

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

**Supreme Court Case No. 78256**  
District Court Case No. CV 39348

Tonopah Solar Energy, LLC,  
*Petitioner*

Electronically Filed  
Jul 08 2019 10:37 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

v.

The Fifth Judicial District Court, State of Nevada, Nye County, and  
the Honorable Steven P. Elliott, Senior Judge,  
*Respondent*

and

Brahma Group, Inc.,  
*Real Party in Interest.*

**TSE'S OPPOSITION  
TO BRAHMA'S MOTION TO PERMIT  
LATE FILING OF MOTION TO STAY BRIEFING**

D. LEE ROBERTS, JR., ESQ.  
Nevada Bar No. 8877  
COLBY L. BALKENBUSH, ESQ.  
Nevada Bar No. 13066  
RYAN T. GORMLEY, ESQ.  
Nevada Bar No. 13494  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL, LLC  
6385 South Rainbow Blvd., Suite 400  
Las Vegas, Nevada 89118  
(702) 938-3838  
[lroberts@wwhgd.com](mailto:lroberts@wwhgd.com)  
[cbalkenbush@wwhgd.com](mailto:cbalkenbush@wwhgd.com)  
[rgormley@wwhgd.com](mailto:rgormley@wwhgd.com)

*Attorneys for Petitioner*  
*Tonopah Solar Energy, LLC*

## **I. INTRODUCTION**

Real Party in Interest Brahma Group, Inc.’s (“Brahma”) Motion to Permit Late Filing of Motion to Stay Briefing (“Motion to Permit”) should be denied, and as a result, this Court should reject Brahma’s Motion to Stay Briefing as both belated and untimely. Yet, so as to avoid the draconian result of not allowing Brahma to file an answer to Petitioner Tonopah Solar Energy’s (“TSE”) writ petition, Brahma should be granted an extension of time and directed to file an answer to TSE’s writ petition by July 26, 2019, or within 14 days of the denial of its Motion to Permit, whichever comes later.

## **II. STATEMENT OF FACTS**

On March 6, 2019, TSE filed a writ petition. On May 16, 2019, the Court ordered Brahma to file an answer to the writ petition. Brahma’s answer was due on June 13, 2019. Brahma obtained a telephonic extension under Rule 26, which extended the deadline for its answer to June 26, 2019. The day before the answer deadline, on June 25, 2019, Brahma attempted to file a motion to stay.

Brahma’s motion to stay sought to stay briefing on TSE’s writ petition until the United States District Court for the District of Nevada resolved two motions pending before it—one filed by TSE and one filed by Brahma. The parties had completed briefing on both of those motions in November 2018. On May 30, 2019, twenty-five days before Brahma attempted to file its motion to stay, the

federal court set those motions for hearing on June 25, 2019. The hearing went forward as scheduled. At the hearing, the federal court took the matter under advisement and indicated that it would issue a written decision. It did not indicate what the substance of the written decision would be, or when it would be issued. Of particular interest to this Court, the federal court seemed to contemplate whether it should wait to see if the resolution of TSE's writ petition mooted some or all of the issues before it.<sup>1</sup>

On June 26, 2019, the day after Brahma attempted to file its motion to stay, this Court rejected the filing because it violated NRAP 27(d)(2). NRAP 27(d)(2) dictates that motions shall not exceed 10 pages. Brahma's motion to stay was 18 pages and included nearly 600 pages of mostly immaterial exhibits. Brahma had not sought leave to exceed the page limit limitation.

Two days later, on June 28, 2019, Brahma filed the instant Motion to Permit and a Motion to Stay Briefing (Re-Submitted). This time Brahma shortened its re-

---

<sup>1</sup> See *generally* transcript of proceedings before the Hon. Judge Richard F. Boulware, II, at 35:14-38:17 (entire transcript attached as **Ex. A**). Brahma's motion to stay would seek to stay this proceeding until the federal court rules, while at the same time the federal court is considering whether to delay its own decision until this Court rules. As a matter of policy, to the extent that the Nye County District Court is acting outside of its jurisdiction, it would be better to have that corrected by this Court rather than forcing the federal court to defend its own jurisdiction.

submitted motion to stay so that it was under the 10 page limit.<sup>2</sup> Of course, by this time, Brahma's deadline to answer TSE's writ petition, as extended, had already passed.

### **III. ARGUMENT**

In its Motion to Permit, Brahma asks that this Court excuse the late filing of its re-submitted motion to stay. As explained below, Brahma's Motion to Permit should be denied.

Brahma's original motion to stay (the 18 page one) was belated. Brahma filed its original motion to stay with hundreds of pages of exhibits on June 25, 2019. This was a month and a half after this Court had ordered an answer to TSE's writ petition (May 16, 2019), two weeks after Brahma's initial answer deadline (June 13, 2019), and one day before its telephonically extended deadline (June 26, 2019). During this approximately six-week period, the motions pending in federal court were no secret. They had been pending since November 2018. Moreover, the federal motions were set for hearing almost four weeks prior to Brahma filing the motion to stay (May 30, 2019). By filing the motion to stay on the eve of its telephonically extended answer deadline and weeks after the issues raised by the

---

<sup>2</sup> Brahma's re-submitted motion to stay, however, does not comply with NRAP 27(d)(1)(D)'s double-spacing requirement. The spacing appears narrower than double. No leave of court was sought to waive compliance with NRAP 27(d)(1)(D).

motion were presented (which TSE contends have no merit), there is no question that the motion was belated.

Now, due to Brahma ignoring the page limit requirements of NRAP 27 (filing an 18 page motion instead of a 10 page motion), Brahma's re-submitted motion to stay is untimely. Brahma filed it two days after its June 26, 2019 deadline to file an answer to TSE's writ petition. For this reason in conjunction with the initial belated filing date, Brahma's Motion to Permit should be denied as belated and untimely filed.

TSE recognizes, however, that denial of Brahma's Motion to Permit would potentially preclude Brahma from filing an answer to TSE's writ petition. In light of this Court's policy of resolving matters on the merits, TSE submits that Brahma should be granted a 30 day extension based on the stipulation of the parties, and permitted to file an answer by July 26, 2019, or 14 days from the date of this Court's denial of Brahma's Motion to Permit, whichever is later. This result would accomplish the dual goal of not unnecessarily delaying resolution of the writ petition while avoiding a potentially draconian result.<sup>3</sup>

---

<sup>3</sup> In this opposition, TSE only addresses Brahma's Motion to Permit. If Brahma is permitted to file its re-submitted motion to stay, TSE will oppose the motion to stay on the merits, as there is no justification for delaying the resolution of TSE's writ petition, particularly not an extraordinary or compelling reason as required by NRAP 26(b)(1)(B) at this stage of the proceedings.

#### IV. CONCLUSION

Based on the foregoing, Brahma's Motion to Permit should be denied. TSE submits that Brahma should be granted a 30 day extension based on a stipulation of the parties, and permitted to file an answer by July 26, 2019, or 14 days from the date of this Court's denial of Brahma's Motion to Permit, whichever is later.

Dated: July 8, 2019

/s/ Ryan T. Gormley

D. Lee Roberts, Jr., Esq.

Colby L. Balkenbush, Esq.

Ryan T. Gormley, Esq.

WEINBERG, WHEELER, HUDGINS,

GUNN & DIAL, LLC

6385 South Rainbow Blvd., Suite 400

Las Vegas, Nevada 89118

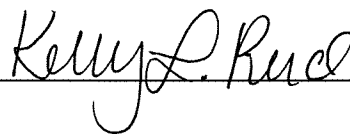
*Attorneys for Petitioner*

*Tonopah Solar Energy, LLC*

### **CERTIFICATE OF SERVICE**

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on July 8<sup>th</sup>, 2019, I submitted the foregoing **TSE'S OPPOSITION TO BRAHMA'S MOTION TO PERMIT LATE FILING OF MOTION TO STAY BRIEFING** for filing via the Court's electronic filing system. Electronic notification will be sent to the following:

Richard L. Peel, Esq.  
Eric B. Zimbelman, Esq.  
Cary B. Domina, Esq.  
Peel Brimley, LLP  
3333 E. Serene Avenue, Suite 200  
Henderson, Nevada 89074  
[rpeel@peelbrimley.com](mailto:rpeel@peelbrimley.com)  
[ezimbelman@peelbrimley.com](mailto:ezimbelman@peelbrimley.com)  
[cdomina@peelbrimley.com](mailto:cdomina@peelbrimley.com)  
*Attorneys for Brahma Group, Inc.*

  
\_\_\_\_\_

# EXHIBIT A

# EXHIBIT A



~~2:18-cv-01747-RFB-GWF~~

## UNITED STATES DISTRICT COURT

## DISTRICT OF NEVADA

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

---

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

Counter-claimant,

vs.

BRAHMA GROUP, INC., a  
Nevada corporation,

Counter-defendant.

## REPORTER'S TRANSCRIPT OF PROCEEDINGS

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

APPEARANCES: See next page

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

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

2:18-cv-01747-RFB-GWF

1 APPEARANCES:

2 For the Plaintiff:

**ERIC ZIMBELMAN, ESQ.**

3 **RICHARD LESLIE PEEL, ESQ.**

PEEL BRIMLEY, LLP

4 3333 E. Serene Avenue, Suite 200

Henderson, Nevada 89074-6571

5 (702) 990-7272

6 For the Defendant:

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

7 **COLBY BALKENBUSH, ESQ.**

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC

8 6385 S. Rainbow Boulevard, Suite 400

Las Vegas, Nevada 89118

9 (702) 938-3838

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

2:18-cv-01747-RFB-GWF

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

2 --oOo--

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

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

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

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

15 MR. PEEL: Good afternoon, Your Honor.

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

19 THE COURT: Good afternoon.

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

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

2:18-cv-01747-RFB-GWF

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

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

3 MR. ZIMBELMAN: Zimbelman.

4 (Court conferring with courtroom administrator.)

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

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

10 THE COURT: Sure.

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

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

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

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

19 MR. ZIMBELMAN: Right.

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

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

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

2:18-cv-01747-RFB-GWF

1 right now.

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

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

4 MR. ZIMBELMAN: I understand.

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

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

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

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

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

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

19 MR. ZIMBELMAN: Yes.

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

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

25 THE COURT: Right.

2:18-cv-01747-RFB-GWF

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

2 THE COURT: Right.

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

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

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

6 MR. ZIMBELMAN: That is correct.

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

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

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

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

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

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

23 MR. ZIMBELMAN: Not by my client.

24 THE COURT: By anyone?

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

2:18-cv-01747-RFB-GWF

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

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

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

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

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

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

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

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

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

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

2:18-cv-01747-RFB-GWF

1 So ...

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

3 THE COURT: Well, I understand that.

4 MR. ZIMBELMAN: Yeah.

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

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

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



2:18-cv-01747-RFB-GWF

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

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

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

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

8 (Court reporter interruption.)

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

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

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

17 MR. ZIMBELMAN: The answer is yes.

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

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

23 THE COURT: Hold on.

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

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

2:18-cv-01747-RFB-GWF

1 filed?

2 MR. ZIMBELMAN: That's correct.

3 THE COURT: In Nye County?

4 MR. ZIMBELMAN: That's correct.

5 THE COURT: Against whom?

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

8 THE COURT: And that was filed when?

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

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

13 MR. ZIMBELMAN: After.

14 THE COURT: Okay.

15 MR. ZIMBELMAN: And Judge Elliott --

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

17 MR. ZIMBELMAN: Sorry.

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

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

22 THE COURT: And when did you do that?

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

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

2:18-cv-01747-RFB-GWF

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

3 MR. ZIMBELMAN: Well --

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

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

8 THE COURT: Cobra.

9 MR. ZIMBELMAN: Somebody else did.

10 THE COURT: Right.

11 MR. ZIMBELMAN: Yeah.

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

15 MR. ZIMBELMAN: That's fair.

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

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

24 MR. ZIMBELMAN: There is one other.

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

2:18-cv-01747-RFB-GWF

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

4 MR. ZIMBELMAN: Correct.

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

7 MR. ZIMBELMAN: Yes.

8 THE COURT: Okay.

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

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

14 MR. ZIMBELMAN: The first.

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

17 MR. ZIMBELMAN: And they --

18 THE COURT: Hold on. Let me finish.

19 MR. ZIMBELMAN: Sorry.

20 THE COURT: You filed the foreclosure complaint.

21 MR. ZIMBELMAN: Right.

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

2:18-cv-01747-RFB-GWF

1 MR. ZIMBELMAN: That's correct.

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

6 MR. ZIMBELMAN: That's true.

7 THE COURT: Okay.

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

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

11 MR. ZIMBELMAN: That's true.

12 THE COURT: Right.

13 MR. ZIMBELMAN: Yeah.

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

17 MR. ZIMBELMAN: That is correct.

18 THE COURT: Okay.

19 MR. ZIMBELMAN: Yeah.

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

22 MR. ZIMBELMAN: No.

23 THE COURT: Okay. So --

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

2:18-cv-01747-RFB-GWF

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

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

3 MR. ZIMBELMAN: Those claims --

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

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

7 THE COURT: And stayed by whom?

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

14 THE COURT: Okay.

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

18 MR. ZIMBELMAN: Yes.

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

21 MR. ZIMBELMAN: Sure.

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

24 MR. ZIMBELMAN: Right.

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

2:18-cv-01747-RFB-GWF

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

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

6 THE COURT: Sure.

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

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

12 MR. ZIMBELMAN: Uh-hmm.

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

15 MR. ZIMBELMAN: That is true.

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

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

23 THE COURT: As to that particular issue.

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

2:18-cv-01747-RFB-GWF

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

6 THE COURT: Right. Okay.

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

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

10 MR. ZIMBELMAN: Of course.

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

15 MR. ZIMBELMAN: Certainly.

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



2:18-cv-01747-RFB-GWF

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

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

11 MR. ZIMBELMAN: Okay. I understand that.

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

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

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

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

2:18-cv-01747-RFB-GWF

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

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

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

14 MR. PEEL: Your Honor --

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

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

18 THE COURT: Sure.

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

20 THE COURT: And so ...

21 (Plaintiff's counsel conferring.)

22 THE COURT: You made the argument --

23 MR. ZIMBELMAN: Yes.

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

2:18-cv-01747-RFB-GWF

1 MR. ZIMBELMAN: Right.

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

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

4 MR. ZIMBELMAN: True.

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

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

21 MR. ZIMBELMAN: Zimbelman.

22 THE COURT: Zimbelman.

23 MR. ZIMBELMAN: Yes.

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

2:18-cv-01747-RFB-GWF

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

3 MR. ZIMBELMAN: Sure.

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

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

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

20 THE COURT: Okay.

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

2:18-cv-01747-RFB-GWF

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

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

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

9 MR. ZIMBELMAN: Yeah.

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

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

2:18-cv-01747-RFB-GWF

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

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

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

17 THE COURT: Okay.

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

21 MR. ZIMBELMAN: Absolutely.

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

24 MR. ZIMBELMAN: Thank you, Your Honor.

25 THE COURT: As relates to the arguments here.



2:18-cv-01747-RFB-GWF

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

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

6 (Court conferring with court reporter.)

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

9 THE COURT: Okay.

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

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

13 MR. ROBERTS: Fair enough.

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

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

20 THE COURT: Okay.

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

2:18-cv-01747-RFB-GWF

1 THE COURT: On the second lien?

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

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

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

16 THE COURT: Right.

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

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

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

2:18-cv-01747-RFB-GWF

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

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

7 MR. ROBERTS: Roberts.

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

3 THE COURT: Right.

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

11 THE COURT: Right.

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

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

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

21 MR. ROBERTS: Correct, Your Honor.

22 THE COURT: Okay.

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

2:18-cv-01747-RFB-GWF

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

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

16 What's left there --

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

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

2:18-cv-01747-RFB-GWF

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

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

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

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

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

10 MR. ROBERTS: Yes.

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

12 MR. ROBERTS: Yes, Your Honor.

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

16 MR. ROBERTS: Correct.

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

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

11 THE COURT: To --

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

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

18 MR. ROBERTS: Absolutely, Your Honor.

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

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

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

2:18-cv-01747-RFB-GWF

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

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

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

8 THE COURT: Right.

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

12 THE COURT: Got it. Okay.

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

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



2:18-cv-01747-RFB-GWF

1 they filed no timely motion to remand.

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

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

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

8 THE COURT: Under I think it was --

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

11 THE COURT: Quackenbush or --

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

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

19 MR. ROBERTS: Yes, Your Honor.

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

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

2:18-cv-01747-RFB-GWF

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

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

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

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

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

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

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

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

23 THE COURT: Yes.

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

2:18-cv-01747-RFB-GWF

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

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

6 MR. ROBERTS: Yes.

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

9 MR. ROBERTS: No.

10 THE COURT: -- they're suggesting.

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

13 THE COURT: Okay. All right.

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

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

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

2:18-cv-01747-RFB-GWF

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

4 MR. ROBERTS: Yes, Your Honor.

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

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

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

5 MR. ROBERTS: Fair enough.

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

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

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

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

19 MR. ROBERTS: Nothing else, Your Honor.

20 THE COURT: All right. Thank you.

21 MR. ROBERTS: Thank you for your time.

22 THE COURT: Uh-huh.

23 Mr. Zimbelman, any final response?

24 MR. ZIMBELMAN: Thank you, Your Honor.

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

2:18-cv-01747-RFB-GWF

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

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

6 MR. ZIMBELMAN: Now.

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

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

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

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

19 THE COURT: Okay. So how --

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

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

2:18-cv-01747-RFB-GWF

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

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

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

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

15 THE COURT: Right.

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

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

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



2:18-cv-01747-RFB-GWF

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

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

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

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

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

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

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

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

2:18-cv-01747-RFB-GWF

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

3 MR. ZIMBELMAN: Of course.

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

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

14 THE COURT: Okay.

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

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

2:18-cv-01747-RFB-GWF

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

3 MR. ZIMBELMAN: I'm sorry?

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

5 MR. ZIMBELMAN: They did.

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

10 MR. ZIMBELMAN: Same dispute.

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

14 MR. ZIMBELMAN: Okay.

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

16 MR. ZIMBELMAN: It's both.

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

20 MR. ZIMBELMAN: It is.

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

25 MR. ZIMBELMAN: I appreciate the distinction, Your

2:18-cv-01747-RFB-GWF

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

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

3 MR. ZIMBELMAN: Thank you, Your Honor.

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

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

9 MR. ROBERTS: Thank you, Your Honor.

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

11 --oOo--

12 COURT REPORTER'S CERTIFICATE

13

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

18

19 Date: June 27, 2019.

20

/s/ Patricia L. Ganci

21

Patricia L. Ganci, RMR, CRR

22

CCR #937

23

24

25