

In the
Supreme Court
of the
State of Nevada

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Feb 28 2020 04:05 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

COBRA THERMOSOLAR PLANTS, INC.
and AMERICAN HOME ASSURANCE COMPANY,
Petitioners and Third-Party Defendants,

v.

THE FIFTH JUDICIAL DISTRICT COURT, STATE OF NEVADA
NYE COUNTY, and THE HONORABLE STEVEN P. ELLIOTT, SENIOR JUDGE,
Respondent,

BRAHMA GROUP, INC.,
Real Party in Interest.

FROM A DECISION OF THE FIFTH JUDICIAL DISTRICT COURT,
NYE COUNTY, NEVADA · CASE NO. CV 39348 c/w CV 39799
HONORABLE STEVEN ELLIOTT · DEPARTMENT 2 · PHONE: (775) 751-4213

**EXHIBITS IN SUPPORT OF PETITION FOR
WRIT OF MANDAMUS, OR, ALTERNATIVELY, PROHIBITION
VOLUME II OF III – Pages 236 to 469 of 711**

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EXHIBIT 12

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11 *Attorneys for Brahma Group, Inc.*

12 **FIFTH JUDICIAL DISTRICT COURT**

13 **NYE COUNTY, NEVADA**

14 BRAHMA GROUP, INC., a Nevada corporation.

15 Lien/Bond Claimant,

16 vs.

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

22 Defendants.

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

23 **SUMMONS**

(American Home Assurance Company)

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

25 **TO THE DEFENDANT:**

26 **AMERICAN HOME ASSURANCE COMPANY**

27 ///

28 ///

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

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

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

- 4 a. File with the Clerk of this Court, whose address is shown below, a formal
5 written response to the Complaint in accordance with the rules of the Court,
6 with the appropriate filing fee.
7 b. Serve a copy of your response upon the attorney whose name and address
8 is shown below.

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

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

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

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

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

20 Issued at the direction of:

Nye County Clerk of the Court

21 **PEEL BRIMLEY, LLP**

22 

By 

Deputy Clerk

12/14/18
Date

23 RICHARD L. PEEL, Esq. (SBN 4359)
24 ERIC B. ZIMBELMAN, ESQ. (SBN 9407)
25 CARY B. DOMINA, ESQ. (SBN 10567)
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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

BRAHMA GROUP, INC., a Nevada corporation.

Lien/Bond Claimant.

vs.

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

Defendants.

CASE NO. :
DEPT. NO. :

CV 39799
1

SUMMONS

(Cobra Thermosolar Plants, Inc.)

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

TO THE DEFENDANT:

COBRA THERMOSOLAR PLANTS, INC.

///

///

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

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

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

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

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

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

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

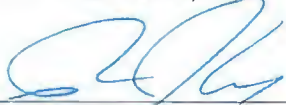
17 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

20 Issued at the direction of:

Nye County Clerk of the Court

21 **PEEL BRIMLEY, LLP**

22 
23 _____
24 RICHARD L. PEEL, Esq. (SBN 4359)
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By 

Deputy Clerk

Date 12/14/10

EXHIBIT 14

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FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA

12
13
14
15 BRAHMA GROUP, INC., a Nevada corporation.
16
17 Lien/Bond Claimant,

18 vs.

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

23 Defendants,

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

///

FILED
FIFTH JUDICIAL DISTRICT COURT

DEC 14 2018

NYE COUNTY DEPUTY CLERK
DEPUTY

Marianne Yoffee

CASE NO. : CV39799
DEPT. NO. : 1

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

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

THE PARTIES

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

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

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

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

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

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

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

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

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

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

³ While TSE is not a party to this Case, it is a party to Case No. CV 39348 in the Fifth Judicial District Court of Nye County, which Case Brahma will seek to consolidate this Action into.

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

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

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

6 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
7 Parcels.⁴

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

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

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

16 b. Issued Bond No. 854481 ("Surety Bond") pursuant to NRS 108.2415 as
17 discussed more fully below; and

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

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

21 a. Is and was at all times relevant to this Action a Nevada corporation; and

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

23 8. Brahma does not know the true names of the individuals, corporations, partnerships
24 and entities identified and named as Defendants by the fictitious names of (collectively, the "Doe
25 Defendants"), (i) BOE BONDING COMPANIES I through X, (ii) DOES I through X, and (iii)
26 ROE CORPORATIONS I through X. Brahma alleges that such Doe Defendants may be liable to
27 Brahma for damages arising from the construction of the Work of Improvement, as more fully

28 ⁴ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels
and the Liberty Parcels.

1 discussed under the claims for relief set forth below. Brahma will request leave of this Honorable
2 Court to amend this Complaint to show the true names and capacities of each such fictitious Doe
3 Defendants when Brahma discovers such information.

4 9. Cobra, AHAC and the Doe Defendants are collectively referred to in the Complaint
5 as the "Defendants."

6
7 **FIRST CAUSE OF ACTION**
(Claim Against Surety, Surety Bond and Principal thereon)

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

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

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

- 15 a. The BLM; and
16 b. TSE, even though it had no statutory duty to do so.

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

19 14. On or about April 09, 2018, Brahma timely recorded a Notice of Lien in the Official
20 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
21 \$6,982,186.24.

22 15. On or about April 16, 2018 and as allowed by NRS 108.229(1), Brahma recorded
23 a Notice of First Amended and Restated Lien in the Official Records of Nye County, Nevada, as
24 Document 891073 and re-recorded the same document on April 18, 2018 as Document No.
25 891507, in the amount of \$7,178,376.94 (the "First Amended Lien").

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

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

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

7 19. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
8 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, the "Lien," were:

9 a. in writing;
10 b. recorded against the Work of Improvement; and
11 c. given or served on the authorized agents of the BLM and TSE, or the BLM
12 and/or TSE knew of the existence of the Lien.

13 20. The Lien is in the amount Twelve Million Eight Hundred and Fifty-Nine Thousand,
14 Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents. (\$12,859,577.74), which is the
15 amount due and owing Brahma as of the date of this Complaint (the "Lienable Amount").

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

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

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

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

25 25. Brahma makes claim against Cobra and AHAC, and Cobra and AHAC are
26 obligated to Brahma for the Lienable Amount plus interest, costs and attorney's fees up to the
27 penal sum of the Surety Bond and Rider as provided in Chapter 108 of the Nevada Revised
28 Statutes.

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

2 1. Enters judgment against the Defendants, and each of them, jointly and severally in
3 the amount of the Liable Amount;

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

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

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

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

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

14 Dated this 14th day of December 2018.

15 **PEEL BRIMLEY LLP**

16 

17 RICHARD L. PEEL, ESQ.

18 Nevada Bar No. 4359

19 ERIC ZIMBELMAN, ESQ.

20 Nevada Bar No. 9407

21 CARY B. DOMINA, ESQ.

22 Nevada Bar No. 10567

23 RONALD J. COX, ESQ.

24 Nevada Bar No. 12723

25 3333 E. Serene Avenue, Suite 200

26 Henderson, Nevada 89074-6571

27 *Attorneys for Brahma Group, Inc.*

EXHIBIT 15

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

JAN 08 2019

Nye County Clerk
Deputy

1 **ORDR**
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3 Nevada Bar No. 4359
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16 Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

19 Plaintiff,

20 vs.

21 BRAHMA GROUP, INC., a Nevada corporation,

22 Defendant.

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

**ORDER GRANTING BRAHMA'S
MOTION FOR ATTORNEY'S FEES
AND COSTS PURSUANT TO NRS
108.2275(6)(C)**

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

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

I. STATUTORY BASIS FOR AWARD OF FEES AND COSTS.

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

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

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1 Brahma's mechanic's lien pursuant to NRS 108.2275 ("Underlying Motion"). As part of the
2 Order Denying the Underlying Motion, the Court concluded that Brahma's Notice of Lien is
3 not frivolous nor was it made without reasonable cause. NRS 108.2275(6)(c) states in relevant
4 part:

5 (6) If, after a hearing on the matter, the court determines that:

6 ***

7 (c) The notice of lien is *not frivolous* and was made *with reasonable*
8 *cause*...the court *shall* make an order awarding costs and reasonable
9 attorney's fees to the lien claimant for defending the motion.

10 Accordingly, once the Court determines that a lien is not frivolous or excessive and
11 made with reasonable cause, an award of attorneys' fees is mandatory. In Nevada, the method
12 upon which a reasonable fee is determined is subject to the discretion of the court, which is
13 tempered only by reason and fairness. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837,
14 864-65, 124 P.3d 530, 548-49 (2005).

15 II. BRAHMA'S APPLICATION FOR AWARD OF FEES AND COSTS.

16 Pursuant to NRS 108.2275(6)(c), Brahma applied to the Court by way of the Fee
17 Motion for an award of \$77,937.50 in attorney's fees and \$479.84 in costs plus additional
18 sums, discussed below, for work performed on the Reply, at oral argument on the Fee Motion
19 and in preparation of this Order. In support of its Fee Motion, Brahma submitted the
20 Declaration of Richard L. Peel, Esq. and supporting documentation including invoicing and
21 time records relating to Peel Brimley LLP's work performed on Brahma's behalf in defending
22 the Underlying Motion. Brahma's motion addressed the factors identified in *Brunzell v.*
23 *Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31 (1969) that the District Court is
24 required to consider in reviewing any application for reasonable attorney's fees ("the *Brunzell*
25 *Factors*"). See *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d
26 730, 736 (2008).²

27 ² The *Brunzell* factors are:

- 28 1) The advocate's qualities, including ability, training, education, experience, professional standing, and skill;
- 2) The character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
- 3) The work performed, including the skill, time, and attention given to the work; and

1 TSE opposed the Fee Motion on multiple grounds and asserted that the fees requested
2 were excessive for work performed in response to a "single motion." [TSE Opposition p. 2].
3 Among other things, TSE contends that (i) PB's rates are higher than the "prevailing rate," (ii)
4 PB engaged in "block billing," and (iii) PB "overstaffed" the work on the Underlying Motion
5 and its invoices contain duplicative work or billings. On Reply, Brahma argued, among other
6 things, that (i) the Underlying Motion was an existential threat to Brahma's lien rights – its sole
7 source of security³ for the \$12,859,577.74 Brahma claims to be owed for its work on TSE's
8 Crescent Dunes Solar Energy Project (the "Project"),⁴ (ii) involved multiple complex issues,
9 and (iii) the work successfully performed by Brahma's attorneys was reasonable and necessary
10 under the circumstances.

11 Having received and reviewed the Fee Motion, TSE's Opposition, Brahma's Reply,
12 having heard and considered oral argument counsel at hearing on December 11, 2018, and
13 having considered the *Brunzell* Factors, the Court makes the following findings and
14 conclusions:

15 **III. FINDINGS.**

16 In general, and while the attorney hours expended and resulting amount sought by way of
17 the Fee Motion are substantial, the hour and amounts are reasonable and not excessive in light
18 of (i) the size and importance of Brahma's lien, (ii) the complex and varied issues presented to
19 the Court, (iii) the high quality counsel on both sides of the case, (iv) higher quality work
20 product than seen in ordinary cases and (v) the clients' reasonable expectations for superior
21 intellectual ability and work product on both sides. In addition, the Court is satisfied that the
22 rates charged by Brahma's counsel, including associate and partner rates, are reasonable and
23 justified.

24 4) The result—whether the attorney was successful and what benefits were derived.
25 See *Brunzell*, 85 Nev. at 349; *Barney v Mt Rose Heating & Air Conditioning*, 124 Nev. at 829.

26 ³ A mechanic's lien is a statutory creature established to help ensure payment of work, materials and/or equipment
provided for the construction or improvements on real property (*In re Fontainebleau Las Vegas Holdings*, 289 p.3D
1199, 1210 (Nev. 2012)).

27 ⁴ Underlying Nevada's public policy of securing payment to contractors by way of mechanics' liens is that
28 "contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time,
labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment."
Id.

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

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

12
13 **III. CONCLUSION.**

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

18 1. As presented by way of the Declaration of Richard L. Peel, Esq., for fees and
19 costs incurred in defending the Underlying Motion and submitting the Fee Motion the sum of
20 \$78,417.34; and

21 2. As agreed by the parties by a separate Stipulation attached hereto as Exhibit A,
22 for fees incurred in preparing Brahma's Reply to TSE's Opposition to the Fee Motion, for
23 appearance of counsel at oral argument and preparation of this Order, the additional sum of
24 \$10,000.00.

25 ///

26 ///

27 ///

28 ///

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1
2 **NOW THEREFORE, IT IS HEREBY ORDERED** that Brahma's Motion For
3 Attorney's Fees And Costs Pursuant To NRS 108.2275(6)(c) is **GRANTED** and Brahma is
4 awarded the sum of \$88,417.34 which shall be due and payable by TSE within ten (10) days of
5 a notice of entry of this order being filed.

6 Dated this 31 day December 2018.

7
8 
9 Senior Judge Steven Elliott

10 Submitted by:

11 **PEEL BRIMLEY LLP**

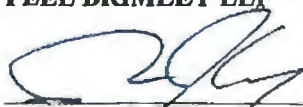
12 
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EXHIBIT 16

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11 *Attorneys for Brahma Group, Inc.*

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

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

18 vs.

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

23 Defendants,
24
25
26
27
28

CASE NO. : CV39799
DEPT. NO. : 1

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

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

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

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

FILE

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NYE COUNTY CLERK

BY
DEPUTY

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

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

9 **THE PARTIES**

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

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

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

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

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

25
26
27 ¹ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of
the BLM Parcels by way of this Action.

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ³ While TSE is not a party to this Case, it is a party to Case No. CV 39348 in the Fifth Judicial District Court of Nye
28 County, which Case Brahma will seek to consolidate this Action into.

⁴ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels
and the Liberty Parcels.

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

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

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

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

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

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

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

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

- 3 a. The BLM; and
4 b. TSE, even though it had no statutory duty to do so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 **SECOND CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

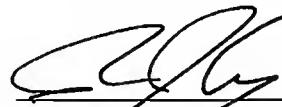
2. For such other and further relief as this Honorable Court deems just and proper in the premises.

AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 11th day of January 2019.

PEEL BRIMLEY LLP



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EXHIBIT 17

ORIGINAL

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Attorneys for Brahma Group, Inc.

FILE

2019 JAN 24 A 10:37

NYE COUNTY CLERK

BY Bennett
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
DEPT. NO. : 2

ORDER

- (I) DENYING TONOPAH
SOLAR ENERGY, LLC'S
MOTION TO STRIKE AND
DISMISS; AND
- (II) GRANTING IN PART
TONOPAH SOLAR
ENERGY, LLC'S MOTION
FOR STAY
- (III) GRANTING BRAHMA
GROUP, INC'S MOTION TO
AMEND

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1 BRAHMA GROUP, INC., a Nevada corporation,
2
3 Counterclaimant/Lien Claimant,

4 vs.

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

10 Counter-Defendant,

11 BRAHMA GROUP, INC., a Nevada corporation,

12 Third-Party Plaintiff,

13 vs.

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

20 Third-Party Defendants.

21 **ORDER**

22 These matters came on for hearing December 11, 2018 (the "Hearing") before the
23 Honorable Senior Judge Steven Elliott on the Motion to Strike, Motion to Dismiss and Motion
24 for Stay ("Motion to Strike") filed by Plaintiff TONOPAH SOLAR ENERGY, LLC ("TSE")
25 and Motion to Amend filed by Defendant, Brahma Group, Inc. ("Brahma"). D. Lee Roberts,
26 Esq., and Ryan Gormley, Esq. of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
27 appeared on behalf of TSE. Richard Peel, Esq., Eric B. Zimbelman, Esq. and Cary Domina, Esq.
28 of PEEL BRIMLEY LLP appeared on behalf of Brahma.

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

1 The Court finds that Brahma's Amended Counter-Complaint does not violate NRCP 7(a)
2 because it (i) acts as a standalone complaint, (ii) was served on TSE, and (iii) provides adequate
3 notice of the claims that are at issue between Brahma and TSE. While incorrectly styled as a
4 "Counter-Complaint," the Court finds that it is really a "Complaint" and complies with NRCP
5 7(a) as it "puts the matters asserted therein at issue." In fact, the initial pleading Brahma filed in
6 this Action was identified as a "Mechanic's Lien Foreclosure Complaint" and was not called an
7 Amended Counter-Complaint until Brahma amended the initial Complaint.

8 The Court further finds that there was nothing improper with Brahma filing its Counter-
9 Complaint in the same Case TSE commenced when it filed its Motion to Expunge Brahma's
10 Lien. First, NRS 108.2275(5) establishes the Nevada Legislature's intent to combine mechanic's
11 lien foreclosure actions with motions to expunge liens. ~~Had Brahma filed a standalone complaint~~
12 ~~as an independent action and then moved the Court to consolidate that action with Case No. CV~~
13 ~~39348 as TSE suggests, the Parties would be in the same position they currently find themselves~~
14 ~~in. Also,~~ ^{SPE} at the time Brahma filed its Amended Counter-Complaint in this Action, the Court had
15 not yet ruled on Brahma's Motion for Attorney's Fees and Costs under NRS 108.2275, so that
16 Case was still open.

17 The Court further finds that the following three Causes of Action asserted by Brahma
18 against TSE are stayed: (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith
19 and Fair Dealing; and (iii) Violations of NRS 624 until such time as the federal court rules on
20 Brahma's and TSE's pending motions filed in the federal action. With respect to all remaining
21 causes of action (as may be further amended), nothing herein is intended to be a stay of such
22 claims and causes of action and Brahma is entitled to proceed with the prosecution of such
23 claims.

24 Finally, the Court finds that Brahma shall be permitted to amend its Amended Counter-
25 Complaint to (i) withdraw the mechanic's lien foreclosure action against TSE's Work of
26 Improvement; (ii) identify the Rider to the Bond (as defined in the Parties' Briefing); and (iii)
27 increase its mechanic's lien foreclosure action against the Bond and Rider to \$19,289,366. The
28 three stayed Causes of Action shall be included in the Second Amended Complaint but shall

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1 remain stayed as set forth above.

2 **THEREFORE, IT IS HEREBY ORDERED** that TSE's Motion to Strike Brahma's
3 Amended Counter-Compliant is DENIED;

4 **IT IS FURTHER ORDERED** that TSE's Motion to Dismiss Brahma's Amended
5 Counter-Complaint is DENIED; and

6 **IT IS FURTHER ORDERED** that TSE's Motion for Stay is DENIED in part and
7 GRANTED in part. The Motion for Stay is granted only as to the following three Causes of
8 Action which TSE initially removed to federal court: (i) Breach of Contract; (ii) Breach of
9 Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624. These three
10 Causes of Action shall be stayed until such time as the Federal Court rules on whether this Court
11 has proper jurisdiction over these claims. Brahma may prosecute its remaining claims and causes
12 of action as amended. TSE's Motion for Stay is DENIED as to all other claims.

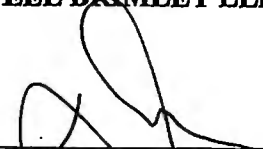
13 **IT IS FURTHER ORDERED** that Brahma shall be permitted to amend its Amended
14 Counter-Complaint.

15 Dated this 24 day of January, 2019.

16
17 
18 **SENIOR JUDGE STEVEN ELLIOTT**

19
20 Respectfully submitted by:
21 **PEEL BRIMLEY LLP**

22
23 Approved as to form and Content
24 **WEINBERG, WHEELER, HUDGINS,**
25 **GUNN & DIAL, LLC**

26 
27 **RICHARD L. PEEL, ESQ. (4359)**
28 **ERIC B. ZIMBELMAN, ESQ. (9407)**
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EXHIBIT 18

FILED
FIFTH JUDICIAL DISTRICT

FEB 19 2019

Nye County Clerk

~~Marianne Yoffe~~ Deputy

1 **ORDR**

2 RICHARD L. PEEL, ESQ.

3 Nevada Bar No. 4359

4 ERIC B. ZIMBELMAN, ESQ.

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16 *Attorneys for Brahma Group, Inc.*

17 **FIFTH JUDICIAL DISTRICT COURT**

18 **NYE COUNTY, NEVADA**

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

21 Plaintiff,

22 vs.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Defendant.

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

**ORDER GRANTING BRAHMA'S
MOTION TO CONSOLIDATE CASE
NO. CV39799 WITH CASE NO. CV
39348**

25 This matter came on for hearing January 24, 2019 (the "Hearing") before the Honorable
26 Senior Judge Steven Elliott on the Motion to Consolidate Case No. CV39799 with Case No. CV
27 39348 ("Motion") filed by BRAHMA GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of
28 PEEL BRIMLEY LLP appeared on behalf of Brahma. Colby L. Balkenbush, Esq. of
WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of Plaintiff
TONOPAH SOLAR ENERGY, LLC ("TSE").

The Court having considered all the pleadings and papers on file, and having heard
argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
bench on January 24, 2019:

I. BASIS FOR CONSOLIDATION

Brahma seeks to consolidate Case No. CV39799 with Case No. CV 39348 pursuant to
NRCP 42, which provides in relevant part:

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1 [W]hen actions involving a common question of law or fact are pending before the
2 court, it may order a joint hearing or trial of any or all the matters in issue in the
3 actions; it may order all the actions consolidated; and it may make such orders
4 concerning proceedings therein as may tend to avoid unnecessary costs or delay.

5 Consolidation is vested in the sound discretion of the trial court. (*Zupancic v. Sierra Vista
6 Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981).

7 **II. FINDINGS AND CONCLUSIONS.**

8 1. The Court finds (i) the two cases involve common questions of law or fact, and
9 (ii) consolidation would “avoid unnecessary costs or delay” and provide judicial economy.

10 2. TSE opposed the Motion on several grounds. First, TSE argues that it was
11 procedurally improper for Brahma to file Case No. CV39799 when Case No. CV 39348 is
12 pending in this Court with similar or identical claims. However, in its Motion to Strike Brahma
13 Group, Inc.’s (“Brahma”) First Amended Counter-Complaint (“Motion to Strike”),¹ TSE argued
14 that Brahma’s proposed amended pleading was improper because “one cannot file a Counter-
15 Complaint into a special proceeding such as this.” In support of its position, TSE relied on what
16 it claimed to be “the leading Nevada construction law treatise,” LEON F. MEAD II,
17 CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) “it is improper legal
18 procedure to file a counter-claim to a petition under NRS 108.2275,” and (ii) “the proper
19 procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate
20 the two matters.”

21 3. As discussed in the Court’s Order Denying Motion to Strike, the Court does not
22 agree with Mr. Mead’s premise and found that there was nothing improper with Brahma filing
23 its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge
24 Brahma’s Lien. Additionally, the Court has now come to the conclusion that had Brahma filed a
25 standalone complaint as an independent action and then moved the Court to consolidate that
26 action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they
27 currently find themselves in.

28 ¹ The complete title of that motion was “Tonopah Solar Energy, LLC’s Motion to Strike Brahma Group, Inc.’s First Amended Counter-Complaint, or, in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative, Motion to Stay this Action until the Conclusion of the Proceedings in Federal Court.”

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4. In any event, and especially where TSE has stated its intention to file a Writ Petition to the Nevada Supreme Court with respect to this Court's denial of TSE's Motion to Strike, it was appropriate for Brahma to file Case No. CV39799 and for this Court to consolidate that action into the present action. Specifically, but without limitation, if the Supreme Court were to ultimately overrule this court and determine that it was improper for Brahma to file a counterclaim to a petition under NRS 108.2275, Brahma's time to file a complaint against the applicable surety bond would by then have lapsed pursuant to NRS 108.2421. If, on the other hand, the Nevada Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure claim filed in Case No. CV39799 is (at worst) moot with no prejudice having been suffered by any party by way of consolidation.

5. The Court also rejects TSE's contention that Case No. CV39799 and Brahma's Motion to Consolidate is futile. The Court finds that Brahma's Complaint filed in Case No. CV39799 is not impermissible claim-splitting and does not violate NRCP 1 or NRCP 15.

6. Based on the foregoing, the Court hereby concludes that Case No. CV39799 may be and is hereby consolidated with Case No. CV 39348.

NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion to Consolidate is **GRANTED** and Case No. CV39799 is hereby consolidated with Case No. CV 39348.

Dated this 12th day February 2019.

 2-14-19
Senior Judge Steven Elliott

Submitted by:
PEEL BRIMLEY LLP

/s/
RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
ERIC B. ZIMBELMAN, ESQ. (NV Bar No. 9407)
RONALD J. COX, ESQ. (NV Bar No. 12723)
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EXHIBIT 19

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

APR 22 2019

Nye County Clerk
Deputy

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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Counterdefendants,

CASE NO. : CV 39348

Consolidated with:

Case No. CV39799

DEPT. NO. : 2

BRAHMA GROUP, INC.'S:

**(I) SECOND AMENDED
COMPLAINT; AND**

**(II) FIRST AMENDED THIRD-
PARTY COMPLAINT.**

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

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1 BRAHMA GROUP, INC., a Nevada corporation,

2 Lien/Bond Claimant and Third-
3 Party Plaintiff,

4 vs.

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

9 Third-Party Defendants.
10

11 **SECOND AMENDED COMPLAINT**

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

17 **THE PARTIES**

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

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

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

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

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

1 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
2 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
3 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
4 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
5 06 (the "Liberty Parcel").²

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

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

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

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

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

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

19 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
20 Parcels.³

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

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

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

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

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

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

9 **FIRST CAUSE OF ACTION**
10 **(Breach of Contract)**

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

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

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

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

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

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

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

28 ///

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

3 14. BGI is owed Twelve Million Eight Hundred Fifty-Nine Thousand Five Hundred
4 Seventy-Seven and 74/100 Dollars (\$12,859,577.74—"Outstanding Balance") from TSE for the
5 Work.

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

9 **SECOND CAUSE OF ACTION**

10 **(Breach of Implied Covenant of Good Faith & Fair Dealing)**

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

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

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

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

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

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

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

28 ///

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

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

7 **THIRD CAUSE OF ACTION**
8 **(Violation of NRS 624)**

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

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

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

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

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

23 ///

24 ///

25 ///

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

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

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

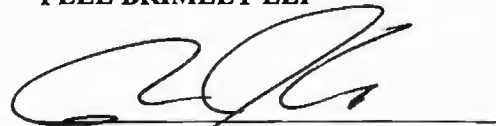
7 3. For such other and further relief as this Honorable Court deems just and proper in
8 the premises.

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

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

12 Dated this 19th day of April 2019.

13 **PEEL BRIMLEY LLP**

14 

15 **RICHARD L. PEEL, ESQ.**

16 Nevada Bar No. 4359

17 **ERIC ZIMBELMAN, ESQ.**

18 Nevada Bar No. 9407

19 **RONALD J. COX, ESQ.**

20 Nevada Bar No. 12723

21 3333 E. Serene Avenue, Suite 200

22 Henderson, Nevada 89074-6571

23 Attorneys for Brahma Group, Inc.

24 ///

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

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

8 **THE PARTIES**

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

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

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

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

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

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

26
27 _____
28 ⁴ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of
the BLM Parcels by way of this Action.

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

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

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

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

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

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

15 i. Commonly known as the *Crescent Dunes Solar Energy Project*; and
16 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
17 Parcels.⁷

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ///

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

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

- 6 a. The BLM; and
7 b. TSE, even though it had no statutory duty to do so.

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

10 14. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official
11 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
12 \$6,982,186.24.

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

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

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

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

27 ///

28 ///

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

- 4 c. In writing;
5 d. Recorded against the Work of Improvement; and
6 e. Were given or served on the authorized agents of the BLM and TSE, or the
7 BLM and/or TSE knew of the existence of the Lien.

8 20. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
9 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
10 (\$12,859,577.74 - "Lienable Amount").

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

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

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

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

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

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

25 ///

26 ///

27 ///

28

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

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

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

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

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

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

11
12 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

15 Dated this 19th day of April 2019.

16 **PEEL BRIMLEY LLP**

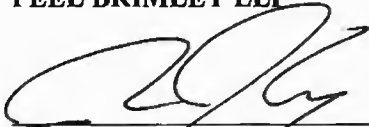
17 
18 _____
19 RICHARD L. PEEL, ESQ.
20 Nevada Bar No. 4359
21 ERIC ZIMBELMAN, ESQ.
22 Nevada Bar No. 9407
23 RONALD J. COX, ESQ.
24 Nevada Bar No. 12723
25 3333 E. Serene Avenue, Suite 200
26 Henderson, Nevada 89074-6571
27 *Attorneys for Brahma Group, Inc.*
28

EXHIBIT 20

COPY

MAY 02 2019

ORDER

Richard E. Haskin, Esq.
Nevada State Bar # 11592

Daniel M. Hansen, Esq.
Nevada State Bar # 13886

**GIBBS GIDEN LOCHER TURNER
SENET & WITTBRODT LLP**

1140 N. Town Center Drive, Suite 300
Las Vegas, Nevada 89144-0596
(702) 836-9800

Attorneys for Plaintiff-In-Intervention
H&E EQUIPMENT SERVICES, INC.

Terri Pemberton

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

Plaintiff,

v.

BRAHMA GROUP, INC., a Nevada Corporation,

Defendants.

Case No.: CV 39348
CV 39799

Dept.: 2

**ORDER ON H&E EQUIPMENT
SERVICES, INC.'S MOTION TO
INTERVENE**

Date: January 24, 2019

Time: 9:00 a.m.

BRAHMA GROUP, INC., a Nevada Corporation,

Counterclaimant/Lien Claimant,

v.

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,

Counterdefendant.

BRAHMA GROUP, INC., a Nevada Corporation,

Third-Party Plaintiff,

v.

COBRA THERMOSOLAR PLANTS, INC., a
Nevada Corporation: AMERICAN HOME

1 ASSURANCE COMPANY, a surety; BOE
2 BONDING COMPANIES I through X; DOES I
3 through X; ROE CORPORATIONS I through X,
4 inclusive,

Third-Party Defendants.

5 H&E EQUIPMENT SERVICES, INC., a Delaware
6 Corporation,

Plaintiff-In-Intervention,

7
8 v.

9
10 BRAHMA GROUP, INC., a Nevada Corporation,
11 TONOPAH SOLAR ENERGY LLC, a Delaware
12 Limited Liability Company, COBRA
13 THERMOSOLAR PLANTS, INC., a Nevada
14 Corporation; AMERICAN HOME ASSURANCE
15 COMPANY, a surety; BOE BONDING
16 COMPANIES I through X; DOES I through X;
17 ROE CORPORATIONS I through X; and TOE
18 TENANTS I through X, inclusive,

Defendants-In-Intervention.

16 This matter came on for hearing on January 24, 2019 (the "Hearing") before the Honorable
17 Senior Judge Steven Elliott on H&E Equipment Services, Inc.'s Motion to Intervene ("Motion to
18 Intervene"). Daniel M. Hansen, Esq. of GIBBS GIDEN LOCHER TURNER SENET &
19 WITTBRODT LLP appeared on behalf of H&E Equipment Services, Inc. Eric B. Zimbelman, Esq.
20 of PEEL BRIMLEY LLP appeared on behalf of Brahma Group, Inc ("Brahma"). Colby Balkenbush
21 of WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of Tonopah
22 Solar Energy LLC ("TSE").

23 The Court having considered all the pleadings and papers on file, and having heard argument
24 of counsel, hereby ORDERS as follows, having rendered its oral decision from the bench on January
25 24, 2019:

26 The Court finds that H&E is permitted to join this lawsuit as a lien claimant pursuant to NRS
27 108.239(3). Furthermore, NRCP 24(a) allows a party to intervene of right when a statute confers an
28 unconditional right to intervene. That right exists here for H&E.

1 **THEREFORE, IT IS HEREBY ORDERED** that H&E's Motion to Intervene is
2 GRANTED.

3 **IT IS SO ORDERED.**

4 Dated this 30 day of April, 2019

5
6 By: 
 SENIOR JUDGE STEVEN ELLIOTT

7
8 Respectfully Submitted by:

9 GIBBS GIDEN LOCHER TURNER
10 SENET & WITTBRODT LLP


11 
12 Richard E. Haskin, Esq.
13 Nevada State Bar # 11592
14 Daniel M. Hansen, Esq.
15 Nevada State Bar # 13886
16 1140 N. Town Center Drive, Suite 300
17 Las Vegas, Nevada 89144
18 Attorneys for Plaintiff-In-Intervention
19 H&E EQUIPMENT SERVICES, INC.
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EXHIBIT 21

COPY

FILED
FIFTH JUDICIAL DISTRICT

MAY 17 2019

Nye County Clerk
DEBRA BENNETT Deputy

GEOFFREY CRISP, ESQ.
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JEREMY R. KILBER, ESQ.
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Attorneys for COBRA THERMOSOLAR PLANTS, INC. and
AMERICAN HOME ASSURANCE COMPANY

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada
corporation,

Defendant.

) Case No.: CV39348
) Consolidated With
) Case No.: CV39799
) Dept. No.: 2
)
)
)

) **COBRA THERMOSOLAR PLANTS, INC.'S**
) **AND AMERICAN HOME ASSURANCE**
) **COMPANY'S ANSWER TO BRAHMA**
) **GROUP, INC.'S FIRST AMENDED THIRD-**
) **PARTY COMPLAINT**

BRAHMA GROUP, INC., a Nevada
corporation,

Lien/Bond Claimant,

vs.

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

Counter-defendants.

1 BRAHMA GROUP, INC., a Nevada)
 2 corporation,)
 3)
 4 Lien/Bond Claimant and)
 5 Third-Party Plaintiff,)
 6 vs.)
 7)
 8 COBRA THERMOSOLAR PLANTS, INC.,)
 9 a Nevada corporation; AMERICAN HOME)
 10 ASSURANCE COMPANY, a surety; BOE)
 11 BONDING COMPANIES I through X;)
 12 DOES I through X; ROE CORPORATIONS I)
 13 through X, inclusive,)
 14)
 15 Third-Party Defendants.)
 16)

17 **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE**
 18 **COMPANY'S ANSWER TO BRAHMA GROUP, INC.'S**
 19 **FIRST AMENDED THIRD-PARTY COMPLAINT**

20 Third-Party Defendants, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN
 21 HOME ASSURANCE COMPANY (collectively, for purposes of this Answer, "COBRA"), by and
 22 through their attorneys of record, the law firm of WEIL & DRAGE, APC, hereby answer
 23 Lien/Bond Claimant and Third-Party Plaintiff BRAHMA GROUP, INC.'s ("BRAHMA") First
 24 Amended Third-Party Complaint (hereinafter, "Complaint") on file herein, by admitting, denying,
 25 and alleging as follows:

26 **THE PARTIES**

27 1. Answering Paragraph 1(a), and (b) of BRAHMA's Complaint, COBRA is without sufficient
 28 information or knowledge as to form a belief as to the truth of the allegations contained in said
 Paragraph and, therefore, denies the same. Answering Paragraph 1(c), AMERICAN HOME
 ASSURANCE COMPANY is without sufficient information or knowledge as to form a belief as to the
 truth of the allegations contained in said Paragraph and, therefore, denies the same. Answering
 Paragraph 1(c), COBRA THERMOSOLAR PLANTS, INC. admits only that BRAHMA and COBRA
 THERMOSOLAR PLANTS, INC. are parties to a negotiated settlement, denies the remainder of the

1 allegations contained in said Paragraph, and respectfully refers the Court to the writings memorializing
2 the terms of that settlement for a full and complete statement of their contents.

3 2. Answering Paragraph 2 of BRAHMA's Complaint, COBRA is without sufficient
4 information or knowledge as to form a belief as to the truth of the allegations contained in said
5 Paragraph and, therefore, denies the same.

6 3. Answering Paragraph 3 of BRAHMA's Complaint, COBRA is without sufficient
7 information or knowledge as to form a belief as to the truth of the allegations contained in said
8 Paragraph and, therefore, denies the same.

9 4. Answering Paragraph 4(a), (b), (c), and (d)(i) and (ii) of BRAHMA's Complaint, COBRA is
10 without sufficient information or knowledge as to form a belief as to the truth of the allegations
11 contained in said Paragraph and, therefore, denies the same.

12 5. Answering Paragraph 5 of BRAHMA's Complaint, no response is required. However, to
13 the extent a response is deemed required, COBRA denies the same.

14 6. Answering Paragraph 6(a) of BRAHMA's Complaint, AMERICAN HOME ASSURANCE
15 COMPANY admits it is a bonding company duly licensed and qualified to do business as a surety in
16 Nevada. Answering Paragraph 6(a) of BRAHMA's Complaint, COBRA THERMOSOLAR PLANTS,
17 INC. is without sufficient information or knowledge as to form a belief as to the truth of the allegations
18 contained in said Paragraph and, therefore, denies the same. COBRA denies the allegations in Paragraph
19 6(b), and (c) of BRAHMA's Complaint, and respectfully refers the Court to the alleged bond and rider
20 for a full and complete statement of their contents.

21 7. Answering Paragraph 7(a), (b), and (c) of BRAHMA's Complaint, AMERICAN HOME
22 ASSURANCE COMPANY is without sufficient information or knowledge as to form a belief as to the
23 truth of the allegations contained in said Paragraph and, therefore, denies the same. Answering
24 Paragraph 7(a), and (b) of BRAHMA's Complaint, COBRA THERMOSOLAR PLANTS, INC. admits
25 the allegations in Paragraph 7(a), denies the allegations in Paragraph 7(b), and refers the Court to the
26 alleged bond and rider for a full and complete statement of their contents. Further, answering Paragraph
27 7(c), COBRA THERMOSOLAR PLANTS, INC. admits only that BRAHMA and COBRA
28 THERMOSOLAR PLANTS, INC. are parties to a negotiated settlement, denies the remainder of the

1 allegations contained in said Paragraph 7(c), and respectfully refers the Court to the writings
2 memorializing the terms of that settlement for a full and complete statement of their contents.

3 8. Answering Paragraph 8 of BRAHMA's Complaint, COBRA is without sufficient
4 information or knowledge as to form a belief as to the truth of the allegations contained in said
5 Paragraph and, therefore, denies the same.

6 9. Answering Paragraph 9 of BRAHMA's Complaint, no response is required. However, to
7 the extent a response is deemed required, COBRA denies same.

8 **FIRST CAUSE OF ACTION**

9 **(Claim Against Surety, Surety Bond, and Principal thereon)**

10 10. Answering Paragraph 10 of BRAHMA's Complaint, COBRA repeats and realleges their
11 answers to Paragraphs 1 through 9 as though fully set forth herein.

12 11. Answering Paragraph 11 of BRAHMA's Complaint, COBRA is without sufficient
13 information or knowledge as to form a belief as to the truth of the allegations contained in said
14 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Services
15 Agreement for a full and complete statement of its contents.

16 12. Answering Paragraph 12(a) and (b) of BRAHMA's Complaint, COBRA is without
17 sufficient information or knowledge as to form a belief as to the truth of the allegations contained in said
18 Paragraph and, therefore, denies the same.

19 13. Answering Paragraph 13 of BRAHMA's Complaint, COBRA is without sufficient
20 information or knowledge as to form a belief as to the truth of the allegations contained in said
21 Paragraph and, therefore, denies the same.

22 14. Answering Paragraph 14 of BRAHMA's Complaint, COBRA is without sufficient
23 information or knowledge as to form a belief as to the truth of the allegations contained in said
24 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of Lien
25 for a full and complete statement of its contents.

26 15. Answering Paragraph 15 of BRAHMA's Complaint, COBRA is without sufficient
27 information or knowledge as to form a belief as to the truth of the allegations contained in said
28 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of

1 First Amended and Restated Lien for a full and complete statement of its contents.

2 16. Answering Paragraph 16 of BRAHMA's Complaint, COBRA is without sufficient
3 information or knowledge as to form a belief as to the truth of the allegations contained in said
4 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of
5 Second Amended and Restated Lien for a full and complete statement of its contents.

6 17. Answering Paragraph 17 of BRAHMA's Complaint, COBRA is without sufficient
7 information or knowledge as to form a belief as to the truth of the allegations contained in said
8 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of
9 Third Amended and/or Restated Lien for a full and complete statement of its contents.

10 18. Answering Paragraph 18 of BRAHMA's Complaint, COBRA is without sufficient
11 information or knowledge as to form a belief as to the truth of the allegations contained in said
12 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of
13 Fourth Amended and/or Restated Lien for a full and complete statement of its contents.

14 19. Answering Paragraph 19(a) (inadvertently noted as (c)), (b) (inadvertently noted as (d)), and
15 (c) (inadvertently noted as (e)) of BRAHMA's Complaint, COBRA is without sufficient information or
16 knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,
17 therefore, denies the same.

18 20. Answering Paragraph 20 of BRAHMA's Complaint, COBRA is without sufficient
19 information or knowledge as to form a belief as to the truth of the allegations contained in said
20 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Lien for a full
21 and complete statement of its contents.

22 21. Answering Paragraph 21 of BRAHMA's Complaint, COBRA denies the allegations
23 contained in said Paragraph.

24 22. Answering Paragraph 22 of BRAHMA's Complaint, COBRA admits only that they caused a
25 surety bond to be recorded in Nye County, denies the remainder of the allegations contained in said
26 Paragraph 22, and respectfully refers the Court to the Surety Bond for a full and complete statement of
27 its contents.

28 ///

23. Answering Paragraph 23 of BRAHMA's Complaint, COBRA admits only that they caused an amendment to a previously recorded surety bond to be recorded in Nye County, denies the remainder of the allegations contained in said Paragraph 23, and respectfully refers the Court to the Surety Rider for a full and complete statement of its contents.

24. Answering Paragraph 24 of BRAHMA's Complaint, COBRA denies the allegations contained in said Paragraph, including because the amount of the bond was increased to comply with statutory requirements, not as a penal sum, and respectfully refers the Court to the Surety Rider for a full and complete statement of its contents.

25. Answering Paragraph 25 of BRAHMA's Complaint, said paragraph calls for a legal conclusion which COBRA cannot admit or deny. However, to the extent a response is deemed necessary, COBRA denies the allegations contained in said Paragraph.

26. Answering Paragraph 26 of BRAHMA's Complaint, COBRA denies the allegations contained in said Paragraph.

AFFIRMATIVE AND SEPARATE DEFENSES

FIRST AFFIRMATIVE DEFENSE

1. BRAHMA's Complaint on file herein fails to state a claim against COBRA upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

2. BRAHMA's alleged damages, if any, were and are, wholly or partially, contributed to and proximately caused by BRAHMA's negligence, thus barring or diminishing BRAHMA's recovery herein according to principles of comparative negligence.

THIRD AFFIRMATIVE DEFENSE

3. COBRA is not legally responsible for the acts and/or omissions of those Defendants and/or Third-Party Defendants named in the consolidated action and/or herein.

FOURTH AFFIRMATIVE DEFENSE

4. COBRA is informed and believes and thereon alleges that they are not legally responsible in any fashion with respect to damages and injuries claimed by TONOPAH SOLAR ENERGY, LLC ("TSE") or BRAHMA in their respective Complaints; however, if COBRA is

1 subjected to any liability to BRAHMA or any other parties, it will be due, in whole or in part, to the
2 breach of contract, conduct, acts, omissions, activities, carelessness, recklessness and negligence of
3 others; wherefore any recovery obtained by BRAHMA, or any other parties, against COBRA,
4 should be reduced in proportion to their respective negligence and fault and legal responsibility of
5 all other parties, persons and entities, their agents, servants and employees who contributed to
6 and/or caused any such injury and/or damages, in accordance with the law of comparative
7 negligence; the liability of COBRA, if any, is limited in direct proportion to the percentage of fault
8 actually attributed to COBRA.

9 **FIFTH AFFIRMATIVE DEFENSE**

10 5. BRAHMA unreasonably delayed the filing of its Complaint and the notification of
11 COBRA of any basis for the causes of action alleged against them, all of which has unduly and
12 severely prejudiced COBRA in their defense of the action, thereby barring or diminishing
13 BRAHMA's recovery herein under the Doctrine of Estoppel.

14 **SIXTH AFFIRMATIVE DEFENSE**

15 6. BRAHMA unreasonably delayed the filing of its Complaint and the notification of
16 COBRA of any basis for the causes of action alleged against them, all of which has unduly and
17 severely prejudiced COBRA in their defense of the action, thereby barring or diminishing
18 BRAHMA's recovery herein under the Doctrine of Waiver.

19 **SEVENTH AFFIRMATIVE DEFENSE**

20 7. BRAHMA unreasonably delayed the filing of its Complaint and the notification of
21 COBRA of any basis for the causes of action alleged against them, all of which has unduly and
22 severely prejudiced COBRA in their defense of the action, thereby barring or diminishing
23 BRAHMA's recovery herein under the Doctrine of Laches.

24 **EIGHTH AFFIRMATIVE DEFENSE**

25 8. BRAHMA has failed, refused, and neglected to take reasonable steps to mitigate its
26 alleged damages, if any, thus barring or diminishing BRAHMA's recovery herein.

27 **NINTH AFFIRMATIVE DEFENSE**

28 9. BRAHMA has failed to join all necessary and indispensable parties to this lawsuit.

1 **TENTH AFFIRMATIVE DEFENSE**

2 10. The injuries and damages of which BRAHMA complains were proximately caused
3 by, or contributed to, by the acts and/or omissions of other Defendants and/or Third-Party
4 Defendants in the consolidated action and/or other defendants or third-party defendants in this
5 action, if any, as well as persons and/or other entities, and that said acts were an intervening and
6 superseding cause of the injuries and damages, if any, of which BRAHMA complains, thus barring
7 BRAHMA from any recovery against COBRA.

8 **ELEVENTH AFFIRMATIVE DEFENSE**

9 11. BRAHMA, or other persons or entities other than COBRA, without the knowledge
10 or consent of COBRA, altered the subject property, and to the extent that BRAHMA has incurred
11 or suffered any damages, which COBRA denies, such alleged damages were solely and proximately
12 caused by such alteration.

13 **TWELFTH AFFIRMATIVE DEFENSE**

14 12. The damages referred to in the Complaint, and each and every purported claim for
15 relief contained therein, were proximately caused or contributed to by the negligence of persons
16 and/or entities other than COBRA in failing to exercise the proper care which a prudent person
17 under the same or similar circumstance would have exercised, and/or by the wrongful acts of
18 persons and/or entities other than COBRA, and if COBRA acted in any manner negligently or
19 wrongfully (which supposition is made only for purposes of this defense, without admitting same to
20 be true), the aforesaid negligence and/or wrongful acts of persons and/or entities other than
21 COBRA constituted an intervening and superseding cause of the damages alleged in the Complaint.

22 **THIRTEENTH AFFIRMATIVE DEFENSE**

23 13. The claims of BRAHMA are reduced, modified, and/or barred by the Doctrine of
24 Unclean Hands.

25 **FOURTEENTH AFFIRMATIVE DEFENSE**

26 14. Any and all events, happenings, injuries and damages alleged by BRAHMA were a
27 direct result of an Act of God.

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FIFTEENTH AFFIRMATIVE DEFENSE

15. The claims of BRAHMA are reduced, modified, and/or barred by the Doctrine of Parol Evidence.

SIXTEENTH AFFIRMATIVE DEFENSE

16. COBRA is informed and believes and thereon alleges that BRAHMA's claims for damages are barred as a result of the failure to satisfy conditions precedent to bring the claim(s) at issue.

SEVENTEENTH AFFIRMATIVE DEFENSE

17. Any allegation not otherwise responded to is generally and specifically denied.

EIGHTEENTH AFFIRMATIVE DEFENSE

18. COBRA alleges that the occurrence referred to in the Complaint, and all injuries and damages, if any, resulting therefrom, were caused by the acts of omissions of a third party over whom these answering Third-Party Defendants had no control.

NINETEENTH AFFIRMATIVE DEFENSE

19. COBRA performed no acts, deeds, omissions or failures to act relevant to the subject matter of BRAHMA's Complaint such as would create any liability or duty whatsoever on the part of COBRA to BRAHMA.

TWENTIETH AFFIRMATIVE DEFENSE

20. COBRA's alleged acts are not the proximate cause of the alleged damages, if any, sustained by BRAHMA.

TWENTY-FIRST AFFIRMATIVE DEFENSE

21. COBRA has appropriately, completely and fully performed and discharged any and all of their obligations and legal duties arising out of the matters alleged in BRAHMA's Complaint and any recovery by BRAHMA would be unjust and inequitable under these circumstances.

TWENTY-SECOND AFFIRMATIVE DEFENSE

22. At all times relevant herein, COBRA acted diligently and with due care in the performance of any duty owed to BRAHMA, if any.

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TWENTY-THIRD AFFIRMATIVE DEFENSE

23. COBRA has no duty to post a bond related to BRAHMA's lien claim, thus, the release of the bond, or any proceeds, to BRAHMA will result in unjust enrichment to BRAHMA. COBRA reserves the right to recover any/all funds released to BRAHMA in this matter.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

24. COBRA is informed and believes and thereon alleges that BRAHMA has failed to plead with sufficient specificity any violation of codes, ordinances, regulations, statutes or any other law.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

25. COBRA denies that it breached any contract and/or agreement whatsoever with respect to any service that it provided for this matter.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

26. COBRA has appropriately, completely and fully performed and discharged all of its respective obligations and legal duties, if any, arising out of the matters alleged in BRAHMA's Second Amended Complaint and any recovery by BRAHMA would be unjust and inequitable under these circumstances.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

27. The liability of COBRA for all damages is limited pursuant to the express terms of its contract(s) with TSE, thus, BRAHMA's recovery on the bond is limited to only what is recoverable from COBRA under its contract(s) with TSE, if anything.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

28. COBRA has no control over or charge of, nor is responsible for, the construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work at issue in this matter.

TWENTY-NINTH AFFIRMATIVE DEFENSE

29. COBRA is informed and believes and thereon alleges that BRAHMA's action is barred by the voluntary agreement to submit any disputes to binding and/or independent arbitration. COBRA hereby reserves its right to obligate the parties to submit this matter to arbitration at

anytime even after answering BRAHMA's First Amended Third-Party Complaint.

THIRTIETH AFFIRMATIVE DEFENSE

30. BRAHMA's claims, and each of them, are barred as a result of an accord and satisfaction.

THIRTY-FIRST AFFIRMATIVE DEFENSE

31. Each and every one of BRAHMA's alleged rights, claims, and obligations which it seeks to enforce against COBRA is, by BRAHMA's conduct, agreement, or otherwise, barred by the Doctrine of Estoppel.

THIRTY-SECOND AFFIRMATIVE DEFENSE

32. BRAHMA's claims, and each of them, are barred for failure of consideration.

THIRTY-THIRD AFFIRMATIVE DEFENSE

33. BRAHMA's claims, and each of them, are barred as a result of the failure of BRAHMA to timely make those claims as against COBRA and allow COBRA to collect evidence sufficient to establish its nonliability. COBRA relied upon the failure to allege claims by BRAHMA and as a result, BRAHMA is barred by the Doctrine of Laches.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

34. By virtue of BRAHMA's actions, conduct, and omissions, COBRA has been released.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

35. BRAHMA's claims, and each of them, are barred as a result of no enforceable contract because the contract lacks valid offer and acceptance; the contract lacks consideration; the contract was validly rescinded; the contract is illusory and/or lacks mutuality; or the contract is void for vagueness.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

36. All or part of the claims alleged did not arise from a construction contract and/or are otherwise improper pursuant to NRS Chapter 624, and therefore said claims are not properly asserted against the bond.

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THIRTY-SEVENTH AFFIRMATIVE DEFENSE

37. BRAHMA's claims, and each of them, are barred by BRAHMA's breaches of the agreement which preceded the acts complained of.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

38. BRAHMA's claims, and each of them, are barred by BRAHMA's ratification and confirmation of the alleged actions.

THIRTY-NINTH AFFIRMATIVE DEFENSE

39. COBRA is informed and believes and thereon alleges that BRAHMA breached its contract, if any, and by reason of such breach of contract, COBRA has been excused of any duty it may have had to perform any obligation.

FORTIETH AFFIRMATIVE DEFENSE

40. COBRA is informed and believes and thereon alleges that BRAHMA did not supply labor, materials, or equipment toward the improvement of the Property.

FORTY-FIRST AFFIRMATIVE DEFENSE

41. COBRA is informed and believes and thereon alleges that BRAHMA's lien was not made with reasonable cause.

FORTY-SECOND AFFIRMATIVE DEFENSE

42. COBRA is informed and believes and thereon alleges that BRAHMA failed to complete the work it agreed to perform.

FORTY-THIRD AFFIRMATIVE DEFENSE

43. COBRA is informed and believes and thereon alleges that BRAHMA's claims, and each of them, are barred due to fraud.

FORTY-FOURTH AFFIRMATIVE DEFENSE

44. COBRA is informed and believes and thereon alleges that BRAHMA's claims, and each of them, are barred as a result of unconscionability.

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FORTY-FIFTH AFFIRMATIVE DEFENSE

45. COBRA is informed and believes and thereon alleges that BRAHMA's claims, and each of them, are barred, in whole or in part, by the doctrines of mistake, excuse and/or nonperformance.

FORTY-SIXTH AFFIRMATIVE DEFENSE

46. COBRA is informed and believes and thereon alleges that BRAHMA's claims, and each of them, are barred as a result of the failure to satisfy conditions precedent.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

47. COBRA is informed and believes and thereon alleges that BRAHMA's claims, and each of them, are barred by the failure to satisfy conditions subsequent.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

48. COBRA is informed and believes and thereon alleges that BRAHMA's claims, and each of them, are barred as a result of lack of good faith.

FORTY-NINTH AFFIRMATIVE DEFENSE

49. Each and every one of BRAHMA's alleged rights, claims, and obligations, and each and every one of BRAHMA's causes of action against COBRA, must be, and are, stayed as a result of that certain Order of the Fifth Judicial District Court, Nye County, Nevada, Case No. CV 39348, dated January 24, 2019, pursuant to which the Court ordered the causes of action asserted by BRAHMA against TSE for (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624—which causes of action form the basis of BRAHMA's causes of action against COBRA—are stayed until such time as the federal court rules on BRAHMA's and TSE's pending motions filed in the federal action. The federal court has not yet ruled on those pending motions. Accordingly, no further action may be taken at this time as to BRAHMA's causes of action against COBRA.

FIFTIETH AFFIRMATIVE DEFENSE

50. Each and every one of BRAHMA's alleged rights, claims, and obligations, and each and every one of BRAHMA's causes of action against COBRA, must be, and are, stayed as a result of that certain Order of the Supreme Court of Nevada, Docket Number 78256, Directing Answer

1 to the Petition for Writ of Prohibition, or, Alternatively, Mandamus, filed by TSE on or about
2 March 5, 2019, and arising out of the Nye County Court's denial of TSE's Motion to Dismiss,
3 Strike, or Stay BRAHMA's First Amended Counter-Complaint. Accordingly, no further action
4 may be taken at this time as to BRAHMA's causes of action against COBRA.

5 **FIFTY-FIRST AFFIRMATIVE DEFENSE**

6 51. COBRA reserves the right to dispute the applicability and recoverability of all
7 damages claimed in BRAHMA's prayer for relief as the pleadings and facts are insufficient to
8 create recovery against COBRA for such damages.

9 **FIFTY-SECOND AFFIRMATIVE DEFENSE**

10 52. All possible affirmative defenses may not have been alleged herein insofar as
11 sufficient facts were not available after reasonable inquiry upon the filing of COBRA's Answer to
12 BRAHMA's Complaint and, therefore, COBRA reserves their right to amend their Answer to
13 allege additional affirmative defenses if subsequent investigation so warrants.

14 **FIFTY-THIRD AFFIRMATIVE DEFENSE**

15 53. COBRA incorporates by reference those affirmative defenses enumerated in
16 N.R.C.P. 8 as if fully set forth herein. In the event further investigation or discovery reveals the
17 applicability of any such defenses, COBRA reserves the right to seek leave of court to amend their
18 Answer to specifically assert the same. Such defenses are herein incorporated by reference for the
19 specific purpose of not waiving same.

20 **PRAYER FOR RELIEF**

21 **WHEREFORE**, having fully answered BRAHMA's Complaint, COBRA respectfully
22 requests that Judgment be entered in their favor, and against BRAHMA as follows:

- 23 1. That BRAHMA take nothing by virtue of its Complaint;
24 2. The Complaint be dismissed *with prejudice*;
25 3. For the costs of suit incurred herein;
26 4. For attorneys' fees and costs; and

27 ///

28 ///

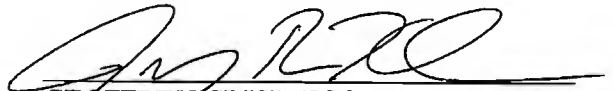
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5. For such other and further relief as the court deems just, equitable and proper.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that this document does not contain personal information as defined in NRS 603A.040 about any person.

DATED this 16th day of May, 2019.

WEIL & DRAGE, APC



GEOFFREY CRISP, ESQ.

Nevada Bar No. 2104

JEREMY R. KILBER, ESQ.

Nevada Bar No. 10643

2500 Anthem Village Drive

Henderson, NV 89052

Attorneys for COBRA THERMOSOLAR PLANTS,
INC. and AMERICAN HOME ASSURANCE
COMPANY

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 16th day of May, 2019, service of the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S ANSWER TO BRAHMA GROUP, INC.'S FIRST AMENDED THIRD-PARTY COMPLAINT** was made this date by mailing a true and correct copy of the same, via first-class mail, at Henderson, Nevada, addressed to the following:

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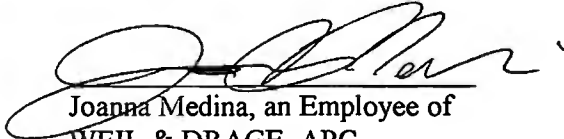

Joanna Medina, an Employee of
WEIL & DRAGE, APC

EXHIBIT 22

2:18-cv-01747-RFB-GWF

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
vs.) Tuesday, June 25, 2019
2:42 p.m.
TONOPAH SOLAR ENERGY, LLC,) MOTION HEARING
a Delaware limited)
liability company,)
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.

PATRICIA L. GANCI, RMR, CRR (702) 385-0670

2:18-cv-01747-RFB-GWF

1 APPEARANCES:

2 For the Plaintiff:

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6 For the Defendant:

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PATRICIA L. GANCI, RMR, CRR (702) 385-0670

2:18-cv-01747-RFB-GWF

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

2 --oOo--

3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: Now calling Brahma Group,
5 Incorporated versus Tonopah Solar Energy, LLC, Case Number
6 2:18-cv-01747-RFB-GWF. This is the time for the hearing
7 regarding Docket 13, motion to stay case or in the alternative
8 motion to amend complaint, and Docket 16, motion for permanent
9 injunction.

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

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

15 MR. PEEL: Good afternoon, Your Honor.

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

19 THE COURT: Good afternoon.

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

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

PATRICIA L. GANCI, RMR, CRR (702) 385-0670

—2:18-cv-01747-RFB-GWF—

1 MR. ZIMBELMAN: I will be, Your Honor.

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

3 MR. ZIMBELMAN: Zimbelman.

4 (Court conferring with courtroom administrator.)

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

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

10 THE COURT: Sure.

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

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

15 MR. ZIMBELMAN: Why are we not just withdrawing?

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

19 MR. ZIMBELMAN: Right.

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

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

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

—2:18-cv-01747-RFB-GWF—

1 right now.

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

3 THE COURT: I'm not asking their position.

4 MR. ZIMBELMAN: I understand.

5 THE COURT: So I want you to answer --

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

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

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

16 MR. ZIMBELMAN: Might not, but it might.

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

19 MR. ZIMBELMAN: Yes.

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

22 MR. ZIMBELMAN: No, not at all. In fact, I absolutely
23 100 percent agree this court has jurisdiction over this
24 action --

25 THE COURT: Right.

—2:18-cv-01747-RFB-GWF—

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

2 THE COURT: Right.

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

4 THE COURT: Okay. So I'm trying to clarify that.

5 Okay. But you're now asking me to stay this case.

6 MR. ZIMBELMAN: That is correct.

7 THE COURT: Now, I want to make sure I'm understanding.

8 There is not a current lien because there's a bond covering the
9 alleged claimed work, disputed work, correct?

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

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

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

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

23 MR. ZIMBELMAN: Not by my client.

24 THE COURT: By anyone?

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

—2:18-cv-01747-RFB-GWF—

1 THE COURT: But you would be informed about that.

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

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

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

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

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

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

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

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

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

2:18-cv-01747-RFB-GWF

1 So ...

2 MR. ZIMBELMAN: We are pursuing those lien claims.

3 THE COURT: Well, I understand that.

4 MR. ZIMBELMAN: Yeah.

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

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

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

—2:18-cv-01747-RFB-GWF—

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

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

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

7 MR. ZIMBELMAN: I'm getting there --

8 (Court reporter interruption.)

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

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

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

17 MR. ZIMBELMAN: The answer is yes.

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

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

23 THE COURT: Hold on.

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

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

—2:18-cv-01747-RFB-GWF—

1 filed?

2 MR. ZIMBELMAN: That's correct.

3 THE COURT: In Nye County?

4 MR. ZIMBELMAN: That's correct.

5 THE COURT: Against whom?

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

8 THE COURT: And that was filed when?

9 MR. ZIMBELMAN: I want to say October or November of
10 2018.

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

13 MR. ZIMBELMAN: After.

14 THE COURT: Okay.

15 MR. ZIMBELMAN: And Judge Elliott --

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

17 MR. ZIMBELMAN: Sorry.

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

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

22 THE COURT: And when did you do that?

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

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

—2:18-cv-01747-RFB-GWF—

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

3 MR. ZIMBELMAN: Well --

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

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

8 THE COURT: Cobra.

9 MR. ZIMBELMAN: Somebody else did.

10 THE COURT: Right.

11 MR. ZIMBELMAN: Yeah.

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

15 MR. ZIMBELMAN: That's fair.

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

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

24 MR. ZIMBELMAN: There is one other.

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

—2:18-cv-01747-RFB-GWF—

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

4 MR. ZIMBELMAN: Correct.

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

7 MR. ZIMBELMAN: Yes.

8 THE COURT: Okay.

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

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

14 MR. ZIMBELMAN: The first.

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

17 MR. ZIMBELMAN: And they --

18 THE COURT: Hold on. Let me finish.

19 MR. ZIMBELMAN: Sorry.

20 THE COURT: You filed the foreclosure complaint.

21 MR. ZIMBELMAN: Right.

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

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1 MR. ZIMBELMAN: That's correct.

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

6 MR. ZIMBELMAN: That's true.

7 THE COURT: Okay.

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

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

11 MR. ZIMBELMAN: That's true.

12 THE COURT: Right.

13 MR. ZIMBELMAN: Yeah.

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

17 MR. ZIMBELMAN: That is correct.

18 THE COURT: Okay.

19 MR. ZIMBELMAN: Yeah.

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

22 MR. ZIMBELMAN: No.

23 THE COURT: Okay. So --

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

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

2 THE COURT: And they're on hold --

3 MR. ZIMBELMAN: Those claims --

4 THE COURT: I'm sorry. Go ahead.

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

7 THE COURT: And stayed by whom?

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

14 THE COURT: Okay.

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

18 MR. ZIMBELMAN: Yes.

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

21 MR. ZIMBELMAN: Sure.

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

24 MR. ZIMBELMAN: Right.

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

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

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

6 THE COURT: Sure.

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

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

12 MR. ZIMBELMAN: Uh-hmm.

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

15 MR. ZIMBELMAN: That is true.

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

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

23 THE COURT: As to that particular issue.

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

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

6 THE COURT: Right. Okay.

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

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

10 MR. ZIMBELMAN: Of course.

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

15 MR. ZIMBELMAN: Certainly.

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

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

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

11 MR. ZIMBELMAN: Okay. I understand that.

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

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

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

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

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

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

10 You brought the case in Clark County, right. I'm not
11 saying in any way that any of the rights that would exist under
12 108.2421 or 108.2453 would in any be abridged in this action.
13 It's a diversity action. State law would apply.

14 MR. PEEL: Your Honor --

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

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

18 THE COURT: Sure.

19 MR. PEEL: Mr. Zimbelman. Go ahead.

20 THE COURT: And so ...

21 (Plaintiff's counsel conferring.)

22 THE COURT: You made the argument --

23 MR. ZIMBELMAN: Yes.

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

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1 MR. ZIMBELMAN: Right.

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

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

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

13 MR. ZIMBELMAN: So, first of all, because N.R.S.
14 108.2421 states that the lien claimant is entitled to bring an
15 action against the principal and the surety on the surety bond
16 and the lien claimant's debtor in any court or competent
17 jurisdiction that is located within the county where the
18 property upon work for improvement is located. The lien claim's
19 debtor in this case is TSE.

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

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

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

4 MR. ZIMBELMAN: True.

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

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

21 MR. ZIMBELMAN: Zimbelman.

22 THE COURT: Zimbelman.

23 MR. ZIMBELMAN: Yes.

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

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

3 MR. ZIMBELMAN: Sure.

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

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

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

20 THE COURT: Okay.

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

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

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

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

20 And we're going to make the same arguments there that
21 we make here. And they may make some of the same arguments that
22 TSE is going to make here in defense of our lien claim.

23 But, you know, fundamentally the causes -- the claims,
24 the dispute, is the same. The facts are the same. And some
25 facts maybe would not be elucidated over here that might be here

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

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

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

9 MR. ZIMBELMAN: Yeah.

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

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

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1 MR. ZIMBELMAN: Only because those specific causes of
2 action are not enumerated, but in fact our lien is going to be
3 based upon the unpaid balance of the contract owed to us less
4 all just offsets and credits. Right. What are those just
5 offsets and credits? They make all kinds of arguments about our
6 invoicing being incorrect and they've even stretched that to
7 allege fraud. It's absurd, but that's their allegation. Those
8 same arguments would be made in defense of our lien claim over
9 in Nye County and presumably will be.

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

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

17 THE COURT: Okay.

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

21 MR. ZIMBELMAN: Absolutely.

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

24 MR. ZIMBELMAN: Thank you, Your Honor.

25 THE COURT: As relates to the arguments here.

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

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

6 (Court conferring with court reporter.)

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

9 THE COURT: Okay.

10 MR. ROBERTS: Too much paper in this case.

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

13 MR. ROBERTS: Fair enough.

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

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

20 THE COURT: Okay.

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

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1 THE COURT: On the second lien?

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

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

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

16 THE COURT: Right.

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

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

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

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

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

7 MR. ROBERTS: Roberts.

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

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

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

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

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

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

3 THE COURT: Right.

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

11 THE COURT: Right.

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

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

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

21 MR. ROBERTS: Correct, Your Honor.

22 THE COURT: Okay.

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

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

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

16 What's left there --

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

25 MR. ROBERTS: I would disagree, Your Honor.

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

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

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

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

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

10 MR. ROBERTS: Yes.

11 THE COURT: -- in State Court, right?

12 MR. ROBERTS: Yes, Your Honor.

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

16 MR. ROBERTS: Correct.

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

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

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

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

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

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

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

11 THE COURT: To --

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

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

18 MR. ROBERTS: Absolutely, Your Honor.

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

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

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

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

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

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

8 THE COURT: Right.

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

12 THE COURT: Got it. Okay.

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

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

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1 they filed no timely motion to remand.

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

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

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

8 THE COURT: Under I think it was --

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

11 THE COURT: Quackenbush or --

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

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

19 MR. ROBERTS: Yes, Your Honor.

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

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

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

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

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

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

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

18 MR. ROBERTS: They would still end up here.

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

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

23 THE COURT: Yes.

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

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

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

6 MR. ROBERTS: Yes.

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

9 MR. ROBERTS: No.

10 THE COURT: -- they're suggesting.

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

13 THE COURT: Okay. All right.

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

22 THE COURT: And the basis of the writ was?

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

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

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

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

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

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

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

4 MR. ROBERTS: Yes, Your Honor.

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

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

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

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

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

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

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

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

5 MR. ROBERTS: Fair enough.

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

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

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

18 So, is there anything else you wanted to add?

19 MR. ROBERTS: Nothing else, Your Honor.

20 THE COURT: All right. Thank you.

21 MR. ROBERTS: Thank you for your time.

22 THE COURT: Uh-huh.

23 Mr. Zimbelman, any final response?

24 MR. ZIMBELMAN: Thank you, Your Honor.

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

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

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

6 MR. ZIMBELMAN: Now.

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

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

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

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

19 THE COURT: Okay. So how --

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

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

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

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

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

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

15 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. ZIMBELMAN: Of course.

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

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

14 THE COURT: Okay.

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

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

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

3 MR. ZIMBELMAN: I'm sorry?

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

5 MR. ZIMBELMAN: They did.

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

10 MR. ZIMBELMAN: Same dispute.

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

14 MR. ZIMBELMAN: Okay.

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

16 MR. ZIMBELMAN: It's both.

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

20 MR. ZIMBELMAN: It is.

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

25 MR. ZIMBELMAN: I appreciate the distinction, Your

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

2 THE COURT: Okay. All right. Thank you.

3 MR. ZIMBELMAN: Thank you, Your Honor.

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

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

9 MR. ROBERTS: Thank you, Your Honor.

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

11 --oOo--

12 COURT REPORTER'S CERTIFICATE

13

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

18

19 Date: June 27, 2019.

20

/s/ Patricia L. Ganci

21

Patricia L. Ganci, RMR, CRR

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CCR #937

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PATRICIA L. GANCI, RMR, CRR (702) 385-0670

EXHIBIT 23

1
2
3
4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**

6 * * *

7 BRAHMA GROUP, INC., a Nevada
8 Corporation,

9 Plaintiff,

10 v.

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

13 Defendant.

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

16 Counter Claimant

17 v.

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

20 Counter Defendant

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

ORDER

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

26 ///

27 ///

28 ///

1 **I. PROCEDURAL BACKGROUND**

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

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

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

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

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

16
17 **II. FACTUAL BACKGROUND**

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

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

28 ///

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

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

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

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

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

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

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

9 10 **III. LEGAL STANDARD**

11 **a. Colorado River Abstention**

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

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

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

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

14 **IV. DISCUSSION**

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

22 **a. Colorado River Abstention**

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

25 **i. Jurisdiction Over a Res**

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

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

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

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

10 **iii. Avoidance of Piecemeal Litigation**

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

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

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

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

9 **v. Rule of Decision**

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

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

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

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

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

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

7
8 **V. CONCLUSION**

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

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

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

17
18 DATED: September 25, 2019.

19
20 _____
21 **RICHARD F. BOULWARE, II**
22 **UNITED STATES DISTRICT JUDGE**
23
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28

EXHIBIT 24

COPY

FILED
FIFTH JUDICIAL DISTRICT

OCT 16 2019

Nye County Clerk
Sarah Westfall Deputy

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*Attorneys for COBRA THERMOSOLAR PLANTS, INC. and
AMERICAN HOME ASSURANCE COMPANY*

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF NYE

TONOPAH SOLOR ENERGY, LLC, a) Case No.: CV39348
Delaware limited liability company,) Consolidated With
Plaintiff,) Case No.: CV39799
Dept. No.: 2

vs.

BRAHMA GROUP, INC., a Nevada
corporation,

Defendant.

**COBRA THERMOSOLAR PLANTS, INC.'S
AND AMERICAN HOME ASSURANCE
COMPANY'S MOTION TO STAY**

[ORAL ARGUMENT REQUESTED]

BRAHMA GROUP, INC., a Nevada
corporation,

Lien/Bond Claimant,

vs.

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

Counter-defendants.

Date of Hearing: TBD

Time of Hearing: TBD

COPY

1 BRAHMA GROUP, INC., a Nevada)
2 corporation,)
3 Lien/Bond Claimant and)
4 Third-Party Plaintiff,)
5 vs.)
6 COBRA THERMOSOLAR PLANTS, INC.,)
7 a Nevada corporation; AMERICAN HOME)
8 ASSURANCE COMPANY, a surety; BOE)
9 BONDING COMPANIES I through X; DOES)
10 I through X; ROE CORPORATIONS I)
11 through X, inclusive,)
12 Third-Party Defendants.)

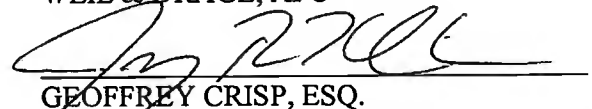
11 **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE**
12 **COMPANY'S MOTION TO STAY**

13 COMES NOW Third-Party Defendants, COBRA THERMOSOLAR PLANTS, INC. and
14 AMERICAN HOME ASSURANCE COMPANY (collectively, for purposes of this response,
15 "COBRA"), by and through their attorneys of record, the law firm of WEIL & DRAGE, APC, and
16 hereby moves this Court for a stay of BRAHMA GROUP, INC.'s Third-Party action against
17 COBRA.

18 This Motion is based on the Memorandum of Points and Authorities submitted herein, all
19 pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this
20 Honorable Court will entertain.

21 DATED this 15th day of October, 2019.

22 WEIL & DRAGE, APC

23 

24 GEOFFREY CRISP, ESQ.

25 Nevada Bar No. 2104

26 JEREMY R. KILBER, ESQ.

27 Nevada Bar No. 10643

28 2500 Anthem Village Drive

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** will be heard before the above-entitled Court located at 1520 E. Basin Avenue, Pahrump, Nevada 89060, in Department 2, on the _____ day of DATE TBD, 2019, at _____ a.m./p.m., or as soon thereafter as counsel may be heard.

Oral argument is requested.

DATED this 15th day of October, 2019.

WEIL & DRAGE, APC



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ASSURANCE COMPANY*

1 that Brahma alleges TSE owes. Thus, if Brahma's claim against TSE fails, its claim against Cobra
2 similarly fails. Because the claim against Cobra is wholly dependent on the claims against TSE,
3 and those claims have been enjoined by the federal court, the surety claim against Cobra and
4 AHAC should similarly be stayed pending the outcome of the federal court action between
5 Brahma and TSE.

6 Cobra will be filing a petition to intervene in the related federal case. If that motion were
7 to be granted, which it should be, Brahma will have near identical claims against Cobra and
8 AHAC in state and federal court. The federal court recognized as much when it enjoined Brahma
9 from litigating its contract claims against TSE in this matter. Thus, at the very least, this Court
10 should stay the proceedings as to Cobra and AHAC pending the federal court's decision on Cobra
11 and AHAC's motion to intervene.

12 II.

13 FACTS¹

14 On or about February 1, 2017, TSE entered a Services Agreement ("Agreement") with
15 Brahma Group Inc., whereby Brahma agreed to provide TSE, on a time and material basis, work,
16 materials, and equipment (collectively, the "Work") at Crescent Dunes. Brahma alleges that it
17 provided the Work at Crescent Dunes and TSE failed to fully pay Brahma for such Work.

18 Because of TSE's alleged failure to fully pay Brahma for its Work, Brahma caused a notice
19 of lien ("Original Lien") to be recorded on April 9, 2018 with the Nye County Recorder as
20 Document No. 890822. Thereafter, the Original Lien was amended on several occasions. On
21 September 14, 2018, Brahma recorded its Fourth Amended Notice of Lien ("Fourth Amended
22 Lien") with the Nye County Recorder, as Document No. 899351.3, increasing the amount to
23 \$12,859,577.74. Brahma's Original Lien and the amendments and restatements thereto, including
24 the Fourth Amended Lien, are referred to collectively as the "Brahma Lien."

25 Cobra caused a surety bond to be recorded with the Nye County Recorder's Office on
26 September 6, 2018, as Document No. 898974 (the "Brahma Surety Bond"), reserving its rights
27

28 ¹ These facts have been taken from the Complaint and are assumed to be true for the purposes of this motion only.

1 against TSE. The Brahma Surety Bond (i) was issued by AHAC, as surety ("Surety") on August
2 15, 2018, (ii) identifies Cobra, as principal ("Principal"), and (iii) was in the amount of
3 \$10,767,580.00.

4 Cobra increased the amount of the Surety Bond to \$19,289,366.61, or 1.5 times the amount
5 of Brahma's Fourth Amended Lien. Cobra did so by recording a Rider, that amended the Surety
6 Bond (the "Brahma Surety Bond Rider"), on October 9, 2018 with the Nye County Recorder's
7 Office as Document No. 900303. The Brahma Surety Bond and the Brahma Surety Bond Rider
8 are collectively referred to herein as the "Brahma Surety Bond." The Braham Surety Bond
9 released the Brahma Lien.

10 On May 15, 2018, H&E Equipment Services Inc., a Delaware Corporation and one of
11 Brahma's suppliers for Crescent Dunes, caused a notice of lien to be recorded with the Nye County
12 Recorder as Document No. 892768 in the amount of \$477,831.40 (the "H&E Lien"). On
13 September 6, 2018, Cobra caused a surety bond to be recorded with the Nye County Recorder's
14 Office as Document No. 898975 (the "H&E Surety Bond"). The H&E Surety Bond (i) was issued
15 by AHAC, as surety ("Surety") on August 15, 2018, (ii) identifies Cobra, as principal
16 ("Principal"), and (iii) is in the amount of \$716,741.10. The H&E Surety Bond released the H&E
17 Lien.

18 Section 24 of the TSE/Brahma Agreement required Brahma to pursue any contract-based
19 claims it had against TSE in Clark County, Nevada. As a result, Brahma filed a Complaint on July
20 17, 2018, against TSE alleging breach of contract, unjust enrichment, and violation of NRS
21 Chapter 624 in the Eighth Judicial District Court of Nevada (the "Clark County Action"). On
22 September 10, 2018, TSE removed the Clark County Action to the United States District Court,
23 District of Nevada (the "Federal Action"). TSE's removal petition cited 28 U.S.C. § 1332,
24 diversity of citizenship, as the basis subject matter jurisdiction. Brahma did not move to remand
25 the case and has not otherwise raised an objection to the Court's subject matter jurisdiction.

26 On September 21, 2018, Brahma (as the defendant in Case No. CV 39348, the "Nye
27 County Action") filed its Mechanic's Lien Foreclosure Complaint, as required by NRS 108.239(1).
28 On September 25, 2018, Brahma filed in the Nye County Action its (i) First Amended Counter-

1 Complaint and included therein its contract-based claims against TSE, and (ii) Third-Party
2 Complaint asserting a claim against the Surety, the Brahma Surety Bond and Cobra, as Principal.

3 On October 18, 2018, TSE moved to stay this action until the Federal Action was
4 complete. On January 24, 2019, this Court granted TSE's motion to stay the only three remaining
5 causes of action in this case: (1) breach of contract; (2) breach of implied covenant of good faith
6 and fair dealing, and (3) violations of NRS 624 until such time as the federal court rules on
7 Brahma's and TSE's pending motions filed in the Federal Action.

8 On April 19, 2019, Brahma filed a Second Amended Complaint and First-Amended Third
9 Party Complaint. The only claim against Cobra is the surety bond claim.

10 On April 30, 2019, this Court granted H&E's motion to intervene, permitting H&E to join
11 this lawsuit as a lien claimant pursuant to NRS 108.239(3). H&E's claims are derivative of
12 Brahma's claims against TSE.

13 On September 25, 2019, the court in the Federal Action enjoined Brahma from litigating its
14 contract claims in this Court, finding that Brahma "fraudulently filed [in this court] in an attempt
15 to subvert the removal of a prior case." (Case No. 2:18-cv-01747, Dkt. 55 at 8-9.) As such,
16 Brahma is currently enjoined from litigating its contract claims against TSE. As a result of the
17 federal court's injunction, TSE has naturally refused to participate in discovery.

18 III.

19 LEGAL ARGUMENT

20 Nevada state courts have cited the United States Supreme Court's *Landis* framework when
21 analyzing a motion to stay. "The power to stay proceedings is incidental to the power inherent in
22 every court to control the disposition of the causes of its docket with economy of time and effort
23 for itself, for counsel, and for litigants. How this can best be done calls for the exercise of
24 judgment which must weigh competing interests and maintain an even balance." *Maheu v. Eighth*
25 *Judicial Dist. Court In & For Clark Cty., Dep't No. 6*, 89 Nev. 214, 217 (1973) (quoting *Landis v.*
26 *N. Am. Co.*, 299 U.S. 248, 254-55 (1936)); see also *Jordan v. State ex rel. DMV and Public Safety*,
27 110 P.3d 30, 41 (2005).

28

1 Courts have “broad” discretionary power to stay proceedings that are “incidental to the
2 power in every court to control the disposition of the causes on its docket with economy of time
3 and effort for itself, for counsel, and for litigants.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997);
4 *Landis*, 299 U.S. at 254.

5 Courts have set out the following framework for a *Landis* stay:

6 Where it is proposed that a pending proceeding be stayed, the
7 competing interests which will be affected by the granting or refusal
8 to grant a stay must be weighed. Among those competing interests
9 are the possible damages which may result from the granting of a
10 stay, the hardship or inequity which a party may suffer in being
11 required to go forward, and the orderly course of justice measured in
12 terms of the simplifying or complicating issues, proof, and questions
13 of law which could be expected to result from a stay.

14 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005). Courts should also consider “the
15 judicial resources that would be saved by avoiding duplicative litigation.” *Pate v. Depuy*
16 *Orthopaedics, Inc.*, No. 2:12-cv-01168-MMD-CWH, 2012 WL 3532780, at *2 (D. Nev. Aug. 14,
17 2012).

18 **A. NO POSSIBLE DAMAGE WILL RESULT FROM GRANTING A STAY**

19 Brahma will not be prejudiced by a stay because a stay will not significantly delay any
20 relief to which Brahma may be entitled – and even such delay would not be grounds for refusing a
21 stay. In weighing the competing interests, a court should consider the possible damage to the non-
22 moving party. *Lockyer*, 398 F.3d at 1110; *see In re Am. Apparel, Inc. Shareholder Derivative*
23 *Litig.*, No. CV 10-06576 MMM, 2012 WL 9506072, at *43 (C.D. Cal. July 31, 2012) (noting
24 “courts generally consider whether doing so would cause undue prejudice or present a clear
25 tactical disadvantage to the non-moving party”) (citation omitted).

26 For example, courts have found that a stay is appropriate when the non-moving party’s
27 damage was only a delay in recovering money damages. *See, e.g., CMAX, Inc. v. Hall*, 300 F.2d
28 265, 268-69 (9th Cir. 1962); *see also Lockyer*, 398 F.3d at 1110. In *CMAX*, the non-moving party
sought to recover \$12,696.09 for its services as an air freight forwarder. *Id.* at 266. Because the
non-moving party sought an exact damage amount, the Ninth Circuit affirmed the stay noting that
the non-moving party “alleged no continuing harm and sought no injunctive or declaratory relief.”

1 *Lockyer*, 398 F.3d at 1110 (recognizing “[d]elay of CMAX’s suit would result, at worst, in a delay
2 in its monetary recovery”).

3 Similarly here, Brahma will not be damaged if this Court grants Cobra’s stay because
4 Brahma is only seeking monetary relief – it seeks an alleged outstanding balance, or leinable
5 amount, in the amount of \$12,859,577.74. (Second Am. Compl. at 12.) As a result, a limited stay
6 would not result in any continuing harm.

7 Moreover, Brahma will not be damaged or prejudiced by a stay given that discovery is in
8 its infancy. Courts have found that no clear prejudice exists from the granting of a stay when a
9 case is still in its earliest stages, and significant discovery has not yet begun. *See, e.g., Schwartz v.*
10 *Nugent*, No. 17-9133 (FLW) (TJB), 2018 WL 3069220, at *6 (D.N.J. June 21, 2018); *Knapp v.*
11 *Reid*, No. C15-1769-RSM, 2016 WL 561734, at *2 (W.D. Wash. Feb. 12, 2016); *Card Activation*
12 *Techs., Inc. v. 7-Eleven, Inc.*, No. 1:10-cv-4984, 2011 WL 663960, at *3 (N.D. Ill. Feb. 10, 2011).
13 Here, discovery is in its infancy; no depositions have taken place, and the parties have yet to
14 exchange significant documentation.

15 **B. COBRA WILL FACE HARDSHIP AND INEQUITY IF FORCED TO**
16 **PROCEED WITH LITIGATION WHILE THE CASE IS ENJOINED AS TO**
17 **TSE**

18 Moreover, although a stay will not cause Brahma any harm, allowing this case to move
19 forward will cause hardship and inequity to Cobra. Given how inextricably linked Cobra’s
20 defenses are to the claims against TSE, which are currently being litigated in federal court, this
21 Court should similarly stay the proceedings against Cobra. Brahma’s claim against Cobra is
22 intrinsically tied to its claim against TSE; if Brahma is unable to show that TSE owes it money,
23 then Cobra is not liable under the bond. Inasmuch as Brahma will have to prove its case against
24 TSE before it may proceed against the bond, it would make little sense to proceed against Cobra in
25 isolation before Brahma’s related claims against TSE are decided. If Brahma were to be allowed
26 to proceed against Cobra in respect to the bond while the federal court ruling is pending, there
27 would be significant risk of conflicting decisions and unjust results against the orderly course of
28 justice.

1 Courts in Nevada and elsewhere have stayed proceedings pending resolution of a related,
2 underlying claim.² For example, in *Specrite Design, LLC v. Elli N.Y. Design Corp.*, No. 16 Civ.
3 6154 (ER), 2017 WL 3105859 (S.D.N.Y. July 20, 2017), a subcontractor sued, in federal court, the
4 prime contractor and lien fund holder on a project, alleging that the contractor did not pay for labor
5 performed and materials the subcontractor furnished. In addition to the federal case, there was a
6 related state court lawsuit for breach of the subcontract. *Id.* at *1. The contractor moved to stay
7 the federal case pending resolution of the state court action because that court would determine if
8 the contractor had defaulted. *Id.* at *2. The court granted the motion to stay, finding “the right to a
9 lien can only be enforced to the extent of the amount due or to become due to the contractor or
10 subcontractor on whose credit the labor or materials are furnished under his contract.” *Id.* at *4.
11 The court went on to find that “even though the Lien was discharged by the issuance of [the surety
12 bond] the same test for the validity of the lien and the amount of the lien fund applies.” *Id.* Thus,
13 because “an action to enforce a discharged lien is in substance an action to test the validity of the
14 lien and to enforce the lien to the extent it is valid”, the court first needed to determine in state
15 court whether the contractor defaulted. *Id.* As a result, the court found that granting the stay
16 would balance the interests and prejudice that would result if it had not been granted, as well as
17 promote judicial efficiency and minimized the possibility of conflicts between different courts;
18 indeed, not granting a stay “would lead to unnecessary litigation that is time-consuming for this
19 Court and for the parties.” *Id.* at *5.

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23 ² See, e.g., *Kopicko v. Young*, 114 Nev. 1333, 1338 n.3 (Nev. 1998) (staying a legal malpractice case pending
24 the resolution of the underlying action); see *Allstate Prop. & Cas. Ins. Co. v. Talda*, No. No. 2:14-CV-00050-
25 APG-CWH, 2015 WL 1344517, at *5 (D. Nev. Mar. 20, 2015) (granting defendant’s motion to stay
26 regarding defendant’s duty to indemnify when the underlying tort cause has not been resolved and there were
27 underlying relevant factual disputes); see also *Colony Ins. Co. v. Vantaggio Farming Corp.*, 1:17-cv-00714-
28 LJO-SKO, 2017 WL 3478998, at *8 (E.D. Cal. Aug. 14, 2017) (granting defendant’s motion to stay the
insurance proceedings after finding that there were significant unresolved factual issues in the underlying suit
that would implicate the question of coverage liability); *State Nat’l Ins. Co., Inc. v. US-SINO Inv., Inc.*, No.
5:13-CV-05240-EJD, 2015 WL 5590842, at *5 (N.D. Cal. Sept. 23, 2015) (granting stay pending resolution
of underlying actions and rejecting insurer’s argument that it would be prejudiced by advancing defense costs
during the stay); *Zurich Am. Ins. Co. v. Omnicell, Inc.*, No. 18-CV-05345-LHK, 2019 WL 570760, at *6
(N.D. Cal. Feb. 12, 2019) (finding that the stay was necessary when the dispute was related to claims in
another action).

1 Similarly here, the federal court must first determine whether TSE is liable for the
2 payments to Brahma prior to Brahma being able to foreclose on the lien against Cobra's bond. If
3 the federal court determines that TSE is not liable for the payments to Brahma, then Brahma
4 cannot foreclose on the lien against Cobra's bond. The federal court recently enjoined Brahma
5 from litigating its contract claims against TSE in this Court. In making this determination, the
6 federal court found that this action was "fraudulently filed in an attempt to subvert the removal of
7 a prior case." (Case No. 2:18-cv-01747, Dkt. 55 at 8-9) (citing *Lou v. Belzberg*, 834 F.2d 730, 741
8 (9th Cir. 1987)). Further, the federal court found that "there would be immediate and irreparable
9 injury to TSE for which there would not be an adequate remedy at law if Brahma's behavior is
10 rewarded." *Id.* Thus, the federal court enjoined Brahma from litigating the breach of contract,
11 breach of implied covenant of good faith and fair dealing, and violation of NRS 624 claims against
12 TSE. *Id.* Given that the underlying claims against TSE are enjoined, resulting in TSE's lack of
13 participation in discovery, Cobra will be inherently harmed if it is forced to continue litigation
14 without TSE.

15 **C. A STAY WILL PROMOTE THE ORDERLY COURSE OF JUSTICE WHILE**
16 **COBRA'S MOTION TO INTERVENE IN THE FEDERAL ACTION IS**
17 **PENDING**

18 In determining whether to grant a stay, the court considers "the orderly course of justice
19 measures in terms of the simplifying or complicating of issues, proof, and questions of law which
20 could be expected to result from a stay." *CMAX*, 300 F.2d. at 268 (citing *Landis*, 299 U.S. at 254-
21 55). For example, courts have granted stays when there is a pending decision which would narrow
22 the issues in a case. *See, e.g., Brown v. Credit One Bank, N.A.*, No.: 2:17-cv-00786-JAD-VCF,
23 2018 WL 1697801, at *4 (D. Nev. Apr. 6, 2018) (granting motion to stay pending decision from
24 the D.C. Circuit's decision would help to "simplify and streamline the proceedings and promote
25 the efficient use of the parties' and the court's resources"); *Bank of N.Y. Mellon v. 4655*
26 *Gracemont Ave. Trust*, No. 2:17-cv-00063-JAD-PAL, 2018 WL 1697800, at *3 (D. Nev. Apr. 5,
27 2018) (granting a motion to stay pending the Nevada Supreme Court's acceptance of a certified
28 question a statutory interpretation which will "prevent unnecessary briefing and the expenditures

1 of time, attorney's fees, and resources that could be wasted"). Staying the claims as to Cobra will
2 promote the orderly course of justice and simplify issues because Cobra will be filing a motion to
3 intervene in the Federal Action, where Brahma and TSE's claims are currently being heard.

4 Courts have granted motions to stay pending a motion to intervene in a related case which
5 bears upon the case. *See, e.g., Briscoe v. City of New Haven*, No. 3:09-cv-1642 (CSH), 2009 WL
6 5184357, at *2 (D. Conn. Dec. 23, 2009) (granting plaintiff's motion to stay when plaintiff filed a
7 motion to intervene in a related case; thus, "[i]n light of the uncertainty regarding in which case
8 [plaintiff's] claims will be heard, if at all, it is prudent to stay the bulk of discovery until
9 [plaintiff's] motion to intervene" is decided). Similarly, proceedings may be stayed "pending
10 resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of*
11 *California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). Where a stay is sought pending the resolution
12 of another action, the court need not find that two cases possess identical issues; a finding that the
13 issues are substantially similar is sufficient to support a stay. *See Landis*, 299 U.S. at 254. Courts
14 should weigh the competing interests of the parties. *See id.* at 254-55. The issues involved in the
15 pending proceedings need not be "controlling of the action before the court" for a stay to be
16 ordered. *See Leyva*, 593 F.2d at 864.

17 Given that Cobra will be moving to intervene in the Federal Action, upon which identical
18 claims are being litigated, this Court should grant Cobra's motion to stay. Because the Federal
19 Action is the more appropriate forum and that court should have jurisdiction over these claims, as
20 the federal court recognized when it enjoined Brahma from litigating its contract claims against
21 TSE in this matter, this Court should similarly stay the claims against Cobra. In doing so, granting
22 a stay pending the federal court's decision on Cobra's motion to intervene will simplify the issues
23 and promote efficiency because all parties and claims will be in the same court, before the same
24 judge. Thus, the claims against Cobra should be stayed, as the federal court's decision on Cobra's
25 motion to intervene will promote the orderly course of justice by simplifying, or removing, the
26 issues in this case.

27 ///

28 ///

1 **D. JUDICIAL RESOURCES WOULD BE SAVED BY AVOIDING DUPLICATIVE**
2 **LITIGATION AND THE RISK OF CONFLICTING DECISIONS**

3 Moreover, the claims against Cobra should be stayed to avoid unnecessary duplicative
4 discovery and the risk of conflicting decisions. *See, e.g. Knepper v. Equifax Info. Servs.*, No. 2:17-
5 CV-02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2, 2017) (granting a motion to stay
6 the action, which would “limit hardship or inequity to [defendant] from unnecessary proceedings,
7 inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple
8 jurisdictions.”); *Tobler v. DePuy Orthopedics, Inc.*, No. 2:12-cv-01167-LDG (RJJ), 2012 WL
9 3598291, at *2-3 (D. Nev. Aug. 17, 2012) (granting a stay pending an multi-district litigation
10 transfer order to avoid duplicative discovery and pretrial management efforts). In *Knepper*, the
11 court granted a stay when plaintiffs in related cases filed a motion for consolidation and transfer.
12 The court granted the stay, finding that doing so would limit hardship and inequity to defendants
13 from “unnecessary proceedings, inconsistent rules, duplicative discovery, and having to re-litigate
14 claims in multiple jurisdictions.” *Id.* at *3. Courts have similarly stayed cases when doing so “is
15 the most efficient way to allow [] uncertainties to resolve”, especially when the parties face
16 “duplicative discovery” where there was a potential to need to “re-open discovery and coordinate
17 two or more cases.” *Honghui Deng v. Nevada ex rel. Bd. of Regents*, No. 2:17-cv-03019-APG-
18 VCF, 2019 U.S. Dist. LEXIS 36716, at *6 (D. Nev. Mar. 7, 2019) (granting a motion to stay when
19 a state court case contained a federal claim and removal was possible, and there were already
20 similar state cases).

21 Currently, Brahma is noticing depositions of Cobra in this Court in its effort to support its
22 claims against TSE. However, Brahma’s claims against TSE are being litigated in federal court.
23 If this Court does not stay the claims against Cobra, Cobra faces the real possibility of duplicative
24 discovery down the road. Moreover, if Brahma’s claims against Cobra proceed in this matter,
25 while Brahma’s claims against TSE simultaneously proceed in federal court, the parties face the
26 risk of inconsistent and conflicting rulings. Because such cost is unnecessary, and in order to
27 promote fairness and efficiency, this Court should stay the proceedings against Cobra.

28 ///

IV.


CONCLUSION

Based upon the foregoing, Cobra respectfully request that the Court grant this Motion and stay the claims against it and grant such other relief as the Court deems just and proper.

The undersigned does hereby affirm, pursuant to NRS 239B.030, that this document does not contain personal information as defined in NRS 603A.040 about any person.

DATED this 15th day of October, 2019.

WEIL & DRAGE, APC



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Nevada Bar No. 2104

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*Attorneys for COBRA THERMOSOLAR
PLANTS, INC. and AMERICAN HOME
ASSURANCE COMPANY*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 15th day of
3 October, 2019, service of the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND**
4 **AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** was made this date
5 by mailing a true and correct copy of the same, via first-class mail, at Henderson, Nevada,
6 addressed to the following:

7
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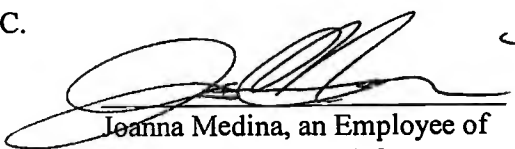
18
19 
20 Joanna Medina, an Employee of
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EXHIBIT 25

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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF NEVADA**

12 BRAHMA GROUP, INC., a Nevada
13 Corporation,

14 Plaintiff,

15 vs.

16 TONOPAH SOLAR ENERGY, LLC, a
17 Delaware Limited Liability Company; DOES I
18 through X; and ROE CORPORATIONS I
through X,

19 Defendants.

20 TONOPAH SOLAR ENERGY, LLC a
21 Delaware limited liability company; DOES I
22 through X; and ROE CORPORATIONS I
through X,

23 Counter-claimants,

24 vs.

25 BRAHMA GROUP, INC., a Nevada
26 corporation,

27 Counter-defendant.
28

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

**MOTION TO INTERVENE AS
DEFENDANTS**

{01626568;1}

MOTION TO INTERVENE AS DEFENDANTS

MOTION TO INTERVENE AS DEFENDANTS

COMES NOW the Proposed Defendants-Intervenors, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN HOME ASSURANCE COMPANY, by and through their attorneys of record, at the law firm of WEIL & DRAGE, APC, and for the reasons set forth herein, hereby move this Court pursuant to Fed. R. Civ. P. 24, to Intervene as Defendants in this action. The Proposed Defendants-Intervenors seek to intervene in this matter as of right under Fed. R. Civ. P. 24(a) or in the alternative, permissively, pursuant to Fed. R. Civ. P. 24(b).

This Motion is based upon the Pleadings and Papers on file, the attached Points and Authorities, the accompanying proposed Answer in Intervention¹, and oral argument to be made by counsel at any Hearing of this matter.

DATED this 18th day of October, 2019.

WEIL & DRAGE, APC

/s/ Jeremy R. Kilber

By: _____

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and AMERICAN HOME ASSURANCE
COMPANY*

¹ Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Proposed Answer in Intervention is attached hereto as *Exhibit 1*.

I. INTRODUCTION

A. THE PROPOSED DEFENDANTS-INTERVENORS.

The Proposed Defendant-Intervenor, Cobra Thermosolar Plant, Inc., a Nevada corporation (“Cobra”) is a member of the Cobra Group of companies. The Cobra Group, which is active in projects in Spain and in many other countries globally, specializes in large infrastructure projects, including both conventional energy (e.g., coal, natural gas) and renewable energy (e.g., solar, wind, hydropower) projects.

Defendant Tonopah Solar Energy, LLC, a Delaware limited liability company (“TSE”), is the owner of the Crescent Dunes Solar Energy Project constructed by Cobra in Tonopah, Nevada (“Crescent Dunes”). Cobra engineered and constructed Crescent Dunes—a cutting edge concentrating solar power plant—that generates electricity without any fossil fuel at all. Cobra and TSE negotiated a complex EPC contract over the course of a year and executed it on September 22, 2011. The EPC Contract (including its exhibits) consists of over 2,200 pages, including a statement of work detailing the work to be performed by Cobra.

As detailed below in Section I.B., Cobra and American Home Assurance Company (“AHAC”), an insurance company incorporated under the laws of the State of New York, also a Proposed Defendant-Intervenor, issued a surety bond that guarantees the liabilities, if any, that are at issue in this action.

B. THE FACTS ALLEGED IN THIS ACTION.

On or about February 1, 2017, TSE entered a Services Agreement (“Agreement”) with Plaintiff, Brahma Group Inc., under which Brahma agreed to provide TSE, on a time and material basis, work, materials, and equipment (collectively, the “Work”) at Crescent Dunes. Brahma alleges that it provided the Work at Crescent Dunes and TSE failed to fully pay Brahma for such Work.

Because of TSE’s alleged failure to fully pay Brahma for its Work, Brahma recorded a notice of lien against Crescent Dunes with the Nye County Recorder on April 9, 2018.

Thereafter, the lien was amended on several occasions and ultimately increased to \$12,859,577.74 by Brahma in the Fourth Amended Notice of Lien (“Fourth Amended Lien”),

1 recorded with the Nye County Recorder on September 14, 2018. Brahma's lien and the
2 amendments and restatements thereto, including the Fourth Amended Lien, are referred to
3 collectively herein as the "Brahma Lien."

4 To replace Crescent Dunes with a surety bond as security for the Brahma Lien, Cobra
5 recorded a surety bond with the Nye County Recorder's Office on September 6, 2018, reserving
6 its rights against TSE. The bond was issued by AHAC on August 15, 2018 in the amount of
7 \$10,767,580.00. Cobra is the principal on the bond; AHAC is the surety.

8 Cobra increased the amount of the bond to \$19,289,366.61 or 1.5 times the amount of
9 Brahma's Fourth Amended Lien, by recording a rider that amended the bond, on October 9, 2018.
10 The bond and rider that amended the bond are collectively referred to herein as the "Cobra Surety
11 Bond."

12 Section 24 of the TSE/Brahma Agreement required Brahma to pursue any contract-based
13 claims it had against TSE in Clark County, Nevada. Accordingly, on July 17, 2018, Brahma filed
14 a Complaint against TSE in the Eighth Judicial District Court of Nevada, alleging breach of
15 contract, unjust enrichment, and violation of NRS Chapter 624 (the "Clark County Action"). On
16 September 10, 2018, TSE removed the Clark County Action to this Court. TSE's removal petition
17 cited 28 U.S.C. § 1332, diversity of citizenship, as the basis for subject matter jurisdiction.
18 Brahma did not move to remand the case and has not otherwise raised an objection to the Court's
19 subject matter jurisdiction.

20 On September 17, 2018, TSE filed its Answer and Counterclaim. TSE's counterclaim
21 alleges several state law claims against Brahma: breach of contract, breach of implied covenant of
22 good faith and fair dealing, declaratory relief, unjust enrichment, fraudulent/intentional
23 misrepresentation, and negligence misrepresentation.

24 In its counterclaims, among other things, TSE alleged that Brahma had submitted
25 numerous invoices that contained fraudulent misrepresentations regarding the amount of money
26 Brahma was due from TSE for the Work on Crescent Dunes. TSE alleged that it relied on
27 Brahma's false representations and made payments to Brahma it would not have otherwise. TSE
28 also alleged that Brahma supplied false information and made false representations to TSE

1 because Brahma had a pecuniary interest in inducing TSE to pay Brahma amounts to which
2 Brahma was not entitled. TSE alleged that it relied on Brahma's false representations in making
3 payments to Brahma and was, therefore, damaged by Brahma's negligent misrepresentations.

4 On September 25, 2018, Brahma filed its First Amended Complaint. The First Amended
5 Complaint purported to remove all causes of action against TSE except for Brahma's unjust
6 enrichment claim.

7 At the same time, Brahma filed a first amended counter-complaint and third-party
8 complaint in state court, asserting the three claims it had just dropped in this action (Case No. CV
9 39348, consolidated with Case No. CV39799, the "Nye County Action"). The third-party
10 complaint asserted one claim against Cobra and AHAC: claim on the surety bond.

11 On October 5, 2018, Brahma filed its Answer to TSE's counterclaim. On October 9, 2018,
12 TSE filed its Answer to Brahma's First Amended Complaint. On October 16, 2018, Brahma filed
13 its Motion to Stay the Case and on October 18, 2018, TSE files a Motion for an Injunction. This
14 Court heard oral arguments regarding Brahma's Motion to Stay and TSE's Motion for an
15 Injunction on June 25, 2019.

16 On September 25, 2019, this Court denied Brahma's Motion to Stay and granted TSE's
17 Motion for an Injunction, finding that "the state court action was fraudulently filed [by Brahma] in
18 an attempt to subvert the removal of a prior case." (Dkt. No. 55 at 8-9.). This Court further struck
19 Brahma's Amended Complaint (Dkt. No. 8), and reinstated Brahma's Original Complaint (Dkt.
20 No. 1-1.) Brahma is currently enjoined from litigating its contract claims against TSE in the Nye
21 County Action. As a result, Cobra and AHAC have moved to stay Brahma's claims against them
22 in the Nye County Action.

23 Discovery is at a very early stage. No depositions have taken place and fact discovery is not
24 set to close until January 23, 2020. (Dkt. No. 54). Additionally, TSE has objected to Cobra
25 participating in discovery in this action because it is adverse to Cobra in a separate arbitration
26 under the Rules of Arbitration of the International Chamber of Commerce International Court of
27 Arbitration (ICC Case No. 23247/MK) and does not want to risk Cobra having the benefit of any
28 discovery here that might be useful in the arbitration. Despite TSE's objection, Cobra and AHAC

1 should be able to take part in this action to protect and guard their rights directly.

2 **C. THE PROPOSED DEFENDANTS-INTERVENORS' INTEREST IN THE**
 3 **FEDERAL ACTION**

4 Although Brahma's claims are against TSE, the Cobra Surety Bond guarantees payment of
 5 whatever amount Brahma may prove it is owed by TSE. While TSE has raised affirmative defenses
 6 and counter-claims that sound in fraud in response to Brahma's claims, Cobra and AHAC still bear all
 7 the downside risk and the ultimate cost of TSE's defenses. There is a significant risk that TSE has
 8 little incentive to oppose Brahma's claims, or that TSE will be mindful of its dispute against Cobra in
 9 picking and choosing which arguments to use in its case against Brahma, conscious that it could
 10 undermine the credibility of its position in the arbitration against Cobra. Or, at the very least, TSE has
 11 nowhere near the incentive to oppose Brahma's claims that Cobra and AHAC have in this action.
 12 Therefore, Cobra and AHAC should be able to take part in this action to protect and guard their rights
 13 directly. They should not have to rely on TSE to do so for them.

14 Because of the loss that the Cobra and AHAC will suffer should Brahma prevail, Cobra and
 15 AHAC seek leave to intervene in action as of right pursuant to Fed. R. Civ. P. 24(a). Or, in the
 16 alternative, seek leave to intervene pursuant to Fed. R. Civ. P. 24(b).

17 **II. ARGUMENT**

18 **A. COBRA AND AHAC ARE ENTITLED TO INTERVENE AS OF RIGHT UNDER**
 19 **FRCP 24(a).**

20 Under Federal Rule of Civil Procedure 24(a), a court must permit any party to intervene in
 21 a lawsuit who "claims an interest relating to the property or transaction that is the subject of the
 22 action, and is so situated that disposing of the action may as a practical matter impair or impede
 23 the movant's ability to protect its interest, unless existing parties adequately represent that
 24 interest." Fed. R. Civ. P. 24(a)(2).

25 The rule is broadly construed in favor of intervention. *See Cabazon Band of Mission*
 26 *Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997); *see Sw. Ctr. for Biological Diversity v.*
 27 *Berg*, 268 F.3d 810, 818 (9th Cir. 2001) ("In general, we construe Rule 24(a) liberally in favor of
 28 potential Interveners."). "Courts are to take all well-pleaded, nonconclusory allegations in the

1 motion to intervene, the proposed complaint or answer in intervention, and declarations
 2 supporting the motion as true absent sham, frivolity or other objections.” *Id.* at 820. The Court
 3 follows the guidance of Rule 24 advisory committee notes that state that “[i]f an absentee would
 4 be substantially affected in a practical sense by the determination made in an action, he should, as
 5 a general rule, be entitled to intervene.” *Id.* at 822 (*citing* Fed. R. Civ. P. 24 advisory
 6 committee’s notes); *see also United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir.
 7 2004) (Courts considering Rule 24(a) motions are “guided primarily by practical and equitable
 8 considerations, and the requirements for intervention are broadly interpreted in favor of
 9 intervention”).

10 The Ninth Circuit employs four criteria to determine whether intervention under Rule 24(a)
 11 is appropriate: (1) the motion to intervene must be timely; (2) the applicant must have a
 12 significantly protectable interest related to the property or transaction that is the subject of the
 13 action; (3) the applicant must be situated such that the disposition of the action may impair or
 14 impede the party’s ability to protect that interest; and (4) the applicant’s interest must be
 15 inadequately represented by the existing parties. *See Arakaki v. Cavetano*, 324 F.3d 1078, 1083
 16 (9th Cir. 2003). The burden falls on the applicant to show that all of the requirements for
 17 intervention have been met. *See Alisal Water Corp.*, 370 F.3d at 919.

18 **1. This Motion to Intervene is Timely.**

19 The determination as to whether a motion to intervene is timely is left to the court’s
 20 discretion. *See Dilks v. Aloha Airlines*, 642 F.2d 1155, 1156 (9th Cir. 1981). Courts weigh three
 21 factors in determining whether a motion to intervene is timely: “(1) the stage of the proceeding at
 22 which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and
 23 length of the delay.” *Cal. Dep’t. of Toxic Substances Control v. Commercial Realty Projects, Inc.*,
 24 309 F.3d 1113, 1119 (9th Cir. 2002) (internal quotation marks omitted). The most important
 25 consideration in evaluating the timeliness of a motion to intervene is whether any delay in moving
 26 for intervention may prejudice existing parties; as long as prejudice is not likely to result from the
 27 timing of the motion, courts interpret the timeliness requirement liberally. *See, e.g., Cummings v.*
 28 *United States*, 704 F.2d 437, 439 (9th Cir. 1983) (motion to intervene timely even though made

1 after interrogatories and two weeks before date set for close of discovery). This motion to
 2 intervene is timely and will not prejudice any existing party. This action is at a very early stage.
 3 Due to motion practice engaged in by TSE and Brahma, the case is barely beyond the pleading
 4 stage. No depositions have taken place. Fact discovery is not set to close until January 23, 2020.
 5 (Dkt. No. 54.) Therefore, the Court should find this Motion is timely and Cobra and AHAC's
 6 intervention will not prejudice the other parties.

7 **2. Cobra and AHAC Have a Significantly Protectable Interest**
 8 **in this Action.**

9 "An applicant has a significant protectable interest in an action if (1) it asserts an interest
 10 that is protected under some law, and (2) there is a relationship between its legally protected
 11 interest and the plaintiff's claims." *United States v. City of Los Angeles*, 288 F.3d 391, 398 (9th
 12 Cir. 2002) (internal quotation marks omitted). This is "not a clear-cut or bright-line rule, because
 13 no specific legal or equitable interest need be established. Instead, the interest test directs courts to
 14 make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by
 15 involving as many apparently concerned persons as is compatible with efficiency and due
 16 process[.]" *Id.* It is construed "broadly in favor of proposed intervenors," *See Wilderness Soc. v.*
 17 *U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011). An applicant demonstrates a "significantly
 18 protectable interest" when the relief in the action will have "direct, immediate, and harmful effects"
 19 on the applicant's "legally protectable interests." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 118.

20 As principal and surety of the bond, Cobra and AHAC have a direct, substantial, and legally
 21 protectable interest in Brahma's claims against TSE. Indeed, Cobra and AHAC bear all the risk and
 22 the ultimate cost of TSE's defenses. Although Brahma's claims are against TSE, the Cobra Surety
 23 Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE. As such, Cobra
 24 and AHAC have a significantly protectable interest in this action.

25 **3. The Disposition of this Action May Impair or Impede**
 26 **Cobra and AHAC's Ability to Protect this Interest.**

27 "If an absentee would be substantially affected in a practical sense by the determination
 28 made in an action, he should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological*

1 *Diversity*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 advisory committee notes) (alteration
 2 omitted). But, there is no requirement that the party seeking to intervene show to “an absolute
 3 certainty” that its interests will be impaired. *Citizens for Balanced Use v. Mont, Wilderness Ass’n*,
 4 647 F.3d 893, 900 (9th Cir. 2011).

5 Cobra and AHAC will be substantially affected more than just in a practical sense. Cobra
 6 and AHAC face the loss of millions of dollars if TSE is found liable to Brahma for work at
 7 Crescent Dunes. Cobra and AHAC should be able to take part in this action to protect their
 8 interests in the first instance and without reliance on TSE to do so for them. Although TSE has
 9 thus far raised defenses and counterclaims against Brahma, the reality is that Cobra and AHAC –
 10 not TSE – bear all the risk. Moreover, there is a significant risk that TSE has little incentive to
 11 oppose Brahma’s claims, or that TSE will be mindful of its dispute against Cobra in picking and
 12 choosing which arguments to use in its case against Brahma, conscious that it could undermine the
 13 credibility of its position in the arbitration against Cobra. There is at least the possibility that TSE
 14 may simply go through the motions of making a defense since it knows, at the end of the day,
 15 Cobra and AHAC will be responsible for any amounts awarded to Brahma. As such, disposition
 16 of the Brahma’s action without Cobra and AHAC’s participation would impede their ability to
 17 protect their interests.

18 **4. Cobra and AHAC’s Interest Will Not Be Adequately** 19 **Represented by TSE.**

20 In determining whether a would-be intervenor’s interests will be adequately represented by
 21 an existing party, courts consider: (1) whether the interest of a present party is such that it will
 22 undoubtedly make all the intervenor’s arguments; (2) whether the present party is capable and
 23 willing to make such arguments; and (3) whether the would-be intervenor would offer any
 24 necessary elements to the proceedings that other parties would neglect. *Sw. Ctr. for Biological*
 25 *Diversity*, 268 F.3d at 822. The prospective intervenor bears the burden of demonstrating that the
 26 existing parties may not adequately represent its interest. *Id.* at 822-23 (citing *Sagebrush*
 27 *Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983)). However, the burden of showing
 28 inadequacy is “minimal” and the applicant need only show that representation of its interests by

1 existing parties “may be” inadequate. *Citizens for Balanced Use*, 647 F.3d at 898.

2 In assessing the adequacy of representation, the focus should be on the “subject of the
3 action,” not just the particular issues before the court at the time of the motion. *Sagebrush*, 713
4 F.2d at 528. “The ‘most important factor’ in assessing the adequacy of representation is ‘how the
5 interest compares with the interests of existing parties.’” *Citizens for Balances Use*, 647 F.3d at
6 898 (quoting *Arakaki*, 324 F.3d at 1086).

7 “If an applicant for intervention and an existing party share the same ultimate objective, a
8 presumption of adequacy of representation arises[,]” which can be rebutted by “a ‘compelling
9 showing’ of inadequacy of representation.” *Citizens for Balances Use*, 647 F.3d at 898 (quoting
10 *Arakaki*, 324 F.3d at 1086). The Ninth Circuit has held the presumption of adequacy may be
11 overcome where the intervenors have “more narrow, parochial interests” than the existing party.
12 *Forest Conservation Council v. United States Forest Secy.*, 66 F.3d 1489, 1499 (9th Cir. 1995).

13 Cobra and AHAC have “more narrow, parochial interests” than TSE. Although Brahma’s
14 claims are against TSE, the Cobra Surety Bond guarantees payment of whatever amount Brahma may
15 prove it is owed by TSE. Although TSE has thus far raised defenses and counterclaims against
16 Brahma, the reality is that Cobra and AHAC – not TSE – bear all the risk. TSE has little incentive
17 to make sure it wins because if it loses, Cobra and AHAC bear the cost. Indeed, Cobra and
18 AHAC face the loss of millions of dollars if TSE is found liable to Brahma for work at Crescent
19 Dunes. Cobra and AHAC should be able to take part in this action to protect their interests in the
20 first instance and without reliance on TSE to do so for them.

21 **B. IN THE ALTERNATIVE, COBRA AND AHAC SHOULD BE ENTITLED TO**
22 **INTERVENE UNDER RULE 24(b).**

23 Under Federal Rule of Civil Procedure 24(b), a court may grant permissive intervention
24 where (1) the applicant shows independent grounds for jurisdiction; (2) the motion is timely; and
25 (3) the applicant’s claim or defense and the main action share a common question of law or fact.
26 *See Freedom from Religion Foundation, Inc. v. Geitlin*, 644 F.3d 836, 843 (9th Cir. 2011). In
27 exercising its discretion on an application for permissive intervention, the court “must consider
28 whether the intervention will unduly delay or prejudice the adjudication of the original parties’

rights.” Fed. R. Civ. P. 24(b)(3). Permissive intervention is committed to the broad discretion of the district court. *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (citing to *Orange v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986); *Spangler v. Pasadena City Board of Ethics*, 552 F.2d 1326, 1329 (9th Cir. 1977) (identifying nonexclusive discretionary factors that the district court may consider when deciding whether to grant permissive intervention). In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties. *Donnelly*, 159 F.3d at 412; See Fed. R. Civ. P. 24(b)(2) (so providing). Courts give Rule 24(b) a liberal construction in favor intervention. See *Arakaki*, 324 F.3d at 1083.

First, in assessing independent jurisdiction, courts first look at whether a party’s intervention would destroy diversity jurisdiction. Crucially, the Supreme Court has established that “diversity of citizenship is assessed at the time the action is filed . . . if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.” *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991). The *Freeport-McMoRan* Court stressed that diversity jurisdiction is not “defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties.” *Id.* (quoting *Wichita R.R. & Light Co. v. Public Utils. Comm’n of Kansas*, 260 U.S. 48, 54 (1922)). Thus, whether diversity jurisdiction is defeated by the addition of a nondiverse party to the action depends on whether the nondiverse party is “indispensable.” *Id.*; see also *Mattel Inc. v. Bryant*, 446 F.3d 1011, 1013-14 (9th Cir. 2006) (“Intervention destroys diversity if the intervening party is indispensable.”) (internal quotation omitted).

Federal Rule of Civil Procedure 19(b) instructs that the question of whether a party is indispensable requires that a determination be made “in equity and good conscience.” Fed. R. Civ. P. 19(b). Indispensable parties under Rule 19(b) are “persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.” *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 779 (9th Cir. 2005). To determine whether a person is indispensable, Rule 19(b)

1 requires that the court consider: (1) the extent to which its judgment may prejudice the absent
 2 party or the parties already before the court, (2) the extent to which such prejudice may be
 3 lessened or avoided by protective provisions in the judgment, or other measures, (3) whether a
 4 judgment rendered in such person's absence will provide an adequate remedy to the parties before
 5 the court, and (4) whether, if the action is dismissed for nonjoinder, plaintiff will have an adequate
 6 remedy elsewhere. *See* Fed. R. Civ. P. 19(b). For example, courts have found that a nonparty to a
 7 commercial contract ordinarily is not necessary or indispensable to the adjudication of rights under
 8 the contract. *See TPOV Entrs. 16, LLC v. Paris Las Vegas Operating Co.*, No. 2:17-CV-346,
 9 2017 WL 2871070, at *7 (D. Nev. July 3, 2017). Further, "a defendant intervenor's declaration
 10 that it is not indispensable satisfies any concern that a decision in its absence would have
 11 prejudiced it." *Mattel*, 446 F.3d at 1013.

12 Further, 28 U.S.C. § 1367, the supplemental jurisdiction statute, extends supplemental
 13 jurisdiction to "persons . . . seeking to intervene as plaintiffs under Rule 24" in a diversity case as
 14 long as the exercise of supplemental jurisdiction is not inconsistent with the diversity jurisdiction
 15 statute. *See* 28 U.S.C. § 1367(b). The Court may extend supplemental jurisdiction here. The
 16 Supreme Court, along with circuit courts, recognize the well-established rule that the exercise of
 17 jurisdiction over the addition of a nondiverse party is not inconsistent with the requirements of
 18 diversity jurisdiction as long as the party is not indispensable. *See Freeport-McMoRan, Inc.*, 498
 19 U.S. at 428 (holding that diversity jurisdiction survived the addition of a nondiverse plaintiff when
 20 complete diversity existed at the time the federal action arose); *see also Mattel, Inc. v. Bryant*, 446
 21 F.3d at 1014 (holding that "[n]either § 1332 nor § 1367 upset the long-established judge-made rule
 22 that the presence of a nondiverse and not indispensable defendant intervenor does not destroy
 23 complete diversity.")

24 Here, while AHAC is from New York, Cobra is not a diverse party – it is a Nevada
 25 company. However, diversity jurisdiction is not defeated by the intervention of Cobra and AHAC
 26 because neither company is an indispensable party to the controversy between Brahma and TSE.
 27 This lawsuit is Brahma's attempt to enforce its rights against TSE for unpaid work at Crescent
 28 Dunes. While Cobra has a strong interest in this case, and should be granted intervention based on

1 that strong interest, it is not an indispensable party. Therefore, Cobra's presence does not destroy
2 subject-matter jurisdiction.

3 *Second*, this motion to intervene is timely. This action is at a very early stage. Due to
4 motion practice engaged in by TSE and Brahma, the case is barely beyond the pleading stage. No
5 depositions have taken place. Fact discovery is not set to close until January 23, 2020. (Dkt. No.
6 54.) Therefore, the Court should find this Motion is timely.

7 *Lastly*, Cobra and AHAC's defenses and the main action share a common question of law
8 of fact. Although the claims in the main action arise out of the TSE-Brahma relationship, Cobra
9 and AHAC are the principal and surety of the Cobra Surety Bond. Additionally, Cobra and
10 AHAC's defenses have a question of law and fact in common with the main action: whether and
11 to what extent TSE is obligated to Brahma will determine Brahma's right to collect against the
12 Cobra Surety Bond. Therefore, Cobra and AHAC should be able to take part in this action to
13 protect and guard their rights directly.

14 Since courts favor intervention, the Court should permit Cobra and AHAC to intervene
15 under Rule 24(b).

16 III. CONCLUSION

17 For the reasons discussed above, Cobra and AHAC respectfully request that the Court
18 grant their Motion to Intervene in this action as of right under Fed. R. Civ. P. 24(a), or the
19 alternative, under to Fed. R. Civ. P. 24(b), and to grant them such other relief as the Court deems
20 just and proper.

21 Respectfully submitted this 18th day of October, 2019.

22 WEIL & DRAGE, APC

23 /s/ *Jeremy R. Kilber*

24 By: _____

25 Jeremy R. Kilber, Esq.
26 Nevada Bar No. 10643
27 2500 Anthem Village Drive
28 Henderson, NV 89052

Attorneys for Proposed Defendants-Intervenors,
COBRA THERMOSOLAR PLANTS, INC.,
and AMERICAN HOME ASSURANCE
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of October, 2019, a true and correct copy of the foregoing **MOTION TO INTERVENE AS DEFENDANTS** was made this date by electronically filing through the CM/ECF Filing System and therefore served upon all counsel of record via ECF Notification:

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EXHIBIT 26

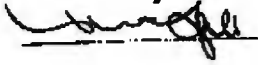
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ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

1. 12019

Nye County Clerk
 Deputy

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

12 Plaintiff,

13 vs.

14 BRAHMA GROUP, INC., a Nevada corporation,

15 Defendant.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Lien/Bond Claimant,

18 vs.

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

23 Counter-Defendants,

CASE NO. : CV 39348
Consolidated with:
Case No. CV39799

DEPT. NO. : 2

24 ///

25 ///

26 ///

27

28

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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 OPPOSITON TO COBRA THERMOSOLAR PLANTS, INC
AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY**

Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record,
the law firm of PEEL BRIMLEY LLP, hereby submits the following Opposition to the Motion to
Stay ("Motion") filed by Third-Party Defendants Cobra Thermosolar Plants, Inc.' ("Cobra") and
American Home Assurance Company's ("AHAC"), collectively, the "Cobra Parties." This
Opposition is made and based upon the papers and documents on file in this matter and the
accompanying points and authorities and exhibits and the arguments of counsel on the hearing of
the Motion.

Respectfully submitted this 31st of October 2019.

PEEL BRIMLEY LLP



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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

Approximately nine months ago this Court stayed Brahma's claims against Tonopah Solar Energy, LLC ("TSE") but **did not** stay Brahma's claim against the Cobra Parties or the surety bond (the "Surety Bond") they caused to be posted to release Brahma's Notice of Lien. More recently, the United States District Court for the District of Nevada (the "Federal Court") enjoined Brahma from proceeding in this Court on its claims against TSE ("TSE Claims"),¹ but again **did not** enjoin Brahma's claims against the Cobra Parties and the Surety Bond (the "Surety Bond Claim"). The Cobra Parties now ask this Court to stay Brahma's claim against them and the Surety Bond. The Court should deny the Motion for the following reasons.

As discussed more fully below, the Surety Bond Claim is an independent cause of action, pursuant to NRS 108.2421(1), that Brahma is entitled to assert and prosecute "in the county upon where the property upon which the work of improvement is located," irrespective of any other claims or causes of action against any other party. The Motion is nothing more than a dilatory tactic designed to continue to delay and obstruct Brahma's efforts to collect the nearly \$13 million it is owed and has now been outstanding for over 15 months (not including attorney's fees, costs and statutory interest that must be awarded pursuant to NRS 108.234). As a Nevada contractor and lien claimant Brahma is entitled to the full protections of Nevada's mechanic's lien statute (NRS 108.221 to 108.246). Moreover, NRS 108.2421(3) entitles Brahma to demand a preferential trial setting and for the preferential trial to be held within 60 days of the date the demand was made in "the county where the property upon which the work of improvement is located." Because of this, Cobra's requested stay seeks to deprive Brahma of this important statutory right, further prolonging the delays that Brahma has experienced to date.

Finally, where the Cobra Parties voluntarily chose to post the Surety Bond in Nye County (i.e., the county where the property upon which the work of improvement is located), Brahma was afforded these important statutory rights (and other statutory rights were eliminated, such as the right to foreclose on its Notice of Lien recorded against the work of improvement), the Cobra

¹ The "TSE Claims" include Brahma's claims against TSE for (i) Breach of Contract; (ii) Breach of Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of NRS 624.

1 Parties should not be heard to complain that Brahma seeks to exercise the very rights that the Cobra
2 Parties created.

3 **II. STATEMENT OF PERTINENT FACTS.**

4 As the Court is aware, Brahma commenced this action more than a year ago seeking to
5 recover payment for the labor, materials and equipment (the “Work”) Brahma performed at the
6 direction of TSE at the Crescent Dunes Solar Energy Project (the “Work of Improvement”),
7 including the foreclosure of its Notice of Lien in the amount of \$12,859,577.74. The procedural
8 history of this case is lengthy, complex and well known to the Court. As such, Brahma will
9 dispense with a detailed recitation of the same.

10 Nonetheless, it is important to note that after Brahma initially sought to foreclose on its
11 Notice of Lien against the Work of Improvement, Cobra and AHAC voluntarily posted a Surety
12 Bond as amended by Rider (collectively the “Surety Bond”)² pursuant to NRS 108.2415 to release
13 Brahma’s lien from the Work of Improvement and attach the same to the Surety Bond.³ As the
14 Court is aware, Cobra is not a party to the contract between Brahma and TSE, nor an owner of the
15 Work of Improvement, and it therefore remains unclear why Cobra, for its own reasons and
16 purposes, chose to post the Surety Bond.

17 By way of consolidation and amendments, Brahma’s current consolidated pleading (filed
18 on April 22, 2019)⁴ asserts (among others) a Third-Party Claim against Cobra, AHAC and the
19 Surety Bond pursuant to NRS 108.2421, seeking recovery against these parties and the Surety
20 Bond for the lienable amount due and owing to Brahma.⁵

21 As the Court will also recall, TSE removed a companion action from the Clark County
22 District Court (the “Clark County Action”) to federal court. Brahma then amended its Clark
23 County Complaint and removed the TSE Claims and filed them in this Court by way of its pleading
24 in Case No. CV 39348 (which TSE commenced by way of an NRS 108.2275 special proceeding

25 ² See **Exhibit 1**.

26 ³ NRS 108.2415(6)(a) provides that (upon proper execution and recording) the Surety Bond “releases the property
described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for
the lien.”

27 ⁴ See **Exhibit 2**.

28 ⁵ NRS 108.2421(1) provides that a “lien claimant is entitled to bring an action against the principal and surety on the
surety bond and the lien claimant’s debtor in any court of competent jurisdiction that is located within the county where
the property upon which the work of improvement is located.”

1 (the “NRS 108.2275 Proceeding”) seeking to expunge Brahma’s lien.

2 Brahma, also by amendment, asserted a third-party claim on the Surety Bond and against
3 Cobra and AHAC (as the bond principal and surety, respectively).⁶ Out of an abundance of caution,
4 and because TSE threatened to seek review of this Court’s decision that Brahma properly asserted
5 affirmative claims in the NRS 108.2275 Proceeding, Brahma also filed a standalone action, Case
6 No. CV 39799 (the “Standalone Action”) in which it asserted a claim on the Surety Bond and
7 against Cobra and AHAC.⁷ In March 2019, this Court granted Brahma’s Motion to Consolidate
8 the NRS 108.2275 Special Proceeding and the Standalone Action,⁸ after which Brahma filed (with
9 the court’s express authorization)⁹ its current amended and consolidated pleading.¹⁰

10 In January 2019, this Court also granted TSE’s Motion to Stay while denying its Motion
11 to Strike and Dismiss.¹¹ By way of that Order, the Court granted TSE a temporary stay (until such
12 time as the federal court ruled on then-pending jurisdictional and venue motions) “only as to the
13 following three Causes of Action which TSE initially removed to federal court: (i) Breach of
14 Contract; (ii) Breach of Implied Covenant of Good Faith and Fair Dealing; and (iii) Violations of
15 NRS 624.”¹² This Court did not stay Brahma’s claims against the Cobra Parties or the Surety Bond,
16 even though such claims were then pending in the NRS 108.2275 Proceeding.¹³

17 While the foregoing proceedings in this Court were underway, Brahma and TSE filed
18 related motions in the Federal Court in which Brahma argued, on the one hand, that the Federal
19 Court should abstain and stay proceedings pursuant to the *Colorado River* Doctrine, while TSE
20 argued that the Federal Court should enjoin Brahma from prosecuting its claims in the Nye County
21 Action. Brahma argued in favor of abstention, and against an injunction, because a “substantial
22 factor in the *Colorado River* analysis is whether there are special concerns associated with
23 resolving the issues in piecemeal fashion via parallel proceedings.”¹⁴ Not surprisingly, and as more

24 ⁶ See Exhibit 3.

25 ⁷ See Exhibit 4.

26 ⁸ See Exhibit 5.

27 ⁹ See Exhibit 6 (Order Granting Countermotion to File Consolidated Amended Pleading)

28 ¹⁰ See Exhibit 2, *supra*.

¹¹ See Exhibit 7.

¹² See *id.*

¹³ See Exhibit 4, *supra*

¹⁴ See Exhibit 8, Reply in Support of Motion for Stay, p. 9 citing *Seneca Ins. Co. Inc. v. Strange Land, Inc.*, 862 F.3d 835, 842 (9th Cir. 2017).

1 fully discussed below, Cobra’s present motion relies heavily on the notion that a stay should be
2 granted to “avoid duplication.”¹⁵ However, the Federal Court was “unconvinced” by this authority
3 and found no “special or important rationale or legislative preference for having these issues be
4 resolved in a single proceeding.”¹⁶ As a result, the Federal Court denied Brahma’s motion, granted
5 TSE’s motion and “enjoin[ed] Brahma from litigating its contract claims in the Nye County
6 Action.”¹⁷ More specifically, the Federal Court enjoined Brahma “from litigating the following
7 claims alleged against [TSE] in any state court action: 1) breach of contract, 2) breach of implied
8 covenant of good faith and fair dealing and 3) violation of NRS 624.”¹⁸ The Federal Court did not
9 enjoin Brahma from proceeding on its remaining claims in this Court-- specifically, Brahma’s
10 claims against the Cobra Parties and the Surety Bond.¹⁹

11 Although it now seeks a stay, Cobra answered Brahma’s consolidated amended pleading
12 in May 2019.²⁰ Similarly, in June 2019 and September 2019 respectively, Cobra answered the
13 Complaint in Intervention and Amended Complaint in Intervention of H&E Equipment Services,
14 Inc. (“H&E”), whose lien Cobra and AHAC also bonded (again, for unknown reasons).²¹ Cobra
15 also participated in an Early Case Conference and joined in the Joint Case Conference Report filed
16 on June 26, 2019.²²

17 As more fully described in Brahma’s pending and separate Motion to Compel Deposition
18 of Cobra’s Person Most Knowledgeable (“PMK”),²³ Brahma began requesting a deposition of
19 Cobra’s PMK in August 2019 and Cobra’s counsel repeatedly promised to provide available dates
20 for that deposition for his client’s witness.²⁴ After Cobra repeatedly failed to provide available
21 dates for its witness, Brahma noticed the deposition for October 16, 2019, to which Cobra objected
22 on pretextual grounds.²⁵ Counsel for Brahma and Cobra held a meet and confer pursuant to NRCP

23 ¹⁵ See Motion pp. 11-12.

24 ¹⁶ See Exhibit 9, p. 6, ll. 17-21.

25 ¹⁷ See *id.*, p. 9, ll. 5-6 (emphasis added).

26 ¹⁸ See *id.*, p. 9, ll. 14-16.

27 ¹⁹ See *id.*

28 ²⁰ See Exhibit 10.

²¹ See Exhibit 11 and Exhibit 12.

²² See Exhibit 13.

²³ See Exhibit 14 (exhibits omitted for brevity).

²⁴ See *id.*, pp. 3-5

²⁵ See *id.*

37 on October 14, 2019,²⁶ and Cobra submitted is Motion to Stay the next day.²⁷

III. ARGUMENT AND AUTHORITY.

A. **Cobra Chose This Forum.**

It is important to remember that the Cobra Parties' involvement in this action is purely voluntary. Brahma's claim of lien arose from its unpaid work for TSE, not Cobra. Nonetheless, the Cobra Parties elected to obtain and post the Surety Bond. Having done so, the Cobra Parties subjected themselves to Brahma's NRS 108.2415 through 108.2425 cause of action, which claim must be heard in the county where the property upon which the work of improvement is located.²⁸ Cobra makes no argument (nor could it) that Brahma's action against the Cobra Parties and the Surety Bond are somehow improperly sited in this Court.

Similarly, following months of motion practice for which Cobra was provided notice and a full opportunity to participate, the Cobra Parties voluntarily answered Brahma's amended consolidated complaint on April 22, 2019. The Cobra Parties also voluntarily obtained and posted a surety bond to release H&E's notice of lien and they voluntarily answered H&E's Complaint in Intervention.

Subsequently, the Cobra Parties participated in the Early Case Conference and in presentation of the Joint Case Conference Report, and until filing the present Motion, acknowledged its willingness to engage in discovery and to present its PMK for deposition. All of these events occurred months after TSE obtained an Order from this Court staying the proceedings as to TSE.²⁹ In short, The fact that Cobra only now seeks a stay is a clear demonstration that its primary strategy is delay, which this Court should not reward by granting this Motion.

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²⁶ See *id.*

²⁷ See Motion and Certificate of Service p. 15. Cobra served the Motion by regular mail only.

²⁸ See discussion, *infra*.

²⁹ Despite its involvement in these proceedings for more than a year, including while TSE's Motion to Stay was pending, Cobra's motion is its first and only effort to seek a stay. Similarly, Cobra made no effort to intervene in the Federal Court Action until after it filed the current Motion to Stay.

1 **B. This Court and the Federal Court have Declined to Stay Proceedings**
2 **Against Cobra.**

3 When considering TSE's motion to stay (filed and heard earlier this year), this Court could
4 have stayed this action in its entirety, but chose not to do so.³⁰ Similarly, the Federal Court could
5 have enjoined Brahma from proceeding on any claim (including its claim against the Cobra Parties
6 and the Surety Bond) arising out of or relating to the acts and occurrences giving rise to Brahma's
7 claims against TSE. Again, however, the Federal Court did not do so, choosing only to enjoin
8 Brahma from proceeding in state court on the TSE Claims. Brahma respectfully submits that these
9 were conscious and deliberate decisions by experienced and knowledgeable judges.

10 As noted above, for example, Judge Boulware expressly rejected the very arguments on
11 which Cobra heavily relies—i.e., the avoidance of piecemeal litigation, potential duplication and
12 the possibility of inconsistent results. Cobra specifically argues that “the claims against Cobra
13 should be stayed to avoid unnecessary duplicative discovery and the risk of conflicting
14 decisions.”³¹ In rejecting this very issue, Judge Boulware cited the lack of any “special or important
15 rationale or legislative preference for having these issues be resolved in a single proceeding.”³²
16 This Court should therefore follow Judge Boulware's lead and reject Cobra's concerns of
17 duplication and the possibility of inconsistent results. What is good for the goose is good for the
18 gander.

19 **C. Brahma Asserts an Independent Statutory Claim on the Surety Bond.**

20 NRS 108.2421(1) provides:

21 A lien claimant is entitled to bring an action against the principal and surety on the
22 surety bond and the lien claimant's debtor in any court of competent jurisdiction
23 that is located within the county where the property upon which the work of
24 improvement is located.

25 ///

26 ///

27 ³⁰ See Exhibit 7, *supra*.

28 ³¹ See Motion p. 13, ll. 3-4, citing *Knepper v. Equifax Info. Servs.*, No.2: 17- CV -02368-KJD-CWH, 2017 WL 4369473, at *3 (D. Nev. Oct. 2, 2017) (granting a motion to stay the action, which would “limit hardship or inequity to [defendant] from unnecessary proceedings, inconsistent rulings, duplicative discovery, and having to re-litigate claims in multiple jurisdictions.”);

³² See Exhibit 9, p. 6, ll. 19-20.

1 By posting the Surety Bond, the Cobra Parties caused Brahma's Notice of Lien against the
2 Work of Improvement to be released.³³ Brahma's lien now attaches to the Surety Bond,³⁴ which
3 entitles³⁵ Brahma to bring its action against the Surety Bond in this Court. This is a statutory right,
4 not merely a privilege.³⁶

5 Further, by posting the Surety Bond, the Cobra Parties have submitted themselves to the
6 jurisdiction of this Court and appointed the Clerk of the Court as their agent pursuant to NRS
7 108.2423 which provides in part:

8 By entering into a surety bond given pursuant to NRS 108.2415, the principal and
9 surety submit themselves to the jurisdiction of the court in which an action or suit
10 is pending on a notice of lien on the property described in the surety bond, and the
11 principal and surety irrevocably appoint the clerk of that court as their agent upon
whom any papers affecting the liability on the surety bond may be served. The
12 liability of the principal may be established by the court in the pending action.

13 Accordingly, Cobra (not TSE) is the Surety Bond principal against whom Brahma has a
14 claim and against whom it seeks to obtain a judgment, along with the surety (AHAC) and the
15 Surety Bond, in the county in which the Work of Improvement is located. While Brahma also has
16 claims against TSE, those contract-based claims now reside in the Federal Court.

17 By contrast, Brahma's claim against the Surety Bond seeks an award of "the lienable
18 amount plus the total amount that may be awarded by the court pursuant to NRS 108.237, so long
19 as the liability of the surety is limited to the penal sum of the surety bond."³⁷ NRS 108.237 requires
20 the Court to "award a prevailing lien claimant, whether on its lien or on a surety bond, the lienable
21 amount found due by the court" plus costs of repairing and recording the notice of lien, interest,
22 and costs of the proceedings including reasonable attorney's fees."³⁸ "Lienable amount" means
23 "the principal amount of a lien to which a lien claimant is entitled pursuant to subsection 1 of NRS
24 108.222."³⁹

25 ³³ See NRS 108.2413 ("A lien claimant's lien rights or notice of lien may be released upon the posting of a surety bond
in the manner provided in NRS 108.2415 to 108.2425, inclusive.").

26 ³⁴ See NRS 108.2415(6)(a) ("the surety bond shall be deemed to replace the property as security for the lien.").

27 ³⁵ See *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) ("When examining a statute, a purely legal inquiry,
this court should ascribe to its words their plain meaning, unless this meaning was clearly not intended.").

28 ³⁶ Black's Law Dictionary provides: "to entitle is to give a right or title." See <https://thelawdictionary.org/entitle/>
(emphasis added).

³⁷ See NRS 108.2421(6).

³⁸ See NRS 108.237(1).

³⁹ See NRS 108.22136.

1 NRS 108.222(1) provides:

2 Except as otherwise provided in subsection 2, a lien claimant has a lien upon the
3 property, any improvements for which the work, materials and equipment were
4 furnished or to be furnished, and any construction disbursement account
established pursuant to NRS 108.2403, for:

5 (a) If the parties agreed, by contract or otherwise, upon a specific price or
6 method for determining a specific price for some or all of the work, material and
7 equipment furnished or to be furnished by or through the lien claimant, the unpaid
8 balance of the price agreed upon for such work, material or equipment, as the case
may be, whether performed, furnished or to be performed or furnished at the
instance of the owner or the owner's agent; and

9 (b) If the parties did not agree, by contract or otherwise, upon a specific price
10 or method for determining a specific price for some or all of the work, material and
11 equipment furnished or to be furnished by or through the lien claimant, including,
12 without limitation, any additional or changed work, material or equipment, an
13 amount equal to the fair market value of such work, material or equipment, as the
14 case may be, including a reasonable allowance for overhead and a profit, whether
performed, furnished or to be performed or furnished at the instance of the owner or
at the instance of the owner's agent.⁴⁰

15 Stated differently, NRS 108.2421 permits a lien claimant, such as Brahma, to prove up its
16 lienable amount, be awarded the same plus interest, costs and reasonable attorney's fees and to
17 have a judgment against the Surety Bond up to its "penal sum." Such a judgment "is immediately
18 enforceable and may be appealed regardless of whether any other claims asserted or consolidated
19 actions or suits have been resolved by a final judgment."⁴¹ The Cobra Parties' arguments
20 notwithstanding, Brahma's Claim Against the Surety Bond is not derivative of or dependent upon
its breach of contract claim against TSE,⁴² rather it is a separate and distinct cause of action with
separate and distinct elements of proof.⁴³

21 While Brahma has now been required to pursue the TSE Claims in Federal Court, there is
22 nothing in Nevada's Lien Statute that obligates Brahma to pursue its claim against the Surety Bond
23 in the Federal Court.⁴⁴ Similarly, nothing in Nevada's Lien Statute requires Brahma to wait to
24 proceed on its claim against the Surety Bond and the Cobra Parties while it pursues the TSE Claims

25 ⁴⁰ See NRS 108.222(1) (emphasis added).

26 ⁴¹ See NRS 108.2421(6) (emphasis added).

27 ⁴² See e.g., Motion pp. 10-11.

28 ⁴³ Similarly, H&E's Claim on Surety Bond is not "derivative of Brahma's claims against TSE." See Motion p. 7. Rather,
H&E's claim must stand or fail on its own merits and H&E is similarly entitled to an award and judgment against the
(separate) surety bond Cobra posted to release H&E's lien.

⁴⁴ Because Brahma and Cobra are not diverse, Cobra also cannot remove the action to Federal Court.

1 against TSE in Federal Court. Because Cobra's Motion seeks just that, the Court should deny the
2 Motion.

3 **D. The Hardships Favor Brahma.**

4 The Cobra Parties argue that they "will face hardship and inequity" if forced to defend the
5 very Surety Bond they posted (in Nye County) to release Brahma's lien (also recorded in Nye
6 County).⁴⁵ Such sophistry is particularly galling where the Cobra Parties volunteered to be bound
7 to the jurisdiction of this Court when they posted the Surety Bond. To the contrary, a stay will
8 cause extreme hardship to Brahma, who first recorded its Notice of Lien more than 19 months ago
9 yet continues to defend against procedural motions designed to delay its pursuit of important
10 statutory rights and remedies.

11 A mechanic's lien is a statutory creature established to help ensure payment of work or
12 materials provided for the construction or improvements on real property. *In re Fontainebleau Las*
13 *Vegas Holdings*, 289 p.3D 1199, 1210 (Nev. 2012). The Nevada Supreme Court has consistently
14 held that "the mechanic's lien statutes are remedial in character and should be liberally construed."
15 *Id.* In fact, the Nevada Supreme Court in *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528
16 (2010), cited the legislative record wherein it states that Nevada's "lien law should be liberally
17 construed in favor of lien claimants." *Id.* at 538 (citing Hearing on S.B. 343 Before the Assembly
18 Comm. On Judiciary, 73d Leg. (Nev., May 13, 2005)) (emphasis added). Nevada's public policy
19 favors securing payment for labor and material contractors; "[u]nderlying the policy in favor of
20 preserving laws that provide contractors secured payment for their work and materials is the notion
21 that contractors are generally in a vulnerable position because they extend large blocks of credit;
22 invest significant time, labor, and materials into a project; and have any number of workers vitally
23 depend upon them for eventual payment." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*,
24 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008).

25 Cobra's Motion seeks to subvert the policies underlying Nevada's Lien Statute by forcing
26 Brahma to await the outcome of a different case, against a different defendant, in a different forum.

27 ///

28 _____
⁴⁵ See Motion, p. 9.

1 There is no guaranty that Brahma's case against TSE will go to trial anytime soon, much less go
2 to judgment. Even a temporary stay while the Federal Court considers Cobra's Motion to
3 Intervene⁴⁶ is likely to delay the case by as much as a year. By way of the most relevant example,
4 TSE filed its injunction motion in October 2018 and Judge Boulware's decision was issued in
5 September 2019.

6 In this regard also, the Cobra Parties' Motion must be seen as nothing more than a delaying
7 tactic. The Nevada Courts do not look favorably upon dilatory tactics. *See e.g., Burnett v. C.B.A.*
8 *Sec. Serv., Inc.*, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991) (delay, bad faith, or a dilatory motive
9 are all sufficient reasons to deny a motion to amend a pleading); *Mikohn Gaming Corp. v. McCrea*,
10 120 Nev. 248, 253, 89 P.3d 36, 40 (2004) (while stay pending appeal of an order denying
11 arbitration is generally granted, the court should deny the stay if the appellant apparently filed the
12 stay motion for dilatory purposes); *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d
13 705, 713 (2011) (district court did not abuse its discretion in refusing to permit defendant to
14 withdraw his invocation of the Fifth Amendment privilege or in denying his request to reopen
15 discovery because such tactics had already resulted in unnecessary expense and probable delay in
16 obtaining discovery documents). This court also should reject Cobra's dilatory conduct designed
17 only to obstruct and delay Brahma's pursuit of the very rights provided to it when Cobra recorded
18 the Surety Bond.

19 **E. Brahma is Entitled to a Preferential Trial.**

20 Among the many statutory rights and remedies that Cobra seeks to delay, obstruct and
21 preclude by way of the Motion, NRS 108.2421(3) entitles Brahma to seek a preferential trial:

22 *At any time after the filing of a joint case conference report* pursuant to Rule 16.1
23 of the Nevada Rules of Civil Procedure or, if the case is designated by the court as
24 complex litigation, after the approval of the initial case management order by the
25 court, *each lien claimant in the action may serve* upon the adverse party *a "demand*
for preferential trial setting" and file the demand with the clerk of the court. Upon
filing, the clerk of the court shall, before the Friday after the demand is filed, vacate

26 ⁴⁶ It is entirely unclear what claim the Cobra Parties are asking the Federal Court to allow it to intervene with. Indeed,
27 the pleading Cobra proposes to file in the Federal Court is titled "[Proposed] Answer in Intervention to Plaintiff's
28 Complaint." The only means by which Cobra may voluntarily join the Federal Court Action is to remove Brahma's
claim against the Surety Bond and move to consolidate it with the existing Federal Court Action. However, as noted
above, Cobra cannot remove Brahma's claim on Surety Bond because Cobra and Brahma are not diverse. *See* 28 U.S.C.
1332, 1441 and/or 1446.

1 a case or cases in a department of the court and set the lien claimant's case for
2 hearing, on a day or days certain, to be heard within 60 days after the filing of the
3 "demand" for preferential trial setting."⁴⁷

4 Importantly, this right arose only because the Cobra Parties posted the Surety Bond. No
5 such right to a preferential trial arises from an action to foreclose on a notice of lien.⁴⁸


6 Here, Brahma's exercise of this important right may be its only shield against the delays,
7 endless procedural motions and other dilatory tactics employed against its efforts to collect the
8 nearly \$13 million (exclusive of attorney's fees, costs and statutory interest) it has been owed since
9 at least April 2018. This right exists because of Nevada's policy of securing payment to contractors
10 like Brahma, who is "in a vulnerable position" having extended "large blocks of credit," invested
11 "significant time, labor, and materials into a project," and having "any number of workers vitally
12 depend upon them for eventual payment." See *Bullock*, 124 Nev. at 1117-18. Brahma has carried
13 more than \$12.9 million on its books for nearly two years (and some of it longer) and should not
14 be forced to wait even a day longer to prove up its claim. The Court should deny the Motion.

15 **IV. CONCLUSION**

16 Based on the foregoing, the Court should deny Cobra's Motion.

17 Respectfully submitted this 31st day of October, 2019.

18 **PEEL BRIMLEY LLP**

19 
20 RICHARD L. PEEL, ESQ.

21 Nevada Bar No. 4359

22 ERIC B. ZIMBELMAN, ESQ.

23 Nevada Bar No. 9407

24 3333 E. Serene Avenue, Suite 200

25 Henderson, Nevada 89074-6571

26 Telephone: (702) 990-7272

27 rpeel@peelbrimley.com

28 ezimbelman@peelbrimley.com

Attorneys for Brahma Group, Inc.

⁴⁷ See NRS 108.2421(3).

⁴⁸ See e.g., NRS 108.233 (requiring commencement of an action to enforce a notice of lien within six months of recording but otherwise offering no trial preference).

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 1st day of November, 2019, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S OPPOSITON TO COBRA THERMOSOLAR PLANTS, INC AND AMERICAN HOME ASSURANCE COMPANY'S MOTION TO STAY** 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 attorney(s) and/or party(ies) 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.

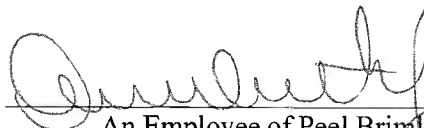

An Employee of Peel Brimley LLP

Exhibit 1

1 Geoffrey Crisp, Esq.
2 Nevada Bar No. 2104
3 Jeremy R. Kilber, Esq.
4 Nevada Bar No. 10643
5 **WEIL & DRAGE, APC**
6 2500 Anthem Village Drive
7 Henderson, NV 89052
8 (702) 314-1905 • Fax (702) 314-1909
9 gcrisp@weildrage.com
10 jkilber@weildrage.com
11 Attorneys for
12 COBRA THERMOSOLAR PLANTS, INC.

13
14
15 **FIFTH JUDICIAL DISTRICT COURT**
16
17 **NYE COUNTY, NEVADA**

18 TONOPAH SOLOR ENERGY, LLC, a) Case No.: CV 39348
19 Delaware limited liability company,) Dept. No.: 2

20 Plaintiff,

21 vs.

22 BRAHMA GROUP, INC., a Nevada
23 corporation,

24 Defendant.

25 BRAHMA GROUP, INC., a Nevada
26 corporation,

27 Counterclaimant/Lien Claimant,

28 vs.

29 TONOPAH SOLOR ENERGY, LLC, a)
30 Delaware limited liability company; BOE)
31 BONDING COMPANIES I through X; DOES)
32 I through X; ROE CORPORATIONS I)
33 through X; and TOE TENANTS I through X,)
34 inclusive,)

35 Counterdefendant,

36 **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that I am an employee of WEIL & DRAGE, APC, and that on this 9th day of October, 2018, I caused the following documents:

1. 10/09/2018 Recorded Doc #900303

Surety Rider Bond 854481 Posted to Release Lien with Power of Attorney; and

2. 09/24/2018 Affidavit of Service of 09/06/2018 Recorded Doc #898974

Surety Bond 85441 Posted to Release Lien with Power of Attorney.

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 Henderson, Nevada; and

By facsimile; and

By email transmission

to the attorneys listed below at the address, facsimile and email transmission indicated below:

Richard L. Peel, Esq.
Eric B. Zimbelman, Esq.
Ronald J. Cox, Esq.
Terri Hansen, Paralegal
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
(702) 990-7273 Fax
Peel@PeelBrimley.com
Zimbelman@PeelBrimley.com
RCox@PeelBrimley.com
thansen@peelbrimley.com
Attorneys for
BRAHMA GROUP, INC.

Colby Balkenbush, Esq.
WEINBERG WHEELER HUDGINS
GUNN & DIAL
6385 South Rainbow Blvd., Suite 400
Las Vegas, NV 89118
702.938.3864 Fax
CBalkenbush@wwhgd.com
Attorney for
TONOPAH SOLAR ENERGY, LLC

/s/ Ana M. Maldonado

Ana M. Maldonado, An Employee of
WEIL & DRAGE, APC

DOC #900303

Official Records Nye County NV

Deborah Beatty - Recorder

10/09/2018 11:13:27 AM

Requested By: WEIL & DRAGE APC

Recorded By: kd RPTT:\$0

Recording Fee: \$35.00

Non Conformity Fee: \$

Page 1 of 3

APN012-031-04; 012-131-03; 012-131-04;

APN012-140-01; 012-141-01; 012-431-06;

APN012-150-01; 012-151-01; and

APN012-141-01.

Recording Requested By:

NameWEIL & DRAGE, APC

Address2500 Anthem Village Drive

City / State / ZipHenderson, NV 89052

Surety Rider Bond 854481 Posted to Release Lien with Power of Attorney

Title of Document (required)

****Only use below if applicable****

This document is being re-recorded to correct document number _____,
and is correcting _____

I the undersigned hereby affirm that this document submitted for recording does contain personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information. The Nevada Revised Statute (NRS), public program or grant referenced is: (check applicable)

☐ Affidavit of Death – NRS 440.380(1)(A) & NRS 40.525(5)

☐ Judgment – NRS 17.150(4)

☐ Military Discharge – NRS 419.020(2)

☐ Other _____

Signature

Ana M. Maldonado

Name Typed or Printed

This page is added to provide additional information required by NRS 111.312 Sections 1-2.

This cover page must be typed or printed.

SURETY RIDER

To be attached to and form a part of American Home Assurance Company

Bond No. 854481

dated 08/15/2018
effective
(MONTH-DAY-YEAR)

executed by Cobra Thermosolar Plants, Inc. , as Principal,
(PRINCIPAL)

and by American Home Assurance Company , as Surety,

in favor of Brahma Group, Inc.
(OBLIGEE)

in consideration of the mutual agreements herein contained the Principal and the Surety hereby consent to changing

The Bond Amount as follows:

From \$10,767,580.00
To \$19,289,366.61

and

The Lien Amount as follows:

From \$7,178,386.94
To \$12,859,577.74

Nothing herein contained shall vary, alter or extend any provision or condition of this bond except as herein expressly stated.

This rider
is effective 08/15/2018
(MONTH-DAY-YEAR)

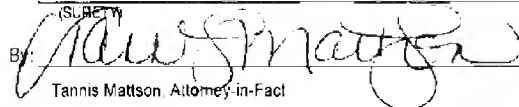
Signed and Sealed 09/25/2018
(MONTH-DAY-YEAR)

Cobra Thermosolar Plants, Inc.
(PRINCIPAL)

By: _____
(PRINCIPAL)

José Antonio Fernández

American Home Assurance Company

By: 
(SURETY)
Tannis Mattson, Attorney-in-Fact

POWER OF ATTORNEY

American Home Assurance Company
 National Union Fire Insurance Company of Pittsburgh, PA.
 Principal Bond Office: 175 Water Street, New York, NY 10038

Power No. 7212

No. 31-B-002348

KNOW ALL MEN BY THESE PRESENTS:

That American Home Assurance Company, a New York corporation, and National Union Fire Insurance Company of Pittsburgh, PA., a Pennsylvania corporation, does each hereby appoint

—Mary Ann Garcia, Gloria Magoni, Marissa Shepherd, Terri Johnson, Laurie Sudduth,
 Sandra Parker, Gina A. Rodriguez, Tannis Madison, Mario Arzansendi, Orlando Aguirre, of Houston, Texas

its true and lawful Attorney(s)-in-Fact, with full authority to execute on its behalf bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA., have each executed these presents



This 16th day of May, 2018

Michael Yang, Vice President

STATE OF NEW YORK }

COUNTY OF NEW YORK } ss.

On this 16th day of May, 2018, before me came the above named officers of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA., to me personally known to be the individual and officer described herein, and acknowledged that he executed the foregoing instrument and affixed the seals of said corporations herein by authority of his office.

JULIANA HALLENBECK

Notary Public - State of New York
No. 01646125671Qualified in Essex County
My Commission Expires April 19, 2021**CERTIFICATE**

Excerpts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. on May 18, 1976:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorneys-in-Fact to represent and act for and on behalf of the Company to execute bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, and to attach thereto the corporate seal of the Company, in the transaction of its surety business.

"RESOLVED, that the signatures and attestations of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance and other contract of indemnity and writing obligatory in the nature thereof.

"RESOLVED, that any such Attorney-in-Fact delivering a secretary's certification that the foregoing resolutions still be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact."

I, Martin Bogue, Assistant Secretary of American Home Assurance Company and of National Union Fire Insurance Company of Pittsburgh, PA. do hereby certify that the foregoing excerpts of Resolutions adopted by the Boards of Directors of these corporations, and the Powers of Attorney issued pursuant thereto, are true and correct, and that both the Resolutions and the Powers of Attorney are in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of each corporation



65166-1496)

this 25th day of September, 2018

Martin Bogue, Assistant Secretary

Attorney or Party without Attorney: Weil & Drage, APC 2500 Anthem Village Drive, 2nd Floor Henderson, NV 89052 Telephone No: (702) 314-1905 Attorney For:				For Court Use Only	
Ref. No. or File No.: 2803.001 CRESCENT DUNES					
Insert name of Court, and judicial District and Branch Court:					
Plaintiff: Defendant:					
AFFIDAVIT OF SERVICE		Hearing Date:	Time:	Dept/Div:	Case Number: DOC #898974

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of the NRS 108.2415 Surety Bond 854481 Posted to Release Lien with Power of Attorney, Power of Attorney
3.
 - a. Party served: Brahma Group, Inc.
 - b. Person served: Amber-Rose Aparicio, Authorized Agent, a person of suitable age and discretion at the most recent street address of the registered agent shown on the information filed with the Secretary of State.
4. Address where the party was served: Cogency Global Inc. - Registered Agent
321 W. Winnie Lane, #104, Carson City, NV 89703
5. I served the party:
 - a. by personal service. I personally delivered the documents listed in item 2 to the party or person authorized to receive process for the party (1) on: Fri, Sep 14 2018 (2) at: 02:40 PM

Fee for Service: \$0.00

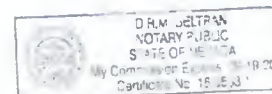
I Declare under penalty of perjury under the laws of the State of NEVADA that the foregoing is true and correct.

6. Person Who Served Papers:
 - a. Toni Ruckman (R-052005, Washoe)
 - b. FIRST LEGAL
NEVADA PI/PS LICENSE 1452
2920 N. GREEN VALLEY PARKWAY, SUITE 514
HENDERSON, NV 89014
 - c. (702) 671-4002

24 Sept 18 (Date) Toni L Ruckman (Signature)

7. STATE OF NEVADA, COUNTY OF Clark 24 day of Sept, 2018 by Toni Ruckman (R-052005, Washoe)
 Subscribed and sworn to (or affirmed) before on this 24 day of Sept, 2018 by Toni Ruckman (R-052005, Washoe)
 proved to me on the basis of satisfactory evidence to be the person who appeared before me.

Amber-Rose Aparicio
 (Notary Signature)



AFFIDAVIT OF SERVICE

2641854
(55090604)



DOC #898974

Official Records Nye County NV
Deborah Beatty - Recorder
09/06/2018 11:58:11 AM
Requested By: WEIL & DRAGE APC
Recorded By: MJ RPTT:\$0
Recording Fee: \$35.00
Non Conformity Fee: \$
Page 1 of 4

APN 012-031-04; 012-131-03; 012-131-04;

APN 012-140-01; 012-141-01; 012-431-06;

APN 012-150-01; 012-151-01; and

APN 612-141-01.

Recording Requested By:

Name WEIL & DRAGE, APC

Address 2500 Anthem Village Drive

City / State / Zip Henderson, Nevada 89052

NRS 108.2415 Surety Bond 854481 Posted to Release Lien with Power of Attorney

Title of Document (required)

Only use below if applicable

This document is being re-recorded to correct document number _____,
and is correcting _____

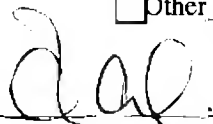
I the undersigned hereby affirm that this document submitted for recording does contain personal information (social security number, driver's license number or identification card number) of a person as required by specific law, public program or grant that requires the inclusion of the personal information. The Nevada Revised Statute (NRS), public program or grant referenced is: (check applicable)

☐ Affidavit of Death – NRS 440.380(1)(A) & NRS 40.525(5)

☐ Judgment – NRS 17.150(4)

☐ Military Discharge – NRS 419.020(2)

☐ Other _____


Signature

Ana M. Maldonado, Paralegal

Name Typed or Printed

This page is added to provide additional information required by NRS 111.312 Sections 1-2.
This cover page must be typed or printed.

NRS 108.2415 Form of surety bond posted to release lien:**Bond #854481**

(Assessor's Parcel Numbers: 012-031-04; 012-131-03; 012-131-04; 612-141-01; 012-431-06; 012-140-01; 012-150-01; 012-151-01; 012-141-01)

WHEREAS, Cobra Thermosolar Plant Inc. (name of principal), located at 11 Miles North Gabbs Pole Line Road, Tonopah, NV 89049 (address of principal), desires to give a bond for releasing the following described property owned by Tonopah Solar Energy, LLC (name of owners) from that certain notice of lien in the sum of \$7,178,386.94 recorded July (month) 19 (day) 2018, (year), in the office of the recorder in Nye County (name of county where the property is located):

Crescent Dunes Solar Energy Project

NOW, THEREFORE, the undersigned principal and surety do hereby obligate themselves to the lien claimant named in the notice of lien, Brahma Group, Inc. (name of lien claimant) under the conditions prescribed by NRS 108.2413 to 108.2425, inclusive, in the sum of \$10,767,580.00 (1 1/2 x lienable amount), from which sum they will pay the lien claimant that amount as a court of competent jurisdiction may adjudge to have been secured by the lien, including the total amount awarded pursuant to NRS 108.237, but the liability of the surety may not exceed the penal sum of the surety bond.

IN TESTIMONY WHEREOF, the principal and surety have executed this bond at Houston, Texas on the 15th day of August, 2018.

Cobra Thermosolar Plant, Inc.



(Signature of Principal) Carlos Ramirez Visser

American Home Assurance Company



Sandra Parker, Attorney-in-Fact

State of Texas }

} ss.

County of Harris }

On August 15, 2018, before me, the undersigned, a notary public of this County and State, personally appeared Sandra Parker known (or satisfactorily proved), who acknowledged that he or she executed the foregoing instrument for the principal and the surety for the purposes therein mentioned, Sandra Parker known (or satisfactorily proved) to me to be the attorney in fact of the surety that executed the foregoing instrument, known to me to be the person who executed that instrument on behalf of the surety therein named, and he or she acknowledged to me that the surety executed the foregoing instrument.

Laura Elizabeth Sudduth

(Notary Public in and for the County of Harris and State of Texas)

Laura Elizabeth Sudduth Commission Expires: 04/20/2022



POWER OF ATTORNEY

American Home Assurance Company
 National Union Fire Insurance Company of Pittsburgh, PA.
 Principal Bond Office: 175 Water Street, New York, NY 10038

Power No. 7188

No. 31-B-002348

KNOW ALL MEN BY THESE PRESENTS:

That American Home Assurance Company, a New York corporation, and National Union Fire Insurance Company of Pittsburgh, PA., a Pennsylvania corporation, does each hereby appoint

—Mary Ann Girella, Gloria Moulton, Marissa Shepherd, Terri Morrison, Laurie Sadduth,
 Sandra Parker, Lina A. Rodriguez, Tannis Mattson, Mario Azumendi, Orlando Aguirre, of Houston, Texas

its true and lawful Attorneys-in-Fact, with full authority to execute on its behalf bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. have each executed these presents



This 15th day of May, 2018

Michael Yung, Vice President

STATE OF NEW YORK)
 COUNTY OF NEW YORK) ss.

On this 15th day of May, 2018, before me came the above named officer of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA., to me personally known to be the individual and officer described herein, and acknowledged that he executed the foregoing instrument and affixed the seals of said corporations thereto by authority of his office.

JULIANA HALLENBECK

Notary Public, State of New York

No. 011640125077

Qualified in Suffolk County

My Commission Expires April 18, 2021

CERTIFICATE

Excerpts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA. on May 18, 1970:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorneys-in-Fact to represent and act for and on behalf of the Company to execute bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, and to affix thereto the corporate seal of the Company, in the transaction of its stated business.

"RESOLVED, that the signatures and attestations of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance and other contract of indemnity and writing obligatory in the nature thereof.

"RESOLVED, that any such Attorney-in-Fact delivering a secretarial certification that the foregoing resolutions still be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact."

I, Martin Bogue, Assistant Secretary of American Home Assurance Company and of National Union Fire Insurance Company of Pittsburgh, PA. do hereby certify that the foregoing excerpts of Resolutions adopted by the Boards of Directors of these Corporations, and the Powers of Attorney issued pursuant thereto, are true and correct, and that both the Resolutions and the Powers of Attorney are in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the facsimile seal of each corporation.



This 15th day of August, 2018

Martin Bogue, Assistant Secretary

65166 (4/96)

Exhibit 2

ORIGINAL

FILED
FIFTH JUDICIAL DISTRICT

APR 22 2019

Nye County Clerk
Deputy

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.

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Lien/Bond Claimant,

vs.

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

Counterdefendants,

CASE NO. : CV 39348

Consolidated with:

Case No. CV39799

DEPT. NO. : 2

BRAHMA GROUP, INC.'S:

**(I) SECOND AMENDED
COMPLAINT; AND**

**(II) FIRST AMENDED THIRD-
PARTY COMPLAINT.**

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

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

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Lien/Bond Claimant and Third-
3 Party Plaintiff,

4 vs.

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

9 Third-Party Defendants.
10

11 **SECOND AMENDED COMPLAINT**

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

17 **THE PARTIES**

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

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

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

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

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

1 3. Brahma is informed and believes and therefore alleges that LIBERTY MOLY,
2 LLC, a Delaware limited liability company ("Liberty"), is and was at all times relevant to this
3 Action, an owner or reputed owner of the fee simple title to all or portions of real property located
4 in Nye County, Nevada, and more particularly described as Nye County Parcel Number 012-431-
5 06 (the "Liberty Parcel").²

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

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

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

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

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

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

19 ii. Constructed on the BLM Parcels, the TSE Parcels, and the Liberty
20 Parcels.³

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

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

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

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

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

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

9 **FIRST CAUSE OF ACTION**
10 **(Breach of Contract)**

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

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

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

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

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

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

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

28 ///

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

3 14. BGI is owed Twelve Million Eight Hundred Fifty-Nine Thousand Five Hundred
4 Seventy-Seven and 74/100 Dollars (\$12,859,577.74—"Outstanding Balance") from TSE for the
5 Work.

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

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

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

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

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

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

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

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

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

28 ///

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

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

7 **THIRD CAUSE OF ACTION**
8 **(Violation of NRS 624)**

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

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

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

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

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

23 ///

24 ///

25 ///

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

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

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

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

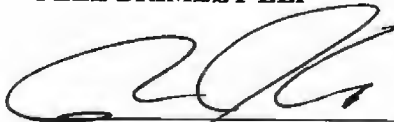
7 3. For such other and further relief as this Honorable Court deems just and proper in
8 the premises.

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

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

12 Dated this 19th day of April 2019.

13 **PEEL BRIMLEY LLP**

14 

15 **RICHARD L. PEEL, ESQ.**
16 Nevada Bar No. 4359
17 **ERIC ZIMBELMAN, ESQ.**
18 Nevada Bar No. 9407
19 **RONALD J. COX, ESQ.**
20 Nevada Bar No. 12723
21 3333 E. Serene Avenue, Suite 200
22 Henderson, Nevada 89074-6571
23 *Attorneys for Brahma Group, Inc.*
24
25
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28

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

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

8 **THE PARTIES**

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

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

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

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

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

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

26
27

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

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

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

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

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

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

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

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

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

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

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

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

26
27 ⁵ Liberty is not a party to this Action and Brahma is not making a claim against Liberty or the fee simple title of the
Liberty Parcel by way of this Action.

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

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

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

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

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

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

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

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

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

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

23 **FIRST CAUSE OF ACTION**

24 **(Claim Against Surety, Surety Bond and Principal thereon)**

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

28 ///

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

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

- 6 a. The BLM; and
7 b. TSE, even though it had no statutory duty to do so.

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

10 14. On or about April 9, 2018, Brahma timely recorded a Notice of Lien in the Official
11 Records of Nye County, Nevada, as Document No. 890822 ("Original Lien"), in the amount of
12 \$6,982,186.24.

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

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

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

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

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

- 4 c. In writing;
5 d. Recorded against the Work of Improvement; and
6 e. Were given or served on the authorized agents of the BLM and TSE, or the
7 BLM and/or TSE knew of the existence of the Lien.

8 20. The Lien (as amended) is in the amount Twelve Million Eight Hundred and Fifty-
9 Nine Thousand, Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents.
10 (\$12,859,577.74 - "Lienable Amount").

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

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

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

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

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

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

25 ///

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27 ///

28

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(702) 990-7272 ♦ FAX (702) 990-7273

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

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

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

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

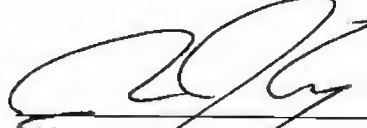
9 4. For such other and further relief as this Honorable Court deems just and proper in
10 the premises.

11
12 **AFFIRMATION PURSUANT TO NRS 239B.030**

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

15 Dated this 19th day of April 2019.

16 **PEEL BRIMLEY LLP**

17 

18 **RICHARD L. PEEL, ESQ.**

19 Nevada Bar No. 4359

20 **ERIC ZIMBELMAN, ESQ.**

21 Nevada Bar No. 9407

22 **RONALD J. COX, ESQ.**

23 Nevada Bar No. 12723

24 3333 E. Serene Avenue, Suite 200

25 Henderson, Nevada 89074-6571

26 Attorneys for Brahma Group, Inc.

Exhibit 3

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Attorneys for Brahma Group, Inc.

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

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

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

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

Counterdefendant,

FILED
FIFTH JUDICIAL DISTRICT

SEP 25 2018

Terri Pemberton Deputy Clerk
Deputy

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

BRAHMA GROUP, INC.'S:
(I) FIRST AMENDED COUNTER-
COMPLAINT; AND
(II) THIRD-PARTY COMPLAINT.

**[Arbitration Exemption: Action
Concerning Title to Real Estate]**

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

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

8 Third-Party Defendants.
9

10
11 **FIRST AMENDED COUNTER-COMPLAINT**

12 Counterclaimant/Lien Claimant/Third-Party Claimant, BRAHMA GROUP, INC.
13 (“Brahma”), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, hereby
14 amends in this action (the “Action”), that certain Mechanic’s Lien Foreclosure Complaint
15 (“Original Counter-Complaint”) by way of this First Amended Counter-Complaint (“Amended
16 Counter-Complaint”), which is brought against the above-named Counterdefendants. Brahma
17 complains, avers and alleges as follows:

18 **THE PARTIES**

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

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

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

24 ///

25 ///

26 ///

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

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

4. 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, 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

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

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

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

1 5. The TSE Parcels, along with the Project, are collectively referred to herein as the
2 “Work of Improvement,” and include all leasehold estates, easements, rights-of-way, common
3 areas and appurtenances related thereto, and the surrounding space as may be required for the
4 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, 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 claim a) an interest in or to the TSE Parcels and/or the Work of Improvement, or b) 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 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 Amended Counter-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 Amended Counter-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 a portion of the work, materials and/or equipment (the “Work”) for or relating to 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.

27 |||

28 |||

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

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

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

- 8 a. Failing and/or refusing to pay monies owed to BGI for the Work; and
9 b. Otherwise failing and/or refusing to comply with the Agreement and
10 Nevada law.

11 14. BGI is owed Twelve Million Eight Hundred Fifty-Nine Thousand Five Hundred
12 Seventy-Seven and 74/100 Dollars (\$12,859,577.74—"Outstanding Balance") from TSE for the
13 Work.

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

17 **SECOND CAUSE OF ACTION**

18 **(Breach of Implied Covenant of Good Faith & Fair Dealing)**

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

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

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

26 ///

27 ///

28 ///

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

2 a. Asserting pre-textual, extra-contractual and inaccurate reasons for

3 withholding payment long after the time required by the Agreement and Nevada law had elapsed.

4 b. TSE has improperly withheld moneys totaling more than One Million U.S.

5 Dollars for "retention" in purported reliance upon NRS 624.609(2)(a)(1). While that statutory

6 provision permits withholding (on a payment-by-payment basis) a retention amount, not to exceed

7 five percent (5%), such retention must be authorized pursuant to the Agreement, which it is not.

8 c. Furthermore, and even if the Agreement allowed TSE to withhold retention

9 from monthly payments (which it does not), TSE's withholding of retention amounts retroactively

10 aggregated from Payment Applications issued (and, in some cases, payments previously made)

11 long ago constitutes extreme bad faith.

12 20. Due to the actions of TSE, BGI suffered damages in the amount of or exceeding

13 the Outstanding Balance for which BGI is entitled to judgment in an amount to be determined at

14 trial.

15 21. BGI has been required to engage the services of an attorney to collect the

16 Outstanding Balance, and BGI is entitled to recover its reasonable costs, attorney's fees and

17 interest therefor.

18 **THIRD CAUSE OF ACTION**

19 **(Foreclosure of Notice of Lien)**

20 22. Brahma repeats and realleges each allegation contained in the preceding paragraphs

21 of this Amended Counter-Complaint, incorporates them by reference, and further alleges as

22 follows:

23 23. Brahma provided the Work for the Work of Improvement and is owed the

24 Outstanding Balance for the Work.

25 24. As provided in NRS 108.245, Brahma gave or served a copy of its Notice of Right

26 to Lien on:

27 a. The BLM; and

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

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

26. On or about April 09, 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.

27. On or about April 16, 2018 and 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").

28. On or about April 24, 2018 and 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").

29. On or about July 19, 2018 and 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").

30. On or about September 14, 2018, 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").

31. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv) Third Amended Lien, and (iv) Fourth Amended Lien, collectively, the "Lien," were:

- a. In writing;
- b. Recorded against the Work of Improvement; and
- c. 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.

32. The Lien is in the amount of the Outstanding Balance, which is the amount due and owing Brahma as of the date of this Amended Counter-Complaint.

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33. In addition to an award of the Outstanding Balance, Brahma is entitled to an award of its attorney's fees, costs, and interest, as provided in Chapter 108 of the Nevada Revised Statutes.

FOURTH CAUSE OF ACTION
(Violation of NRS 624)

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

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

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

37. 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 statutes.

38. 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.

WHEREFORE, Brahma prays that this Honorable Court:

1. Enters judgment against the Counterdefendants, and each of them, jointly and severally and to the extent of their interest in the Work of Improvement, in the amount of the Outstanding Balance;

2. Enters a judgment against the Counterdefendants, and each of them, jointly and severally and to the extent of their interest in the Work of Improvement, 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;

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1 3. Enters judgment declaring that Brahma has a valid and enforceable notice of lien
2 against the Work of Improvement, in the amount of the Outstanding Balance together with costs,
3 attorneys' fees and interest in accordance with NRS Chapter 108;

4 4. Adjudge a lien upon the Work of Improvement for the Outstanding Balance, plus
5 reasonable attorneys' fees, costs and interest thereon, and that this Honorable Court enter an Order
6 that the Work of Improvement, and improvements, such as may be necessary, be sold pursuant to
7 the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of
8 sums due Brahma herein;

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

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

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

14 Dated this 24 day of September 2018.

15 **PEEL BRIMLEY LLP**

16
17 

18 RICHARD L. PEEL, ESQ.
19 Nevada Bar No. 4359
20 ERIC ZIMBELMAN, ESQ.
21 Nevada Bar No. 9407
22 RONALD J. COX, ESQ.
23 Nevada Bar No. 12723
24 3333 E. Serene Avenue, Suite 200
25 Henderson, Nevada 89074-6571
26 Attorneys for Brahma Group, Inc.
27
28

BRAHMA GROUP, INC.'S THIRD-PARTY COMPLAINT

Third-Party Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record, the law firm of PEEL BRIMLEY LLP, brings this Third-Party Complaint ("Third-Party Complaint") in the action (the "Action") against the above-named Third-Party Defendants. Brahma 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; 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 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 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;

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.

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 While TSE is a party to Brahma's Counterclaim, TSE is not a party to the Third-Party Action.

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; and

b. Issued Bond No. 854481 ("Surety Bond") pursuant to NRS 108.2413 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; and

b. Is the principal on the Surety Bond.

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

1 8. Brahma does not know the true names of the individuals, corporations, partnerships
2 and entities identified and named as Third-Party Defendants by the fictitious names of
3 (collectively, the “Doe Defendants”), (i) BOE BONDING COMPANIES I through X, (ii) DOES
4 I through X, and (iii) ROE CORPORATIONS I through X. Brahma alleges that such Doe
5 Defendants claim damages (as an offset) arising from the construction of the Work of
6 Improvement, as more fully discussed under the claims for relief set forth below. Brahma will
7 request leave of this Honorable Court to amend this Third-Party Complaint to show the true names
8 and capacities of each such fictitious Doe Defendants when Brahma discovers such information.

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

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

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

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

27 15. On or about April 16, 2018 and as allowed by NRS 108.229(1), Brahma recorded
28 a Notice of First Amended and Restated Lien in the Official Records of Nye County, Nevada, as

1 Document 891073 and as re-recorded by Brahma in the Official Records of Nye County, Nevada
2 on April 18, 2018, as Document No. 891507, in the amount of \$7,178,376.94 (the "First Amended
3 Lien").

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

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

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

13 19. The (i) Original Lien, (ii) First Amended Lien, (iii) Second Amended Lien, (iv)
14 Third Amended Lien, and (iv) Fourth Amended Lien, collectively, the "Lien," were:

15 c. In writing;

16 d. Recorded against the Work of Improvement; and

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

19 20. The Lien is in the amount Twelve Million Eight Hundred and Fifty-Nine Thousand,
20 Five Hundred and Seventy-Seven Dollars and Seventy-Four Cents. (\$12,859,577.74), which is the
21 amount due and owing Brahma as of the date of this Third-Party Complaint (the "Outstanding
22 Balance").

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

26 40. The Surety Bond fails to meet the requirements of NRS 108.2415(1), because it is
27 not in an amount that is 1 ½ times the amount of Brahma's Lien.
28

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

42. Brahma makes claim against Cobra and AHAC are obligated to Brahma for the Outstanding Balance plus interest, costs and attorney's fees up to the penal sum⁸ of the Surety Bond as provided in Chapter 108 of the Nevada Revised Statutes.

WHEREFORE, Brahma prays that this Honorable Court:

6. Enters judgment against the Third-Party Defendants, and each of them, jointly and severally in the amount of the Outstanding Balance;

7. Enters a judgment against the Third-Party Defendants 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;

8. Enters judgment against AHAC up to the penal sum of the Surety Bond.

9. 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 24 day of September 2018.

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.

⁸ Brahma has separately excepted to the sufficiency of the penal sum of the Surety Bond under NRS 108.2425. Nothing herein shall be deemed a waiver of any rights and claims that Brahma may possess under contract, at law or in equity.

Exhibit 4

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10 rcox@peelbrimley.com
11 *Attorneys for Brahma Group, Inc.*

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

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

18 vs.

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

23 Defendants,
24
25
26
27
28

CASE NO. : CV39799
DEPT. NO. : 1

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

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

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

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

FILED

2019 JAN 11 P 1:14

NYE COUNTY CLERK

BY
DEPUTY

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

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

9 THE PARTIES

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

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

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

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

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

25
26
27 ¹ The BLM is not a party to this Action and Brahma is not making a claim against the BLM or the fee simple title of
the BLM Parcels by way of this Action.

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ³ While TSE is not a party to this Case, it is a party to Case No. CV 39348 in the Fifth Judicial District Court of Nye
County, which Case Brahma will seek to consolidate this Action into.

28 ⁴ The term "Project" as used herein, does not include, and expressly excludes, the fee simple title of the BLM Parcels
and the Liberty Parcels.

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

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

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

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

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

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

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

12. 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.

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

- 3 a. The BLM; and
4 b. TSE, even though it had no statutory duty to do so.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 **SECOND CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

18 **THIRD CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 50. Brahma has been required to engage the services of an attorney to collect the
21 Second Payment, and Brahma is entitled to recover its reasonable costs, attorney's fees, and
22 interest therefore.

23 **WHEREFORE**, with respect to the First Cause of Action, Brahma prays that this
24 Honorable Court:

25 1. Enters judgment against the Defendants, and each of them, jointly and severally in
26 the Liable Amount;

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2. Enters a judgment against the Defendants and each of them, jointly and severally, for Brahma's reasonable costs and attorney's fees incurred in the collection of the Lienable Amount, as well as an award of interest thereon;

3. Enters judgment against AHAC up to the penal sum of the Surety Bond and Rider; and

4. For such other and further relief as this Honorable Court deems just and proper in the premises.

WHEREFORE, with respect to the Second through Fourth Causes of Action, Brahma prays that this Honorable Court:

1. Enters judgment against the Defendants and each of them, jointly and severally, in the amount of the Second Payment, plus Brahma's reasonable costs and attorney's fees incurred in the collection of the Second Payment; and

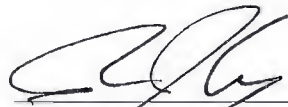
2. For such other and further relief as this Honorable Court deems just and proper in the premises.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the proceeding document does not contain the social security number of any persons.

Dated this 11th day of January 2019.

PEEL BRIMLEY LLP



RICHARD L. PEEL, ESQ.

Nevada Bar No. 4359

ERIC ZIMBELMAN, ESQ.

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Attorneys for Brahma Group, Inc.

Exhibit 5

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FILED
FIFTH JUDICIAL DISTRICT

MAR 15 2019

Nye County Clerk

Marianne Yoffee Deputy

**FIFTH JUDICIAL DISTRICT COURT
NYE COUNTY, NEVADA**

TONOPAH SOLAR ENERGY, LLC, a Delaware
limited liability company,

Plaintiff,

vs.

BRAHMA GROUP, INC., a Nevada corporation,

Defendant.

CASE NO. : CV 39348
Consolidated with CV39799
DEPT. NO. : 2

NOTICE OF ENTRY OF ORDER

BRAHMA GROUP, INC., a Nevada corporation,

Counterclaimant/Lien Claimant,

vs.

TONOPAH SOLAR ENERGY LLC, a Delaware
limited liability company; BOE BONDING
COMPANIES I through X; DOES I through X;
ROE CORPORATIONS I through X; and TOE
TENANTS I through X, inclusive,

Counterdefendant,

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Third-Party Plaintiff,

3 vs.

4 COBRA THERMOSOLAR PLANTS, INC., a
5 Nevada corporation; AMERICAN HOME
6 ASSURANCE COMPANY, a surety; BOE
7 BONDING COMPANIES I through X; DOES I
through X; ROE CORPORATIONS I through X,
inclusive,

8 Third-Party Defendants.
9

10 H&E EQUIPMENT SERVICES, INC., a Delaware
corporation,

11 Plaintiff-in-Intervention,

12 vs.

13 BRAHMA GROUP, INC., a Nevada corporation,
14 TONOPAH SOLAR ENERGY LLC, a Delaware
15 limited liability company, COBRA
16 THERMOSOLAR PLANTS, INC., a Nevada
17 Corporation; AMERICAN HOME ASSURANCE
18 COMPANY, a surety; BOE BONDING
COMPANIES I through X; DOES I through X;
ROE CORPORATIONS I through X, and TOE
TENANTS I through X, inclusive,

19 Defendants-in-Intervention.
20

21 BRAHMA GROUP, INC. a Nevada corporation,

22 Plaintiff,

23 vs.

24 COBRA THERMOSOLAR PLANTS, INC., a
25 Nevada corporation; AMERICAN HOME
26 ASSURANCE COMPANY, a surety; BOE
27 BONDING COMPANIES 1 through X; DOES I
through X; ROE CORPORATIONS I through X,
inclusive,

28 Defendants.

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NOTICE OF ENTRY OF ORDER

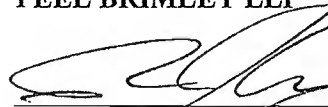
PLEASE TAKE NOTICE that an Order Granting Brahma's Motion to Consolidate Case No. 39799 with Case No. 39348 was filed on **February 19, 2019**, a copy of which is attached as Exhibit 1.

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the proceeding document does not contain the social security number of any persons.

Dated this 13th day of March, 2019.

PEEL BRIMLEY LLP



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 13th day of March, 2019, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

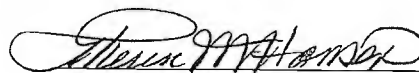
- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other – electronic mail

to the party(ies) and/or attorney(s) listed below at the address and/or facsimile number indicated below:

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An Employee of Peel Brimley LLP

EXHIBIT 1

FILED
FIFTH JUDICIAL DISTRICT

FEB 19 2019

Nye County Clerk
Marianne Yoffe Deputy

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FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

11 TONOPAH SOLAR ENERGY, LLC, a Delaware
12 limited liability company,

13 Plaintiff,

14 vs.

15 BRAHMA GROUP, INC., a Nevada corporation,

16 Defendant.

CASE NO. : CV 39348
DEPT. NO. : 2

**ORDER GRANTING BRAHMA'S
MOTION TO CONSOLIDATE CASE
NO. CV39799 WITH CASE NO. CV
39348**

17 This matter came on for hearing January 24, 2019 (the "Hearing") before the Honorable
18 Senior Judge Steven Elliott on the Motion to Consolidate Case No. CV39799 with Case No. CV
19 39348 ("Motion") filed by BRAHMA GROUP, INC. ("Brahma"). Eric B. Zimbelman, Esq. of
20 PEEL BRIMLEY LLP appeared on behalf of Brahma. Colby L. Balkenbush, Esq. of
21 WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC appeared on behalf of Plaintiff
22 TONOPAH SOLAR ENERGY, LLC ("TSE").

23 The Court having considered all the pleadings and papers on file, and having heard
24 argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the
25 bench on January 24, 2019:

26 **I. BASIS FOR CONSOLIDATION**

27 Brahma seeks to consolidate Case No. CV39799 with Case No. CV 39348 pursuant to
28 NRCP 42, which provides in relevant part:

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1 [W]hen actions involving a common question of law or fact are pending before the
2 court, it may order a joint hearing or trial of any or all the matters in issue in the
3 actions; it may order all the actions consolidated; and it may make such orders
concerning proceedings therein as may tend to avoid unnecessary costs or delay.

4 Consolidation is vested in the sound discretion of the trial court. (*Zupancic v. Sierra Vista*
5 *Recreation, Inc.*, 97 Nev. 187, 193, 625 P.2d 1177, 1181 (1981).

6 **II. FINDINGS AND CONCLUSIONS.**

7 1. The Court finds (i) the two cases involve common questions of law or fact, and
8 (ii) consolidation would “avoid unnecessary costs or delay” and provide judicial economy.

9 2. TSE opposed the Motion on several grounds. First, TSE argues that it was
10 procedurally improper for Brahma to file Case No. CV39799 when Case No. CV 39348 is
11 pending in this Court with similar or identical claims. However, in its Motion to Strike Brahma
12 Group, Inc.’s (“Brahma”) First Amended Counter-Complaint (“Motion to Strike”),¹ TSE argued
13 that Brahma’s proposed amended pleading was improper because “one cannot file a Counter-
14 Complaint into a special proceeding such as this.” In support of its position, TSE relied on what
15 it claimed to be “the leading Nevada construction law treatise,” LEON F. MEAD II,
16 CONSTRUCTION LAW 286 (2016 Ed.), for the proposition that (i) “it is improper legal
17 procedure to file a counter-claim to a petition under NRS 108.2275,” and (ii) “the proper
18 procedure is to file a complaint for foreclosure and to move the petitioning court to consolidate
19 the two matters.”

20 3. As discussed in the Court’s Order Denying Motion to Strike, the Court does not
21 agree with Mr. Mead’s premise and found that there was nothing improper with Brahma filing
22 its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge
23 Brahma’s Lien. Additionally, the Court has now come to the conclusion that had Brahma filed a
24 standalone complaint as an independent action and then moved the Court to consolidate that
25 action with Case No. CV 39348 as TSE suggests, the Parties would be in the same position they
26 currently find themselves in.

27
28 ¹ The complete title of that motion was “Tonopah Solar Energy, LLC’s Motion to Strike Brahma Group, Inc.’s First
Amended Counter-Complaint, or, in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative,
Motion to Stay this Action until the Conclusion of the Proceedings in Federal Court.”

4. In any event, and especially where TSE has stated its intention to file a Writ Petition to the Nevada Supreme Court with respect to this Court's denial of TSE's Motion to Strike, it was appropriate for Brahma to file Case No. CV39799 and for this Court to consolidate that action into the present action. Specifically, but without limitation, if the Supreme Court were to ultimately overrule this court and determine that it was improper for Brahma to file a counter-claim to a petition under NRS 108.2275, Brahma's time to file a complaint against the applicable surety bond would by then have lapsed pursuant to NRS 108.2421. If, on the other hand, the Nevada Supreme Court rejects TSE's position (or TSE chooses not to challenge the issue), the foreclosure claim filed in Case No. CV39799 is (at worst) moot with no prejudice having been suffered by any party by way of consolidation.

5. The Court also rejects TSE's contention that Case No. CV39799 and Brahma's Motion to Consolidate is futile. The Court finds that Brahma's Complaint filed in Case No. CV39799 is not impermissible claim-splitting and does not violate NRCP 1 or NRCP 15.

6. Based on the foregoing, the Court hereby concludes that Case No. CV39799 may be and is hereby consolidated with Case No. CV 39348.

NOW THEREFORE, IT IS HEREBY ORDERED that Brahma's Motion to Consolidate is **GRANTED** and Case No. CV39799 is hereby consolidated with Case No. CV 39348.

Dated this 12th day February 2019.

Steven P. Elliott 2-14-19
Senior Judge Steven Elliott

Submitted by:
PEEL BRIMLEY LLP

/s/
RICHARD L. PEEL, ESQ. (NV Bar No. 4359)
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