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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

MAX BAER PRODUCTIONS, LTD., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RIVERWOOD PARTNERS, LLC, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

3:09-cv-00512-RCJ-RAM

**ORDER**

This case arises out of two interdependent failed real estate developments. Pending before the Court is Defendant’s Motion to Dismiss (ECF No. 6). For the reasons given herein, the Court grants the motion.

**I. FACTS AND PROCEDURAL HISTORY**

On or about September 25, 2007, Plaintiff Max Baer Productions, Ltd. (“Max Baer”) and Defendant Riverwood Partners, LLC (“Riverwood”) entered into the Real Estate Sales Agreement (“the Sales Agreement”), under which Plaintiff was to purchase from Defendant certain property. (See Am. Compl. ¶ 4; ECF No. 6 Ex. 1; *id.* Ex. 1, Ex. A). The Sales Agreement may in fact fail to satisfy the statute of frauds for failure to describe the land. “To satisfy the statute of frauds the boundaries need only be ‘ascertainable from the memorandum.’” *Wiley v. Cook*, 583 P.2d 1076, 1080 (Nev. 1978) (quoting *Durham v. Dodd*, 285 P.2d 747, 749 (Ariz. 1955)). Exhibit A to Exhibit 1 to the Sales Agreement was to contain a delineation of the property. Exhibit A, however, simply

1 indicates that the description of the property is “attached hereto,” yet it is not. (*See id.* Ex. 1, Ex. A).  
2 Exhibit B to Exhibit 1 to the Sales Agreement immediately follows Exhibit A, with no description  
3 of the land attached in between. The first page of the Sales Agreement gives the only description  
4 of the property in the attached documents, describing it as approximately 21.42 acres in Douglas  
5 County, Nevada, on the east side of a proposed road called Riverwood Drive. (*See id.* Ex 1, at 1).  
6 The reader is directed to see Exhibit A to Exhibit 1 to the Sales Agreement for a better description.  
7 This description is insufficient to convey real property. It is possible that Defendant has simply  
8 failed to attach Exhibit A to Exhibit 1 to the Sales Agreement, but the evidence in the record  
9 currently indicates a Sales Agreement that does not satisfy the statute of frauds and which is  
10 insufficient to convey real property.

11 On or about October 16, 2007, the parties entered into a Cost Sharing and Development  
12 Agreement (“the Development Agreement”), which by its terms was to close concurrently with the  
13 Sales Agreement, and under which Defendant was to undertake various improvements on its  
14 property to establish utilities, roadways, and other infrastructure to service the casino and resort to  
15 be built on Plaintiff’s property, which was the property Plaintiff purchased from Defendant under  
16 the Sales Agreement and which was adjacent to Defendant’s property. (*See id.* Ex. 2, at 1).

17 On October 29, 2007, Plaintiff gave Defendant a deed of trust against 15.83 acres of property  
18 to secure a \$500,000 promissory note. (*See id.* Ex. 3; *id.* Ex. 3, Ex. A). Plaintiff alleges that  
19 Defendant has failed to obtain a required \$27 million construction loan or to fulfill its development  
20 obligations under section 4 of the Development Agreement. (*See Am. Compl.* ¶ 8). Defendant  
21 argues that the Development Agreement only requires completion of the improvements sixty days  
22 before Plaintiff completes its buildings, and Plaintiff has not even begun construction on any  
23 buildings. Plaintiff alleges that in July of 2008, Defendant returned to Plaintiff the deed of trust and  
24 corresponding note it had given to Plaintiff. (*See id.* ¶ 9). It is not clear whether Plaintiff means to  
25 imply that Defendant thereby anticipatorily repudiated the contract by returning the note and deed

1 of trust before they were satisfied or rather that Plaintiff had satisfied the note and Defendant  
2 therefore returned the note and the deed of trust. However, Plaintiff alleges that Defendant then  
3 requested a cash deposit or a letter of credit in lieu of the promissory note in order to assist  
4 Defendant in obtaining a construction loan. (*See id.* ¶ 10). On or about October 29, 2008, Defendant  
5 admitted it did not have the financing required to proceed under the Development Agreement. (*Id.*  
6 ¶ 11).

7 Plaintiff sued Defendant in this Court on four causes of action. First, Plaintiff requests a  
8 declaration that Plaintiff's performance under the Development Agreement has been made  
9 impracticable through no fault of its own and that the purpose of the Development Agreement has  
10 been frustrated. Second, Plaintiff requests a declaration that Defendant has breached the implied  
11 covenant of good faith and fair dealing under the Development Agreement. Third, Plaintiff seeks  
12 rescission of both the Development Agreement and the Sales Agreement due to Defendant's "failure  
13 of consideration" under the former. Fourth, Plaintiff asks the Court to enjoin Defendants from  
14 foreclosing on the \$500,000 note and deed of trust. Defendant has moved to dismiss for failure to  
15 state a claim.

## 16 **II. Rule 12(b)(6) STANDARDS**

17 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the  
18 claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what  
19 the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).  
20 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails  
21 to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d  
22 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to  
23 state a claim, dismissal is appropriate only when the complaint does not give the defendant fair  
24 notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v.*  
25 *Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a

1 claim, a court takes all material allegations as true and construes them in the light most favorable to  
2 the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however,  
3 is not required to accept as true allegations that are merely conclusory, unwarranted deductions of  
4 fact or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.  
5 2001).

6 “Generally, a district court may not consider any material beyond the pleadings in ruling on  
7 a Rule 12(b)(6) motion . . . . However, material which is properly submitted as part of the complaint  
8 may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896  
9 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, “documents whose contents are  
10 alleged in a complaint and whose authenticity no party questions, but which are not physically  
11 attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss” without  
12 converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d  
13 449, 454 (9th Cir. 1994). Under Federal Rule of Evidence 201, a court may take judicial notice of  
14 “matters of public record.” *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).  
15 Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss  
16 is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*,  
17 261 F.3d 912, 925 (9th Cir. 2001).

18 If the court grants a motion to dismiss, it must then decide whether to grant leave to amend.  
19 The court should “freely give” leave to amend when there is no “undue delay, bad faith[,] dilatory  
20 motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the  
21 amendment, [or] futility of the amendment . . . .” Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S.  
22 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of  
23 the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655,  
24 658 (9th Cir. 1992).

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3 **III. ANALYSIS**

4 The first two causes of action invoke the Court’s power to enter declaratory judgments:

5 In a case of actual controversy within its jurisdiction . . . any court of the United  
6 States, upon the filing of an appropriate pleading, may declare the rights and other  
7 legal relations of any interested party seeking such declaration, whether or not further  
relief is or could be sought. Any such declaration shall have the force and effect of  
a final judgment or decree and shall be reviewable as such.

8 28 U.S.C. § 2201. Such judgments may not cross the line into advisory opinions; there must be a  
9 case or controversy cognizable under Article III. *Calderon v. Ashmus*, 523 U.S. 740, 745–46 (1998).

10 In other words, the harm alleged must be complete or imminent, not “hypothetical.” *See id.* at 746.

11 **A. Impracticability and Frustration of Purpose**

12 **1. Impracticability**

13 Nevada recognizes the impracticability defense to a contract in both Uniform Commercial  
14 Code and common-law contracts, though the standards for showing impracticability under the two  
15 kinds of contracts differ. *See Helms Constr. & Dev. Co. v. State, ex rel. Dep’t of Highways*, 634 P.2d  
16 1224, 1225 (Nev. 1981). The agreements at issue in this case are not for the sale of goods, and are  
17 therefore common-law contracts. Under the common law, “performance [is] excused if the  
18 promisor’s performance ‘is made impossible or highly impractical by the occurrence of unforeseen  
19 contingencies, but if the unforeseen contingency is one which the promisor should have foreseen,  
20 and for which he should have provided, this defense is unavailable to him.’” *Id.* (citations omitted)  
21 (holding that the Arab oil embargo of the late 1970s was not an unforeseen contingency under the  
22 rule). For a circumstance to constitute an unforeseen contingency giving rise to the defense of  
23 impracticability, it must be a circumstance giving rise to an unforeseen cost increase that is “more  
24 than merely onerous or expensive,” but is so great that “it [is] positively unjust to hold the parties  
25 bound.” *Id.* (citation omitted). The Restatement states the rule thus:

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3               Where, after a contract is made, a party's performance is made impracticable  
4       without his fault by the occurrence of an event the non-occurrence of which was a  
5       basic assumption on which the contract was made, his duty to render that  
6       performance is discharged, unless the language or the circumstances indicate the  
7       contrary.

8       Restatement (Second) of Contracts § 261 (1981). "Events that come within the rule stated in this  
9       Section are generally due either to 'acts of God' or to acts of third parties." *Id.* cmt. d. An example  
10      of circumstances sufficient to warrant the defense is the closing of a port due to quarantine. *See id.*  
11      illus. 1. Examples of circumstances insufficient to warrant the defense include the failure of a bank  
12      where a party's only funds are located, an employer's discontinuation of business and discharge of  
13      a contracted employee due to expensive governmental regulations, and the inability of a seller to  
14      deliver specific promised goods due to his business being put into receivership. *See id.* illus. 2-4.

15              Plaintiff identifies no unforeseen contingencies, and certainly no acts of God or even acts of  
16      third parties. Defendant's alleged failure to perform is not an unforeseen contingency giving rise to  
17      a defense of impracticability. It is an allegation of Defendant's own breach. Moreover, insofar as  
18      Plaintiff attempts to obtain a declaration that he is entitled to the defense of impracticability as  
19      against a putative suit against him for breach of contract by Defendant, Plaintiff requests an advisory  
20      opinion, and this Court may not issue one. *Calderon*, 523 U.S. at 745-46.

## 2.       Frustration of Purpose

21              The Nevada Reports do not appear to include any cases addressing the contractual defense  
22      of frustration of purpose. The Restatement states the rule thus:

23              Where, after a contract is made, a party's principal purpose is substantially  
24      frustrated without his fault by the occurrence of an event the non-occurrence of  
25      which was a basic assumption on which the contract was made, his remaining duties  
26      to render performance are discharged, unless the language or the circumstances  
27      indicate the contrary.

28      Restatement (Second) of Contracts § 265 (1981). Examples of circumstances sufficient to warrant

1 the defense include the cancellation of a parade for which a party was to pay another party to view  
2 it from his window, the cancellation of an advertising contract when the event to be advertised is  
3 cancelled due to war, the cancellation of a hotelier's contract with a country club under which the  
4 hotelier was to pay the club for his guests' use of the country club's facilities where the hotel burned  
5 down, and interceding governmental regulations prohibiting the activities contracted for. *See id.* illus.  
6 1-4. Examples of circumstances insufficient to warrant the defense include interceding  
7 governmental regulations prohibiting a buyer's primary intended use of goods but not preventing any  
8 reasonable disposition of the goods, and a change in traffic regulations making operation of a  
9 gasoline station impossible without substantial losses, so long as operation is in fact still possible.  
10 *See id.* illus. 5-6.

11 Plaintiff identifies no external frustration of the purpose of the contract apart from  
12 Defendant's alleged breach. And like impracticability, frustration of purpose is a defense, "not a  
13 cause of action." *See Far W. Fed. Bank, S.B. v. Office of Thrift Supervision-Dir.*, 119 F.3d 1358,  
14 1364 (9th Cir. 1997) (citing Restatement (Second) of Contracts § 265). Insofar as Plaintiff brings  
15 his declaratory judgment action in order that the Court declare his entitlement to this defense in a  
16 putative suit against him by Defendant for breach of contract, he requests an impermissible advisory  
17 opinion.

18 Nor is an affirmative breach of contract claim viable, because, as discussed at oral argument,  
19 Defendant was only required to use its best efforts to obtain financing. Also, Plaintiff failed to  
20 mitigate. Plaintiff's own failure to mitigate by obtaining its own financing to complete the project  
21 itself shows that financing was not reasonably available. Plaintiff in fact admitted at oral argument  
22 that Max Baer, like Defendant, did not intend to go forward with the development because of the  
23 reduction in value of the property. It is difficult to see how expectancy damages could possibly be  
24 supported under such circumstances. Moreover, the contract specifically notes that the sole remedy  
25 in the case of non-completion was for Plaintiff to take over the project and seek Defendant's pro rata

1 share of the improvement costs. The Court dismisses this cause of action.

2 **B. Implied Covenant of Good Faith and Fair Dealing**

3 Every contract gives rise to a duty not to act arbitrarily or unfairly to the detriment of the  
4 other party. *Nelson v. Heer*, 163 P.3d 420, 427 (Nev. 2007). Breach of this duty is a tort different  
5 in nature from a claim for the underlying breach of contract. *See Ins. Co. of the West v. Gibson Tire*  
6 *Co., Inc.*, 134 P.3d 698, 702 (Nev. 2006). A bad faith claim is predicated on the abuse of a fiduciary  
7 relationship existing between parties to certain kinds of contracts; it does not arise simply from a  
8 particularly egregious or willful breach of a contract, as litigants often imply by reflexively pleading  
9 bad faith along with nearly every breach of contract claim:

10 Although every contract contains an implied covenant of good faith and fair  
11 dealing, an action in tort for breach of the covenant arises only “in rare and  
12 exceptional cases” when there is a special relationship between the victim and  
13 tortfeasor. A special relationship is “characterized by elements of public interest,  
14 adhesion, and fiduciary responsibility.” Examples of special relationships include  
15 those between insurers and insureds, partners of partnerships, and franchisees and  
16 franchisers. Each of these relationships shares “a special element of reliance”  
17 common to partnership, insurance, and franchise agreements. We have recognized  
18 that in these situations involving an element of reliance, there is a need to “protect  
19 the weak from the insults of the stronger” that is not adequately met by ordinary  
20 contract damages. In addition, we have extended the tort remedy to certain situations  
21 in which one party holds “vastly superior bargaining power.”

22 *Id.* (footnotes omitted). The Washington Supreme Court has similarly described the bad faith tort  
23 as “the intentional abuse of a fiduciary relationship.” *Kirk v. Mt. Airy Ins. Co.*, 951 P.2d 1124, 1126  
24 (Wash. 1998). Accordingly, the most common and appropriate targets of bad faith claims are  
25 insurers. *See, e.g., Allstate Ins. Co. v. Miller*, 212 P.3d 318, 324 (Nev. 2009).

When there is no fiduciary relationship, as here, a Plaintiff can still show a breach of contract  
under a “good faith and fair dealing” theory when a defendant does not violate the letter of a contract  
but treats the other party unfairly under it:

A good, illustrative example of a claim for contract damages for breach of the  
covenant of good faith and fair dealing can be seen in percentage lease cases. For  
example, if a lessee agrees to pay a certain percentage of gross sales receipts as rental  
and then deliberately alters its business in a way that reduces expected sales (say, by  
diverting business to another store for the sole purpose of bringing down the rental),  
the lessee would not be acting in good faith. In such a case the lessee would be



1 abiding with the literal terms of the contract but could still be liable for losses  
2 resulting from breach of the covenant of good faith.  
3 *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 808 P.2d 919, 924 n.6 (Nev. 1991) (citation  
4 omitted). There is no evidence of an analogous fact-pattern in this case. Here, Defendant is alleged  
5 to have violated the literal terms of the contract. Defendant is not alleged to have adhered to the  
6 literal terms of the contract but otherwise treated Plaintiff unfairly. Therefore, the Court dismisses  
7 the second cause of action.

### 7 C. Rescission

8 Plaintiff requests to be released from the Sales Agreement and the Development Agreement  
9 for “failure of consideration.” This appears to be implausible. The contracts on their faces require  
10 valuable consideration from both parties. Plaintiff’s “lack of consideration” argument appears to rest  
11 on its claim that Defendant has not completed the improvements contemplated under the  
12 Development Agreement. This does not constitute a “lack of consideration,” which is merely a  
13 measure of what is promised under the contract, but an allegation of failure to perform, i.e., breach,  
14 which cause of action has been addressed.

### 15 D. Injunctive Relief

16 The Ninth Circuit in the past set forth two separate sets of criteria for determining whether  
17 to grant preliminary injunctive relief:

18 Under the traditional test, a plaintiff must show: (1) a strong likelihood of success on  
19 the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is  
20 not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of  
21 the public interest (in certain cases). The alternative test requires that a plaintiff  
22 demonstrate either a combination of probable success on the merits and the  
23 possibility of irreparable injury or that serious questions are raised and the balance  
24 of hardships tips sharply in his favor.

25 *Taylor v. Westly*, 488 F.3d 1197, 1200 (9th Cir. 2007). “These two formulations represent two  
26 points on a sliding scale in which the required degree of irreparable harm increases as the probability  
27 of success decreases.” *Id.*

28 The Supreme Court recently reiterated, however, that a plaintiff seeking an injunction must  
29 demonstrate that irreparable harm is “likely,” not just possible. *Winter v. NRDC*, 129 S. Ct. 365,

1 374–76 (2008) (rejecting the Ninth Circuit’s alternative “sliding scale” test). The Ninth Circuit has  
2 explicitly recognized that its “possibility” test was “definitively refuted” in *Winter*, and that “[t]he  
3 proper legal standard for preliminary injunctive relief requires a party to demonstrate ‘that he is  
4 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of  
5 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public  
6 interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter*, 129 S.  
7 Ct. at 374) (reversing a district court’s use of the Ninth Circuit’s pre-*Winter*, “sliding-scale” standard  
8 and remanding for application of the proper standard).

9         A recent Ninth Circuit ruling relying largely on the dissenting opinion in *Winter* parsed the  
10 language of *Winter* and subsequent Ninth Circuit rulings and determined that the sliding scale test  
11 remains viable when there is a lesser showing of likelihood of success on the merits amounting to  
12 “serious questions,” but not when there is a lesser showing of likelihood of irreparable harm. *See*  
13 *Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2010 WL 2926463, at \*5–7 (9th Cir. July  
14 28, 2010). As a preliminary matter, to the extent this interpretation of *Winter* is inconsistent with  
15 that in *Selecky*, *Selecky* controls. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)  
16 (holding that, in the absence of an intervening Supreme Court decision, only the en banc court may  
17 overrule a decision by a three-judge panel). In any case, the Supreme Court has made clear that a  
18 movant must show both “that he is *likely* to succeed on the merits [and] that he is *likely* to suffer  
19 irreparable harm in the absence of preliminary relief . . . .” *Winter*, 129 S. Ct. at 374 (citing *Munaf*  
20 *v. Geren*, 128 S. Ct. 2207, 2218–19 (2008); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987);  
21 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982)) (emphases added). To satisfy *Winter*,  
22 the movant must show that he is “likely” to succeed on the merits. To the extent the *Cottrell* court  
23 meant to imply that its “serious questions” standard was a lesser standard than “likely,” it is  
24 inconsistent with *Winter* and *Selecky*. The Court must reconcile the cases by interpreting the *Cottrell*  
25 “serious questions” language to be in harmony with the *Winter/Selecky* “likelihood” standard, not

1 as being in competition with it. The movant must therefore show that there are serious questions as  
2 to the merits of the case, *such that* success on the merits is likely. A claim can be weaker on the  
3 merits if it raises “serious questions” and the amount of harm the injunction will prevent is very  
4 great, but the chance of success on the merits cannot in any case be weaker than “likely.”

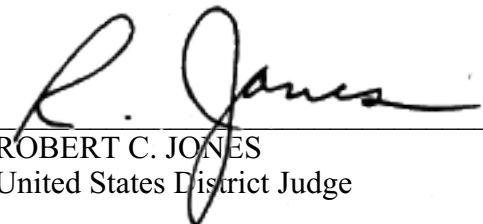
5 Because Plaintiff’s underlying claims will be dismissed, the request for injunctive relief will  
6 also be dismissed. If Defendant forecloses on Plaintiff’s property, Plaintiff may file an action for  
7 injunctive relief in state court to prevent foreclosure if it believes it has a defense to the note and  
8 deed of trust.

9 **CONCLUSION**

10 IT IS HEREBY ORDERED that the Motion to Dismiss (ECF No. 6) is GRANTED.

11 IT IS SO ORDERED.

12 DATED: This 17th day of September, 2010.

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15   
16 ROBERT C. JONES  
United States District Judge