

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

**Supreme Court Case No. 78092**

Tonopah Solar Energy, LLC,  
*Appellant*

v.

Brahma Group, Inc.,  
*Respondent*

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

**APPELLANT'S APPENDIX  
VOLUME 13**

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1 Circuit requires to take place. They don't even  
2 mention that. That's what we argued in our brief was  
3 that, wait a minute, you're forgetting about this  
4 whole analysis, the fraud analysis. Why on earth --  
5 if there was a black letter rule that said once you  
6 remove a state court case, or once you remove claims  
7 in federal court and then bring them down and try to  
8 file them in state court that there's an automatic  
9 bar, then you wouldn't have this case law that we  
10 have from the Ninth Circuit that says, well, no, you  
11 don't do that. You look to see if there was a  
12 fraudulent means of trying to avoid federal  
13 jurisdiction. And I'll explain that there's no  
14 fraudulent means on our part. There is a valid basis  
15 for why we did what we did when we amended first our  
16 claim here to add those contract claims and then our  
17 claim in federal court, Brahma's claim in federal  
18 court.

19 So, again, I just want to make it super  
20 clear for the judge, the foreclosure action, be it  
21 against the work of improvement or against the surety  
22 bond, was never in Clark County and was never removed  
23 to federal court. It's always stayed right here in  
24 Nye County. And from our perspective it can never go  
25 anywhere. It has to stay here because Brahma --

1 because, again, diversity jurisdiction issues.  
2 You've got Cobra, a Nevada corporation, saying it's  
3 Brahma, and it's other issues there. So I wanted to  
4 make sure that was clear in the court's mind.

5 Now, what's interesting though, your Honor,  
6 this amended complaint that we did, it accomplishes  
7 the very same goals that are set forth under NRS  
8 108.2275, subsection 5, which says if you have --  
9 it's basically the legislature's intent to put a  
10 motion to expunge and a foreclosure action in front  
11 of the same judge. You don't want to have multiple  
12 judges, different departments deciding issues  
13 relating to the mechanics lien foreclosure action.

14 So 108.2275, subsection 5, requires that a  
15 person filing a motion to expunge would file it in a  
16 foreclosure action that has already been commenced.  
17 And in this case there was one, but it had been  
18 dismissed and so they filed their independent one,  
19 and we then filed our foreclosure action within that  
20 same case.

21 Now again, as I said, had Brahma filed its  
22 foreclosure action first, they would have been  
23 required to file into that one, which is exactly what  
24 they did, if we look back at that original complaint  
25 that Brahma filed. TSE ended up filing its first

1 motion to expunge within that case. It later  
2 withdrew it. That was its own decision, and it  
3 decided not to use that same case when it filed its  
4 second one, but nonetheless they knew that that's how  
5 it worked.

6 So let's talk about the case law that  
7 supports this proposition that our amended complaint  
8 is valid, because that's really where I'm going. I  
9 need to make sure that your Honor understands that  
10 this is just an amended complaint. Yes, at one point  
11 it was inartfully styled, but it doesn't matter what  
12 it was called because you look at it and say, what  
13 does it do? What is it effectively doing? And I  
14 cite the H.W. Polk V Tooley (phonetic) case in our  
15 opposition, and that was where the Nevada Supreme  
16 Court took a very practical approach to a similar  
17 issue when it found that -- it denied a judgment  
18 debtor's motion to dismiss a case filed by a creditor  
19 wherein the creditor filed a complaint to revive a  
20 judgment in a case where the judgement had commenced  
21 that was closed.

22 So basically you had a judgment, and the  
23 creditor came in and tried to -- he commenced a new  
24 action within that same case that had been closed in  
25 an effort to revive this judgment. The details in



1 the case are a little sketchy. I'm not sure if it  
2 had expired or what they were doing to revive it, but  
3 basically the debtor was trying to say no, no, you  
4 can't do that, you have to dismiss the case because  
5 you filed into this wrong action and you should have  
6 filed into its own separate action, which is what  
7 they're arguing here.

8 And the court, the supreme court held that  
9 in the absence of a specific statute requiring an  
10 independent action, that the procedure followed by  
11 the judgment creditor was not improper. And this is  
12 the real part of that language that's important, they  
13 said it was because the debtor was served with a  
14 summons and complaint and had notice of the action.  
15 So the court looked at it and said, well, yeah, maybe  
16 they shouldn't have filed in that same case, but  
17 we're not really bothered by it because it was a  
18 complaint and they served it by summons on the other  
19 side, and they got notice of it.

20 And that's the same argument we have here.  
21 They can be all disturbed that, you know, there was  
22 something different about this or it doesn't look  
23 like some of the other briefing that they -- or the  
24 other pleadings they've seen, but what does it look  
25 like? It's a complaint. It looks exactly like any

1 other complaint that you would see that was filed in  
2 any case commencing in action.

3           So just like the situation in Polk, again  
4 TSE was served with our summons and complaint. It  
5 was a standalone complaint. Just like the situation  
6 in Polk, there's nothing in the mechanics lien  
7 statute that says that you have to file a separate  
8 action. You look at the mechanics lien statute, it  
9 doesn't say when you go to file a foreclosure, do not  
10 file within a case that's been commenced by way of a  
11 motion to expunge. They say, oh, it doesn't say that  
12 language so, therefore, it says you can't do it. But  
13 I look at the opposite. It doesn't say anything  
14 about it. It doesn't say we can't. And if you look  
15 at the statute, it actually infers that the  
16 legislature wants these things to be held together,  
17 which is why someone filing a motion to expunge must  
18 file it within a cause of action that's been  
19 commenced, if it's already been commenced.

20           Again, we also argue in our briefing, your  
21 Honor, that this isn't a novel issue. This isn't  
22 something that we just kind of created on a whim and  
23 we've done before. This is something that our firm  
24 and other construction firms in the state do on a  
25 regular basis, and that is to avoid having to spend

1 money filing a motion to consolidate, getting it  
2 maybe in a peremptory challenge back and forth and  
3 other judges. You never know where things are going  
4 to end up, and so it's a streamline process to be  
5 able to file your complaint in a case that's already  
6 been commenced. We actually gave an attachment in  
7 the briefing of another case where we did the same  
8 thing and had no problem with it.

9 Now, in opposition or to support their  
10 argument that you can't file a foreclosure action in  
11 a commenced mechanics lien case, they cite to a  
12 treatise which is purportedly a treatise on  
13 construction matters in Nevada. First I would say  
14 that this is a publication that is not binding on  
15 this court, and it's not even authoritative. It's  
16 filed by -- it was drafted by a gentleman -- he was  
17 an attorney who practices in Clark County, and his  
18 name is Leon Mead. And Leon Mead is a great guy, but  
19 one he's not a legal scholar. He is not a professor.  
20 He's just a -- he's a guy like myself or Mr. Peel.  
21 Yeah, we understand the mechanics lien law but we're  
22 not professors and we're not trying to draft  
23 briefings or draft treatises that try to convince the  
24 court one way or another on an issue.

25 And, in fact, even if you look at that

1 language, it's funny because it doesn't even say, and  
2 I don't know if your Honor is familiar with what I'm  
3 talking about, but this little exhibit that they  
4 attached as part of their reply brief, they  
5 introduced it in their reply the first time, but it  
6 doesn't even stand for the proposition that they  
7 claim that it does. In that case Mr. Mead simply  
8 says -- this is what he says, he says, "I don't  
9 believe that foreclosure suits can be filed as a  
10 counterclaim to a petition to expunge a foreclosure  
11 action." So he doesn't say that you can't file a  
12 foreclosure action in a case that's been commenced  
13 with a motion to expunge, he just says you can't file  
14 it as a counterclaim. Again, we didn't do a  
15 counterclaim. It's a complaint.

16 Now, Mr. Mead goes on to say that he thinks  
17 the appropriate procedure would have been to file a  
18 complaint and then to move the petitioning court to  
19 consolidate that case over there with the motion to  
20 expunge, but in essence after consolidation and after  
21 a lot of work and expense, you'd be in the very same  
22 procedural posture that we're in right now with TSE.

23 Now, I'm going to mention this next thing,  
24 and it's not to take a jab at Leon Mead, because I  
25 like Leon. I'm not going to speak ill of him, but

1 he's been wrong on several key issues in front of the  
2 Nevada Supreme Court on a few different occasions.  
3 And so the court shouldn't look at his treatise as  
4 gospel or having some binding effect, even though  
5 that's how it was cited in their brief.

6 And, in fact, in the Hardy V SNMark case,  
7 which was a supreme court case decided back in 2010,  
8 the supreme court specifically mentioned in a  
9 footnote that it disagreed with Mr. Mead's position  
10 on one of the doctrines that he espoused in that very  
11 same Nevada construction manual. They said, we  
12 disagree with this particular practitioner.

13 And so, again, I'm not saying that to throw  
14 him under the bus or say, oh, you know, he's never  
15 right, because he's a good attorney, but it wouldn't  
16 be the first time that he got something wrong, and I  
17 believe that he's wrong in this case as well.

18 The next argument that they make, they cite  
19 the Crestline case. This is in their motion. The  
20 Crestline case basically says that if you're adding a  
21 motion to expunge, the district court can decide  
22 three issues. They can only decide that the lien was  
23 frivolous, that the lien was excessive, or that the  
24 lien was neither excessive or frivolous. Those are  
25 the only three issues that can happen. Well, that

1 was the holding and that's it.

2 And so what happened in that case was the  
3 district court had actually denied the motion to  
4 expunge and went in and increased the lien claimant's  
5 lien amount, and the supreme court came in and said,  
6 no, you can't do that. You can only follow what the  
7 statute says.

8 But that holding has nothing to do with what  
9 we're here on today. That holding does not say you  
10 cannot file a foreclosure action in a case that has  
11 been commenced for a motion to expunge. It says at  
12 the hearing you can't take any other action, and we  
13 certainly have done that. We're not asking your  
14 Honor, and we didn't ask your Honor at the time of  
15 the hearing to rule on some other issue or find that  
16 our lien was adjudicated in full. So that is a  
17 complete -- the case that they cite has no bearing on  
18 the issue here, so long as, again, the hearing is  
19 limited and those three inquiries are addressed then  
20 you don't have a problem.

21 So let's talk about the Smith case. The  
22 Smith case is the case that TSE relies upon in its  
23 motion, and you heard extensive argument about it  
24 from opposing counsel. And in that case the court  
25 found, and I'll agree with opposing counsel, they



1 found that the cross-claim that was filed by the  
2 plaintiff was improper, but they did that because  
3 they found that under Rule 12A it should have been --  
4 it should have been with an answer, which is a  
5 pleading.

6 So you can't file a cross-claim on its own,  
7 and in this case the plaintiff, or the party, had  
8 filed an answer and then failed to file a cross-claim  
9 with it and waited several years in fact to file its  
10 cross-claim, and it didn't even serve the cross-claim  
11 on anybody. So the court came in and said, wait a  
12 minute here, you know, you're trying to file a  
13 standalone, rogue document that's not a pleading.  
14 Had you attached it to an answer, then you're talking  
15 business. Now you've got a pleading and you can do a  
16 cross-claim, but you didn't do it at the answer and  
17 your time to file the answer, your time to file that  
18 cross-claim with the answer has come and gone, so,  
19 therefore, we're going to strike that particular  
20 pleading, or it's not a pleading, that particular  
21 document because it wasn't a pleading, and  
22 furthermore they didn't even serve it.

23 So unlike the cross-claim in the Smith case,  
24 which again was never served on the parties and  
25 required to be accompanied by the answer, i.e., the

1 pleading and was time barred, Brahma's amended  
2 complaint was timely filed, it was served, and it  
3 acts as a standalone pleading in compliance with NRCP  
4 7A or the complaint.

5 Now, finally, the last argument I think I  
6 can make on this, your Honor, on the motion to strike  
7 is under NRCP 81A, and that's kind of this catchall  
8 rule that says in the event that you are dealing with  
9 a special proceeding, that the normal rules of civil  
10 procedure can be kind of held in abeyance or kind of  
11 stayed and they don't govern that specific proceeding  
12 when you have instances where there may be a conflict  
13 between the specific rule and/or the specific statute  
14 and a rule of civil procedure.

15 So that's what I'm arguing here is that  
16 under 108.2275 the legislature has shown its intent  
17 to put motions to expunge and foreclosure actions  
18 together and, therefore, that in and of itself is  
19 enough for us to be able to do what we did because  
20 Rule 81, if there was an issue with Rule 7, which I  
21 don't think there is, I think we comply with Rule 7,  
22 but even if your Honor felt that we had run afoul of  
23 it, then simply put, 81 takes Rule 7 out of  
24 application.

25 And then I guess the final word on that



1 would be this: If the court finds that there truly  
2 is an error here, and that we should not have filed  
3 the amended complaint in this action, then the court  
4 can simply severe the amended complaint and ask the  
5 clerk of the court to assign it its own case number,  
6 strip it out from the motion to expunge, give it its  
7 own case number, and then immediately, within the  
8 same action, consolidate it back to this case, which  
9 would be the same posture we're in. And it would  
10 make no sense to do it that way, but if the court  
11 felt like there was some kind of technical default or  
12 technical issue with the amended complaint, that's  
13 one way the court could handle it.

14 I don't know if your Honor had something to  
15 say. It looked like you had a question.

16 THE COURT: Well, I'm struggling with any  
17 right that the Brahma Group might have to take an  
18 action which has been removed to the federal court  
19 and dismiss out claims from there and refile in state  
20 court. That is something that doesn't sound right to  
21 me. It's not within my experience to do that.

22 MR. DOMINA: And obviously I've been  
23 spending my time on the motion to strike.

24 THE COURT: And I might, you know, I might  
25 be inclined to favor Tonopah Solar's position on

1 that, but maybe I can severe out the claim that you  
2 say is simply a foreclosure action which wasn't part  
3 of the Clark County claims that were removed to  
4 federal court, if I understand this right. I mean, I  
5 would distinguish certain claims within your thing  
6 that was erroneously marked as a --

7 MR. DOMINA: So, your Honor, putting aside  
8 the concern it appears that you have with respect to  
9 the three causes of action that were removed from  
10 federal court and then brought into the complaint,  
11 putting that aside, does your Honor have an issue  
12 with respect to the complaint in and of itself, just  
13 the procedural issue and how it relates to Rule 7A?

14 THE COURT: Well, I think I can understand  
15 that, everybody agrees, and if you look at the either  
16 case law or statute, I think it's in the statute,  
17 that, well, you can take a motion to foreclose and  
18 put in a, you know, motion to expunge within the same  
19 case. And if you can do that, why can't you do it  
20 the other way?

21 You know, if the other thing comes first,  
22 the motion to expunge, then can't you come in with a,  
23 you know, motion to foreclose and for that, and it  
24 would seem like they do go together. And I  
25 understand your position about that, and, you know,

1 if there's a way that I can do that, I probably will.

2 MR. DOMINA: Okay. So then I think that --  
3 that was the motion to strike part. That's what I  
4 wanted the court to understand is that the complaint  
5 itself is okay, it's viable, it doesn't -- there's  
6 not an issue with it.

7 Now we need to talk about those three causes  
8 of action that are in that complaint and how we deal  
9 with those, and that was their argument for the  
10 motion to dismiss. Primarily they argue, again, that  
11 the court lacks subject matter jurisdiction to even  
12 hear those three cases, or these three causes of  
13 action, because they were once in federal court and  
14 now are here in state court.

15 But, again, the court, number one, your  
16 Honor need not decide that issue today. Your Honor  
17 could say, you know what, maybe I have jurisdiction,  
18 maybe I don't. If the federal court believes that  
19 you don't have jurisdiction, then the federal court  
20 will grant their motion for injunction, which they  
21 filed in federal court. And so there's no reason to  
22 say, oh, I'm not going to take jurisdiction of this  
23 based on what they're telling you because they've  
24 also filed in the federal court a motion for  
25 injunction trying to stop those three causes of

1 action from being heard.

2 So there's really no harm in saying, well,  
3 let's proceed on them, and if there's no  
4 jurisdiction, then there's no jurisdiction. But I  
5 think that there is jurisdiction, and, again, because  
6 the only cases that they've cited, none of them are  
7 within the Ninth Circuit. But the cases that I  
8 wanted to call your attention to, your Honor --

9 THE COURT: I don't want to say anything bad  
10 about my superiors at the Ninth Circuit, but, you  
11 know, I've gone to those Erwin Chemerinsky --

12 MR. DOMINA: Right.

13 THE COURT: -- lectures. He describes how  
14 the Ninth Circuit is by far the most overturned  
15 circuit in the country.

16 MR. DOMINA: Well, fortunately this isn't  
17 just one rogue case. This is a doctrine that they  
18 follow in the Ninth Circuit, they follow in the Fifth  
19 Circuit. And the two cases that we cite, one is the  
20 Lou V Belzberg in the Ninth Circuit, and basically  
21 that's a case that involved parallel litigation.

22 You had a state court case that had been  
23 commenced only after a party had removed a prior  
24 state court case to federal court. And what they  
25 ended up doing was the same thing that we did, they

1 then took a -- they then went to state court and  
2 filed the same exact litigation that had been removed  
3 to federal court and pursued it in state court.  
4 Well, at that point the party that removed it in  
5 federal court filed a motion for injunction in front  
6 of the district court. And the district court said,  
7 well, how do we treat this? What do we do? And they  
8 do recognize that in the event that you can show that  
9 there's a fraud, a fraudulent purpose to avoid the  
10 jurisdiction of the federal court, then you can go  
11 ahead and enjoin a state court from having  
12 jurisdiction over those causes of action that were  
13 then -- that were once in federal court.

14 But if you don't find that there's fraud,  
15 and this is the Lou case, this is what Lou says, Lou  
16 says -- or what the Lou court did, it overturned a  
17 district court that had actually issued the  
18 injunction of the state court action. And the reason  
19 why the Lou court overturned it was because they  
20 found that there wasn't fraud. They said, look,  
21 these are parallel cases, yes. And, yes, it looks to  
22 be very similar, but we don't think they did it for a  
23 fraudulent purpose. They added some new parties,  
24 there's some new claims. Yes, it's parallel  
25 jurisdiction but it doesn't rise to the level of

1 fraud.

2 Now, you may say, well, how have you shown  
3 me that you haven't tried to avoid this fraudulently?  
4 Number one, I would say this: That's the federal  
5 court's decision to make. That will be argued at the  
6 time of their motion for injunction in front of the  
7 federal court, and we will be putting on argument to  
8 that court. So your Honor doesn't have to decide,  
9 oh, I'm going to dismiss these three claims because  
10 it's already up and teed up for the federal court.  
11 And if they think something's been run afoul, they'll  
12 make that determination. So that's number one.

13 But, two, we did this for a very specific  
14 reason. Remember I indicated that when we first  
15 looked at that, when Brahma first looked at the  
16 contract, the forum selection clause, it looked to be  
17 a mandatory forum selection cause. It's not. It's  
18 permissive. And I think TSE has even kind of  
19 acknowledged that it is permissive. They keep  
20 saying, well, even if it's not mandatory. So they've  
21 kind of looked at the language.

22 And if you look at the case that we cite  
23 with respect to that, that's on -- that's the  
24 American First Credit Union case. That case is a  
25 Nevada Supreme Court decision and it holds that



1 clauses in which a party agrees to submit to  
2 jurisdiction are not necessarily mandatory. It says  
3 absent specific language of exclusion, any agreement  
4 conferring jurisdiction in one forum will not be  
5 interpreted as excluding jurisdiction elsewhere. So  
6 the clause that we're talking about is section 24,  
7 and it's exactly that. It is a clause that confers  
8 jurisdiction but doesn't expressly exclude other  
9 jurisdictions in Clark County.

10 So when we filed that Clark County claim,  
11 basically they're only in federal court because we  
12 filed the Clark County action thinking that that was  
13 what was required under the contract. They would not  
14 be in -- they'd have no diversity if those claims  
15 were not filed in Clark County because they would be  
16 here and you would have Brahma linked up with, again,  
17 Cobra and the others parties on the bond and they  
18 would not be able to remove it to federal court. In  
19 addition to the fact that they're a plaintiff in this  
20 case, they wouldn't be able to do it in federal  
21 court.

22 So the whole reason why we're in federal  
23 court was based on this issue here. But as we  
24 started looking at it, we realized that there's  
25 actually a statutory basis to be in front of Nye

1 County on the contract claims, and that is under the  
2 mechanics lien statute. If I can quickly turn your  
3 attention to NRS 108.2421, subsection 1, this is a  
4 statute that entitles -- this is only applicable if  
5 you have a mechanics lien release bond in play. So  
6 if you're dealing with a lien on real property, it's  
7 not applicable.

8 But if you're dealing with a mechanics lien  
9 release bond, as Brahma is here, under 108.2421,  
10 subsection 1, Brahma's expressly authorized to bring  
11 contract claims against TSE in the county where the  
12 property is located. And this is the language. It  
13 says the lien claimant is entitled to bring an action  
14 against the principal and the surety on the surety  
15 bond, and this is the important language, and the  
16 lien claimant's debtor in any court of competent  
17 jurisdiction that is located within the county where  
18 the property upon which the work and permit is  
19 located.

20 Well, we know who the principal is. That's  
21 Cobra. We know who the surety is. That's AHAC,  
22 American Home Assurance Company. Well, who is the  
23 lien claimant's debtor? That is TSE. They're the  
24 debtor. So this statute gives us the right to pursue  
25 a claim against all three parties in the same action



1 in the county where the property is located.

2 Now, you may say, okay, well, you didn't.

3 Well, the problem is the forum selection clause that  
4 they're trying to foist upon us, if it violates a  
5 provision of the mechanics lien statutes, which in  
6 this case it does, in other words that provision is  
7 requiring us to file in Clark County, and this  
8 statute gives us the right to file in Nye County,  
9 then it violates the mechanics lien statute under  
10 108.2453 that says you can't have a provision in a  
11 contract that requires any lien claimant to waive or  
12 release any rights under the mechanics lien statute,  
13 period. This is one such right.

14 We believe that under 108.2421, subsection  
15 1, we have the absolute right, had the absolute right  
16 to file in Nye County against TSE, against Brahma,  
17 against everybody, even if that provision in the  
18 contract was mandatory. And because they're claiming  
19 that it's mandatory, and if the court found that it  
20 was mandatory, it would then be in violation of  
21 108.2453, and that statute says that any provision is  
22 void and unenforceable, it's against public policy,  
23 and void and unenforceable, and so, therefore, that  
24 provision could not have even been enforceable  
25 against us, and any action that was taken, i.e., the

1 filing of the Clark County case to begin with was  
2 void because it was based on a demand that the  
3 contract require us to file within Clark County, and  
4 that goes against the mechanics lien statute.

5 So, again, you have this statute that  
6 provides rights that can't be waived and, therefore,  
7 based on that understanding, based on that belief  
8 that we do have rights to able to pursue the claims  
9 in Clark County, or, excuse me, in Nye County, that's  
10 why we decided we would file those contract claims in  
11 Nye County and we would take them out of federal  
12 court. That's not fraud, and that's the analysis.  
13 There is no case law that they can point to in Nevada  
14 that says if you remove a case to federal court that  
15 all states or all counties, all courts within this  
16 state are now deprived of jurisdiction on claims that  
17 are similar to those.

18 In fact, the case law is the very opposite.  
19 The case law says there are instances where you can  
20 have parallel litigation and the federal court will  
21 not issue an injunction unless and until it has been  
22 satisfied that they found fraud in the way that  
23 the -- in the way that the claims were asserted in  
24 state court after the fact.

25 So that's where we're at. There's no fraud.

1 I'm not asking your Honor to even make that  
2 determination, because you don't have to. It's a  
3 determination that will be made in the federal court,  
4 but at this juncture your Honor can come up with a  
5 couple things. One is the complaint on its face is a  
6 complaint. It satisfies all of the requirements  
7 under Rule 7A. Not a problem.

8 So then we move to, well, what about those  
9 causes of action that are in there that were giving  
10 you a problem before? Your Honor doesn't have to  
11 decide whether you have jurisdiction or not. You can  
12 just deny the motion, even deny it without prejudice  
13 and let's see what the federal court says. If the  
14 federal court says there's no jurisdiction, then the  
15 injunction will be filed and we'll have a  
16 different --

17 THE COURT: So are you proposing that I  
18 would stay action on those claims and not simply  
19 dismiss them?

20 MR. DOMINA: No, I'm not proposing that you  
21 stay action on them, because here's why. Your Honor  
22 is going to need to know the contract issues between  
23 the parties. We're going to go forward on the  
24 mechanics lien, or the lien -- the bond claim  
25 regardless, because that can't be anywhere else but

1 in this court.

2 And so we have the right to file a demand  
3 for preferential trial setting, and your Honor can't  
4 just say, well, here's the bond, here's the judgment.  
5 Your Honor will have to get into the issues that are  
6 between the parties, the contractual issues: How  
7 much do they owe us, how much do they claim they've  
8 paid us, how much are they claiming in offsets.  
9 Those are issues that are going to have to be looked  
10 at irrespective of whether those actual causes of  
11 action for breach of contract are in the case or not.

12 So I would say the best thing to do is let's  
13 go forward with those three claims as if you do have  
14 jurisdiction on them. Let's develop the discovery on  
15 them, because it's not like it's going to be all for  
16 not and we're going to, you know, end up saying, oh,  
17 well, we just wasted all our time learning what kind  
18 of contract issues were there because those contract  
19 issues are going to be relevant with respect to the  
20 foreclosure action on the bond, which the court must  
21 decide, must determine what the lienable value is.  
22 And you can only do that by way of understanding the  
23 parties' agreements and offsets. So that is what  
24 we're proposing, your Honor.

25 And as far as the stay goes, staying

1 anything, especially the bond claim that we have,  
2 that would be in complete contrast or it would be  
3 basically taking away Brahma's right to pursue its  
4 mechanics lien claim as well as its bond claim under  
5 its demand for preferential trial setting. So under  
6 no circumstance can we stay that. That case --  
7 because if you stay it, it doesn't go anywhere. It  
8 can't go to federal court. It has to remain here in  
9 this court. And by staying it then we go their  
10 route, the two-year process, whereas under the  
11 mechanics lien statute we have an automatic right to  
12 file a demand for preferential trial setting which  
13 will then ask the court to clear its calendar within  
14 60 days of filing that demand and giving us a trial  
15 within that timeframe.

16 And that would be something, if there was  
17 ever any attempt for them to thwart that or to stay  
18 it, that would be something that the Nevada Supreme  
19 Court, based on their Fontainebleau analysis, would  
20 frown upon and think that now we've interfered with  
21 mechanics lien rights that are sacrosanct, that are  
22 entitled to -- or that all lien claimants are  
23 entitled to. So with that, your Honor, do you have  
24 any specific questions for me with respect to what  
25 may be --

1 THE COURT: Well, when I look at what you're  
2 attempting to do on behalf of the Brahma Group, I  
3 certainly wouldn't call it fraud in the ordinary  
4 sense of the word, because, you know, you want to  
5 have your client get, you know, an expeditious and  
6 economical, you might say, resolution of the case.

7 But on the other hand, you are taking  
8 something that, you know, had been removed to the  
9 federal court, you know, these certain claims, three  
10 claims you say, and dismiss them from the action  
11 there and then refile them as part of the foreclosure  
12 action, that's what I'm understanding, and I don't  
13 know. I mean, maybe that's called fraud under, you  
14 know, the rules of removal simply to take claims out  
15 and refile them in order to prosecute the claims in  
16 state court rather than federal court. You know, I  
17 think your motives are good, but maybe you can't do  
18 that. Maybe that's called fraud under, you know, the  
19 diversity case law. I don't know that at this point.

20 MR. DOMINA: And I understand that, which is  
21 exactly why this should be an issue that's decided by  
22 the federal court because they -- this is  
23 something --

24 THE COURT: Well, they would certainly know.

25 MR. DOMINA: Yeah, they filed their motion



1 for injunction, and that's pending before the federal  
2 court. And so it's not -- again, it's not something  
3 this court has to -- it's not a bridge this court has  
4 to cross. You can just say, look, I'm deferring any  
5 decision on the motion to dismiss those claims  
6 because what if the federal court disagrees with them  
7 and there is no injunction that's been issued and  
8 your Honor then dismisses those cases, those causes  
9 of action, then we're kind of -- we're not up there,  
10 we're not down here and we're trying to figure out  
11 what's going on.

12 So I think the best solution would be hold  
13 in abeyance any decision with respect to the motion  
14 to dismiss those three causes of action and let the  
15 federal court decide what it's going to do. And if  
16 the federal court issues the injunction, then that  
17 was the decision, but at least they have the case law  
18 and probably the, you know, this is where those  
19 things get filed is in the federal court. They're  
20 the ones that, you know, control this. There isn't  
21 case law that you'll find in Nevada that says you do  
22 not automatically have jurisdiction over causes of  
23 action that have been removed from federal court to  
24 state court. So that would be our position is let's  
25 bump that one, hold that one off and let the federal

1 court decide it.

2 THE COURT: All right.

3 MR. DOMINA: Any other questions, your  
4 Honor?

5 THE COURT: Not at this point.

6 MR. DOMINA: Okay. Thank you.

7 THE COURT: Why don't we break for lunch,  
8 that's the reasonable thing to do, since it's after  
9 12:30. I don't think we have to keep going, do we?

10 MR. ROBERTS: I'm happy to let the court  
11 decide what would be most convenient for you.

12 THE COURT: Let's just take a --

13 MR. ROBERTS: I'll probably take about  
14 20 minutes. If you'd like to get it done now, I'm  
15 happy to do that. If you'd like to break for lunch,  
16 that's fine too.

17 THE COURT: I think we ought to break for  
18 lunch. That's probably the better thing to do. And  
19 we'll try to get back in an hour, you know, about  
20 1:35 then if we can possibly do that. All right.  
21 Court will stand in recess.

22 (A lunch recess was taken.)

23 THE COURT: Good afternoon. You may be  
24 seated.

25 MR. PEEL: Your Honor, if I may, Richard



1 Peel, for the record. I did talk to Mr. Roberts, and  
2 he has graciously agreed to give me just a few  
3 moments to address the court before it's his turn to  
4 provide his rebuttal.

5 THE COURT: Okay.

6 MR. PEEL: Mr. Roberts used an analogy, and  
7 he said that I'm like Lance Armstrong in that I am  
8 the guy that let's other people do the work and then  
9 I end up allowing them to break the wind for me so  
10 that I can end up taking the lead. I don't feel that  
11 way in this circumstance, by any means, but I am here  
12 to provide some observations that I have heard and  
13 seen in sitting back here and watching what has  
14 unfolded. So I'd like to just take a brief moment  
15 and address those issues.

16 I want to make it clear for the court, the  
17 three claims that we've been talking about are breach  
18 of contract, breach of the covenant of good faith and  
19 fair dealing, and violation of NRS 624. Those are  
20 the three claims that were pending in federal court.  
21 And Mr. Roberts used the word "dismissed," and your  
22 Honor even used the word "dismissed" on occasion, but  
23 they were removed by way of an amendment from the  
24 underlying complaint when it was amended in federal  
25 court, and instead those three causes of action were

1 brought over here.

2 As Mr. Domina correctly noted, the claim for  
3 foreclosure of lien and the claim against the bond  
4 have never been in federal court. They're not the  
5 subject of the federal court, and they are properly  
6 before this court.

7 I've sat and listened to what the court's  
8 concerns are, and specifically I've heard very loudly  
9 that your Honor is concerned about proceeding on  
10 three causes of action that have yet to be ruled on  
11 by the federal court. And so in talking to the  
12 client, what we feel like would be the best way to  
13 approach this is to allow Brahma to go ahead and  
14 amend its underlying complaint, turn around and allow  
15 for those three causes of action to be included, but  
16 to dismiss the mechanics lien foreclosure action,  
17 which is moot at this point because of the bond  
18 that's in place, allow us to revise the claim against  
19 the bond to increase the amount that was provided by  
20 way of the surety rider that Cobra issued, and then  
21 to turn around and have the court stay only those  
22 three contract-related causes of action pending the  
23 federal court ruling on those three causes of action  
24 at a later date. This would allow the court to go  
25 forward on the bond claim that is properly before

1 this court, which it has jurisdiction to hear and to  
2 adjudicate.

3 And so we think that this, in addressing  
4 your concern that that would address that concern  
5 such that you're able to wait and see what the  
6 federal court does on the three contract claims, but  
7 still allow the underlying claim against the bond to  
8 proceed, which is our biggest concern because every  
9 day that \$13 million does create a huge burden on my  
10 client.

11 That's what I had to offer. I appreciate  
12 you indulging me for a few moments. I'm very  
13 grateful. And I'll turn the time over to  
14 Mr. Roberts.

15 THE COURT: All right. Thank you, Mr. Peel.

16 Mr. Roberts, you may explain your client's  
17 position to the best of your ability what I should do  
18 then.

19 MR. ROBERTS: Thank you. And the first  
20 thing, although I recognize the court mentioned  
21 something and then acknowledged that it was probably  
22 not relevant to your decision, I would like to  
23 address the "delay, deny, don't pay" comment by the  
24 court. And I certainly understand how at first blush  
25 it appears that these guys are looking for money and

1 we're trying to avoid an adjudication on it; however,  
2 I would submit to you that if the court looked a  
3 little harder, that the delay deny is actually over  
4 here on this side of the table where Brahma is.

5 The contract has been performed for a period  
6 of time. Tonopah Solar Energy paid invoices for a  
7 period of time. A management company was brought in  
8 to take a look at things, and they found evidence of  
9 fraud, if not intentional fraud, at least negligent  
10 misrepresentations. There were problems. There were  
11 impossibilities with the bills that we had received.  
12 And they saw indicia that there was more there.  
13 That's why Tonopah Solar Energy stopped paying  
14 because they believed that not only were the invoices  
15 which had been submitted suspect, but that they had  
16 been induced to wrongfully pay moneys which were not  
17 owed.

18 What did we do? We asked to see the backup  
19 for the invoices that we paid that would prove that  
20 they were owed the money and that they had performed  
21 the work. They said oh, under NRS 624 you didn't  
22 object within X numbers of days so, oh, doesn't  
23 matter, you're not entitled to see any proof. You  
24 can't get it back. Ha, ha, we tricked you. Too  
25 late.

1 We made an offer of judgment. A substantial  
2 offer of judgement. They turned it down. It could  
3 be us that's asking for attorney's fees at the end of  
4 the day. But we also said this is our best offer  
5 blind, give us the backup and we'll consider paying  
6 more. Total refusal to give us documents. So, yes,  
7 in federal court, once a scheduling order was issued,  
8 on the first available day that we could, we  
9 submitted discovery requests to them, not only to  
10 determine how much they were owed, but to determine  
11 how much they owed us for overpayments.

12 We have a countercomplaint in the federal  
13 action seeking millions of dollars, and we're trying  
14 to get discovery on that. And the court has issued a  
15 scheduling order allowing that discovery to proceed.  
16 They have filed a stay request in federal court  
17 trying to avoid answering discovery, not only on the  
18 amount that they're actually due, but on the amount  
19 we've overpaid prior to today.

20 The delay and the deny is on that side of  
21 the table, your Honor. This is not a situation where  
22 an owner is simply saying, oh, I'm out of money, I'm  
23 not going to pay, and I'm going to fight and I'm  
24 going to make excuses. Tonopah Solar Energy has the  
25 power. They don't need a bond. They don't need

1 security. We have the money. We have the money in  
2 escrow to pay them if they prove they are owed this  
3 money.

4 So there's no subversion here. We're trying  
5 to get discovery to figure out how much they're owed,  
6 they're trying to avoid it. That's what's going on  
7 today.

8 Forum shopping. They represented that they  
9 think we filed the removal to avoid jurisdiction with  
10 you because you had denied our motion to expunge.  
11 What they're forgetting is that we removed on  
12 September 10th, 2018. This court held its hearing on  
13 September 12th, 2018. So two days before we knew  
14 what you were going to do, we filed the removal.

15 The order of the proceedings was also  
16 misquoted to your Honor this morning. The complaint  
17 in Clark County was filed in July, 2018. Our notice  
18 of removal was filed 9-10-2018. And their  
19 foreclosure complaint, the one that they said it just  
20 was inartfully named, was filed September 20th. So  
21 it wasn't until ten days after we removed their Clark  
22 County action that they came back here to Nye County  
23 to try to file the foreclosure complaint in this  
24 special proceeding. The forum shopping is not us,  
25 your Honor.



1 And now let's take a look at what they say  
2 was a complaint. And we agree that the initial  
3 document was labeled Brahma Group, Inc.'s Mechanics  
4 Lien Foreclosure Complaint, but let's look beyond the  
5 title. In this, Brahma Group is referred to as the  
6 counter-claimant lien claimant. Tonopah Solar Energy  
7 is the counter-defendant. In the introductory  
8 paragraph in the complaint says that the  
9 counter-claimant, Brahma Group -- counter-claimant  
10 lien claimant, Brahma Group, Inc., by and through its  
11 attorneys of record and for its complaint in this  
12 action against the counter-defendants complains and  
13 alleges as follows. So if you go beyond the title,  
14 it's a countercomplaint, and it was filed in this  
15 special proceeding.

16 So I think that does lead us back to where I  
17 was this morning, and I urge the court to simply find  
18 this is a rogue pleading and strike it and let them  
19 start over properly. And I understand, you know, as  
20 the court was giving some feedback during Brahma's  
21 presentation that you said that you know that under  
22 the statute that you can file a motion to expunge in  
23 a complaint for foreclosure, so it makes sense to the  
24 court that you could do the opposite, file a  
25 complaint for foreclosure in a motion to expunge

1 special proceeding. And would I ask the court to  
2 rethink that facially plausible conclusion simply  
3 because of two things. One is the statute  
4 specifically allows the filing of a special action or  
5 a motion to expunge in a foreclosure complaint, but  
6 it doesn't expressly allow the other.

7 And now why would it make a difference? The  
8 reason it makes a difference is because right back to  
9 Rule 3, a civil action is commenced by filing a  
10 complaint. This is not a civil action. This is a  
11 special proceeding pursuant to NRS 108. There is no  
12 civil action. The only way to initiate a civil  
13 action is by filing a complaint. And even if you  
14 were to construe this document as a complaint, it did  
15 not initiate a civil action. It attempted to come  
16 into a special proceeding. It lists this civil, this  
17 civil action number on the docket. And they  
18 acknowledge that they did that so that you would get  
19 jurisdiction of it, but it goes -- it goes further  
20 than that.

21 You initiate a civil action by filing a  
22 complaint. If they had filed this document and  
23 allowed it to be assigned a case number and it was a  
24 new civil action, that would have been proper. The  
25 only parties to this when they did this on



1 September 20th was Brahma versus Tonopah Solar  
2 Energy. We had just removed ten days earlier. If  
3 they had filed this as a civil action, the way they  
4 were supposed to do, the result wouldn't be exactly  
5 the same as Brahma suggests. If they had filed it as  
6 a civil action, we would have removed it too. Right?  
7 We've got 30 days from removal. If they file it into  
8 a special proceeding which we had initiated, we can't  
9 remove that. If they had done it the right way, this  
10 would be up in federal court now too, because the  
11 federal court can take jurisdiction over foreclosure  
12 proceedings.

13 And so the whole scheme here was fraudulent,  
14 not in the sense of criminal fraud, not in the sense  
15 of civil fraud, but in the sense of the way the  
16 federal courts used the word "fraud" in connection  
17 with removal proceedings. What is a fraudulent  
18 joinder? It's including a party who's not necessary  
19 for the purpose of avoiding federal jurisdiction.  
20 Why did they amend to get rid of the complaints? And  
21 I agree they amended to eliminate the causes of  
22 action they refiled here rather than dismiss, that's  
23 because they'd already voluntarily dismissed once.  
24 If they dismissed again then they would be barred, so  
25 they did this amended complaint to remove the causes

1 of action and then filed them here. And I think  
2 there is sufficient evidence that the reason they've  
3 done this, the reason for these maneuverings is to  
4 avoided federal jurisdiction over claims properly  
5 removed to federal court.

6 They cited a case where the supreme court  
7 said, you know, you had notice. The fact that you  
8 filed this into another cause of action, we're not  
9 going to -- that we don't have a problem with that  
10 because there was notice of the action, they've been  
11 served. The key and distinguishing factor there is  
12 it was filed into a civil action, which had been  
13 initiated by the filing of a complaint. There is no  
14 civil action here initiated by the filing of a  
15 complaint. There's only a special proceeding.

16 And Leon Mead, while, you know, I think if  
17 being overturned by the Nevada Supreme Court  
18 invalidated an attorney's right to write books, none  
19 of us would be able to write books about the law,  
20 your Honor. I know I wouldn't. But Leon Mead wrote  
21 Nevada Construction Law, and he's a neutral party to  
22 this dispute. And the neutral party says a  
23 foreclosure suit cannot be filed as a counterclaim to  
24 a petition to expunge. And that may be just his  
25 opinion, but it's an opinion consistent with the

1 Smith V Eighth Judicial District case. It's an  
2 opinion consistent with the Nevada Rules of Civil  
3 Procedure.

4 And I do believe that this is a very simple  
5 issue, and it's probably a writable issue, if this  
6 court does not dismiss this rogue pleading and allow  
7 them to refile in accordance with the rules of civil  
8 procedure. And that is the way that we think that  
9 the court should come down today.

10 There is no forum shopping on the part of  
11 Tonopah Solar Energy. Tonopah Solar Energy is from  
12 Delaware, and they have a right to be in federal  
13 court to avoid whatever bias might be against them as  
14 an out-of-state defendant in state court. And they  
15 properly removed the breach of contract action.  
16 They're entitled to have that breach of contract  
17 action heard in a federal forum. And their right to  
18 have that done should not be subverted through these  
19 types of maneuverings.

20 The only reason that they can claim there's  
21 a parallel state court proceeding is because they  
22 amended to remove their claims and refiled. You  
23 can't create a competing state case in order to  
24 subvert federal jurisdiction. It would render the  
25 right to remove meaningless.

1           There was one more thing, your Honor, if  
2   you'd just allow me to check my notes. I'm trying to  
3   be brief here. And that brings us around to, just as  
4   a practical matter, the idea that they cannot obtain  
5   complete relief in federal court. As this court  
6   knows, there's ancillary jurisdiction, there's  
7   supplemental jurisdiction. If removal was proper at  
8   the time of removal, then the federal court has a  
9   right to consider whether it has supplemental or  
10   ancillary jurisdiction in order to give complete  
11   relief.

12           But even if the court were to believe that  
13   they cannot get the decision in federal court on  
14   their bond claim against Cobra, it really doesn't  
15   alter the analysis, and here's why. I had a case a  
16   few years back with Judge Denton in the Eighth  
17   Judicial District. It was a case arising out of a  
18   public works project in Clark County, and there was a  
19   mandatory arbitration clause. The sub filed a  
20   mechanics lien, as they had a right to do. We moved  
21   to compel arbitration. And what Judge Denton did is  
22   he says, okay, the arbitrators have jurisdiction over  
23   the contract dispute. Go decide the contract  
24   dispute, get an award and then come back here and  
25   I'll enter a foreclosure on the lien and I'll award

1 attorney's fees under the statute, if proper, and  
2 allows the parties, who have a right to have their  
3 contract claims heard in arbitration, to have that  
4 heard while still preserving the lien rights of the  
5 plaintiff.

6 And this case can happen the same way. We  
7 believe that the federal court has jurisdiction to  
8 foreclose on a lien, foreclosure on a bond, grant  
9 attorney's fees. But even if they don't, we will  
10 not, and this is judicial estoppel, I'll represent to  
11 the court, we will not raise any type of  
12 jurisdictional argument. The amount of the claim on  
13 the bond cannot exceed the amount they're owed on  
14 their contract for labor and materials. It's one and  
15 the same.

16 So it's just a ministerial matter to enter  
17 judgement on the bond once the court, with proper  
18 jurisdiction, decides how much is owed under the  
19 contract. And whatever court enters judgment on the  
20 bond, we agree will have authority to enter  
21 attorney's fees under the statute, if allowed. And I  
22 say "if allowed" because, as I told the court, I  
23 won't mention an amount, I think that would be  
24 improper, but there's an offer of judgment. If  
25 there's an offer of judgment, and they don't get more

1 than the offer of judgement, we get our attorney's  
2 fees and they get no attorney's fees under NRS 108.  
3 And so it's not a forgone conclusion that someone is  
4 going to have to decided how much attorney's fees  
5 they get for foreclosing on the bond.

6 We would urge the court to go no further  
7 than to look to see if under Smith V Eighth Judicial  
8 District this document they filed into a special  
9 proceeding was a complaint initiating a civil action,  
10 or was it filed into a civil action already initiated  
11 by a complaint. The answer is "no" and "no." It's a  
12 rogue pleading. You strike it. They can start over  
13 and then we can deal with all of these other messy  
14 jurisdictional issues. Thank you, your Honor.

15 THE COURT: I'm just wondering if you can,  
16 one more time, explain or give some authority to the  
17 concept that these three causes of action: Breach of  
18 contract, breach of covenant of good faith and fair  
19 dealing, and NRS 624; is that right?

20 MR. ROBERTS: Yes.

21 THE COURT: That those actions were removed  
22 to federal court, then the Brahma Group has attempted  
23 to dismiss it in federal court and refile in the  
24 state court, why is that improper? Why are they  
25 forbidden from doing that, just so I have it here



1 maybe once more on the record. I'm inclined to think  
2 that must be the law, but you're the one that would  
3 know the law better than I on the subject.

4 MR. ROBERTS: Your Honor, let me cite the  
5 court to a few cases. Resolution Trust Corp. V  
6 Bayside Developers, 43F 3rd, 1230 at page 1238, Ninth  
7 Circuit opinion which, quote -- remove the quotes  
8 yet. Once a party removes a case, the federal  
9 removal statute bars any further proceedings in state  
10 court, quote, because the state court loses  
11 jurisdiction upon filing of the petition for removal.

12 The Ninth Circuit in California ex rel  
13 Sacramento Metro Air Quality Management District V  
14 the United States, 215 F.3d 1005 at page 1011, Ninth  
15 Circuit 2000, quote, it is impossible to obtain  
16 judicial remedies and sanctions in state and local  
17 courts once an action is removed to federal court  
18 because removal of an action to federal court  
19 necessarily divests state --

20 (Cellphone interruption.)

21 MR. ROBERTS: Sorry, your Honor, I  
22 apologize. I set a call when I thought we would be  
23 done here at 1:30 and I forget to turn off my ringer.

24 To continue, removal an action to federal  
25 court necessarily divests state and local courts of

1 their jurisdiction over a particular dispute.

2 So I think that if the court, both based on  
3 this law, and certainly what the court is familiar  
4 with personally, if they had sued us for breach of  
5 contract in this court, and we have removed that  
6 claim to federal court, and they had dismissed it and  
7 refiled again in your court, what would you do?  
8 Would you think you had jurisdiction? Can you avoid  
9 a remand -- a removal? Can you avoid seeking a  
10 remand by just getting rid of the federal claim and  
11 then trying again and then going back up to federal  
12 court and saying, oh, no, no, they can't do --  
13 there's a parallel state court proceeding. We filed  
14 these claims back with Judge Elliott after they  
15 removed and now they're two cases. You can't do  
16 that.

17 So the only question for this court is does  
18 it make a difference that they refiled them in Nye  
19 instead of re-filing in Clark. And we've cited three  
20 cases from other jurisdictions which are a little old  
21 that says no, you can't do that kind of trickery.  
22 Once the state courts are divested of jurisdiction,  
23 it's not just the particular court it was removed  
24 from, but it's all of the state courts in that state.  
25 And that makes sense. We agree there's no Ninth



1 Circuit or Nevada law addressing that particular  
2 issue, but it makes sense that you can't do this type  
3 of gamesmanship simply to avoid a federal forum where  
4 they don't want to be.

5 And they don't need to be here to get  
6 complete relief because it is -- even if they can't  
7 get jurisdiction over Brahma and the bond, it's a  
8 simply ministerial act for this court to enter  
9 judgement on the bond and award attorney's fees, if  
10 we owe them anything under our contract, your Honor.

11 THE COURT: Thank you.

12 MR. ROBERTS: Thank you.

13 THE COURT: Anything else or can I move on?  
14 But in the end, Mr. Roberts gets the last word.

15 MR. DOMINA: Understood.

16 THE COURT: Anything else? No? All right.

17 Well, Mr. Robert, I do appreciate, you know,  
18 your explanation of those last two issues. And I  
19 agree with you on the issue of once a claim, not  
20 just, you know, part of a claim, but the whole claim  
21 of those things are taken out and removed to federal  
22 court, I don't think you can simply, well, let's move  
23 to dismiss them and refile them in the state court.  
24 That would vitiate the whole theory, you know, the  
25 reason for, you know, removal to federal court. You

1 can't just do that on your own. This can't be right.

2 So as to these claims: Breach of contract,  
3 NRS 624, and breach of the covenant of good faith and  
4 fair dealing, since they were removed to the federal  
5 court, I want the federal court basically to take  
6 action. What I'm going to do is rather than just  
7 throw them out, I want this case to move as  
8 expeditiously at all possible in this department, if  
9 it can, and, you know, I'm simply going to stay the  
10 action in this court on those pending, you know,  
11 let's see what the federal court does.

12 If the federal court agrees to divest itself  
13 of those, fine. But if it feels that it wants to  
14 take jurisdiction of those claims, then those claims  
15 will be dismissed here. But at the moment we I think  
16 stay and wait and see what the federal court does.

17 And I still do appreciate your explanation  
18 of why it's okay to take a motion, let's say a motion  
19 to foreclose or a complaint to foreclose, and then  
20 file in with it a motion to expunge the lien, but you  
21 can't go otherwise, you explained that, because a  
22 motion to expunge is a special proceeding and it  
23 isn't a complaint.

24 But I'm not going to rule in your favor on  
25 that. I'm going to rule in favor of the Brahma Group

1 that they had a live expungement action here, because  
2 I hadn't issued any written order on it, plus there  
3 was still the pending, you know, motion for  
4 attorney's fees. It wasn't dead. They still had a  
5 live case here. And I believe that the reverse  
6 should be allowed. It's appropriate under the  
7 circumstances. And I adopt the rationale explained by  
8 Mr. Peel and Mr. Domina.

9 So I want the, you know, that to survive and  
10 would deny, you know, the motion insofar as it tries  
11 to go after the foreclosure complaint. And I believe  
12 it is truly a complaint, not a countercomplaint  
13 that's somehow not a pleading. I think that was just  
14 something that was put on there, but it really is  
15 just the reverse of what's contemplated in the  
16 statute, that it tries to take those two things, put  
17 them together in the case to expeditiously, you know,  
18 reach a conclusion in the best possible expedient way  
19 here in court.

20 So I'm not quite sure how to word all this  
21 but maybe I need help from Mr. Domina in terms of  
22 what this -- what he wants this court to find in  
23 order to keep that thing alive. But I am keeping  
24 alive your, you know, all your claims with regard to,  
25 you know, the proceeding against the bond. I think

1 that needs to be allowed. And what Mr. Peel said  
2 makes sense that since you made that filing, you have  
3 an adequate, you know, one and a half times the  
4 amount of the bond for your claim so it meets the  
5 statutory requirements, and therefore what you have  
6 is really an action against the bond, not an action  
7 to foreclose on the property anymore. You know,  
8 that's not going to happen. And in a way it seems to  
9 me, you know, that regardless of the federal claim,  
10 if the Brahma Group can get satisfaction from the  
11 bond, it seems like the other part is moot.

12 Anyway, Mr. Peel or Mr. Domina, if you  
13 would --

14 MR. PEEL: I think I'll step up.

15 THE COURT: What sort of wording do you want  
16 me to put into this to keep your claims alive?

17 MR. PEEL: I assume that your Honor is going  
18 to prepare the order? Is that what you're intending?

19 THE COURT: No, I want you to -- of course I  
20 want you to do it.

21 MR. PEEL: All right. So what I would say  
22 is is that of course you're denying their motion to  
23 strike and to dismiss, you're granting their motion  
24 to stay but only as to the three causes of action.

25 THE COURT: That's correct.

1 MR. PEEL: That Brahma will have the right  
2 to amend its complaint to remove the mechanics lien  
3 foreclosure action as it pertains to the real  
4 property.

5 THE COURT: Correct.

6 MR. PEEL: To increase the amount of the  
7 claim against the surety bond that Cobra caused to be  
8 posted, and that, again, those three causes of action  
9 will be stayed, but otherwise the action can proceed.

10 MR. ZIMBELMAN: Richard, we need to attach  
11 the rider as well, the rider to the bond to the  
12 extent it's a --

13 MR. PEEL: Mr. Zimbelman brings up a good  
14 point in that rather than go back and issue a new  
15 bond, what Cobra did is it had the surety issue a  
16 surety rider, which is basically just an amendment to  
17 the underlying bond. And so that will need to be  
18 attached to the amended complaint. Again, that would  
19 resolve and from my perspective the things that I  
20 understand the court has desire to address. Did I  
21 miss anything?

22 MR. ZIMBELMAN: That's right.

23 MR. DOMINA: That's right.

24 MR. PEEL: Anyway, that's the gist of what  
25 this order would present for the court's approval and

1 signature.

2 THE COURT: Mr. Roberts, does that sound  
3 like, not what you agree with, but does that sound  
4 like a reasonable conclusion as to what the court  
5 believes is the correct ruling?

6 MR. ROBERTS: Your Honor, I believe it  
7 sounds like a workable solution to implement opinions  
8 expressed by the court. I would notice -- I would  
9 point out that I think the court even misspoke or  
10 forgot about a technicality, and that is these lien  
11 expungement proceedings are over. The court's ruled.  
12 They're over, and there is no claim against the bond  
13 in these proceedings. There's only a lien  
14 foreclosure action. Cobra is not a party.  
15 Nothing -- they aren't a party. There's no claim  
16 against the bond. You aren't allowing something to  
17 proceed because it was decided before the expungement  
18 proceeding.

19 This case is over, and they don't want to  
20 foreclose the lien. They can't. They want to file a  
21 complaint against a bond, and that hasn't been done  
22 and these proceedings are over and we continue to  
23 except, take exception to the court's ruling. But  
24 having said that, I think that what's been proposed  
25 by Mr. Peel implements your order as well as anything



1 I can come up with.

2 THE COURT: Okay.

3 MR. PEEL: I would just --

4 THE COURT: I'll go along with what you  
5 said, Mr. Peel.

6 MR. PEEL: All right. Then I'll sit down.

7 THE COURT: Okay.

8 MR. PEEL: No reason to go further. Thank  
9 you.

10 THE COURT: No, I accept the argument  
11 presented by Mr. Roberts, but I don't approve of it.  
12 I just understand that he has that position.

13 And then as to the next, is there a next  
14 item?

15 MR. ZIMBELMAN: I think the motion to amend  
16 has been resolved by way of this discussion we just  
17 had, because what we'd be doing is effectively  
18 amending our motion to amend on the fly to do exactly  
19 what Mr. Peel suggested.

20 MR. ROBERTS: Our only objection to the  
21 amendment, your Honor, is that you cannot amend a  
22 rogue pleading, that the initial pleading is  
23 improper, so you can't amend an improper pleading.  
24 But the court has overruled us on that so we'll stand  
25 by our objection, but I agree the allowing the

1 amendment follows from the court's order.

2 THE COURT: Okay. Great.

3 MR. ROBERTS: But there is one more thing  
4 though that this brings up, your Honor, that I would  
5 ask. As I mentioned, I think this is a pure legal  
6 issue and there's no discretion to rule against the  
7 Nevada Supreme Court opinion in Smith V Judicial  
8 District. We're going to seek a writ on this, and I  
9 would ask the court to stay the foreclosure action  
10 until the court rules on the writ to avoid -- I'm  
11 required by the rules to ask you for a stay before I  
12 ask the court of appeals. And we will commit to the  
13 court and the parties that we'll get that writ filed  
14 within a week, and as long as we do that, I would  
15 request that you stay what we believe to be an  
16 extract judicial foreclosure action until that writ  
17 is decided.

18 THE COURT: Well, I don't know that I can  
19 take any action just on this oral presentation, but  
20 Mr. Peel?

21 MR. PEEL: My response to that would be as  
22 the attorney's fees, they certainly have the right to  
23 seek an appeal of that issue pursuant to 108.2275.  
24 But as to the rest of it that we've discussed this  
25 afternoon and talked about and what the court has



1 indicated is its intended ruling, they don't have the  
2 right to stay that part of the proceeding.

3 So based on that, and really what they're  
4 seeking to do is to go to argue up on appeal  
5 everything we've discussed rather than just the  
6 attorney's fees issue, which is the subject of  
7 108.2275. So based on that I would say that that's  
8 an improper oral motion. If he chooses to bring it,  
9 he should bring it as a separate written motion with  
10 this court, or he can bring it with the Nevada  
11 Supreme Court, if he so chooses, but it's improper  
12 before this court.

13 THE COURT: Well, I won't act on it as an  
14 oral motion at this time, you know, without the  
15 benefit of briefing and the other side informally  
16 just what they think. I think that's the appropriate  
17 thing. I'm not going to prejudge your issue, but I  
18 just don't think I'm going to do it. And if you can  
19 get this thing going in a hurry, I can certainly do  
20 something, but I'm leaving town, what, February 16th  
21 for a month, so you won't get anything out of me  
22 during that period of time.

23 MR. ROBERTS: Very good.

24 THE COURT: But in January I'll be -- okay.

25 MR. KILBER: Your Honor, Jeremy Kilber on

1   behalf of Cobra. I did have a housekeeping issue,  
2   just to clarify. Are we staying the present  
3   complaint that is on file in this action, because I  
4   believe we were named, and we would have an answer  
5   due if that's the operative pleading. And if we're  
6   staying those causes of action, then we wouldn't have  
7   an answer due.

8           THE COURT: I signed this stipulation and  
9   order to continue hearing on H & E --

10          MR. PEEL: That's for H & E.

11          MR. KILBER: That's for a different party,  
12   your Honor.

13          THE COURT: -- to intervene --

14          MR. DOMINA: Cobra was only named on the  
15   bond.

16          MR. ZIMBELMAN: I believe I can answer your  
17   concerns. The court has granted us the ability to  
18   amend our complaint to --

19          THE COURT: Right.

20          MR. ZIMBELMAN: -- attach the rider and  
21   increase the claim on the bond. At that point you'd  
22   have additional time to file your answer, because it  
23   would be in the pleading. So and we'll of course  
24   work with you, grant you any reasonable extension  
25   that you may require.

1 MR. PEEL: And I've already given -- give me  
2 your name again.

3 MR. KILBER: Jeremy.

4 MR. PEEL: -- Jeremy -- Jeremy's partner,  
5 Mr. Crisp (phonetic), I've already given him an  
6 extension in which to answer until after this  
7 proceeding is concluded. So they've already got an  
8 extension. We're not asking them to respond to the  
9 existing complaint. Instead we'll amend and then at  
10 that time we'll have whatever course that you've got.

11 MR. KILBER: Perfect. All right. Just  
12 making sure. I don't want to miss the filing.

13 THE COURT: Okay. All right. Well, thank  
14 you very much. And the court will stand in recess.

15 MR. PEEL: Thank you very much.

16 MR. ROBERTS: Thank you for your time, your  
17 Honor.

18 (Thereupon the proceedings  
19 were concluded at 2:14 p.m.)

20 \* \* \* \* \*

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CERTIFICATE OF REPORTER


STATE OF NEVADA )

SS:

COUNTY OF CLARK )

I, Deborah Ann Hines, certified court reporter, do hereby certify that I took down in shorthand (Stenotype) all of the proceedings had in the before-entitled matter at the time and place indicated; and that thereafter said shorthand notes were transcribed into typewriting at and under my direction and supervision and the foregoing transcript constitutes a full, true and accurate record of the proceedings had.

IN WITNESS WHEREOF, I have hereunto affixed my hand this 21st day of December, 2018.



Deborah Ann Hines, CCR #473, RPR

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