Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
June 19, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re:	Case No.: 19-14796-MKN
	Chapter 11
GYPSUM RESOURCES MATERIALS, LLC,	
	Jointly Administered with
☐ Affects Gypsum Resources Materials, LLC	Case No.: 19-14799-MKN
☒ Affects Gypsum Resources, LLC	
☐ Affects All Debtors	
Debtor.	
GYPSUM RESOURCES, LLC, a Nevada limited liability company,	Adv. Proc. No. 19-01105-MKN
Plaintiff,	
vs.	Date: March 26, 2020
	Time: 1:30 p.m.
CLARK COUNTY, a political subdivision of the State of Nevada; CLARK COUNTY BOARD OF COMMISSIONERS,	
Defendants.	

ORDER ON DEFENDANTS CLARK COUNTY'S AND THE CLARK COUNTY BOARD OF COMMISSIONERS' MOTION FOR JUDGMENT ON THE PLEADINGS[1]

[1] In this Order, all references to "AECF" are to the numbers assigned to the documents filed in the above-captioned adversary proceeding. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "NRS" are to the Nevada Revised Statutes.

On March 26, 2020, the court heard Defendants Clark County's and the Clark County Board of Commissioners' Motion for Judgment on the Pleadings ("Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[2]

On May 17, 2019, Gypsum Resources, LLC ("Debtor") filed a Complaint against Clark County ("County") and the Clark County Board of Commissioners ("Board"), collectively referred to as the "Defendants." The Complaint was filed in the United States District Court for the District of Nevada ("District Court") and denominated Case No. 2:19-cv-00850-GMN-EJY ("District Court Case").[3] (Dkt. 1; AECF No. 1).

On August 12, 2019, Debtor filed a First Amended Complaint ("FAC") in the District Court Case. (Dkt. 9; AECF No. 1). The FAC alleged the following causes of action:

1st Claim for Relief:	Petition for Writ of Mandamus
2nd Claim for Relief:	Equal Protection Violation
3rd Claim for Relief:	Violation of 42 U.S.C. § 1983
4th Claim for Relief:	Injunctive Relief
5th Claim for Relief:	Breach of Contract
6th Claim for Relief:	Breach of the Implied Covenant of Good Faith and Fair Dealing
7th Claim for Relief:	Inverse Condemnation
8th Claim for Relief:	Pre-Condemnation Damages

On September 3, 2019, the County filed an Answer to the FAC and a motion asking for partial judgment on the pleadings. (Dkt. 13 and 16; AECF No. 1). In its Answer, the County asserted an affirmative defense that the Board "is not a sueable entity." Id. at 10:1-2. On that

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[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the dockets in the above-captioned adversary proceeding and Case No. 2:19-cv-00850-GMN-EJY filed in the United States District Court for the District of Nevada. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Lawson v. Klondex Mines Ltd., 2020 WL 1557468, at *5 (D.Nev. March 31, 2020); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015).

[3] All references to "Dkt." are to the documents filed in the District Court Case.

same day, the Board filed a motion to dismiss the FAC, also arguing it is not a suable entity. (Dkt. 15; AECF No. 1).

On September 4, 2019, Debtor filed a motion in the District Court asking that the District Court Case be referred to this bankruptcy court. (Dkt. 17; AECF No. 1).

On November 7, 2019, the Honorable Gloria M. Navarro entered an order granting in part and denying in part Debtor's motion, pursuant to which she referred the District Court Case to this court and dismissed as moot the pending motions filed by the County and the Board ("Referral Order"). (Dkt. 28; AECF Nos. 1 and 11).[4]

On February 10, 2020, Defendants filed the instant Motion. (AECF No. 20). See also (AECF Nos. 12, 14, 15, and 19).

On March 13, 2020, Debtor filed its opposition ("Opposition") to the Motion. (AECF No. 39).

On March 19, 2020, Defendants filed their reply ("Reply") to the Opposition. (AECF No. 44).

DISCUSSION

By the instant Motion, Defendants seek a judgment on the pleadings on all claims for relief alleged in the FAC under Civil Rule 12(c), made applicable to this adversary proceeding pursuant to Bankruptcy Rule 7012. Debtor opposes the Motion and, in the alternative, asks for leave to amend the FAC. Prior to addressing the merits of the Motion, the court will first address two issues neither party raised: the court's jurisdiction and the premature nature of this Motion as to the Board.

I. Jurisdictional Issues.

In the Referral Order, Judge Navarro determined that the matters alleged in the FAC are "related to" the underlying bankruptcy case, though she left it up to this bankruptcy court to determine whether the issues concern "core" or "non-core" matters. The court need not decide the "core" or "non-core" nature of the underlying claims for relief at this time because, for the

[4] Pursuant to a November 16, 2019, minute entry order, the District Court Case is currently stayed. (Dkt. 29).

reasons discussed below, the court is not entering a final order or judgment on any of the claims for relief. See 28 U.S.C. § 157(c)(1) (stating that "any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions….") (emphasis added). See also Feggins v. LVNV Funding LLC (In re Feggins), 535 B.R. 862, 864 (Bankr. M.D. Ala. 2015) ("Determination of whether the Defendants are entitled to judgment [on the pleadings] on Feggin's FDCPA claim is a non-core proceeding, but the denial of a motion for judgment on the pleadings is not a final order."). Because the court's resolution of the Motion does not constitute a final order or judgment, the court does not need to enter proposed findings of fact and conclusions of law for the District Court. To the extent this bankruptcy court is incorrect, however, this order constitutes the bankruptcy court's proposed findings of fact and conclusions of law.

II. Judgment on the Pleadings.

A. Legal Standard.

The District Court recently stated the legal standard as follows:

> [Civil] Rule 12(c) states: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The Ninth Circuit treats a [Civil] Rule 12(c) motion as "functionally identical" to a [Civil] Rule 12(b)(6) motion. Gregg v. Dep't of Pub. Safety, 870 F.3d 883, 887 (9th Cir. 2017) (citations omitted). Judgment on the pleadings is proper when "taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." Id. (quotations and citations omitted). In ruling on a [Civil] Rule 12(c) motion, the court must determine if the at-issue complaint contains "sufficient factual matter, accepted as true, to state a claim of relief that is plausible on its face." Harris v. Cty. of Orange, 682 F.3d 1126, 1131 (9th Cir. 2012) (quotations and citations omitted). A claim is plausible when the plaintiff alleged sufficient facts for the court to reasonably infer misconduct. Id. "[T]he court is not required to accept as true a legal conclusion couched as a factual allegation." Id. (quotations and citations omitted).

LVBK, LLC v. Bank of Am., N.A., 2019 WL 1261101, at *2 (D.Nev. March 19, 2019).

Consistent with the District Court's pronouncement, the Bankruptcy Appellate Panel for this circuit has observed:

> [t]he standard governing a Civil Rule 12(c) motion for judgment on the pleadings is functionally identical to that governing a [Civil] Rule 12(b)(6) motion. *United States ex rel. Caffaso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). For a complaint to withstand a Civil Rule 12(c) motion for judgment on the pleadings, it must contain more detail than "bare assertions" that are "nothing more than a formulaic recitation of the elements" required for the claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). Courts must draw upon their "experience and common sense" when evaluating the specific context of the complaint to determine whether it contains the necessary detail to state a plausible claim for relief. *Id*. at 679.
>
> When evaluating a Civil Rule 12(c) motion, the court must construe factual allegations in a complaint in the light most favorable to the nonmoving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). "'A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, [a] party is entitled to judgment as a matter of law.'" *Lyon* [*v. Chase Bank USA, N.A.*], 656 F.3d [877,] at 883 [(9th Cir. 2011)]; *Hal Roach Studios, Inc. v . Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989).
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> "Although Civil Rule 12(c) does not mention leave to amend, courts have the discretion in appropriate cases to grant a Civil Rule 12(c) motion with leave to amend, or to simply grant dismissal of the action instead of entry of judgment. *Cagle v. C & S Wholesale Grocers Inc.*, 505 B.R. 534, 538 (E.D. Cal. 2014).

Lee v. Farrar (In re Gold Strike Heights Homeowners Assoc.), 2018 WL 3405473, at *4-5 (B.A.P. 9th Cir. July 12, 2018).

B. The Board's Request Appears to be Premature.

Judge Navarro recently denied a motion under Rule 12(c) as premature, explaining as follows:

> Federal Rule of Civil Procedure 12(c) provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). The pleadings are closed when all required pleadings have been served and filed. *Doe v. U.S.*, 419 F.3d 1058, 1061 (9th Cir. 2005) ("[T]he pleadings are closed for the purposes of Rule 12(c) once a complaint and answer have been filed."); *see* Fed.R. Civ. P. 7(a) (listing pleadings). Defendant has not yet filed it answer in this action. Thus, the pleadings are not closed, and Plaintiff's Motion is premature. *See Doe*, 419 F.3d at 1061-62 (holding that a motion for judgment on

> the pleadings filed before any answer "was premature and should have been denied"). The Court therefore DENIES Plaintiff's Motion for Judgment on the Pleadings without prejudice.

Childs v. Extra Space Storage, Inc., 2017 WL 720543, at *2 (D.Nev. Feb. 23, 2017).

Similarly, the Board has not filed an answer. Therefore, the pleadings are not closed as to the Board, and it appears that the Board's request under Civil Rule 12(c) is premature and should be denied. However, the County has filed an answer asserting an affirmative defense on the Board's behalf and otherwise implicitly purports to speak on the Board's behalf in the Motion. Additionally, Debtor did not raise in its Opposition the premature nature of the Board's request for judgment on the pleadings. For these reasons, and for the sake of judicial efficiency since the court's resolution of the issues raised in the Motion appear to equally apply to both Defendants, the court will consider the merits of the Motion as to both the County and the Board.

C. Analysis.

As previously noted, Defendants seek judgment on the pleadings regarding all claims for relief alleged in the FAC. As a threshold matter, however, the court must first consider Defendants' argument that the Board must be dismissed as a party because it is not a suable entity under NRS 41.031(2) and Civil Rule 17(b).

In pertinent part, Civil Rule 17(b) discusses a party's capacity to sue or be sued. In this case, the Board's capacity to sue or be sued is based on Nevada state law. Defendants argue that the Board is not a suable entity under NRS 41.031(2), which states, in pertinent part, that

> [a]n action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department, commission, board or other agency of the State whose actions are the basis for the suit.

NEV. REV. STAT. 41.031(2) (Emphasis added).

Debtor responds that its suit against the Board is authorized under NRS 278.0233 and is not limited by NRS 41.031. NRS 278.0233 states, in pertinent part, as follows:

> 1. Any person who has any right, title or interest in real property, and who has filed with the appropriate state or local agency an application for a permit which is required by statute or an ordinance, resolution or regulation adopted pursuant to NRS

> 278.010 to 278.630, inclusive, before that person may improve, convey or otherwise put that property to use, may bring an action against the agency to recover actual damages caused by:
>
> (a) Any final action, decision or order of the agency which imposes requirements, limitations or conditions upon the use of the property in excess of those authorized by ordinances, resolutions or regulations adopted pursuant to NRS 278.010 to 278.630, inclusive, in effect on the date the application was filed, and which:
>
> (1) Is arbitrary or capricious; or
>
> (2) Is unlawful or exceeds lawful authority.

NEV. REV. STAT. 278.0233(1)(a) (Emphasis added). Debtor additionally argues that the language of NRS 41.032 does not prevent the Board from being sued for undertaking allegedly discretionary actions in bad faith.

In a case cited by both parties, the applicable standard was enunciated as follows:

> "In the absence of statutory authorization, a department of the municipal government may not, in the departmental name, sue or be sued." 64 C.J.S. *Municipal Corporations* § 2195 (1950) (footnotes omitted). The State of Nevada has not waived immunity on behalf of its departments of political subdivisions…. NRS 41.031.
>
> NRS 41.032 states that no action may be brought against the state, state agencies, political subdivisions, or any officer or employee of the state, its agencies, or its political subdivisions based upon the exercise or performance of a discretionary function or duty, whether or not the discretion involved is abused. This court has defined discretionary acts as "those which require the exercise of personal deliberation, decision and judgment." *Travelers Hotel v. City of Reno*, 103 Nev. 343, 345-46, 741 P.2d 1353, 1354 (1987).

Wayment v. Holmes, 912 P.2d 816, 819 (Nev. 1996). The Nevada Supreme Court specifically noted, however, that

> Had [the county assistant district attorney] terminated [the plaintiff deputy district attorney] in bad faith, his actions would no longer be discretionary and subject to immunity.

Id. at 820 (Emphasis added).

Defendants acknowledge the "bad faith" exception to discretionary-act immunity under NRS 41.032, as identified in Wayment, but further contend that it has been clarified and replaced

by the Nevada Supreme Court. See Reply at 15:9-18 citing Martinez v. Maruszczak, 168 P.3d 720, 727-29 (Nev. 2007) and Butler ex rel. Biller v. Bayer, 168 P.3d 1055, 1066 n.50 (Nev. 2007). In Butler ex rel. Biller, the Nevada Supreme Court explained its refined analysis of discretionary-act immunity analysis as follows:

> Recently, in *Martinez v. Maruszczak*, we clarified our prior jurisprudence regarding NRS 41.032(2) and adopted the federal approach set forth in *Berkovitz v. United States*[, 486 U.S. 531 (1988)] and *United States v. Gaubert*[, 499 U.S. 315 (1991)] for analyzing claims of discretionary-act immunity. Under the *Berkovitz-Gaubert* approach, acts are entitled to discretionary-function immunity if they meet two criteria. First, the disputed act must be discretionary, in that it involves an element of judgment or choice. Second, even if an element of judgment or choice is involved, the court must determine if "the judgment is of the kind that the discretionary function exception was designed to shield," *i.e.*, actions "based on considerations of social, economic, or political policy." The focus of this second inquiry is not on the employee's "'subjective intent in exercising the discretion conferred … but on the nature of the actions taken and on whether they are susceptible to policy analysis.'"
>
> Thus, as we explained in *Martinez*, certain acts, although discretionary, do not fall within the ambit of discretionary-act immunity "because they involve 'negligence unrelated to any plausible policy objectives.'" Federal courts applying the *Berkovitz-Gaubert* test have reiterated that courts "must assess cases on their facts, keeping in mind [the purposes of] the exception: 'to prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'"

168 P.3d at 1066-67.

Contrary to Defendants' argument, the court does not read the case law as replacing and/or overruling Wayment. Indeed, the District Court has also recognized the continuing vitality of the bad faith exception to discretionary-act immunity in Nevada:

> However, there are two limitations on discretionary-act immunity. First, immunity does not attach for actions taken in bad faith. *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888, 891 (1991); *Davis [v. City of Las Vegas*], 478 F.3d [1048,] at 1059 [(9th Cir. 2007)]. … Second, acts taken in violation of the Constitution cannot be considered discretionary. *Mirmehdi v. United States*, 689 F.3d

> 975, 984 (9th Cir. 2011); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000).

Koiro v. Las Vegas Metro. Police Dep't, 69 F.Supp. 3d 1061, 1074 (D. Nev. 2014). See also Kiessling v. Rader, 2018 WL 1475511, at *7-8 (D. Nev. March 26, 2018) (Judge Navarro acknowledged the standard cited in Martinez and Butler ex rel Bayer, cited approvingly to Koiro, and stated, in pertinent part, that "one limitation to the application of discretionary-act immunity is that the alleged action cannot violate the Constitution or some other legal mandate.").

The FAC alleges actions taken in bad faith and in violation of constitutional rights. These allegations, when viewed in a light favorable to Debtor, allege sufficient facts regarding the Board's alleged bad faith and violation of constitutional rights. Therefore, contrary to Defendants' arguments, the Board is not entitled to discretionary-act immunity under NRS 41.031 as a matter of law. For these reasons, the court overrules the Motion to the extent it alleges that the Board is not a suable entity.

The court now addresses the arguments in the Motion beginning with the 2nd Claim for Relief and concluding with the 1st Claim for Relief.[5]

i. 2nd Claim for Relief – Equal Protection Violation.

Defendants argue that Debtor has not alleged a plausible claim for a violation of the equal protection clause because it "failed to allege in the FAC that [it was] subject to discriminatory treatment that was different than other similar situated persons or parties…." Motion at 17:3-6. Debtor responds as follows:

> Gypsum alleges that it was treated differently than similar applicants because no other applicant was Commissioner Jones' self-declared "arch-nemesis" or had to endure the unending delays

[5] In their Motion, Defendants' focus is on violations of the U.S. Constitution, though they also seek relief against any causes of action asserting violations of the Nevada Constitution. Because the U.S. Constitution constitutes the "floor" by which all state constitutions are bound, the court's analysis in this order also focuses on the parties' arguments vis-à-vis the U.S. Constitution. See, e.g., Allen v. Cty. of Lake, 2017 WL 363209, at *6 (N.D. Cal. Jan. 25, 2017)' Evans v. Wash. Cty., 1999 WL 1271025, at *5 (D.Or. Dec. 10, 1999) ("The United States Constitution proscribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. … However, state constitutions may provide protections for civil liberties more expansive than the protections provided by the United States Constitution.") (citations and quotations omitted).

> and hurdles that it faced. ([FAC], ¶¶ 59-60.). The delays Gypsum endured were unprecedented and prevented Gypsum from having its applications properly heard. (*Id*., ¶ 62.) The County's actions singled out Gypsum when compared to all other applicants. (*Id*., ¶¶ 72-73.)

Opposition at 16:3-7.

The court's thorough review of the FAC, including the paragraphs referenced by Debtor above, only reveals one reference to disparate treatment "from others similarly situated[.]" FAC, ¶ 73. Debtor contends that it is alleging a "class of one" violation of the equal protection clause. See Opposition at 16:8-17:5, citing Village of Willowbrook v. Olech, 528 U.S. 562 (2000). In Village of Willowbrook, the Supreme Court determined that the plaintiff pled a "class of one" claim when her "complaint can fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners." Id. at 564. In the instant case, Debtor's generic and conclusory allegation discussing disparate treatment from "others similarly situated," without more, does not sufficiently allege a "class of one" violation of the equal protection clause.

For these reasons, the court grants the Motion in part as it relates to the 2nd Claim for Relief. However, the court provides Debtor with leave to amend its FAC to allege further facts regarding the "others similarly situated" who were treated in a manner different than Debtor, including the manner in which they were treated differently.

ii. 3rd Claim for Relief – Violation of 42 U.S.C. § 1983.[6]

Judge Navarro recently discussed 42 U.S.C. § 1983 as follows:

> Section 1983 of Title 42 of the United States Code aims "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135[,] 1139 (9th Cir. 2000)). The statute "provides a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights[,]" *Conn v.*

[6] "[T]he settled rule is that exhaustion of state remedies is *not* a prerequisite to an action under [42 U.S.C.] § 1983." Knick v. Twp. of Scott, 139 S.Ct. 2162, 2167 (2019) (quotations and citations omitted) (emphasis in original).

> *Gabbert*, 526 U.S. 286, 290 (1999), and therefore "serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes." *Crumpton v. Almy*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require a plaintiff to allege (1) the violation of a federally-protected right by (2) a person or official acting under the color of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the plaintiff must establish each of the elements required to prove an infringement of the underlying constitutional or statutory right.

Johnson v. Garofalo, 2020 WL 1169397, at *4 (D.Nev. March 11, 2020).

Debtor's 3rd Claim for Relief depends on the success of its other constitutional arguments, including the inverse condemnation claim subsequently discussed for which the Motion will be denied. Because the Debtor has sufficiently alleged a claim for relief regarding a violation of a constitutional right, its 3rd Claim for Relief is also adequately pled.

For these reasons, the court denies the Motion to the extent it seeks dismissal and/or judgment on the pleadings regarding the 3rd Claim for Relief.

iii. 4th Claim for Relief – Injunctive Relief.

Defendants argue that Debtor's asserted "injunctive relief claim cannot pass dismissal scrutiny because there is no federal injury alleged and the scope of the injunctive [sic] as pled is far too broad." Motion at 19:25-26. Defendants are wrong on the former point for the reasons previously stated under the 3rd Claim for Relief and subsequently stated under the 7th Claim for Relief.

Defendants' Motion appears to ask the court to make evidentiary determinations without the benefit of the evidentiary process, which the court cannot do. One such attempt claims that

> Clark County's decision to not waive conditions or green light Plaintiff's major development is "at least a fairly debatable" basis to support the decisions. … The law is well established that the government has a legitimate interest in protecting undeveloped areas from the "ill effects of urbanization." Agins v. Tiburon, 447 U.S. 255, 261, 100 S. Ct. 2138 (1980).

Motion at 20 n.11. Clark County's decision may very well be legitimate and be supported by "at least a fairly debatable" basis. However, the court cannot make that determination at this stage

of the proceeding based on the allegations in the FAC. Specifically, the FAC alleges that the Debtor's alleged ordeal with Defendants began in 2001 when Clark County took actions detrimental to Debtor's alleged development rights in order to protect undeveloped areas from the ill effects of urbanization, including, placing Debtor's property into "the Red Rock Design Overlay District to prohibit land use applications to increase the zoning density for properties within the district" in order to "drive down the fair market price of the Gypsum Property so that Defendants could pressure [Debtor] to sell and/or exchange the Gypsum Property to Defendant and/or the BLM for a low price." FAC, ¶¶ 5-17. Debtor, thereafter, filed a lawsuit against Clark County and obtained orders finding certain Clark County's actions to be unconstitutional. Id. at ¶¶ 18-20. Ultimately, Debtor agreed to enter into a Settlement Agreement with Defendants, pursuant to which Debtor agreed to dismiss pending lawsuits against Defendants in consideration for Defendants' removal of Debtor's real property from the Red Rock Overlay District and Defendants' "good faith" processing and review on Debtor's development application. Id. at ¶¶ 21-26.

Defendants' generic contention that it has the right to deny applications that introduce the "ill effects of urbanization," without more, does not, as a matter of law, entitle them to judgment on the pleadings based on the FAC's allegations. Indeed, the FAC alleges that Defendants entered into a Settlement Agreement that arose because of Defendants' previous unconstitutional attempt to deny development at the Debtor's expense solely for the purpose of avoiding the ill effects of urbanization. Viewing the allegations in the FAC in a light favorable to Debtor, as the court must, the court concludes that Debtor has alleged a cause of action for some type of injunctive relief.

However, Defendants are correct that the requested injunctive relief is too broad. Although the request to enjoin Commissioner Jones' participation in any future hearing involving Debtor's application is a specific request that may or may not be appropriate after the post-pleading stage of this proceeding, the FAC's additional request asking the court to "enjoin[] the Board's arbitrary and capricious actions, and further enjoin[] Clark Country and the Board to comply with its own laws and policies" is too broad and non-specific. Id. at ¶ 88. As

Defendants correctly argue, "injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation." Motion at 20:9-11, citing Armstrong v. Davis, 275 F.3d 849, 870 (9th Cir. 2001). For this reason, the court grants in part and denies in part the Motion with regards to the 4th claim for relief, though it also provides Debtor with leave to amend to clarify with more specificity the actions that it asks the court to enjoin.

iv. 5th Claim for Relief – Breach of Contract.

"In Nevada, a plaintiff alleges a breach of contract by pleading four elements: (1) formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3) material breach by the defendant; and (4) damages." Johnston v. Int'l Mixed Martial Arts Fed'n, 2015 WL 273619, at *3 (D.Nev. Jan. 22, 2015). See also S. Fork Livestock P'ship v. U.S., 183 F.Supp.3d 1111, 1118 (D.Nev. 2016) ("Under Nevada state law, the plaintiff in a breach of contract action must allege (1) the existence of a valid contract; (2) a breach by the defendant; and (3) damage as a result of the breach."). "Whether a party has breached a contract and whether the breach is material are questions of fact." Las Vegas Sands, LLC v. Nehme, 632 F.3d 526, 536 (9th Cir. 2011).

Defendants contend that Debtor "has not alleged Clark County materially breached the contract as the contract at issue provides no more rights to Plaintiff than is afforded under Title 30.20 of the Clark County Code." Motion at 21:8-10. Defendants do not cite to any portions of Title 30.20 of the Clark County Code that require Debtor to dismiss pending lawsuits in consideration for Defendants' creation of an exception to land development and a "good faith" review and hearing on any development applications therein. See FAC, ¶¶ 22-26. Indeed, taken to its logical conclusion, Defendants' argument is that no contract exists due to their failure to provide new consideration:

> To be legally enforceable, a contract "must be supported by consideration." *Jones v. SunTrust Mortg., Inc.*, 128 Nev. 188, 191, 274 P.3d 762, 764 (2012). "Consideration is the exchange of a promise or performance, bargained for by the parties." *Id.* A party's affirmation of a preexisting duty is generally not adequate consideration to support a new agreement. *See Cty. of Clark v.*

> *Bonanza No. 1*, 96 Nev. 643, 650, 615 P.2d 939, 943 (1980)). However, where a party's promise, offered as consideration, differs from that which it already promised, there is sufficient consideration to support the subsequent agreement. 3 *Williston on Contracts* § 7:41 (4th ed. 2008).

Cain v. Price, 415 P.3d 25, 28 (Nev. 2018). Whether Defendants provided new consideration, or whether the promises made in the Settlement Agreement mirrored preexisting duties owed by Defendants under NRS 30.20 of the Clark County Code, is a question of fact that cannot be decided by a judgment on the pleadings.

Defendants' alleged breach of their obligations (whether they be classified as preexisting or new) are also questions of fact that cannot be decided at this stage of the proceeding. Indeed, the FAC discusses Debtor's submission of applicable development applications for Defendants' review and spends several paragraphs alleging Defendants' attempts to delay consideration of the same, such as Defendants' filing of a lawsuit regarding the development applications, Defendants' intentional and/or negligent misplacing of the development applications, Defendants' continuances of Debtor's applications from their agenda, and the eventual "no action" removal of Debtor's applications from Defendants' agenda. See id. at ¶¶ 27-63, 90-95. In summation, the FAC alleges that its application has not been considered after a more than 7-year period after entry into the parties' Settlement Agreement:

> 62. As of the date of the filing of this Complaint, Plaintiff's 2011 Concept Specific Plan and PFNA applications have still not been considered by Defendants, despite the fact that they have been pending with Defendants for over seven years and Defendants have known for over three years that Plaintiff was not proceeding with any kind of land swap with BLM. Given the course of conduct of [D]efendants concerning the applications, any further attempts to obtain entitlements would be futile.

FAC, ¶ 62. These allegations of delay and intentional and/or negligent conduct sufficiently allege a breach of the Settlement Agreement, which required Defendants to process Debtor's applications in good faith. Therefore, the court denies the Motion to the extent it requests judgment on the pleadings and/or dismissal of the 5th Claim for Relief.

v. 6th Claim for Relief – Breach of the Implied Covenant of Good Faith and Fair Dealing.

An "'implied covenant of good faith and fair dealing is recognized in every *contract* under Nevada law,' and '[w]hen one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith." Johnston, 2015 WL 273619, at *3, quoting Pemberton v. Farmers Ins. Exch., 858 P.2d 380, 382 (Nev. 1993) and Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 808 P.2d 919, 923 (Nev. 1991) (emphasis in original). "Whether the controlling party's actions fall outside the reasonable expectations of the dependent party is determined by the various factors and special circumstances that shape these expectations." Hilton Hotels Corp., 808 P.2d at 923-24.

For all the reasons previously stated under the 5th Claim for Relief, the court denies the Motion to the extent it seeks judgment on the pleadings and/or dismissal of the 6th Claim for Relief.

vi. 7th Claim for Relief – Inverse Condemnation.

Defendants contend that "Plaintiff has not stated facts plausibly stating that Clark County has actually taken Plaintiff's property without just compensation." Motion at 22:18-19. Defendants are correct that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." Motion at 23:5-8, citing Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005) (quotations omitted). The court further acknowledges Defendants' argument that a government's exercise of its statutorily-prescribed discretionary powers in denying a speculative development application has been found to not be a regulatory taking under the 14th Amendment. See Motion at 22:27-23:3, citing Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007), aff'd, 553 U.S. 591 (2008).

The FAC's allegations, however, do not neatly fit within the parameters of Defendants' legal recitations. Specifically, as previously noted, the FAC alleges Defendants' efforts over a period of years to either delay a vote on Debtor's applications and/or deny Debtor's applications for the purpose of either denying all development on the property and/or taking the property for

Defendants' own use. The FAC then summarizes the 7th Claim for Relief for Inverse Condemnation as follows:

> 105. Defendants' acts and/or omissions have resulted in a de facto taking of Plaintiff's valuable property and the loss of intended economic benefit to Plaintiff, because the Defendants have delayed timely consideration of Plaintiff's development applications fairly in good faith, as required by the Settlement Agreement, thus depriving Plaintiff of its right to develop its property.
>
> 106. Defendants' taking of Plaintiff's property by the public constitutes a taking by inverse condemnation which requires compensation under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Nevada Constitution, requiring Defendants to pay full and just compensation to Plaintiff.

FAC, ¶¶ 105 and 106.

The FAC's allegations essentially contend that Defendants have denied Debtor of all economically viable use of its property. In City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999), Del Monte Dunes sued the City of Monterey, alleging a regulatory taking "[a]fter five years, five formal decisions, and 19 different site plans…." Id. at 698. At that point, "Del Monte Dunes decided the city would not permit development of the property under any circumstances." Id. Del Monte Dunes was successful at the trial court level, and the trial court was affirmed by both the court of appeals and the Supreme Court. As the Supreme Court held in City of Monterey, "the issue whether a landowner has been deprived of all economically viable use of his property is a predominately factual question." Id. at 720.

Debtor's allegations in the FAC, countered by Defendants' unverified explanations in its Motion, create a factual dispute that renders a judgment on the pleadings inappropriate. Therefore, the court denies the motion to the extent it requests judgment on the pleadings and/or dismissal of the 7th Claim for Relief.

vii. 8th Claim for Relief – Pre-Condemnation Damages.

Regarding the 8th Claim for Relief, the FAC alleges, in pertinent part:

> 109. Following Clark County's announcement of its intent to acquire for purposes of a BLM land exchange, and its unreasonable actions surrounding such announcement, Clark

> County has, and continues to wrongfully freeze, delay, and oppose Gypsum's development efforts. Defendants' acts and/or omissions have resulted in Plaintiff suffering significant pre-condemnation damages in an amount to be determined, due to the massive delays in processing Plaintiff's development applications, freezing of corresponding property values, without paying Plaintiff just compensation.
>
> 110. The pre-condemnation taking of Plaintiff's property by the public for use mandates compensation under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Nevada Constitution,[7] requiring Defendants to pay full and just compensation to Plaintiff in an amount to be determined.

FAC, ¶¶ 109 and 110.

In their pleadings, the parties conflate their arguments on pre-condemnation damages with their arguments regarding the 7th Claim for Relief for inverse condemnation, with no specific discussion concerning the standard for pre-condemnation damages. The court's own research has located the following standard for pre-condemnation damages:

> As stated in *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 229, 181 P.3d 670 (2008), to support a claim for precondemnation damages, the landowner must allege facts showing an official action by the would-be condemnor amounting to an announcement of intent to condemn. Second, the landowner must show that the public agency acted improperly following the announcement of its intent to condemn. Unreasonable or extraordinary delay in moving forward with the condemnation proceeding can constitute improper action which causes damage to the landowner such as reduced market value of the property.

Nev. v. U.S. Dep't of the Treasury-IRS, 2017 WL 277399, at *1 (D.Nev. Jan. 18, 2017). See also Nev. v. U.S. Dep't of the Treasury, 2017 WL 4582265, at *2 (D.Nev. Oct. 13, 2017) ("To make out a pre-condemnation damages claim, the landowner must show: (1) an official action by the [would be] condemnor amounting to an announcement of intent to condemn; (2) the condemnor acted improperly following the agency's announcement of its intent to condemn,

[7] Article I, Section 8 of the Nevada Constitution states, in pertinent part, that "[p]rivate property shall not be taken for public use without just compensation having first been made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made."

such as by unreasonably delaying an eminent domain action after announcing its intent to condemn the landowner's property; (3) resulting in damages.") (citations and quotations omitted).

For all the reasons previously stated, including with respect to the 7th Claim for Relief for inverse condemnation, the court concludes that there exists a factual dispute for which a judgment on the pleadings is inappropriate. Therefore, the court denies the motion to the extent it requests judgment on the pleadings and/or dismissal of the 8th Claim for Relief.

viii. 1st Claim for Relief – Petition for Writ of Mandamus.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cty. of Washoe, 179 P.3d 556, 558 (Nev. 2008). The statutory vehicle under Nevada law providing for the issuance of a writ of mandamus states:

> The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

NEV. REV. STAT. 34.160.[8]

In pertinent part, the FAC alleges that a writ of mandamus should issue because:

> 66. Clark County failed to perform various acts that the law requires including but not limited to the fair, unbiased, and timely processing of Gypsum's Major Project Application Specific Plan and FFNA[.]

[8] The District Court Case seeks mandamus relief against the County and the Board under state law. It is unclear whether such relief instead should be sought from a federal court under the All Writs Act, 28 U.S.C. §1651.

> 67. Clark County and the Board acted arbitrarily and capriciously by performing or failing to perform the acts enumerated above and because, *inter alia*:
>
> a. There is no legitimate governmental purpose for the failure of Commissioner Jones to fail to abstain from the Gypsum Applications;
>
> b. Clark County and the Board's actions are not based on any reason related to the public health, safety, or well-being;
>
> c. Clark County and the Board violated Gypsum's right to due process.
>
> 68. These violations of the Defendants' legal duties and arbitrary and capricious actions compel this Court to issue a Writ of Mandamus directing Clark County and the Board to require Commissioner Jones' recusal from any participation in Gypsum's Applications, and take all other necessary action to correct the Defendants' actions and to require Clark County to deal in "good faith" with Gypsum Applications as required in the Settlement Agreement.

FAC, ¶¶ 66-68.

In their Motion and Reply, Defendants argue that Debtor does not have a constitutionally protected property interest to which a due process claim may attach. Defendants additionally argue that the considerable discretion afforded both the Board and Commissioner Jones regarding development applications in general, and Debtor's applications in particular, undermines the alleged due process violation on the basis of Commissioner Jones' alleged bias. Debtor responds with similar arguments as previously addressed, including the loss of its property (as raised in the 7th Claim for Relief for inverse condemnation), the contractual right to a "good faith" review and hearing under the Settlement Agreement (as raised in the 4th Claim for Relief for injunctive relief, the 5th Claim for Relief for breach of contract, and the 6th Claim for Relief for breach of the implied covenant of good faith and fair dealing), and with caselaw addressing due process issues that may arise when the alleged bias of a public official, such as Commissioner Jones, is allowed to permeate public decision-making.

"The Fourteenth Amendment to the United States Constitution provides that a State shall not 'deprive any person of life, liberty, or property, without due process of law.'" Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 755 (2005) quoting Amdt. 14, § 1. "A corporation … is a 'person' possessing Fourteenth Amendment due process rights." San Bernardino Physicians' Servs. Med. Grp., Inc. v. Cty. of San Bernardino, 825 F.2d 1404, 1407 (9th Cir. 1987), citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778-80 (1978).

A procedural[9] due process claim requires proof of "(1) a protectible liberty or property interest … and (2) a denial of adequate procedural protections." Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1998), citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-71 (1972). As the Supreme Court has stated:

> The procedural component of the Due Process Clause does not protect everything that might be described as a "benefit": "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Such entitlements are, "'of course, … not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Paul v. Davis*, 424 U.S. 693, 709, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (quoting *Roth*, *supra*, at 577, 92 S.Ct. 2701); see also *Phillips v.*

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[9] Due process encompasses both substantive and procedural components, though Debtor's Opposition only appears to contend that it is asserting a procedural due process claim. This is likely because, as Judge Navarro has recognized:

> The use of substantive due process to extend constitutional protection to economic and property rights has been "largely discredited." *Armendariz v. Penman*, 75 F.3d 1311, 1318-19 (9th Cir. 1996). Substantive due process primarily protects those liberties "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland, Ohio*, 431 U.S. 494, 503, 97 S.Ct. 1932[] (1977), such as marriage, procreation, contraception, family relationships, child rearing, education, and an individual's bodily integrity. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791[] (1992); *Armendariz*, 75 F.3d at 1319.

Salus v. Nev. ex rel. Bd. of Regents of Nev. Sys. of Higher Educ., 2011 WL 4828821, at *4 (D. Nev. Oct. 10, 2011).

> *Washington Legal Foundation*, 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998).

Town of Castle Rock, Colo., 545 U.S. at 756.

Constitutionally protected property interests may arise out of written contracts:

> In fact, it has long been settled that a contract can create a constitutionally protected property interest. In *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709, the Supreme Court explained that property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." In *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), a companion case, the Court continued its definition:
>
> > "[P]roperty" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.
>
> *Id*. at 601, 92 S.Ct. at 2699 (citations omitted). The Court went on to state that written contracts, as clear evidence of a formal understanding supporting a claim of entitlement, can create protected property interests. *Id*. *See also Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976); *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 777 (9th Cir. 1982); *Vail v. Board of Education*, 706 F.2d 1435, 1437-38 (7th Cir. 1983), *aff'd by an equally divided Court*, 466 U.S. 377, 104 S.Ct. 2144, 80 L.Ed.2d 377 (1984); *Tidwell*, 670 F.2d at 510-11.

San Bernardino Physicians' Servs. Med. Group, Inc., 825 F.2d at 1407-08.

Furthermore, institutional bias may constitute a violation of procedural due process:

> *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), and its progeny establish two main categories of due process challenges based on structural bias. First, due process is violated if a decisionmaker has a "direct, personal, substantial pecuniary interest" in the proceedings. *Id*. at 523, 47 S.Ct. at 441. Second, even if the decisionmaker does not stand to gain personally, due process may also be offended where the decisionmaker, because of his institutional responsibilities, would have "so strong a motive" to

> rule in a way that would aid the institution. *Id*. at 532, 47 S.Ct. at 444.

Alpha Epsilon Phi Tau Chapter Housing Ass'n v. City of Berkeley, 114 F.3d 840, 844 (9th Cir. 1997). "Whether an institutional motive is 'so strong' to violate due process is obviously a matter of degree." Id. at 845. The question is whether the situation is one

> "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused."

Id. citing Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972), quoting Tumey Ohio, 273 U.S. at 532). The court must also consider "whether the official motive is 'strong,' … so that it 'reasonably warrant[s] fear of partisan influence on [the] judgment[.]'" Alpha Epsilon Phi Tau Chapter Housing Ass'n, 114 F.3d at 845-46 (citation omitted).

The court concludes that the FAC alleges sufficient facts regarding a violation of procedural due process for all the reasons previously stated, plus more. The Board claims that it was under no obligation to approve any of Debtor's proposals because the Settlement Agreement gave Debtor no more rights than it previously had under NRS 30.20. However, as previously noted, the court cannot make that factual determination at this stage of the proceeding. Specifically, the Settlement Agreement provided Debtor with an exception to the Red Rock Overlay District and required the Board to consider Debtor's development applications in good faith. No other party is alleged to have obtained a similar exception to develop property within the Red Rock Overlay District and to be entitled to the good faith processing of future development. At this stage of the proceeding, the court cannot, as Defendants ask, conclude as a matter of law that Debtor did not obtain a protectible property interest under the Settlement Agreement.

Further, the FAC contains several allegations regarding the lack of any such good faith and the involvement of institutional bias by several members of the Board, including Commissioner Jones. Regarding Commissioner Jones' involvement, the FAC is replete with allegations about his alleged bias, including his prior involvement as counsel to an entity trying

to block Debtor's development of the applicable real property, his self-described characterization as "The Red Rock Guy" whose "superpower is making compelling arguments for preservation and fending off my arch-nemesis Jim the Sprawl Developer [i.e. James Rhodes, who is Debtor's principal]," his eventual election as a commissioner on the Board, and his participation in Debtor's request to develop the applicable real property. See FAC, ¶¶ 38, 49-69. Although Defendants are correct that Commissioner Jones' potential viewpoint bias may not constitute a violation of Debtor's right to due process, see Republican Party of Minn. v. White, 536 U.S. 765 (2002), Commissioner Jones' private participation in allegedly obstructing Debtor's attempts to develop this land, which continued after he became a public figure, might constitute a violation of Debtor's right to due process. See Am. Gen. Ins. Co. v. Fed. Trade Comm'n, 589 F.2d 462 (9th Cir. 1979). Although the FAC alleges facts that may be consistent with the type of viewpoint bias that has been found to not violate the Constitution in White, it further alleges facts that appear to paint Commissioner Jones as having a personal vendetta against Debtor and its principal. Defendants' Motion essentially asks this court to make a credibility determination without the benefit of evidence, which is an improper request at this stage of the proceeding.

The FAC also implicates actions of other commissioners who, the FAC alleges, took various actions in an effort "to avoid potential political fall-out [by engaging in] a vote on the proposed Gypsum development concept plans…" including allegedly "misplacing" Debtor's applications. See FAC, ¶¶ 27-48. Defendants may be correct that these allegations involve negligent acts that do not violate the Constitution; however, in the absence of evidence, and viewing the allegations in a light favorable to Debtor, the court cannot accept Defendants' interpretation of the allegations at this stage of the proceedings.

For these reasons, the court denies the Motion to the extent it seeks judgment on the pleadings and/or dismissal of the 1st Claim for Relief.

IT IS THEREFORE ORDERED that Defendants' Clark County's and the Clark County Board of Commissioners' Motion for Judgment on the Pleadings, Adversary Docket No. 20, be, and the same hereby is, **GRANTED IN PART WITH LEAVE TO AMEND AND**

DENIED IN PART. Specifically, the court grants the motion with leave to amend regarding the 2nd and 4th Claims for Relief and denies the motion regarding the remaining claims for relief.

IT IS FURTHER ORDERED that Gypsum Resources Materials, LLC shall file and serve its amended complaint no later than **July 3, 2020**.

Copy sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

GYPSUM RESOURCES, LLC
ATTN: OFFICER/MANAGING AGENT
8212 SPANISH RIDGE AVENUE, #200
LAS VEGAS, NV 89148

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