



By the order of the court, Judge David A Wiseman

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1 FOR PUBLICATION

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4
5 IN THE SUPERIOR COURT
6 OF THE
7 COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

8 JANET U. MARATITA, RAY)
9 ANTHONY N. YUMUI, for themselves)
10 and on behalf of the taxpayers of the)
11 CNMI and the ratepayers of CUC, and)
12 THE NORTHERN MARIANAS)
13 COMMONWEALTH SENATE,)
14 Plaintiffs,)
15 v.)
16 BENIGNO R. FITIAL, EDWARD T.)
17 BUCKINGHAM, COMMONWEALTH)
18 UTILITIES CORPORATION, and)
19 SAIPAN DEVELOPMENT, LLC,)
20 Defendants.)

CIVIL CASE No. 12-0194

ORDER GRANTING MOTION FOR
PARTIAL SUMMARY JUDGMENT

DECLARING THE POWER
PURCHASE AGREEMENT VOID *AB*
INITIO AND THE POWER PLANT
DEVELOPMENT AND MANAGEMENT
AGREEMENT INVALID

21 INTRODUCTION

22 **THIS MATTER** came before the Court on September 19, 2013, at 1:30 p.m. in Courtroom 223A.
23 At the hearing, the parties presented arguments regarding Defendant Commonwealth Utilities Corporation
24 (“CUC”)’s Motion for Partial Summary Judgment. CUC was represented by attorneys Deborah Fisher, Esq.
25 and James Sirok, Esq., while Defendant Saipan Development, LLC (“SDLLC”) was represented by William
Fitzgerald, Esq.

On July 26, 2013, Defendant CUC moved for Partial Summary Judgment pursuant to Rule 56 of the
NMI Rules of Civil Procedure on the basis that the Power Purchasing Agreement (“PPA”) is illegal and void

1 *ab initio* because it did not meet the procurement regulations controlling such transactions.¹ Defendant
2 SDLLC opposes the motion on the grounds that: (1) the PPA was validly executed by CUC and signed by
3 the Acting Director of CUC; (2) CUC is bound by its agents' actions and is estopped from arguing Fitial
4 lacked actual authority to execute the PPA; and (3) SDLLC reasonably relied upon representations of its
5 highest officials of the CNMI. Defendant SDLLC also argues that the Court may not issue advisory opinions
6 and that the Attorney General's December 31, 2012 Opinion is merely persuasive and cannot form the basis
7 for granting summary judgment.

8 For the following reasons, the Court **GRANTS** CUC's Motion for Partial Summary Judgment.

9 **BACKGROUND**

10 This case revolves around the execution of an agreement amongst the Defendants to build a new
11 power plant on Saipan in order to provide electricity, water and sewage services to the ratepayers of the
12 public, but without following any applicable regulations governing such agreements. This agreement was
13 executed prior to an executive order declaring a disaster emergency due to the failure of the utility to provide
14 the above services, and suspending such regulations to provide immediate relief. Subsequently, the
15 Defendants executed a contract finalizing the proposed project, each relying on the representations made by
16 the Attorney General as to the form and legal capacity of the contract. Further, the Court has reviewed all
17 applicable laws and regulations governing the procurement of new energy construction projects by the
18 utility, which provide the procedures that must be followed in various circumstances.

19 **I. Development Agreement**

20 On March 27, 2012, former Governor Beningo R. Fitial ("Fitial") and Donald R. Kurz, SDLLC's
21 President, signed a "Power Plant Development and Management Agreement" ("Development Agreement").
22 (Pl.'s Second Amended Complaint ("SAC"), Ex. 1, at 11.) Fitial was undersigned "Governor", and former
23 Attorney General Edward T. Buckingham ("Buckingham") approved as to form and legal capacity. (*Id.*)

24
25 ¹ Plaintiffs Janet Maratita and Ray N. Yumul properly joined CUC's Motion for Partial Summary Judgment on August 30, 2013, seeking a judgment that the PPA is illegal, void *ab initio* as a matter of law, and unenforceable.

1 In relevant part, the Development Agreement “authorize[d] the [SDLLC] to immediately proceed,
2 without the need for further approvals, with the development of the Power Plant on an urgent basis.” (*Id.*
3 at 5.) Further, the Development Agreement provided that “Developer shall have an exclusive relationship
4 with CNMI regarding the development of the Facility and the Enterprise.” (*Id.* at 7.) Lastly, the
5 Development Agreement included a representation and warranty that it did “not violate any contract or
6 agreement to which CNMI is a party, law, regulation, rule or ordinance or any order, judgment or decree of
7 any federal, state, or local court, or require any approval by Governmental authorities.” (*Id.* at 8.)

8 **II. Executive Order**

9 On May 18, 2012, Fitial signed Executive Order No. 2012-05 (“Executive Order”), declaring a state
10 of disaster emergency, citing CUC’s imminent failure, and recognizing “the need to provide immediate
11 reliable power, water, and wastewater services.” 34 Com. Reg. 032412 (May 28, 2012). Significantly,
12 Directive 1 of the Order provided that the governor “assume all of the executive power of the CUC which
13 shall include any and all powers vested in the board of Directors and the Executive Director,” while
14 Directive 2 suspended “all provisions in the Commonwealth Code and P.L. 17-34 that concern PUC
15 regulation of CUC and its actions . . .” (*Id.* at 6.)

16 On August 16, 2012, Acting Governor Eloy S. Inos signed Executive Order No. 2012-10, extending
17 the state of disaster emergency originally declared in Executive Order No. 2012-05, effectively renewing
18 the Directives contained in the original Order. (Def. CUC’s Mot. for Partial Summ. J., Ex. 4, at 1; 24 Com.
19 Reg. 032735 (August 29, 2012).)²

20 **III. Power Purchase Agreement**

21 On August 3, 2012, following the signing of the Development Agreement and the issuance of the
22 Executive Order bestowing the power of CUC’s executive office on Fitial, he and SDLLC’s President

23
24 ² This Order was renewed as Executive Order No. 2012-12 (34 Com. Reg. 32795 (Sept. 29, 2012)), Executive Order
25 No. 2012-14 (34 Com. Reg. 32875 (Oct. 29, 2012)); Executive Order No. 2012-16 (34 Com. Reg. 33111 (Nov. 29, 2012));
Executive Order No. 2013-02 (35 Com. Reg. 33135 (Jan. 28, 2013)); and Executive Order No. 2013-03 (35 Com. Reg.
33299 (Mar. 28, 2013)).

1 Donald R. Kurz signed a “Power Purchase Agreement.” (Pl.’s SAC, Exhibit 4a, at 46.) Fitial was
2 undersigned “Governor, pursuant to his authority under Executive Order”, and Buckingham again signed
3 his approval as to form and legal capacity. (*Id.*)

4 In addition, Fitial signed the “Pledge and Security Agreement,” executing a guaranty as Guarantor
5 for the contract with SDLLC. (Pl.’s SAC, Ex. 4b, at 48.) Fitial was undersigned “Governor”, and
6 Buckingham again signed his approval as to form and legal capacity. (*Id.*)

7 **IV. Attorney General Opinion**

8 On December 31, 2012, Attorney General Joey P. San Nicolas filed Attorney General Opinion 2012-
9 04 (“Opinion”), representing to the Court that: (1) Executive Order No. 2012-07 did not vest the Governor
10 with the authority to enter into the disputed PPA with SDLLC; (2) the PPA will not address any of the
11 specified grounds for finding that CUC was faced with an immediate disaster; and (3) suspending CUC’s
12 procurement regulations was not necessary for CUC to enter a PPA that will neither take effect nor show
13 results for a number of years. (Pl.’s SAC, Ex. 7, at 7.) The Opinion reasoned that while the “Executive
14 Order No. 2012-07 certainly empowered the Governor or his designated agent to exercise the CUC Board
15 of Directors’ powers . . . the Governor is still obligated to follow CUC’s procurement regulations to the same
16 extent as the Board would be so obligated.” (*Id.* at 11.) The Opinion went on to state that “[e]ntering the
17 PPA is not necessary to address any of the specified reasons for the CUC emergency” and that “suspending
18 CUC’s procurement regulations is not necessary to enter the PPA, as there is ample time to enter the PPA
19 or a similar agreement through the procurement process.” (*Id.*)

20 Further, the Opinion also represented that Buckingham was mistaken as to his certification that the
21 PPA was proper as to form and capacity, and that the former Governor cannot be held “liable for actions
22 taken in good faith reliance on the Attorney General’s representations.” (*Id.* at 10.) The Opinion reasoned
23 that “[t]he Governor should be able to rely on the advice of the Commonwealth’s highest legal officer, and
24 cannot be faulted when the Attorney General is mistaken.” (*Id.* at 11.)

25 On January 4, 2013, Attorney General Joey P. San Nicolas sent a letter to SDLLC representing that

1 the Buckingham erred when he indicated that the contracts between CUC and SDLLC were sufficient as to
2 form and legal capacity. (Pl.’s SAC, Ex. 8, at 13.) Specifically, the letter states that while “Executive Order
3 No. 2012-07 . . . authorized the Governor to take appropriate steps to address immediate threats to public
4 health and safety [, it] did not provide authority or capacity to enter into the Contracts.” (*Id.*) Most
5 importantly, the Attorney General opined that “[t]he Contracts were void *ab initio* as they were executed in
6 a manner contrary to Commonwealth law.” (*Id.*)

7 **V. Procurement Regulations**

8 CUC is obligated to follow specific procedures in the awarding of contracts for construction of
9 power-generating machinery. On May 5, 2006, Fitial issued Executive Order No. 2006-04, establishing
10 CUC as a public corporation and setting forth its duties and powers. 28 Com. Reg. 25626 (May, 19, 2006).
11 Section 4 of the Executive Order established that CUC must comply with the procurement regulations of
12 the Commonwealth, and that the “continued application of such procurement regulations is in the best
13 interests of CUC and the CNMI Government and that such regulations should be adopted as permanent . .
14 .” 4 CMC § 8152. These regulations were adopted as permanent in 2006 by CUC’s Executive Director,
15 who determined the procurement regulations are in the best interests of CUC and the CNMI Government.
16 Executive Order No. 2006-4 § 4.

17 **A. 4 CMC § 8191: Private Sector Assistance Agreements**

18 Public Law 16-17, also known as the CUC Private Sector Partnership Act of 2008 and codified at
19 4 CMC § 8191, sets forth the procedural requirements CUC must follow to procure new projects from and
20 award contracts to private sector companies.

21 Such private sector assistance agreements (“PSAA”) include, performance management contracts,
22 concessions or franchise agreements, build/operate/transfer (BOT) contracts, contracts for independent
23 power producers (IPP), and full privatization of CUC. 4 CMC § 8191(c)(1-6). Under these requirements,
24 “[t]he [CUC] shall not enter into any form of performance management contract, franchise agreement, or
25 private sector assistance agreement unless the agreement is awarded pursuant to an invitation to bid . . .”

1 *Id.* § 8191(a). Most importantly, the requirements provide that “CUC shall procure such private sector
2 assistance under its own procurement regulations (set forth in the Commonwealth Register, Volume 26, No.
3 6; June 18, 2007) . . . [n]o other procurement regulations shall apply.” *Id.* § 8191-3(c).

4 In 2011, Public Law 17-34 modified and expanded the requirements established by PL 16-17,
5 providing avenues for CUC to procure PSAAs in ways other than invitations to bid. In addition to the
6 bidding procedure, a contract may be awarded pursuant to a request for proposals “if the Attorney General
7 certifies, under penalty of perjury, that (1) [it] is the most appropriate procurement tool for a specific form
8 of PSAA, and (2) [it] complies with all CUC procurement regulations, CNMI and federal laws.” *Id.*

9 **B. CNMI Administrative Code § 50-50, et. seq.**

10 Initially established on June 18, 2007 by CMNI Register Volume 29, No. 6, CNMI Administrative
11 Code § 50-50, et. seq. requires CUC to follow certain procedures in the procurement process and the
12 contracts necessary in doing so, specifically in regards to contract oversight and source selection.

13 1. *Contract Oversight: § 50-50-115*

14 The Administrative Code requires the specific procedures to be followed where a contract is to be
15 entered with CUC for the procurement of goods, leases, the sale of goods, or services. In relevant part,
16 subsection (a) requires that a contract must be “reviewed and approved by the Director or his designee,”
17 while subsection (b) requires that the contract “be approved by the Comptroller who shall certify the
18 availability of funds.” Further, subsection (c) requires the Attorney General to “certify the form and legal
19 capacity of every CUC contract,” and subsection (e) prescribes that “upon his own initiative or the request
20 of the Public Auditor, the Director may refer any contract to the Public Auditor for a recommendation before
21 he approves or disapproves of the contract.” Most importantly, subsection (i) provides that “no contract is
22 effective against the Commonwealth until all of the Commonwealth officials whose signatures appear on
23 the contract form have signed the contract.”

24 ///

25 ///

1 2. *Sole Source Procurement: § 50-50-215*

2 The Administrative Code also provides procedures CUC must follow should it elect to award a
3 contract without competition and the standard bidding process. Subsection (a) provides that “[a] contract
4 may be awarded . . . without completion when the Director determines in writing that there is a demonstrated
5 benefit to CUC for sole source procurement for the required . . . item.” Further, subsection (b) requires that
6 “the written determination shall be prepared by the Director” and contain “the unique capabilities required
7 and why they are required and the consideration given to alternative sources.”

8 3. *Emergency Procurement: § 50-50-220*

9 These regulations provide the particular procedures to be followed in emergencies. Subsection (a)
10 provides that “CUC may make emergency procurements when there exists a threat to public health, safety
11 or welfare under emergency conditions. An emergency procurement must be as competitive as practical
12 under the circumstances.” Importantly, subsection (b) of the statute provides that “[a] written determination
13 of the basis for the emergency and for the selection of the particular contractors must be made by the
14 Director and approved by the Board of Directors.”

15 **LEGAL STANDARD**

16 The Court may grant a motion for summary judgment “if the pleadings, depositions, answers to
17 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine
18 issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” NMI R.
19 Civ. P. 56(c). In considering the motion, the court views facts and inferences in the light most favorable to
20 the non-moving party. *Century Ins. Co. v. Hong Kong Ent. Invs., et. al.*, 2009 MP 4 ¶ 14, citing *Estate of*
21 *Mendiola*, 2 NMI 223, 240 (1991); *Aplus Co. v. Niizeki Int’l Saipan Co.*, 2006 MP 13 ¶ 10.

22 A party moving for summary judgment “bears the initial responsibility of informing the [] court of
23 the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the
24 absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see*
25 *Furuoka v. Dai Ichi Hotel*, 2002 MP 5 ¶ 22, citing *Santos v. Santos*, 4 NMI 206, 210 (1995). The movant

1 must show the absence of evidence to support the nonmoving party's case. *Id.* at 325; *see Furuoka*, 2002
2 MP 5 ¶ 22 (specifying that “[i]f a movant is the defendant, he or she has the [...] duty of showing that the
3 undisputed facts establish every element of an asserted affirmative defense.”). “Once the moving party
4 satisfies the initial burden, the non-moving party must respond by establishing that a genuine issue of
5 material fact exists.” *Id.* ¶ 24. However, “[i]f the non-moving party cannot muster sufficient evidence to
6 make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter
7 of law.” *Id.*

8 In shouldering its burden, the opposing party may not simply rely upon the pleadings but must tender
9 evidence of specific facts in the form of affidavits, and/or admissible evidence. NMI R. Civ. P. 56(e);
10 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, n. 11 (1986). A disputed fact is
11 considered material “if its determination may affect the outcome of the case.” *Triple J Saipan, Inc. v.*
12 *Agulto*, 2002 MP 11 ¶ 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986)).

13 Once the movant has discharged its burden, the burden of production shifts to the nonmoving party.
14 *Roberto*, 2002 MP 23 ¶ 17. The nonmoving party “must do more than simply show that there is some
15 metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
16 574, 586 (1986). A party opposing a properly supported motion for summary judgment “may not rest upon
17 the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a
18 genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted).

19 To establish a genuine issue, the nonmoving party must assert sufficient factual indicia for a
20 reasonable trier of fact to sustain a finding in their favor. *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268,
21 272 (1995). “Both the ‘quantum and quality of proof’ is to be considered, and ‘the mere existence of a
22 scintilla of evidence in support of the plaintiff’s position will be insufficient.’” *Id.* (quoting *Anderson v.*
23 *Liberty Lobby, Inc.*, 477 U.S. 242, 252, 254 (1986). “If the evidence set forth by the non-moving party is
24 ‘merely colorable . . . or [was] not significantly probative . . . summary judgment may be granted.’” *Eurotex,*
25 *Inc. v. Muna*, 4 NMI 280, 284 (1995) (citing *Anderson*, 477 U.S. at 249-50).

1 **DISCUSSION**

2 **I. Attorney General Opinion as Persuasive Authority**

3 First, to the extent that CUC relies on the Opinion in support of its motion, the Court finds the
4 Opinion to be persuasive authority that explicitly supports the reasoning of the Court's decision.

5 While an Attorney General’s Opinion is not binding on the judiciary, it is generally regarded as
6 “highly persuasive.” *Cedar Shake and Shingle Bureau v. City of Los Angeles*, 997 F.2d 620, 625 (9th Cir.
7 1993). Further, our Supreme Court has held that “an Opinion of the Attorney General should be treated as
8 persuasive authority for the judiciary only so far as it is properly and thoroughly researched.” *United States*
9 *v. Borja (Mayor of Tinian)*, 2003 MP 8, ¶ 21 (D.N.M.I. May 8, 2003).

10 SDLLC argues that the Court should follow the Supreme Court’s reasoning in *Borja*, which found
11 the Attorney General's Opinion in that case to be unpersuasive for two reasons: (1) it repudiated an opinion
12 rendered months previous, and (2) the argument relied upon was “four sentences long . . . contain[ing] ninety
13 words with no reference to case law or legislative history.” *Id.* (Def. SDLLC's Opp., at 5.) However, CUC
14 distinguishes *Borja* by asking the Court to not only disregard the previous opinion – rendered by Defendant
15 Edward Buckingham – because it was not supportable, but also find that the Opinion was well-researched.
16 (Def. CUC's Reply, at 5.)

17 First, the Court recognizes that the opinion previously rendered in *Borja* was similarly unsupportable
18 and inconsistent such that the Commonwealth requested that “[a]ll other opinions previously rendered on
19 this issue are superseded and withdrawn . . .” *Borja*, 2003 MP 8, ¶ 20. However, given the unique
20 circumstances presented by this case – where the former Attorney General is a named defendant whose
21 unsupported opinion was relied upon by the parties involved and the subsequent opinion is independently
22 rendered by the current Attorney General – the Court finds the fact that the Opinion repudiated a previous
23 one made by a named defendant to be non-dispositive. Second, the Court also finds that the Opinion goes
24 far beyond the level the Supreme Court found to be insufficient in *Borja*, as it is several pages long,
25 thoroughly researched, and well-reasoned, complete with compelling legal precedent and statutory analysis.

1 For the aforementioned reasons, the Court finds the Opinion to be properly considered as persuasive
2 authority.

3 **II. Failure to Raise Invalidity As Affirmative Defense**

4 Second, a preliminary question the Court must consider in this case is whether CUC waived its
5 invalidity argument by failing to timely plead the invalidity of the PPA as an affirmative defense. SDLLC
6 argues that while CUC expressly raised the PPA’s invalidity as an argument in its Memorandum in Support
7 of its Motion for Summary Judgment, CUC has waived the right to assert invalidity as an affirmative defense
8 because it did not do so in its Answer to the Second Amended Complaint. (Def. SDLLC’s Opp. to Def.
9 CUC’s Mot. for Partial Summ. J., at 1.) Thus, the Court must decide whether CUC was required to assert
10 invalidity as an affirmative defense in its responsive pleadings in order for the defense to form the basis of
11 its subsequent Motion for Partial Summary Judgment.

12 The NMI Rules of Civil Procedure require parties to include any affirmative defenses in their
13 responsive pleadings. NMI R. Civ. P. 8(c). Generally, if those defenses are not plead in the response to the
14 complaint, they are waived. Fed R. Civ. P. 8(c)(1) (“In response to a pleading, a party must affirmatively
15 state any avoidance or affirmative defense, . . .”); see e.g., *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224,
16 1239 (11th Cir. 2010) (“Failure to plead an affirmative defense generally results in a waiver of that
17 defense.”); see also *Sablan v. Elameto*, 2013 MP 7 ¶ 17 (citing *Ishimatsu v. Royal Crown Ins. Corp.*, 2010
18 MP 8 ¶ 60 (“[W]hen our rules are patterned after the federal rules it is appropriate to look to federal
19 interpretation for guidance.”)).

20 Here, CUC asserted various affirmative defenses in its Answer to the Second Amended Complaint,
21 including standing, failure to exhaust administrative remedies, contributory negligence, unclean hands, and
22 *malfeasance on the part of the other named defendants*. (Def. CUC’s Answer to SAC, at 18 (emphasis
23 added).) Subsequently, without clearly alleging such an affirmative defense in its previous pleadings, CUC
24 argued the illegality and invalidity of the PPA as the basis for its present Motion for Partial Summary
25 Judgement. (Def. CUC’s Mot. for Partial Summ. J., at 4-7.)

1 Even so, the general waiver rule does not apply when a party either had notice of the unpled defense
2 or was not prejudiced by the lack of notice. *Proctor v. Fluor Enters., Inc.*, 494 F.3d 1337, 1350 (11th Cir.
3 2007) (deemed the “notice-prejudice” exception). Further, courts have specifically held that notice can be
4 delivered in a motion for summary judgment or a pre-trial conference. *See, e.g., Stoebner v. Parry et. al.*,
5 91 F.3d 1091, 1093-94 (8th Cir. 1996) (per curiam) (citing *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th
6 Cir. 1993) (holding that, in absence of prejudice, affirmative defense may be raised for first time in summary
7 judgment motion)); *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 797 (11th Cir. 1989) (“[I]f a plaintiff
8 receives notice of an affirmative defense by some means other than pleadings, ‘the defendant’s failure to
9 comply with Rule 8(c) does not cause the plaintiff any prejudice.’”).

10 Here, even if CUC was required to plead invalidity as an affirmative defense in their responsive
11 pleadings, SDLLC cannot credibly claim unfair surprise or prejudice. While it is true that CUC failed to
12 clearly allege the invalidity of the PPA in its Answer, the alleged misconduct of Fitial, Buckingham, and
13 SDLLC with regards to the formation of an allegedly illegal and facially invalid contract has been the central
14 issue of the case since its inception. The Attorney General unambiguously mentioned the illegality of the
15 contract as grounds for its facial invalidity in the Opinion filed with the Complaint and the concurrent letter
16 sent to SDLLC on January 4, 2013. (Pl.’s SAC, Ex. 7, at 7.) Additionally, SDLLC received notice of
17 CUC’s affirmative defense of the invalidity of the PPA in its Motion for Partial Summary Judgment. (Def.
18 CUC’s Mot. for Partial Summ. J., at 4-7.) Accordingly, the Court finds that the parties’ filings and discovery
19 afforded SDLLC sufficient notice of the possibility CUC would allege invalidity of the PPA as an
20 affirmative defense and the basis for the present Motion.

21 Further, no prejudice has been claimed by SDLLC aside from its requests for additional time to
22 depose certain individuals regarding the Development Agreement, which has no direct bearing on the
23 validity of the PPA because the Court need not consider evidence extrinsic to the PPA to make its finding.
24 Thus, the Court finds that SDLLC cannot be said to suffer any prejudice from CUC’s failure to raise
25 invalidity as an affirmative defense in its Answer to the Second Amended Complaint.

1 Accordingly, the Court holds that CUC is not precluded from arguing the invalidity of the PPA as
2 the basis of the present motion.

3 **III. Impermissible Advisory Opinion**

4 Next, SDLLC argues that the Court may not issue advisory opinions when resolving a Motion for
5 Partial Summary Judgment pursuant to NMI R. Civ. P. Rule 56 of the Rules of Civil Procedure, but is
6 limited to ruling on claims or defenses. As discussed above, CUC permissibly pled the affirmative defense
7 of the invalidity of the PPA in its Motion for Partial Summary Judgment, and thus SDLLC’s argument that
8 CUC failed to identify which of its claims or defenses it is asking the Court to consider and dispose of fails.

9 By entering judgment on the present motion, the Court is neither entertaining a hypothetical or
10 abstract question, nor declaring principles or rules of law which do not pertain to the instant case. *See Bank*
11 *of Saipan, Inc. v. Superior Court*, 2004 MP 15 ¶ 6; *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d
12 1134, 1138 (9th Cir. 2000); *Walker v. Munro*, 124 Wash. 2d 402, 418 (1994). Here, the issue before the
13 Court – the illegality and invalidity of the PPA – has been raised as an affirmative defense in the present
14 Motion, and the Court’s decision on the matter directly affects the parties. The Court has reviewed all the
15 factual materials submitted in the case since its inception, including those pertaining to the PPA, and finds
16 that no further factual information is necessary to enter judgment on the precise issue of law regarding the
17 legality and validity of the PPA. Further, the Court’s judgment on this question of law will serve to declare
18 the rights, duties and obligations of the various parties, as well as dispense of critical issues and provide the
19 case with direction toward a final resolution.

20 Thus, the Court rejects SDLLC’s argument claiming the Court’s declaratory judgment in response
21 to the present Motion would be an impermissible advisory opinion.

22 **IV. Summary Judgment**

23 Having ruled that CUC is not precluded from arguing the invalidity of the PPA, finding the Attorney
24 General’s Opinion to be persuasive authority, and rejecting SDLLC’s argument that the present decision will
25

1 be an impermissible advisory opinion, the Court will now consider whether summary judgment is
2 appropriate in the present case.

3 After reviewing the materials submitted by the parties and the laws applicable to the PPA, the Court
4 finds no inconsistencies in facts material to the legal issues before the Court. CUC has met its burden of
5 production by proffering the Motion's supporting documents, including the Development Agreement, the
6 PPA, the Executive Order, and the Opinion, all of which provide pertinent information relevant to the
7 validity of the PPA. The Court finds that no absence of any fact material to the issues presented exists, and
8 that the Court may resolve the question of law using the evidence presented. Thus, the burden of production
9 shifts to SDLLC to assert sufficient evidence to indicate a genuine dispute exists as to a material fact.

10 SDLLC has failed to shoulder its burden of producing any specific evidence that a genuine issue of
11 material fact exists. To the extent that SDLLC attempts to create an issue of material fact by requesting
12 additional time to conduct additional discovery, the Court hereby finds there is no need to take further
13 depositions of individuals involved in order to find the PPA illegal and facially invalid. The Court need only
14 look within the four corners of the PPA to determine whether it was validly executed pursuant to the laws
15 and regulations of the CNMI which govern CUC's procurement of construction projects. No ambiguity
16 exists in the PPA itself, and thus evidence extrinsic to the PPA is not pertinent to the issue presented. The
17 mere possibility of further information relevant to the issues presented being discovered by conducting
18 further depositions is not enough to meet the stringent standards for defeating a motion for summary
19 judgment.

20 Accordingly, the Court finds that summary judgment is appropriate to dispose of the legal issue
21 presented by CUC's motion because SDLLC has not met its burden in convincing the Court that a jury trial
22 is necessary to reconcile a genuine dispute as to a material fact. Ruling on this legal issue will resolve a
23 critical aspect of the case and provide direction to its complete disposition. The Court now addresses in turn
24 the arguments submitted in the parties' briefs, in order to determine whether to grant summary judgment.

25 ///

1 **V. Execution of the PPA**

2 Next, the Court will examine the critical issue in the case, namely whether the Power Purchase
3 Agreement entered into by Defendants Fitial, Buckingham and SDLLC was validly executed pursuant to
4 well-established procurement regulations and the former Governor's vested authority under the Executive
5 Order. CUC argues that the PPA and its associated financing documents are illegal and invalid as a matter
6 of law due to Fitial's failure to follow procurement regulations, while SDLLC argues that the PPA was
7 validly executed by Fitial, acting with actual and apparent authority as executive of CUC, pursuant to
8 emergency and sole-source procurement regulations. The Court finds the PPA to be void *ab initio* for the
9 following reasons.

10 **A. Invalid Development Agreement**

11 First, the Court will consider whether the Development Agreement executed by Fitial, Buckingham,
12 and SDLLC was initially invalid, effectively shedding light on the validity of the nearly identical Power
13 Purchase Agreement.

14 The Development Agreement was executed on March 27, 2012, exactly fifty days before Fitial
15 signed Executive Order 2012-05 on May 15, 2012. The Development Agreement authorized SDLLC to
16 proceed immediately on an urgent basis, without the need for further approval, and bound CUC to an
17 exclusive relationship with SDLLC. The intention of the Development Agreement was to bind CUC and
18 the CNMI into further entering into the PPA, which was modeled after the Development Agreement.
19 However, Fitial's authority to enter into the PPA, as Executive Director of CUC, did not vest until he signed
20 Executive Order 2012-05, fifty days after the Development Agreement was executed and 84 days prior to
21 the execution of the PPA.

22 CUC argues that the Development Agreement signed by Fitial is void because: (1) it did not follow
23 the procurement process pursuant to CNMI's Administrative Code § 50-50, *et. seq.*; (2) it was not signed
24 by CUC's Executive Director or Comptroller; and (3) it was signed before Executive Order 2012-05, vesting
25 the authority of CUC's executive in Fitial, was in effect. (Def. CUC's Mot. for Partial Summ. J., at 8.)

1 SDLLC fails to respond to these arguments in their Opposition, in effect providing the Court with no reason
2 to refute CUC’s arguments regarding the Development Agreement.

3 Accordingly, the Court finds that because: (1) the procurement regulations could not have been
4 suspended before the Executive Order declaring a disaster emergency was in effect; (2) regulations requiring
5 the signatures of CUC’s Executive Director or Comptroller were not followed; and (3) Fitial did not have
6 the authority to enter into the Development Agreement in the absence of the approval of CUC’s Executive
7 Director or Comptroller, the Development Agreement was improper and facially invalid, and CUC is not
8 bound by its terms purporting to obligate CUC to enter into the forthcoming PPA.

9 **B. No Authority to Disregard Procurement Regulations**

10 Second, the Court determines whether Fitial had authority to effectively disregard the procurement
11 regulations of the CUC and CNMI law in order to enter into the PPA. The Court will examine whether: (a)
12 Fitial had the power to declare a disaster emergency; and (b) the imminent necessity of remedying the
13 disaster emergency permitted Fitial to suspend CUC’s procurement regulations, in order to execute the PPA
14 outside of CUC regulations.

15 1. *Declaration of Disaster Emergency*

16 Commonwealth Constitution Article III, § 10 states “[t]he governor may declare a state of emergency
17 in the case of invasion, civil disturbance, natural disaster, or *other calamity as provided by law*, and may
18 mobilize available resources to respond to that emergency.” NMI Const. art. III, § 10 (emphasis added).
19 Further, the Disaster Relief Act specifies under which instances the governor may declare a disaster
20 emergency by executive order, stating he is authorized “if the governor finds a disaster has occurred or that
21 occurrence or the threat thereof is imminent.” 3 CMC § 5121(c). The Disaster Relief Act defines a
22 “disaster” as the:

23 occurrence or imminent threat of a widespread or severe damage, injury, or
24 loss of life or property resulting from any natural or man-made cause . . .
25 occurring in any part of the Commonwealth which, in the determination of
the Governor is of sufficient severity and magnitude to warrant assistance by
the Commonwealth to supplement the efforts and available resources of the

1 political subdivisions thereof and relief organizations in alleviating the
2 damage, loss, hardship or suffering caused thereby.

3 3 CMC § 5114(a).

4 Here, Fitial signed Executive Order No. 2012-07 on July 16, 2012, declaring a state of disaster
5 emergency, citing CUC's imminent failure to provide reliable power, water, and wastewater services to the
6 public. Exec. Order No. 2012-07. As stated by the Committee on Governmental Institutions, which
7 modified the Constitution to include the phrase "other calamity as provided by law," "[w]ith skillful use of
8 language, almost anything can be considered a 'calamity' or a potential calamity justifying use of emergency
9 power." See SECOND NORTHERN MARIANAS CONSTITUTIONAL CONVENTION, COMMITTEE ON
10 GOVERNMENTAL INSTITUTIONS, COMMITTEE REPORT NO. 44. Thus, under the Disaster Relief Act, if Fitial
11 properly determined the imminent threat of widespread damage or injury caused by CUC's failure to provide
12 necessary utilities was severe enough to justify the assistance of the Executive Branch in alleviating such
13 damage or injury, he was authorized to declare a disaster emergency by executive order. See 3 CMC §
14 5114(a).

15 Accordingly, the Court finds Fitial had the authority to declare a state of disaster emergency pursuant
16 to his determination that CUC was unable to provide necessary utilities to the public.

17 2. *Suspension of Procurement Regulations*

18 Next, the Court examines whether the suspension of procurement regulations to enter into the PPA
19 was a necessary remedy to alleviate the imminent threat that prompted the signing of the Executive Order.

20 In order to suspend the applicable procurement regulations, Fitial would have had to show that ". . .
21 . . . strict compliance with the provision of . . . [the] regulation would in any way prevent, hinder, or delay
22 necessary action in coping with the emergency." See 3 CMC § 5121(f)(1). Therefore, Governor Fitial would
23 have first had to show that entering into the PPA was necessary in order to address the immediate needs in
24 preventing the imminent disaster. Then, he would also have had to prove that complying with the applicable
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1 procurement regulations would prevent, hinder or delay the prevention of the imminent disaster caused by
2 CUC's failure to provide necessary utilities to the public.

3 The Executive Order provides more context, identifying four sources of the imminent threat to the
4 public: (1) CUC's cash shortage and resulting inability to purchase fuel; (2) the need for renewable energy
5 projects; (3) the need for CUC to retain "specialized technical employees who are not U.S. citizens"; and
6 (4) the lack of a CUC Board of Directors. Exec. Order No. 2012-07, at 2 (July 16, 2012). The first three
7 sources articulated in the Executive Order are not remedied by the PPA. First, it is undisputed that the PPA
8 would not generate enough income or take effect quickly enough to address the cash crisis. In fact, it is
9 possible CUC would be buried deeper in debt due to the large sums promised to SDLLC each month for an
10 extended period of time, effectively exacerbating the cash crisis for the sake of providing emergency power
11 to the public. Second, the PPA purports to build a diesel power plant, which is not a renewable energy
12 source, and requires the CNMI and CUC to procure further resources to operate it. Lastly, the PPA would
13 also not work to provide noncitizen technical workers.

14 The only cause of the immediate threat addressed by the Executive Order is the lack of a Board of
15 Directors, which would effectively prevent CUC from entering into agreements to purchase additional
16 power-generating construction. In order to remedy this issue, the Executive Order vested the authority of
17 CUC's Executive Director and Board of Directors in Fitial, allowing him to act as the head of CUC and enter
18 into contracts on its behalf. However, the Executive Order also purported to suspend the regulations
19 governing the procurement of additional power-generating construction projects in order to enable Fitial and
20 SDLLC to enter into the PPA – which was based on the Development Agreement previously and improperly
21 entered into by Fitial – without having to follow the stringent regulations placed on such agreements.

22 Further, as the PPA would not take effect for some time, effectively leaving the issue of remedying
23 the power crisis at a standstill, the Court finds that compliance with the applicable procurement regulations
24 would not "prevent, hinder, or delay" the PPA to such an extent to warrant their complete and total
25 suspension. While the Court recognizes that compliance with the regulations would push back the

1 availability of power to the public, it does not find the same type of delay envisioned by the drafters of the
2 Disaster Relief Act. If following the procurement regulations meant a complete shutdown of Saipan’s
3 utilities, and the PPA purported to provide immediate relief in the way of emergency power, the Court would
4 be more receptive to that line of reasoning. However, as discussed above, the PPA would not take effect
5 for a few years from its execution, so it is not imperative that it is entered into without following the proper
6 procurement channels and regulations governing the process, and those regulations must still be followed.

7 Accordingly, the Court finds that while Fitial had the authority to declare a state of disaster
8 emergency pursuant to his determination that CUC was unable to provide necessary utilities to the public,
9 he did not have the authority to suspend the applicable regulations binding the Executive Director and Board
10 of Directors governing procurement. As a result, the Court now examines whether CUC procurement
11 regulations, which apply to the PPA notwithstanding Fitial’s Executive Order, were followed in the
12 execution of the PPA.

13 **C. Failure to Comply with CUC Procurement Regulations**

14 Third, the Court finds that, to the extent the disaster emergency was properly declared by way of
15 executive order, the applicable procurement regulations of the CNMI were suspended, and Public Utilities
16 Commission (“PUC”) oversight was waived, the execution of the PPA still failed to comply with internal
17 CUC procurement regulations established by the Northern Mariana Islands Administrative Code.³

18 As an initial matter, the Code requires that a contract be “approved by the Comptroller who shall
19 certify the availability of funds,” and that “no contract is effective against the Commonwealth until all of
20

21 ³ SDLLC argues that CUC’s procurement regulations cannot override PL 17-34 in the event the Court finds CUC’s
22 internal regulations were not followed in the execution of the PPA. (Def. SDLLC’s Reply to Opp., at 8.) The Court rejects
23 this argument for the following reasons: (1) the Executive Order 2012-07 that was signed by Fitial purported to suspend all
24 regulations applicable to the PPA, including PUC oversight of the contract; (2) in the event the laws and regulations
25 governing procurement were, in fact, suspended, PL 17-34 § 3(e) provides that CUC regulations must be followed and that no
other procurement regulations apply; (3) even if Fitial had the authority as governor to suspend PUC review of the PPA, he
did not have the authority as acting Executive Director of CUC to disregard CUC procurement regulations in the execution of
the PPA; and (4) in the alternative and keeping with the Court’s ruling that Fitial had no authority to suspend the laws and
regulations governing procurement, the applicable procurement regulations were not followed by the execution of the PPA.

1 the Commonwealth officials whose signatures appear on the contract form have signed the contract.”
2 NMIAC § 50-50-115(a) and (b). Here, the PPA was only signed by Fitial, acting as CUC’s Executive
3 Director and Board of Directors, Buckingham, certifying the agreement as to form and capacity, and Donald
4 R. Kurz, manager of SDLLC. (Pl.’s SAC, Ex. 4(a), at 46.) Thus, the contract does not follow the
5 procurement regulations specific to contract oversight, and is facially invalid as against CUC.

6 The Administrative Code further provides that CUC may make emergency procurements when “there
7 exists a threat to public health, safety or welfare under emergency conditions,” and that they “must be as
8 competitive as practical under the circumstances.” NMIAC § 50-50-220(a). Importantly, “[a] written
9 determination of the basis for the emergency and for the selection of the particular contractors must be made
10 by the Director and approved by the Board of Directors.” NMIAC § 50-50-220(b). Here, no such
11 regulations were met. While Fitial did declare a disaster emergency by way of executive order, the
12 Development Agreement – which was executed before the Executive Order was signed – made exclusivity
13 a material term with Clause 3.6, effectively prohibiting any competition for the projects required. (Pl.’s
14 SAC, Ex. 1, at 1, 5.) As stated above, while the Court recognizes that the circumstances warranted the
15 expedited handling of procurement agreements, it is not of the opinion that the operation of the PPA would
16 provide power quickly and efficiently enough to warrant the anti-competitive measures central to the PPA
17 and the underlying agreements.

18 Further, even if the exclusivity clause in the Development Agreement did not violate the competition
19 restrictions of the emergency procurement regulations, the Court finds CUC’s sole source regulations –
20 dealing with exclusive relationships between the parties – were also not complied with.

21 Under the sole source procurement regulations of the Administrative Code, the Director must
22 determine in writing that there is a demonstrated benefit to CUC for sole source procurement for the required
23 item. NMIAC § 50-50-215(a). Further, this writing must contain “the unique capabilities required and why
24 they are required and the consideration given to alternative sources.” NMIAC § 50-50-215(b). Here, no
25 such written determination was made by the acting Director – Fitial – as to any of the requirements

1 enumerated in the regulation. Fitial, acting in his official capacity as Executive Director of CUC, never
2 specified the unique capabilities required to remedy the imminent threat of failing to provide power to the
3 public. In fact, no specific capabilities were required, as the only result intended by the Development
4 Agreement and the PPA was to provide power to the public. There were no findings that SDLLC would be
5 the only company able to provide the necessary power in the accelerated time tables required by CUC, or
6 that SDLLC would be able to provide such power in the most efficient and cost-effective way possible.
7 Further, the PPA itself does not specify the unique capabilities SDLLC would provide, why those
8 capabilities are required, and whether or not other sources of the unique capabilities were considered.

9 Thus, the Court finds that the applicable regulations were not followed in the execution of the PPA.

10 **D. The PPA is Void *Ab Initio***

11 Lastly, in ruling that Fitial had no authority, as neither Governor nor acting Executive Director, to
12 suspend the applicable procurement regulations, and that the execution of the PPA failed to comply with
13 emergency and sole source procurement, the Court finds that the PPA is void *ab initio*.

14 The phrase “void *ab initio*” means “[n]ull from the beginning, as from the first moment when a
15 contract is entered into.” *Aldan v. Pangelinan*, 2011 MP 10 ¶ 5. In effect, this means the execution of the
16 contract would have to be invalid or entered into without the proper authority. Here, Fitial, acting in the
17 capacity of the Executive Director, was vested with the proper authority to enter into the PPA because
18 CUC’s Executive Director has been authorized to execute a loan in the absence of an organized board of
19 directors.⁴ However, Fitial could not have possessed more authority, actual or apparent, than the Board
20 would have in similar circumstances, and the Board is not authorized to bypass internal procurement
21 regulations in entering into agreements with the private sector. Thus, he did not possess authority to suspend

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23 ⁴ PL 17-62 was enacted on December 3, 2011 solely to authorize the Executive Director, in the absence of an
24 organized Board of Directors, to borrow an amount up to \$10,000,000 from Independence Bank of East Greenwich, Rhode
25 Island. The loan was found by the Legislature to be necessary to fund CUC's obligations under the Stipulated Orders entered
in District Court case *USA v. CUC & CNMI*, Civ. No. 08-0051 (D.N.M.I., Feb. 3, 2012), and for other necessary maintenance
projects on Rota and Tinian. This precedent suggests that Fitial, acting in the capacity of the Executive Director, would be
able to enter into the PPA on behalf of CUC without the approval of a nonexistent Board of Directors.

1 CUC procurement regulations in his capacity as acting Executive Director and Board of Directors of CUC,
2 and the PPA failed to comply with those regulations by its own terms and on its face.

3 Accordingly, the Court finds that the PPA is void *ab initio*, and CUC is excused from its obligations
4 thereunder. Next, the Court addresses SDLLC’s argument requesting the application of equitable estoppel
5 to CUC and the CNMI in order to enforce the PPA.

6 **VI. Estoppel Does Not Apply Against the CNMI**

7 Lastly, the Court examines whether SDLLC may argue that the PPA is binding under the well-
8 established principles of applying equitable estoppel against the government.

9 Equitable estoppel is ordinarily unavailable as applied against the government, except in particular
10 circumstances. A party who seeks estoppel against the government must show two additional elements
11 beyond the traditional requirements for promissory estoppel: “(1) a party must demonstrate that applying
12 estoppel would not compel the government to violate the law; and (2) a party must
13 show that the government engaged in affirmative misconduct beyond mere negligence.” *O’Connor v. Div.*
14 *of Pub. Lands*, 1999 MP 5 ¶ 19 (citing *In re Blankenship*, 3 NMI 209, 214 (July 24, 1992)). Moreover,
15 “estoppel will not be invoked against the government where it would defeat effective operation of public
16 policy adopted to protect the public.” *Blankenship*, 3 NMI at 214. In other words, SDLLC would have to
17 prove that “the government’s wrongful act [going beyond mere negligence] will cause a serious injustice,
18 and the public’s interest will not suffer undue damage by imposition of the liability.” *See Benavente v.*
19 *Marianas Pub. Land Corp.*, 2000 MP 13 ¶ 19.

20 First and foremost, SDLLC has not demonstrated that applying estoppel and compelling CUC and
21 the CNMI to honor their contract with SDLLC would not compel the violation of the laws and regulations
22 of the CNMI regarding procurement. As ruled upon above, the PPA is void *ab initio* due to its
23 noncompliance with and complete disregard of CUC procurement regulations. Thus, compelling CUC to
24 honor its contract with SDLLC would force them to be in noncompliance with the CNMI’s Administrative
25 Code and Commonwealth Code. Accordingly, SDLLC cannot prove that the laws and regulations governing

1 the procurement process would not be violated by this Court applying equitable estoppel to enforce the terms
2 of the PPA.

3 Second, SDLLC has not alleged any misconduct on the part of Fitial and Buckingham that would
4 rise to a level beyond that of mere negligence. SDLLC claims that the conduct of Fitial and Buckingham
5 were more egregious than the U.S Attorney in a 7th Circuit case that applied the principles of equitable
6 estoppel against the government. *Houck on Behalf of U.S. v. Folding Carton Admin. Comm.*, 881 F.2d 494
7 (7th Cir. 1989). The court in *Houck* allowed estoppel to be applied against the Chief of the U.S. Attorney’s
8 Civil Division for failing to object to a proposed settlement agreement and then later challenging it. The
9 court reasoned that as “the legal representative of the government,” the U.S. Attorney’s Office “acted in such
10 a manner as to prejudice . . . the parties [and] the government . . .” *Houck*, 881 F.2d at 501.

11 Conversely, SDLLC has presented no factual basis for the determination that the conduct of Fitial
12 and Buckingham rose to a level beyond that of ordinary negligence. Neither SDLLC nor CUC have alleged
13 that Fitial deliberately circumvented the laws and regulations of the CNMI, or that Buckingham intentionally
14 misrepresented the same in order to induce SDLLC or Fitial to entering into the PPA. Rather, SDLLC
15 claims it “reasonably relied upon the opinion of the Attorney General who clearly held the constitutional and
16 statutory authority to render opinions on the laws of the CNMI” in order to support its claim for equitable
17 estoppel in this case, expecting the court to insert wrongdoing in order to meet the standard. (Def. SDLLC’s
18 Opp., at 13.) The Court declines at this stage of the case to rule on the present intent of Fitial or
19 Buckingham, as neither CUC nor SDLLC has alleged any intentional or egregious wrongdoing in the
20 execution of an otherwise void contract. Thus, upon the facts presented in the parties’ moving papers, the
21 Court cannot rule that the conduct of the parties rose above that of mere negligence in researching the laws
22 and regulations relating to the procurement process and offering a legally unsound opinion that the parties
23 surely relied upon in executing the PPA.

24 SDLLC has also argued that it will “suffer substantial injury if the PPA is declared invalid because
25 it has invested hundreds of thousands of dollars in investigating and developing the preliminary plans for

1 the construction of a power plant on Saipan.” (Def. SDLLC’s Opp., at 13.) SDLLC claims that if it “had
2 been advised by the Attorney General that the PPA could not be validly executed by the Governor, [it] would
3 never have invested the resources in pursuing the PPA with the Governor.” (*Id.* at 14.) While the Court
4 agrees that SDLLC’s reliance was reasonable given the particular circumstances at hand, including
5 representations by the highest legal official that the PPA was valid in form and capacity, the Court does not
6 view this, as SDLLC would have it, as requiring the application of estoppel in this case. Neither requirement
7 for applying estoppel against the government has been met, and SDLLC’s detrimental reliance is merely one
8 factor favoring such application – one which is ultimately outweighed by public policy consideration.

9 Further, applying estoppel in the present case would “defeat effective operation of public policy
10 adopted to protect the public.” *See Blankenship*, 3 NMI at 214. In *Blankenship*, the public policies at issue
11 were that of eligibility to sit for the CNMI bar exam, statutes surely designed to protect the public by
12 preventing unqualified attorneys from representing clients in legal matters. The court reasoned that applying
13 estoppel to the representations of the Clerk of the Supreme Court and allowing the aspiring attorney to be
14 admitted without meeting the eligibility requirements provided by law would cause the public to suffer
15 injustice by permitting “unsuitable practitioners” to practice law in the CNMI. *Id.* at 215.

16 Similarly here, the applicable procurement regulations governing agreements such as the PPA are
17 intended to protect the public by establishing the specific avenues and requirements governing large
18 procurement contracts. In effect, the regulations are designed to prevent utilities like CUC, which are funded
19 solely from ratepayers, from being forced to fund such agreements should they be entered into improperly,
20 or without proper competition, effectively costing the utility – and therefore the public – large sums of
21 money as a result. Thus, the Court finds that applying estoppel in the present case would effectively defeat
22 the public policy objectives of the applicable procurement regulations.

23 Accordingly, because (1) enforcing the PPA would require CUC and the CNMI to violate the
24 applicable legal and regulatory procurement procedures; (2) SDLLC has not alleged any misconduct on the
25 part of Fitial and Buckingham going beyond mere negligence; and (3) applying estoppel would countermine

1 the public policies intended by the applicable procurement regulations, the Court holds that the doctrine of
2 equitable estoppel is not applicable on the facts before the Court.

3 **VII. Public Policy**

4 Lastly, the Court also feels it is necessary to address the overarching public policy considerations that
5 are central to the issues presented in this case. The Court does not intend this section to supplant the above
6 legal analysis, but rather provide further justification to its reasoning and ultimate holding.

7 The powers of the Executive Branch of the CNMI government, including those providing the
8 authority to declare disaster emergencies and assume the roles, duties, and obligations of the officers of a
9 government agency or public corporation, are integral to efficient government functioning and the ability
10 to adapt to ongoing emergencies in a steadfast manner. However, those powers enabling the Executive to
11 take over government agencies or corporations do not vest without great risk to the public as a whole,
12 especially in circumstances like the present case where the Executive intends to enter into a commercial
13 contract without the requisite knowledge, experience, and legal advice in doing so. Otherwise, the Executive
14 is blindly obligating the agency or corporation – and therefore the public or ratepayers – to agreements that
15 may be defective due to the failure to follow certain procedures, as in the present case. Without properly
16 qualified leaders in such agencies or public corporations, who have direct knowledge of the standard
17 operating procedures and applicable laws and regulations relating to such agreements, the public may be
18 forced to contribute to the ramifications of potential errors made in their execution.

19 Furthermore, as discussed above, the procurement regulations applicable to contracts such as the
20 PPA are designed to protect both the government agency or public corporation and the ratepayers of the
21 general public. The need for checks and balances in industries such as power utilities is paramount due to
22 the size of the projects and necessary agreements involved in completing them. Top-heavy leadership
23 without routine and independent verification only increases the risk of improper or erroneous execution of
24 contracts. This issue is exacerbated when the highest government official from the executive branch
25 attempts to suspend those regulations in order to enter into agreements that may be improper or detrimental

1 to the public as a whole. The applicable regulations established by the legislature ensure that each project
2 and connected agreement will be one that both CUC and the general public will benefit from, while
3 independent verification before their execution assists in preventing the risk of the corollary effects
4 stemming from improper agreements from reaching the public.

5 Thus, the public policy considerations of ensuring the protection and benefit of government agencies
6 or public corporations, as well as the public as a whole, are vital to the proper operation of procurement
7 mechanisms in industries such as power utilities.

8 **CONCLUSION**

9 In conclusion, the Court hereby **GRANTS** CUC's Motion for Partial Summary Judgment, holding:

- 10 (1) CUC is not precluded from arguing the invalidity of the PPA as the basis of this motion;
11 (2) The Court's opinion is not an impermissible advisory opinion;
12 (3) The Development Agreement was improper and facially invalid;
13 (4) Fitial had authority to declare a state of disaster emergency;
14 (5) Fitial did not have authority to suspend CUC procurement regulations;
15 (6) CUC procurement regulations were not complied with in the execution of the PPA;
16 (7) The PPA is void *ab initio*; and
17 (8) Equitable estoppel is not applicable against CUC or the CNMI in these circumstances;
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21 A **Status Conference** shall be held on **February 13, 2014 at 1:30 p.m.** in **Courtroom 223A**, at which
22 time the parties shall be prepared to discuss their position regarding further procedures in this matter.

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1 **SO ORDERED** this 4th day of February, 2014.

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David A. Wiseman, Associate Judge