



FOR PUBLICATION



E-FILED
CNMI SUPERIOR COURT
E-filed: Jan 22 2021 09:21AM
Clerk Review: Jan 22 2021 09:21AM
Filing ID: 66274832
Case Number: 19-0183-CV
N/A

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH UTILITIES CORPORATION,)	CIVIL CASE NO. 19-0183
)	
)	
Plaintiff,)	ORDER DENYING COMMONWEALTH UTILITIES CORPORATION'S RULE 12(b)(6) MOTION TO DISMISS BECAUSE A PARTY CAN FILE MULTIPLE CAUSES OF ACTION WITH DIFFERENT OR ALTERNATE LEGAL THEORIES ON THE SAME SET OF FACTUAL ALLEGATIONS
vs.)	
GPPC CONSTRUCTION, INC. and FIDELITY & DEPOSIT COMPANY OF MARYLAND,)	
)	
Defendants.)	
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I. INTRODUCTION

THIS MATTER came before the Court on August 11, 2020 at 2:30 p.m. on Plaintiff Commonwealth Utilities Corporation's ("CUC") Motion to Dismiss Defendant GPPC Construction, Inc's counterclaims. Plaintiff CUC was represented by Assistant Attorney Generals Abbi Novotny and Jose Mafnas, Jr. Defendant GPPC Construction, Inc ("GPPC") was represented by Attorney Mark Hanson. Defendant Fidelity & Deposit Company of Maryland ("Fidelity") was represented by Attorney Thomas Clifford.

II. LEGAL STANDARD

Rule 8(a)(2) of the Northern Mariana Islands Rules of Civil Procedure states that a pleading "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." A party's demand for relief "may include relief in the alternative or different types of relief."

By order of the Court, Associate Judge Joseph N. Camacho

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1 Rule 8(a)(3); *see also* *McLeodUSA Telcoms. Servs. v. Qwest Corp.*, 469 F. Supp. 2d 677, 704 (N.D.
2 Iowa 2007) (stating that “a party is generally entitled to assert alternative theories for relief”).

3 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can
4 be granted.” NMI R. CIV. P. 12(b)(6). A Rule 12(b)(6) motion tests the legal sufficiency of the claims
5 asserted in a complaint. *Camacho v. Micronesian Dev. Co.*, 2008 MP 8 ¶ 10. To survive a Rule
6 12(b)(6) motion to dismiss, a “complaint must [1] contain either direct allegations on every material
7 point necessary to sustain a recovery on any legal theory, even though it may not be the theory
8 suggested or intended by the pleader, or [2] contain allegations from which an inference fairly may
9 be drawn that evidence on these material points will be introduced at trial.” *In re Adoption of*
10 *Magofna*, 1 NMI 449, 454 (1990) (citations omitted).

11 When deciding a Rule 12(b)(6) motion to dismiss, the Court must assume that all factual
12 allegations in the challenged pleading are true and construe them in the light most favorable to the
13 non-moving party. *See Cepeda v. Hefner*, 3 NMI 121, 127–28 (1992); *see also Camacho v.*
14 *Micronesian Dev. Co.*, 2008 MP 8 ¶ 10 (“Factual argument is inappropriate in a Rule 12(b)(6) motion
15 because the motion only tests the legal sufficiency of the complaint.”); *Govendo v. Marianas Pub.*
16 *Land Corp.*, 2 NMI 482, 490 (1992). However, plaintiffs cannot base their complaints “solely on
17 unsupported legal conclusions since such conclusions do not constitute direct or indirect allegations.”
18 *Syed v. Mobil Oil Mariana Islands, Inc.*, 2012 MP 20 ¶ 21; *see also Fernandez-Montes v. Allied Pilots*
19 *Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993) (stating that “conclusory allegations or legal conclusions
20 masquerading as factual conclusions will not suffice to prevent a motion to dismiss”). Additionally,
21 though the Supreme Court of the Commonwealth of the Northern Mariana Islands (“Commonwealth
22 Supreme Court”) has rejected the federal “plausibility” standard outlined in *Ashcroft v. Iqbal*, 556
23 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *see Syed*, 2012 MP 20 ¶
24 17, if the plaintiff’s complaint “lacks sufficient factual accompaniment, a court must examine whether

1 the allegations reasonably suggest that the claimant will produce substantiating evidence.” *Atalig v.*
2 *Mobil Oil Mariana Islands, Inc.*, 2013 MP 11 ¶ 23 (citation omitted). “A statement of facts that
3 merely creates a suspicion that the pleader might have a right of action’ is insufficient.” *Id.* (quoting
4 *Rios v. City of Del Rio*, 444 F.3d 417, 421 (5th Cir. 2006)). This is because “Rule 8(a)(2) does not
5 permit a plaintiff to bring purely speculative claims.” *Id.* Furthermore, the court “has no duty to strain
6 to find inferences favorable to the plaintiff.” *Cepeda*, 3 NMI at 127-28.

7 III. BACKGROUND

8 A. Assumed Facts for Purposes of a Rule 12(b)(6) Motion to Dismiss

9 Because CUC filed a Rule 12(b)(6) motion to dismiss, the Court must assume that all factual
10 allegations in the challenged pleading are true and construe them in the light most favorable to GPPC
11 Inc., the non-moving party.¹

- 12 1. In August 2011, CUC issued an Invitation for Bids on the installation of a new 500,000-
13 gallon oil storage tank at Power Plant Number 1 on Saipan, CNMI (the “Project”).
- 14 2. GPPC developed and submitted its bid prior to the August 31, 2011 deadline
- 15 3. On September 6, 2011, GPPC was given a Conditional Notice of Intent to Award the
16 Project.
- 17 4. CUC requested that GPPC provide additional information to support its ability to perform
18 on the Project pursuant to the Project Scope of Work.
- 19 5. By February 2012, GPPC had prevailed in pre-award protests by Tano Group, Inc.
20 (“Tano”), who had submitted a higher priced bid.

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¹ Fidelity orally joined with GPPC at the Hearing.

- 1 6. On April 5, 2012, after more than seven months after its bid submission, GPPC entered
2 into Contract No. CUC-PG-12-C004 with CUC (the “Contract”) for performance of the
3 Project.
- 4 7. The original Contract amount was \$448,800.
- 5 8. The Contract provides that GPPC would be responsible for installing an above ground
6 welded steel oil storage tank (“Tank 102”) at CUC’s Power Plant 1 facility in Lower Base,
7 Saipan.
- 8 9. Pursuant to the Contract, GPPC was required to perform welding tasks pursuant to the
9 Standard 650 of the American Petroleum Institute, Welded Tanks for Oil Storage (“API
10 650”) which “establishes minimum requirements for material, design, fabrication,
11 erection, and testing for vertical, cylindrical, aboveground, closed- and open-top, welded
12 storage tanks in various sizes and capacities for internal pressures approximating
13 atmospheric pressure [....]” API 650, § 1.1.1.
- 14 10. CUC contracted with Endeavour Inspection Services LLC (“Endeavour”) as the quality
15 control/quality assurance (“QC/QA”) firm.
- 16 11. CUC contracted with the tank manufacturer, United Industries Group, Inc., (“UIG”) as
17 the Construction Manager.
- 18 12. The Contract provided that any direction from Endeavour or UIG would be regarded as
19 issued by CUC itself.
- 20 13. Because of CUC’s need to commission a soil study and redesign the concrete tank
21 foundation on which the GPPC would erect Tank 102, GPPC’s commencement of work
22 on the Project was delayed.

- 1 14. In December 2012, CUC issued a Notice to Proceed indicating work should begin on
2 January 7, 2013 — over 16 months after GPPC first submitted its bid and nine months
3 after GPPC signed the Contract to perform the Project.
- 4 15. The modified work required by the changes to the Project scope which were memorialized
5 in Change Order No. 1, which increased the total contract amount to \$579,770.60.
- 6 16. GPPC completed the concrete base work on or about March 18, 2013 — almost one month
7 ahead of schedule.
- 8 17. By April 8, 2013, GPPC had completed liner and cathodic protection installation, again
9 well ahead of the Project construction schedule.
- 10 18. As of April 19, 2013, GPPC had been paid on its first two payment request submittals in
11 the total amount of \$245,212.36.
- 12 19. Prior to beginning the actual erection of Tank 102 scheduled for early May 2013, CUC's
13 QC/QA contractor Endeavour required all GPPC welders to "recertify" their welding
14 credentials, a process which delayed work on the erection of Tank 102 and initiated the
15 procedure by which CUC eventually defaulted GPPC and terminated its Contract to
16 replace GPPC with Tano.
- 17 20. In the almost 21 months since GPPC had submitted its bid, several of the high-quality and
18 in-demand welders GPPC had arranged to work on the Project had taken jobs on other
19 projects for other employers. The lack of substantial welding work necessary to retain
20 these valuable employees was due to the delay in the commencement of the Project, which
21 was not due to any actions or inaction by GPPC.
- 22 21. The less skilled welders then available for the Project quickly began to have problems
23 passing Endeavour's welder qualification trials, much of testing was on welding skills
24 unnecessary to the actual work to be performed on the Project.

- 1 22. Erection of Tank 102 on the newly completed foundation began in early May 2013 as
2 scheduled.
- 3 23. However, due to Endeavour's demands regarding welder qualifications and various
4 recertification tests not called for under the Contract, the welding work did not begin until
5 about May 17, 2013.
- 6 24. Almost immediately after the erection of Tank 102 commenced in early May 2013,
7 Endeavour began this new phase of the Project with a threat of possible issuance of "non-
8 conformance reports" ("NCRs").
- 9 25. By May 23, 2013, only a few weeks into the tank erection work and only days after
10 welding work commenced, CUC claimed that GPPC was in default and had breached
11 various provisions of the Contract.
- 12 26. GPPC claims that CUC's basis for its determination that GPPC was in default at that early
13 stage was based almost entirely on CUC's opinion of GPPC's apparent lack of readiness
14 and capabilities to perform welding work with its welding crew. GPPC claims that the
15 delays stemmed from Endeavour's efforts to frustrate GPPC and not actually based on
16 any particular breach of the Contract or Project specifications.
- 17 27. GPPC claims that from that point in May 2013 to CUC's eventual "formal" termination
18 of GPPC for default in September 2013, CUC and Endeavour continued their criticism of
19 GPPC's performance, CUC's and Endeavour's interference with GPPC's ability to
20 perform and CUC's and Endeavour's demands for additional "assurances" not otherwise
21 required by the Contract documents.
- 22 28. GPPC claims that Endeavour's efforts in furtherance of its own financial advantage
23 continued with its NCRs increasing in scope and subjectiveness throughout the months of
24 May and June 2013.

- 1 29. GPPC claims that instead of focusing on project performance, GPPC managers were
2 continually forced by Endeavour to respond to Endeavour's NCRs with "submittals" in
3 response with ever increasing detail demanded by Endeavour.
- 4 30. During the same period of time, CUC's expectations of and demands on GPPC increased
5 beyond the obligations of GPPC under the Contract documents.
- 6 31. GPPC claims that a substantial portion of the rhetoric from CUC during this period of
7 proposed "cure" was the continued reference by CUC to "Stipulated Order No. 2," the
8 Environmental Protection Agency ("EPA") and the pressure CUC was supposedly under
9 by the EPA to exact gold standard performance from GPPC with little to no margin of
10 error.
- 11 32. GPPC claims that by mid-June 2013, Endeavour's efforts and CUC's increasingly extra-
12 contractual demands had essentially made GPPC's performance on the Project untenable.
- 13 33. Between CUC's May 23, 2013 "Notice of Intent to Default" and its June 22, 2013
14 "Contract Default Final Warning," GPPC claims that Endeavour had issued nineteen
15 NCRs in an obvious attempt to bolster a pre-determined declaration of default.
- 16 34. GPPC claims that, from the time of CUC's initial rejection of GPPC's bid in September
17 2011, CUC did not want GPPC as the tank erection contractor on the Project, preferring
18 instead Tano with whom it had an ongoing public works relationship.
- 19 35. GPPC claims that CUC's actions with regards to managing, criticizing and then
20 terminating GPPC's performance on the Project were taken by CUC and Endeavour in
21 furtherance of their desire to replace GPPC with Tano as the Contractor for the Tank 102
22 erection notwithstanding GPPC's actual capabilities and performance within Project
23 specifications.
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- 1 36. GPPC claims that CUC's actions, and that of its contractor Endeavour, were in bad faith
2 and its criticisms and concerns were merely a pretext to the default CUC had already pre-
3 determined.
- 4 37. GPPC claims that notwithstanding that GPPC used welding procedures in accord with the
5 API 650 standard for the construction of steel tanks as required by the Contract, CUC and
6 Endeavour continued to assert that GPPC's welders and work were deficient with
7 Endeavour continuing to misapply the relevant codes and specifications for the work to
8 be performed by GPPC under the Contract.
- 9 38. GPPC claims that the actions of Endeavour unnecessarily delayed the work performed by
10 GPPC and ultimately prevented GPPC from performing any work at all.
- 11 39. On August 5, 2013, CUC issued GPPC a letter with a formal declaration of default and
12 provided GPPC with fourteen days from receipt of the letter to submit a plan to CUC
13 detailing how GPPC would cure the issues presented by CUC.
- 14 40. On August 15, 2013, an independent evaluation of the work performed on Tank 102
15 commissioned by GPPC indicated that Tank 102 was progressing within code
16 specifications, with a few exceptions that were capable of repair under API 650 standards.
- 17 41. On August 21, 2013, and in response to and in accord with the demands of CUC, GPPC
18 offered and tendered full performance of all the terms of the Contract when it submitted
19 its Revised Tank Erection/Cure Work Plan (the "Cure Plan") as required by CUC's
20 August 5, 2013 "official declaration of default."
- 21 42. On about September 11, 2013, CUC disapproved GPPC's Cure Plan essentially reiterating
22 its rejection of GPPC as the contractor going forward.
- 23 43. On September 16, 2013, CUC sent GPPC an official notification of termination of the
24 Contract.

- 1 44. As part of the Contract, GPPC obtained a performance bond (the “Bond”) from Fidelity
2 & Deposit Company of Maryland (“Fidelity”).
- 3 45. On or about the time of CUC’s termination of GPPC, CUC sought performance of the
4 completion of the Project from Fidelity.
- 5 46. GPPC claims that Endeavour and CUC together developed a new Request for Proposals
6 for the new scope of work that was to be the Tank 102 completion and, in addition to
7 demanding “remedial action” from Fidelity under the surety bond, CUC directly solicited,
8 without publication, proposals from Tano and possibly other potential third-party
9 contractors for “completion” of Tank 102 pursuant to the new scope of work it had
10 developed.
- 11 47. The new Request for Proposal for “Completion of Installation of new 500,000 Gal. Diesel
12 Fuel Tank at Power Plant No. 1, Saipan” was dated October 31, 2013 and designated as
13 CUC-RFP-14-003.
- 14 48. GPPC claims that this completion proposal CUC demanded of Fidelity had various
15 conditions and the proposed new scope of work materially differed from the original
16 requirements under the Contract.
- 17 49. In response to CUC’s demands for “remedial action” and Fidelity’s completion of the
18 Tank 102, on January 29, 2014, Fidelity tendered full performance of all of the terms of
19 the original Contract.
- 20 50. On or about June 3, 2014, CUC notified Fidelity that CUC would not accept Fidelity’s
21 tender of performance.
- 22 51. Fidelity claims that CUC wrongfully refused Fidelity’s tender of full performance of the
23 original Contract.
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1 **B. Procedural Background**

2 1. On February 25, 2020, GPPC filed its Answer, Affirmative Defenses and Counterclaims
3 (“Counterclaim”)

4 2. In GPPC’s Counterclaim, GPPC brought the following five (5) claims:

5 a. First. Breach of Contract - Duty of Good Faith and Fair Dealing for arbitrarily and
6 capriciously denying GPPC the ability to use suitable welders and welding
7 techniques, disapproving qualified welders and supervisors, and erroneously
8 concluding that any defects could not be repaired;

9 b. Second. Breach of Contract - For CUC’s prevention of GPPC’s performance of
10 its obligations under the Contract;

11 c. Third. Declaratory Judgment - Tender and Refusal of Full Performance to be
12 discharged for any further liability under the Contract;

13 d. Fourth. Declaratory Judgment Releasing Surety for the Court to declare that
14 GPPC and Fidelity are not liable to CUC for the costs of a project other than that
15 particularly described in the Contract because CUC changed the scope of work to
16 be done following termination of the Contract and GPPC’s performance
17 thereunder, Fidelity cannot be held liable for the costs of this new project; and

18 e. Fifth. Declaratory Judgment Releasing Surety to declare that Fidelity is
19 discharged to the extent that the performance tendered would have discharged the
20 secondary obligation because CUC unreasonably refused Fidelity’s tendered
21 performance.

22 3. On March 31, 2020, CUC filed its Memorandum of Law in Support of CUC’s Motion to
23 Dismiss GPPC, Inc.’s Counterclaims.

24 4. On May 8, 2020, GPPC filed its Opposition to CUC’s Motion to Dismiss Counterclaims.

1 *New G*, 2012 MP 6 ¶ 16)); *see also* 7 CMC § 3401 (stating that the Court should turn to the common
2 law of other jurisdictions “in the absence of written law or local customary law to the contrary”).

3 There are two opinions from the Supreme Court of the Commonwealth of the Northern
4 Mariana Island (“Commonwealth Supreme Court”) that are helpful in addressing the issue of whether
5 a party can bring a breach of contract claim and an implied covenant of good faith and fair dealing
6 claim even when both claims are based on the same allegations and the reliefs sought are intrinsically
7 tied – *Tano Grp., Inc. v. Dep’t of Pub. Works*, 2009 MP 18, and *Ishimatsu v. Royal Crown Ins. Corp.*,
8 2010 MP 8.

9 In *Tano*, the plaintiff sued the Commonwealth Government for, amongst other things, breach
10 of contract and breach of the implied covenant of good faith and fair dealing. The Commonwealth
11 Supreme Court in *Tano* upheld the trial court’s finding that the defendant, the Commonwealth
12 Government (Department of Public Works), breached its contractual duties by failing to pay its
13 contractual obligations in a timely manner and, as a result, the plaintiff suffered consequential
14 damages. *See Tano Grp., Inc.*, 2009 MP 18 ¶ 36 (“The evidence supports a finding that [the
15 Commonwealth Government’s] failure to pay [the plaintiff] caused it to sell its equipment, and that
16 it was foreseeable to [the Commonwealth Government] that the failure to pay [the plaintiff] such a
17 large sum would force it to sell valuable assets in order to remain financially liquid.”). Additionally,
18 the *Tano* court also upheld the trial court’s finding that the same behavior by the Commonwealth
19 Government, its failure to pay its contractual obligations in a timely manner, also resulted in a breach
20 of the implied covenant of good faith and fair dealing. *See id.* at ¶ 44 (stating that “the
21 [Commonwealth Government] breached the covenant of good faith and fair dealing when it failed to
22 pay [the plaintiff] what it was owed on the contract, and as a result, [the plaintiff] was forced to sell
23 its [equipment].”). Notably though, the Commonwealth Supreme Court awarded damages to the
24 plaintiff for the plaintiff’s breach of contract claim but not for the plaintiff’s implied covenant of good

1 faith and fair dealing claim because “such an award would be duplicitous in light of the consequential
2 damages awarded for the [breach of contract claim].” *Id.* at ¶ 44 n.3.

3 In *Ishimatsu*, the Commonwealth Supreme Court upheld the jury’s finding that the defendant,
4 an insurance company, violated the implied covenant of good faith and fair dealing by unreasonably
5 denying the plaintiff’s insurance claim after an automobile crash. *See Ishimatsu v. Royal Crown Ins.*
6 *Corp.*, 2010 MP 8 ¶ 18. The Commonwealth Supreme Court also found that the same evidence that
7 supported the plaintiff’s implied covenant of good faith and fair dealing claim also supported his
8 breach of contract claim. *See id.* at ¶ 20 (“The evidence [the plaintiff] cites to support the jury’s breach
9 of contract finding is the same as for the finding of bad faith[.]”). Similar to *Tano*, the plaintiff in
10 *Ishimatsu* did not recover damages for both the implied covenant of good faith and fair dealing claim
11 and the breach of contract claim – albeit, in *Ishimatsu*, the damages for the breach of contract claim
12 were included in the damages for the implied covenant of good faith and fair dealing claim. *See id.*
13 at ¶ 4 n.1.

14 Both of the Commonwealth Supreme Court opinions show that plaintiffs can bring a breach
15 of contract claim as well as a breach of the implied covenant of good faith and fair dealing claim even
16 when both claims rely on the same set of facts. The only limitation is that a plaintiff cannot *recover*
17 for both claims when doing so would be duplicitous. However, questions of damages are not
18 appropriate at this stage of the litigation. *See Sturm v. Rasmussen*, No. 18-CV-01689-W-BLM, 2019
19 U.S. Dist. LEXIS 24504, at *7 (S.D. Cal. Feb. 14, 2019) (stating that there are a “growing number of
20 district court cases finding Rule 12(b)(6) generally inapplicable to damage prayers.”). Therefore, the
21 Court, for the reasons stated above, denies CUC’s Rule 12(b)(6) motion to dismiss GPPC’s implied
22 covenant of good faith and fair dealing claim.

1 **B. GPPC’s Fourth and Fifth Counterclaims are not Duplicitous**

2 As stated above, GPPC’s Fourth Counterclaim seeks a declaration “to establish that GPPC
3 and Fidelity are not liable to CUC for the costs of a project other than that particularly described in
4 the Contract,” and GPPC’s Fifth Counterclaim seeks a declaration “to establish that [Fidelity] is
5 discharged to the extent that the performance tendered would have discharged the secondary
6 obligation.” CUC argues that these counterclaims ask for the same type of relief because if Fidelity’s
7 obligation is declared to be limited to the terms of the Contract (as requested in both counterclaims)
8 and declared that such tendered performance would have discharged Fidelity’s obligation, then
9 naturally, if relief is granted there, then Fidelity would not be liable for the costs of the alleged “new
10 project” as described in the Fourth Claim because the alleged complete tender of performance would
11 have wholly discharged Fidelity from the project and costs associated with the supposedly “new
12 project.” Therefore, because CUC argues that GPPC’s Fourth Counterclaim will neither serve a useful
13 purpose in clarifying and settling the legal issues nor terminate the proceedings and afford relief from
14 the uncertainty and controversy faced by the parties, CUC argues that GPPC’s Fourth Counterclaim
15 should be dismissed as duplicative of the Fifth Counterclaim. However, for the reasons stated below,
16 the Court finds CUC’s arguments unpersuasive.

17 In the Commonwealth, Rule 8(a)(3) allows for parties to demand relief in the alternative.
18 Therefore, though “a party may not ultimately *recover* duplicative damages, a party is generally
19 entitled to *assert* alternative theories for relief.” *McLeodUSA Telcoms. Servs. v. Qwest Corp.*, 469 F.
20 Supp. 2d 677, 704 (N.D. Iowa 2007) (citation omitted) (emphasis added).³ Therefore, even if GPPC’s

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23 ³ See also *In re Adoption of Magofna*, 1 NMI 449, 454 (1990) (stating that to survive a Rule 12(b)(6) motion to dismiss, a “complaint must [1] contain either direct allegations on every material point **necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader**, or [2] contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial” (citations omitted) (emphasis in bold)).

1 Fourth and Fifth Counterclaims have the same effect, such a situation would not warrant a dismissal
2 of GPPC's Fourth Counterclaim at the pleading stage of litigation.⁴

3 **V. CONCLUSION**

4 **THEREFORE**, for the reasons stated above, the Court denies the Commonwealth Utilities
5 Corporation's Rule 12(b)(6) Motion to Dismiss.

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7 **IT IS SO ORDERED** this 22nd day of January, 2021.

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9 /s/
10 **JOSEPH N. CAMACHO**, Associate Judge

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22 ⁴ Additionally, the two cases cited by CUC are not applicable to this issue. In CUC's reply, CUC heavily relies on
23 *Vascular Imaging Professionals, Inc. v. Digirad Co.*, 401 F.Supp. 3d 1005 (S.D. Cal. 2019), and *Hardnett v. M&T Bank*,
24 204 F.Supp.3d 851 (E.D. Va. 2016), to argue that GPPC's Fourth Counterclaim is duplicitous of GPPC's Fifth
Counterclaim. Both of these cases focus on the issue of whether the plaintiff's demand for declaratory relief is duplicitous
of the plaintiff's breach of contract claim. Here, in contrast, the issue is whether a plaintiff can plead alternative
declaratory relief theories, which is a materially different issue.