

*In the*  
**Supreme Court**  
*of the*  
**State of Nevada**

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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

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**EXHIBITS IN SUPPORT OF PETITION FOR  
WRIT OF MANDAMUS, OR, ALTERNATIVELY, PROHIBITION  
VOLUME III OF III – Pages 470 to 711 of 711**

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# **Exhibit 6**

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**FILED**  
**FIFTH JUDICIAL DISTRICT**

APR 22 2019

*[Signature]*  
Nye County Clerk  
Deputy

10 **FIFTH JUDICIAL DISTRICT COURT**

11 **NYE COUNTY, NEVADA**

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

18 BRAHMA GROUP, INC., a Nevada corporation,

19 Lien/Bond Claimant,

20 vs.

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

25 Counterdefendants.

CASE NO. : CV 39348

*Consolidated with:*

Case No. CV39799

DEPT. NO. : 2

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

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1 BRAHMA GROUP, INC., a Nevada corporation,

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

4 vs.

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

9 Third-Party Defendants.

10  
11 **ORDER GRANTING BRAHMA'S COUNTERMOTION FOR LEAVE TO FILE A**  
**SINGLE CONSOLIDATED AMENDED COMPLAINT**

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

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

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

25 ///

26 ///

27  
28 <sup>1</sup> Brahma filed its Countermotion in connection with and as part of its Opposition to the Motion to Dismiss  
filed by Third-Party Defendant Cobra Thermosolar Plants, Inc. ("Cobra"). By way of a separate  
Stipulation and Order for Partial Dismissal, Cobra withdrew its Motion to Dismiss.



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**Tonapah Solar v. Brahma Group**

Case No: CV 39348

***Order Granting Brahma's Counter-motion***

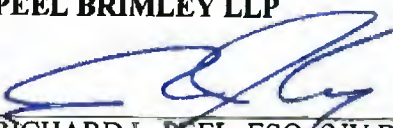
3. Nothing in this Order shall be deemed to mean that the constituent cases of this consolidated action (Case No. CV39348 and Case No. CV39799) do not "retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Matter of Estate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

Dated this \_\_\_\_ day April 2019.

**SENIOR JUDGE STEVEN ELLIOTT**

Submitted by:

**PEEL BRIMLEY LLP**

  
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**Tonapah Solar v. Brahma Group**

Case No: CV 39348

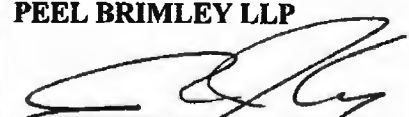
***Order Granting Brahma's Countermotion***

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

Dated this 22 day April 2019.

  
SENIOR JUDGE STEVEN ELLIOTT

Submitted by:  
**PEEL BRIMLEY LLP**

  
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# **Exhibit A**

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

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.  
18

19 BRAHMA GROUP, INC., a Nevada corporation,

20 Lien/Bond Claimant,  
21

22 vs.

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

26 Counterdefendants.  
27  
28

CASE NO. : CV 39348

*Consolidated with:*

Case No. CV39799

DEPT. NO. : 2

**BRAHMA GROUP, INC.'S:**

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

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

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

1 BRAHMA GROUP, INC., a Nevada corporation,

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

4 vs.

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

11 Third-Party Defendants.

12 **SECOND AMENDED COMPLAINT**

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

18 **THE PARTIES**

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

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

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

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

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

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").<sup>2</sup>

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.<sup>3</sup>

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

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

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

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

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

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

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

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

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

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

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

27 a. Failing and/or refusing to pay monies owed to BGI for the Work; and  
28

///  
28

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     ///



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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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(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 \_\_\_\_ day of April 2019.

13                           **PEEL BRIMLEY LLP**

14  
15  
16                           \_\_\_\_\_  
17                           RICHARD L. PEEL, ESQ.  
                          Nevada Bar No. 4359  
18                           ERIC ZIMBELMAN, ESQ.  
                          Nevada Bar No. 9407  
19                           RONALD J. COX, ESQ.  
                          Nevada Bar No. 12723  
20                           3333 E. Serene Avenue, Suite 200  
                          Henderson, Nevada 89074-6571  
21                           *Attorneys for Brahma Group, Inc.*

22       ///

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").<sup>4</sup>

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

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

3 4. TONOPAH SOLAR ENERGY, LLC ("TSE")<sup>6</sup> 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.<sup>7</sup>

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

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

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

1                   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  
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HENDERSON, NEVADA 89074  
(702) 990-7272 ♦ FAX (702) 990-7273

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

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

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

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

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

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

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

15           Dated this \_\_\_\_ day of April 2019.

16                           **PEEL BRIMLEY LLP**

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



# **Exhibit 7**

FILED  
FIFTH JUDICIAL DISTRICT

JAN 28 2019

Nye County Clerk

Deputy

Veronica Aguilar

1 **NEO**  
2 RICHARD L. PEEL, ESQ.  
3 Nevada Bar No. 4359  
4 ERIC B. ZIMBELMAN, ESQ.  
5 Nevada Bar No. 9407  
6 CARY B. DOMINA, ESQ.  
7 Nevada Bar No. 10567  
8 RONALD J. COX, ESQ.  
9 Nevada Bar No. 12723  
10 **PEEL BRIMLEY LLP**  
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15 [rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
16 [ezimbelman@peelbrimley.com](mailto:ezimbelman@peelbrimley.com)  
17 [cdomina@peelbrimley.com](mailto:cdomina@peelbrimley.com)  
18 [rcox@peelbrimley.com](mailto:rcox@peelbrimley.com)  
19 *Attorneys for Brahma Group, Inc.*

FIFTH JUDICIAL DISTRICT COURT

NYE COUNTY, NEVADA

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

15 Plaintiff,

16 vs.

17 BRAHMA GROUP, INC., a Nevada corporation,

18 Defendant.

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

NOTICE OF ENTRY OF 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

24 AND ALL RELATED CROSS-ACTIONS.

25 ///

26 ///

27 ///

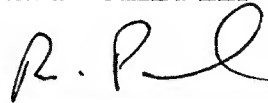
PEEL BRIMLEY LLP  
3333 E. SERENE AVENUE, STE. 200  
HENDERSON, NEVADA 89074  
(702) 990-7272 ♦ FAX (702) 990-7273

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an **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 and (III) GRANTING BRAHMA GROUP, INC'S MOTION TO AMEND** was filed on January 24, 2019, a copy of which is attached as Exhibit 1.

Dated this 28<sup>th</sup> day of January, 2019.

**PEEL BRIMLEY LLP**



RICHARD L. PEEL, ESQ. (4359)  
ERIC B. ZIMBELMAN, ESQ. (9407)  
CARY B. DOMINA, ESQ. (10567)  
RONALD J. COX, ESQ. (12723)  
3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074-6571  
*Attorneys for Brahma Group, Inc.*

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

**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 25<sup>th</sup> day of January, 2019, I caused the above and foregoing document entitled

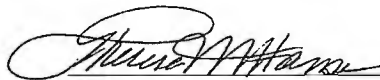
**NOTICE OF ENTRY OF ORDER** to be served as follows:

- ☒ 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
- ☐ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☒ other: Electronic Service (E-mail)

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

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](mailto:lroberts@wwhgd.com)  
[cbalkenbush@wwhgd.com](mailto:cbalkenbush@wwhgd.com)  
*Attorneys for Tonopah Solar Energy, LLC*

Geoffrey Crisp, Esq.  
**WEIL & DRAGE**  
2500 Anthem Village Drive  
Henderson, NV 89052  
[gcrisp@weildrage.com](mailto:gcrisp@weildrage.com)  
*Attorneys for Cobra Thermosolar  
Plants, Inc.*



An Employee of Peel Brimley LLP

# EXHIBIT 1

ORIGINAL

FILED

2019 JAN 24 A 10:37

NYE COUNTY CLERK  
BY Bennett  
DEPUTY

1 **ORDR**

2 RICHARD L. PEEL, ESQ.

3 Nevada Bar No. 4359

4 ERIC B. ZIMBELMAN, ESQ.

5 Nevada Bar No. 9407

6 CARY B. DOMINA, ESQ.

7 Nevada Bar No. 10567

8 RONALD J. COX, ESQ.

9 Nevada Bar No. 12723

10 **PEEL BRIMLEY LLP**

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17 cdomina@peelbrimley.com

18 rcox@peelbrimley.com

19 *Attorneys for Brahma Group, Inc.*

20 **FIFTH JUDICIAL DISTRICT COURT**

21 **NYE COUNTY, NEVADA**

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

24 Plaintiff,

25 vs.

26 BRAHMA GROUP, INC., a Nevada corporation,

27 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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HENDERSON, NEVADA 89074  
(702) 990-7272 \* FAX (702) 990-7273

1 BRAHMA GROUP, INC., a Nevada corporation,

2 Counterclaimant/Lien Claimant,

3 vs.

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

8 Counter-Defendant,

9 BRAHMA GROUP, INC., a Nevada corporation,

10 Third-Party Plaintiff,

11 vs.

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

17 Third-Party Defendants.

18 **ORDER**

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

26 The Court having considered all the pleadings and papers on file, and having heard  
27 argument of counsel, hereby ORDERS as follows, having rendered its oral decision from the  
28 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, 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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(702) 990-7272 ♦ FAX (702) 990-7273

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

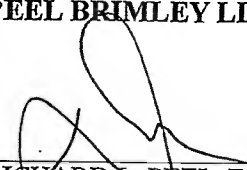
6 **IT IS FURTHER ORDERED** that TSE's Motion for Stay is DENIED in part and  
7 GRANTED in part. The Motion for Stay is granted only as to the following three Causes of  
8 Action which TSE initially removed to federal court: (i) Breach of Contract; (ii) Breach of  
9 Implied Covenant of Good Faith 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 SENIOR JUDGE STEVEN ELLIOTT

18  
19  
20 Respectfully submitted by:  
21 PEEL BRIMLEY LLP

22   
23 RICHARD L. PEEL, ESQ. (4359)  
24 ERIC B. ZIMBELMAN, ESQ. (9407)  
25 CARY B. DOMINA, ESQ. (10567)  
26 RONALD J. COX, ESQ. (12723)  
27 3333 E. Serene Avenue, Suite 200  
28 Henderson, Nevada 89074-6571  
*Attorneys for Brahma Group, Inc.*

Approved as to form and Content  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC

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**BRAHMA GROUP, INC.**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRAHMA GROUP, INC., a Nevada Corporation,

CASE NO.: 2:18-CV-01747-RFB-GWF

Plaintiff,

vs.

TONOPAH SOLAR ENERGY, LLC, a Delaware  
Limited Liability Company; DOES I through X; and  
ROE CORPORATIONS I through X,

**BRAHMA GROUP, INC.'S REPLY IN  
SUPPORT OF MOTION FOR STAY, OR  
IN THE ALTERNATIVE, MOTION TO  
AMEND COMPLAINT**

Defendants.

**AND ALL RELATED MATTERS**

Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys, the law firm of Peel  
Brimley LLP, hereby submits its Reply in Support of its Motion for Stay, or in the Alternative Motion to  
Amend Complaint ("Reply").

This Reply<sup>1</sup> is made and based on the following Memorandum of Points and Authorities, the  
pleadings, declarations and papers on file in this case (the "Case"), and any argument that the Court may  
entertain in this matter.

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<sup>1</sup> Terms defined in the Motion [ECF. No. 13] and Response to Motion for Injunction [ECF. No. 20] are carried through in this Reply.

1 Dated this 8 day of November, 2018.

2 **PEEL BRIMLEY LLP**

3   
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10 **MEMORANDUM OF POINTS & AUTHORITIES**

11 **I. INTRODUCTION**

12 TSE acknowledges in its state court pleadings that this Action and the Nye County Action are  
 13 parallel proceedings—it cannot now claim that they are different to avoid a stay. In any event, TSE’s  
 14 analysis of the *Colorado River* factors is flawed inasmuch as the Ninth Circuit case law holds that exact  
 15 parallelism is not required. Rather, the cases must only be “substantially similar,” which these cases are.  
 16 Both cases will require the trier of fact to determine, among other issues, (i) the agreed upon contract amount  
 17 between TSE and Brahma; (ii) the unpaid balance of the agreed upon contract amount; (iii) the amount of  
 18 labor, materials and equipment Brahma furnished to the Project; (iv) the accuracy and legitimacy of  
 19 Brahma’s billings and invoices to TSE; (v) the amount of payments TSE has made to Brahma; and (vi)  
 20 whether TSE is entitled to withhold money owed to Brahma. Further, when the eight *Colorado River* Factors  
 21 are analyzed, all but one weigh in favor of a stay, and the one that does not favor a stay, remains neutral to  
 22 the analysis.

23 Finally, in a case very similar to this one, this Court granted a *Colorado River* stay recognizing that  
 24 construction disputes involving owners, contractors and subcontractors and mechanic’s lien claims “are  
 25 more frequently and more competently addressed by the state court, which has, over the past ten years,  
 26 engaged in an enormous amount of construction litigation.” *Southwest Circle Group, Inc. v. Perini Building*  
 27 *Company*, 2010 WL 26667335, \*3 (D.Nev. June 29, 2010). This Court’s time and resources are better  
 28 allocated addressing cases involving actual federal right issues. Accordingly, the Court should grant the

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Motion and allow Judge Elliot, who was expressly appointed to resolve this construction dispute between Brahma and TSE, to preside over the entire Case.

## II. LEGAL ARGUMENT

### A. **The Court Should Hear Brahma's Motion for Stay Before it Hears TSE's Motion for Injunction.**

Because Brahma filed its Motion for Stay [ECF. No. 13] first, the Court should decide that Motion first and deny the Motion for Injunction [ECF No. 16] as moot. Deciding the Motion for Stay first promotes (i) judicial efficiency by avoiding unnecessary rulings;<sup>2</sup> and (ii) federal judicial comity toward state courts by reaching the question of enjoining a state court judge only if necessary. *Cf. Younger v. Harris*, 401 U.S. 37, 44 (1971) (abstaining from enjoining state court to promote "comity" for state judicial proceedings).

### B. **TSE's Motion for Injunction Should Be Denied.**

While not relevant to Brahma's Motion for Stay, TSE dedicates a substantial amount of its Response attempting to bolster its shaky position that an injunction should issue against the Nye County Action. Brahma believes its Response [ECF No. 20] adequately responds to TSE's Motion for Injunction, however, the new cases TSE cites in its Response merit a short discussion which Brahma has included in a footnote below.<sup>3</sup> None of those cases support the proposition that federal removal of a civil action automatically and unquestionably divests any state court of jurisdiction over another separately filed state court action.

### C. **Because this Case is Substantially Parallel to the Nye County Action, the Court Should Stay this Case Under *Colorado River*.**

"The *Colorado River* doctrine requires a federal court to abstain from exercising jurisdiction during the pendency of state court proceedings when necessary to promote "wise judicial administration,

<sup>2</sup> That is, if the Court were to decide to enjoin the Nye County Court (though it would be improper to do so), but then later concluded that abstention was proper, the permanent injunction would need to be dissolved.

<sup>3</sup> In *Roberts v. Hollandsworth*, the Idaho Supreme Court affirmed a state trial court's dismissal of an action before it on the grounds another action was pending "between the same parties for the same cause" in federal court. *Roberts*, 101 Idaho 522, 524, 616 P.2d 1058, 1061 (1980). However, the court affirmed because the plaintiffs initiated their state court action "*only after the federal district court had ruled against the plaintiffs adversely*, albeit by summary judgment." *Id.* at 525. In this litigation, there has been no adverse federal court hearing on any matter, let alone a substantive one. Moreover, TSE commenced the Nye County Action prior to the Federal Action. Similarly, *In re M.M.* concerned jurisdictional transfer of a case from a state court to a tribal court and provides no support for the idea that concurrent jurisdiction cannot exist in a state court over a separately filed civil action. *In re M.M.*, 154 Cal. App. 4th 897, 912, 65 Cal. Rptr. 3d 273, 284 (2007). In *Riley v. Carson Pirie Scott & Co.*, after the federal court denied plaintiff's motion to remand, she filed an amended complaint in the very same state court case which defendants had removed, asserting her state law claims against defendants. *Riley*, 946 F. Supp. 716 (E.D. Wisc. 1996). *Riley* is inapplicable because Brahma did not file its contract claims in the Clark County Action and because Brahma did not file its amended Complaint in contradiction to an order from this Court. It did so pursuant to FRCP 15(a) and to preserve claims against the Brahma Bond in the Nye County Action. Similarly, in *Crummie v. Dayton-Hudson Corp.*, the plaintiff filed an amended complaint in the very same state court action from which defendants had removed their case. *Crummie*, 611 F. Supp. 692 (E.D. Mich. 1985). In contrast, Brahma filed its Amended Complaint in the Nye County Action, which TSE commenced before it removed the Clark County Action.

1 conservation of judicial resources, and comprehensive disposition of litigation.” *Puckett v. Schmog*, 2013  
 2 WL 1874754, \*1 (D.Nev. May 3, 2013).

3 The only threshold question in deciding whether a *Colorado River* stay is appropriate is whether  
 4 there are parallel federal and state suits. *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457,  
 5 463 (4th Cir. 2005). However, “in the Ninth Circuit, ‘exact parallelism’ between the two suits is not  
 6 required. It is enough if the two proceedings are ‘substantially similar.’” *Nakash v. Marciano*, 882 F.2d  
 7 1411, 1416 (9th Cir. 1989). “Substantial similarity does not mean that the cases must be identical.” *County*  
 8 *of Marin v. Deloitte Consulting LLP*, 2011 WL 3903222, \*1 (N.D.Cal. Sept. 6, 2011). “This inquiry  
 9 examines whether the suits involve the same parties and the same claims.” *Nakash*, 882 F.2d at 1416. The  
 10 Ninth Circuit is “particularly reluctant to find that the actions are not parallel when the federal action is but  
 11 a ‘spin-off’ of more comprehensive state litigation.” *Id.* at 417.

12 By contrast, the out-of-circuit authority TSE cites requires a comparison that calls for the “exact  
 13 parallelism” restriction the Ninth Circuit rejected in *Nakash*. Specifically, TSE cites *DDR Const. Services,*  
 14 *Inc. v. Siemens Industry, Inc.*, which held, even where the same factual issues were involved, the plaintiff’s  
 15 federal action “did not involve substantially the same legal issues as the claims remaining” in the state court  
 16 action. *Id.* at 645. 770 F.Supp.2d 627 (S.D.N.Y. 2011). In particular, the court found an accounting claim in  
 17 the state action and a quasi-criminal civil RICO claim in the federal action were “entirely different” from  
 18 each other and it was unclear how resolution of the state action would dispose of all the claims in the federal  
 19 case. *Id.*

20 Another out-of-circuit case cited by TSE, *Summit Contracting Grp., Inc. v. Ashland Heights, LP* is  
 21 inapposite to this litigation. *Summit Contracting Grp.*, 187 F. Supp. 3d 893, 897 (M.D. Tenn. 2016). That  
 22 case declined to find parallelism where there was a state lien action and a federal breach of contract action.  
 23 Unlike this Case, however, the state lien action in *Summit Contracting* did not also include contractual  
 24 claims. Here, the Nye County Action includes *both* mechanic’s lien claims as well as related breach of  
 25 contract claims. All the cases TSE cites in footnote 5 to its Response can be distinguished from this Case in  
 26 the same manner.

27 Even if *DDR Const. Services* were consistent with the Ninth Circuit’s rejection of an “exact  
 28 parallelism” requirement, the facts of this Case are very different from that case. Here, Brahma’s claims and

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TSE's claims in state and federal court are, for the most part, virtually identical. In fact, the state court proceedings are more comprehensive and involve additional parties and claims, making the federal action merely a spin-off of the Nye County Action. Even so, both cases will require the trier of fact to determine, among other issues, (i) the agreed upon contract amount between TSE and Brahma; (ii) the unpaid balance of the agreed upon contract amount; (iii) the amount of labor, materials and equipment Brahma furnished to the Project; (iv) the accuracy and legitimacy of Brahma's billings and invoices to TSE; (v) the amount of payments TSE has made to Brahma; and (vi) whether TSE is entitled to withhold money owed to Brahma.

Indeed, in its Motion to Strike/Dismiss Brahma's pleadings filed in the Nye County Action, TSE moves the Nye County Court to stay the Nye County Action based on its admission that the Federal Action and Nye County Action are "duplicative disputes" and "substantially similar."<sup>4</sup> Hence, as acknowledged by TSE, these are substantially parallel cases.

While TSE does assert negligent misrepresentation and fraudulent misrepresentation counterclaims in the Nye County Action, that Action, however, constitutes part of the same alleged contractual transactions that TSE proposes to be heard as federal counterclaims. Nothing prevents TSE from bringing these claims within the concurrent jurisdiction of the Nye County Court. Indeed, (as more fully discussed below) failure to litigate these compulsory claims concerning the contract TSE breached would result in the federal claims being extinguished as claim precluded (*res judicata*).

Hence, both pending cases arise out of the same transaction and occurrence and represent precisely the piecemeal litigation the *Colorado River* Doctrine seeks to avoid. *See Gardner v. Letcher*, 2012 WL 4863055 at \*4 (D.Nev. 2012); *Southwest Circle Group, Inc.*, 2010 WL 26667335, \*2 (finding that subcontractor's breach of contract case against general contractor was "but a 'split-off' from the more comprehensive state litigation" involving mechanic's lien claims.).

#### **D. The Colorado River Factors Weigh in Favor of a Stay.**

<sup>4</sup> See Motion to Strike/Dismiss at pg. 4:21-23 attached as Exhibit "25" to Brahma's Response [ECF No. 20]. Indeed, in footnote 1 to the Motion to Strike, TSE states, "Brahma agrees with TSE that this dispute is duplicative of the first filed federal court action..." see Motion to Strike, Pg. 4, footnote 1. In that same filing, TSE acknowledges that "the Parties are currently in the midst of a dispute over the sufficiency of certain invoices Brahma has submitted to TSE for payment" where "Brahma contends that TSE owes it additional money for work Brahma performed on the Project" and "TSE contends that Brahma is not owed any additional money and that many of Brahma's invoices are fraudulent." *Id.* at pg. 3:4-8. In addition to asserting breach of contract claims against Brahma which are essentially the counter-parts of Brahma's contract claims against TSE, TSE also alleges in its Fifth Claim for Relief of its Counter-Claim filed with this Court, "BGI has submitted numerous invoices that contain fraudulent misrepresentations regarding the amount of money BGI was due from TSE for work BGI performed on the Project." See Counter-Claim at pg. 15, ¶ 63 [ECF No. 4].

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In determining whether “exceptional circumstances” exist to grant a stay under the *Colorado River* Doctrine, the Ninth Circuit Court of Appeals evaluates eight factors: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Seneca Ins. Co. Inc. v. Strange Land, Inc.*, 862 F.3d 835 (9th Cir. 2017).

“These factors are not a mechanical checklist; indeed, some may not have any applicability to the case.” *Id.* (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). Contrary to TSE’s position, “exceptional circumstances” is not a threshold factor or an independent factor in the analysis, but rather, whether such circumstances exist is determined by weighing the eight factors above. *Intel Corp. v. Advanced Micro Devices*, 12 F.3d 908, 912 (9th Cir. 1993). Notably, this Court has held on several occasions that the “exceptional circumstances” limitation “only relates to cases which involve questions of federal law,” not when a case is before the federal court based on diversity jurisdiction only, as is the case here.<sup>5</sup> See *Southwest Circle Group, Inc.*, 2010 WL 2667335, \*1; see also, *Puckett*, 2013 WL 1874754, \* 1; *Gardner*, 2012 WL 4863055, \*2.

### *1. Jurisdiction over the Res*

“[A] mechanic’s lien is a statutory creature established to help ensure payment for work or materials provided for construction or improvements on land.” *In re Fontainebleau Las Vegas Holdings*, 289 P.3d at 1210. Under NRS 108.2415(6), a party may record a surety bond or “bond off” the lien, which “releases the property described in the surety bond.” The surety bond, which is recorded with the county recorder’s office, is “deemed to replace the property as security for the lien.” NRS 108.2415(6); see also *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 551 (2014). However, even after the substitution of the surety bond, the Court continues to hold jurisdiction over the lien and the underlying dispute. Under NRS 108.2423(1), “the principal and surety submit themselves to the jurisdiction of the court in which an action or suit is pending

<sup>5</sup> While it appears this Court does not analyze the “exceptional circumstances” doctrine when deciding cases with no federal questions, out of an abundance of caution, Brahma has followed the Ninth Circuit’s case law and provided analysis for why exceptional circumstances exist in this Case.



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on a notice of lien on the property described in the surety bond.” Moreover, by procuring a bond, the principal and surety agree “they will pay the lien claimant that amount as a court of competent jurisdiction may adjudge to have been secured by his lien...”; however, “the liability of the surety may not exceed the penal sum of the bond.” NRS 108.2415(1).

Thus, TSE “bonding off” the lien affects the remedial aspect of a mechanic’s lien, but not the court’s jurisdiction over the lien. Moreover, in the event Brahma obtains a judgement against TSE which exceeds the penal sum of the Brahma Surety Bond, Brahma would still be entitled to pursue any deficiency judgment against the principal on the Surety Bond (or in most cases, the owner of the work of improvement to which the lien originally attached). *Simmons Self-Storage*, 130 Nev. at 552 (“Only upon showing that an individual surety bond is insufficient in relation to its respective charge can the district court take further action against that bond’s principal to satisfy the judgment”).

Here, on June 11, 2018, the Nye County Court first assumed jurisdiction over the *res* when TSE invoked that state court’s jurisdiction to expunge Brahma’s Lien recorded against the work of improvement.<sup>6</sup> By contrast, TSE removed the Clark County Action to this Court on September 10, 2018. Hence, the Nye County Court maintains jurisdiction over the *res*. Therefore, this factor weighs in favor of this Court granting the stay.

At worst, if the court concludes that no jurisdiction over a *res* is at stake, this factor simply becomes “irrelevant,” *see R.R. Street & Co. Inc., v. Transport Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011); *see also, Seneca Ins. Co. Inc.*, 862 F.3d at 842. TSE unavailingly relies on contrary, out-of-circuit authority to claim absence of a *res* “weighs against” a stay.<sup>7</sup> *Welding Technologies v. James Mach. Works, LLC*, No. 3:12-CV-336, 2013 WL 1123852, at \*3 (S.D. Tex. Mar. 18, 2013) (citing *Evanston Ins. Co. v. Jimco, Inc.*, 844 F.2d 1185, 1191 (5th Cir. 1988)). However, this Court follows the Ninth Circuit and has found otherwise. *See Gardner*, 2012 WL 4863055, at \*3 (holding, when neither state court nor federal court has jurisdiction over property, “this element weighs in neither party’s favor”).

## 2. Nye County Court obtained jurisdiction first.

“In determining the order in which the state and federal courts obtained jurisdiction, district courts

<sup>6</sup> Contrary to TSE’s assertion, the Nye County Action is on-going since Brahma has filed a Motion for Fees and Costs pursuant to NRS 108.2275(6)(c) given Judge Elliot’s decision to deny the Motion to Expunge. In addition, Brahma also has its own claims in its own pleading that relate to the dispute that underlies the mechanic’s lien, among others, TSE’s breach of contract and failure to timely pay.

<sup>7</sup> Response at pg. 14:13-20

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are instructed not simply to compare filing dates, but to analyze the progress made in each case “in a pragmatic, flexible manner with a view to the realities of the case at hand.” *Seneca Ins. Co. Inc. v. Strange Land, Inc.*, 862 F.3d 835 (9th Cir. 2017) (citing *Cone Mem’l Hosp.*, 460 U.S. 21, 103).

While it is true both cases are relatively young, the Nye County Action has progressed further along than the Federal Action since Judge Elliot<sup>8</sup> has already ruled on a dispositive motion in the Nye County Action. That Action was first commenced by TSE on June 11, 2018 when it filed its Second Motion to Expunge Brahma’s Lien. After reviewing all of the briefs on that matter, including receiving supplemental briefing from both parties, Judge Elliot held a 2-hour hearing on September 12, 2018, and denied TSE’s Second Motion to Expunge.

In an obvious attempt to create an argument that the Federal Action has progressed further along than the Nye County Action, TSE directs the Courts attention to certain written discovery requests TSE served on Brahma on October 29, 2018, just one day before filing its Response to Brahma’s Motion for Stay. TSE’s blatant scheme to quickly serve Brahma with discovery requests (i) before it filed its Response to the Motion for Stay; and (ii) despite demanding a one-year discovery period, only proves Brahma’s point that it is TSE who is forum shopping, not Brahma. These actions, coupled with TSE’s efforts to (i) strip away Brahma’s lien rights by staying the Nye County Action and (ii) thwart Brahma from recovering its mandatory award for attorney’s fees and costs under NRS 108.2275(6)(c), should not be overlooked.

Therefore, when the “realities of the case at hand” are considered, it is clear TSE’s discovery requests are nothing more than sham discovery requests put forth to bolster its argument against staying this Case.<sup>9</sup> Therefore, because the Nye County Action has progressed further along than the Federal Action, this factor favors the Court granting the stay.

### 3. Convenience of the forum.

A court may consider the inconvenience of the federal forum, but the geographic dimension of convenience is “irrelevant” when the federal and state actions are located in the same general geographic area. *See, e.g., Jesus Garcia v. County of Contra Costa*, 2015 WL 1548928, at \*3 (N.D. Cal. 2015) (citing *R&R Street & Co. v. Transport Ins. Co.*, 656 F.3d 966, 979 (9th Cir. 2011) (same)).

<sup>8</sup> Judge Elliot has also presided over several cases in Nye County involving mechanic’s lien rights against the Project and TSE, so he has significant familiarity with the Project and as a result, has a much shorter “learner-curve” than this Court.

<sup>9</sup> Brahma intends to file a Motion for a Protective Order to stay any obligation to respond to those discovery requests until such time as this Court rules on the Motion for Stay so Brahma does not waste its time and resources indulging in TSE’s transparent scheme by providing responses.

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Here, the Federal Action in the Lloyd D. George courthouse is located within 65 miles—under an hour’s drive—of the Pahrump state courthouse where the Nye County Action is filed. Contrary to what TSE claims, the geographic dimension of this factor is simply irrelevant in this case and weighs neither for nor against any stay. Convenience, however, extends beyond geographic considerations. Because Brahma has a statutory right to a preferential trial setting in the Nye County Action on the related Brahma Surety Bond, and because the underlying Lien and Brahma Bond are recorded in Nye County, temporal convenience is certainly a relevant convenience consideration. Moreover, H&E’s contract claims against Brahma in the Nye County Action are derivative of Brahma’s claims against TSE, and those claims must remain in the Nye County Action, thus forcing Brahma to litigate “integral and interwoven” issues in two separate forums. *Southwest Circle Group, Inc.*, 2010 WL 26667335, \*2. TSE’s ignores the Court’s admonition that the stay inquiry is to be applied pragmatically and flexibly, not as some “mechanical checklist.” *American Intern. Underwriters v. Continental Ins.*, 843 F.2d 1253, 1257 (9th Cir. 1988). This is especially important where the list of factors favoring a stay “is not exclusive, and others may be considered.” *Nakash*, 882 F.2d 1416.

In the event the Court finds this factor is limited to geographic considerations, since “neither forum is more convenient than the other, this factor is not a factor to be considered.” *Southwest Circle Group, Inc.*, 2010 WL 26667335, at \* 3.

#### 4. Avoiding piecemeal litigation.

“A substantial factor in the *Colorado River* analysis is whether there are special concerns associated with resolving the issues in piecemeal fashion via parallel proceedings.” *Seneca Ins. Co.*, 862 F.3d at 842. “The case must raise a special concern about piecemeal litigation which can be remedied by staying...the federal proceeding.” *R.R. Street & Co. Inc.*, 656 F.3d at 980. For this factor to weigh in favor of granting a stay, there must be “a special or important rationale or legislative preference for resolving these issues in a single proceeding.” *Seneca Ins. Co.*, 862 F.3d at 843.

The Nevada’s Mechanic’s Lien Statute evidences the Nevada Legislature’s preference for resolving construction disputes involving owners, contractors, subcontractors and mechanic’s liens within the same proceeding. Specifically, under NRS 108.2421(1), Brahma (the lien claimant) “is entitled to bring an action against the principal (Cobra) and surety (AHAC) on the surety bond and the lien claimant’s debtor (TSE) in any court of competent jurisdiction that is located within the county where the property upon which the work

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of improvement is located.” Further, under NRS 108.2421(3), Brahma is entitled to file a “demand for preferential trial setting,” and “upon filing, the clerk of the court shall, before the Friday after the demand is filed...set the lien claimant’s case for hearing, on a day or days certain, to be heard within 60 days after the filing of the “demand for preferential trial setting.” Because (i) NRS 108.2421(1) required Brahma’s foreclosure action against the Brahma Bond to be filed in Nye County; and (ii) Cobra, the principal on the Brahma Surety Bond is domiciled in Nevada (the same domicile as Brahma), Brahma’s claims against Brahma Surety Bond must be litigated in Nye County, not the Federal Action, a fact TSE has acknowledged throughout its briefing in this Court and the Nye County Action. In addition, because H&E also has the right to file a demand for preferential trial setting to pursue its claims against the H&E Surety Bond and Brahma (its debtor), staying this Case will ensure that that there are not inconsistent judgements between Brahma and TSE and Brahma and H&E.

Hence, given the clear “legislative preference” under NRS 108.2421 for resolving mechanic’s lien foreclosure actions and disputes between owners, contractors and subcontractors in a single proceeding, this factor weighs in favor of granting the stay.

##### 5. *State law controls the decision on the merits.*

“That state law provides the rule of decision supports abstention only when the state law questions are themselves complex and difficult issues better resolved by a state court...” *Seneca Ins. Co. Inc.*, 862 F.3d at 844 (*citing R.R. St. & Co.*, 656 F.3d at 978-79). This Court has found that cases before it based on diversity jurisdiction only, play “an important factor” in deciding to grant the stay under *Colorado River. Southwest Circle Group, Inc.*, 2010 WL 26667335, \*3 (holding that mechanic’s lien litigation and construction disputes “are more frequently and more competently addressed by the state court, which has, over the past ten years, engaged in an enormous amount of construction litigation”).

Like *Perini*, there are no federal questions in this Case. The parties’ claims are before the Court based solely on diversity jurisdiction with only state law claims in dispute. In addition, like *Perini*, this case involves complex construction litigation involving mechanic’s lien claims, and a dispute between the owner, the general contractor and its subcontractor. Moreover, given the unique and somewhat burdensome nature of NRS 108.2421, which entitles Brahma to (i) a preferential trial setting within sixty (60) days of making its demand and (ii) assert contract claims against TSE (Brahma’s debtor) in the same preferential trial setting,

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1 this Case constitutes one of those “rare circumstances” where the Court is justified in granting a stay. As  
 2 part of that preferential trial, Judge Elliot will be required to determine, among other issues, the agreed upon  
 3 contract price between TSE and Brahma, and the unpaid balance of the agreed upon contract price pursuant  
 4 to NRS 108.222. This fact weighs in favor of a stay.

5 **6. Whether state court proceedings can adequately protect the rights of the**  
 6 **federal litigants.**

7 Brahma agrees with TSE that “a state court proceeding can adequately protect the rights of the  
 8 parties to this case.”<sup>10</sup> Therefore, this factor weighs in favor of a stay.

9 **7. Whether the state court proceedings will resolve all issues before the federal**  
 10 **court.**

11 “When a district court decides to stay a case under *Colorado River*, it presumably concludes that  
 12 the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the  
 13 issues between the parties.” *Cone Memorial Hospital*, 460 U.S. at 28.

14 TSE argues that its counter-claims against Brahma for breach of contract and misrepresentation are  
 15 not before the Nye County Court, so proceeding with the Nye County Action would not resolve all of the  
 16 claims currently before this Court.<sup>11</sup> However, such a position ignores the fact that should this Court stay  
 17 the Federal Action, TSE will be required to assert its compulsory counter-claims in the Nye County Action  
 18 pursuant to NRCP 13(a), or risk having those claims barred.<sup>12</sup>

19 Regardless of whether TSE brings its counterclaims in the Nye County, those claims will be resolved  
 20 by the Nye County Action because that Court will either adjudicate those claims on the merits, or if TSE  
 21 does not bring them, they will be barred, resulting in an adjudication under NRCP 13(a). Therefore, TSE’s  
 22 argument that the Nye County Action will not resolve its counterclaims is a red-herring and should not

23 <sup>10</sup> Response, at pg. 20:3-9.

24 <sup>11</sup> *Id.* at pg. 13:3-8; TSE’s reliance on *Intel Corp.*, 12 F.3d at 913 n.7, is misplaced. The *Intel* court considered a *Colorado River*  
 25 motion and found that “[a] stay would be especially difficult to justify...where the copyright claims are subject to exclusive federal  
 26 jurisdiction...the Circuit Courts, and the Ninth Circuit in particular, have uniformly held that a district court may not grant a stay in  
 27 this context.” *Id.* Here, the Nye County Court, a state court of general subject-matter jurisdiction, may entertain all the claims  
 28 asserted as they all involve questions of state law.

<sup>12</sup> Indeed, should the Court stay this Case, TSE would then be required to file an Answer to Brahma’s Complaint filed in the Nye  
 County Action, which Answer “shall state as a counterclaim any claim which at the time of serving the pleading [TSE] has against  
 [Brahma], if it arises out of the transaction or occurrence that is the subject matter of [Brahma’s] claim.” *see MacDonald v. Krause*,  
 77 Nev. 312, 362 P.2d 724 (1961) (“where a compulsory counterclaim is not pled, the party failing to assert such a claim is thereafter  
 barred from bringing a separate suit on such claim”); *see also Great W. Land & Cattle Corp. v. Sixth Judicial Dist. Court ex rel.*  
*County of Pershing*, 86 Nev. 282, 467 P.2d 1019 (1970) (holding, purpose of this rule is to discourage circuity of action and promote  
 speedy settlement of all controversies between parties in one action). Nevada’s test for claim preclusion “applies to all grounds of  
 recovery that were or could have been brought in the first case.” *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 713 (Nev. 2008)  
 (emphasis added).

persuade this Court to deny the Motion for Stay.

**8. Whether exercising jurisdiction would promote forum shopping.**

“It typically does not constitute forum shopping where a party ‘acted within [its] rights in filing a suit in the forum of [its] choice’ ... even where ‘[t]he chronology of events suggests that both parties took a somewhat opportunistic approach to th[e] litigation.’” *Seneca Ins. Co.*, 862 F.3d at 846. (citations omitted). The primary purpose of amending its Counter-Complaint in the Nye County Action was not to forum shop, but rather, to preserve Brahma’s right to pursue its contract claims against TSE in conjunction with its claim against the Brahma Surety Bond, which claims must be decided along with Brahma’s claims against the Brahma Surety Bond in the Nye County Action. Forbidden forum shopping is limited to when a party “pursue[s] suit in a new forum after facing setbacks in the original proceeding,” *Seneca*, 862 F.3d at 846. As no federal court ruling has occurred, simply put, Brahma has not engaged in forum shopping, and every case TSE cites regarding forum shopping can easily be distinguished from the facts of this Case.

Weighing these eight factors, a stay of this Case under *Colorado River* is appropriate as only one is possibly neutral and all others favor the stay.

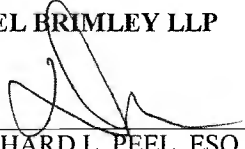
**E. In the Event the Court Does Not Stay this Case, it Should Allow Brahma to Amend its Complaint.**

Should the Court deny Brahma’s Motion for Stay, Brahma must be permitted to amend its Complaint to reassert its contract claims against TSE.

**III. CONCLUSION**

Dated this 8 day of November, 2018.

**PEEL BRIMLEY LLP**

  
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**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. Civ. P. 5, I certify that I am an employee of PEEL BRIMLEY LLP, I am over the age of eighteen years, and not a party to the within action. My business address is 3333 E. Serene Ave, Suite 200, Henderson, NV 89074. On November 8, 2018, I served the within document(s):

**REPLY IN SUPPORT OF MOTION FOR STAY, OR IN THE  
ALTERNATIVE, MOTION TO AMEND COMPLAINT**

to be served as follows:

- X By CM/ECF Filing – with the United States District Court of Nevada. I electronically filed with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the attorney(s) and/or party(ies) listed below.
- ☐ By Facsimile Transmission at or about \_\_\_\_\_ on that date. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the persons) served as set forth below.
- ☐ By placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, NV, addressed as set forth below.

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

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# Exhibit 9



**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

\* \* \*

BRAHMA GROUP, INC., a Nevada  
Corporation,

Plaintiff,

v.

TONOPAH SOLAR ENERGY, LLC, a  
Delaware limited liability company

Defendant.

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

**ORDER**

TONOPAH SOLAR ENERGY, LLC, a  
Delaware limited liability company

Counter Claimant

v.

BRAHMA GROUP, INC., a Nevada  
Corporation,

Counter Defendant

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

///

///

///

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

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

#### 8 **vii. Avoidance of Forum Shopping**

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

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

#### 26 **b. TSE’s Permanent Injunction**

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



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

7  
8 **V. CONCLUSION**

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

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

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

17  
18 DATED: September 25, 2019.

19  
20 

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

# **Exhibit 10**

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

9 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

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

11 TONOPAH SOLOR ENERGY, LLC, a ) Case No.: CV39348  
12 Delaware limited liability company, ) *Consolidated With*  
 ) Case No.: CV39799  
13 Plaintiff, ) Dept. No.: 2  
 )

14 vs. )

15 BRAHMA GROUP, INC., a Nevada )  
16 corporation, )  
17 Defendant. )

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

18 )  
19 BRAHMA GROUP, INC., a Nevada )  
20 corporation, )  
21 Lien/Bond Claimant, )  
 )

22 vs. )

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

27 Counter-defendants. )  
28 )

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

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

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

21 **THE PARTIES**

22 1. Answering Paragraph 1(a), and (b) 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. Answering Paragraph 1(c), AMERICAN HOME  
 25 ASSURANCE COMPANY is without sufficient information or knowledge as to form a belief as to the  
 26 truth of the allegations contained in said Paragraph and, therefore, denies the same. Answering  
 27 Paragraph 1(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, 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.

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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

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

2 **THIRTIETH AFFIRMATIVE DEFENSE**

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

5 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

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

9 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

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

11 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

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

16 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

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

19 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

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

24 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

25 36. All or part of the claims alleged did not arise from a construction contract and/or are  
26 otherwise improper pursuant to NRS Chapter 624, and therefore said claims are not properly  
27 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

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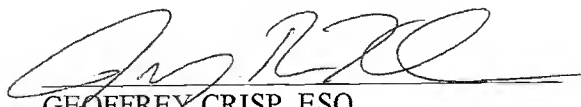
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5. For such other and further relief as the court deems just, equitable and proper.

*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 16<sup>th</sup> day of May, 2019.

WEIL & DRAGE, APC



GEOFFREY CRISP, ESQ.

Nevada Bar No. 2104

JEREMY R. KILBER, ESQ.

Nevada Bar No. 10643

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Henderson, NV 89052

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

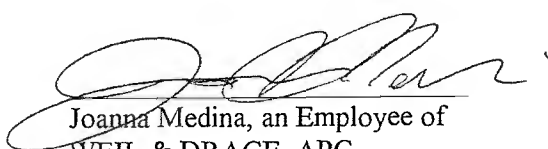
**CERTIFICATE OF SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 16<sup>th</sup> 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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H&E EQUIPMENT SERVICES, INC.

  
Joanna Medina, an Employee of  
WEIL & DRAGE, APC

# **Exhibit 11**

1 GEOFFREY CRISP, ESQ.  
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7 Attorneys for COBRA THERMOSOLAR PLANTS, INC. and  
8 AMERICAN HOME ASSURANCE COMPANY

9 **IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

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

11 TONOPAH SOLOR ENERGY, LLC, a ) Case No.: CV39348  
12 Delaware limited liability company, ) *Consolidated With*  
13 ) Case No.: CV39799  
Plaintiff, ) Dept. No.: 2  
14 )

14 vs. )

15 BRAHMA GROUP, INC., a Nevada ) **COBRA THERMOSOLAR PLANTS, INC.'S**  
16 corporation, ) **AND AMERICAN HOME ASSURANCE**  
17 Defendant. ) **COMPANY'S ANSWER TO H&E**  
18 ) **EQUIPMENT SERVICES, INC.'S**  
19 ) **COMPLAINT IN INTERVENTION**  
20 )

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

21 Lien/Bond Claimant, )  
22 )

22 vs. )

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

27 Counter-defendants. )  
28 )

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. )  
13 H&E EQUIPMENT SERVICES, INC., a )  
14 Delaware Corporation, )  
15 Plaintiff-In-Intervention, )  
16 vs. )  
17 BRAHMA GROUP, INC., a Nevada )  
18 Corporation, TONOPAY SOLAR ENERGY )  
19 LLC, a Delaware Limited Liability Company, )  
20 COBRA THERMOSOLAR PLANTS, INC., )  
21 a Nevada Corporation; AMERICAN HOME )  
22 ASSURANCE COMPANY, a surety; BOE )  
23 BONDING COMPANIES I through X; DOES )  
24 I through X; ROE CORPORATIONS I )  
25 through X, and TOE TENANTA I through X, )  
26 inclusive, )  
27 Defendants-In-Intervention. )  
28 /// )  
29 /// )  
30 /// )  
31 /// )

1        COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE  
2        COMPANY'S ANSWER TO H&E EQUIPMENT SERVICES, INC.'S  
3        COMPLAINT IN INTERVENTION

4        Defendants-In-Intervention, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN  
5        HOME ASSURANCE COMPANY (collectively, for purposes of this Answer, "COBRA"), by and  
6        through their attorneys of record, the law firm of WEIL & DRAGE, APC, hereby answer Plaintiff-  
7        In-Intervention H&E EQUIPMENT SERVICES, INC.'s ("H&E") Complaint-In-Intervention  
8        (hereinafter, "Complaint") on file herein, by admitting, denying, and alleging as follows:

9                                PARTIES

10        1.        Answering Paragraph 1 of H&E's Complaint, COBRA is without sufficient information  
11        or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
12        therefore, denies the same.

13        2.        Answering Paragraph 2 of H&E's Complaint, COBRA is without sufficient information  
14        or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
15        therefore, denies the same.

16        3.        Answering Paragraph 3 of H&E's Complaint, COBRA is without sufficient information  
17        or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
18        therefore, denies the same.

19        4.        Answering Paragraph 4 of H&E's Complaint, COBRA is without sufficient information  
20        or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
21        therefore, denies the same.

22        5.        Answering Paragraph 5 (a), (b), (c), and (d)(i) and (ii) of H&E's Complaint, COBRA is  
23        without sufficient information or knowledge as to form a belief as to the truth of the allegations  
24        contained in said Paragraph and, therefore, denies the same.

25        6.        Answering Paragraph 6 of H&E's Complaint, no response is required. However, to the  
26        extent a response is deemed required, COBRA denies the same.

27        7.        Answering Paragraph 7(a) of H&E's Complaint, AMERICAN HOME ASSURANCE  
28        COMPANY admits it is a bonding company duly licensed and qualified to do business as a surety in

1 Nevada. Answering Paragraph 7(a) of H&E's Complaint, COBRA THERMOSOLAR PLANTS,  
2 INC. is without sufficient information or knowledge as to form a belief as to the truth of the  
3 allegations contained in said Paragraph and, therefore, denies the same. COBRA denies the  
4 allegations in Paragraph 7(b) of H&E's Complaint, and respectfully refers the Court to the alleged  
5 Surety Bond for a full and complete statement of its contents.

6 8. Answering Paragraph 8(a), and (b) of H&E's Complaint, AMERICAN HOME  
7 ASSURANCE COMPANY is without sufficient information or knowledge as to form a belief as to  
8 the truth of the allegations contained in said Paragraph and, therefore, denies the same. Answering  
9 Paragraph 8(a), and (b) of H&E's Complaint, COBRA THERMOSOLAR PLANTS, INC. admits the  
10 allegations in Paragraph 8(a), denies the allegations in Paragraph 8(b), and refers the Court to the  
11 alleged Surety Bond for a full and complete statement of its contents.

12 9. Answering Paragraph 9 of H&E's Complaint, COBRA is without sufficient information  
13 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
14 therefore, denies the same.

15 10. Answering Paragraph 10 of H&E's Complaint, no response is required. However, to the  
16 extent a response is deemed required, COBRA denies same.

#### 17 FIRST CAUSE OF ACTION

##### 18 (Breach of Contract)

19 11. Answering Paragraph 11 of H&E's Complaint, COBRA repeats and realleges their  
20 answers to Paragraphs 1 through 10 as though fully set forth herein.

21 12. Answering Paragraph 12 of H&E's Complaint, COBRA is without sufficient information  
22 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
23 therefore, denies the same, and respectfully refers the Court to the alleged Services Agreement for a  
24 full and complete statement of its contents.

25 13. Answering Paragraph 13 of H&E's Complaint, COBRA is without sufficient information  
26 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
27 therefore, denies the same, and respectfully refers the Court to any alleged contract for a full and  
28 complete statement of its contents.

1       14.     Answering Paragraph 14 of H&E's Complaint, COBRA is without sufficient information  
2 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
3 therefore, denies the same, and respectfully refers the Court to any alleged contract for a full and  
4 complete statement of its contents.

5       15.     Answering Paragraph 15 of H&E's Complaint, COBRA is without sufficient information  
6 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
7 therefore, denies the same.

8       16.     Answering Paragraph 16 of H&E's Complaint, COBRA is without sufficient information  
9 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
10 therefore, denies the same, and respectfully refers the Court to the alleged invoices for a full and  
11 complete statement of their contents.

12       17.     Answering Paragraph 17 of H&E's Complaint, COBRA is without sufficient information  
13 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
14 therefore, denies the same, and respectfully refers the Court to any alleged contract for a full and  
15 complete statement of its contents.

16       18.     Answering Paragraph 18(a) and (b) of H&E's Complaint, COBRA is without sufficient  
17 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, and respectfully refers the Court to any alleged contract  
19 for a full and complete statement of its contents.

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

24       20.     Answering Paragraph 20 of H&E's Complaint, COBRA is without sufficient information  
25 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
26 therefore, denies the same, and respectfully refers the Court to any alleged agreement for a full and  
27 complete statement of its contents.

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1       21.     Answering Paragraph 21 of H&E's Complaint, COBRA is without sufficient information  
2 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
3 therefore, denies the same, and respectfully refers the Court to any alleged agreement, invoices and/or  
4 payment applications for a full and complete statement of their contents.

5       22.     Answering Paragraph 22 of H&E's Complaint, COBRA is without sufficient information  
6 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
7 therefore, denies the same, and respectfully refers the Court to any alleged agreement and invoices  
8 for a full and complete statement of their contents.

9       23.     Answering Paragraph 23 of H&E's Complaint, COBRA is without sufficient information  
10 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
11 therefore, denies the same.

12       24.     Answering Paragraph 24 of H&E's Complaint, COBRA is without sufficient information  
13 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
14 therefore, denies the same.

15       25.     Answering Paragraph 25 of H&E's Complaint, COBRA is without sufficient information  
16 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
17 therefore, denies the same.

18       26.     Answering Paragraph 26 of H&E's Complaint, COBRA is without sufficient information  
19 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
20 therefore, denies the same.

21       27.     Answering Paragraph 27 of H&E's Complaint, COBRA is without sufficient information  
22 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
23 therefore, denies the same.

24       28.     Answering Paragraph 28 of H&E's Complaint, COBRA is without sufficient information  
25 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
26 therefore, denies the same.

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**SECOND CAUSE OF ACTION**

**(Breach of Implied Covenant of Good Faith and Fair Dealing against BGI)**

29. Answering Paragraph 29 of H&E's Complaint, COBRA repeats and realleges their answers to Paragraphs 1 through 28 as though fully set forth herein.

30. Answering Paragraph 30 of H&E'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.

31. Answering Paragraph 31 of H&E's Complaint, COBRA 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, and respectfully refers the Court to any alleged contract for a full and complete statement of its contents.

32. Answering Paragraph 32 of H&E's Complaint, COBRA 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, and respectfully refers the Court to any alleged contract for a full and complete statement of its contents.

33. Answering Paragraph 33 of H&E's Complaint, COBRA 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, and respectfully refers the Court to any alleged contract for a full and complete statement of its contents.

34. Answering Paragraph 34 of H&E's Complaint, COBRA 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, and respectfully refers the Court to any alleged contract for a full and complete statement of its contents.

35. Answering Paragraph 35 of H&E's Complaint, COBRA 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.

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1 THIRD CAUSE OF ACTION

2 (Foreclosure of Notice of Lien)

3 36. Answering Paragraph 36 of H&E's Complaint, COBRA repeats and realleges their  
4 answers to Paragraphs 1 through 35 as though fully set forth herein.

5 37. Answering Paragraph 37 of H&E's Complaint, COBRA is without sufficient information  
6 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
7 therefore, denies the same.

8 38. Answering Paragraph 38 of H&E's Complaint, COBRA is without sufficient information  
9 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
10 therefore, denies the same.

11 39. Answering Paragraph 39(a) and (b) of H&E's Complaint, COBRA is without sufficient  
12 information or knowledge as to form a belief as to the truth of the allegations contained in said  
13 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of  
14 Right to Lien for a full and complete statement of its contents.

15 40. Answering Paragraph 40 of H&E's Complaint, COBRA is without sufficient information  
16 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
17 therefore, denies the same.

18 41. Answering Paragraph 41 of H&E's Complaint, COBRA is without sufficient information  
19 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
20 therefore, denies the same, and respectfully refers the Court to the alleged Notice of Lien for a full  
21 and complete statement of its contents.

22 42. Answering Paragraph 42 of H&E's Complaint, COBRA is without sufficient information  
23 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
24 therefore, denies the same, and respectfully refers the Court to the alleged Lien for a full and  
25 complete statement of its contents.

26 43. Answering Paragraph 43 of H&E's Complaint, COBRA is without sufficient information  
27 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
28 therefore, denies the same, and respectfully refers the Court to the alleged Lien for a full and

1 complete statement of its contents.

2 44. Answering Paragraph 44 of H&E's Complaint, COBRA is without sufficient information  
3 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
4 therefore, denies the same.

5 **FOURTH CAUSE OF ACTION**

6 **(Violation of NRS 624 against BGI)**

7 45. Answering Paragraph 45 of H&E's Complaint, COBRA repeats and realleges their  
8 answers to Paragraphs 1 through 44 as though fully set forth herein.

9 46. Answering Paragraph 46 of H&E's Complaint, said Paragraph calls for a legal conclusion  
10 which COBRA cannot admit or deny. However, to the extent a response is deemed necessary,  
11 COBRA denies the allegations contained in said Paragraph.

12 47. Answering Paragraph 47 of H&E's Complaint, COBRA is without sufficient information  
13 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
14 therefore, denies the same.

15 48. Answering Paragraph 48 of H&E's Complaint, COBRA is without sufficient information  
16 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
17 therefore, denies the same.

18 49. Answering Paragraph 49 of H&E's Complaint, COBRA is without sufficient information  
19 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
20 therefore, denies the same.

21 **FIFTH CAUSE OF ACTION**

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

23 50. Answering Paragraph 50 of H&E's Complaint, COBRA repeats and realleges their  
24 answers to Paragraphs 1 through 49 as though fully set forth herein.

25 51. Answering Paragraph 51 of H&E's Complaint, COBRA is without sufficient information  
26 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
27 therefore, denies the same, and respectfully refers the Court to the alleged Services Agreement for a  
28 full and complete statement of its contents.

1        52.     Answering Paragraph 52 of H&E's Complaint, COBRA is without sufficient information  
2 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
3 therefore, denies the same, and respectfully refers the Court to any alleged contract for a full and  
4 complete statement of its contents.

5        53.     Answering Paragraph 53(a) and (b) of H&E's Complaint, COBRA is without sufficient  
6 information or knowledge as to form a belief as to the truth of the allegations contained in said  
7 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of  
8 Right to Lien for a full and complete statement of its contents.

9        54.     Answering Paragraph 54 of H&E's Complaint, COBRA is without sufficient information  
10 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
11 therefore, denies the same, and respectfully refers the Court to any alleged agreement for a full and  
12 complete statement of its contents.

13        55.     Answering Paragraph 55 of H&E's Complaint, COBRA is without sufficient information  
14 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
15 therefore, denies the same.

16        56.     Answering Paragraph 56 of H&E's Complaint, COBRA is without sufficient information  
17 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
18 therefore, denies the same, and respectfully refers the Court to the alleged Notice of Lien for a full  
19 and complete statement of its contents.

20        57.     Answering Paragraph 57 of H&E's Complaint, COBRA is without sufficient information  
21 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
22 therefore, denies the same, and respectfully refers the Court to the alleged Lien for a full and  
23 complete statement of its contents.

24        58.     Answering Paragraph 58 of H&E's Complaint, COBRA is without sufficient information  
25 or knowledge as to form a belief as to the truth of the allegations contained in said Paragraph and,  
26 therefore, denies the same, and respectfully refers the Court to the alleged Lien for a full and  
27 complete statement of its contents.

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1       59.     Answering Paragraph 59 of H&E's Complaint, COBRA admits only that they caused a  
2     surety bond to be recorded in Nye County, denies the remainder of the allegations contained in said  
3     Paragraph 59, and respectfully refers the Court to the Surety Bond for a full and complete statement  
4     of its contents.

5       60.     Answering Paragraph 60 of H&E's Complaint, said Paragraph calls for a legal conclusion  
6     which COBRA cannot admit or deny. However, to the extent a response is deemed necessary,  
7     COBRA denies the allegations contained in said Paragraph.

8       61.     Answering Paragraph 61 of H&E's Complaint, COBRA denies the allegations contained  
9     in said Paragraph.

10                   **AFFIRMATIVE AND SEPARATE DEFENSES**

11                   **FIRST AFFIRMATIVE DEFENSE**

12           1.     H&E's Complaint on file herein fails to state a claim against COBRA upon which  
13     relief can be granted.

14                   **SECOND AFFIRMATIVE DEFENSE**

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

18                   **THIRD AFFIRMATIVE DEFENSE**

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

21                   **FOURTH AFFIRMATIVE DEFENSE**

22           4.     COBRA is informed and believes and thereon alleges that they are not legally  
23     responsible in any fashion with respect to damages and injuries claimed by TONOPAH SOLAR  
24     ENERGY, LLC ("TSE"), BRAHMA GROUP, INC. ("BRAHMA"), and/or H&E EQUIPMENT  
25     SERVICES, INC. ("H&E") in their respective Complaints; however, if COBRA is subjected to any  
26     liability to H&E or any other parties, it will be due, in whole or in part, to the breach of contract,  
27     conduct, acts, omissions, activities, carelessness, recklessness and negligence of others; wherefore  
28     any recovery obtained by H&E, or any other parties, against COBRA, should be reduced in

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1 proportion to their respective negligence and fault and legal responsibility of all other parties,  
2 persons and entities, their agents, servants and employees who contributed to and/or caused any  
3 such injury and/or damages, in accordance with the law of comparative negligence; the liability of  
4 COBRA, if any, is limited in direct proportion to the percentage of fault actually attributed to  
5 COBRA.

6 **FIFTH AFFIRMATIVE DEFENSE**

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

11 **SIXTH AFFIRMATIVE DEFENSE**

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

16 **SEVENTH AFFIRMATIVE DEFENSE**

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

21 **EIGHTH AFFIRMATIVE DEFENSE**

22 8. H&E has failed, refused, and neglected to take reasonable steps to mitigate its  
23 alleged damages, if any, thus barring or diminishing H&E's recovery herein.

24 **NINTH AFFIRMATIVE DEFENSE**

25 9. H&E has failed to join all necessary and indispensable parties to this lawsuit.

26 **TENTH AFFIRMATIVE DEFENSE**

27 10. The injuries and damages of which H&E complains were proximately caused by, or  
28 contributed to, by the acts and/or omissions of other Defendants and/or Third-Party Defendants in

1 the consolidated action and/or other defendants or third-party defendants in this action, if any, as  
2 well as persons and/or other entities, and that said acts were an intervening and superseding cause  
3 of the injuries and damages, if any, of which H&E complains, thus barring H&E from any  
4 recovery against COBRA.

5 **ELEVENTH AFFIRMATIVE DEFENSE**

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

10 **TWELFTH AFFIRMATIVE DEFENSE**

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

20 **THIRTEENTH AFFIRMATIVE DEFENSE**

21 13. The claims of H&E are reduced, modified, and/or barred by the Doctrine of  
22 Unclean Hands.

23 **FOURTEENTH AFFIRMATIVE DEFENSE**

24 14. Any and all events, happenings, injuries and damages alleged by H&E were a direct  
25 result of an Act of God.

26 **FIFTEENTH AFFIRMATIVE DEFENSE**

27 15. The claims of H&E are reduced, modified, and/or barred by the Doctrine of Parol  
28 Evidence.



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**SIXTEENTH AFFIRMATIVE DEFENSE**

16. COBRA is informed and believes and thereon alleges that H&E’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 Defendants had no control.

**NINETEENTH AFFIRMATIVE DEFENSE**

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

**TWENTIETH AFFIRMATIVE DEFENSE**

20. COBRA’s alleged acts are not the proximate cause of the alleged damages, if any, sustained by H&E.

**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 H&E’s Complaint and any recovery by H&E 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 H&E, if any.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

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

1 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

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

4 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

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

7 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

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

11 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

12 27. The liability of COBRA for any damages is limited pursuant to the express terms  
13 of the alleged contract(s) between TONOPAH SOLAR ENERGY, LLC ("TSE") and BRAHMA  
14 and between BRAHMA and H&E, thus, H&E's recovery on the bond is limited to only what is  
15 recoverable from TSE and/or BRAHMA under their contract(s) with each other and/or with H&E,  
16 if anything.

17 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

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

21 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

22 29. COBRA is informed and believes and thereon alleges that H&E's action is barred  
23 by the voluntary agreement to submit any dispute(s) to mediation as a condition precedent to the  
24 institution of any legal proceedings arising from or relating to the alleged contract(s) between  
25 TONOPAH SOLAR ENERGY, LLC ("TSE") and BRAHMA and between BRAHMA and H&E  
26 and by virtue of the waiver of any right to trial by jury. COBRA hereby reserves its right to  
27 obligate the parties to submit this matter to mediation at any time even after answering H&E's  
28 Complaint In Intervention.

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**THIRTIETH AFFIRMATIVE DEFENSE**

30. H&E'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 H&E's alleged rights, claims, and obligations which it seeks to enforce against COBRA is, by H&E's conduct, agreement, or otherwise, barred by the Doctrine of Estoppel.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

32. H&E's claims, and each of them, are barred for failure of consideration.

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

33. H&E's claims, and each of them, are barred as a result of the failure of H&E 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 H&E and as a result, H&E is barred by the Doctrine of Laches.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

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

**THIRTY-FIFTH AFFIRMATIVE DEFENSE**

35. H&E'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.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

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

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**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

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

**THIRTY-NINTH AFFIRMATIVE DEFENSE**

39. COBRA is informed and believes and thereon alleges that H&E 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 H&E 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 H&E's lien was not made with reasonable cause.

**FORTY-SECOND AFFIRMATIVE DEFENSE**

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

**FORTY-THIRD AFFIRMATIVE DEFENSE**

43. COBRA is informed and believes and thereon alleges that H&E'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 H&E's claims, and each of them, are barred as a result of unconscionability.

**FORTY-FIFTH AFFIRMATIVE DEFENSE**

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

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**FORTY-SIXTH AFFIRMATIVE DEFENSE**

46. COBRA is informed and believes and thereon alleges that H&E’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 H&E’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 H&E’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 H&E’s alleged rights, claims, and obligations, and each and every one of H&E’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 and, concomitantly, H&E’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 either BRAHMA’s or H&E’s causes of action against COBRA.

**FIFTIETH AFFIRMATIVE DEFENSE**

50. Each and every one of H&E’s alleged rights, claims, and obligations, and each and every one of H&E’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 to the Petition for Writ of Prohibition, or, Alternatively, Mandamus, filed by TSE on or about March 5, 2019, and arising out of the Nye County Court’s denial of TSE’s Motion to Dismiss, Strike, or Stay BRAHMA’s First Amended Counter-Complaint. Accordingly, no further action may be taken at this time as to H&E’s causes of action against COBRA.

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**FIFTY-FIRST AFFIRMATIVE DEFENSE**

51. COBRA reserves the right to dispute the applicability and recoverability of all damages claimed in H&E’s prayer for relief as the pleadings and facts are insufficient to create recovery against COBRA for such damages.

**FIFTY-SECOND AFFIRMATIVE DEFENSE**

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

**FIFTY-THIRD AFFIRMATIVE DEFENSE**

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

**PRAYER FOR RELIEF**

**WHEREFORE**, having fully answered H&E’s Complaint In Intervention, COBRA respectfully requests that Judgment be entered in their favor, and against H&E as follows:

- 1. That H&E take nothing by virtue of its Complaint;
- 2. The Complaint In Intervention be dismissed *with prejudice*;
- 3. For the costs of suit incurred herein;
- 4. For attorneys’ fees and costs; and

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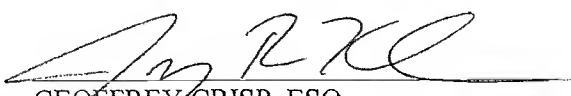
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5. For such other and further relief as the court deems just, equitable and proper.

*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 7<sup>th</sup> day of June, 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

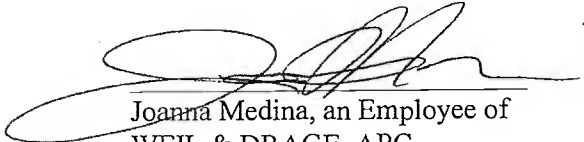
1 CERTIFICATE OF SERVICE

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 7<sup>th</sup> day of  
3 June, 2019, service of the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND**  
4 **AMERICAN HOME ASSURANCE COMPANY'S ANSWER TO H&E EQUIPMENT**  
5 **SERVICES, INC.'S COMPLAINT IN INTERVENTION** was made this date by mailing a true  
6 and correct copy of the same, *via* first-class mail, at Henderson, Nevada, addressed to the  
7 following:

8  
9 D. Lee Roberts, Jr., Esq.  
Colby Balkenbush, Esq.  
10 WEINBERG, WHEELER, HUDGINS, GUNN  
& DIAL, LLC  
11 6385 South Rainbow Boulevard, Suite 400  
Las Vegas, NV 89118  
12 Attorneys for TONOPAH SOLAR ENERGY,  
13 LLC

Richard L. Peel, Esq.  
Eric B. Zimbelman, Esq.  
Cary B. Domina, Esq.  
Ronald J. Cox, Esq.  
PEEL BRIMLEY, LLP  
3333 E. Serene Avenue, Suite 200  
Henderson, NV 89074-6571  
Attorneys for BRAHMA GROUP, INC.

14  
15 Richard E. Haskin, Esq.  
Daniel M. Hansen, Esq.  
16 GIBBS GIDEN LOCHER TURNER  
SENET & WITTBRODT LLP  
17 1140 N. Town Center Drive, Suite 300  
Las Vegas, NV 89144-0596  
18 Attorneys for Plaintiff-In-Intervention  
19 H&E EQUIPMENT SERVICES, INC.

20  
21   
22 Joanna Medina, an Employee of  
23 WEIL & DRAGE, APC  
24  
25  
26  
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28



# **Exhibit 12**

1 GEOFFREY CRISP, ESQ.  
Nevada Bar No. 2104  
2 JEREMY R. KILBER, ESQ.  
Nevada Bar No. 10643  
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6 gcrisp@weiltdrage.com  
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7 Attorneys for COBRA THERMOSOLAR PLANTS, INC. and  
8 AMERICAN HOME ASSURANCE COMPANY

9 IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

10 IN AND FOR THE COUNTY OF NYE

11 TONOPAH SOLOR ENERGY, LLC, a )  
12 Delaware limited liability company, )  
13 Plaintiff, )

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

14 vs. )

15 BRAHMA GROUP, INC., a Nevada )  
16 corporation, )  
17 Defendant. )

) COBRA THERMOSOLAR PLANTS, INC.'S  
) AND AMERICAN HOME ASSURANCE  
) COMPANY'S ANSWER TO H&E  
) EQUIPMENT SERVICES, INC.'S AMENDED  
) COMPLAINT IN INTERVENTION

18 )  
19 BRAHMA GROUP, INC., a Nevada )  
20 corporation, )  
21 Lien/Bond Claimant, )

22 vs. )

23 TONOPAH SOLOR ENERGY, LLC, a )  
24 Delaware limited liability company; BOE )  
25 BONDING COMPANIES I through X; )  
26 DOES I through X; ROE CORPORATIONS I )  
through X; and TOE TENANTS I through X, )  
inclusive, )  
27 Counter-defendants. )  
28 )

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 )  
18 H&E EQUIPMENT SERVICES, INC., a )  
19 Delaware Corporation, )  
20 )  
21 Plaintiff-In-Intervention, )  
22 vs. )  
23 )  
24 BRAHMA GROUP, INC., a Nevada )  
25 Corporation, COBRA THERMOSOLAR )  
26 PLANTS, INC., a Nevada Corporation; )  
27 AMERICAN HOME ASSURANCE )  
28 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, )  
Defendants-In-Intervention. )

**COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE**  
**COMPANY'S ANSWER TO H&E EQUIPMENT SERVICES, INC.'S**  
**AMENDED COMPLAINT IN INTERVENTION**

Defendants-In-Intervention, COBRA THERMOSOLAR PLANTS, INC. and AMERICAN  
HOME ASSURANCE COMPANY (collectively, for purposes of this Answer, "COBRA"), by and  
through their attorneys of record, the law firm of WEIL & DRAGE, APC, hereby answer Plaintiff-

1 In-Intervention H&E EQUIPMENT SERVICES, INC.'s ("H&E") Amended Complaint-In-  
2 Intervention (hereinafter, "Amended Complaint") on file herein, by admitting, denying, and alleging  
3 as follows:

4 PARTIES

5 1. Answering Paragraph 1 of H&E's Amended Complaint, COBRA is without sufficient  
6 information or knowledge as to form a belief as to the truth of the allegations contained in said  
7 Paragraph and, therefore, denies the same.

8 2. Answering Paragraph 2 of H&E's Amended Complaint, COBRA is without sufficient  
9 information or knowledge as to form a belief as to the truth of the allegations contained in said  
10 Paragraph and, therefore, denies the same.

11 3. Answering Paragraph 3 of H&E's Amended Complaint, COBRA is without sufficient  
12 information or knowledge as to form a belief as to the truth of the allegations contained in said  
13 Paragraph and, therefore, denies the same.

14 4. Answering Paragraph 4 of H&E's Amended Complaint, COBRA is without sufficient  
15 information or knowledge as to form a belief as to the truth of the allegations contained in said  
16 Paragraph and, therefore, denies the same.

17 5. Answering Paragraph 5 (a), (b), (c), and (d)(i) and (ii) of H&E's Amended Complaint,  
18 COBRA is without sufficient information or knowledge as to form a belief as to the truth of the  
19 allegations contained in said Paragraph and, therefore, denies the same.

20 6. Answering Paragraph 6 of H&E's Amended Complaint, no response is required. However,  
21 to the extent a response is deemed required, COBRA denies the same.

22 7. Answering Paragraph 7(a) of H&E's Amended Complaint, AMERICAN HOME  
23 ASSURANCE COMPANY admits it is a bonding company duly licensed and qualified to do business as  
24 a surety in Nevada. Answering Paragraph 7(a) of H&E's Amended Complaint, COBRA  
25 THERMOSOLAR PLANTS, INC. is without sufficient information or knowledge as to form a belief as  
26 to the truth of the allegations contained in said Paragraph and, therefore, denies the same. COBRA  
27 denies the allegations in Paragraph 7(b) of H&E's Amended Complaint, and respectfully refers the Court  
28 to the alleged Surety Bond for a full and complete statement of its contents.

8. Answering Paragraph 8(a), and (b) of H&E's Amended Complaint, 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 8(a), and (b) of H&E's Amended Complaint, COBRA THERMOSOLAR PLANTS, INC. admits the allegations in Paragraph 8(a), denies the allegations in Paragraph 8(b), and refers the Court to the alleged Surety Bond for a full and complete statement of its contents.

9. Answering Paragraph 9 of H&E's Amended Complaint, COBRA 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.

10. Answering Paragraph 10 of H&E's Amended Complaint, no response is required. However, to the extent a response is deemed required, COBRA denies same.

### FIRST CAUSE OF ACTION

**(Breach of Contract)**

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

12. Answering Paragraph 12 of H&E's Amended Complaint, COBRA 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, and respectfully refers the Court to the alleged Services Agreement for a full and complete statement of its contents.

13. Answering Paragraph 13 of H&E's Amended Complaint, COBRA 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, and respectfully refers the Court to any alleged contract for a full and complete statement of its contents.

14. Answering Paragraph 14 of H&E's Amended Complaint, COBRA 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, and respectfully refers the Court to any alleged contract for a full and complete statement of its contents.

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1       15.     Answering Paragraph 15 of H&E's Amended Complaint, COBRA is without sufficient  
2 information or knowledge as to form a belief as to the truth of the allegations contained in said  
3 Paragraph and, therefore, denies the same.

4       16.     Answering Paragraph 16 of H&E's Amended Complaint, COBRA is without sufficient  
5 information or knowledge as to form a belief as to the truth of the allegations contained in said  
6 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged invoices for a  
7 full and complete statement of their contents.

8       17.     Answering Paragraph 17 of H&E's Amended Complaint, COBRA is without sufficient  
9 information or knowledge as to form a belief as to the truth of the allegations contained in said  
10 Paragraph and, therefore, denies the same, and respectfully refers the Court to any alleged contract for a  
11 full and complete statement of its contents.

12       18.     Answering Paragraph 18(a) and (b) of H&E's Amended Complaint, COBRA is without  
13 sufficient 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 any alleged contract for a  
15 full and complete statement of its contents.

16       19.     Answering Paragraph 19 of H&E's Amended Complaint, COBRA is without sufficient  
17 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, and respectfully refers the Court to the alleged Notice of Lien  
19 for a full and complete statement of its contents.

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

23       21.     Answering Paragraph 21 of H&E's Amended Complaint, COBRA is without sufficient  
24 information or knowledge as to form a belief as to the truth of the allegations contained in said  
25 Paragraph and, therefore, denies the same.

26       22.     Answering Paragraph 22 of H&E's Amended 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.

1 SECOND CAUSE OF ACTION

2 **(Breach of Implied Covenant of Good Faith and Fair Dealing against BGI)**

3 23. Answering Paragraph 23 of H&E's Amended Complaint, COBRA repeats and realleges  
4 their answers to Paragraphs 1 through 22 as though fully set forth herein.

5 24. Answering Paragraph 24 of H&E's Amended Complaint, said Paragraph calls for a legal  
6 conclusion which COBRA cannot admit or deny. However, to the extent a response is deemed  
7 necessary, COBRA denies the allegations contained in said Paragraph.

8 25. Answering Paragraph 25 of H&E's Amended Complaint, COBRA is without sufficient  
9 information or knowledge as to form a belief as to the truth of the allegations contained in said  
10 Paragraph and, therefore, denies the same, and respectfully refers the Court to any alleged contract for a  
11 full and complete statement of its contents.

12 26. Answering Paragraph 26 of H&E's Amended 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 any alleged contract for a  
15 full and complete statement of its contents.

16 27. Answering Paragraph 27 of H&E's Amended Complaint, COBRA is without sufficient  
17 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, and respectfully refers the Court to any alleged contract for a  
19 full and complete statement of its contents.

20 28. Answering Paragraph 28 of H&E's Amended Complaint, COBRA is without sufficient  
21 information or knowledge as to form a belief as to the truth of the allegations contained in said  
22 Paragraph and, therefore, denies the same, and respectfully refers the Court to any alleged contract for a  
23 full and complete statement of its contents.

24 29. Answering Paragraph 29 of H&E's Amended Complaint, COBRA is without sufficient  
25 information or knowledge as to form a belief as to the truth of the allegations contained in said  
26 Paragraph and, therefore, denies the same.

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1 **THIRD CAUSE OF ACTION**

2 **(Violation of NRS 624 against BGI)**

3 30. Answering Paragraph 30 of H&E's Amended Complaint, COBRA repeats and realleges  
4 their answers to Paragraphs 1 through 29 as though fully set forth herein.

5 31. Answering Paragraph 31 of H&E's Amended Complaint, said Paragraph calls for a legal  
6 conclusion which COBRA cannot admit or deny. However, to the extent a response is deemed  
7 necessary, COBRA denies the allegations contained in said Paragraph.

8 32. Answering Paragraph 32 of H&E's Amended Complaint, COBRA is without sufficient  
9 information or knowledge as to form a belief as to the truth of the allegations contained in said  
10 Paragraph and, therefore, denies the same.

11 33. Answering Paragraph 33 of H&E's Amended Complaint, COBRA is without sufficient  
12 information or knowledge as to form a belief as to the truth of the allegations contained in said  
13 Paragraph and, therefore, denies the same.

14 34. Answering Paragraph 34 of H&E's Amended Complaint, COBRA is without sufficient  
15 information or knowledge as to form a belief as to the truth of the allegations contained in said  
16 Paragraph and, therefore, denies the same.

17 **FOURTH CAUSE OF ACTION**

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

19 35. Answering Paragraph 35 of H&E's Amended Complaint, COBRA repeats and realleges  
20 their answers to Paragraphs 1 through 34 as though fully set forth herein.

21 36. Answering Paragraph 36 of H&E's Amended Complaint, COBRA is without sufficient  
22 information or knowledge as to form a belief as to the truth of the allegations contained in said  
23 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Services  
24 Agreement for a full and complete statement of its contents.

25 37. Answering Paragraph 37 of H&E's Amended Complaint, COBRA is without sufficient  
26 information or knowledge as to form a belief as to the truth of the allegations contained in said  
27 Paragraph and, therefore, denies the same, and respectfully refers the Court to any alleged contract for a  
28 full and complete statement of its contents.



1       38.     Answering Paragraph 38(a) and (b) of H&E's Amended Complaint, COBRA is without  
2 sufficient information or knowledge as to form a belief as to the truth of the allegations contained in said  
3 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Notice of  
4 Right to Lien for a full and complete statement of its contents.

5       39.     Answering Paragraph 39 of H&E's Amended Complaint, COBRA is without sufficient  
6 information or knowledge as to form a belief as to the truth of the allegations contained in said  
7 Paragraph and, therefore, denies the same, and respectfully refers the Court to any alleged agreement for  
8 a full and complete statement of its contents.

9       40.     Answering Paragraph 40 of H&E's Amended Complaint, COBRA is without sufficient  
10 information or knowledge as to form a belief as to the truth of the allegations contained in said  
11 Paragraph and, therefore, denies the same.

12       41.     Answering Paragraph 41 of H&E's Amended 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 Notice of Lien  
15 for a full and complete statement of its contents.

16       42.     Answering Paragraph 42 of H&E's Amended Complaint, COBRA is without sufficient  
17 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, and respectfully refers the Court to the alleged Lien for a full  
19 and complete statement of its contents.

20       43.     Answering Paragraph 43 of H&E's Amended Complaint, COBRA is without sufficient  
21 information or knowledge as to form a belief as to the truth of the allegations contained in said  
22 Paragraph and, therefore, denies the same, and respectfully refers the Court to the alleged Lien for a full  
23 and complete statement of its contents.

24       44.     Answering Paragraph 44 of H&E's Amended Complaint, COBRA admits only that they  
25 caused a surety bond to be recorded in Nye County, denies the remainder of the allegations contained in  
26 said Paragraph 59, and respectfully refers the Court to the Surety Bond for a full and complete statement  
27 of its contents.

28     ///

1 45. Answering Paragraph 45 of H&E's Amended Complaint, said Paragraph calls for a legal  
2 conclusion which COBRA cannot admit or deny. However, to the extent a response is deemed  
3 necessary, COBRA denies the allegations contained in said Paragraph.

4 46. Answering Paragraph 46 of H&E's Amended Complaint, COBRA denies the allegations  
5 contained in said Paragraph.

6 **AFFIRMATIVE AND SEPARATE DEFENSES**

7 **FIRST AFFIRMATIVE DEFENSE**

8 1. H&E's Amended Complaint on file herein fails to state a claim against COBRA  
9 upon which relief can be granted.

10 **SECOND AFFIRMATIVE DEFENSE**

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

14 **THIRD AFFIRMATIVE DEFENSE**

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

17 **FOURTH AFFIRMATIVE DEFENSE**

18 4. COBRA is informed and believes and thereon alleges that they are not legally  
19 responsible in any fashion with respect to damages and injuries claimed by TONOPAH SOLAR  
20 ENERGY, LLC ("TSE"), BRAHMA GROUP, INC. ("BRAHMA"), and/or H&E EQUIPMENT  
21 SERVICES, INC. ("H&E") in their respective Complaints and/or Amended Complaints; however, if  
22 COBRA is subjected to any liability to H&E or any other parties, it will be due, in whole or in part,  
23 to the breach of contract, conduct, acts, omissions, activities, carelessness, recklessness and  
24 negligence of others; wherefore any recovery obtained by H&E, or any other parties, against  
25 COBRA, should be reduced in proportion to their respective negligence and fault and legal  
26 responsibility of all other parties, persons and entities, their agents, servants and employees who  
27 contributed to and/or caused any such injury and/or damages, in accordance with the law of  
28 comparative negligence; the liability of COBRA, if any, is limited in direct proportion to the

1 percentage of fault actually attributed to COBRA.

2 **FIFTH AFFIRMATIVE DEFENSE**

3 5. H&E unreasonably delayed the filing of its Complaint and Amended Complaint and  
4 the notification of COBRA of any basis for the causes of action alleged against them, all of which  
5 has unduly and severely prejudiced COBRA in their defense of the action, thereby barring or  
6 diminishing H&E's recovery herein under the Doctrine of Estoppel.

7 **SIXTH AFFIRMATIVE DEFENSE**

8 6. H&E unreasonably delayed the filing of its Complaint and Amended Complaint and  
9 the notification of COBRA of any basis for the causes of action alleged against them, all of which  
10 has unduly and severely prejudiced COBRA in their defense of the action, thereby barring or  
11 diminishing H&E's recovery herein under the Doctrine of Waiver.

12 **SEVENTH AFFIRMATIVE DEFENSE**

13 7. H&E unreasonably delayed the filing of its Complaint and Amended Complaint and  
14 the notification of COBRA of any basis for the causes of action alleged against them, all of which  
15 has unduly and severely prejudiced COBRA in their defense of the action, thereby barring or  
16 diminishing H&E's recovery herein under the Doctrine of Laches.

17 **EIGHTH AFFIRMATIVE DEFENSE**

18 8. H&E has failed, refused, and neglected to take reasonable steps to mitigate its  
19 alleged damages, if any, thus barring or diminishing H&E's recovery herein.

20 **NINTH AFFIRMATIVE DEFENSE**

21 9. H&E has failed to join all necessary and indispensable parties to this lawsuit.

22 **TENTH AFFIRMATIVE DEFENSE**

23 10. The injuries and damages of which H&E complains were proximately caused by, or  
24 contributed to, by the acts and/or omissions of other Defendants and/or Third-Party Defendants in  
25 the consolidated action and/or other defendants or third-party defendants in this action, if any, as  
26 well as persons and/or other entities, and that said acts were an intervening and superseding cause  
27 of the injuries and damages, if any, of which H&E complains, thus barring H&E from any recovery  
28 against COBRA.

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**ELEVENTH AFFIRMATIVE DEFENSE**

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

**TWELFTH AFFIRMATIVE DEFENSE**

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

**THIRTEENTH AFFIRMATIVE DEFENSE**

13. The claims of H&E are reduced, modified, and/or barred by the Doctrine of Unclean Hands.

**FOURTEENTH AFFIRMATIVE DEFENSE**

14. Any and all events, happenings, injuries and damages alleged by H&E were a direct result of an Act of God.

**FIFTEENTH AFFIRMATIVE DEFENSE**

15. The claims of H&E 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 H&E's claims for damages are barred as a result of the failure to satisfy conditions precedent to bring the claim(s) at issue.

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**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 Amended 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 Defendants had no control.

**NINETEENTH AFFIRMATIVE DEFENSE**

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

**TWENTIETH AFFIRMATIVE DEFENSE**

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

**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 H&E's Amended Complaint and any recovery by H&E 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 H&E, if any.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

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

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

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

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**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 H&E's Amended Complaint and any recovery by H&E would be unjust and inequitable under these circumstances.

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

27. The liability of COBRA for any damages is limited pursuant to the express terms of the alleged contract(s) between TONOPAH SOLAR ENERGY, LLC ("TSE") and BRAHMA and between BRAHMA and H&E, thus, H&E's recovery on the bond is limited to only what is recoverable from TSE and/or BRAHMA under their contract(s) with each other and/or with H&E, 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 H&E's action is barred by the voluntary agreement to submit any dispute(s) to mediation as a condition precedent to the institution of any legal proceedings arising from or relating to the alleged contract(s) between TONOPAH SOLAR ENERGY, LLC ("TSE") and BRAHMA and between BRAHMA and H&E and by virtue of the waiver of any right to trial by jury. COBRA hereby reserves its right to obligate the parties to submit this matter to mediation at any time even after answering H&E's Amended Complaint In Intervention.

**THIRTIETH AFFIRMATIVE DEFENSE**

30. H&E's claims, and each of them, are barred as a result of an accord and satisfaction.  
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**THIRTY-FIRST AFFIRMATIVE DEFENSE**

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

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

~~32. H&E's claims, and each of them, are barred for failure of consideration.~~

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

33. H&E's claims, and each of them, are barred as a result of the failure of H&E 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 H&E and as a result, H&E is barred by the Doctrine of Laches.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

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

**THIRTY-FIFTH AFFIRMATIVE DEFENSE**

35. H&E'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.

**THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

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

**THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

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

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**THIRTY-NINTH AFFIRMATIVE DEFENSE**

39. COBRA is informed and believes and thereon alleges that H&E 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 H&E 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 H&E's lien was not made with reasonable cause.

**FORTY-SECOND AFFIRMATIVE DEFENSE**

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

**FORTY-THIRD AFFIRMATIVE DEFENSE**

43. COBRA is informed and believes and thereon alleges that H&E'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 H&E's claims, and each of them, are barred as a result of unconscionability.

**FORTY-FIFTH AFFIRMATIVE DEFENSE**

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

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**FORTY-SEVENTH AFFIRMATIVE DEFENSE**

47. COBRA is informed and believes and thereon alleges that H&E’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 H&E’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 H&E’s alleged rights, claims, and obligations, and each and every one of H&E’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 and, concomitantly, H&E’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 either BRAHMA’s or H&E’s causes of action against COBRA.

**FIFTIETH AFFIRMATIVE DEFENSE**

50. Each and every one of H&E’s alleged rights, claims, and obligations, and each and every one of H&E’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 to the Petition for Writ of Prohibition, or, Alternatively, Mandamus, filed by TSE on or about March 5, 2019, and arising out of the Nye County Court’s denial of TSE’s Motion to Dismiss, Strike, or Stay BRAHMA’s First Amended Counter-Complaint. Accordingly, no further action may be taken at this time as to H&E’s causes of action against COBRA.

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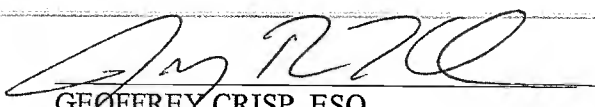
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5. For such other and further relief as the court deems just, equitable and proper.

*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 12<sup>th</sup> day of September, 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

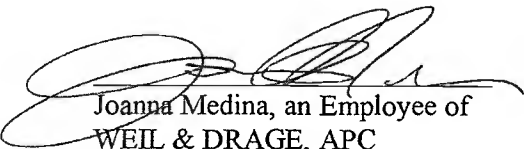
**CERTIFICATE OF SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 12<sup>th</sup> day of September, 2019, service of the foregoing **COBRA THERMOSOLAR PLANTS, INC.'S AND AMERICAN HOME ASSURANCE COMPANY'S ANSWER TO H&E EQUIPMENT SERVICES, INC.'S AMENDED COMPLAINT IN INTERVENTION** 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:

D. Lee Roberts, Jr., Esq.  
Colby Balkenbush, Esq.  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
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LLC

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Attorneys for BRAHMA GROUP, INC.

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

  
Joanna Medina, an Employee of  
WEIL & DRAGE, APC

# Exhibit 13

FILED  
FIFTH JUDICIAL DISTRICT

JUN 26 2019

Nye County Clerk  
Terri Pemberton Deputy

1 RICHARD L. PEEL, ESQ.  
Nevada Bar No. 4359  
2 ERIC B. ZIMBELMAN, ESQ.  
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Attorneys for Brahma Group, Inc.

FIFTH JUDICIAL DISTRICT COURT  
NYE COUNTY, NEVADA

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

14 Plaintiff,

15 vs.

16 BRAHMA GROUP, INC., a Nevada corporation,

17 Defendant.

18 BRAHMA GROUP, INC., a Nevada corporation,

19 Counterclaimant/Lien Claimant,

21 vs.

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

25 Counterdefendant,  
26

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

JOINT CASE  
CONFERENCE REPORT

DISPUTE RESOLUTION  
CONFERENCE REQUIRED:

Yes: \_\_\_\_\_ No: XX

SETTLEMENT CONFERENCE  
REQUESTED

Yes: \_\_\_\_\_ No: XX

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 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.

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10 H&E EQUIPMENT SERVICES, INC., a Delaware  
corporation,

11 Plaintiff-in-Intervention,

12 vs.

13  
14 BRAHMA GROUP, INC., a Nevada corporation,  
15 TONOPAH SOLAR ENERGY LLC, a Delaware  
limited liability company, COBRA  
16 THERMOSOLAR PLANTS, INC., a Nevada  
Corporation; AMERICAN HOME ASSURANCE  
17 COMPANY, a surety; BOE BONDING  
COMPANIES I through X; DOES I through X;  
18 ROE CORPORATIONS I through X, and TOE  
TENANTS I through X, inclusive,

19 Defendants-in-Intervention.

20 BRAHMA GROUP, INC. a Nevada corporation,

21 Plaintiff,

22 vs.

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

27 Defendants.  
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**JOINT CASE CONFERENCE REPORT**

**I.**

**PROCEEDINGS PRIOR TO CASE CONFERENCE REPORT**

**A. DATE OF FILING OF COMPLAINT:**

June 1, 2018	Tonopah Solar Energy, LLC's Motion to Expunge Brahma Group, Inc.'s Mechanic's Lien (Case No. CV39348 – <i>Denied per Order filed October 29, 2018, presently on appeal in Nevada Supreme Court Case No. 78092</i> )
September 21, 2018	Brahma Group, Inc.'s Mechanic's Lien Foreclosure Complaint (Case No. CV39348)
September 25, 2018	Brahma Group, Inc.'s (I) First Amended Counter-Complaint; and (II) Third-Party Complaint (Case No. CV39348)
December 14, 2018	Brahma Group, Inc.'s Mechanic's Lien Foreclosure Complaint Against Surety Bond (Case No. CV39799)
January 11, 2019	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 (Case No. CV39799 – <i>Dismissed by Stipulation and Order filed April 17, 2019</i> )
April 22, 2019	Brahma Group, Inc.'s (I) Second Amended Complaint; and (II) First Amended Third-Party Complaint (Consolidated Action)
May 14, 2019	H&E Equipment Services, Inc.'s Complaint-in-Intervention (Consolidated Action)

**B. DATE OF FILING OF ANSWER BY EACH DEFENDANT:**

May 16, 2019	Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Answer to Brahma Group, Inc.'s First Amended Third-Party Complaint (Consolidated Action)
June 7, 2019	Cobra Thermosolar Plants, Inc. and American Home Assurance Company's Answer to H&E Equipment Services, Inc.'s Complaint-in-Intervention (Consolidated Action)



June 14, 2019      Brahma Group, Inc.'s Answer to H&E Equipment Services, Inc.'s Complaint-in-Intervention (Consolidated Action)

C.    DATE THAT EARLY CASE CONFERENCE WAS HELD AND WHO ATTENDED:

June 6, 2019

Eric B. Zimbelman, Esq. of PEEL BRIMLEY LLP on behalf of Brahma Group, Inc.

Jeremy R. Kilber, Esq. of WEIL & DRAGE on behalf of Cobra Thermosolar Plants, Inc. and American Home Assurance Company

Richard E. Haskin, Esq. of GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP on behalf of Plaintiff-in-Intervention H&E Equipment Services, Inc.

Attorneys WEINBERG WHEELER HUDGINS GUNN & DIAL did not appear on behalf of Tonopah Solar Energy, LLC, who takes the position that it is not obligated to participate in the Early Case Conference.

II.

**A BRIEF DESCRIPTION OF THE NATURE OF THE  
ACTION AND EACH CLAIM FOR RELIEF OR DEFENSE**  
[16.1(c)(2)(A)]

A.    Description of the action:

This consolidated action arises out of the work, materials and equipment Brahma provided to or for the benefit of the Crescent Dunes Solar Energy Facility in Tonopah, Nevada (the "Work of Improvement" or "Project") pursuant to the Services Agreement entered between Brahma and Tonopah Solar Energy, LLC ("TSE"). Brahma asserts claims against TSE (including but not limited to breach of contract and violations of NRS Chapter 624) and against Cobra (as principal), AHAC (as surety) and the Surety Bond issued and recorded on September 6, 2018 in Nye County, Nevada by Cobra and AHAC (Document No. 898975) and the Surety Rider issued and recorded on October 9, 2018 in Nye County Nevada by Cobra and AHAC (Document No. 900303). By Order filed February 19, 2019, this Court consolidated Case No. CV 39348 and Case No. CV 39799.

1. TSE's Motion to Expunge:

2. Brahma's Second Amended Complaint (against TSE);

**Third Claim for Relief:** Violation of NRS 624

#### 4. H&E's Complaint-in-Intervention

**Fifth Claim for Relief:** Claim Against Surety, Surety Bond and Principal thereon

**First Affirmative Defense:** BRAHMA' s Complaint on file herein fails to state a claim against COBRA upon which relief can be granted.

**Second Affirmative Defense:**

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:**

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:**

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

**Fifth Affirmative Defense:**

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

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**Sixth Affirmative Defense:**

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

**Seventh Affirmative Defense:**

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

**Eighth Affirmative Defense:**

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

**Ninth Affirmative Defense:**

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

**Tenth Affirmative Defense:**

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

**Eleventh Affirmative Defense:**

BRAHMA, or other persons or entities other than COBRA, without the knowledge or consent of COBRA, altered the subject property, and to the extent that BRAHMA has incurred or suffered any damages, which COBRA denies, such alleged damages were

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**Twelfth Affirmative Defense:**

solely and proximately caused by such alteration.

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

**Thirteenth Affirmative Defense:**

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

**Fourteenth Affirmative Defense:**

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

**Fifteenth Affirmative Defense:**

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

**Sixteenth Affirmative Defense:**

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:**

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

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**Eighteenth Affirmative Defense:**

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:**

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:**

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

**Twenty-First Affirmative Defense:**

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:**

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

**Twenty-Third Affirmative Defense:**

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:**

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.

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**Twenty-Fifth Affirmative Defense:**

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:**

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:**

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:**

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:**

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:**

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

**Thirty-First Affirmative Defense:**

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.

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**Thirty-Second Affirmative Defense:**

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

**Thirty-Third Affirmative Defense:**

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:**

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

**Thirty-Fifth Affirmative Defense:**

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:**

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.

**Thirty-Seventh Affirmative Defense:**

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:**

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

**Thirty-Ninth Affirmative Defense:**

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.



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**Fortieth Affirmative Defense:**

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:**

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

**Forty-Second Affirmative Defense:**

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

**Forty-Third Affirmative Defense:**

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:**

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

**Forty-Fifth Affirmative Defense:**

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:**

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:**

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:**

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:**

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:**

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

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**Fifty-First Affirmative Defense:**

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

**Fifty-Second Affirmative Defense:**

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

**Fifty-Third Affirmative Defense:**

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

**D. Defenses – Brahma Group**

**First Affirmative Defense:**

H&E's Complaint-in-Intervention on file herein fails to state a claim upon which relief can be granted.

**Second Affirmative Defense:**

H&E's claims under its Complaint-in-Intervention are barred by the doctrine of unclean hands and by its own failure to deal in good faith and deal fairly with Defendant-in-Intervention BGI.

**Third Affirmative Defense:**

H&E's claims under its Complaint-in-Intervention are barred by the doctrine of equitable estoppel.

**Fourth Affirmative Defense:**

H&E's claims under its Complaint-in-Intervention are barred based upon

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**Fifth Affirmative Defense:**

principles of waiver, release, accord, satisfaction and modification.

H&E's claims under its Complaint-in-Intervention are barred as a result of fraud and/or illegality.

**Sixth Affirmative Defense:**

H&E's claims under its Complaint-in-Intervention sounding in equity, if any, are barred inasmuch as H&E had an adequate remedy at law available to it, if any remedy exists.

**Seventh Affirmative Defense:**

H&E's claims under its Complaint-in-Intervention are barred by the doctrine of laches.

**Eighth Affirmative Defense:**

H&E's claims under its Complaint-in-Intervention are barred under the terms of the Subcontract.

**Ninth Affirmative Defense:**

The damages, which are alleged to have been incurred in H&E's Complaint-in-Intervention, if any, were the direct result in whole or in part, of H&E's own intentional, willful and/or negligent acts and deeds and by H&E's breaches of the Subcontract.

**Tenth Affirmative Defense:**

H&E's claims as alleged in its Complaint-in-Intervention, and the loss and damage, if any in fact exist, are the direct and proximate result of the acts, deeds, omissions or failure to act, or the conduct of third parties whose names are presently unknown, over whom BGI had no control, nor the right, duty or obligation to control.

**Eleventh Affirmative Defense:**

H&E's Complaint-in-Intervention fails to mitigate the damages incurred, if any, and therefore, any recovery awarded to H&E against BGI, if any, should be reduced by that amount not mitigated.

**Twelfth Affirmative Defense:**

At all times relevant herein, BGI acted diligently and with due care in its

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**Thirteenth Affirmative Defense:**

performance of any duty owed to H&E, if any.

H&E's claims are barred by the applicable limitations period.

**Fourteenth Affirmative Defense:**

BGI is entitled to assert and hereby asserts in its own behalf and for its own benefit all defenses that could be asserted by its principal whether or not such defenses are actually asserted by its principal.

**Fifteenth Affirmative Defense:**

Nothing herein shall be deemed to be a waiver of BGI's right to mediate and/or arbitrate their dispute with H&E.

**Sixteenth Affirmative Defense:**

H&E's claims are barred by the Statute of Repose.

**Seventeenth Affirmative Defense:**

H&E has no privity of contract with BGI.

**Eighteenth Affirmative Defense:**

H&E failed to name a party necessary for full and adequate relief essential in this action

**Nineteenth Affirmative Defense:**

BGI hereby incorporates by reference those affirmative defenses enumerated in Nev. R. Civ. P. 8 as if fully set forth herein. In the event further investigation or discovery reveals the applicability of any such defenses, BGI reserves the right to seek leave of Court to amend its answer to H&E's Complaint-in-Intervention to specifically assert the same. Such defenses are incorporated by reference for the specific purpose of not waiving same.

**Twentieth Affirmative Defense:**

H&E is estopped and barred from any recovery for the matters set forth in the Complaint-in-Intervention by reason of its failure to timely notify BGI of its claims.

**Twenty-First Affirmative Defense:**

H&E has waived any recovery for any of the matters alleged in its Complaint-in-Intervention by reason of its failure to timely notify BGI of its claims.

**Twenty-Second Affirmative Defense:**

BGI hereby incorporates by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further investigation or discovery reveals the applicability of any such defenses, BGI reserves the right to seek leave of this Court to amend this Answer and to specifically assert any such defense. Such defenses are herein incorporated by reference for the specific purpose of not, waiving any such defenses.

**III.**

**A BRIEF STATEMENT OF WHETHER THE PARTIES DID  
OR DID NOT CONSIDER SETTLEMENT AND WHETHER  
SETTLEMENT OF THE CASE MAY BE POSSIBLE:  
[16.1(c)(2)(B)]**

Brahma and TSE participated in an unsuccessful mediation on April 10, 2019. At this time, and while settlement is always a possibility, the parties do not anticipate settlement in the near future.

**IV.**

**LIST OF ALL DOCUMENTS, DATA COMPILATIONS,  
DAMAGES COMPUTATIONS, INSURANCE AGREEMENTS,  
TANGIBLE THINGS AND OTHER REQUIRED  
INFORMATION IN THE POSSESSION, CUSTODY OR  
CONTROL OF EACH PARTY WHICH WERE IDENTIFIED  
OR PROVIDED AT THE EARLY CASE CONFERENCE OR  
AS A RESULT THEREOF: [16.1(c)(2)(E), (G), (H)]**

A. Brahma:

To be produced on or before June 28, 2019 per agreement

B. Cobra and AHAC:

Served June 20, 2019 (as of June 24, 2019, disclosures have not been received).

C. H&E:

To be produced on or before June 28, 2019 per agreement

V.

**LIST OF PERSONS IDENTIFIED BY EACH PARTY AS  
LIKELY TO HAVE INFORMATION DISCOVERABLE UNDER  
RULE 26(b), INCLUDING IMPEACHMENT OR REBUTTAL  
WITNESSES: [16.1(a)(1)(A) and 16.1(c)(2)(D), (F), (I)]**

Brahma:

To be produced on or before June 28, 2019 per agreement

Cobra and AHAC:

Served June 20, 2019 (as of June 24, 2019, disclosures have not been received).

H&E:

To be produced on or before June 28, 2019 per agreement

VI.

**DISCOVERY PLAN [16.1(b)(4)(C) and 16.1(c)(2)]**

A. What changes, if any, should be made in the timing, form or requirements for disclosures under 16.1(a):

1. Brahma's view: None
2. Cobra's and AHAC's view: None
3. H&E's view: None

B. When disclosures under 16.1(a)(1) were made or will be made:

1. Brahma's disclosures: Due June 28, 2019  
enter calendar date
2. Cobra's and AHAC's disclosures: Served June 20, 2019  
enter calendar date
3. H&E's disclosures: Due June 28, 2019  
enter calendar date

C. Subjects on which discovery may be needed:

1. Brahma's view: All issues

- 1                   2.       Cobra's and AHAC's view                   All issues
- 2                   3.       H&E's view                                   All issues
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- 4       D.       A statement identifying any issues about preserving discoverable information
- 5                   [16.1(c)(2)(J)]:
- 6                   1.       Brahma's view:                               No issues
- 7                   2.       Cobra's and AHAC's view                   No issues
- 8                   3.       H&E's view                                   No issues
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- 10       E.       Should discovery be conducted in phases or limited to or focused upon particular
- 11                   issues?
- 12                   1.       Brahma's view:                               No
- 13                   2.       Cobra's and AHAC's view                   No
- 14                   3.       H&E's view                                   No
- 15       F.       What changes, if any, should be made in limitations on discovery imposed under
- 16                   these rules and what, if any, other limitations should be imposed?
- 17                   1.       Brahma's view:                               None
- 18                   2.       Cobra's and AHAC's view                   None
- 19                   3.       H&E's view                                   None
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- 21       G.       A statement identifying any issues about trade secrets or other confidential
- 22                   information, and whether the parties have agreed upon a confidentiality order or
- 23                   whether a Rule 26(c) motion for protective order will be made [16.1(c)(2)(K)]:
- 24                   1.       Brahma's view:                               Willing to consider protective
- 25   order as necessary
- 26                   2.       Cobra's and AHAC's view                   Willing to consider protective
- 27   order as necessary
- 28                   3.       H&E's view                                   Willing to consider protective
- order as necessary



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H. What, if any, other orders should be entered by court under Rule 26(c) or Rule 16(b) and (c):

- |    |                         |      |
|----|-------------------------|------|
| 1. | Brahma's view:          | None |
| 2. | Cobra's and AHAC's view | None |
| 3. | H&E's view              | None |

I. Estimated time for trial

- |    |                         |  |
|----|-------------------------|--|
| 1. | Brahma's view:          | <u>7-10 Days</u><br>number of court days |
| 2. | Cobra's and AHAC's view | <u>7-10 Days</u><br>number of court days |
| 3. | H&E's view              | <u>7-10 Days</u><br>number of court days |

## VII.

### DISCOVERY AND MOTION DATES [16.1(c)(5)-8]

A. Dates agreed by the parties:

- |    |   |   |
|----|---|---|
| 1. | Close of Discovery:   | <u>March 6, 2020</u><br>enter calendar date   |
| 2. | Final date to file motions to amend pleadings or add parties (without a further court order): | <u>December 6, 2019</u><br>enter calendar date<br>(Not later than 90-days before discovery cut-off)           |
| 3. | Final dates for expert disclosures:   |   |
|    | i. initial disclosure:  | <u>December 6, 2019</u><br>Enter calendar date<br>(Not later than 90 days before discovery cut-off date)      |
|    | ii. rebuttal disclosures:   | <u>January 6, 2020</u><br>Enter calendar date<br>(Not later than 30 days after initial disclosure of experts) |
| 4. | Final date to file dispositive motions  | <u>April 6, 2020</u><br>Enter calendar date<br>(Not later than 30 days after discovery cut-off date)          |

B. In the event the parties do not agree on dates, the following section must be completed:

1. Plaintiff's suggested close of discovery: N/A  
enter calendar date
- Defendant's suggested close of discovery: N/A  
enter calendar date
2. Final date to file motions to amend pleadings or add parties (without a further court order):  
Plaintiff's suggested: N/A  
Enter calendar date  
(Not later than 90 days before discovery cut-off date)  
Defendant's suggested: N/A  
Enter calendar date  
(Not later than 90 days before discovery cut-off date)
3. Final dates for expert disclosures:
  - i. Plaintiff's suggested initial disclosure N/A  
Enter calendar date  
(Not later than 90 days before discovery cut-off date)
  - Defendant's suggested initial disclosure: N/A  
Enter calendar date  
(Not later than 90 days before discovery cut-off date)
  - ii. Plaintiff's suggested rebuttal disclosures: N/A  
Enter calendar date  
(Not later than 30 days after initial disclosure of experts)
  - Defendant's suggested rebuttal disclosures: N/A  
Enter calendar date  
(Not later than 30 days after initial disclosure of experts)
4. Final date to file dispositive motions:  
Plaintiff's suggested N/A  
Enter calendar date  
(Not later than 30 days after discovery cut-off date)  
Defendant's suggested: N/A  
Enter calendar date  
(Not later than 30 days after discovery cut-off date)

1 Failure to agree on the calendar dates in this subdivision shall result in a discovery  
2 planning conference.

3 **VIII.**

4 **JURY DEMAND [16.1(c)(2)(Q)]**

5 A jury demand has been filed: No.  
6 (Yes/No)

7 **IX**

8 **INITIAL DISCLOSURES/OBJECTIONS [16.1(a)(1)]**

9 If a party objects during the Early Case Conference that initial disclosures are not  
10 appropriate in the circumstances of this case, those objections must be stated herein. The Court  
11 shall determine what disclosures, if any, are to be made and shall set the time for such disclosure.

12 This report is signed in accordance with Rule 26(g)(1) of the Nevada Rules of Civil  
13 Procedure. Each signature constitutes a certification that to the best of the signer's knowledge,  
14 information and belief, formed after a reasonable inquiry, the disclosures made by the signer are  
15 complete and correct as of this time.

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AFFIRMATION PURSUANT TO NRS 239B.030

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

Dated this 25<sup>th</sup> day of June, 2019.

PEEL BRIMLEY LLP



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

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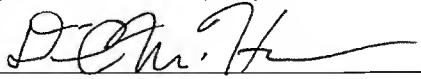
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# Exhibit 14

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Attorneys for Brahma Group, Inc.  
7

8 **FIFTH JUDICIAL DISTRICT COURT**

9 **NYE COUNTY, NEVADA**

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

11 Plaintiff,

12 vs.

13 BRAHMA GROUP, INC., a Nevada corporation,

14 Defendant.

15  
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,  
24

25 ///

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27 ///

28

CASE NO. : CV 39348  
*Consolidated with:*  
Case No. CV39799

DEPT. NO. : 2

**HEARING REQUESTED**

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

1 BRAHMA GROUP, INC., a Nevada corporation,

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

4 vs.

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

11 Third-Party Defendants.

12 **BRAHMA GROUP, INC.'S MOTION TO COMPEL DEPOSITION OF PERSON MOST  
13 KNOWLEDGEABLE OF COBRA THERMOSOLAR PLANTS, INC.;**

14 **AND**

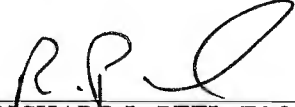
15 **APPLICATION FOR ORDER SHORTENING TIME**

16 Plaintiff, BRAHMA GROUP, INC. ("Brahma"), by and through its attorneys of record,  
17 the law firm of PEEL BRIMLEY LLP, hereby moves the Court for an Order requiring Third-Party  
18 Defendant Cobra Thermosolar Plants, Inc. ("Cobra") to present its Person Most Knowledgeable  
19 ("PMK") for deposition and applies for an Order Shortening Time to hear the Motion.

20 This Motion is made and based upon the papers and documents on file in this matter and  
21 the accompanying points and authorities and exhibits and the arguments of counsel on the hearing  
22 of this Motion.

23 Respectfully submitted this 22nd of October 2019.

24 **PEEL BRIMLEY LLP**

25   
26 RICHARD L. PEEL, ESQ. (4359)  
27 ERIC ZIMBELMAN, ESQ. (9863)  
28 3333 E. Serene Avenue, Suite 200  
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*Attorneys for Brahma Group, Inc.*



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DATED this            day of October 2019.

**DECLARATION OF ERIC ZIMBELMAN, ESQ., IN  
SUPPORT OF BRAHMA'S APPLICATION FOR AN  
ORDER SHORTENING TIME**

Eric Zimbelman, Esq., being first duly sworn, deposes and says:

2. This Declaration is made in support of Brahma's Application for Order Shortening Time to hear Brahma's Motion to Compel Cobra's PMK Deposition. Shortened time to hear the Motion is respectfully requested for the following reasons:

<sup>1</sup> See Exhibit 1.

1           4.     After an exchange of emails and voice mails in August, I reminded Mr. Crisp on  
2     September 6, 2019 that we still need a date for the Cobra deposition and to get it on calendar.<sup>2</sup>

3           5.     On September 9, 2019, as Mr. Crisp confirmed in an email,<sup>3</sup> Mr. Crisp requested  
4     (and I granted) an extension of time for Cobra to respond to Brahma's requests for production. In  
5     addition, Mr. Crisp confirmed that we discussed deposition dates of October 1-3, 2019 and that  
6     he had "reached out to my client and will advise you as soon as I hear back regarding available  
7     dates."<sup>4</sup>

8           6.     On October 3, 2019, Mr. Crisp called and emailed me requesting additional time  
9     to respond to the discovery requests and advising me that he was "still working on dates for  
10    deposition."<sup>5</sup>

11          7.     On October 7, 2019, having still not received available dates for deposition from  
12    Cobra, I wrote to Mr. Crisp that unless I received a date for deposition to be held within the  
13    following week (October 14-18, 2019) I would have no choice but to notice the deposition at my  
14    convenience.<sup>6</sup>

15          8.     When no deposition date was forthcoming, we issued a formal Notice of PMK  
16    Deposition (in the same form as provided to Mr. Crisp by courtesy email on August 5, 2019).<sup>7</sup>

17          9.     On October 9, 2019, having received Cobra's written responses and objections to  
18    Brahma's requests for production (but no documents), I wrote to Mr. Crisp requesting a meet and  
19    confer conference pursuant to Nev. R. Civ. P. 37 and reminded him that "we have the PMK  
20    deposition of Cobra scheduled for Wednesday October 16, 2019, which makes production of  
21    documents pursuant to the Requests especially urgent."<sup>8</sup>

22    ///

23    ///

24    ///

25    

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<sup>2</sup> See Exhibit 2.

26    <sup>3</sup> See Exhibit 3.

27    <sup>4</sup> See Id.

27    <sup>5</sup> See Exhibit 4.

27    <sup>6</sup> See Id.

28    <sup>7</sup> See Exhibit 5.

<sup>8</sup> See Exhibit 6.

1           10.     The following day, and despite the many weeks of communications and efforts to  
2     schedule the deposition that preceded it, Cobra issued a written Objection to the Notice of  
3     Deposition, claiming that the deposition notice was untimely because it was not given at least 14  
4     days in advance and advising Brahma that Cobra “will not be producing a witness on October 16,  
5     2019.”<sup>9</sup>

6           11.     After a series of voice mails and emails, Mr. Crisp and I held a Rule 37 meet and  
7     confer on Monday October 14, 2019, during which Mr. Crisp advised me that he was still  
8     attempting to obtain documents for production and was trying to secure other available dates for  
9     deposition.<sup>10</sup>

10          12.     On October 15, 2019, Mr. Crisp advised me that Cobra would begin making a  
11     rolling production of documents that day and I advised Mr. Crisp that I would reserve the right to  
12     file a motion to compel regarding the documents once I had an opportunity to evaluate the quality,  
13     quantity and timing of the documents.<sup>11</sup> However, and because Mr. Crisp was still unable to  
14     provide me with dates for deposition, I advised him that unless we received and confirmed a date  
15     for the PMK deposition by the end of the day Wednesday, October 10, 2019, our client had  
16     directed us to file a motion to compel.

17          13.     Cobra did not provide any dates for deposition by the stated deadline and instead  
18     filed a Motion to Stay seeking a stay of all proceedings against Cobra, its surety, American Home  
19     Assurance Company (“AHAC”), and the bond issued by them.<sup>12</sup> Brahma intends to vigorously  
20     oppose Cobra’s motion, but (as of this writing) no date has been established for hearing on  
21     Cobra’s motion.

22          14.     Based on these facts, it is clear to Brahma that Cobra never had any intention of  
23     presenting a witness for deposition and was stalling to give itself more time to prepare and submit  
24     its Motion to Stay. As such, and because Brahma has been seeking a deposition for nearly 10  
25     weeks, Brahma respectfully requests a hearing on the present Motion to Compel that is no later  
26     than whatever date this Court sets for hearing on Cobra’s Motion to Stay.

27     <sup>9</sup> See Exhibit 7.

28     <sup>10</sup> See Exhibit 8.


<sup>11</sup> See Exhibit 9.

<sup>12</sup> See Exhibit 10.

1           15. I hereby certify, pursuant to Nev. R. Civ. P. 37(a) and (d), that on behalf of Brahma  
2 (and as described hereinabove) I have in good faith conferred or attempted to confer with Cobra's  
3 counsel in an effort to obtain the deposition without court action.

4           I declare under penalty of perjury that the foregoing is true and correct.

5           DATED this 21<sup>st</sup> day of October 2019.

6  
7   
Eric Zimbelman, Esq.

8  
9                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

10       **I. STATEMENT OF PERTINENT FACTS.**

11           As the Court is by now aware, Brahma commenced this action more than a year ago seeking  
12 to recover payment for the labor, materials and equipment (the "Work") Brahma performed at the  
13 direction of TONOPAH SOLAR ENERGY, LLC ("TSE") at the Crescent Dunes Solar Energy  
14 Project ("Project"), including its claim of lien in the amount of \$12,859,577.74. The procedural  
15 history of this case is lengthy, complex and well known to this Court. As such, Brahma will  
16 dispense with a detailed recitation of the same.

17           It is nonetheless important to note that Cobra and AHAC, for their own reasons and  
18 purposes, posted a Surety Bond as amended by Rider (collectively the "Surety Bond")<sup>13</sup> pursuant  
19 to NRS 108.2413 to release Brahma's lien from the Work of Improvement and attach the same to  
20 the Surety Bond.<sup>14</sup> By way of consolidation and amendments, Brahma's current consolidated  
21 pleading (filed on April 22, 2019)<sup>15</sup> asserts (among others) a Third-Party Claim against Cobra,  
22 AHAC and the Surety Bond pursuant to NRS 108.2421 seeking recovery against these parties and  
23 the Surety Bond for the lienable amount due and owing to Brahma.<sup>16</sup>

24           <sup>13</sup> See **Exhibit 11**.

25           <sup>14</sup> NRS 108.2413(6)(a) provides that (upon proper execution and recording) the Surety Bond  
26 "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           <sup>15</sup> See **Exhibit 12**.

28           <sup>16</sup> 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 As more fully described in the foregoing Declaration of Eric Zimbelman (in support of  
2 Brahma's Application for Order Shortening Time), Brahma has requested from Cobra and  
3 formally noticed a deposition of Cobra's PMK. Cobra has intermittently delayed, stalled and  
4 refused to present a witness for deposition and has instead used the time and extensions generously  
5 granted by Brahma to prepare and file a Motion to Stay. As discussed more fully below, the Court  
6 should not countenance these tactics and, pursuant to Nev. R. Civ. P. 37(d), should require Cobra  
7 to present its PMK witness for deposition within seven days of entry of the Court's Order.  
8 Moreover, pursuant to Nev. R. Civ. P. 37(d)(1)(A), the Court should award sanctions against Cobra  
9 in the form of an award of Cobra's reasonable attorney's fees and costs associated with the present  
10 Motion.

11 **II. ARGUMENT AND AUTHORITY.**

12 **A. This Motion is Authorized by Nev. R. Civ. P. 37(a) and (d).**

13 Nev. R. Civ. P. 37(a) permits a party to move for an order compelling disclosure or  
14 discovery. Brahma has duly noticed the deposition of Cobra's PMK<sup>17</sup> and, after delays, unfulfilled  
15 assurances and stalling, Cobra objected to and failed to present a witness for deposition.

16 Brahma will, in opposition to Cobra's Motion to Stay, more fully address and refute  
17 Cobra's position that the stay against TSE somehow entitles it to a similar stay. Specifically, but  
18 without limitation, Brahma has the right to and is pursuing its independent statutory cause of action  
19 against Cobra, AHAC and the Surety Bond irrespective of the stay issued to TSE.

20 As relates to the present Motion to Compel, unless and until Cobra receives a stay from  
21 this Court, it is nonetheless obligated to comply with the Nevada Rules of Civil Procedure,  
22 including timely and appropriately responding to a duly notice deposition. Cobra can and should  
23 present a witness for deposition – it simply chooses not to and offers delay, obfuscation and  
24 pretextual legal arguments.

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<sup>17</sup> See Exhibit 5, *supra*.

1           **B.       Cobra's Objection is Pretextual.**

2           As discussed above, and despite purporting to cooperate in scheduling a witness for  
3 deposition, Cobra issued a belated objection to Brahma's Notice of Deposition.<sup>18</sup> Specifically,  
4 Cobra's objection asserts that the Notice is untimely because it fails to give notice 14 days in  
5 advance of the deposition. While the formal Notice of Deposition was served less than 14 days in  
6 advance of the date scheduled for deposition, the Notice was first provided to Cobra's counsel (as  
7 a professional courtesy) more than two months earlier. During that time Cobra failed to respond  
8 to repeated requests for available dates and repeatedly made, and failed to honor, assurances that  
9 available dates would be forthcoming.

10           Simply stated, Cobra's Objection is pretextual and made in bad faith. Cobra has had many  
11 weeks to offer dates, repeatedly abused Brahma's patience with failed promises, and took  
12 advantage of Brahma's good faith by rushing to file its Motion for Stay (which it could have filed  
13 many months ago<sup>19</sup>). Further, Cobra is using its Motion for Stay as a basis for not submitting to  
14 deposition, which basis has no merit. As Brahma does not know how long it will be before this  
15 Court hears and considers Cobra's Motion to Stay, Brahma respectfully asks this Court to hear and  
16 rule on the present Motion to Compel at the earliest possible time so as to deprive Cobra of this  
17 unlawful arrogation of a non-existent right to obstruct Brahma's legitimate discovery efforts.

18           **C.       The Court should Order Sanctions against Cobra.**

19           Nev. R. Civ. P. 37(d)(1)(A) permits the Court to order sanctions if a party or a party's  
20 officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) —  
21 fails, after being served with proper notice, to appear for that person's deposition." As  
22 demonstrated above, Cobra has subjected itself to sanctions. At a minimum, Brahma respectfully  
23 requests that the Court Order Cobra to pay Brahma's reasonable attorney's fees and costs  
24 associated with bringing the present Motion and grant Brahma leave to present a cost bill and  
25 supporting declaration of fees incurred.

26       ///

27       

---

<sup>18</sup> See Exhibit 7, *supra*.

28       <sup>19</sup> Cobra bases its Motion to Stay on the stay this Court issued to TSE, which was orally granted in December 2018 and issued in January 2019. See Exhibit 13.

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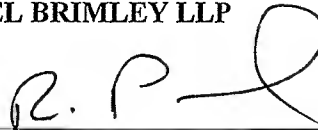
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CONCLUSION

Based on the foregoing, the Court should (1) grant Brahma's Motion, (2) compel Cobra to present its PMK for deposition within 7 days of the Court's Order, and (3) sanction Cobra as requested herein.

Respectfully submitted this 22nd day of October, 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 22 day of October, 2019, I caused the above and foregoing document entitled **BRAHMA GROUP, INC.'S MOTION TO COMPEL DEPOSITION OF PERSON MOST KNOWLEDGEABLE OF COBRA THERMOSOLAR PLANTS, INC.; AND APPLICATION FOR ORDER SHORTENING TIME** to be served as follows:

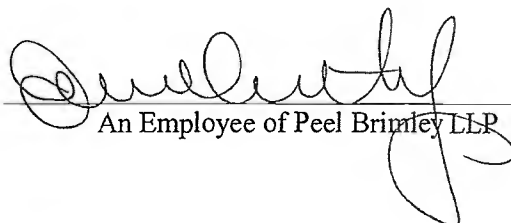
- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other – electronic mail

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

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*Attorneys for H&E Equipment Services, Inc.*

  
An Employee of Peel Brimley LLP



## **EXHIBIT 27**

**ORIGINAL**

**FILED**  
**FIFTH JUDICIAL DISTRICT**

NOV - 8 2019

 Nye County Clerk  
Deputy

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*and AMERICAN HOME ASSURANCE COMPANY*

**IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

**IN AND FOR THE COUNTY OF NYE**

BRAHMA GROUP, INC., a Nevada  
Corporation,

Plaintiff,

vs.

TONOPAH SOLAR ENERGY, LLC, a  
Delaware Limited Liability Company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Defendants.

TONOPAH SOLAR ENERGY, LLC a  
Delaware limited liability company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Counter-claimants,

vs.

BRAHMA GROUP, INC., a Nevada  
corporation,

Counter-defendant.

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

**COBRA THERMOSOLAR PLANTS,  
INC.'S AND AMERICAN HOME  
ASSURANCE COMPANY'S REPLY IN  
FURTHER SUPPORT OF MOTION TO  
STAY**

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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

1                                   **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2   **I.**

3   **PRELIMINARY STATEMENT**

4           Brahma Group, Inc.'s ("Brahma") claims against Third-Party Defendants Cobra  
5   Thermosolar Plants, Inc. ("Cobra") and American Home Assurance Company ("AHAC") concern  
6   the Surety Bond that Cobra and AHAC posted to guarantee the liabilities, if any, that Tonopah  
7   Solar Energy, LLC ("TSE") may have to Brahma for Work performed at the Crescent Dunes Solar  
8   Energy Facility (the "Plant"). There are no substantive claims against Cobra or AHAC in this  
9   action – Brahma will have to prove its case against TSE before it may foreclose against the Surety  
10   Bond. Brahma's claims against TSE are proceeding in federal court (the "Federal Action")  
11   because the federal prohibited Brahma from litigating them here. Cobra has moved to intervene in  
12   the Federal Action—a motion that TSE has joined. (*See* Exhibit A (Federal Action, Dkt. No. 59).)<sup>1</sup>

13           Cobra and AHAC's Motion sensibly seeks a stay of this case pending the outcome of the  
14   Federal Action. Cobra and AHAC's defenses to Brahma's claims on the Surety Bond mirror  
15   TSE's defenses in the Federal Action. The requested stay will, therefore, simplify discovery for  
16   all parties and conserve judicial resources that would otherwise be wasted through duplicative  
17   litigation.

18           Indeed, if the Court allows Brahma's claims against Cobra and AHAC to go ahead in  
19   isolation, while the federal court addresses Brahma's primary claims against TSE, there would be a  
20   significant risk of conflicting decisions and unjust results. In a different procedural posture,  
21   Brahma conceded exactly this, warning of the "chaos" that would erupt if all the parties—Brahma,  
22   TSE, and Cobra—were not in front of the same court:

23                           The Brahma Lien (recorded against the Work of Improvement and  
24                           now secured by the Brahma Surety Bond) creates a property interest  
25                           which cannot be adjudicated by two different courts. Inconsistent  
26                           adjudication regarding Brahma's lien rights (or claim against the  
27                           Brahma Surety Bond) would lead to chaos if one court determines  
28                           that TSE owes Brahma one amount and a different court determines

<sup>1</sup> *Brahma Group, Inc. v. Tonopah Solar Energy, LLC et al.*, No. 2:18-cv-01747-RFB-EJY, (D. Nev. Sep. 17, 2018),  
hereinafter referred to and cited as the "Federal Action." Capitalized terms in this Reply have the same meaning set  
forth in Cobra and AHAC's October 15, 2019 Motion.

1 that TSE owes Brahma a different amount. To resolve those two  
2 inconsistent judgments, it would require further litigation.

3 (Exhibit C (Federal Action, Dkt. No. 13, at 14).)

4 Brahma's Opposition to Cobra and AHAC's Motion does not meaningfully dispute these  
5 essential facts. Rather, Brahma now complains of purported delay and asserts its "statutory right"  
6 to proceed on its Surety Bond claims in this venue. Among other things, Brahma is ignoring that  
7 its own forum shopping is directly responsible for the present posture of the case and its  
8 complicated procedural history. To the extent there has been any delay, Brahma can only blame  
9 itself. Moreover, Nevada's lien law does not grant Brahma any right to a windfall claim for the  
10 full amount the Surety Bond before it succeeds on its claims against TSE in the Federal Action.  
11 While Brahma's Opposition argues that its claim against the Surety Bond is "a separate and  
12 distinct cause of action with separate and distinct elements of proof," (Opp. Br. 10), it told the  
13 court in the Federal Action the opposite:

14 [W]e're going to make the same arguments there that we make here.  
15 And [Cobra] may make some of the same arguments that TSE is  
16 going to make here in defense of our lien claim. But, you know,  
17 fundamentally the causes -- the claims, the dispute, is the same. The  
18 facts are the same. And some facts maybe would not be elucidated  
19 over there that might be here and vice versa, but by in large the facts  
20 are going to be the same.

21 (Exhibit B (Federal Action, June 25, 2019 Tr., at 22:20-23:2).)

22 The Court should, therefore, enter a stay to allow for the resolution of Federal Action that  
23 will determine the amount—in anything—that Brahma is owed for its Work.

## 24 II.

### 25 ARGUMENT

#### 26 A. BRAHMA'S FORUM SHOPPING CAUSED DELAY AND NECESSITATED 27 THIS MOTION

28 Brahma argues that Cobra and AHAC "chose this forum" and inaccurately complains that

1 the “primary strategy [of the instant Motion] is delay.” (Opp. Br. 7.)<sup>1</sup> The Opposition’s  
2 characterization of the procedural history in this case ignores that it is Brahma’s own forum  
3 shopping that caused delay and required Cobra and AHAC’s request for a stay at this time.

4 Brahma tried, but failed, to keep its claims against TSE in state court. Under its  
5 Agreement with TSE, Brahma first filed suit in Clark County, Nevada. After TSE removed the  
6 Clark County Action to the United States District Court for the District of Nevada, Brahma  
7 amended its complaint to remove all causes of action against TSE except for unjust enrichment.  
8 Brahma then filed a first amended counter-complaint and third-party complaint in this Court,  
9 asserting the same claims against TSE that it had just dropped in the Federal Action, as well as its  
10 claim on the Surety Bond against Cobra and AHAC. Brahma then moved to stay the Federal  
11 Action, and defended against TSE’s motion in the Federal Action to enjoin Brahma from  
12 proceeding with its claims against TSE in this Court.

13 On September 25, 2019, the court in the Federal Action denied TSE’s motion to stay and  
14 enjoined Brahma from litigating its contract claims in this Court. The federal court’s decision was  
15 a direct response to Brahma’s gamesmanship:

16 The Court finds that there is considerable evidence of forum  
17 shopping on the part of Brahma here. Brahma filed its complaint  
18 asserting its contract claims against TSE in Clark County Court. It  
19 was only after receiving a favorable ruling on its motion to expunge  
20 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.

21 (Exhibit D (Federal Action, Dkt. 55, at 8).) Still further, the court in the Federal Action found that  
22 Brahma “fraudulently filed [in this Court] in an attempt to subvert the removal of a prior case.”  
23 (*Id.*, at 8-9.)

24 Cobra and AHAC did not waste any time in bringing their motion to stay, which was filed  
25 on October 15, 2019. (Cobra and AHAC filed their motion to intervene in the Federal Action on  
26

---

27 <sup>1</sup> Brahma’s allegation that Cobra “chose this forum” and “voluntarily chose to post the Surety Bond” (Mot. 1) is not  
28 accurate. Under a separate contract between TSE and Cobra, Cobra was required to “bond over” or otherwise obtain a  
discharge of the liens. While this was done under protest and with full reservation of rights, including all rights to  
recover the financial costs related to the Bond, this dispute between TSE and Cobra is not before this court.

1 October 18, 2019.) These motions were made necessary by Brahma's efforts to subvert the federal  
2 court's jurisdiction, which only ended with the September 25, 2019 order in the Federal Action.  
3 As a result of the September 25, 2019 order, Brahma is now enjoined from litigating its contract  
4 claims against TSE in this Court, and there is now a risk of inconsistent decisions on the same  
5 principal issue: the lienable amount, if anything, to which Brahma is entitled. Cobra and AHAC's  
6 rights were significantly prejudiced by this development. Cobra and AHAC did not file their  
7 Motion to Stay to delay this case. It was made necessary by the procedural mess Brahma created.

8 **B. THE FEDERAL COURT HAS NOT "REJECTED" A STAY OF BRAHMA'S**  
9 **SURETY BOND CLAIMS**

10 The September 25, 2019, order in the Federal Action did not, as Brahma claims, "expressly  
11 reject[]" the arguments in Cobra and AHAC's Motion to Stay concerning the avoidance of  
12 piecemeal litigation, potential duplication, and the possibility of inconsistent results. (*See Opp. Br*  
13 *8.*) No order (by the federal court or this Court) forecloses a stay of this case or Cobra and  
14 AHAC's participation in the Federal Action.

15 Brahma requested that the court in the Federal Action abstain from the exercise of federal  
16 jurisdiction in favor of this proceeding by application of the *Colorado River* doctrine.  
17 "Abstention from the exercise of federal jurisdiction is the exception, not the rule" and is granted  
18 only under "exceptional circumstances." (Exhibit D (Federal Action, Dkt. No. 55, at 4) (quoting  
19 *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 813 (1976)).) The *Colorado River*  
20 doctrine is a multi-part test for determining whether a federal court should exercise jurisdiction,  
21 not whether it should enter a stay. It consists of eight factors relevant to "the appropriateness of a  
22 *Colorado River* stay," with "a strong presumption against federal abstention." (Exhibit D (Federal  
23 Action, Dkt. No. 55, at 4).) The "avoidance of piecemeal litigation" is just one of the eight factors  
24 considered under the *Colorado River* doctrine. Contrary to Brahma's characterization of that  
25 analysis, the court in the Federal Action suggested that it was capable of asserting jurisdiction over  
26 the Surety Bond claims proceeding in this Court:

27 Brahma argues that this factor favors abstention because the Nye  
28 County Court will necessarily need to determine issues pertinent to  
the contract claims, such as the agreed upon contract value of the

1 work. The Court is unconvinced by this argument. **Multiple**  
2 **defendants, claims, and cross-claims are routine in diversity**  
3 **cases.** . . . Brahma fails to identify any special or important rationale  
4 or legislative preference for having these issues be resolved in a  
single proceeding, and so the Court finds that this factor does not  
favor abstention.

5 (Exhibit D (Federal Action, Dkt. No. 55, at 6) (emphasis added).) The federal court found that all  
6 the factors considered were “neutral or favor the district court’s exercise of jurisdiction,” and that  
7 “[i]n light of the strong presumption against abstention, [it would] not grant federal abstention  
8 pursuant to *Colorado River*.” (*Id.* at 8.) Key to this determination was the “considerable evidence  
9 of forum shopping on the part of Brahma,” which the federal court also found justified enjoining  
10 Brahma from litigating its claims against TSE in this Court. (*Id.* at 8-9.)

11 This Court’s framework for deciding Cobra and AHAC’s Motion to Stay under *Landis* is  
12 very different. Sufficient duplication of effort and a risk of inconsistent decisions necessary to  
13 justify a stay here is uncomplicated by the other factors and considerations faced by the court in  
14 the Federal Action. As discussed in Cobra and AHAC’s moving brief, courts routinely grant a  
15 *Landis* stay where a related case has the potential to simplify issues, proof, and questions of law.  
16 (Mov. Br. 7.) Brahma has already conceded that the issues, proof, and questions of law in the two  
17 actions are inextricably connected:

18 [T]he claims, the dispute, is the same. The facts are the same. And  
19 some facts maybe would not be elucidated over here that might be  
20 here and vice versa, but by in large the facts are going to be the  
same. The issues are going to be the same.

21 (Exhibit B (Federal Action, June 25, 2019 Tr., at 22:23-23:2).)

22 At oral argument, the federal court acknowledged that it did not have the authority to  
23 “force” this action into the Federal Action. (*Id.* at 30:1-16.) In response to Brahma’s argument that  
24 there was a very real possibility that “one court is going to rule one way and the other court is  
25 going to possibly rule that way or possibly another way,” the federal court responded that there  
26 was another option: “Or wait. One of us is going to have to wait.” (*Id.* at 22:6-23:5.) Cobra and  
27 AHAC now have pending a motion to intervene in the Federal Action so that they may participate  
28 and protect their rights while the federal court resolves the dispute over what, if anything, Brahma



1 is owed for its Work at the Plant. In these circumstances, and against the backdrop of Brahma's  
2 gamesmanship, the Court should exercise its discretion to "wait" while the Federal Action decides  
3 the amount, if anything, Brahma is entitled to.

4 **C. BRAHMA CANNOT COLLECT ON THE BOND WITHOUT**  
5 **RESOLUTION OF THE SAME ISSUES BEING CONSIDERED IN THE**  
6 **FEDERAL ACTION**

7 The merits of Brahma's claim to compensation for Work performed at the Plant—and  
8 TSE's counterclaims, including fraud—will be resolved in the Federal Action. Brahma's  
9 "statutory right" to pursue its claim on the Surety Bond in this venue does not, as Brahma  
10 suggests, allow it to collect without resolution of the amount, if anything, to which it is entitled  
11 through litigation of TSE's defenses and counterclaims in the Federal action. A stay is proper,  
12 despite Brahma's protests about its right to proceed in this venue.

13 NRS § 108.2421 provides that Brahma, as a lien claimant for Work performed in this  
14 county, is "entitled to bring an action against the principal and surety on the surety bond and the  
15 lien claimant's debtor" in this Court. NRS § 108.2421 (emphasis added). At oral argument in the  
16 Federal Action, Brahma confirmed that the "lien claim's debtor in this case is TSE." (Exhibit B  
17 (Federal Action, June 25, 2019 Tr., at 19:18-19:19).) However, Brahma's claims against TSE are  
18 no longer before this Court because of Brahma's attempt to forum shop. Brahma acknowledged  
19 that because it agreed to subject itself to jurisdiction in Clark County and filed a separate action,  
20 this Court is not the exclusive venue to resolve the dispute:

21 THE COURT: . . . Does [NRS § 108.2421] say it can't be brought  
22 elsewhere? And can you point me to Nevada law that says that that  
means that it can only be brought there?

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

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

26 MR. ZIMBELMAN: True.

27 (Exhibit B (Federal Action, June 25, 2019 Tr., at 19:21-20:4).) Cobra and AHAC are not  
28 challenging this Court's jurisdiction to hear Brahma's claim against the Surety Bond. Instead, a

1 stay is justified because the amount that Brahma is entitled to collect will now be litigated in the  
2 Federal Action because of Brahma's tactics.

3 Further, Brahma's proffered interpretation of NRS § 108.222 and NRS § 108.2421  
4 improperly suggests that it may sue for the full amount of the Surety Bond, and seek a preferential  
5 trial on it, without reaching the merits of its claim to the money in the Federal Action. (*See* Opp.  
6 Br. 8-13.) This is not a case falling under NRS § 108.222(1)(a), where a contract provides for a  
7 "specific price," there is no dispute about performance, and the lien claimant is simply seeking the  
8 "balance of the price agreed upon for such work, material or equipment." *See* NRS §  
9 108.222(1)(a). Amounts in excess of any price specifically agreed to in a contract or written  
10 change orders "fall[] outside [this subsection] of the mechanic's lien statute." *See SMC Constr.*  
11 *Co. v. Rex Moore Grp., Inc.*, No. 317CV00470LRHVPC, 2017 WL 4227940, at \*4 (D. Nev. Sept.  
12 21, 2017). In such actions, the contractor's "speedy remedy to secure payment" is limited to the  
13 contract price. *California Commercial v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 146, 67 P.3d 328,  
14 330-31 (2003) (citing NRS §§ 108.222, 108.235(1), 108.239(5)). The speed of such a proceeding  
15 is necessarily frustrated where the court is "required to hear evidence regarding the disputed costs  
16 of materials, labor, overhead and profit beyond the contract price." *Id.* at 331.

17 Because there is no set contract price for the Work performed, Brahma must seek recovery  
18 under NRS § 108.222(1)(b), which only permits Brahma to collect an "amount equal to the fair  
19 market value of such work, material or equipment . . . including a reasonable allowance for  
20 overhead and a profit." *See* NRS § 108.222(1)(b); *Cal. Commercial*, 67 P.3d at 331-32. The only  
21 way to determine the fair market value of Brahma's work on the project is through litigation of the  
22 dispute between Brahma and TSE, including TSE's claims that Brahma engaged in fraud.

23 The "fair market value" of Brahma's Work at the Plant is heavily disputed. Brahma tacitly  
24 acknowledges that it must "prove up its lienable amount," (Opp. Br. 10), but tellingly omits how it  
25 will be able to do so without resolution of TSE's counterclaims. TSE's counterclaims in the  
26 Federal Action allege several state law claims against Brahma: breach of contract, breach of  
27 implied covenant of good faith and fair dealing, declaratory relief, unjust enrichment,  
28 fraudulent/intentional misrepresentation, and negligence misrepresentation. (Exhibit E (Federal

1 Action, Dkt. No. 4).) In its fraud counterclaim, among other things, TSE alleges that Brahma  
2 submitted numerous invoices that contained fraudulent misrepresentations regarding the amount of  
3 money Brahma was due from TSE for the Work on Crescent Dunes. TSE alleged that it relied on  
4 Brahma's false representations and made payments to Brahma it would not have made otherwise.  
5 TSE also alleged that Brahma supplied false information and made false representations to TSE  
6 because Brahma had a pecuniary interest in inducing TSE to pay Brahma amounts to which  
7 Brahma was not entitled. TSE alleged that it relied on Brahma's false representations in making  
8 payments to Brahma and was, therefore, damaged by Brahma's negligent misrepresentations.

9 Brahma cannot now argue that its claim against the Surety Bond, which requires a  
10 determination of the "fair market value" of its Work, "is not derivative of or dependent upon" its  
11 dispute with TSE in the Federal Action. (Opp. Br. 10.) Brahma emphasizes in its Opposition that  
12 the case before this Court involves "a separate and distinct cause of action with separate and  
13 distinct elements of proof." (Opp. Br. 10.) But Brahma argued *the opposite* when it sought a stay  
14 of the Federal Action: "Brahma argues that . . . the Nye County Court will necessarily need to  
15 determine issues pertinent to the contract claims [against TSE], such as the agreed upon contract  
16 value of the work." (Exhibit D (Federal Action, Dkt. No. 55, at 6).) Indeed, Brahma argued that  
17 questions "[c]entral to the dispute" could not be decided by two different courts:

18 Central to the dispute between Brahma and TSE is the amount of  
19 Work Brahma performed on the Work of Improvement, the amount  
20 that TSE owes Brahma for that Work, and the lienable amount for  
21 such Work. To determine Brahma's lienable amount, the Nye  
22 County Court will necessarily need to determine (i) the agreed upon  
23 contract value of said Work (NRS 108.222(a)), or (ii) in cases where  
24 there may not have been an agreed upon price, the fair market value  
25 of said Work (NRS 108.222(b)). A mechanic's lien is a charge on  
26 real estate, created by law, in the nature of a mortgage, to secure the  
27 payment of money due for work done thereon, or materials furnished  
28 therefor. *Rosina v. Trowbridge*, 20 Nev. 105, 113, 17 P. 751 (Nev.  
1888).

The Brahma Lien (recorded against the Work of Improvement and  
now secured by the Brahma Surety Bond) creates a property interest  
which cannot be adjudicated by two different courts. Inconsistent  
adjudication regarding Brahma's lien rights (or claim against the  
Brahma Surety Bond) would lead to chaos if one court determines  
that TSE owes Brahma one amount and a different court determines

1                   that TSE owes Brahma a different amount. To resolve those two  
2                   inconsistent judgments, it would require further litigation.

3                   (Exhibit C (Federal Action, Dkt. No. 13, at 14).) The Surety Bond guarantees payment of  
4                   whatever amount Brahma may prove it is owed by TSE, if anything, and nothing more. Nothing in  
5                   the Nevada lien law expands Brahma's rights in this regard—Brahma is simply changing its  
6                   arguments now to invite the duplicative litigation and inconsistent results it previously resisted.

7                   The Court should therefore stay this case while the court in the Federal Action resolves the  
8                   disputed issue of the fair market value of Brahma's Work, preferably with Cobra and AHAC as  
9                   intervening parties.

10                   **D. THE BALANCE OF HARDSHIPS FAVORS A STAY**

11                   Cobra and AHAC's moving brief detailed the significant inequity and hardship they would  
12                   face in the absence of a stay. (Mov. Br. 8-10.) Cobra faces a risk of duplicative discovery down  
13                   the road, and both parties face a risk of inconsistent and conflicting rulings.

14                   While Brahma may not care about imposing added cost on Cobra and AHAC, Brahma  
15                   agrees that there is an "extraordinary chance" of inconsistent results presented by the now-  
16                   competing Federal Action it initiated. When Brahma sought a stay of the Federal Action, it  
17                   emphatically argued that the issues presented in this case "cannot" be determined by two different  
18                   courts, and "[i]nconsistent adjudication regarding Brahma's lien rights (or claim against the  
19                   Brahma Surety Bond) would lead to chaos if one court determines that TSE owes Brahma one  
20                   amount and a different court determines that TSE owes Brahma a different amount." (Exhibit C  
21                   (Federal Action, Dkt. No. 13, at 14) (emphasis added).) At oral argument, Brahma reiterated these  
22                   arguments:

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

27                   But if we do that, we are going to have a very – an extraordinary  
28                   chance to see inconsistent rulings, to have parallel and very non-  
                      efficient proceedings. It will be expensive. It will not honor judicial

1 economy. And it, again, could result in inconsistent rulings because  
2 we're going to proceed in Nye County and we're going to pursue the  
3 surety bond. And we're going to pursue those claims and Cobra, not  
4 TSE, but Cobra is going to have to defend that along with their  
5 surety.

6 And we're going to make the same arguments there that we make  
7 here. And they may make some of the same arguments that TSE is  
8 going to make here in defense of our lien claim. But, you know,  
9 fundamentally the causes -- the claims, the dispute, is the same. The  
10 facts are the same. And some facts maybe would not be elucidated  
11 over here that might be here and vice versa, but by in large the facts  
12 are going to be the same. The issues are going to be the same.

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

15 (Exhibit B (Federal Action, June 25, 2019 Tr., at 22:6-23:5).)

16 Brahma's present arguments concerning the balance of hardships ignore, in stark contrast  
17 with Brahma's previous arguments, the realities of its claims and its ongoing dispute with TSE,  
18 and rely exclusively on policies the purportedly underlie Nevada's lien law. (Opp. Br. 11-12.)  
19 While the Nevada legislature may have enacted the lien law with the intention of protecting  
20 contractors with secured payment for their work and materials, it does not grant Brahma  
21 entitlement to a windfall while it defends claims of fraud relating to the Work covered by the  
22 Surety Bond. Brahma's threat to seek a preferential trial setting for this case signals that it hopes  
23 to advance this case before those issues are decided in the Federal Action.

24 Cobra and AHAC's request for a stay is not a "delaying tactic" designed to obstruct  
25 Brahma's pursuit of its statutory rights. Cobra and AHAC seek to prevent the hardship and  
26 inequity that will result if Brahma is permitted to push this case forward before resolution of its  
27 entitlement to collect for the Work in the Federal Action.

28 **E. BRAHMA'S THREAT TO SEEK A PREFERENTIAL TRIAL SETTING  
SHOULD BE REJECTED**

Brahma's Opposition concludes with a threat of more procedural gamesmanship:  
"Brahma's exercise of this important right [to seek a preferential trial setting under NRS §  
108.2421(3)] may be its only shield against the delays, endless procedural motions and other

1 dilatory tactics employed against its efforts to collect” what it is owed for Work at the Plant.  
2 (Opp. Br. 12-13.) But, Brahma has not satisfied the preconditions that it must before it may seek a  
3 preferential trial setting. Indeed, NRS § 108.2421 provides that Brahma, as a lien claimant for  
4 Work performed in this county, is “entitled to bring an action against the principal and surety on  
5 the surety bond and the lien claimant’s debtor” in this Court. NRS § 108.2421(1) (emphasis  
6 added). Brahma has confirmed that the “lien claim’s debtor in this case is TSE.” (Exhibit B  
7 (Federal Action, June 25, 2019 Tr., at 19:18-19:19).) Given that Brahma’s claims against TSE are  
8 no longer before this Court, Brahma cannot meet the requirements of NRS § 108.2421, and thus  
9 should not be entitled to a preferential trial setting. *See also* Section C, *supra*.

10 Moreover, as set forth above, any delay in this case is due to Brahma’s forum-shopping  
11 campaign. Cobra and AHAC’s Motion to Stay is the necessary result of the procedural posture  
12 that *Brahma created*. Further, and more importantly, Brahma cannot rush this case to trial before  
13 resolution of the issues pending in the Federal Action.

14 **III.**


15 **CONCLUSION**

16 For the foregoing reasons, and those discussed in their Moving Brief, Cobra and AHAC  
17 respectfully request that the Court grant their Motion and stay the claims against them and grant  
18 such other relief as the Court deems just and proper.

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

21 DATED this 7<sup>th</sup> day of November, 2019.

22 WEIL & DRAGE, APC

23 

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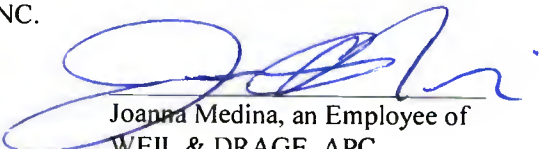
1 CERTIFICATE OF SERVICE

2 Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that on the 8<sup>th</sup> day of  
3 November, 2019, service of the foregoing, **COBRA THERMOSOLAR PLANTS, INC.'S AND**  
4 **AMERICAN HOME ASSURANCE COMPANY'S REPLY IN FURTHER SUPPORT OF**  
5 **MOTION TO STAY**, was made this date by mailing a true and correct copy of the same, *via first-*  
6 *class mail*, at Henderson, Nevada, addressed to the following:

7  
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10  
11 UNITED STATES DISTRICT COURT  
12 DISTRICT OF NEVADA

13 BRAHMA GROUP, INC., a Nevada corporation,

14 Plaintiff,

15 vs.

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

17 Defendant.

18  
19  
20 TONOPAH SOLAR ENERGY, LLC, a Delaware  
limited liability company; DOES I through X; and  
21 ROE CORPORATIONS I through X,

22 Counterclaimant,

23 vs.

24 BRAHMA GROUP, INC., a Nevada corporation,

25 Counterdefendant.

CASE NO. 2:18-cv-01747-RFB-GWF

TONOPAH SOLAR ENERGY, LLC'S  
JOINDER, OR, ALTERNATIVELY,  
RESPONSE TO COBRA'S AND AHAC'S  
MOTION TO INTERVENE AS  
DEFENDANTS



WEINBERG WHEELER  
HUDGINS GUNN & DIAL

Proposed Defendants-Intervenors Cobra Thermosolar Plants, Inc. ("Cobra") and American Home Assurance Company ("AHAC") filed a Motion to Intervene as Defendants on October 18, 2019 ("Motion"). See ECF No. 56. Tonopah Solar Energy, LLC ("TSE") joins the Motion, or, alternatively, responds to the Motion, as set forth in the following Memorandum of Points and Authorities.

# **MEMORANDUM OF POINTS AND AUTHORITIES**

The Motion contends that Cobra and AHAC should be permitted to intervene in this action as a matter of right under Fed. R. Civ. P. 24(a) or permissively under Fed. R. Civ. P. 24(b). See generally ECF No. 56. The Motion also contends that allowing Cobra and AHAC to intervene would not destroy diversity jurisdiction, as they are not indispensable parties under Fed. R. Civ. P. 19(b). See *id.* at pp. 9-11.

While TSE does not necessarily agree with all of the Motion's characterizations and arguments, it does not oppose Cobra's and AHAC's requests to intervene under either Rule 24(a) or (b), so long as their intervention does not destroy diversity jurisdiction, which it should not.

TSE agrees with Cobra's argument that its intervention does not destroy diversity jurisdiction because Cobra is not an indispensable party to this action. See ECF No. 56, pp. 9-10. Indeed, this is the result that TSE envisioned when it first filed its now granted Motion for an Injunction and to Strike.<sup>1</sup>

In addition, it is all the more clear that Cobra's intervention does not destroy diversity jurisdiction because Cobra was not an indispensable party to this action when the complaint giving rise to this action was first filed. See *Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1014 (9th Cir. 2006) (concluding that MGA's intervention as a non-diverse defendant under Rule 24 did not

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<sup>1</sup> See ECF No. 28 (Reply in Support of TSE's Motion for an Injunction and to Strike), p. 12 (noting that "Brahma's bond claim against Cobra and the surety could proceed in Nye County, but, more likely, that action would be stayed and Cobra and the surety could interplead as non-diverse defendants in this action, as interested parties. See *Mattel, Inc. v. Bryant*, 441 F. Supp. 2d 1081, 1095 (C.D. Cal. 2005) *aff'd*, 446 F.3d 1011 (9th Cir. 2006) (providing that intervention by a non-diverse non-indispensable party in an action removed on the basis of diversity does not destroy diversity and that a party can intervene as a defendant even if there is no claim against it); see also ECF No. 55 (Order granting TSE's Motion for an Injunction and to Strike).

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1 destroy diversity jurisdiction because MGA was not indispensable); *Hill v. Blind Indus. & Servs.*  
 2 *of Maryland*, 179 F.3d 754, 757 (9th Cir. 1999), opinion amended on denial of reh'g on  
 3 inapposite grounds, 201 F.3d 1186 (9th Cir. 1999) (providing that "diversity jurisdiction is  
 4 determined at the time the action commences") (citing to *Freeport-McMoRan Inc. v. KN energy,*  
 5 *Inc.*, 498 U.S. 426, 428 (1991) (per curiam)); *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*,  
 6 320 F.3d 1081, 1096 (10th Cir. 2003) (concluding that the joinder of a non-diverse defendant did  
 7 not destroy diversity jurisdiction because the party was not indispensable "at the time the original  
 8 complaint was filed"); *Am. Nat. Bank & Tr. Co. of Chicago v. Bailey*, 750 F.2d 577, 582 (7th  
 9 Cir. 1984) (providing that "the rule that there must be complete diversity to sustain diversity  
 10 jurisdiction is not absolute. A pertinent exception is that if the nondiverse party comes into the  
 11 case by intervening in it, his presence will not deprive the court of jurisdiction unless the  
 12 intervenor was an indispensable party when the complaint was filed.") (citing *Mollan v.*  
 13 *Torrance*, 22 U.S. (9 Wheat.) 537, 549 (1824); *Smith v. Sperling*, 354 U.S. 91, 93, n. 1 (1957));  
 14 *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 483 (D.C. Cir. 1996) ("The only potential caveat  
 15 alluded to in *Freeport-McMoRan* is that a Rule 25(c) addition of a non-diverse party may destroy  
 16 diversity jurisdiction (and hence, in a case removed from state court, require remand) if the  
 17 added party was *indispensable at the time the action began.*") (emphasis in original).

18 The complaint giving rise to this action was first filed on July 17, 2018, when Brahma  
 19 filed suit against TSE in state court. See ECF No. 55, p. 2 (citing ECF No. 1-1). Cobra first  
 20 recorded the surety bond issued by AHAC, the basis upon which Cobra premises its intervention,  
 21 on September 6, 2018.<sup>2</sup> See ECF No. 16-11 (the surety bond recorded on September 6, 2018).

22  
 23 <sup>2</sup> While unnecessary based on the current facts, there is also an argument to be made that Cobra did not  
 24 actually have any interest in this action until a surety bond was issued that released Brahma's lien  
 25 pursuant to NRS 108.2415, which was not until October 9, 2018. Under NRS 108.2413(1), "[t]o obtain  
 26 the release of a lien for which notice of lien has been recorded against the property, the principal and a  
 27 surety must execute a surety bond in an amount equal to 1.5 times the lienable amount in the notice of  
 28 lien. . . .". The surety bond that Cobra recorded on September 6, 2018 was for \$10,767,580. See ECF  
 No. 16-11, p. 9. At the time, however, Brahma was on its Third Amended and/or Restated Notice of  
 Lien, which was recorded on July 19, 2018 in the amount of \$11,902,474.75. See ECF No. 16-10. Cobra  
 did not record a surety bond that was 1.5 times the lienable amount in Brahma's notice of lien, until it  
 recorded a rider to its surety bond on October 9, 2018, thereby increasing its bond's amount to  
 \$19,289,366.61 or 1.5 times the amount of Brahma's Fourth Amended Lien. See ECF No. 20-15.

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1 Prior to the recording of the surety bond, Cobra had no interest in what was otherwise a  
2 contractual dispute between Brahma and TSE—Brahma's claims against TSE were for breach of  
3 contract, breach of the implied covenant, unjust enrichment, and violation of NRS 624. *See* ECF  
4 No. 1-1. Thus, on July 17, 2018, the date the complaint giving rise to this action was first filed,  
5 Cobra was not an indispensable party to this action.

6 To the extent that this Court disagrees and finds that Cobra's intervention destroys  
7 diversity jurisdiction (which should not be found), TSE submits that Cobra and AHAC's Motion  
8 should be denied. *See Medchoice Risk Retention Grp., Inc. v. Rand*, No.  
9 316CV00418MMDVPC, 2017 WL 1025173, at \*2 (D. Nev. Mar. 16, 2017) (finding that  
10 permissive intervention should be denied because it "would unnecessarily encumber the  
11 litigation and impede judicial economy"); *Pharm. Research & Manufacturers of Am. v.*  
12 *Sandoval*, No. 217CV02315JCMCWH, 2017 WL 5158714, at \*2 (D. Nev. Nov. 7, 2017).

13 DATED: November 1, 2019.

14 /s/ Ryan T. Gormley

15 D. Lee Roberts, Jr., Esq.

16 Colby L. Balkenbush, Esq.

17 Ryan T. Gormley, Esq.

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*Tonopah Solar Energy, LLC*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of November, 2019, a true and correct copy of the foregoing **TONOPAH SOLAR ENERGY, LLC'S JOINDER, OR, ALTERNATIVELY, RESPONSE TO COBRA'S AND AHAC'S MOTION TO INTERVENE AS DEFENDANTS** was served by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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WEINBERG WHEELER  
HUDGINS GUNN & DIAL



2:18-cv-01747-RFB-GWF

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

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

10  
11 TONOPAH SOLAR ENERGY, LLC,  
12 a Delaware limited  
liability company,  
13 Counter-claimant,  
14 vs.  
15 BRAHMA GROUP, INC., a  
Nevada corporation,  
16 Counter-defendant.

17  
18 REPORTER'S TRANSCRIPT OF PROCEEDINGS

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

21 APPEARANCES: See next page

22 COURT REPORTER: Patricia L. Ganci, RMR, CRR  
23 United States District Court  
24 333 Las Vegas Boulevard South, Room 1334  
Las Vegas, Nevada 89101

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

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1 APPEARANCES:

2 For the Plaintiff:

3 **ERIC ZIMBELMAN, ESQ.**

4 **RICHARD LESLIE PEEL, ESQ.**

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6 For the Defendant:

7 **D. LEE ROBERTS, JR., ESQ.**

8 **COLBY BALKENBUSH, ESQ.**

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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?

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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



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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.

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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.

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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.

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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.

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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

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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

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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.

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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

23

24

25

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



## **EXHIBIT 28**

Transcription of Proceedings Excerpt

**Case:**

Tonopah Solar Energy, LLC v. Brahma Group, Inc.  
CV 39348

**Date:**

11/21/2019



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1 FIFTH JUDICIAL DISTRICT COURT  
2 NYE COUNTY, NEVADA

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

5 Plaintiff,

6 vs.

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

9 Defendant.

Case No.  
CV 39348

Consolidated  
with CV39799

10 \_\_\_\_\_  
11 (full caption on pages 2 and 3.)  
12 \_\_\_\_\_

13 EXCERPT TRANSCRIPT OF PROCEEDINGS

14 BEFORE JUDGE STEVEN ELLIOTT

15 Pahrump, Nevada

16 November 21, 2019  
17  
18  
19

20 \_\_\_\_\_  
21 Proceedings recorded by electronic sound recording;  
22 transcript produced by transcription service.  
23 \_\_\_\_\_

24 Transcribed by: Becky J. Parker, RPR, CCR  
25 Nevada Certified Court Reporter No. 934

1 FIFTH JUDICIAL DISTRICT COURT  
2 NYE COUNTY, NEVADA

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

5 Plaintiff,

6 vs.

Case No.  
CV 39348

7 BRAHMA GROUP, INC., a Nevada  
8 corporation

Consolidated  
with CV39799

9 Defendant.

10 BRAHMA GROUP, INC., a Nevada  
11 corporation,

12 Counterclaimant/  
13 Lien Claimant,

14 vs.

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

21 Counterdefendant.

22 BRAHMA GROUP, INC., a Nevada  
23 corporation,

24 Third-Party Plaintiff,

25 vs.

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

32 Third-Party Defendants.

1 H&E EQUIPMENT SERVICES, INC., a  
2 Delaware corporation,  
3  
4 Plaintiff-in-Intervention,  
5  
6 vs.  
7  
8 BRAHMA GROUP, INC., a Nevada  
9 corporation, TONOPAH SOLAR ENERGY LLC,  
10 a Delaware limited liability company,  
11 COBRA THERMOSOLAR PLANTS, INC., a  
12 Nevada Corporation; AMERICAN HOME  
13 ASSURANCE COMPANY, a surety; BOE  
14 BONDING COMPANIES I through X; DOES I  
15 through X; ROE CORPORATIONS I through X,  
16 and TOE TENANTS I through X, inclusive,  
17  
18 Defendants-in-Intervention.

---

11 BRAHMA GROUP, INC., a Nevada corporation,  
12  
13 Plaintiff,  
14  
15 vs.  
16  
17 COBRA THERMOSOLAR PLANTS, INC., a  
18 Nevada corporation; AMERICAN HOME  
19 ASSURANCE COMPANY, a surety; BOE  
20 BONDING COMPANIES I through X; DOES  
21 I through X; ROE CORPORATIONS I  
22 through X, inclusive,  
23  
24 Defendants.  
25

---

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24

25

1 PAHRUMP, NEVADA

2 NOVEMBER 21, 2019

3 -oOo-

4

5 THE COURT: All right. Thank you. Well,  
6 I -- I'm in the position here where there is this  
7 independent action on the bond. And then the question  
8 is, should that be delayed pending federal court  
9 determination as to what, if anything, TSA -- I'm sorry,  
10 TSE -- TSE owes to Brahma. And it certainly looks like,  
11 you know, TSE would be having, you know, extremely  
12 valuable knowledge of the case in order to determine  
13 what, if anything, might be owed to Brahma.

14 On the other hand, I -- I reject the  
15 arguments that have been briefed as being not  
16 persuasive, you know, not valid to the point of actually  
17 requiring this court to issue a stay. But if it could  
18 amount to something where TSE is a necessary or  
19 indispensable party to the action, then, you know,  
20 that's something else. Then I think there's a legal  
21 requirement to -- to issue the stay.

22 So Mr. Robben, on behalf of Cobra, has  
23 pointed the Court to NRS 108.2421, Subsection 1, which  
24 talks about the, you know, debtor party being somebody  
25 who could be brought in in this. But then, you know, I

1     hear Mr. Zimbelman talk about, you know, cases that --  
2     that I personally, you know, looked at particularly, you  
3     know, during the recession that started somewhere around  
4     2007 or '8, and got into full swing around 2009. But,  
5     you know, you have contractors who go -- went belly up,  
6     you know. When the housing market crashed, there were  
7     lots of projects that went belly up. Contractors went  
8     belly up and bonding companies were on the hook for  
9     things and didn't really have a debtor party, certainly  
10    not a solvent debtor party, and maybe a debtor party  
11    that's flown the coop, so to speak.

12                 So when -- when you look at the statute, I  
13    don't think it is persuasive to say that this debtor  
14    party for whom the bond may have been issued to cover  
15    their -- their debt is really a necessary indispensable  
16    party to the action.

17                 So under the circumstances, really looking at  
18    the law of all this, I would say that there's still the  
19    independent action that would survive. And I think, you  
20    know, when you look at the tot- -- totality of the --  
21    the bonding statute, I wouldn't grant the motion for  
22    stay because this thing can go forward even though TSA  
23    (sic) is not a party.

24                 And why don't we take a short recess before  
25    we proceed on to the -- to the other motion. But I -- I



1 would direct that Mr. Zimbelman prepare an appropriate  
2 order with some findings of fact on this so that -- you  
3 know, this is the kind of thing that can be appealed.  
4 Most everything could be appealed. But, you know, I  
5 think it ought to be, you know, in writing and, you  
6 know, have some...

7 MR. ZIMBELMAN: I'm happy to prepare an  
8 order.

9 Can I ask the Court, you respectively  
10 overruled my objection to TSE filing a joinder and  
11 arguing today, but I don't know that you've expressly  
12 stated that. And I do think that, particularly given  
13 the long history in appellate cases coming out of this  
14 court, in this case, in this action, that I need a  
15 record about what, you know, that A, that I made that  
16 objection; and B, that it was ruled on. I don't mean to  
17 be difficult. I just think that I need to have  
18 something about that.

19 THE COURT: Well, I -- I guess my only  
20 thoughts were that, hey, Mr. Balkenbush has bothered to  
21 drive out from Las Vegas. And -- and when -- when I  
22 look at the arguments made on behalf of Cobra, you know,  
23 they're talking about TSA (sic), you know, well, they  
24 won't cooperate with us. You know, they're an important  
25 party here and, you know, hearing from TSE, it -- it

1       seemed right, even if they aren't a party to this case.

2               MR. ZIMBELMAN: And -- and I wasn't intending  
3 to, you know, spend a lot of time on that issue in the  
4 order, but I would like to say in the order that, you  
5 know, TSE appeared over our objection. Would that be  
6 appropriate?

7               THE COURT: Fine.

8               MR. ZIMBELMAN: Okay.

9               THE COURT: All right. We'll stand in recess  
10 for --

11              MR. ZIMBELMAN: Thank you, your Honor.

12              THE COURT: -- a few minutes here.

13              (Recess taken.)

14              MR. ZIMBELMAN: Your Honor --

15              THE COURT: Mr. Zimbelman.

16              MR. ZIMBELMAN: -- I was going to ask that  
17 we -- I think we've worked out the motion to compel.  
18 And we just want to put on the record what we -- what  
19 we're agreeing to do in order to -- to take that off  
20 calendar.

21              Specifically, without getting into all the  
22 detail, Cobra is going to commit to giving us a  
23 substantial additional production of documents no later  
24 than January 15th, and to give us a date for a -- a PMK  
25 deposition no later than Jan- -- to be held no later

1     than January 31st. We're going to work out the details  
2     between us, and obviously mutually agree to the extent  
3     that we can. But that would be the -- those will be the  
4     imposed deadlines and that should resolve the need for a  
5     motion.

6                 THE COURT: And Mr. Robben, do you agree with  
7     that?

8                 MR. ROBBEN: Yes, that's fine.

9                 THE COURT: All right. Well, I accept the  
10    stipulation of the parties, and that's -- will be the  
11    court order with regard to the outstanding motion to  
12    compel.

13                MR. ZIMBELMAN: Thank you.

14                MR. ROBBEN: Thank you, your Honor.

15                THE COURT: Thank you, gentlemen. It's been  
16    a pleasure. I really do like coming here and, you know,  
17    having such high quality lawyers, you know. It's a  
18    treat for me. Thank you.

19                MR. ROBBEN: Thank you.

20                MR. ZIMBELMAN: We enjoy being here as well,  
21    Your Honor. Thank you.

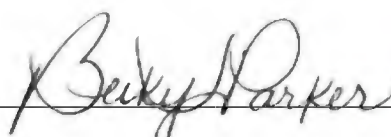
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I, BECKY J. PARKER, do hereby certify  
that the foregoing pages constitute a full, true, and  
accurate transcript of the digital recording, all  
transcribed to the best of my skill and ability.

WITNESS my hand this 11th day of  
December, 2019.





BECKY J. PARKER, RPR, CCR

Nevada Certified Court Reporter No. 934

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## **EXHIBIT 29**



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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

BRAHMA GROUP, INC., a Nevada  
Corporation,

Plaintiff,

vs.

TONOPAH SOLAR ENERGY, LLC, a  
Delaware Limited Liability Company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Defendants.

TONOPAH SOLAR ENERGY, LLC a  
Delaware limited liability company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Counter-claimants,

vs.

BRAHMA GROUP, INC., a Nevada  
corporation,

Counter-defendant.

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

**REPLY IN FURTHER SUPPORT OF  
MOTION TO INTERVENE AS  
DEFENDANTS**

{01649938;1}

Page 1 of 9

**REPLY IN FURTHER SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS**

COMES NOW the Proposed Defendants-Intervenors, COBRA THERMOSOLAR PLANTS, INC. (“Cobra”) and AMERICAN HOME ASSURANCE COMPANY (“AHAC”), by and through their attorneys of record, the law firm of WEIL & DRAGE, APC, and for the reasons set forth herein, hereby submit their Reply in further support of their Motion to Intervene as Defendants [ECF No. 56].

This Motion is based upon the Pleadings and Papers on file, the attached Points and Authorities, the accompanying proposed Answer in Intervention, and oral argument to be made by counsel at any Hearing of this matter.

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

WEIL & DRAGE, APC

*/s/ Jeremy R. Kilber*

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**MEMORANDUM OF POINTS & AUTHORITIES****I. PRELIMINARY STATEMENT<sup>1</sup>**

In their moving papers in support of their Motion to Intervene (the “Motion”), Cobra and AHAC demonstrated that they meet the requirements necessary to intervene as a right under Fed. R. Civ. P. 24(a). Indeed, because the Cobra Surety Bond guarantees payment of whatever amount Brahma may prove it is owed by TSE, Cobra and AHAC bear all the downside risk. So, there is a substantial danger that TSE, which is locked in a contentious arbitration with Cobra, will either lack the incentive to oppose Brahma’s claims, or will protect its litigation position in the arbitration at the expense of its defense against Brahma’s claims. At the very least, TSE has nowhere near the incentive to aggressively oppose Brahma’s claims that Cobra and AHAC have in this action.

Brahma’s opposition does not contest any of this. It cannot. Instead, Brahma bizarrely asks that the Court deny the motion based on a theory that Cobra, a Nevada company, cannot intervene without destroying diversity because it is an indispensable party. This notion is fundamentally flawed. The Court should reject it.

This is not the first case where a non-diverse party sought to join a diversity case to protect its vital interests. Not surprisingly, there is a rule for this. In *Mattel, Inc. v. Bryant*, 446 F.3d 1011 (9th Cir. 2006), the Ninth Circuit held that a non-diverse party can intervene in a diversity case if they were not an indispensable party at the time the plaintiff filed the case. The rule is meant to discourage collusive non-joinder by which a plaintiff might illegitimately obtain access to federal court. Here, Cobra was not an indispensable party when Brahma filed this action. Rather, Cobra (and AHAC) had no interest in the case at all at that point because the Cobra Surety Bond did not yet exist.

Faced with this dispositive temporal obstacle, Brahma urges the Court to ignore the filing date and focus on the date of removal because by that point the Cobra Surety Bond, albeit in a lower amount, did exist. There is no basis for a “date-of-removal” rule, and Brahma points to none. The date of removal is not relevant to the goal of the rule—*i.e.*, to prevent a plaintiff’s

<sup>1</sup> Capitalized terms not otherwise defined in this Reply have the definition given them in Cobra and AHAC’s October 18, 2019 Motion. (Dkt. No. 56.)

1 collusive non-joinder to illegitimately gain access to federal court. Of course, collusive non-  
 2 joinder will rarely, likely never, be an issue in removed cases because those cases, by definition,  
 3 start out in state court. And cases that have analyzed the intervention of non-diverse parties in  
 4 removed, diversity cases do not support the notion that indispensability should be determined as of  
 5 the date of removal. Rather, the date of filing controls no matter how the case came to rest in  
 6 federal court. The Court should do likewise and assess Cobra's status as of the date Brahma  
 7 originally filed this action, not the day TSE removed it.

8 Moreover, Brahma's newly-contrived contrived indispensability argument should be  
 9 rejected as an attempt to once again undermine the court's jurisdiction. If Brahma believed that  
 10 Cobra and AHAC were indispensable parties, it could have – and should have – made that  
 11 argument in September 2018 when TSE removed the case to federal court. Brahma did not. At  
 12 best, Brahma's new position that Cobra and AHAC are indispensable parties is merely another  
 13 senseless run at getting this case remanded to state court. The Court should—again—put an end  
 14 to Brahma's gamesmanship and permit Cobra and AHAC to intervene.

15 Therefore, as summarized above and discussed at greater length below, Brahma's  
 16 opposition to Cobra and AHAC's motion does not withstand scrutiny. The Court should,  
 17 therefore, grant the Motion so that Cobra and AHAC may participate in this action and directly  
 18 protect their significant interests without having to rely on TSE to do it for them.

## 19 II. ARGUMENT

### 20 A. COBRA AND AHAC WERE NOT INDISPENSIBLE AT THE TIME BRAHMA 21 FILED THE COMPLAINT

22 The Ninth Circuit has held that indispensability is determined at the time of filing. Brahma  
 23 improperly claims that a party's indispensability is determined at the time of removal. (Mot. 8-9.)  
 24 Brahma has no support for this contention. Indeed, Brahma does not cite to a single case where a  
 25 nondiverse party seeks to intervene after the case has already been removed under diversity.  
 26 Instead, Brahma cites only to the law that *removal* based on diversity jurisdiction is determined at  
 27  
 28

1 the time of removal. (Opp. at 8.)<sup>2</sup> However, a court’s analysis for removal is different from  
 2 determining whether to recognize a nondiverse party’s right to intervene.

3 Contrary to Brahma’s incorrect contention, the *Mattel* decision specifies that the  
 4 indispensability inquiry looks *at the time of filing*. In *Mattel, Inc. v. Bryant*, Mattel sued its former  
 5 employee, Bryant, in state court for breach of an employment agreement. Bryant removed the  
 6 action to federal court under diversity jurisdiction. *See* 441 F. Supp. 2d 1081, 1091-94 (C.D. Cal.  
 7 2005). In assessing whether removal was proper, the district court analyzed its jurisdiction at the  
 8 time of removal. *Id.* at 1093. Afterwards, a competitor (and Bryant’s new employer), sought to  
 9 intervene as a non-diverse defendant. After finding that the competitor’s intervention was proper  
 10 under Rule 24(a)(2), the district court held that “unless it was ‘indispensable’ under Rule 19(b) *at*  
 11 *the time Mattel filed the Complaint*, [the competitor] did not destroy diversity by intervening.” *Id.*  
 12 at 1095 (emphasis added). Because the competitor was not indispensable at the time Mattel filed  
 13 the complaint, the court found that “the post-removal intervention of a non-diverse, non-  
 14 indispensable defendant” would not destroy diversity. *Id.* at 1098. The Ninth Circuit affirmed. *See*  
 15 *Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1014 (9th Cir. 2006). The Ninth Circuit rule is consistent  
 16 with that applied in the other circuits. *See, e.g.*, 15 Moore’s Federal Practice § 102.16(2)(b)(ii)  
 17 (“The addition of a dispensable, nondiverse party who did not have an interest in the original  
 18 complaint at the time it was filed does not destroy diversity jurisdiction.”).

19 Other courts have similarly found, in situations such as this one, that intervention of a non-  
 20 diverse party in a removed, diversity jurisdiction case does not defeat the court’s jurisdiction so  
 21 long as the non-diverse party was dispensable at the filing of the complaint. *See, e.g., McCormick*  
 22 *v. McCrary*, No. 3:09-cv-0034-HRH, 2010 U.S. Dist. LEXIS 152197, at \*8 (D. Alaska May 11,  
 23 2010) (in a diversity removal proceeding, analyzing whether a non-diverse party was  
 24 indispensable to the action at the time it was commenced); *JMA Energy Co., LLC v. BJ Servs. Co.*  
 25 *USA*, No. CIV-08-738-M, 2009 WL 1856216, at \*3 (W.D. Ok. June 26, 2009) (analyzing, in a  
 26  
 27

28 <sup>2</sup> *See Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985) (analyzing an action for removal based on diversity jurisdiction); *Strotek Corp. v. Air Transport Ass’n. of America*, 300 F.3d 1129, 1131 (9th Cir. 2002) (same); *Takeda v. Northwestern Nat. Life Ins. Co.*, 765 F.2d 815 (9th Cir. 1985) (same).

1 diversity removal case, whether a non-diverse party was indispensable at the time the action  
 2 commenced); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1996 U.S.  
 3 Dist. LEXIS 18818, at \*13-15 (N.D. Ill. Dec. 16, 1996) (finding that, after removal, the  
 4 intervenors were not indispensable parties at the time the suit was filed, and thus should not  
 5 deprive the court of diversity jurisdiction).

6 Here, as in *Mattel*, Cobra and AHAC were dispensable—not indispensable—parties at the  
 7 time Brahma filed its original complaint in state court on July 17, 2018. *See* ECF No. 55, p. 2  
 8 (citing ECF No. 1-1). Cobra first recorded the Cobra Surety Bond issued by AHAC, the basis  
 9 upon which Cobra and AHAC premise their intervention, on September 6, 2018. *See* ECF No. 16-  
 10 11. Prior to recording the Cobra Surety Bond, Cobra and AHAC had no interest in this case.  
 11 Brahma’s claims against TSE were for breach of contract, breach of the implied covenant, unjust  
 12 enrichment, and violation of NRS 624. *See* ECF No. 1-1. Thus, on July 17, 2018, the date the  
 13 complaint was filed, Cobra and AHAC were dispensable parties to this action. Brahma does not  
 14 contest this fact. And the Court should, accordingly, grant the Motion.

15 **B. ANALYZING INDISPENSABILITY AT THE TIME OF REMOVAL WOULD NOT**  
 16 **PREVENT GAMESMANSHIP**

17 Analyzing indispensability at the filing of the complaint, rather than the time of removal,  
 18 makes sense because it prevents parties from gaming the system, a deterrent that would not exist if  
 19 analyzed from the time of removal. Rather, examining whether the intervenor was  
 20 “indispensable” when the action was filed “prevent[s] collusion between parties to avoid  
 21 jurisdictional requirements.” *Mut. Fire, Marine & Inland Ins. Co.*, 726 F. Supp. at 481. “If the  
 22 rule were otherwise, the requirement of complete diversity could be avoided by having one party  
 23 bring an action while the indispensable party waits and then intervenes as of right under the  
 24 court’s ancillary jurisdiction.” *Id.* For example, in *Mattel*, the Ninth Circuit noted that “collusion  
 25 with the plaintiff is manifestly absent”, and as such, the “diversity required by 28 U.S.C. § 1332 is  
 26 satisfied together with the judge-made rule of complete diversity and the judge-made exception  
 27 for a non-indispensable defendant-intervenor.” 446 F.3d at 1013.

28 ///

1 Here, there is no allegation that the parties colluded to avoid the requirement of complete  
 2 diversity to obtain access to federal court. Nor would such a suggestion make sense given that  
 3 Brahma initiated the case in state court. Indeed, because the case was removed from state court,  
 4 there is a “*prima facie* absence of effort by the plaintiff to circumvent the complete diversity  
 5 requirement.” *Mattel*, 441 F. Supp. 2d at 1096 (citing Joan Steinman, *Supplemental Jurisdiction in*  
 6 *§ 1441 Removed Cases: An Unsurveyed Frontier of Congress’ Handiwork*, 35 Ariz. L. Rev. 305,  
 7 347 (1993)).

8 Moreover, Brahma’s argument for assessing indispensability as of removal should be  
 9 rejected because looking at the time of removal makes no sense. The date of removal is not  
 10 relevant to the goal of the rule—*i.e.*, to prevent a plaintiff’s collusive non-joinder to illegitimately  
 11 gain access to federal court. Of course, collusive non-joinder will rarely, likely never, be an issue  
 12 in removed cases because those cases, by definition, start out in state court. And cases that have  
 13 analyzed the intervention of non-diverse parties in removed, diversity cases do not support the  
 14 notion that indispensability should be determined as of the date of removal. Rather, the date of  
 15 filing controls no matter how the case came to rest in federal court. The Court should do likewise  
 16 and assess Cobra’s status as of the date Brahma originally filed this action, not the day TSE  
 17 removed it.

18 **C. BRAHMA’S NEWLY-CONTRIVED INDISPENSABILITY ARGUMENT SHOULD**  
 19 **BE REJECTED AS AN ATTEMPT TO ONCE AGAIN UNDERMINE THE**  
 20 **COURT’S JURISDICTION**

21 Brahma’s claim that Cobra is an indispensable party has no basis. Brahma’s prior  
 22 arguments in this case confirm as much. If Brahma believed that Cobra and AHAC were  
 23 indispensable parties, it could have – and should have – made that argument in September 2018  
 24 when TSE removed the case to federal court. Brahma did not. Nor did Brahma allege that Cobra  
 25 and AHAC are indispensable in its affirmative defenses to TSE’s counterclaims. (*See* Dkt. 10 at  
 26 5-6.) Brahma surely would have argued this point before, when it was trying to legitimize its  
 27 forum shopping, if it felt there was any validity to it since the failure to join an indispensable party  
 28 would have required the Court to dismiss this case. *See, e.g., Takeda v. Northwestern Nat’l Life*

{01649938;1}

1 *Ins. Co.*, 765 F.2d 815, 821 (9th Cir. 1985).

2 At best, Brahma's new position that Cobra and AHAC are indispensable parties is merely  
 3 another senseless run at getting this case remanded to state court. If the Court were to find that  
 4 Cobra and AHAC are indispensable, Brahma's next step will likely be to make a motion to  
 5 remand the case back to state court based on un-joined "indispensable" parties. The Court already  
 6 found that Brahma's forum shopping was an attempt to subvert the Court's jurisdiction over this  
 7 case. (Dkt. 55 at 8.) The Court should—again—put an end to Brahma's gamesmanship and  
 8 permit Cobra and AHAC, which Brahma admits are necessary parties to this action, to intervene  
 9 to protect their vital interests.

### 10 III. CONCLUSION

11 For the foregoing reasons, and those discussed in their Moving Brief, Cobra and AHAC  
 12 respectfully request that the Court grant their Motion to Intervene in this action as of right under  
 13 Fed. R. Civ. P. 24(a), or the alternative, under to Fed. R. Civ. P. 24(b), and to grant them such  
 14 other relief as the Court deems just and proper.

15 DATED this 9<sup>th</sup> day of December, 2019.

16 WEIL & DRAGE, APC

17 /s/ *Jeremy R. Kilber*

18 By: \_\_\_\_\_

19 Geoffrey Crisp, Esq.

20 Nevada Bar No. 2104

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25 *Attorneys for Proposed Defendants-Intervenors,*

26 *COBRA THERMOSOLAR PLANTS, INC.,*

27 *and AMERICAN HOME ASSURANCE*

28 *COMPANY*



**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of December, 2019, a true and correct copy of the foregoing **REPLY IN FURTHER SUPPORT OF 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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*/s/ Joanna Medina*

\_\_\_\_\_  
Joanna Medina, an Employee of  
WEIL & DRAGE, APC

## **EXHIBIT 30**

JAN 13 2020

Nye County Clerk  
**Terri Pemberton**  
Deputy

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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.

23 BRAHMA GROUP, INC., a Nevada corporation,

24 Lien/Bond Claimant,

25 vs.

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

Counter-Defendants,

CASE NO. : CV 39348  
Consolidated with:  
Case No. CV39799

DEPT. NO. : 2

ORDER DENYING COBRA  
THERMOSOLAR PLANTS, INC.'S  
AND AMERICAN HOME ASSURANCE  
COMPANY'S MOTION TO STAY

On November 21, 2019, Cobra Thermosolar Plants, Inc.'s ("Cobra") and American Home Assurance Company's ("AHAC")<sup>1</sup> Motion to Stay ("Motion") was heard by the Honorable Senior Judge Steven Elliott (the "Hearing"). Jeremy Kilber, Esq. of the law firm of Weil & Drage, APC

<sup>1</sup> Cobra and AHAC are referred to herein collectively as the "Cobra Parties."

1 and Philip D. Robben, Esq., of the law firm of Kelley Drye & Warren LLP, admitted *pro hac vice*,  
2 appeared on behalf of Defendants/Third Party Defendants Cobra and AHAC; Eric B. Zimbelman,  
3 Esq. of Peel Brimley LLP appeared on behalf of Defendant/Counterclaim Plaintiff Brahma Group,  
4 Inc. ("Brahma"), and Colby L. Balkenbush, Esq. of Weinberg, Wheeler, Hudgins, Gunn & Dial,  
5 LLC appeared on behalf of Plaintiff Tonopah Solar Energy, LLC ("TSE"), who was permitted to  
6 submit a Joinder and argue at the Hearing over Brahma's objection.<sup>2</sup>

7 The Court, having considered the Motion, Brahma's Opposition to the Motion  
8 ("Opposition"), TSE's Joinder to the Motion, and the Cobra Parties' Reply, and having heard  
9 argument of counsel at the Hearing, hereby ORDERS as follows, having rendered its oral decision  
10 from the bench on November 21, 2019.

11 **II. FINDINGS OF FACT AND CONCLUSIONS.**

12 **A. FINDINGS OF FACT.**

13 1. This case has a lengthy history, the entirety of which need not be repeated here.  
14 Brahma recorded a Notice of Lien ("Lien") against the Tonopah Solar Facility (the "Work of  
15 Improvement")<sup>3</sup> in the amount of \$12,859,577.74, as amended, and sought to enforce the Lien  
16 against the Work of Improvement by way of a Foreclosure of Lien Claim in Case No. CV 39348.  
17 Brahma also asserted various additional claims against TSE, including breach of contract, breach  
18 of the duty of good faith and fair dealing, and violations of NRS 624 (the "TSE Claims").

19 2. Subsequently, the Cobra Parties recorded a surety bond pursuant to NRS 108.2415  
20 (the "Surety Bond") to replace and release the Work of Improvement as security for the Lien. Upon  
21 the recordation of the Surety Bond, the Lien attached to the Surety Bond.

22 3. On April 17, 2019, this Court entered a Stipulation and Order in Case No. CV39348  
23 ("April 17 Stipulation"), whereby Cobra agreed that (i) Brahma "shall be entitled to file (without  
24 Cobra contesting, disputing or opposing) BGI's Consolidated Amended Pleading," (ii) "Cobra's

25 <sup>2</sup> Brahma objected to TSE's participation in the proceedings on the grounds that (1) TSE requested and received from  
26 this Court an Order staying all claims against TSE pending the outcome of certain motions then pending in the United  
27 States District Court for the District of Nevada (the "Federal Court") in Case No. 2:18-CV-01747-RFB-GWF (the  
28 "Federal Court Action"), (2) TSE requested and received from the Federal Court an Order enjoining Plaintiff from  
litigating its claims against TSE in the state courts of Nevada and (3) TSE has refused to participate in (i) the Early  
Case Conference, (ii) preparation of the Joint Case Conference Report and (iii) discovery in this action.

<sup>3</sup> Brahma's Notice of Lien had also attached to some, but not all, of the real property on which the Work of Improvement  
sits.

1 counsel shall accept service of [Brahma's] Consolidated Amended Pleading," and (iii) Cobra shall  
2 file an Answer to the Consolidated Amended Pleading within 20 days ...".

3 4. This Court subsequently consolidated Case No. CV39799 with Case No. CV 39348  
4 ("Consolidated Action"), and Cobra filed an answer in the Consolidated Action.

5 5. Brahma seeks recovery against the Cobra Parties and the Surety Bond for the  
6 lienable amount due and owing to Brahma (the "Claim on Surety Bond") pursuant to NRS 108.221  
7 to 108.246, et. seq.

8 6. On September 29, 2019, the Federal Court enjoined Brahma "from litigating [only]  
9 the following claims alleged against [TSE] in any state court action: 1) breach of contract, 2) breach  
10 of implied covenant of good faith and fair dealing and 3) violation of NRS 624" (collectively, the  
11 "Enjoined Claims").

12 7. While the Federal Court enjoined Brahma from prosecuting the Enjoined Claims in  
13 the Consolidated Action (the "Federal Court Injunction"), it did not enjoin Brahma from  
14 prosecuting the Claim against Surety Bond in the Consolidated Action.

15 8. Although the Claim on Surety Bond has been pending in this Court since September  
16 25, 2018 (and the Cobra Parties have fully participated in the Consolidated Action, as parties, since  
17 then), the Cobra Parties filed (i) the instant Motion with this Court on October 16, 2019, and (ii) a  
18 Motion to Intervene in the Federal Court Action on October 18, 2019, seeking to require Brahma  
19 to pursue its Surety Bond Claim in that forum. The Cobra Parties' Motion to Intervene is pending.

20 9. Cobra now asks this Court to stay Brahma's Claim on Surety Bond indefinitely, or  
21 at a minimum, until the Federal Court rules on the Motion to Intervene in the Federal Court Action.  
22 For the reasons set forth below, this Court denies the Motion.

23 10. Any finding of fact herein that is more appropriately deemed a conclusion of law  
24 shall be treated as such.

25 **B. CONCLUSIONS OF LAW.**

26 1. NRS 108.213 to 108.2425 (the "Bonding Statute") creates an independent cause of  
27 action against a surety bond, the bond principal and the surety. Specifically, NRS 108.2421  
28 provides:

1 A lien claimant is entitled to bring an action against the principal and surety on the  
2 surety bond and the lien claimant's debtor in any court of competent jurisdiction  
3 that is located within the county where the property upon which the work of  
4 improvement is located.

5 2. By posting the Surety Bond pursuant to NRS 108.2415(1), the Cobra Parties caused  
6 Brahma's Lien (recorded against the Work of Improvement) to be released.<sup>4</sup> Brahma's Lien now  
7 attaches to the Surety Bond, which (i) replaces the Work of Improvement as security for Brahma's  
8 Lien,<sup>5</sup> and (ii) entitles Brahma to bring its action against the Surety Bond in this Court.

9 3. Further, by (i) posting the Surety Bond, (ii) entering the April 17 Stipulation and  
10 (iii) filing its Answer the Cobra Parties have submitted themselves to the jurisdiction of this Court  
11 and appointed the Clerk of the Court as their agent pursuant to NRS 108.2423 which provides in  
12 part:

13 By entering into a surety bond given pursuant to NRS 108.2415, the principal and  
14 surety submit themselves to the jurisdiction of the court in which an action or suit  
15 is pending on a notice of lien on the property described in the surety bond, and the  
16 principal and surety irrevocably appoint the clerk of that court as their agent upon  
17 whom any papers affecting the liability on the surety bond may be served. The  
18 liability of the principal may be established by the court in the pending action.

19 4. Cobra (not TSE) is the Surety Bond principal against whom Brahma has a claim  
20 and against whom Brahma seeks a judgment, along with the surety (AHAC) and the Surety Bond,  
21 in the county in which the Work of Improvement is located. While Brahma also has claims against  
22 TSE, those contract-based claims were removed to the Federal Court and now reside there  
23 exclusively by virtue of the Federal Court Injunction.

24 5. While Brahma has now been required to pursue the TSE Claims in Federal Court,  
25 there is nothing in Nevada's Lien Statute that obligates Brahma to pursue its Claim on Surety Bond  
26 in the Federal Court. Similarly, nothing in Nevada's Lien Statute requires Brahma to wait to proceed  
27 on its claim against the Surety Bond and the Cobra Parties while it pursues the TSE Claims against  
28 TSE in Federal Court.

6. The Cobra Parties argue that NRS 108.2421 requires a lien claimant (such as  
Brahma) to bring an action against its debtor (here, TSE) in the same action as it brings its Claim

<sup>4</sup> 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.").

<sup>5</sup> See NRS 108.2415(6)(a) ("the surety bond shall be deemed to replace the property as security for the lien.").

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1 on Surety Bond against the Surety Bond, the bond principal (Cobra) and the surety (AHAC). The  
2 Court does not find this argument to be persuasive. Nothing in NRS 108.2421 mandates that a lien  
3 claimant must bring an action against its debtor in the same action as the principal and surety who  
4 caused a surety bond to be issued. To the contrary, NRS 108.2421 simply confirms that a lien  
5 claimant is "entitled to bring an action against ... the lien claimant's debtor in any court of  
6 competent jurisdiction that is located within the county where the property upon which the work of  
7 improvement is located."

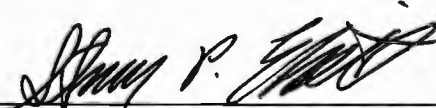
8 7. The Court is personally aware of instances in which contractors have become  
9 insolvent or otherwise judgment proof and, like here, their bonding companies were required to  
10 stand in their shoes and defend claims against the contractors in the forum "where the property upon  
11 which the work of improvement is located."

12 8. Accordingly, the Court does not find that TSE is a necessary or indispensable party  
13 and finds that the Consolidated Action can proceed even though TSE is not a party.

14 9. Any conclusion of law herein that is more appropriately deemed a finding of fact  
15 shall be treated as such.

16 **NOW THEREFORE, IT IS HEREBY ORDERED** that the Cobra Parties' Motion to Stay  
17 is ***DENIED***.

18 Dated this 10 day <sup>January</sup> ~~December~~ 2019.

19  
20   
21 Senior Judge Steven Elliott

22 Submitted by:  
23 **PEEL BRIMLEY LLP**

24 **RICHARD L. PEEL, ESQ. (NV Bar No. 4359)**  
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