. ZIMBELMAN: So one thing the court may not be aware of because it occurred subsequent to all of the briefing, we had a motion that I believe they've provided you some documentation on, their motion to Judge Elliott in Nye County saying, hey, you know, these guys shouldn't have been able to file a complaint in the special proceeding, the motion to expunge that they commenced back in June, the very first -- well, that's not even the very first, but for our purposes the first action that was commenced in Nye County.

And we filed a complaint after the judge had denied their motion to expunge and we said, "Well, great. We want to file our foreclosure complaint." We did that. We subsequently amended that maybe a week or so later. And they brought a motion to Judge Elliott and asked him to dismiss or strike that on the grounds that, their position which they've asserted here as well, that we didn't have a right to file a complaint in a special proceeding. Judge Elliott looked at Nevada law and he said, "No, I don't agree with that. I think that's incorrect.

I think you had a right to do that and you did that."

Now, the other thing they said in their motion --

THE COURT: Well, hold on, but let me clarify this. I want to make sure I'm understanding. What current -- other than the appeal of Judge Elliott's decision on the motion to expunge, what current state case involving these parties --

MR. ZIMBELMAN: I'm getting there --

(Court reporter interruption.)

THE COURT: What current state case exists in Nye County, if any, that involves the dispute between the parties regarding this issue?

MR. ZIMBELMAN: So -- and I don't mean to be long winded. I just want to make sure you understand how this came about. There is a second --

THE COURT: Well, no, but you have to stop -- you have to ask -- answer my direct question.

MR. ZIMBELMAN: The answer is yes.

THE COURT: Okay. So thank you. So what is that?

MR. ZIMBELMAN: Yes, that case is a separate action that we filed. Again, it's actually this time against the bond because by that point in time the bond had been -- had been posted. And that action has been consolidated with --

THE COURT: Hold on.

MR. ZIMBELMAN: -- the action that came --

THE COURT: Hold on. That is a case that you have

filed?

MR. ZIMBELMAN: That's correct.

THE COURT: In Nye County?

MR. ZIMBELMAN: That's correct.

THE COURT: Against whom?

MR. ZIMBELMAN: Against Cobra and American Home, its surety, and we amended to include claims against TSE as well.

THE COURT: And that was filed when?

MR. ZIMBELMAN: I want to say October or November of 2018.

THE COURT: Before or after you filed the complaint in this case?

MR. ZIMBELMAN: After.

THE COURT: Okay.

MR. ZIMBELMAN: And Judge Elliott --

THE COURT: And when -- hold on a second.

MR. ZIMBELMAN: Sorry.

THE COURT: Because I'm trying to get the timing. And was TSE part of that initial filing or did you amend to add claims against them?

MR. ZIMBELMAN: Yeah, we amended to add claims.

THE COURT: And when did you do that?

MR. ZIMBELMAN: Almost immediately thereafter. So, again, November/December I want to say.

THE COURT: Okay. So November/December of 2018 is when

you file or amend -- have amended claims against TSE with respect to the bond -- surety bond?

MR. ZIMBELMAN: Well --

THE COURT: And the claims that are regarding the agreement you have regarding the work to be performed.

MR. ZIMBELMAN: Right. So TSE didn't post the surety bond.

THE COURT: Cobra.

MR. ZIMBELMAN: Somebody else did.

THE COURT: Right.

MR. ZIMBELMAN: Yeah.

THE COURT: So -- but I -- okay. So, because I want to make sure that I'm aware of all of the different actions that are proceeding --

MR. ZIMBELMAN: That's fair.

THE COURT: -- to understand what would be the relief either side would obtain.

So as I understand it, then, right now currently you have an appeal proceeding relating to Judge Elliott's Nye County -- Judge Elliott's from Nye County order regarding the motion to expunge. And there is also I understand -- I don't know if they issued an order as relates to the fees regarding the outcome of that, correct? That's one proceeding.

MR. ZIMBELMAN: There is one other.

THE COURT: Okay. Well, let me finish my list.

In addition to that, you have a separate proceeding brought in Nye County that initially related to the bond that has since added counterclaims for TSE, correct?

MR. ZIMBELMAN: Correct.

THE COURT: Are there any other State Court proceedings that are going forward?

MR. ZIMBELMAN: Yes.

THE COURT: Okay.

MR. ZIMBELMAN: There is a writ petition that TSE filed arising out of the district court's, Nye County District Court's, denial of their motion to strike or dismiss our complaint, our foreclosure complaint as amended.

THE COURT: Which is the second action that I -- okay.

MR. ZIMBELMAN: The first.

THE COURT: So you -- okay. So the first one you filed --

MR. ZIMBELMAN: And they --

THE COURT: Hold on. Let me finish.

MR. ZIMBELMAN: Sorry.

THE COURT: You filed the foreclosure complaint.

MR. ZIMBELMAN: Right.

THE COURT: And Judge Elliott said that it was proper for you to file the foreclosure complaint, and he's proceeding or is going to proceed on that. And they filed a writ to say you can't proceed until this is decided.

MR. ZIMBELMAN: That's correct.

THE COURT: So the foreclosure complaint would have addressed some of the issues that are raised in this federal action based upon the original complaint that was filed in Clark County.

MR. ZIMBELMAN: That's true.

THE COURT: Okay.

MR. ZIMBELMAN: No, not in Clark County; in Nye County.

THE COURT: No. Well, you also filed here in Clark County.

MR. ZIMBELMAN: That's true.

THE COURT: Right.

MR. ZIMBELMAN: Yeah.

THE COURT: And I'm saying the complaint you filed in Clark County has some overlap with the foreclosure complaint that you filed in Nye County.

MR. ZIMBELMAN: That is correct.

THE COURT: Okay.

MR. ZIMBELMAN: Yeah.

THE COURT: But the foreclosure complaint that you filed in Nye County is on hold pending a decision on the writ.

MR. ZIMBELMAN: No.

THE COURT: Okay. So --

MR. ZIMBELMAN: What is on hold are the -- what they're calling the copycat claims, right, the ones that were here that

we removed by way of amendment and that are back in Nye County.

THE COURT: And they're on hold --

MR. ZIMBELMAN: Those claims --

THE COURT: I'm sorry. Go ahead.

MR. ZIMBELMAN: Those claims have been stayed pending a hearing on these motions, what we're here for today.

THE COURT: And stayed by whom?

MR. ZIMBELMAN: By Judge Elliott who wanted this court to give its opinion. He wanted a ruling on those issues before -- he felt that that was fair I think is basically what he decided. He denied their motion to strike. He denied their motion to dismiss, but he granted a stay with respect to those causes of action until this court rules on these motions.

THE COURT: Okay.

Would a decision on the original issues raised in the complaint in this case resolve the foreclosure complaint that was filed in Nye County?

MR. ZIMBELMAN: Yes.

THE COURT: Okay. So, now, let's go to the issue of the enforceability or not of the forum-selection clause.

MR. ZIMBELMAN: Sure.

THE COURT: Because it seems to me you have two arguments. One is that it's permissive; not mandatory.

MR. ZIMBELMAN: Right.

THE COURT: The other is that it's void as a matter of

policy, which would then be potentially dispositive of some of the issues here. So let's address that first because I think that's the toughest argument for you because I'm not sure how it's void as a matter of policy where you agreed --

MR. ZIMBELMAN: I'm sorry. I need to grab my glasses.

THE COURT: Sure.

MR. ZIMBELMAN: May I ask the court what you mean by dispositive? Because we're -- I think we're here regardless.

THE COURT: There's an argument about -- notwithstanding your agreement to the clause, right, that pursuant to N.R.S. 13.010, right?

MR. ZIMBELMAN: Uh-hmm.

THE COURT: That there -- this case should still be brought in Nye County, right?

MR. ZIMBELMAN: That is true.

THE COURT: And if I were to find that the forum-selection clause was unenforceable as a matter of policy, it would seem to me that would then dictate that the court stay this proceeding potentially and allow the claims to proceed in Nye County, which is your argument, correct?

MR. ZIMBELMAN: Well, that's part of our argument, certainly.

THE COURT: As to that particular issue.

MR. ZIMBELMAN: Well, I think the argument that we've made -- and the reason we made that argument to you is not that

we necessarily need that decided today, but what we -- what we believe is fundamentally that this is a -- that the issues or the causes of action that are before you today, right, with respect to their motion for an injunction specifically are part of a bigger package --

THE COURT: Right. Okay.

MR. ZIMBELMAN: -- that really can't be separated.

THE COURT: Well, look, this court handles diversity actions under state law all the time.

MR. ZIMBELMAN: Of course.

THE COURT: Right. So the idea that it -- that the claims arise out of Nevada law, even the liens or all of that, is not unique, right. That happens in diversity actions all the time.

MR. ZIMBELMAN: Certainly.

THE COURT: And so what I'm trying to figure out is given the fact that what I have now in terms of looking at sort of abstention or not or staying is an action that's before me through diversity jurisdiction whereby this court would have the authority to decide state law issues. And it seems to me the only impediment legally that the court would have would be potentially if I were to find that as a matter of public policy you couldn't be or you couldn't have brought the suit here. Because, otherwise, the court can simply find you brought the suit here. There's diversity jurisdiction. This court can

decide all of those issues, and we just move forward. I would potentially allow you to amend to add back in the claims, and we would just go forward.

I don't really understand why that wouldn't happen in this case, and the only issue it seems to me that the court has to resolve is the issue about the enforceability about that clause. Because if it's not -- if it doesn't require as a matter of public policy that this case be dismissed because it wasn't properly brought here, because that clause is void, then the case just needs to proceed.

MR. ZIMBELMAN: Okay. I understand that.

THE COURT: So that's why I'm focussed on that because from my perspective that's one of the main issues here.

MR. ZIMBELMAN: Okay. I think I understand your question now and thank you for clarifying it, Your Honor.

And I agree with you and I disagree with you, and let me explain why if I may. I agree with you that the -- that there is Nevada public policy as expressed in the Nevada lien statute that says that any condition, stipulation, or provision in any contract may not alter or waive or require a lien claimant to give up in any way, shape, or form the rights that are afforded to it by the Nevada lien statute. And the Nevada lien statute expressly describes where lien claims need to be brought.

Now, it doesn't say that this applies to every other

claim in the world, but the lien claims cannot be separated from the contract claims in an important respect. A lien --

THE COURT: Okay. But you're not answering my question, which is I'm not saying that you wouldn't have -- your client wouldn't have those rights under the lien statute. The issue is you made an argument that this is the wrong forum because of Section 13.010 essentially trumping the forum clause, right. That is not -- so that's the issue I'm focussed on, right.

You brought the case in Clark County, right. I'm not saying in any way that any of the rights that would exist under 108.2421 or 108.2453 would in any be abridged in this action. It's a diversity action. State law would apply.

MR. PEEL: Your Honor --

THE COURT: So we have one -- I'm sorry. Do you want to bring something in?

MR. PEEL: Can I present this book to Eric?

THE COURT: Sure.

MR. PEEL: Mr. Zimbelman. Go ahead.

THE COURT: And so ...

(Plaintiff's counsel conferring.)

THE COURT: You made the argument --

MR. ZIMBELMAN: Yes.

THE COURT: -- on page 12 of your -- and I'm looking at your response to the motion for a preliminary injunction --

MR. ZIMBELMAN: Right.

THE COURT: -- and motion to strike that says that Section 10 -- Section 13.010 sort of essentially prevents any action from being -- commencing anywhere else except Nye County, right?

MR. ZIMBELMAN: Right, unless there's a contract specifically to the contrary.

THE COURT: Well, this contract allows for that to be brought. And all I'm saying to you is if I find that that clause is not unenforceable such that the action could be brought in Clark County, particularly where you brought it, why wouldn't this case then proceed in this court?

MR. ZIMBELMAN: So, first of all, because N.R.S. 108.2421 states that the lien claimant is entitled to bring an action against the principal and the surety on the surety bond and the lien claimant's debtor in any court or competent jurisdiction that is located within the county where the property upon work for improvement is located. The lien claim's debtor in this case is TSE.

THE COURT: Well, I understand that, but that doesn't appear to me to be an exclusive clause. Does it say it can't be brought elsewhere? And can you point me to Nevada law that says that that means that it can only be brought there?

MR. ZIMBELMAN: Yes, a lien claim can only be brought in the county in which ...

THE COURT: Right, except -- except you've agreed to subject yourself to Clark County and you filed a separate action.

MR. ZIMBELMAN: True.

THE COURT: And you didn't move, right, to withdraw. You haven't moved to withdraw those claims, right. You still want to pursue those claims. I'm trying to understand how you can both say we can proceed with those claims that are related to that lien and then say, well, but we still want to maintain a parallel action in Nye County, which I don't see how that works. And I don't see how in this context the court wouldn't find that you've agreed to subject yourself to the jurisdiction here, and that the court would decide your claims to the extent that they overlap with the other claims in this jurisdiction.

I don't see -- and, I mean, this is a somewhat unusual case. I don't see any Nevada law that says that in this context the court should dismiss a case that was brought in a different jurisdiction which had other claims, but it included the foreclosure complaint. The reality of it is also, Mr. -- and, I'm sorry, is it --

MR. ZIMBELMAN: Zimbelman.

THE COURT: Zimbelman.

MR. ZIMBELMAN: Yes.

THE COURT: -- is I could simply say I'm going to let the claims proceed. You don't have to bring your foreclosure

complaint here. That's in Nye County. You can bring all of the other claims here.

MR. ZIMBELMAN: Sure.

THE COURT: This court had the first -- had an action that was filed here prior to that and the court will address that. That way we're not even addressing this issue of the complaint being filed pursuant to that, because that was filed in Nye County. This court will just go forward with the other claims, and then Judge Elliott can decide how he wished to proceed in that case. But it seems to me that I have other claims that are brought here and now counterclaims that are brought in this action that could proceed nonetheless before me.

And I guess what I understand you to be saying is what should happen is because you think that complaint can only be brought in Nye County this court should stay the action and then allow the parties to go back to Nye County to bring all of their claims and counterclaims there. Is that what you're saying?

MR. ZIMBELMAN: I think what I'm saying is not precisely that, Your Honor.

THE COURT: Okay.

MR. ZIMBELMAN: What I am saying is that irrespective of whether or not the complaint -- let's assume for a minute that the forum-selection clause required us to file in Clark County, all right, that the contract itself split the causes of action by forcing us -- as we had mistakenly believed, forcing

us to file those contract and N.R.S. 624 claims in Clark County while maintaining our lien action in Nye County. Even if that's true, we're asking Your Honor not to dismiss this case and we're not asking Your Honor to say that you don't have jurisdiction over this case.

What we're asking you to do is to abstain under the Colorado River doctrine. We're asking you to say, "Yeah, I do have jurisdiction. I can proceed. I can deny your motion and proceed and let you bring your contract and N.R.S. 624 claims back here." And we'll proceed on that while whatever happens in Nye County happens in Nye County. We can do that.

But if we do that, we are going to have a very -- an extraordinary chance to see inconsistent rulings, to have parallel and very non-efficient proceedings. It will be expensive. It will not honor judicial economy. And it, again, could result in inconsistent rulings because we're going to proceed in Nye County and we're going to pursue the surety bond. And we're going to pursue those claims and Cobra, not TSE, but Cobra is going to have to defend that along with their surety.

And we're going to make the same arguments there that we make here. And they 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 here that might be here

and vice versa, but by in large the facts are going to be the same. The issues are going to be the same.

And one court is going to rule one way and the other court is going to possibly rule that way or possibly another way.

THE COURT: Or wait. One of us is going to have to wait. I mean, it's not as if one -- you're asking one of us to wait. I mean, most likely what would happen --

MR. ZIMBELMAN: Yeah.

THE COURT: -- is either Judge Elliott or myself -- it's possible, but not likely that we would proceed along the same lines. And I take from what he's done in terms of staying that he's waiting to see what I'm going to do. Otherwise, he wouldn't have stayed his consideration of the other portions of that complaint.

So the question becomes for me is, one -- and I think you've offered your argument, which is your position is that the different and varying claims and counterclaims all overlap. Because it's not clear to me that the standard under, sort of, the foreclosure complaint you filed is the same as the standard that we apply for all of the claims and counterclaims because those elements are not all the same, the parties are not all the same. So even the decision on the foreclosure complaint is not going to resolve all of the claims and counterclaims before me, right?

MR. ZIMBELMAN: Only because those specific causes of action are not enumerated, but 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.

THE COURT: But they haven't been made yet. So, in other words, in terms of the complaint that's there now, it doesn't have all of the claims that I have?

MR. ZIMBELMAN: Well, the affirmative defenses to our lien claim does in many ways elucidate those same defenses that TSE is asserting by way of its counterclaim here, yes. I'd say they are very, very similar.

THE COURT: Okay.

Well, let me hear from -- it's difficult to call you plaintiffs versus defense counsel because you guys have switched positions and different courtrooms.

MR. ZIMBELMAN: Absolutely.

THE COURT: But let me hear from opposing counsel, Mr. Zimbelman. Thank you.

MR. ZIMBELMAN: Thank you, Your Honor.

THE COURT: As relates to the arguments here.

MR. ROBERTS: Thank you, Your Honor. Would it be convenient for the court for me to address you from counsel table so I have access to my books? Or I'd be happy to move up if that would allow you --

THE COURT: Well, it's not so much my convenience.

(Court conferring with court reporter.)

MR. ROBERTS: Okay. I can bring my books up here. I think I've got room for everything, Your Honor.

THE COURT: Okay.

MR. ROBERTS: Too much paper in this case.

THE COURT: That's all right. Just make sure when you're speaking you're in front of a microphone.

MR. ROBERTS: Fair enough.

Thank you, Your Honor. Lee Roberts for Tonopah Solar Energy.

There -- based on the questions that you had for Mr. Zimbelman, I think it's important to clarify the procedural posture because I think I may disagree with his characterization of what's currently pending in State Court.

THE COURT: Okay.

MR. ROBERTS: So we start out with the filing. As Your Honor noted, they chose to file in Clark County on their contract claims. On September 10th we removed to Federal Court. On September 12th that's when the hearing on the motion to expunge was held.

THE COURT: On the second lien?

MR. ROBERTS: Well, I believe by that time it was on the fourth amended lien, Your Honor, but yes.

THE COURT: Okay. The fourth. Well, I wasn't sure if the motion tracks with the amendments to the lien or the motion was tied to a particular lien because it seems to me that actually may matter in this case. Because we haven't addressed one of the issues we may also come up with is the extent that the court has to give some sort of res judicata effect to what Judge Elliott previously decided even if I were to keep jurisdiction, but we'll set that aside for the moment to go through your review of the record. So keep going, please.

MR. ROBERTS: Okay. So then we come to September 20th. After we had removed, on September 20th Brahma filed a mechanic's lien foreclosure complaint into the special action.

THE COURT: Right.

MR. ROBERTS: So at that point that's what was in State Court against us. We were the main party on the lien, foreclosure action. And then on September 25th, five days later, they did two things simultaneously. One, they amended their complaint in this action to eliminate three causes of action.

THE COURT: Right. And just had the unjust enrichment, right.

MR. ROBERTS: On the same day they amended their lien

foreclosure action to add those three exact causes of action into the State Court. And that's what Judge Elliott has stayed, those three causes of action which were originally here and which they dismissed and refiled in State Court.

THE COURT: And, sorry, tell me -- I'm sorry. Is it Mr.?

MR. ROBERTS: Roberts.

THE COURT: Roberts. Is it your position that the claims that were added to the complaint there and removed from the complaint here and the counterclaim are all essentially overlapping to the extent that deciding those claims should all occur by the same court or judge?

MR. ROBERTS: I'm not positive I understand your question.

THE COURT: So, in other words, I assume that these claims are all going to be about the agreement that was reached between TSE and Brahma, what work was actually performed or not performed pursuant to the agreement, and what could or shouldn't be liened, right?

MR. ROBERTS: Well, if I could clarify one step further which is where I was going with this. Cobra was a contractor that worked for Tonopah Solar Energy, the developer. And Brahma was hired to complete their warranty work when they failed to complete their warranty claims. So we have a charge --

THE COURT: Was hired to complete when you say "their"?

MR. ROBERTS: Cobra's. Cobra's work that we felt was defective.

THE COURT: Right.

MR. ROBERTS: We demanded that they do it. They started, but then they didn't finish. So we hired Brahma to complete their warranty work, and we have a separate claim in International Arbitration against Cobra for them to pay us whatever it is that we owed Brahma. Pursuant to our contract with Cobra, we demanded that they bond off this lien which they did, which is why Cobra is on the bond and not us.

THE COURT: Right.

MR. ROBERTS: But as this court noted in your questions to Mr. Zimbelman, as soon as Cobra bonded off the lien there's no longer a lien foreclosure action. Now, there's an action against the bond.

So the only thing left against Tonopah in State Court in Nye County are these three causes of action which were originally here, dismissed, and put back there.

THE COURT: Because the bond covers what would have been addressed by that foreclosure complaint?

MR. ROBERTS: Correct, Your Honor.

THE COURT: Okay.

MR. ROBERTS: Now, Your Honor, I'm not going to -- this is not before you today. I have had similar actions where you have a bond that's posted and then you have a forum-selection

provision, for example arbitration, where the contractor's required to arbitrate, but wants to pursue his lien claims against the bond that's been posted. And what typically happens is the bond claim is stayed until the contract action is determined in the appropriate forum to determine that action. That's one way that the State Court could deal with this. Because although their action has to proceed against Cobra in State Court, basically what we owe them is what their claim is on the bond.

So it doesn't have to all be decided together. They could simply wait, litigate, have the court of correct jurisdiction determine what they're owed under their contract, and then they can collect on the bond whatever this court finds they're owed. So they don't have to be decided by the same court.

What's left there --

THE COURT: Well, but the question isn't whether or not they don't have to be decided. The question is whether or not they could be decided, because it seems to me I can't decide all of these claims necessarily, but the State Court could, right. There's a difference between the courts. The State Court could hear all of the claims that are brought in the case that I have, but I can't necessarily require or force the claims that are in State Court to proceed in front of me, correct?

MR. ROBERTS: I would disagree, Your Honor.

THE COURT: Well, how could I -- well, the Cobra bond claim, I can't force that case to come to Federal Court, right?

MR. ROBERTS: Absolutely, but you don't have to in order to grant complete relief to the parties in front of you.

THE COURT: I'm sorry. When you say --

MR. ROBERTS: There is no claim against us that needs to be decided in State Court.

THE COURT: That's not the question I'm asking you. There's a claim that involves Cobra --

MR. ROBERTS: Yes.

THE COURT: -- in State Court, right?

MR. ROBERTS: Yes, Your Honor.

THE COURT: Okay. That claim is not before me. I don't have the authority to force that case into Federal Court in this current case, correct?

MR. ROBERTS: Correct.

THE COURT: Okay. But that court could hear all of the claims that I have in that same action.

MR. ROBERTS: They could if it did not violate our right to remove to Federal Court --

THE COURT: Well, okay, that -- we can get to that.

MR. ROBERTS: -- and be heard in an impartial forum.

THE COURT: We can get to that, but part of this deals with the issue of also abstention and staying and what I should and how I should proceed from an efficiency standpoint. So

you're not disagreeing with the fact that, one, there's an overlap with these claims. Now, it does seem to me the overlap with the claims between your client and Cobra and your client and Brahma is actually not the same. There are different issues. There are different contractors. The only overlap is that Cobra was obligated to bond the issue of the work that was allegedly not compensated with respect to Brahma, but other than that, the disagreements between the parties are separate. Is that right?

MR. ROBERTS: Yes. Yes, Your Honor, in that --

THE COURT: To --

MR. ROBERTS: In that Cobra is not really a separate factual issue because Cobra just owes under the bond whatever we owe under the contract. It's just a guarantee that we're going to pay.

THE COURT: But you have -- you have a separate claim about the deficiency of their work.

MR. ROBERTS: Absolutely, Your Honor.

THE COURT: Is that in the State Court or is that part of this other claim you filed, this International claim?

MR. ROBERTS: It is in the State Court, but only because they dismissed it from here and refiled it in State Court after we had removed.

THE COURT: Okay. And what is exactly the claim that that is? I want to make sure I'm understanding which claim --

MR. ROBERTS: That is for breach of contract, Count One; breach of the implied covenant of good faith and fair dealing; and the third count is violation of N.R.S. 624.

THE COURT: And that's the claim that Brahma's brought against your client?

MR. ROBERTS: They brought that against my client in Clark County along with an unjust enrichment count.

THE COURT: Right.

MR. ROBERTS: We removed here. They dismissed three out of their four counts and left unjust enrichment pending here.

THE COURT: Got it. Okay.

So you're suggesting that I not abstain and we proceed. I let them amend to put their claims back into their complaint, and then we go forward.

MR. ROBERTS: Yes, Your Honor. And we're suggesting a little bit further than that, and this is the Cross case that we cited to the court out of the -- one of the district courts in Iowa, I believe. And that is very similar to this in the procedural posture. We're going a step further and saying you don't even get to the Colorado River abstention doctrine. You don't even get to that analysis if you find that the State Court has no jurisdiction because, once those three claims were removed to this court, this court has jurisdiction over them to the exclusion of the State Court until they're remanded. And

they filed no timely motion to remand.

So you never get to the abstention analysis because this court still has jurisdiction of those three claims which have been refiled in State Court.

THE COURT: And you're asking me to enjoin them from being able to pursue them further in State Court.

MR. ROBERTS: Yes, I am, Your Honor.

THE COURT: Under I think it was --

MR. ROBERTS: Under an exception to the Anti-Injunction Act.

THE COURT: Quackenbush or --

MR. ROBERTS: Yes, Quackenbush is one of the cases cited. Yes, Your Honor.

THE COURT: Because the case was properly removed and they don't dispute that. And the issue then is once it's properly removed and this court has jurisdiction then State Court actions can't be commenced to try to deprive this court of the jurisdiction that it has as a result of the removal.

MR. ROBERTS: Yes, Your Honor.

THE COURT: Okay. All right. Anything else you wanted to add?

MR. ROBERTS: One thing, Your Honor, and the court discussed the venue provision. And, interestingly, that might be one of the only reasons the Nye County court couldn't decide the contract claims. If the venue selection provision in the

contract is valid, they would have to be transferred back to Clark County where these claims were removed from. But then let's go a step further. Let's assume as the court was suggesting if the venue selection required the claims to be brought in Nye, but Brahma elected to bring them in Clark and we had not removed. The claims would not be dismissed for lack of jurisdiction. The court could transfer venue to the appropriate county where venue is proper.

So now we've removed those Clark County claims --

THE COURT: And they would still be removed here which is ...

MR. ROBERTS: They would still be removed here because --

THE COURT: Right, I mean, that was the separate issue which is potentially if the claims were brought -- even if Brahma had brought the claims in Nye County and you'd filed the removal --

MR. ROBERTS: They would still end up here.

THE COURT: -- they could still end up here. Now that's a ...

MR. ROBERTS: And this court is the proper court for venue in Clark County and Nye County.

THE COURT: Yes.

MR. ROBERTS: So it is proper for the court to have these claims here now that they have been removed, and we would

suggest that there's nothing improper or which would justify dismissal on that basis.

THE COURT: Well, but they're not asking to be able to at this point have the case dismissed and then refiled in Nye County.

MR. ROBERTS: Yes.

THE COURT: I mean, I'll ask Mr. Zimbelman about that, but I don't think that's what --

MR. ROBERTS: No.

THE COURT: -- they're suggesting.

MR. ROBERTS: I think you're right, Your Honor, that that is correct.

THE COURT: Okay. All right.

MR. ROBERTS: The only other thing that I did note when I was preparing for the hearing because it was after all of the papers had been briefed, Mr. Zimbelman mentioned our writ to the Nevada Supreme Court which is not part of the record. The Nevada Supreme Court has directed an answer to that writ. I have the writ and the order directing an answer which has not yet been filed. And I'm happy to provide a copy of that to the court if you're interested in it.

THE COURT: And the basis of the writ was?

MR. ROBERTS: The basis of the writ, there were actually three bases. The first area alleged was that you can't file a complaint into a special action because a Nevada civil

action can only be initiated through the filing of a complaint. And what we argue is the only reason they tried to file their complaint as a counterclaim into the special action was to avoid our ability to remove to this court as we would have had the right to do if they had filed it as a complaint because this was before Cobra got involved, before the subcontractor got involved.

If they had filed it the correct way, we would have simply removed it back up here, too. But they tried to file it into a special proceeding which was an improper way to initiate it as a way of avoiding federal jurisdiction.

So we do seek a writ on that basis. We say the court therefore should not have stayed these three causes of action. They should have dismissed them for lack of jurisdiction because there was no proper remand to the State Court.

The second basis is that the court had no jurisdiction because we had removed them to Federal Court, so it's very similar to the issue before the court here. And your decision may moot that second ground. And then the third ground was that the court should have exercised the first-filed rule, and because we had -- the Clark County action was filed first, that's the action that should have proceeded and that's up here.

So those were the three bases. Again, I don't know if the court feels that's controlling in any way, but if you're interested in having that, I'd be happy to --

THE COURT: And part of it is I still have to -- I mean, part of it is the consideration of what proceedings are moving forward or not.

MR. ROBERTS: Yes, Your Honor.

THE COURT: And what proceedings might even moot some of the issues that are raised before me as a matter of state law which the Nevada Supreme Court could actually decide. So if the Nevada Supreme Court said, for example, the complaint should not have been filed in a special proceeding, but should have been separately brought and, by the way, the complaint could have been also brought in Clark County, that pretty much would address the issues that are brought in front of me.

MR. ROBERTS: I don't think so, Your Honor, because if we lose, it's the same procedural posture we're in now. If we win, it makes that complaint go away which is even more reason for the court --

THE COURT: That's what I'm saying. What I'm saying is if you lose, I still have to decide those issues. But if you win, that effectively would force the case here, I believe, based upon the determination.

And I know what you're going to say to me is, well, I shouldn't wait. That's your concern. You think, I think, are not disputing, right, that if you win that helps your argument. You just don't want to wait.

MR. ROBERTS: I just don't want to wait.

THE COURT: Okay. That's fine. You can say that.

MR. ROBERTS: And we don't know how long it is going to take the court to rule on the writ, Your Honor.

THE COURT: No, no. And I appreciate that.

MR. ROBERTS: Fair enough.

THE COURT: It's not as if you don't recognize, I would assume, that if the court were to rule -- the Nevada Supreme Court were to rule in your favor or your client's favor, that would address some of the issues that are raised by Brahma in the motions before me.

MR. ROBERTS: Yes, I believe it would, Your Honor.

THE COURT: Okay. And I'm saying that in part because there has been a request to stay the case. The court has to consider all proceedings that are ongoing in State Court as it relates to abstention or not or whether and how that would be considered by this court. And so that's why I asked you that question.

So, is there anything else you wanted to add?

MR. ROBERTS: Nothing else, Your Honor.

THE COURT: All right. Thank you.

MR. ROBERTS: Thank you for your time.

THE COURT: Uh-huh.

Mr. Zimbelman, any final response?

MR. ZIMBELMAN: Thank you, Your Honor.

Just a couple of points. I want to be sure that I've

made this point. The lien foreclosure action that we filed could not have been filed in Clark County. It had to be filed in the county in which the work of improvement was located.

THE COURT: Okay. How -- let me ask this question. There's a bond now, right?

MR. ZIMBELMAN: Now.

THE COURT: Okay. But -- so are you saying that that action would still go forward even with the bond that exists now?

MR. ZIMBELMAN: That action can't go forward as a lien foreclosure -- as a foreclosure against the work of improvement, but it is still a lien foreclosure action, Your Honor. And I want to make that point as well.

THE COURT: Well, no, but that's not. It's a lien foreclosure action in which there are other proceedings that are brought into it. The lien part of it with the filing or with the surety bond being obtained, there's no lien that exists.

MR. ZIMBELMAN: That's not correct, Your Honor.

THE COURT: Okay. So how --

MR. ZIMBELMAN: There is still a lien. You just have a different surety for that lien. The bond purely is there to replace your surety. It removes the lien from the property and attaches it to the bond.

THE COURT: I understand that. That's not what I'm asking you. What I'm saying is, so you're saying that the

action proceeds not against obviously in terms of the lien, foreclosing on the lien, but you would still have an action as to whether or not there should still be payment or foreclosure of the amount of the lien?

MR. ZIMBELMAN: That is true. And that action is still pending in Nye County and has not been stayed.

THE COURT: Okay. And when you say it's not been stayed, what does that mean?

MR. ZIMBELMAN: Well, the -- again, I want to make sure you don't misunderstand. The stay that Judge Elliott entered was purely with respect to the three causes of action that had been part of the Clark County case that was removed to this court and then by way of amendment, not dismissal, but by way of amendment are no longer here --

THE COURT: Right.

MR. ZIMBELMAN: -- and are now back in Nye County. Those three causes of action are the only parts of that case that are stayed. The foreclosure action against now the surety bond is not stayed. It's going forward. We have had our joint case conference report filed. I think it's been filed today. And we're going to proceed in discovery.

THE COURT: Okay. So that portion of the case is moving forward?

MR. ZIMBELMAN: It is. And it requires the court to determine what the amount of our lien is, the just amount due to

the lien claimant. And the lien claimant is entitled to the unpaid balance of its contract, or if there's an allegation that there isn't a contract or the price can't be determined based upon a contract, then it's determined based on the reasonable value of the work. So either way that determination has to be made in order for that court to then enter a foreclosure order against the bond, which is there at one and a half times of the amount of the lien.

THE COURT: So -- but that foreclosure complaint again was filed after the complaint in this case was filed?

MR. ZIMBELMAN: Yes, but this but, again, is filed into a case that preexisted the Clark County --

THE COURT: Well, you're saying that, but there is actually no case. It was filed into a dispute that preexisted, right?

MR. ZIMBELMAN: I disagree. I mean, is a special proceeding not an action? I think that it is. And that proceeding was filed by TSE in the Nye County court seeking to expunge, to do away with, our lien. That's what started this.

THE COURT: So you're saying that the foreclosure complaint was a continuation of the previous special proceedings that had existed?

MR. ZIMBELMAN: That is correct, and that is what Judge Elliott ruled as well.

THE COURT: Okay. Well, I mean, I don't have to

necessarily defer to that. I have to make my own independent determination --

MR. ZIMBELMAN: Of course.

THE COURT: -- as it relates to whether or not there was a State Court action that had been commenced or proceeding that had been commenced previously. Your argument is, notwithstanding the fact that the bond had been obtained, those special proceedings were still -- that was the same special proceeding that was ongoing the entire time.

MR. ZIMBELMAN: It is. It's in the same case number. It is -- it has an outcropping of the same action, of the same foreclosure action against the work of improvement that we filed --

THE COURT: Okay.

MR. ZIMBELMAN: -- against -- with respect to the same work of improvement that our lien is recorded against which is the same lien that they tried to expunge by commencing that action on June 1st of 2018, right, the first action. That was commenced by them, but it was commenced. That's important. And, you know, I don't think I'm -- I don't think I'm playing word games.

The action commenced. It existed. So if we're talking about a first-to-file rule, not only was it filed first in Nye County, it was filed first by them. They started the fight there, and now they don't want to be there anymore.

THE COURT: Well, you mean they started with the motion to expunge is what you're saying.

MR. ZIMBELMAN: I'm sorry?

THE COURT: They started it with a motion to expunge.

MR. ZIMBELMAN: They did.

THE COURT: And that created a special proceeding. And your argument is all of these subsequent filings as it relates to the lien and the bond are all part of the same essentially, we call them special proceedings, the same case.

MR. ZIMBELMAN: Same dispute.

THE COURT: Well, no, no, because that -- this is an important distinction I think as relates to abstention. The same dispute and same case are not --

MR. ZIMBELMAN: Okay.

THE COURT: -- they're not the same in this --

MR. ZIMBELMAN: It's both.

THE COURT: Right. And so I want -- that's why I want to make sure I'm understanding your argument. Your argument is that it's the same case --

MR. ZIMBELMAN: It is.

THE COURT: -- the same special proceeding; not just the same dispute. Because you can have disputes that go back and forth between multiple proceedings, but your argument is that it's the same proceeding.

MR. ZIMBELMAN: I appreciate the distinction, Your

Honor. And I do. I do agree with that.

THE COURT: Okay. All right. Thank you.

MR. ZIMBELMAN: Thank you, Your Honor.

THE COURT: All right. Well, I will take the matter under submission and issue a decision accordingly. I appreciate the arguments of counsel and clarification of the record.

We'll be adjourned in this case. I'm going to stay on the bench for the next case. Thank you.

MR. ROBERTS: Thank you, Your Honor.

(Whereupon the proceedings concluded at 3:33 p.m.)

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COURT REPORTER'S CERTIFICATE

I, PATRICIA L. GANCI, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Date: June 27, 2019.

/s/ **Patricia L. Ganci**

Patricia L. Ganci, RMR, CRR

CCR #937

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

*** * ***

BRAHMA GROUP, INC., a Nevada Corporation, Plaintiff, v. TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company Defendant.	Case No. 2:18-cv-01747-RFB-GWF **ORDER**
TONOPAH SOLAR ENERGY, LLC, a Delaware limited liability company Counter Claimant v. BRAHMA GROUP, INC., a Nevada Corporation, Counter Defendant	

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

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I. PROCEDURAL BACKGROUND

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

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

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

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

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

II. FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

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

III. LEGAL STANDARD

a. Colorado River Abstention

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

b. Anti-Injunction Act and Permanent Injunction

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

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

IV. DISCUSSION

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

a. Colorado River Abstention

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

i. Jurisdiction Over a Res

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

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

ii. Inconvenience of the Federal Forum

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

iii. Avoidance of Piecemeal Litigation

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

iv. The Order In Which the Fora Obtained Jurisdiction

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

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

v. Rule of Decision

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

vi. Adequacy of the State Forum and Parallel Suits

This factor has two components: the "adequacy" factor, which examines whether the state court proceedings can adequately protect the rights of the federal litigants, and the "parallelism" factor which considers whether the state courts will resolve all issues before the federal court. Seneca, 862 F.3d at 845.[1] The adequacy factor looks to whether the state court can enforce federal rights, while the parallelism factor looks to whether the proceedings address substantially similar claims. Id. Each factor is more relevant when it counsels against abstention, because inadequacy

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

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

vii. Avoidance of Forum Shopping

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

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

b. TSE's Permanent Injunction

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

in an attempt to subvert the removal of a prior case." Lou v. Belzberg, 834 F.2d 730, 741 (9th Cir. 1987). 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.

V. CONCLUSION

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

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

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

DATED: September 25, 2019.

RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE