

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

Electronically Filed
Oct 03 2019 04:24 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

v.

Brahma Group, Inc.,
Respondent

Appeal
Fifth Judicial District Court
The Honorable Steven P. Elliott
Case No. CV 39348

**APPELLANT'S APPENDIX
VOLUME 12**

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In the Matter Of:

Tonopah Solar Energy, LLC. vs Brahma Group, Inc.

CV 39348
D2

FILED
FIFTH JUDICIAL DISTRICT
MAY 17 2019
Nye County Clerk
DEBRA BENNETT Deputy
5-17-19

MOTION HEARING

December 11, 2018

Job Number: 514280

1 CASE NO. CV 39348

2 DEPT NO. 2

3

4 IN AND FOR THE FIFTH JUDICIAL DISTRICT COURT

5 COUNTY OF NYE, STATE OF NEVADA

6

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

8

Plaintiff,)

9

vs.)

10

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

11

12 Defendant.)

13

) MOTION HEARING

14

15 BEFORE THE HONORABLE STEVEN ELLIOTT, DISTRICT COURT JUDGE

16

1520 EAST BASIN AVENUE

17

PAHRUMP, NEVADA 89060

18

19 ON TUESDAY, DECEMBER 11, 2018

20

AT 10:04 A.M.

21

22

23

24 Reported by: Deborah Ann Hines, CCR #473, RPR

25

Job Number: 514280

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1 TUESDAY, DECEMBER 11, 2018

2 ---cOo---

3 THE COURT: Good morning. You may be
4 seated. This morning we're here in the Tonopah Solar
5 Energy versus Brahma Group case, and we're here for
6 motions. I guess maybe I should make a record, first
7 of all, as to this issue. The parties have
8 stipulated to an order to continue hearing date for
9 H & E Equipment Services, Incorporated's motion to
10 intervene only. So I have signed that stipulation
11 today so that can be moved on.

12 And then there's just a whole bunch of
13 things that, you know, are probably to be considered
14 today, and I'm not sure the order and how the parties
15 want to do it, but we do have the attorney's fees
16 issue. And then we have Tonopah Solar Energy has
17 filed the motion to strike, motion to dismiss, or
18 motion for stay, so all that's potentially on for a
19 ruling.

20 MR. ZIMBELMAN: If I may, your Honor, we did
21 confer just before you came in about the order of
22 hearing the motions.

23 THE COURT: Good.

24 MR. ZIMBELMAN: We have a plan. The plan
25 would be, if you approved, it would be motion for

1 fees heard first, then have Tonopah Solar's motion to
2 strike, et cetera, and leave the motion to amend for
3 the last.

4 THE COURT: Okay. All right.

5 MR. ROBERTS: Your Honor knows our
6 opposition to the motion to amend is based on the
7 fact that you can't amend a void pleading. And if
8 the court -- which way the court goes in the dismiss
9 may really move the issue for ruling on the motion
10 for leave to amend. Thank you, your Honor.

11 THE COURT: Okay. Great. Thank you. Well,
12 Brahma Group then has the motion for attorney's fees,
13 so I suppose you would be the first one to speak as
14 to the motion.

15 MR. ZIMBELMAN: Ready to hear that, your
16 Honor?

17 THE COURT: Yes, sir.

18 MR. ZIMBELMAN: Thank you. Good morning,
19 your Honor. My name is Eric Zimbelman. You may
20 recall from the last time we were here, given that I
21 argued the motion to expunge, which was the
22 underlying motion, it seems appropriate that I argue
23 in support of our motion for attorney fees and costs
24 arising from that proceeding.

25 As you know, that's a proceeding arising

1 under NRS 108.2275, particularly subsection 6
2 permits -- it requires the court to award reasonable
3 attorney's fees and costs to the prevailing lien
4 claimant, and that's us. The Tonopah Solar doesn't
5 dispute that we're entitled to fees, they simply
6 don't like the number. Now, granted it's a fairly
7 large number, and I guess I'm not surprised that they
8 are opposing it. Nonetheless, it's --

9 THE COURT: So the number is \$78,417 plus
10 whatever it costs to --

11 MR. ZIMBELMAN: I estimated approximately
12 \$7500 for the reply brief, which was fairly
13 extensive, responding to a number of their arguments,
14 and obviously coming up here and appearing today.
15 And presumably there's going to be an order involved
16 and so forth. So that's a rough estimate. That's
17 what I can give the court today.

18 You know, the total dollars spent may seem
19 significant, but we're talking about a proceeding
20 that we didn't ask for to defend against an attempt
21 to expunge to eliminate the only security that my
22 client had for a lien of in excess of \$12.8 million.

23 And Nevada public policy is extremely
24 sensitive to the importance of mechanics liens. That
25 is it recognizes that the contractors are in a

1 vulnerable position. And this is directly out of the
2 Fontainebleau case. Vulnerable position, they extend
3 large blocks of credit, significant time, labor and
4 materials, have any number of workers vitally
5 dependent upon them. This is why mechanics liens are
6 important. It's why mechanics liens statute exists,
7 and more importantly it's why NRS 108.2275 has an
8 internal attorney fees provision, right, because the
9 lien statute itself has a fee provision. But 2275
10 says, look, if you're going to bring that motion, you
11 better be prepared to prevail, because if you don't,
12 you're going to have to pay the other side's
13 reasonable attorney's fees and costs for defending
14 that motion.

15 And you don't have to bring a motion to
16 expunge under 2275, you have other options. You can
17 proceed to discovery. If you feel you have a
18 legitimate basis, you can file a motion for summary
19 judgment. You can proceed to trial and argue that
20 the lien is invalid for some reason. But they chose
21 to engage in that proceeding. And, frankly, it would
22 have been malpractice for us not to pull out all the
23 stops to try to defeat that petition.

24 Now, that doesn't mean acting unreasonably
25 or spending unreasonable dollars, and we don't

1 believe we did, but in general I compare this case to
2 some of the cases they cited in their opposition,
3 which are effectively discovery motions, and I don't
4 see any comparison whatsoever. This is a vastly
5 different case with vastly different stakes, and, you
6 know, again the result was it's expensive. And our
7 client has incurred and paid those fees and they're
8 entitled to have them reimbursed.

9 Now, obviously the court has to engage in a
10 Brunzell analysis. That's in every case we read.
11 You know, if you don't say that you looked at the
12 Brunzell cases, well, you're going to be reversed.
13 But if you do, and you analyze them, your decision is
14 subject to great discretion. It can be tempered only
15 by reason and fairness as long as it's supported by
16 substantial evidence. I represent to the court that
17 you have substantial evidence in front of you to
18 support the award that we have requested.

19 Now, let's look at some of the Brunzell
20 factors, if you don't mind. The first one is the
21 advocate's qualities, including ability, training,
22 education, experience, professional standing, and
23 skill. Now, they aren't disputing that we are
24 quality attorneys, but by the same token, Tonopah
25 Solar's attorneys are excellent lawyers. Mr. Roberts

1 is a terrific attorney and a heck of an advocate.
2 And when you are presented with both a party that is
3 sophisticated and high quality attorneys, you
4 don't -- and you never would -- do a slop job, right?
5 You need to present your best case. You need to put
6 it out there, and I believe that we did that. I
7 believe that we did that appropriately.

8 Another Brunzell factor is the character of
9 the work by which the courts may -- the difficulty,
10 the intricacy, importance, as well as the time and
11 skill required, the responsibility imposed, and the
12 prominence and character of the parties when
13 affecting the importance of the litigation. Well,
14 the complexity, your Honor, was driven part by not
15 just the issues that were brought to the court, but
16 the way in which they came here. Because initially
17 their motion was based upon the following arguments,
18 that the lien attached to the BLM property, remember
19 that, and we demonstrated that that wasn't the case,
20 that the lien was void for that reason and it
21 couldn't be amended. Again we demonstrated the
22 liberality of the lien statute as far as amendments
23 are concerned.

24 They argued that Brahma could only lien
25 parcels on which it worked, and we made a lot of

1 arguments about the right to lien the work of
2 improvement, the project as a whole. That no notice
3 of right to lien, a pre-lien notice wasn't given. We
4 showed you that, yes, indeed it was, even though we
5 didn't believe it was necessary.

6 Then on reply they made the argument about
7 sovereign immunity. They argued effectively that our
8 lien impaired the government's security interest.
9 You remember that. And we talked about that for a
10 very long period of time, when we were here last. We
11 didn't brief that initially because that wasn't an
12 argument they made in our initial motion. They
13 argued sovereign immunity only as it related to the
14 land and their argument that we couldn't lien the
15 property.

16 Well, on reply we -- or in response to their
17 reply I prepared a supplemental statement of
18 authorities where I showed the court the cases that
19 we would be talking about when I got up here in front
20 of you. We didn't make legal argument, we just
21 presented the cases. They responded with a reply
22 brief. So both parties had some time to go back and
23 look at that and analyze, synthesize, develop,
24 prepare. We both did that. I certainly did that.
25 And so we spent a good deal of time on that issue,

1 and it's an important issue and it's certainly not a
2 simple issue. The I guess long story short, this
3 isn't a discovery motion, right. This is a big deal,
4 and it's a complex deal.

5 Another Brunzell factor is the prominence
6 and character of the parties. I mentioned
7 previously, Tonopah Solar is obviously a highly
8 sophisticated company doing these solar projects.
9 These are big deals. And we certainly have an
10 important -- a big player on the other side, but
11 consider this: Given the sovereign immunity
12 arguments, we were arguing against in effect the
13 United States of America, right, because they're
14 arguing the government's interest. We had to respond
15 to those arguments. We had to respond to the
16 argument, not made by the government itself, but by
17 somebody who purports to speak for the government,
18 but the government's interest were impaired. So we
19 had to deal with that as well.

20 The importance of the litigation I
21 mentioned. Obviously a \$13 million lien claim. It's
22 a big deal. It's an important thing. And it's, you
23 know, effectively malpractice not to bring out your
24 best case, and I feel that we did that. I know it's
25 everything to Brahma. And Brahma didn't pick this

1 fight. They obviously have their lien. We obviously
2 had their claims. But they didn't pick to engage in
3 this proceeding and this special proceeding.

4 And I'd ask you when you consider all of
5 these factors and you put them all together and you
6 consider where we were at and why we did what we did
7 and how we responded, you know, put yourself in
8 Brahma's shoes for a second. Your lien is at risk.
9 Your only security. You aren't thinking about hiring
10 Joe off the street. You're not thinking about
11 putting in, you know, a short brief with a few
12 citations and hope it goes well. That's not going to
13 work, not against Mr. Roberts, not against frankly
14 anybody.

15 I'd also suggest that the importance of the
16 litigation extends beyond just our lien, right.
17 There are other potential lien claimants out at that
18 project. This isn't the first case to arise from
19 that project, it certainly won't be the last. And
20 Nevada public policy itself is obviously implicated
21 here, and I think this is a perfect example of where
22 Nevada public policy fits into this case and where
23 this case fits into Nevada public policy. It's a
24 perfect plan.

25 The next factor is the time, skill, and

1 attention given to the work. Frankly, their argument
2 is we spent too much time. We spent too much effort,
3 overstaffing, redundancy and the like. And I'll talk
4 about those issues in a moment. Well, respectfully I
5 believe that we gave the appropriate amount of
6 staffing, appropriate amount of redundancy,
7 appropriate amount.

8 And obviously the results is the last
9 factor. And of course we won. And, yeah, it's a big
10 deal. And what we won was the preservation of a
11 nearly \$13 million lien claim. That's a lot more
12 important than whether somebody provided appropriate
13 responses to an interrogatory or request for
14 production.

15 So let's talk about their biggest complaints
16 and concerns. They argue that our rates are too
17 high, that there is a prevailing rate in the state of
18 Nevada that is lower than what we billed. Well, I
19 would -- frankly, I would dispute that there's such a
20 thing as a prevailing rate. It's a market economy.
21 Attorneys can charge what their clients will pay them
22 for the work they feel they're being appropriately
23 provided.

24 Now, that said, we haven't submitted the
25 court with rates request of \$700 or something, some

1 crazy number, and I've seen those kinds of things.
2 That's not out of the -- maybe a little bit out of
3 the ordinary, but it's certainly not unheard of. Our
4 rate requests were between 250 and \$425 an hour, \$425
5 being from my partner, Mr. Peel, who is obviously a
6 widely recognized expert in Nevada lien law, somebody
7 who wrote the right to work -- right to stop work
8 statute, someone who effectively rewrote the Nevada
9 lien statute in 2003 and 2005, who knows more about
10 lien law than I would suggest anybody in the state of
11 Nevada.

12 And you'll remember that Mr. Peel grabbed
13 the microphone from me at one point in our argument
14 here last time, and I'm glad that he did because he
15 can provide a perspective, a historical perspective
16 of how these statutes came about and why certain
17 changes were made that nobody can do besides him, in
18 my view. He was there from the beginning. He saw it
19 through. He was involved in the legislative process.
20 So, you know, important, and, frankly, that he only
21 bills \$425 an hour, and I've always felt he was
22 under-billing. Myself, \$400 an hour. I've been
23 practicing law for 20-plus years, construction law
24 for 20-plus years. And, you know, no one wants to
25 brag about themselves. I feel it's an appropriate

1 rate for the work that I've performed and provided to
2 our client.

3 Their biggest beef is with our associates,
4 but our associates are highly trained, highly skilled
5 and very experienced associates, particularly
6 Mr. Cox, who they raised a complaint about, but
7 Mr. Cox is near partner level. He's not a partner
8 but he's near that, and he brings a great deal to the
9 table, was very, very important to our team approach.
10 So we feel like he's a highly skilled, highly trained
11 person.

12 THE COURT: As I recall, one of the factors
13 that they felt was overbilling concerning Mr. Cox was
14 they said, well, some recent case that there was a
15 charge for \$250 for his services --

16 MR. ZIMBELMAN: Right.

17 THE COURT: -- versus the 350 you're asking
18 for, and maybe you can talk about that.

19 MR. ZIMBELMAN: Are you talking about the
20 other case that we had recently submitted a fee
21 request on?

22 THE COURT: Well, I forgot what the other
23 case was, but they just --

24 MR. ZIMBELMAN: Yeah, so what they did is --

25 THE COURT: Some other case fairly recently.

1 MR. ZIMBELMAN: We went dumpster diving for
2 prior fee motions that we had filed, and we had done
3 one in a case called Manhattan lien litigation, but
4 that case dates back to 2008, your Honor. It
5 involved -- it went up to the supreme court, it came
6 back down, it bounced, and finally went to trial for
7 a number of the remaining lien claims, the ones who
8 survived that gauntlet, and there were only a few of
9 them, went to trial and we prevailed against one or
10 both of the general contractors on that project.

11 Now, those rates that we submitted, they're
12 legacy rates. They date back. They're reduced. And
13 so, you know, to me this is not that, right. Every
14 case is different. And particularly the time they
15 were citing about Mr. Cox it's from more than two
16 years ago, so, you know, I'm not sure what bearing
17 that has on anything.

18 And, you know, they cited to some cases
19 saying, well, here are some ranges and so forth, and
20 we cited some cases saying here's some ranges, but
21 really it's up to you. And the rates that we charge
22 are the rates that we feel are appropriate and the
23 rates that our client feels is appropriate, and, you
24 know, at the end of the day it achieved an effective,
25 positive result for our client. So getting down to

1 the weeds, but I don't think that that's really what
2 we need to do. I think we need to look at the bigger
3 analysis and the bigger picture about where we're at.

4 Overstaffing is an argument that they make.
5 And, you know, I think my response, you probably saw
6 my reply, collaboration isn't redundancy. I mean,
7 teamwork requires you to work together. It requires
8 you sometimes to do work that is reflected on your
9 billing statements that may seem similar, but it's
10 not the same thing. It's not doing the exact same
11 thing. And even when it is, right, reviewing a brief
12 and revising the brief, for example, well, the edits
13 that Mr. Peel makes are different than the edits that
14 I make and they're different than the drafting that
15 Mr. Cox provided initially. And we all have a
16 process and an input.

17 You know, we have a company motto which is,
18 "There's no pride in authorship." That's the best
19 way to approach a work product, mind you. You think
20 you're right, you really aren't paying attention,
21 because somebody else has some good ideas and they
22 need to be considered and they need to be
23 incorporated, and that's how we work, and we think it
24 works for us and we think it works for our clients.

25 They argue as well that we engaged in block

1 billing. Well, you know, outside of insurance
2 company attorneys, say that virtually everybody I
3 know engages in some form of block billing. It's
4 almost impossible to --

5 THE COURT: Maybe you have to describe block
6 billing.

7 MR. ZIMBELMAN: I think the argument is --

8 THE COURT: Actually, I never worked for
9 firms like you, the two of you have where you're, you
10 know, high end, you know, corporate counsel people.
11 You know, I don't understand the billing.

12 MR. ZIMBELMAN: So I think block billing,
13 it's like saying, okay, I spoke on the telephone
14 about X, Y and Z, point 02, okay. And on that same
15 day, 20 minutes later, I reviewed a letter from
16 opposing counsel, point 3. And on that same day, 20
17 minutes later, I began working on a brief, and I
18 worked on that brief for 2.3 hours. And then on that
19 same day -- well, what we do is we say, look, on the
20 21st of October, I did these things.

21 Now, where that could create a problem is if
22 I was working on the brief in support of opposition
23 to the motion to expunge, and I also added some time
24 for preparing a lien amendment, right, not, strictly
25 speaking, related to this motion to expunge. But you

1 will not see that in the invoices that we submitted
2 to your Honor because we opened a sub matter, the 03A
3 motion to expunge matter where we billed only the
4 time pertaining to this motion to expunge in that
5 matter. All other time that we spent we billed on
6 another matter.

7 So there is no time in those billings that
8 is not pertaining to this motion to expunge. In my
9 view that's the most important issue when you're
10 talking about block billing is can the court evaluate
11 whether and to what extent this work was done for on
12 behalf of the proceeding for which fees are being
13 requested, right. Sometimes at the end of a case
14 they'll argue, well, you should be entitled to fees
15 for this claim that you prevailed on but not this
16 claim that you prevailed on, and yet your block bill
17 contains some time for both. We don't have that
18 problem here, your Honor. Our time is one hundred
19 percent in response to the motion to expunge. So
20 from my view that's really not an issue that the
21 court should be worried about.

22 In addition, they make kind of a fuzzy math
23 argument that, hey, 80 percent of their time entries
24 are block billing. I didn't go fine-toothed comb and
25 try to determine whether that was, you know, whether

1 it was 68 or 72. I don't think they're right about
2 that, but even if they are right, they're asking you
3 to reduce our fees by 30 percent across the board,
4 even though, by their own admission, not all of our
5 time is block billed, so that doesn't make any sense.

6 And, you know, more importantly, and I've
7 cited to the Wells versus Metro Life case in my
8 brief, it's once of the cases they cited, and that
9 case actually rejected the U.S. district court's
10 across the board reduction of 20 percent and remanded
11 to the district court to explain how or why the
12 reduction fairly balances those hours that were
13 actually billed in block format. In other words, you
14 can't just say, well, it's block billing, therefore
15 I'm going to whack a big chunk of this. There has to
16 be an analysis. They made no effort to provide that
17 analysis to your Honor. I see no reason why your
18 Honor should try to make their arguments for them.

19 You know, they made some of what I consider
20 really nitpicks, and I added those at the end of my
21 reply brief. And they argued about things like the
22 allegation that we spent 41 hours purely drafting a
23 brief. Well, it's inconsistent with their argument
24 that we engaged in block billing, in other words,
25 that there are more than one thing on a particular

1 entry. So if it says 5.5 hours, and part of that was
2 working on a brief and part of that was doing some
3 other things pertaining to this motion that that was
4 purely drafting. That's just not correct. So
5 technically incorrect.

6 Even if it's true, this was some pretty
7 extensive, intense briefing, your Honor. And I, you
8 know, I feel very strongly that we have spent an
9 appropriate amount of time, not more and not less
10 than was necessary to achieve the result that was
11 required for our client.

12 They argued similarly that we spent 59.9
13 hours to prepare for and attend a hearing. But,
14 remember, we came here the first time before the case
15 was assigned to you by Judge Lane, and we had to
16 prepare then, and I had to be ready to go. And Judge
17 Lane assigned the case to your Honor, we went back
18 and during that period of time was when the
19 supplemental briefly happened about the sovereign
20 immunity, right. So there was a lot of stuff that
21 happened in between and even more things to prepare
22 for when we came back to see you. So we spent --
23 yeah, we spent a good deal of time getting ready. I
24 am not going to apologize for that. It's factually
25 detailed, legally detailed, as was the order that we

1 prepared that they disputed, and they submitted their
2 own countervailing order. You signed our order.

3 And then, you know, they're arguing about
4 the time we spent on the motion, this motion for
5 fees. I mean, I guess you can do a mini Brunzell
6 analysis, but our initial request was for nearly
7 \$80,000 in fees. Again, you need to do a fair job of
8 presenting your basis and your arguments for why
9 you're entitled to those fees, and I think we've done
10 that. And particularly on the reply I think we've,
11 you know, we've addressed their concerns in great
12 detail. I actually didn't draft the initial motion
13 because I was preparing for trial in another case,
14 but I got an opportunity to prepare the reply, and it
15 really gave me a chance to tell you how I feel about
16 this. And I really do feel very strongly that we did
17 everything we can, and we did it appropriately.

18 There's some argument about non-permitted
19 briefs. I mean, again, if you raise something on
20 reply, it shouldn't be a surprise that we submit a
21 supplemental statement of authorities. And, by the
22 way, they filed their own reply brief, sort of
23 sur-reply to those authorities.

24 And, finally, they argue that there's
25 inadequate documentation. You know, I think that our

1 billing statements reflect fairly what we've done and
2 advised our clients fairly what they're getting for
3 the money. Could you do better here or there? I
4 mean, everybody can do better. We can all do better.
5 But I believe that this isn't just a worked-on case,
6 thought-about case, right. We provide detail, and
7 you'll see that in our billing statements. And, you
8 know, if there's some lack of clarity or there's
9 some -- you know, I apologize, but we really do our
10 best and we think we've done a good job generally.

11 Your Honor, TSE concludes its opposition by
12 asking you to make a 70 percent across the board
13 reduction to give us 30 percent of the fees that we
14 have incurred on behalf of our client that our client
15 has paid defending the motion they brought. I submit
16 that that is wrong, that it's absurd, it's unfair.
17 You have a great deal of discretion today. I trust
18 that you'll exercise that appropriate and fairly. We
19 feel that we -- we feel we did it right. We feel
20 that we did nothing that we weren't supposed to do,
21 that we've billed for nothing that we weren't
22 entitled to, and that our client got good value for
23 the money they spent. And that, in my view, ought to
24 be the analysis the court engages in, that they
25 provide the value that they're asking for today, and

1 I submit that we did. Thank you. Any questions for
2 me, your Honor?

3 THE COURT: Thank you, Mr. Zimbelman.

4 All right. Let me get your brief here.
5 Okay.

6 MR. ROBERTS: Good morning, your Honor. Lee
7 Roberts for Tonopah Solar Energy.

8 THE COURT: Okay.

9 MR. ROBERTS: I want to start by saying that
10 we do not dispute that Mr. Peel and his legal team
11 are exceptionally skillful and very experienced in
12 these matters. And we're not arguing that it's
13 unreasonable for his client to be paying 425 for
14 Mr. Peel, 400 for Mr. Zimbelman. That's not the
15 point we're trying to make. In fact, I'll disclose
16 to the court that my rate on this matter is a little
17 higher than Mr. Peel's.

18 The argument that we're making is that when
19 you attempt to shift costs under a fee shifting
20 statute like this, the court is charged with setting
21 a reasonable rate and reasonable fees. The statute
22 doesn't give carte blanche. It only awards
23 reasonable fees. And I was thinking about it on the
24 drive here, I was stuck in traffic on the mountain,
25 about maybe a parallel for how I could put this in

1 context, and it came to me another place that the law
2 uses the term "reasonable" is in the duty of
3 reasonable care. And there's a little bracket in the
4 Nevada jury instruction for the duty of reasonable
5 care which says that the person whose conduct we set
6 up as a standard is not the extraordinarily cautious
7 individual nor the exceptionally skillful one, but a
8 person of reasonable and ordinary prudence.

9 So when you talk about reasonable attorney's
10 fees and reasonable rates, we're not talking about
11 the highest rate that an exceptionally skillful
12 lawyer can charge, it's a reasonable rate. And the
13 cases that we've cited to the court which talk about
14 the maximum rates that courts have awarded in the
15 past set up what is a reasonable rate, what's an
16 average rate for someone who can do this type of
17 work. And we would suggest that the average rate,
18 the reasonable rate, the rate that would customarily
19 be shifted in a case like this is much lower than the
20 actual rate charged, even though the actual rate
21 charged was higher.

22 And it's the same thing with the hours. The
23 court doesn't have to find that Peel Brimley acted
24 improperly, that they overcharged their client, that
25 they overworked the case in order to reduce the fees.

1 206 hours, they felt it was necessary to spend that
2 much to prepare for this hearing? We're not saying
3 that was malpractice or it was improper, but we are
4 saying that a reasonable attorney could have prepared
5 for that hearing with substantially less time
6 invested and with substantially less duplication of
7 effort.

8 And the Helix Electric motion for attorney's
9 fees that we cited the court was just filed in June
10 of 2018. It was just filed this year and had that
11 250 associate rate in for one of the same attorneys
12 on this case. And all the cases and the fees did
13 start in 2009, they continued until shortly before
14 that motion was filed, and that was the rate they
15 were charging for that case shortly before it was
16 filed in June of 2018.

17 So we do think that the court has the
18 discretion and should reduce the amount billed to
19 something that's more in line with what the average
20 attorney of ordinary prudence would have billed on
21 this case. And although our rates were higher, we
22 did bill substantially less time preparing for this
23 same hearing.

24 The block billing, an example I could give
25 to your Honor, the issue with block billing is that

1 in order to exercise your discretion, you're required
2 to review their bills and determine if the amount of
3 time they spent was reasonable for the task they
4 performed. But when you block bill, and you include
5 multiple tasks with only one time, it becomes then
6 impossible for the court to determine if the time
7 spent was reasonable because you can't tell how much
8 time was spent on each one of those activities.

9 Just by way of example, your Honor,
10 September 12 of 2018, continue preparations for oral
11 argument regarding TSE motion to expunge, travel to
12 Pahrump and participate in same, meeting with client
13 regarding decision, status and things to do, office
14 conference with Richard and Ronny regarding same, and
15 then one time entry of 8.5 hours. Well, let's say
16 the court decided it's improper to ask us to pay for
17 meeting with client regarding decision, status and
18 things to do, that we shouldn't pay for their meeting
19 with their client because that's not necessary work
20 to defeat the motion to expunge, and the court wanted
21 to eliminate that. It's now impossible for the court
22 to take that out of the fee calculation because
23 there's only one lump sum of 8.5 hours.

24 And that's the issue that we believe
25 necessitates some sort of an across the board

1 reduction for block billing. And this is something
2 that there is Nevada precedent to do to reduce time
3 when there is a block billing simply because of the
4 impossibility for the court to then determine the
5 reasonableness of the time spent on the individual
6 activities.

7 THE COURT: Mr. Roberts, hang on. I
8 certainly don't know the ins and outs of billing the
9 way you all understand it, because I didn't really
10 have to do that as a government lawyer and judge, but
11 it sounds like you're saying an example would be
12 meeting with your client, and I suspect that you're
13 probably going to have to bill something for meeting
14 with clients, particularly if your client is bugging
15 you a lot, I don't know, wants you to hold their hand
16 all the time, you know, you want to discourage that
17 because it's time that you could do other work.
18 Wouldn't you bill for that?

19 MR. ROBERTS: Absolutely I would bill for
20 that, my client would pay me for it, but if I was
21 seeking to recover for my opposition to a motion to
22 expunge, I don't think I could bill the other side
23 for that time. And I'm not saying this is an
24 improper way for them to bill their clients. I have
25 clients that do not allow block billing and require a

1 time for every entry, and I also have clients that
2 allow block billing like this, and it's perfectly
3 acceptable, with the agreement of the client.

4 The issue, and the sticking point, becomes
5 if you're trying to shift a portion of that time to
6 another party. And this is not attorney's fees under
7 the prevailing party where everything they did could
8 be tied to the attorney fee motion. This is a very
9 narrow entitlement only to attorney fees for opposing
10 the motion to expunge, and that that's why it's a
11 little bit different than a prevailing party type of
12 determination.

13 Regarding a few of the other arguments that
14 they've made, we do acknowledge this was complex, and
15 it was complicated, and there were a lot of issues.
16 But some of those issues were of their own doing, and
17 it was not us that increased some of the complexity
18 and time spent. For example, they justified the
19 59 hours to prepare for a couple of hours of our oral
20 argument by saying that we came here prepared to
21 argue before Judge Lane and then it was transferred
22 to you and we had to come back again. Well, what
23 they failed to point out is that I also showed up to
24 that hearing, I was prepared to move forward, they
25 asked to have it transferred to Judge Lane. They

1 asked to come back to him. I didn't oppose it but
2 I'm not the one who asked to transfer it to Judge
3 Lane, I mean to you from Judge Lane and increase that
4 time. This is something they asked for, and now I'm
5 being asked to pay for it. So I don't think it's as
6 simple as they pointed out.

7 There were five different lien amendments.
8 That complicated things.

9 THE COURT: But isn't it true that they
10 wouldn't have known that Judge Lane was going to
11 bounce it out to a senior judge? I assume that
12 wasn't in the thought process of doing that.

13 MR. ROBERTS: Well, your Honor, they're the
14 ones who asked Judge Lane to bounce it to you. We
15 were all here ready to argue, and they asked Judge
16 Lane to bounce it to you because of his prior
17 involvement with the underlying facts and disputes.
18 Now, we didn't oppose that, but I think if they said,
19 "And we're going to ask you to pay for it and we're
20 going to ask you to pay for our time in coming
21 today," I might have opposed it back then.

22 But the amendments, the complexity of the
23 repeated amendments, that was not created by us. The
24 court found, as you recall, in one of the central
25 issues was whether Brahma had intentionally attached

1 BLM land in their early lien filings such that is was
2 precluded from amending. That was a key part of the
3 issues. Well, they ultimately did file amendments
4 which clarified what they were seeking to attach
5 through their lien, but their first amendment
6 attached BLM land and said BLM was the owner, and
7 they created that issue. And the court may have
8 found they didn't intentionally create it, but this
9 was a mess of their own doing that created this
10 complexity.

11 And certainly we were justified under these
12 facts where the initial lien filings had
13 intentionally -- had, excuse me, had at least
14 nominally attached to BLM land and where there was
15 Nevada case law talking about void pleadings, it was
16 a good faith argument. And I do feel that awarding
17 the totality of the fees, given how high they are in
18 connection with this single motion, would be somewhat
19 punitive. We agree they're owed fees, and a
20 reasonable amount of fees, but we would ask the court
21 to exercise its discretion to reduce that amount.
22 Thank you, your Honor.

23 THE COURT: I don't want to be like a
24 president who, you know, just says whatever is on his
25 mind without a lot of thought, but I'm thinking about

1 this issue of, you know, well, you follow different
2 paths, you know, during the course of a really very
3 complex litigation that went on here in this case,
4 and, you know, sometimes you follow a dead end, you
5 know, you have to backtrack.

6 And I was just thinking about the movie
7 about Howard Hughes, the Aviator, and, you know, at
8 the end of the war they brought Howard Hughes to
9 Congress when he was probably already insane, but,
10 you know, he, you know, defended a project. They
11 were saying, well, this project really didn't go
12 anywhere so we don't think the government should have
13 to pay for it. And he pointed out, well, you know,
14 these were exigent times during World War II and, you
15 know, many projects were looked at that weren't
16 ultimately built and, you know, gone through fruition
17 as we tried to get the best, you know, war machinery
18 out there that we could in as short a period of time
19 as possible, and a lot of work had to go into that,
20 and the government paid.

21 And I'm sort of thinking that, well,
22 litigation is sort of an exigent circumstance. You
23 have a certain limited amount of time and, you know,
24 when I draft orders, I, you know, put out things that
25 ultimately I read over and decide that maybe I don't

1 want to go there and pull it out. You know, it's not
2 all a straight line process that I understand right
3 away.

4 And I would assume that even though, you
5 know, I don't compare my intellect to the ability of
6 the people at the table here, I'm sure that you
7 probably do that too, that, you know, we're going to
8 go down this line and see if there's something there,
9 and ultimately you find that might actually work
10 against you if you did it, or it doesn't really
11 amount to anything and you want to pull it out.

12 Well, isn't that the case here? You know,
13 like, what you're arguing, well, if you reach a dead
14 end, as I understand your argument, that you
15 shouldn't be allowed to bill even though that was
16 work that went, you know, toward, you know, getting
17 the best possible work product to the court. So is
18 that -- am I correct in understanding what you're
19 telling me or am I not?

20 MR. ROBERTS: No, your Honor. I do believe
21 that, yeah, the court is right, we reach dead ends,
22 we do work on arguments ultimately we don't make.
23 But all that wrapped up together, we believe that
24 even including that type of exigent circumstance and
25 overlapping work and running down dead ends to give

1 the court the best work product possible, that
2 206 hours on a single motion is still somewhat
3 unreasonable. And the court's applying a
4 reasonableness standard. And I would certainly
5 understand if you didn't reduce it by the full amount
6 we're requesting, but I do believe that the full
7 amount would be unreasonable for the court to grant.

8 THE COURT: All right. Thank you,
9 Mr. Roberts.

10 MR. ROBERTS: Thank you.

11 THE COURT: And then, Mr. Zimbelman?

12 MR. ZIMBELMAN: I just have two small
13 points, if I may.

14 THE COURT: Okay.

15 MR. ZIMBELMAN: One, on the order of
16 reassignment, I mean, my partner had a copy of the
17 order, and Mr. Roberts is correct that the order
18 states that the defendant then requested the matter
19 be heard before the senior judge, but before that it
20 says, and this is more in keeping with my own
21 recollection of events, "Both parties were present at
22 the hearing and indicated to the court that senior
23 judge Steven Elliott has familiarity with the parties
24 and the facts due to his involvement in a previous
25 case." All right, and we had that discussion, and it

1 was my recollection that the parties agreed that that
2 would be an appropriate reassignment and to bring the
3 case to your Honor who has familiarity and it's a
4 good place to be. Frankly, Judge Lane, he was
5 relieved to be able to pass the case on to you.

6 So on that, you know, yeah, do we ask? I
7 guess. But my recollection it was a joint request.
8 In any event, my bigger point is this: Mr. Roberts
9 sort of made this argument about a standard of care
10 analysis that equals reasonableness, and I think that
11 that's an inappropriate analogy. You can be barely
12 adequate and not violate the standard of care, right?
13 Attorneys do moderately poor work all the time that
14 doesn't meet the standard of care argument in a
15 malpractice case. But engaging in not malpractice is
16 not the same thing as doing excellent work, all
17 right? And that's what we're asking for. That's
18 what we feel that we did, and that's what we feel is
19 an appropriate award. Thank you.

20 THE COURT: All right. Thank you very much.

21 Well, you know, I certainly want to give
22 Tonopah Solar its, you know, due credit for
23 challenging, you know, what does seem like a pretty
24 high bill for something that's not a week long trial
25 or something where you would expect a very large

1 bill. But on the other hand I can understand that
2 for the Brahma Group, it certainly didn't want to
3 lose, you know, the -- basically I guess you call it
4 the security interest that it would have in its
5 almost \$13 million claim.

6 And, you know, they hired, you know,
7 topnotch attorneys, just as Tonopah Solar, you know,
8 and you guys are, you know, the best of the best.
9 You're right up there with the best attorneys in the
10 state, without doubt. And one expects that, you
11 know, the work product is a little more than what you
12 usually see in your typical case, which was kind of
13 family law, personal injury, you know, some criminal
14 casework, you know, just the routine work. This is a
15 higher level and you had a lot more at stake, and the
16 clients expect, you know, the brain power of a couple
17 really topnotch firms to do it.

18 I was in a case where I believe it was the
19 firm Gordon Silver was involved, and they had a
20 couple of attorneys there that were beyond the 425
21 level, but, you know, they had a statewide, if not
22 regional or national reputation, and they can charge
23 a lot.

24 And I don't have any problem with the three
25 partners billing, you know, at 375 to 425. Mr. Cox,

1 the associate, at 350, you know, it's asserted that
2 he's almost at the level of a partner and he has
3 worked there, you know, a number of years. And I'm
4 not so sure that, you know, he's not like, you know,
5 entry level guy. You know, he's well beyond that. I
6 don't think that those fees are unjust, given, you
7 know, who these people are and, you know, a
8 substantial firm here in a big city.

9 Going through the factors that I would need
10 to look at in the Brunzell factors, you need to look
11 at the advocate's qualities, including ability,
12 training, education, experience, professional
13 standing, and skill. There is no doubt that when you
14 look at Mr. Peel, you know, he's very well
15 experienced in, you know, understands these
16 construction liens as well as anybody in the state,
17 and, you know, the firm would undoubtedly, you know,
18 be topnotch in all these areas.

19 The character of the work, the difficulty,
20 intricacy, importance. We've gone over the
21 importance to the client. This is, you know, upwards
22 of a \$13 million claim. You know, this isn't, you
23 know, fighting over \$30,000 as we often do in court.
24 You know, there's a lot at stake, and it was, you
25 know, very difficult for me to figure it out, and,

1 you know, I had the benefit of all your briefing too,
2 you know, to guide me to a just and appropriate
3 decision I suppose, but it was very hard for me to do
4 it. You know, it's not subject matter that I would
5 work, or any typical judge would work on on a normal
6 basis. So I did find that it was very difficult and,
7 you know, many different things that had to be
8 attacked.

9 And the next one is the work performed,
10 including the skill, time, and attention given to the
11 work. And obviously a lot time and attention was
12 given to this work. And the result was that the
13 attorneys for the Brahma Group ultimately became
14 persuasive, in my opinion. My superiors might have a
15 different opinion, that's always the possibility
16 here, but it looked good to me.

17 So in the end I guess I, you know, don't
18 really have a big problem with the 206.9 hours which
19 I think is what was requested of the billing, you
20 know, that many hours coming up to \$78,417.34. You
21 know, while it is a lot of money, a lot work went
22 into this, a lot of time.

23 And even though maybe you'd come to court
24 with Judge Lane and you have a continuance, that's
25 pretty normal too in the course of litigation, you

1 know, very common. I often felt like, you know,
2 we're running a snowplow, you know, and cases that
3 get continued are the snow that's in front of this
4 plow and you're trying to get it out of there, but
5 sometimes it keeps building up and up and you can't
6 get the case going for good reason, but still it
7 happens that you can't always be fully prepared and
8 have a hearing as timely as we'd like.

9 Anyway, I feel that under the Brunzell
10 factors, the time and the dollars attributed to that
11 time are appropriate, so I am going to grant the
12 Brahma Group's motion for attorney's fees and costs.
13 And I'm wondering, you know, you're talking about the
14 amount of money for presenting the attorney's fees
15 and costs and coming here today to have the hearing
16 on it, and I think I basically need to have another,
17 you know, amount of money that, you know, something
18 in writing more than, well, I think it's going to be
19 7,000 --

20 MR. ZIMBELMAN: That's fair.

21 THE COURT: -- but you don't really know
22 that yet. So I don't want to have another hearing on
23 that, but you'll have to submit something in writing.

24 MR. ZIMBELMAN: Well, perhaps the court
25 would make an award up through the -- I guess up

1 through the amount that we submitted initially, and I
2 would be prepared to prepare a supplemental
3 declaration, run it by Mr. Reports. Maybe we can
4 even agree on the amount on those dollars.

5 THE COURT: Is that acceptable?

6 MR. ROBERTS: Yes, reserving our objection
7 to the ruling, I believe we can, in light of your
8 ruling today, reach a stipulation as to the amount of
9 additional fees which should be awarded.

10 THE COURT: Okay. We'll just do that.

11 Then why don't we take a recess before we
12 pick up something else.

13 MR. ZIMBELMAN: So is the court awarding
14 then the dollar amount that we put in the motion
15 plus --

16 THE COURT: I accept that, yes. I think
17 it's justified based on all the Brunzell factors.

18 MR. ZIMBELMAN: Okay. So if I prepare the
19 order, it would say something like, "I'm going to
20 grant the fees requested in that dollar amount plus
21 additional sums to be submitted to the court or
22 agreed upon by the parties"?

23 THE COURT: Yes. And maybe by the time you
24 draft that order, you'll have the --

25 MR. ZIMBELMAN: Hopefully we can agree.

1 Yeah. Thank you, your Honor.

2 THE COURT: Okay. Court will stand in
3 recess.

4 (A recess was taken.)

5 THE COURT: You may be seated. If I
6 understand this correctly, the next matter would be
7 Tonopah Solar Energy's motion to strike, to dismiss
8 and/or to stay. So, Mr. Roberts, maybe you could
9 explain what's going on with this one.

10 MR. ROBERTS: I'll do my best, your Honor.
11 I think maybe the easiest way to attack this is to
12 first try to simplify the procedural posture of the
13 case to the relevant factors to our motion. And it
14 is a complicated procedural history, as we just
15 discussed in the last motion.

16 The court recalled that there was a
17 complaint filed in Nye County to foreclose on the
18 lien. And in the last hearing counsel for Brahma
19 mentioned that there is a mandatory mediation clause
20 where the parties are supposed to mediate before
21 legal action can be filed, and that's why the case
22 was dismissed. And that's certainly true, but it's
23 also true that the lien statute says that you cannot
24 move to foreclose, you cannot file an action to
25 foreclose on your lien until 30 day after you file

1 it. And that first action was filed within that
2 30-day period and was improper on that grounds too.
3 So upon our demand they did dismiss that first
4 action.

5 So at the time that we filed our motion to
6 expunge, there was no legal proceeding. There was no
7 civil action into which we could file our motion to
8 expunge under NRS 108. And as they pointed out, we
9 agree that if there is a complaint initiating a legal
10 action to foreclose, you can bring a statutory motion
11 to expunge in that proceeding, and that's expressly
12 allowed by the statute. But there's nothing in the
13 statute that says you can bring a complaint, a civil
14 action in a special proceeding to expunge a lien
15 under NRS 108, which is the flip side, which is what
16 they've done here.

17 Going back to the procedural posture. We
18 filed the motion to expunge, which the court just
19 ruled upon, and the court's granted fees. It's our
20 position that that special action which was initiated
21 by filing a motion, terminates this proceeding as
22 soon as the court rules on the motion to expunge and
23 deals with the attorney's fees. So upon signing the
24 order for attorney's fees, your job will be done and
25 this special proceedings will be terminated and

1 there's nothing else that can be done in this special
2 proceeding.

3 So after we file the motion to expunge here,
4 as the property's located here, Brahma filed a
5 complain against us. They did not file it in Nye
6 County. They did not attempt to file it in this
7 court. They initiated it by filing a complaint,
8 which is the appropriate way to initiate a civil
9 action in Nevada. We removed that complaint to
10 federal court based on diversity. The federal court
11 has not remanded that case. They've not filed a
12 motion to remand that case. Instead, without leave
13 of court, we're not arguing they needed it, but
14 without leave of court they dismissed the contract
15 causes of action in federal court leaving only an
16 unjust enrichment claim, and then they refiled those
17 contract causes of action in this special proceeding,
18 not by initiating a complaint but by something called
19 a countercomplaint.

20 So that leaves us with several arguments
21 that we want to present here today. And the first
22 one is a motion to dismiss, and we believe that may
23 be the simplest way to deal with this because there
24 is very clear Nevada precedent that what they have
25 done in order to avoid federal court jurisdiction

1 over their claims is procedurally simply not allowed
2 under both the Nevada rules of Civil Procedure and
3 binding Nevada precedent, precedent that's binding on
4 this court.

5 And I would draw the court's attention to
6 Smith V Eighth Judicial District Court, 113 Nev.
7 1343, 950 P.2d 280, a 1997 supreme court case. Now,
8 in that case the lawyer filed a cross-claim, and the
9 title of the pleading said "cross-claim." And the
10 supreme court found that that cross-claim should have
11 been dismissed by the trial court because it was not
12 a proper pleading.

13 Now, under the Nevada rules, you can assert
14 a cross-claim in a pleading, but a cross-claim is not
15 a pleading. And the supreme court cited to NRCP 7A
16 which states, There shall be a complaint and an
17 answer, a reply to a counterclaim denominated as
18 such, an answer to cross-claim, if the answer
19 contains a cross-claim, a third-party complaint, if a
20 person who is not an original party is summoned under
21 the provisions of Rule 14, and a third-party answer
22 if a third-party complaint is served. And then the
23 court, the supreme court emphasized by putting in
24 italics the following portion of Rule 7A, "No other
25 pleading shall be allowed, except that a court may

1 order a reply to an answer or a third-party answer."

2 So explaining this, the court, citing the
3 Black's Law dictionary says, "A claim is not a
4 pleading, a demand as of one's own or as one's right.
5 Such a demand to be legally recognizable must be
6 asserted in a pleading. Counterclaims and
7 cross-claims are types of claims, not types of
8 pleadings." So in that case the cross-claim was
9 struck.

10 How does that apply to this case? Under
11 Rule 3, a civil action is commenced by filing a
12 complaint with the court. That's how you commence a
13 civil action. No complaint has been filed in this
14 special proceeding, and it is not a civil action
15 because it was not initiated by the filing of a
16 complaint. The document through which they asserted
17 their claims is denominated a countercomplaint.
18 Well, if you look at the list I just read you under
19 NRCP 75A, a countercomplaint is not one of the
20 pleadings allowed by Nevada law. There is no such
21 animal.

22 And under Smith they've instructed trial
23 courts when you have rogue pleadings that are filed,
24 pleadings that are not authorized by the rules of
25 civil procedure, the appropriate thing to do is to

1 strike them. So that is what we contend this court
2 should do, it should strike the countercomplaint as a
3 rogue pleading not allowed by the rules of civil
4 procedure, and that's the end of our motion, the
5 court does not have to deal with any other issue here
6 today.

7 But let's assume what they argue, it's a
8 notice pleading state and we're being too strict.
9 Well, your Honor, that same type of argument was
10 addressed in Smith. And what Smith said is that
11 pleadings are liberally construed under the notice
12 pleading standard. That doesn't mean that you can
13 file something that is not an allowed pleading. You
14 can't liberally construe something that's not a
15 pleading allowed by the rules.

16 The argument under NRS 108, you know, the
17 *expressio est unius* I think was the old Latin they
18 used to teach us, but when the legislature said you
19 can file a special -- you can file a motion to
20 expunge in a civil action that's already been
21 initiated, and they don't say you can file a motion
22 to foreclose in a special action, when you say one
23 and not the other, the court can infer an intent to
24 exclude it. And NRS 108 would have had to expressly
25 allow this because otherwise this type of pleading is

1 not allowed by the rules of civil procedure.

2 So why try to file it in this action? Why
3 try to file it as a countercomplaint rather than a
4 complaint? Because had it been filed as a complaint,
5 we could have simply removed once again to federal
6 court, and they were trying to prevent that. Which
7 leads us to our second argument, which I believe is
8 just as strong, even though the court does not have
9 to reach it, and that is that they chose to file
10 these contract causes of action in a separate
11 proceeding in Clark County. We believe they chose to
12 do that because the contract sets venue in Clark
13 County.

14 Now, whether that's permissive or simply a
15 consent to jurisdiction doesn't matter. They read
16 the contract and they filed that action in Clark
17 County after this lien hearing, after this motion to
18 expunge had been filed and was still pending here
19 before this court, they filed a separate complaint on
20 the contract in Clark County in accordance with the
21 venue provisions of the contract. It was that
22 separate complaint that they chose to file as a
23 separate proceeding which we removed to federal
24 court.

25 And under the case law, the very strong case

1 law we've cited, once we've removed that proceeding,
2 and Judge Gonzalez was assigned to the Eighth
3 Judicial District, once we removed that to federal
4 court, the federal court had jurisdiction over those
5 claims and they can voluntarily dismiss those claims
6 if they want to, that's their right, but what the
7 case law says is the entire courts of the state of
8 Nevada lose jurisdiction over those claims once
9 they're removed to federal court because the court,
10 federal court now has jurisdiction. So this court
11 does not have jurisdiction over the claims set forth
12 in the countercomplaint because they are
13 substantially the same claims which we removed to
14 federal court. And the federal court now has
15 jurisdiction, and the only way they can get those
16 claims back to state court is to file a motion for
17 remand, which they did not do.

18 So this court has absolutely no jurisdiction
19 to proceed with the claims set forth in the
20 countercomplaint. Exclusive jurisdiction lies with
21 Judge Boulware up in the federal court. And, your
22 Honor, we have moved to stay this case under the
23 arguments that the federal court has jurisdiction and
24 should not allow their jurisdiction to be subverted
25 and avoided through this procedural practice which

1 they have chosen here.

2 And that leads us to our final argument. If
3 the court is not satisfied that it's a rogue pleading
4 and should be stricken, if the court is not yet
5 convinced that the federal court has taken
6 jurisdiction and wants to and will keep it, then the
7 court can simply stay and see what the federal court
8 does, because Brahma has filed a motion to stay
9 discovery in that proceeding, and we believe that the
10 federal court is going to proceed, because the court
11 has given a hint.

12 We compete -- we submitted competing
13 scheduling orders. Under the Brahma scheduling order
14 in federal court, discovery would not begin, and
15 under ours it would begin. And the court has signed
16 our scheduling order authorizing discovery to
17 proceed, and we believe that is an indication that
18 the court is going to proceed with it.

19 And Judge Boulware himself has adjudicated
20 mechanic lien actions, although the federal court has
21 jurisdiction and can adjudicate a lien action
22 anywhere in the state of Georgia (sic). If you
23 remember the divisions are informal, so the federal
24 courts, whether northern or southern division, have
25 jurisdiction of the entire state, but I would point

1 out --

2 MR. PEEL: Nevada.

3 MR. ROBERTS: Excuse me. What did I say?

4 MR. PEEL: Georgia.

5 MR. ROBERTS: You know, I've been out of
6 Georgia -- I've been out of Georgia for 19 years,
7 your Honor, and I --

8 MR. ZIMBELMAN: It's a novel argument.

9 MR. DOMINA: I was like, well, I'm in the
10 wrong court and I don't know Georgia law.

11 MR. ROBERTS: But I was just there over the
12 weekend. I went to a nice Christmas party.

13 THE COURT: Mr. Roberts, I think you're
14 saying it, but just so I understand it, and if I
15 understand it wrong let me know, but when a case is
16 removed to the federal court under the diversity of
17 jurisdiction, because I think the deal is that
18 Tonopah Solar Energy is a Delaware corporation, and
19 the Brahma Group is a Nevada corporation, so you have
20 the diversity and they might take it, but they might
21 not.

22 Can't -- I mean, you said the judge is
23 hinting that he'll take it, but diversity cases,
24 while, you know, you have the right to, you know,
25 kind of get some sort of a stay or, you know,

1 whatever is removed probably has to be stayed, but
2 the court often kicks those things out. Isn't that
3 what -- can ultimately happen is they said we don't
4 think this is, you know, should be heard by us. You
5 know, the state court is the better forum and you're
6 out. They don't just have to take it, right.

7 MR. ROBERTS: I believe they do, your Honor.
8 And I'm glad you asked for clarification, because
9 Brahma's initiated this action in Clark County. We
10 removed to federal court. The only way to get those
11 cases out of federal court is to remand them to state
12 court. That's the only way that the state court can
13 be reinvested with jurisdiction to hear those claims,
14 and they haven't even moved to remand.

15 So I believe that while the -- I suppose the
16 federal court could choose not to proceed with
17 claims, they can't proceed anywhere else because
18 jurisdiction is divested. This court has not
19 jurisdiction to even consider claims that have been
20 properly removed to federal court. And it would
21 completely gut the whole purpose of removal, right?
22 As you know, removal is automatic. It doesn't have
23 to be removed on by any judge. As soon as you file
24 the pleading, it's up there until the court remands
25 it or dismisses it.

1 We filed removal. If you could simply
2 dismiss your claims after removal and refile them in
3 another county, well, removal wouldn't work at all in
4 accordance with the federal scheme.

5 THE COURT: Well, I just have had experience
6 with, you know, the diversity, removal, having
7 federal court kick them back out, you know. It's not
8 a sure thing.

9 MR. ROBERTS: And which is why we've given
10 the court the option to stay to see what the court
11 does. But right now the case that these claims were
12 originally filed in is sitting up with Judge Boulware
13 in federal court and he hasn't chosen not to proceed,
14 and he hasn't dismissed it, and we hasn't remanded
15 it.

16 So if the court has any doubt, you can stay
17 this case and see what Judge Boulware does to see if
18 that impacts your decision to see if he throws it
19 out, to see if he grants a motion to remand, if one
20 can still be filed. But at this point the court
21 simply cannot proceed with this action while the
22 removed claims are in federal court.

23 THE COURT: And you're saying that really
24 all the claims that were initially removed to federal
25 court would really be, you know, stuck in that, the

1 federal jurisdiction, even if they're now dismissed
2 by --

3 MR. ROBERTS: Yes. You cannot avoid removal
4 by dismissing your claims and then re-filing again in
5 state court. It's just we've cited three very strong
6 cases that say this would completely destroy the
7 authority or the removal, the right to remove if you
8 could simply, instead of moving to remand, dismiss
9 and refile again in state court. It makes no sense
10 that you could do that, your Honor.

11 THE COURT: Okay. You can proceed.

12 MR. ROBERTS: Actually, your Honor, that
13 concludes my argument. You know, we've cited case
14 law to the court. We've cited three cases that very
15 strongly say that when you remove a case to federal
16 court, not only does the actual state court you
17 removed from lose jurisdiction, but every state court
18 in the state loses jurisdiction over those removed
19 claims. And in response they have cited no authority
20 to the contrary. None.

21 And while we believe this is a very strong
22 argument, and you would be invading the province of
23 the federal court if you chose to proceed in any way
24 with this proceeding, the court never has to get
25 their because under Smith versus Eighth Judicial

1 District it's clear what you have to do. This is not
2 a pleading. There is no countercomplaint under
3 Nevada law. It's not a pleading. And the court can
4 simply dismiss it under clear Nevada precedent and
5 avoid dealing with all of this complex federal, state
6 jurisdiction morass. Thank you, your Honor.

7 THE COURT: Thank you, Mr. Roberts.

8 MR. DOMINA: Good afternoon, your Honor.
9 May I approach the lecture?

10 THE COURT: Yes, certainly.

11 MR. DOMINA: Your Honor, I will apologize in
12 advance. I know that my -- there's a lot of moving
13 parts in this particular motion, three separate
14 motions in essence that I'm opposing, and so I know
15 that my oral argument is going to go a little bit
16 longer, so I apologize in advance, but hopefully I
17 don't go too far into the lunch hour. Is that
18 acceptable?

19 THE COURT: I'm not worried about it. We
20 are going to take a lunch break. I think we probably
21 will do that but I'm not starving here.

22 MR. DOMINA: Very good.

23 THE COURT: I'm good.

24 Please introduce yourself.

25 MR. DOMINA: Sure, your Honor. Cary Domina

1 representing Brahma Group, Inc. And, your Honor,
2 TSE's objective currently, and it's clear as day,
3 they want to fight Brahma in federal court on
4 Brahma's contract claims where they're seeking
5 approximately \$13 million, much of which is owed to
6 Brahma's lower tiered subcontractors and suppliers on
7 the project because they know that that's going to
8 take years to get through that, and in the meantime
9 they want your Honor to stay Brahma's bond claim
10 action, foreclosure action on the bond claim here in
11 Nye County.

12 And the reason why they want to do that is
13 because there are certain rights that come with a
14 mechanics lien bond claim. For instance, you have
15 the right to pursue attorney's fees and costs,
16 interest as well. You have the right to pursue a
17 mechanics lien or a demand for preferential trial
18 setting, which would take their two-year timeframe,
19 give or take, in federal court and truncate it down
20 to about 60 days. And so these are -- this is really
21 what they want.

22 They don't want to be in front of your
23 Honor. They've already had kind of an adverse ruling
24 by your Honor on the motion to expunge, but they want
25 to be in federal court because it is a slow process

1 up there. It used to be that you could get things
2 done there, but it is very slow and they know that
3 and they're banking on that because every day that
4 goes by that they don't pay Brahma is money saved.
5 They're making money on interest, they're not having
6 to pay that money out, and so that's their real
7 objective.

8 But because Brahma's claims in this action
9 and the federal action arise out of the same
10 transaction and occurrence, a single judge should
11 decide the entire case. We shouldn't be piecemealing
12 this, a little bit in federal court, a little in
13 state court. But the problem with that, to say that
14 you want to have one judge decide the entire case,
15 you have to look and say, well, what courts do we
16 have? Well, this court is a court of general
17 jurisdiction, meaning this court can hear anything
18 for the most part that comes to it.

19 The federal court is not. The federal court
20 is a court of limited jurisdiction and it can only
21 hear cases where it has, where it has specific
22 statutory authorization to do so. One example would
23 be diversity. But, remember, we have to have
24 diversity, complete diversity among all the parties
25 in order to be in federal court.

1 Another issue would be if there's a federal
2 question before the court. We don't have that.
3 There's no question that -- there's no federal
4 question or no federal issue involved in this case.
5 So the only way that this is in front of the federal
6 court is based on diversity jurisdiction.

7 Now, what they want to say is, well, why
8 can't we just stay the case here. Why can't we stay
9 the bond claim. I already pointed out some of the
10 problems with that. That means we lose our right to
11 demand a preferential trial setting, we lose our
12 attorney's fees claim. A judge there, even if we're
13 able to get a judgment in federal court, isn't going
14 to be able to award attorney's fees and costs under a
15 bond claim that's over here in Nye County that's been
16 stayed, so there's a lot problems with it.

17 THE COURT: Mr. Domina, I'm just trying to,
18 you know, understand this. But the bond claim, you
19 know, a lot was made about the bond claim, and
20 certainly I'm sympathetic that, you know, we should
21 be able to proceed on the bond claim, but I don't
22 understand if the bond claim was somehow caught up in
23 the Clark County claims that were then, you know,
24 removed to federal court, wasn't that not in Clark
25 County?

1 MR. DOMINA: Right. Correct. It's not. It
2 was not filed. And I will, with the court's
3 indulgence, I'd like to spend a few minutes going
4 through some of the facts because opposing counsel
5 did go through some of the facts but omitted many of
6 them, and I think there's some gaps here. So I'd
7 like to spend some time to go through the facts so
8 that this court is aware completely of the procedural
9 posture of the case, why we are where we're at right
10 now. And so this is as good a time to do that as
11 any, but I kind of go back to my -- the line of
12 thinking that I was in just moments ago, that is this
13 is the court that should hear the entire case. Now,
14 I'm not asking you to make that decision today
15 because, frankly, I don't think you can, but I want
16 to tell you the reasons why we think it's important
17 for this court to hear the case.

18 Number one, the work of improvement was done
19 in Nye County. The Tonopah solar project is in Nye
20 County. All of the contracts that are the subject of
21 the dispute, and this includes the H & E contract
22 between Brahma and H & E, are performed in Nye
23 County. We have the liens that Brahma and H & E
24 recorded were recorded with the Nye County recorder's
25 office. The bonds that Cobra and TSE procured to

1 release the liens from the project, those are
2 recorded with the Clark County recorder's office.

3 And also very importantly is your presence
4 on this case, your Honor. You already have some
5 background information about the case. A few years
6 ago you presided over the litigation that involved
7 another one of our clients. You've had extensive
8 knowledge of this case. You've already decided a
9 dispositive issue in this case, and so to send it up
10 to the federal court now and have them hear
11 everything, one, it's not even feasible because you
12 have nondiverse parties that can't get there. Cobra
13 is a Nevada corporation. Well, so is Brahma. So you
14 can't have nondiverse parties up there.

15 Interestingly H & E is a Delaware
16 corporation. Well, guess what, so is TSE. Not a
17 nondiverse party. So there will be no way that the
18 federal court will be able to grab the entire case
19 and hear it all in federal court. And the only way
20 to have it in one court is to be back here in front
21 of your Honor.

22 THE COURT: Well, maybe I should say this:
23 That I'm very sympathetic to the position that Brahma
24 Group has here. And, you know, to bring another
25 analogy out, a personal injury lawyer whose ad on TV

1 was, you know, this is the way insurance companies
2 work: Delay, deny, don't pay. Well, I can somewhat
3 see what's going on with this, and I could kind of
4 see that Tonopah Solar is in that mode.

5 And while, yeah, we should have all of this,
6 you know, here at the state court here in Nye County,
7 everything could be, you know, handled just fine, I
8 would say that's the most expeditious way, but on the
9 other hand Tonopah Solar Energy has the right to, you
10 know, take this up to federal court if they're within
11 the law. And you might look at that as delay, deny,
12 don't pay, but unfortunately it's not, you know, it's
13 not a question of what is the right thing to do, but
14 what is the lawful thing to do.

15 So, you know, I can't just be acting because
16 this is helpful to, you know, the most expeditiously,
17 do the cheapest way possible, that, you know, get rid
18 of the case in an appropriate manner, you know, the
19 other side has the right to exercise their lawful
20 rights here.

21 MR. DOMINA: Absolutely. Understood. And,
22 your Honor, again, I don't bring this out to try to
23 convince you today that, oh, you're going to somehow
24 go and bring what's in federal court back down. We
25 know that that can't happen. But we did do

1 something. Opposing counsel made a misstatement. He
2 said the only way for the case that's currently in
3 front of the federal court to come back here is on
4 remand. And that's not technically true.

5 We have filed what's call a Colorado River
6 Doctrine stay in federal court. And what that does
7 is basically it asked the federal court to look at
8 the case and looked at -- you've got a state court
9 case that's parallel with the federal court case.
10 And if it's there on diversity only, the federal
11 court says, look, I don't really have an expertise in
12 this issue. This is construction litigation. It's
13 here on diversity only. I don't have a federal
14 question that I'm going to be resolving. And so my
15 docket is completely full. I really don't want this
16 case. It's going on already in a parallel fashion in
17 state court. There appears to be a senior judge
18 who's been assigned to the case specifically for this
19 purpose. Why on earth would I burden my docket and
20 either piecemeal this case, because, again, they
21 cannot -- the federal court will never have
22 jurisdiction over our bond claim, and those are
23 claims that we're going to pursue and we have
24 specific rights under those.

25 And so it really comes down to we believe

1 that the federal court will, in fact, entertain our
2 Colorado River motion. We didn't brief it for your
3 Honor's purpose, because of course it wasn't an issue
4 that your Honor has to decide, but I found no less
5 than four cases in the U.S. District Court of Nevada
6 where Colorado River was granted on very similar
7 facts to what we have here. And so we feel strong
8 that that's what's going to happen.

9 What they end up doing is staying the case
10 and kind of giving the opportunity for the state
11 court action to go in earnest, and you basically
12 litigate it, and once it's resolved then the federal
13 court looks to see if there's any remaining claim
14 that didn't get worked out. If so, maybe they handle
15 them, but most of the time it gets worked out and
16 that case is then terminated, dismissed or
17 what-have-you. So that's what we believe will
18 happen. And the same arguments that I made to you
19 about the reasons why it should stay here were I
20 think compelling arguments that we made in that
21 brief.

22 But let me get to the facts. These are the
23 important matters that your Honor needs to know so
24 that you know why it is we filed the Clark County
25 action and you know why it is we're in kind of the

1 situation we're in. First of all, because TSE failed
2 to pay Brahma in full for the work that it provided,
3 it recorded its original lien on the project on
4 April 9th of 2018. I'm going to kind of omit the
5 year because everything happened in 2018. So going
6 forward I'll just cite the date, assuming that it's
7 all 2018.

8 About a week after Brahma recorded that
9 lien, it filed then a complaint to foreclose against
10 that lien in Nye County. Now, that complaint only
11 had a cause of action for foreclosure. There was no
12 other cause of action with it. And as opposing
13 counsel mentioned, immediately after that they sent a
14 demand letter to Brahma's attorneys at the time, it
15 wasn't our firm, and that was on April 19th, and the
16 letter said basically, look, you need to -- you need
17 to, number one, expunge your lien; and two, we want
18 you to dismiss your complaint because you have to
19 engage in mandatory mediation, and we think it's
20 improper under the mechanics lien statute. So it
21 also said if you don't do that, if you don't expunge
22 the lien, we're going to file a motion to expunge the
23 lien if you don't do it voluntarily.

24 So on April 24th, TSE was true to its word
25 and it filed its first motion to expunge in that case

1 that had been initiated. But before Brahma could
2 receive the motion to expunge, and not wanting to
3 engage in protracted motion practice about whether
4 the complaint was ripe, they decided that they would
5 voluntarily dismiss that complaint without prejudice,
6 but they didn't discharge the lien. And so even
7 though TSE had officially appeared in that action by
8 filing its motion to expunge, and that Brahma had not
9 released its lien at the time, they made the decision
10 to withdraw their motion to expunge out of that case
11 and, you know, the parties kind of went their way for
12 a little bit.

13 And then on May 15th, H & E, who is one of
14 Brahma's suppliers on the project and is owed money,
15 is claiming money and is actually here today, a
16 representative is here today, and they, of course,
17 have their motion pending to intervene because they
18 too believe this is the right forum to pursue their
19 bond claim and contract claims, but on May 15th they
20 recorded their lien with the Nye County recorder's
21 office.

22 And on June 8th TSE filed a motion to
23 expunge that lien in the case, or in an independent
24 case they filed their motion to expunge, and that
25 case was assigned to judge, and I hope I don't mess

1 up her name, is it Wanker? Judge Wanker. But later
2 TSE withdrew that petition. So you have these two
3 cases that are kind of dead in Nye County, they're
4 just sitting there, but, again, it's always TSE
5 trying to avail itself by filing these motions to
6 expunge.

7 Now, September is -- forward a bit. On
8 September 6th H & E required Cobra, who was the
9 general contractor on the project, and I think your
10 Honor will recall the litigation a few years ago
11 involving Cobra, but Cobra was required to procure a
12 mechanics lien release bond to release the lien,
13 H & E's lien from the project. And so on June 1st
14 TSE then commenced this very action seeking to
15 expunge Brahma's lien.

16 Again the case was originally assigned to
17 Judge Lane, but on August 14th he entered an order of
18 reassignment assigning the case to your Honor because
19 the parties again presented themselves and recognized
20 that your Honor had experience and that this was
21 going to need to go to a senior judge, and they --
22 whether it was our firm or both firms that
23 collaborated, it was decided that the case would be
24 assigned to your Honor.

25 Now, Brahma's lien was then amended and

1 restated on several occasions and ultimately was
2 increased to approximately 13 million. The actual
3 number is 12,859,577, and that's by way of their
4 fourth amended lien which was recorded in Nye County.

5 At the hearing on the motion to expunge,
6 which was held on September 12th, your Honor of
7 course denied TSE's motion to expunge Brahma's lien.

8 Now, this is where we kind of get into the
9 facts of well, why -- how did we end up in Clark
10 County. Now, based on a mistake in understanding or
11 belief that section 24 of the contract between Brahma
12 and TSE required Brahma to pursue its contract base
13 claims in Clark County, and after Richard Peel
14 reached out to TSE and asked if there was a way that
15 they would stipulate that we could file the action in
16 one location, be it Nye County, Clark County,
17 wherever, but that there would be one judge to handle
18 the entire case, and TSE rejected that. TSE never
19 got back to us and then ultimately said, well, our
20 client isn't going to agree to that, do what you want
21 to do. So based on that understanding, and Brahma's
22 belief that they were dealing with a mandatory forum
23 selection clause, Brahma filed a complaint in Clark
24 County on July 17, 2018 in the Eighth Judicial Court
25 of Nevada.

1 Shortly after that, on September 10, TSE
2 then removed the Clark County action to the federal
3 court based on diversity jurisdiction only, as again
4 TSE's Delaware and Brahma is a Nevada corporation.
5 Now, it's important to note that they did not -- TSE
6 did not remove any portion of the Nye County action
7 or attempt to do anything in Nye County with respect
8 to claims being removed, and they still haven't,
9 being removed to the federal court. It was solely
10 the contract claims that were asserted -- there's
11 three of them -- breach of contract, breach of
12 implied covenant of good faith and fair dealing, and
13 then NRS 624, which isn't really a contract but it
14 has to do with the prompt pay act of Nevada.

15 So on September 17th, TSE then filed its
16 answer and its counterclaim against Brahma in the
17 federal court action where it stated, or where it
18 brought -- asserted basically counterclaims of breach
19 of contract, and it also asserted other state law
20 claims, such as fraudulent and negligent
21 misrepresentation.

22 Now, on September 21st, and as required by
23 NRS 108.239, subsection 1, Brahma filed its complaint
24 to foreclose its lien here in Nye County and filed it
25 in the action that TSE had already commenced

1 regarding the motion to expunge. The case had
2 already been commenced. Brahma filed a foreclosure
3 action, and that's how it was titled. The initial
4 complaint was entitled Brahma Group, Inc.'s Mechanics
5 Lien Foreclosure Complaint, and it included a single
6 foreclosure action because at that time TSE and Cobra
7 had not bonded around Brahma's lien. TSE and Cobra
8 hadn't bonded around the lien.

9 Now, after Brahma had filed its complaint to
10 foreclose, TSE then recorded with the Nye County's
11 office, or recorder's office a mechanics lien release
12 bond, which at the time was only one and a half times
13 the amount of Brahma's original lien, but keep in
14 mind Brahma had amended its claim, its lien, several
15 times, and so it fell short of what it needed to be,
16 which is one and a half times the fourth amended
17 lien.

18 So because that bond had been recorded, on
19 September 25th, 2018, Brahma then filed its first
20 amended complaint, which it admittedly inartfully
21 called a first amended countercomplaint where it then
22 asserted its contract claims against TSE and claims
23 against the mechanics lien release bond that Cobra
24 and TSE had procured, but it did not dismiss at that
25 time its foreclosure action against the property,

1 against its lien on the property because the bond was
2 not sufficient to cover the full lien amount and so
3 it was under-collateralized. And so they basically
4 had two different foreclosure actions, one against
5 the real property, or the work improvement I should
6 say, and one against the bond.

7 Now, because this bond was insufficient to
8 secure Brahma's lien, Brahma then filed in this same
9 action before your Honor a motion excepting to the
10 sufficiency of the bond. It's a procedure that you
11 can file where you require a party that has filed or
12 recorded a mechanics release bond to increase the
13 amount or take some action to increase it to secure
14 the lien amount, and we filed that here in the state
15 court. And after filing that, Cobra and TSE did come
16 up with a rider to the bond and increased the amount
17 of the bond to 19,289,366 bucks, which is now one and
18 a half times the amount of Brahma's fourth amended
19 lien.

20 Now, again after Brahma then amended its
21 complaint in this action to add its contract claims,
22 it then went to federal court and removed those three
23 contract claims from the federal court action, which
24 it could do because an answer within the timeframe to
25 be able to amend our answer, we were able to do so

1 freely without bringing a motion. They hadn't
2 filed -- they had filed an answer but you have a
3 little bit more time. The rule is a little different
4 in federal court. There's a little bit of a lapse
5 there. So we amended the complaint in federal court,
6 withdrew the three contract-based claims and filed
7 them here in our amended complaint with this district
8 court, with the Nye County court.

9 So then that takes us to September 16th, and
10 that is when Brahma, as I indicated, filed a motion
11 for stay in federal court based on the Colorado River
12 Doctrine where we're asking the federal court to
13 abstain from deciding that case because, number one,
14 it involves the same transaction and occurrences that
15 are here in this case, and in addition because this
16 court already has the familiarity necessary to
17 proceed on this case, and even ruled on a dispositive
18 motion.

19 So after we filed that, then TSE immediately
20 filed, and this is going to be important as I get to
21 the motion to dismiss part of the argument here, TSE
22 then filed with the federal court a motion for
23 injunctive relief asking the federal court to issue
24 an injunction against Brahma precluding it from
25 pursuing its three contract claims that it had

1 removed from the federal court action and brought
2 here to the Nye County action. Neither of those two
3 motions, the motion for the Colorado River Doctrine
4 motion or the motion for injunctive relief has been
5 set for oral argument yet. Again, based on my
6 experience with the federal court it could be several
7 months before the court gets to those two motions.

8 Then the day before -- what's interesting is
9 the day before the opposition to the motion for the
10 Colorado River stay was due, TSE gets a bright idea
11 and they said, you know what, we're going to serve
12 you, Brahma, with discovery requests. We're going to
13 serve you with interrogatories and requests for
14 production of documents.

15 And the reason why they did that so quickly
16 out the box, and they did this, by the way, before
17 the federal magistrate had even issued the scheduling
18 order setting forth the discovery timeframe, they did
19 it so they could argue in opposition to the Colorado
20 River motion that that case, the federal case, was
21 further along than the Nye County case.

22 It's one of the factors the federal court
23 will look at when deciding whether or not to grant a
24 Colorado River motion is which case is further along.
25 So they said, oh, we're going to put out these

1 basically bogus, or whatever you -- strategic
2 discovery requests all for the sole purpose of trying
3 to get that case jump started so they can come back
4 and make the argument to the federal court, "We need
5 to stay in federal court, your Honor."

6 And I bring that to the court's attention
7 because they want in their brief to say that we're
8 the ones that are forum shopping. Well, we're not
9 the ones that are trying to run away from a
10 federal -- or from a ruling that was adverse to us.
11 There's been no ruling in federal court against us.
12 We're not -- we don't care if we're in federal court
13 but we don't want to be in two cases in two courts.
14 That's our beef. We can't be in two courts. It will
15 be extremely expensive, and we know we cannot put the
16 bond claims in the federal court so the case has to
17 be here, and that's the argument we're going to make
18 to the federal court, but they want to stay in
19 federal court and we went through that already.

20 And then, finally, based on the fact that we
21 received these discovery requests, we filed -- Brahma
22 filed a motion for stay of the discovery request in
23 the federal court, and that is set for hearing on
24 December 27th. So that's the procedural posture of
25 the case, your Honor. I will refer back to some of

1 these dates as I tie it to the legal arguments. I
2 apologize if that was lengthy, but in short amount of
3 time there's been a lot in this case and some of
4 these are really important to hone in on some of the
5 nuances of what's going on here.

6 So I think I'd like to attack or address
7 their motion to strike first. I'm not sure what
8 order it was presented. I think it was motion to
9 dismiss first, but let's go with the motion to strike
10 and then I'm going to hit the motion to dismiss and
11 then the motion for stay.

12 With respect to the motion to strike, again
13 when Brahma first filed it in this action, it filed a
14 foreclosure complaint. It was not styled as a
15 countercomplaint, it was just a simple foreclosure
16 complaint. It took the case that had already been
17 generated and it filed within that very same
18 proceeding. It wasn't until Brahma amended the
19 complaint when it perhaps again inartfully called it
20 a countercomplaint. But it's really not a
21 countercomplaint. If you look at it, it's simply an
22 amended complaint because it acts as a standalone
23 complaint. It has all the makings, all of the
24 necessary notice provisions, the claims. It was
25 served by summons on TSE, on Cobra, and so it is an

1 amended complaint. We can get away -- if their
2 concern is that we call it a countercomplaint, fine,
3 let's call it something else. It's a complaint.

4 And what's interesting is when you look at
5 Rule 7, if you look at it under that lens that it is
6 a complaint, and it's not a countercomplaint because
7 we're not responding, it's not in response to
8 something, we had already filed an opposition to
9 their motion to expunge, it's a standalone complaint
10 that was simply filed in the same case that they had
11 generated. And, again, it's capable of standing on
12 its own.

13 So their argument that the countercomplaint
14 is not a pleading under Rule 7A, it's really putting
15 form over substance. And it's interesting because
16 opposing counsel took us through the list of all of
17 the different types of pleadings that are identified
18 under Rule 7A, and complaint was one of them, but one
19 of the lists I didn't see, or name on the list I
20 didn't see was "amended complaint." Well, it's not
21 on the list, but nobody in their right mind would get
22 up in front of the court and say amended complaints
23 aren't pleadings. You can't do an amended complaint.
24 It's not in Rule 7A. That's essentially what they're
25 arguing here is, well, you're calling it something

1 different, but we're calling it a complaint. It is a
2 complaint. It's stands on its own. It's not in
3 response to something. It was filed in the case.

4 Now, why did we file in the case? First of
5 all, I should note that by filing that complaint in
6 this case, it puts the parties in the same exact
7 procedural posture as if we had filed the action
8 first, and then they came in and brought their motion
9 to expunge. We're in the exact same posture as we
10 would be. You would have a complaint that was served
11 by service that they had to respond to and file an
12 answer. It's no different than had we done it that
13 way.

14 And the reason why we decided to file in the
15 state court action was we wanted to ensure that your
16 Honor was the one who got the case. If we had just
17 filed a standalone complaint, it would have likely
18 been sent to one of the other departments, it
19 wouldn't have gone to your Honor because you're not
20 getting, you know, cases unless they're assigned to
21 you, it would have gone to one of the other
22 departments and we would then had to have filed a
23 motion to consolidate.

24 Now, based on the opposition that we've
25 received on every little thing that we've done with

1 these guys, who knows if they would have stipulated
2 to that, but they may have opposed the motion to
3 consolidate as well. And so basically it was a way
4 of saying instead of filing it in a separate action,
5 let's file it in this case that's already been
6 commenced, and therefore the need to file the motion
7 to consolidate is avoided, we're not wasting
8 resources, the court's time, our client's money on
9 something of that nature.

10 THE COURT: Mr. Domina, just so I can
11 understand this, is this complaint for foreclosure
12 something different than a claim that was taken from
13 Clark County to the federal court?

14 MR. DOMINA: The foreclosure action, no,
15 your Honor. The complaint is a foreclosure action.
16 And when we amended it, we did bring the three causes
17 of action that were once in federal court, we removed
18 those and we filed same concurrent jurisdiction
19 causes of action, breach of contract claims in that
20 same complaint where the foreclosure action is
21 against the bond and the real property, the work of
22 improvement at this time.

23 THE COURT: Okay. I think I understand it.
24 Thank you.

25 MR. DOMINA: All right. And I have more

1 on -- I'm going to discuss how that's not a big deal
2 when we get to the motion to dismiss. They want
3 to -- they're positing a rule that, first of all they
4 say they cited these three really strong cases.
5 Well, there's not a single case that they cite from
6 the Ninth Circuit. They're not Nevada cases.
7 They're random cases. Some of them are outdated,
8 66 years old. One is about a tribal Indian land.
9 They have no bearing.

10 And the reason why we didn't want to waste
11 our time addressing them is because we focused on the
12 case law in the Ninth Circuit that completely shoots
13 down their proposition that there's some kind of
14 automatic stay, if you will, or automatic bar, some
15 kind of automatic bar that precludes a district court
16 from hearing state court actions that were once in
17 federal court that had been removed.

18 Now, where they may be correct is if we had
19 filed a case back in Clark County in the action where
20 it actually had been removed from, and we tried to
21 file right back into that same case, there may be
22 some legs to what they're saying, but that's not what
23 we did here. We filed those breach of contract
24 claims in an action that had actually been filed and
25 commenced before the federal action had been

1 commenced. So it's not like we're going out and
2 filing in the very same case that was removed.

3 When you have removal, and that court loses
4 jurisdiction, it's only with respect to the court
5 that it was removed from, the Clark County Eighth
6 Judicial District Court. Doesn't say anything about
7 other states, or, excuse me, other counties. And
8 their argument that they say, oh, we've got great
9 case law on it, no, they don't. It's case law all
10 over the country or three of them in different
11 jurisdictions, two of them aren't even applicable and
12 are quite older.

13 But again, once I get to the motion to
14 dismiss, you'll see that the case law really says
15 this about it. It gives us an argument that unless
16 the federal court finds that a case was removed from
17 federal jurisdiction and put into state court for
18 fraudulent means of trying to avoid federal
19 jurisdiction, the federal court will not intervene.
20 The federal court will not issue an injunction and
21 has no concern with the state court proceeding on
22 parallel litigation that may have already been in
23 federal court.

24 But that fraudulent analysis is important
25 for the courts to undertake, and it's what the Ninth