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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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10 Solar Utilities Network, LLC,

11 Plaintiff,

12 vs.

13 Navopache Electric Cooperative, Inc.,

14 Defendant.

No. CV-12-08095-PCT-PGR

ORDER

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16 Among the motions pending before the Court is defendant Navopache Electric  
17 Cooperative, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6) (Doc. 15), wherein  
18 the defendant seeks the dismissal of the entirety of plaintiff Solar Utilities Network,  
19 LLC's First Amended Complaint ("FAC") (Doc. 7) for failure to state a claim, and the  
20 plaintiff's Conditional Motion for Leave to Amend (Doc. 20). Having considered the  
21 parties' memoranda in light of the allegations of the FAC, the Court finds that the  
22 FAC should be dismissed with leave to amend.<sup>1</sup>  
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25 Although the plaintiff has requested oral argument, the Court concludes  
that oral argument would not significantly aid the decisional process.

26 The Court notes that it has intentionally not discussed every argument  
raised by the parties and that those arguments not discussed were considered by  
the Court to be unnecessary to its resolution of the pending motions.

1 Background

2 According to the FAC, this action arises out of the defendant's alleged  
3 wrongful repudiation and termination of the parties' Power Purchase Agreement  
4 ("PPA") dated October 15, 2010. The purpose of the PPA, which the parties entered  
5 into after two and half years of planning and negotiating, was to assist the defendant  
6 in complying with requirements of the Arizona Corporation Commission that it obtain  
7 certain amounts of its electricity from renewable energy sources. Pursuant to the  
8 PPA, the defendant agreed to purchase for twenty years all of the electric energy  
9 and related environmental benefits produced at or attributable to a one megawatt  
10 solar power plant that the plaintiff was to construct and operate in Hunt Valley,  
11 Arizona. In early August 2011, the defendant terminated the PPA and repudiated  
12 its contractual obligations without warning on the ground that the plaintiff breached  
13 the PPA by failing to timely secure construction financing and to timely commence  
14 construction of the solar power plant. The FAC alleges claims for breach of contract  
15 and for breach of the implied covenant of good faith and fair dealing, both arising  
16 from the termination of the PPA.

17 Discussion

18 The defendant seeks the dismissal of both claims in the FAC with prejudice  
19 pursuant to Fed.R.Civ.P. 12(b)(6). The defendant's basic position is that the Court  
20 can determine as a matter of law from the facts alleged in the FAC, together with the  
21 uncontested documents relied on and referred to in the FAC, both that the defendant  
22 properly terminated the PPA because the plaintiff unquestionably failed to timely  
23 perform as required by § 2.02(b) of the PPA, and that any amendment of the FAC  
24 would be futile.

25 There is no dispute that the PPA permitted the defendant to terminate the  
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1 contract under certain circumstances, which included the plaintiff's failure to timely  
2 perform its obligations as required by § 2.02(b) of the PPA.<sup>2</sup> That provision  
3 provided that

4 [i]n the event that Construction Financing has not been secured, and  
5 construction of the Generating Facility commenced, by July 31, 2011,  
6 Buyer [the defendant] shall have the right to terminate in this  
7 Agreement without payment or penalty by giving Notice to Seller [the  
8 plaintiff], which Notice when given shall automatically terminate this  
9 Agreement.

10 What is disputed by the parties is how § 2.02(b) is to be interpreted, *i.e.*, what  
11 the plaintiff had to do to "secure" construction financing and to "commence"  
12 construction.<sup>3</sup> The defendant argues in effect that the plaintiff has pleaded itself out  
13 of court because it is clear from the FAC that the plaintiff did not by the July 31, 2011  
14 deadline either "secure" the required construction financing, which the defendant  
15 interprets as requiring an actual commitment of financing, nor did the plaintiff  
16 "commence" construction, which the defendant interprets as requiring the  
17 commencement of some actual vertical construction of a facility capable of  
18 generating electricity, given the FAC's allegations that the plaintiff had by the  
19 deadline only obtained a preliminary proposal for financing<sup>4</sup>, a proposal for

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20 The plaintiff acknowledges in the FAC that the PPA provided the  
21 defendant with "a limited right to terminate the contract only if the Plant was not  
22 operational by July 31, 2012, or if [the plaintiff] did not secure construction financing  
23 or commence construction by July 31, 2011." (FAC ¶16).

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24 The Court notes that the terms "secured" and "commenced" as used in  
25 § 2.02(b) are not defined in the PPA.

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26 With regard to securing construction financing, the FAC alleges that  
"the PPA did not require that [the plaintiff] close on construction financing to comply

1 construction, a draft construction contract, and was ready to finalize the solar plant's  
2 design.<sup>5</sup> The plaintiff argues that the PPA, if construed as the parties intended at the

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4 with the July 31, 2011 deadline, but only required that [the plaintiff] secure  
5 construction financing[,]” (FAC ¶ 18), that the plaintiff was able to “secure a written  
6 proposal for construction financing ... on July 22, 2011, from National Cooperative  
7 Bank, FSB (“NCB”), a bank dedicated to delivering nationwide banking products to  
8 cooperatives like [the defendant,]” (FAC ¶29), that the plaintiff “received NCB’s  
9 proposal before the PPA’s July 31, 2011 deadline to secure construction financing[,]”  
10 (FAC ¶ 30), and that “NCB gave [the plaintiff] thirty days to accept the terms of its  
11 proposal and to submit an initial deposit of \$10,000.” (FAC ¶ 31).

12 The Court notes that the plaintiff, in connection with its motion to  
13 amend, has submitted additional relevant information which could be alleged in a  
14 second amended complaint, including that it was the regular practice of NCB, the  
15 plaintiff’s financing bank, to issue a financial proposal, such as the one the plaintiff  
16 received prior to the deadline, only after a substantial portion of the underwriting is  
17 completed and the parties have agreed to the overall financing structure of the  
18 proposed transaction, that NCB would have timely closed on the financing proposal  
19 due to the reputation of DV, the plaintiff’s financial advisor, and that NCB would have  
20 promptly closed on its financing proposal if the defendant had not terminated the  
21 PPA.

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23 With regard to commencing construction, the FAC alleges that the  
24 plaintiff

25 negotiated and obtained a proposal for construction and a draft  
26 construction contract from Sundt on March 11, 2011; began the design  
of the Plant, including exchanging preliminary designs, with Sundt; and  
secured two construction-site surveys in April 2011. On April 20, 2011,  
[the plaintiff] closed escrow on the lease option agreement [for the plant  
property] it previously negotiated with JMK Properties. And, on July 31,  
2011, Mr. Moore and Chriss Kengla, a participating landowner in the  
Hunt Valley project, held a ground-breaking ceremony.

(FAC ¶22).

In its proposed second amended complaint, the plaintiff would add the  
allegation that Sundt’s construction proposal estimated a two-month time period to  
complete the physical construction of the solar power plant, and the plaintiff has

1 time of contracting, did not require that the plaintiff actually close on construction  
2 financing or actually begin vertical construction of the solar power plant by July 31,  
3 2011 in order to avoid forfeiture and termination of the PPA since it was the parties'  
4 intent that the defendant could terminate the PPA by that date only if it was evident  
5 that the plaintiff could not complete construction of the plant by the construction  
6 completion deadline of July 31, 2012, which the plaintiff alleges in the FAC it was on  
7 schedule to do.

8         The dismissal of a complaint under Rule 12(b)(6) is appropriate where the  
9 complaint contains allegations establishing an absolute defense or bar to recovery.  
10 See Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 n.1 (9th Cir.1997)  
11 (“Whether the case can be dismissed on the pleadings depends on what the  
12 pleadings say. A plaintiff may plead [itself] out of court. If the pleadings establish  
13 facts compelling a decision one way, that is as good as if depositions and other  
14 expensively obtained evidence on summary judgment establishes the identical  
15 facts.”) (internal citations, quotation marks and brackets omitted.) The Court,  
16 however, is not persuaded that it can appropriately determine at this time that the  
17 defendant was justified as a matter of law in terminating the PPA based on the  
18 plaintiff’s § 2.02(b)-related performance, nor is the Court persuaded that it would be  
19 futile to allow the plaintiff to amend the FAC.

20         The standard of review at this nascent stage of the litigation is not whether the  
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22 submitted additional factual contentions that could be included in a second amended  
23 complaint, including information that Sundt was on board with the project and would  
24 be able to complete construction of the plant well before the construction completion  
25 deadline of July 31, 2012.

26         While the defendant contends that the plaintiff’s ground-breaking  
ceremony held on the day of the construction commencement deadline was merely  
a pretense, the validity of that contention is not something the Court can resolve on  
a Rule 12(b)(6) motion.

1 plaintiff's claims must be true or even probable, but whether they are backed by  
2 factual allegations in the complaint, accepted as true, that make the claims facially  
3 plausible, *i.e.*, are sufficient to permit the Court, drawing on its judicial experience  
4 and common sense, to make the reasonable inference that the defendant is liable  
5 for the alleged misconduct such that it would not be unfair to require the defendant  
6 to be subjected to the expense of discovery and continued litigation. See Ashcroft  
7 v. Iqbal, 556 U.S. 662, 678 (2009); Starr v. Baca, 652 F.3d 1202, 1216-17 (2011),  
8 *cert. denied*, 132 S.Ct. 2101 (2012). If the complaint meets that standard, it must be  
9 allowed to proceed even if the actual proof of its alleged facts is improbable and a  
10 recovery is very remote and unlikely. Bell Atlantic Corp. v. Twombly, 550 U.S. 544,  
11 556 (2007).

12 While the sufficiency of the allegations related to the plaintiff's performance  
13 directed at its § 2.02(b) compliance is problematic, especially those related to the  
14 commencement of construction, the issue of the plausibility of those allegations  
15 depends in part on how § 2.02(b) is interpreted, and the Court concludes that it need  
16 not now decide the validity of the parties' differing interpretations of § 2.02(b). This  
17 is because a dismissal with prejudice of this action is not now appropriate because  
18 the plaintiff also alleges in the FAC, in relation to both of its claims, that the  
19 termination of the PPA was improper inasmuch as the defendant impeded the  
20 plaintiff's ability to meet § 2.02(b)'s time requirement. The governing Arizona law  
21 recognizes the general principle that "[i]f one party to a contract prevents the other  
22 party from performing one of the conditions to the contract, then he cannot use the  
23 failure to deny his own obligation under the agreement." Fowler v. Dana, 436 P.2d  
24 166, 167 (Ariz.App.1968). The gist of the FAC's hindrance-related allegations is that  
25 the plaintiff hired Dudley Ventures ("DV"), an investment and advisory services firm,  
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1 in January 2011 to assist it in obtaining the required construction financing, that DV  
2 advised the plaintiff to obtain the defendant's audited financial statements for the  
3 years 2007-2009 because lenders or investors would be unlikely to finance the  
4 project without proof of the defendant's ability to perform under the PPA, that the  
5 plaintiff requested those statements from the defendant beginning in mid-February  
6 2011 and repeatedly thereafter for the next three months, but the defendant refused  
7 to produce them until May 18, 2011.<sup>6</sup> Based on these allegations, the plaintiff

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The plaintiff alleges in part in the FAC as follows:

10 25. Acting on DV's advice, Mr. Moore [the plaintiff's principal] sent [the  
11 defendant] an email on February 14, 2011 requesting that it forward  
12 [the defendant's] audited financial statements to assist [the plaintiff] in  
13 securing construction financing. Mr. Moore specifically informed [the  
14 defendant] that "his lenders are requesting financials from [the  
15 defendant]" and explained that lenders needed the information to verify  
16 [the defendant's] ability to perform under the PPA as [the defendant's]  
17 performance would directly impact [the plaintiff's] ability to repay any  
18 lender or investor. David Plumb, the then CEO of [the defendant,]  
19 unexpectedly and without explanation denied [the plaintiff's] request,  
20 offering only his uninformed opinion that [the defendant's] audited  
21 financial statements provided to the [Arizona Corporation Commission]  
22 would suffice.

\* \* \*

23 27. Frustrated and confused by [the defendant's] lack of cooperation,  
24 [the plaintiff] nevertheless continued to press [the defendant] for audited  
25 financial statements over the next three months. Mr. Moore raised the  
26 need for the audited financial statements essentially every time he  
reported to [the defendant] on the progress of [the plaintiff's]  
performance under the PPA, making at least ten more requests (nine  
telephonic and on in-person) for the audited financials in addition to the  
written requests discussed above. Mr. Plumb, on behalf of [the  
defendant,] denied each and every request.

28. Finally, on May 18, 2011, three months after [the plaintiff's] initial  
request, [the defendant] provided [the plaintiff] with its audited financial  
statements for 2007, 2008, 2009, and 2010.

1 alleges in the breach of contract claim that the defendant's own misconduct in failing  
2 to timely cooperate with the plaintiff caused any alleged delay in the plaintiff's  
3 performance, and it alleges in the breach of the implied covenant claim that the  
4 plaintiff's reasonable expectations under the PPA were denied in part by the  
5 defendant's failure to cooperate with the plaintiff's efforts to obtain construction  
6 financing.

7 While the plaintiff's allegations in the FAC certainly make its hindering of  
8 performance contention possible, the Court is not convinced that the FAC plausibly  
9 alleges that the degree of that hindrance prevented the plaintiff from timely  
10 complying with § 2.02(b) given that the plaintiff alleges that it received the  
11 defendant's audited financial statements some ten weeks prior to the § 2.02(b)  
12 deadline. See Iqbal, 556 U.S. at 679 ("But where the well-pleaded facts do not  
13 permit the court to infer more than the mere possibility of misconduct, the complaint  
14 has alleged - but has not shown - that the pleader is entitled to relief.") (internal  
15 quotation marks omitted.) The Court is also not convinced, however, that it would  
16 be futile to permit the plaintiff the opportunity to add additional factual allegations  
17 regarding this issue in a second amended complaint.

18 The defendant further argues that an independent ground for dismissing the  
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21 The Court notes that the plaintiff has submitted additional factual contentions  
22 in support of its motion to amend the FAC that could be incorporated into a second  
23 amended complaint, including information from NCB that it is essential and  
24 consistent with industry custom and practice for a lender to require a utility's audited  
25 financial statements before making a financing offer such as the one that NCB made  
26 to the plaintiff and that a utility's delay in providing its audited financial statements  
will delay the lender's decision to issue a financing offer.



1 FAC is that the plaintiff cannot, as a matter of law, recover the damages it seeks in  
2 light of the various damages-related provisions of the PPA. While the plaintiff may  
3 not be able to establish its entitlement to certain types of damages under the PPA,  
4 that is not a reason to dismiss the FAC, or to prevent the plaintiff from filing a second  
5 amended complaint, given that the type and amount of damages, if any, the plaintiff  
6 may be entitled to under the PPA depend on numerous factors that cannot be  
7 resolved at this time. Therefore,

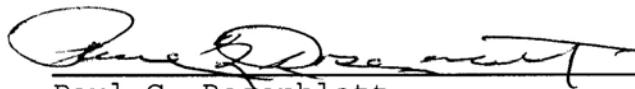
8 IT IS ORDERED that Navopache Electric Cooperative, Inc.'s Motion to  
9 Dismiss Pursuant to Rule 12(b)(6) (Doc. 15) is granted to the extent that Solar  
10 Utilities Network, LLC's First Amended Complaint (Doc. 7) is dismissed pursuant to  
11 Fed.R.Civ.P. 12(b)(6) with leave to amend.

12 IT IS FURTHER ORDERED that Plaintiff's Conditional Motion for Leave to  
13 Amend (Doc. 20) is granted to the extent that Solar Utilities Network, LLC shall file  
14 a second amended complaint no later than October 31, 2013.<sup>7</sup>

15 IT IS FURTHER ORDERED that Navopache Electric Cooperative, Inc.'s  
16 Motion to Strike Reply (Doc. 30) is denied.

17 IT IS FURTHER ORDERED that the parties' Joint Status Request Re:  
18 Pending Motion to Dismiss, Conditional Motion for Leave to Amend, and Motion to  
19 Strike Reply (Doc. 33) is denied as moot.

20 DATED this 27<sup>th</sup> day of September, 2013.

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23 Paul G. Rosenblatt  
United States District Judge

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25 The Court notes that the second amended complaint may contain  
26 additional factual allegations not set forth in the plaintiff's proposed Second  
Amended Complaint (Ex. A to Doc. 20).