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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GRID ONE SOLUTIONS, INC.,  
Plaintiff,  
v.  
ELSTER AMCO WATER, LLC,  
Defendant.

Case No. [15-cv-03452-JSW](#)

**ORDER GRANTING MOTION TO  
DISMISS AND GRANTING, IN PART,  
MOTION TO STRIKE AND  
INSTRUCTIONS TO PARTIES**

Re: Docket Nos. 19, 20

Now before the Court for consideration are the motion to dismiss and the motion to strike, filed by Defendant Elster Amco Water, LLC (“Elster”). The Court has considered the parties’ papers, relevant legal authority, and the record in this case, and it has had the benefit of oral argument. The Court **HEREBY GRANTS** Elster’s motion to dismiss, **GRANTS, IN PART,** Elster’s motion to strike, and it **GRANTS,** Plaintiff Grid One Solutions, Inc. (“GOS”) leave to file an amended complaint.

**BACKGROUND**

On January 6, 2010, GOS and the City of San Francisco (the “City”), through the San Francisco Public Utilities Commission (“SFPUC”), entered into an “Agreement for Procurement, Installation and Implementation of an Advanced Meter Infrastructure System” (the “Prime Contract.”) (*Id.* ¶ 6, and Ex. A (Prime Contract).)<sup>1</sup>

According to GOS, the City wanted to implement an Advanced Meter Infrastructure System (the “AMI Project”), and as part of the AMI Project wanted to: (1) acquire meter data from residential and commercial customers and to deliver meter data to the City to achieve reliable and

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<sup>1</sup> At the time it entered into the Prime Contract, GOS was known as VSI Meter Services, Inc.

1 accurate reporting of water usage; (2) purchase a new AMI radio based automatic meter reading  
2 system that was compatible with all meters that the City had installed; (c) remove and/or retrofit  
3 existing water meters and install new meters, and/or registers, and meter interface units (“MTUs”);  
4 and (d) create an effective interface between the City’s Customer Information System (“CIS”) and  
5 the AMI system. The SFPUC wanted to “collect hourly consumption data from its retail water  
6 customers to more efficiently manage its water resources and water system assets in San  
7 Francisco, and to provide enhanced service to residential and commercial customers.” (Compl. ¶¶  
8 7-9; *see also* Prime Contract at 9, Recitals, ¶ 1, Compl. Ex. B (Material Supply Agreement  
9 (“MSA”), Recitals).)

10 On November 30, 2009, GOS and Elster entered into the MSA, whereby Elster agreed to  
11 provide GOS with certain “AMI products, materials and services” that GOS needed to perform its  
12 obligations under the Prime Contract. (*Id.* ¶¶ 3, 10.) The MSA also required that the products  
13 would conform in all material respects to the technical specifications and performance standards  
14 and that the services would materially comply with requirements set forth in the Prime Contract.  
15 (Compl. ¶¶ 13-14; *see also* MSA, Article II.A.15.)

16 On March 1, 2011, the City issued a notice of Non-conforming Work and Direction to  
17 Correct (“First Non-conforming Work Notice”), and it notified GOS that some of the AMI  
18 Project’s system components “did not comply with the meter read accuracy/transmission accuracy  
19 requirements set forth in the Prime Contract[.]” (*Id.* ¶ 15, and Ex. C (First Non-conforming Work  
20 Notice).) GOS, in turn, notified Elster of the First Non-conforming Work Notice. (*Id.* ¶ 16, and  
21 Ex. D.) Ultimately, after the City initiated a Proposed Change Order, GOS and Elster modified  
22 the MSA to address the issues raised by the First Non-conforming Work Notice and the proposed  
23 solutions to resolve the alleged non-conformities. (*See generally id.* ¶¶ 18-21, 26-27, and Ex. E  
24 (“Modification No. 1”).) GOS alleges that it suffered a variety of damages because the Elster  
25 Product did not conform with specifications set forth in the Prime Contract. (Compl. ¶ 28.)

26 According to GOS, Elster also was unable to supply GOS the contractually required  
27 number of products between December 2010 and August 12, 2011, which resulted in two Project  
28 shutdowns and “decreases in productivity averages.” (*Id.* ¶ 29.) Specifically, “Elster’s inability to

1 supply GOS the various meter sizes it required for installation caused GOS to skip routes, reduce  
2 its average meter install rate, prevented GOS from ramping up to full installation staff and resulted  
3 in layoffs and Project shutdowns.” (*Id.* ¶ 30.)

4 On August 6, 2013 and August 14, 2013, the City issued two notices of non-conformance  
5 (“Second Non-conforming Work Notice”), and GOS notified Elster of the notices of non-  
6 conformance.<sup>2</sup> (*Id.* ¶¶ 31-33, Exs. F-G.) The non-conformities caused the Project to shut down  
7 for approximately 70 weeks, but GOS was “contractually required to maintain its management and  
8 field presence, which directly resulted in extended general conditions and home office overhead  
9 being incurred by GOS.” (*Id.* ¶ 34.) GOS and Elster subsequently modified the MSA  
10 (“Modification No. 2”). (*Id.* ¶ 34, Ex. H (Modification No. 2).)

11 Based on these, and other allegations, which the Court shall address as necessary, GOS  
12 asserts one claim of breach of contract against Elster for: (1) failure to timely supply GOS the  
13 contractually required number products; (2) providing products that did not conform with meter  
14 read accuracy/transmission accuracy requirements; (3) providing products that did not conform in  
15 all material respects to the technical specifications and performance standards; (4) concealing the  
16 product’s inability to meet the AMI Project’s performance specifications; and (5) failing to  
17 indemnify GOS.

18 **A. Applicable Legal Standards.**

19 **1. Motion to Dismiss for Failure to State a Claim.**

20 A motion to dismiss is proper under Rule 12(b)(6) where the complaint fails to state a  
21 claim upon which relief can be granted. The Court’s “inquiry is limited to the allegations in the  
22 complaint, which are accepted as true and construed in the light most favorable to the plaintiff.”  
23 *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal  
24 pleadings standard of Federal Rule of Civil Procedure 8(a)(2), “a plaintiff’s obligation to provide  
25 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a  
26 formulaic recitation of the elements of a claim for relief will not do.” *Bell Atlantic Corp. v.*

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28 <sup>2</sup> GOS has attached the notice dated August 6, 2013 to the Complaint.

1 *Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

2 Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but  
3 must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A  
4 claim has facial plausibility when the Plaintiff pleads factual content that allows the court to draw  
5 the reasonable inference that the Defendant is liable for the misconduct alleged.” *Ashcroft v.*  
6 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). If the allegations are  
7 insufficient to state a claim, a court should grant leave to amend, unless amendment would be  
8 futile. *See, e.g. Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss &*  
9 *Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

10 **2. Motion to Strike.**

11 A court may strike from a pleading “any insufficient defense or any redundant, immaterial,  
12 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Immaterial matter “is that which has no  
13 essential or important relationship to the claim for relief or the defenses being pleaded.” *Fantasy*  
14 *Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds by Fogerty v.*  
15 *Fantasy, Inc.*, 510 U.S. 517 (1994) (internal citations and quotations omitted). Impertinent  
16 material “consists of statements that do not pertain, or are not necessary to the issues in question.”  
17 *Id.*

18 Motions to strike are regarded with disfavor because they are often used as delaying tactics  
19 and because of the limited importance of pleadings in federal practice. *Colaprico v. Sun*  
20 *Microsystems Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991). A motion to strike should be  
21 resorted to only when the matter to be stricken could have no possible bearing on the issues in  
22 litigation. *LeDuc v. Kentucky Central Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992). The  
23 possibility that issues will be unnecessarily complicated or that superfluous pleadings will cause  
24 the trier of fact to draw unwarranted inferences at trial is the type of prejudice that is sufficient to  
25 support the granting of a motion to strike. *California Dept. of Toxic Substances Control v. Alco*  
26 *Pacific, Inc.*, 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002). Ultimately, the decision as to whether  
27 to strike allegations is a matter within the Court’s discretion. *Colaprico*, 758 F. Supp at 1339.

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1     **B.     The Court Grants the Motion to Dismiss, with Leave to Amend.**

2             GOS has asserted one claim for breach of contract, the essential elements of which are: (1)  
3     the existence of a contract, (2) plaintiff’s performance or excuse for nonperformance, (3)  
4     defendant’s breach, and (4) resulting damages to plaintiff. *Reichert v. General Insurance Co.*, 68  
5     Cal. 2d 822, 830 (1969). Elster argues that GOS has not, and cannot, allege facts supporting the  
6     fourth element of the claim, because Article V.B.(2) of the MSA precludes GOS from recovering  
7     consequential and incidental damages.

8             In its opposition brief, and at the hearing, GOS argued that Article II.A.3 of the MSA  
9     permits it to recover the damages it seeks. It also argued that “Elster’s failure to deliver  
10    conforming Products and Services is tantamount to a complete failure to meet the delivery  
11    schedule.” (*See, e.g.*, Opp. Br. at 1:16-17.) GOS also argues that Article V.B(2) is not  
12    enforceable, either because Elster’s actions caused Article.II.A.3 to “fail[] for its essential  
13    purpose,” or because Elster’s alleged breach is “total and fundamental.” (Opp. Br. at 2:17-22.)

14            The Court finds that the allegations are insufficient to show a breach of Article II.A.3, and  
15    that GOS would be entitled to the damages described therein for such a breach. GOS does allege  
16    that Elster failed to meet a product delivery schedule, and the MSA includes has an attachment  
17    identified as “Schedule 1 - Estimated Meter Delivery Time,” but GOS has not included a copy of  
18    that schedule with the Complaint. In addition, Article II.A.3 states that Elster would have no  
19    liability under that provision “unless it’s [*sic*] delivery is more than seven days past an agreed  
20    upon due date....” (MSA, Article II.A.3.) GOS has not included any facts about the timing of  
21    delivery, so the Court cannot determine if there are sufficient facts to support a breach.

22            In addition, although GOS alleges the AMI Project was shut down for an extended period  
23    of time, without additional facts, the Court cannot say it is a reasonable inference that the failure to  
24    provide non-conforming product is “tantamount to a complete failure to meet the delivery  
25    schedule,” such that Article II.A.3 would fail for its essential purpose. Similarly, the facts alleged  
26    are insufficient to demonstrate that the failure to provide product was so fundamental that Article  
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1 V.B(2) should not be enforced.<sup>3</sup> See, e.g., *Beltran v. Capitol Records, LLC*, No. 12-cv-1002-  
2 YGR, 2012 U.S. Dist. LEXIS 82025, at \*6 (N.D. Cal. June 13, 2012).

3 Accordingly, the Court grants the motion to dismiss. However, because the Court  
4 concludes it would not be a futile act, it grants GOS leave to amend to cure the deficiencies  
5 identified above.

6 **C. The Court Grants, in Part, the Motion to Strike.**

7 Elster moves to strike paragraphs 22 through 25 of the Complaint, on the basis that they  
8 contain confidential settlement information, and it submits a declaration to support that assertion.  
9 (Declaration of James Allan, ¶¶ 4-8.) GOS contends that the statements addressed in the  
10 Complaint were made during the course of a commercial meeting, but it has not provided a  
11 declaration to support that statement.

12 Federal Rule of Evidence 408 prohibits the use of “conduct or a statement made during  
13 compromise negotiations about the claim,” when such conduct or a statement is used “to prove or  
14 disprove the validity or amount of a disputed claim[.]” Fed. R. Evid. 408(2).

15 Although, in general, the Court should accept the allegations in the Complaint as true, the  
16 Allan declaration stands rebutted. Accordingly, the Court concludes that Elster has made a  
17 sufficient showing that the statements and information contained in paragraph 22, lines 15-24, and  
18 paragraph 23 are confidential settlement communications, and it shall strike them on that basis.  
19 GOS shall not include those allegations in the amended complaint permitted by this Order. The  
20 Court also notes that its ruling should not be construed as precluding GOS from seeking to admit  
21 these statements or other evidence on this issue as the litigation progresses.

22 Elster also argues that paragraphs 22 through 25 are immaterial, because they refer to  
23 alleged misrepresentations, and GOS’s sole claim for relief is for breach of contract. GOS argues  
24 that these paragraphs are relevant to the theory of relief discussed in the preceding section. Based  
25 on GOS’s theory of the case, and with the exception noted above, the Court cannot conclude that  
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27 <sup>3</sup> At the hearing, GOS also argued that Elster had a shortage of product and so provided  
28 GOS with “something,” without knowing whether that product would comply with the Prime  
Contract’s specifications. Those facts also are not in the Complaint.

1 these allegations have absolutely no bearing on the claim for breach of contract.

2 Accordingly, the Court shall not strike paragraphs 22, 24 and 25 in their entirety, and it  
3 denies, in part, the motion to strike on that basis.

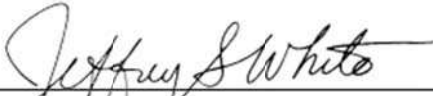
4 **CONCLUSION**

5 For the reasons set forth above, the Court GRANTS Elster's motion to dismiss, and it  
6 GRANTS GOS leave to amend. The Court GRANTS, IN PART, Elster's motion to strike. GOS  
7 shall file the amended complaint permitted by this Order by no later than January 8, 2016. Elster  
8 shall answer or otherwise respond within the time set forth in the Federal Rules of Civil  
9 Procedure.

10 It is FURTHER ORDERED that the parties shall file a stipulation and proposed order  
11 selecting an ADR process and a deadline to complete ADR by December 16, 2015.

12 **IT IS SO ORDERED.**

13 Dated: December 9, 2016

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16 JEFFREY S. WHITE  
17 United States District Judge  
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