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**IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA**

**UNITED STATES OF AMERICA  
FOR THE USE AND BENEFIT  
OF GRAYBAR ELECTRIC  
COMPANY, INC.,**

**Plaintiff,**

**v.**

**MILLER/WATTS CONSTRUCTION,  
INC., et al,**

**Defendants.**

**And related cross claims.**

**1:06-CV-1521 AWI DLB**

**ORDER GRANTING LIBERTY  
MUTUAL INSURANCE COMPANY'S  
MOTION TO DISMISS THE CROSS  
CLAIMS BROUGHT BY G.E.  
ELECTRICAL  
(Document #60)**

**ORDER DISMISSING G.E.  
ELECTRICAL'S CROSS CLAIMS  
(Document #15)**

**BACKGROUND**

On October 27, 2006, the United States, for the use and benefit of Graybar Electric Company, Inc., filed a complaint for recovery under the Miller Act (40 U.S.C. § 270(b)), along with claims for breach of an oral contract, the agreed upon/reasonable value of goods sold and delivered, an account stated, an open book account, intentional misrepresentation, negligent misrepresentation, and recovery on a payment bond. The named defendants include Defendant Liberty Mutual Insurance Company, Defendant G.E. Electrical, Inc., improperly sued as "Gilbert Electric, Inc.", and UPA Group, Inc. On December 29, 2006, Defendant UPA Group, Inc. filed an answer, along with a cross claim against Defendant G.E. Electrical, Inc. On January 31,

1 2007, Defendant G.E. Electrical, Inc. filed an answer to UPA Group, Inc.’s cross claim and a  
2 cross claims against all Defendants, including Liberty Mutual Insurance Company. (Document  
3 #15).

4 On February 4, 2011, Defendant Liberty Mutual Insurance Company filed a motion to  
5 dismiss the cross claims brought by Defendant G.E. Electrical, Inc. Liberty Mutual Insurance  
6 Company contends that G.E. Electrical, Inc. lacks the capacity to prosecute its cross claims  
7 because its corporate status has been suspended. On February 28, 2011, Liberty Mutual  
8 Insurance Company filed a reply brief.

9 G.E. Electrical, Inc. did not file an opposition to Liberty Mutual Insurance Company’s  
10 motion or otherwise contact the court.

#### 11 LEGAL STANDARDS

12 Parties invoking federal jurisdiction must have standing. Davis v. Federal Election  
13 Com'n, 128 S.Ct. 2759, 2768 (2008). In the Ninth Circuit, attacks upon standing at the pleading  
14 stage are generally brought in a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules  
15 of Civil Procedure. See, e.g., Sacks v. Office of Foreign Assets Control, 466 F.3d 764, 771 (9<sup>th</sup>  
16 Cir. 2006); Jensen v. County of Sonoma, 2010 WL 2330384, at \*4 (N.D.Cal. 2010); Yeager v.  
17 Bowlin, 2008 WL 3289481, at \*6 n.4 (E.D.Cal. 2008).

18 Under Rule 12(b)(6), a claim may be dismissed because of the plaintiff’s “failure to state  
19 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Although a complaint’s  
20 factual allegations may provide the framework of a complaint, legal conclusions are not accepted  
21 as true and “[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory  
22 statements, do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009); see also Warren  
23 v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9<sup>th</sup> Cir. 2003). As the Supreme Court has  
24 explained:

25 While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
26 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his  
27 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic  
recitation of the elements of a cause of action will not do. Factual allegations must

1 be enough to raise a right to relief above the speculative level, on the assumption  
2 that all the allegations in the complaint are true (even if doubtful in fact).

3 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Thus, “a complaint must contain  
4 sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
5 Iqbal, 129 S.Ct. at 1949. “A claim has facial plausibility when the plaintiff pleads factual  
6 content that allows the court draw the reasonable inference that the defendant is liable for the  
7 misconduct alleged.” Iqbal, 129 S.Ct. at 1949. “In sum, for a complaint to survive a motion to  
8 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must  
9 be plausibly suggestive of a claim entitling the plaintiff to relief.” Moss v. United States Secret  
10 Service, 572 F.3d 962, 969 (9<sup>th</sup> Cir. 2009).

11 As a general matter, a district court may not consider any material outside of the  
12 pleadings when ruling on a Rule 12(b)(6) motion. Dunn v. Castro, 621 F.3d 1196, 1205 n.6 (9<sup>th</sup>  
13 Cir. 2010); Intri-Plex Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9<sup>th</sup> Cir.  
14 2007); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9<sup>th</sup> Cir.2001). However, the court may  
15 consider documents of which the court may take judicial notice. Coto Settlement v. Eisenberg,  
16 593 F.3d 1031, 1038 (9<sup>th</sup> Cir. 2010); Catholic League for Religious and Civil Rights v. City and  
17 County of San Francisco, 567 F.3d 595, 607 n.13 (9<sup>th</sup> Cir. 2009); U.S. v. 14.02 Acres of Land  
18 More or Less in Fresno County, 547 F.3d 943, 955 (9<sup>th</sup> Cir. 2008).

## 19 DISCUSSION

20 Liberty Mutual Insurance Company contends that G.E. Electrical, Inc.’s cross claims  
21 should be dismissed because G.E. Electrical, Inc. is a California corporation that is currently  
22 suspended by the California Secretary of State. Liberty Mutual Insurance Company argues that  
23 California law prohibits a suspended corporation from prosecuting claims.

24 Preliminarily, the court notes that Liberty Mutual Insurance Company has filed a request  
25 for judicial notice in support of its motion to dismiss G.E. Electrical, Inc.’s cross claims. Liberty  
26 Mutual Insurance Company provides a State Certificate of Status provided by the California  
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1 Secretary of State. The Certificate of Status states that the office's records:

2 indicate the Secretary of State suspended the entity's powers, rights and privileges  
3 on March 12, 2009, pursuant to the provisions of the California Corporations  
Code, and the entity's powers, rights and privileges remain suspended.

4 See Liberty Mutual Insurance Company's Exhibit A. The court may take judicial notice of facts  
5 that are capable of accurate and ready determination by resort to sources whose accuracy cannot  
6 reasonably be questioned. Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331,  
7 333 (9<sup>th</sup> Cir. 1993). Facts subject to judicial notice may be considered by a court on a motion to  
8 dismiss. Coto, 593 F.3d at 1038. The court finds that a Certificate of Status provided by the  
9 California Secretary of States is a source whose accuracy cannot reasonably be questioned.

10 The capacity of a corporate litigant to sue or be sued in a federal case is controlled by  
11 Rule 17(b) of the Federal Rules of Civil Procedure. Rule 17(b) provides that the capacity of a  
12 corporation to sue is determined "by the law under which it was organized." Fed.R.Civ.Pro.  
13 17(b)(2); Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp., 302 U.S. 120,  
14 124-25 (1937); AmeriPride Services, Inc. v. Valley Indus. Service, Inc., 2008 WL 5068672, at \*3  
15 (E.D.Cal. 2008). The Ninth Circuit has held that pursuant to Rule 17(b), the court must  
16 determine a corporations's standing pursuant to state law. Hillis Motors, Inc. v. Hawaii Auto.  
17 Dealers' Ass'n, 997 F.2d 581, 584 (9<sup>th</sup> Cir. 1993); Community Elec. Serv. v. Nat'l Elec.  
18 Contractors Ass'n, 869 F.2d 1235, 1239 (9<sup>th</sup> Cir. 1987). Thus, this court must follow California  
19 law to determine whether G.E. Electrical, Inc. has the capacity to sue. See Louisiana-Pacific  
20 Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9<sup>th</sup> Cir. 1993); Levin Metals Corp. v. Parr-Richmond  
21 Terminal Co., 817 F.2d 1448, 1451 (9<sup>th</sup> Cir.1987).

22 Liberty Mutual Insurance Company provides undisputed evidence that G.E. Electrical,  
23 Inc.'s corporate status has been suspended. Under California law, a suspended corporation  
24 cannot prosecute an action in either a California court or a federal court. See e.g., Matter of  
25 Christian & Porter Aluminum Co., 584 F.2d 326, 331 (9<sup>th</sup> Cir. 1978). Because G.E. Electrical,  
26 Inc., as a suspended corporation, lacks standing to sue, G.E. Electrical, Inc.'s cross claims must

1 be dismissed

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**ORDER**

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Accordingly, the court ORDERS that:

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1. Liberty Mutual Insurance Company's motion to dismiss G.E. Electrical, Inc.'s  
5 cross claims is GRANTED; and

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2. G.E. Electrical, Inc.'s cross claims (Document #15) is DISMISSED.

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IT IS SO ORDERED.

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Dated: April 13, 2011

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CHIEF UNITED STATES DISTRICT JUDGE

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