UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

Britz Fertilizers, Inc., a California corporation, Plaintiff, v. Bayer Corporation, an Indiana corporation, and Bayer CropScience, a Delaware limited partnership, Defendants.	1:07-cv-00846-OWW-SMS MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT FOR DAMAGES FOR NEGLIGENCE, GROSS NEGLIGENCE, AND BREACH OF CONTRACT (Doc. 9)

I. Introduction.

This cases concerns Bayer Corporation's ("Bayer Corp.) and Bayer CropScience, LP's ("Bayer Science") (collectively "Defendants") alleged inadequate defense of Britz Fertilizers, Inc. ("Britz") in a state court lawsuit where a judgment was entered against Britz for over seven million dollars. Before the court for decision is Defendants' motion to dismiss ("Motion") Britz's First Amended Complaint for Damages for Negligence, Gross Negligence, and Breach of Contract ("FAC"). Defendants move to dismiss Britz's FAC on the following grounds: Britz's FAC is duplicative of a previously filed complaint in this Court, the allegations in the FAC are contrary to documents subject to judicial notice, Britz cannot recover on its negligence and gross negligence claims for relief because the claims are for negligent

performance of a contract and are not independent of the contract, and Britz cannot recover for breach of contract because the FAC does not allege a breach of the contract's terms.

II. Background.

A. Procedural Background.

Britz filed a Complaint for Damages for Negligence, Gross Negligence, and Negligent Supervision against Defendants on June 8, 2007 (hereinafter "*Britz II*"). Ten days later, on June 18, 2007, Britz filed its FAC for damages for negligence, gross negligence, and breach of contract. Britz invokes the court's diversity of citizenship jurisdiction under 28 U.S.C. § 1332. Britz alleges the amount in controversy exceeds $75,000, exclusive of interest and costs. Britz is a California corporation with its principal place of business located in Fresno, California. Defendant Bayer Corp. is an Indiana corporation with its principal place of business located in Pittsburgh, Pennsylvania. Defendant Bayer Science is a Delaware limited partnership with its principal place of business in Research Triangle Park, North Carolina. The partners of Bayer Science are entities that are citizens of Delaware, Indiana, and Germany. Britz alleges Bayer Corp. controlled Bayer Science and was responsible for its actions or inaction.[1] FAC ¶ 7.

On July 17, 2007, Defendants filed this Motion. Britz opposes Defendants' Motion. On July 25, 2007, District Judge Anthony W. Ishii signed an order reassigning this case (*Britz II*)

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[1] In the FAC, Britz jointly refers to Bayer Corp. and Bayer Science as "Defendant" or as "Bayer." The terms are also used interchangeably in this Order.

to this court because of a currently pending lower-numbered related case captioned *Britz Fertilizers, Inc., v. Bayer Corporation, et al.*, 1:06-cv-00287-OWW-SMS (hereinafter "*Britz I*").

B. Factual Background.

1. *Britz II*.

Defendants manufacture agricultural chemical products. FAC ¶ 10. Britz was a distributor of Defendants' agricultural products in central California. FAC ¶ 11. As a distributor, Britz was one of Defendants' largest accounts generating between $20 and $25 million in annual sales for Defendants. FAC ¶ 11. One of the products Defendants manufactured was an agricultural chemical product known as "Ethrel." FAC ¶ 12.

In 2002, Britz purchased Defendants' Ethrel. FAC ¶ 13. Britz sold the Defendants' Ethrel to an individual named Ahmad Skouti ("Skouti"), who was a grape grower in Fresno and Madera Counties. FAC ¶ 13. Britz alleges that in July 2002, Skouti applied Defendants' Ethrel to certain vineyards he owned in Fresno and Madera Counties, and to a vineyard in Fresno County that he leased from Walter Johnsen ("Johnsen"). FAC ¶ 14. Skouti's vineyards sustained damage after the application of Defendants' Ethrel to the vineyards; Britz alleges this damage was not through its fault or negligence. FAC ¶ 15.

In September 2002, after becoming aware of the damage to Skouti's vineyards, Britz promptly notified Defendants of the damage. FAC ¶ 16. On September 10, 2002, William Ferguson ("Ferguson"), Defendants' vice president and assistant general counsel, acting as an agent or representative of the Defendants,

represented to Britz, in writing, that in the event a claim arose out of the application of Defendants' Ethrel to Skouti's vineyards "it would be Bayer's position that it would defend and indemnify [Plaintiff against] any claim related to [Defendant's] product in a situation where the [D]istributor acted as a purely 'pass through' entity." FAC ¶¶ 17-18. Ferguson had been managing product liability litigation for Bayer since approximately 1988 and had significant experience in this area. FAC ¶ 18.

On December 18, 2002, Skouti and Johnsen filed a lawsuit against Britz in Fresno County Superior Court for damages sustained as a result of the application of Defendant's Ethrel to Skouti's vineyards ("Skouti Lawsuit"). FAC ¶ 19. Britz's insurance carrier retained Theodore Hoppe ("Hoppe") to represent Britz in the Skouti Lawsuit. FAC ¶ 20. On March 7, 2003, Britz filed a cross-complaint against Defendants for declaratory relief and indemnification in the Skouti Lawsuit. FAC ¶ 22.

On January 16, 2003, Britz requested that Defendants defend and indemnify Britz in the Skouti Lawsuit. FAC ¶ 21. On May 14, 2003, James Moore ("Moore") of the law firm Baker & Hostetler LLP, as the agent or representative and on behalf of Defendants, agreed in writing that Defendants would defend Britz in connection with the Skouti Lawsuit. FAC ¶ 23. Moore's May 14, 2003, correspondence is addressed to Hoppe and reads:

> Re: No. 02-CECG04540; *Ahmad Skouti and Walter Johnsen v. Britz Fertilizers, Inc., et al*; In the Superior Court of California, County of Fresno.
>
> Dear Mr. Hoppe:

> This is in response to your letter dated January 16, 2003, concerning the above-referenced matter. Bayer has asked me to respond to the letter.
>
> You have provided to Bayer CropScience ("Bayer") a copy of a complaint that does not mention Bayer or any Bayer product. The complaint alleges, among other things, that Britz Fertilizers, Inc. ("Britz") acted as a consultant for the plaintiff and performed negligently in this capacity. The information provided to Bayer indicates that Bayer has no duty to defend or indemnify Britz Fertilizers in this case.
>
> However, because of Bayer's relationship with Britz, Bayer agrees to defend Britz Fertilizers, Inc. at this time. Bayer will not pay past attorneys fees or costs in this case. Bayer will retain Jim Rushford of Rushford & Bonotto in Sacramento, to defend this matter with you. If there is any evidence in this case of negligence or fault on the part of Britz (whether credible or not), Bayer may at its option withdraw from the defense of this case. In the event that Bayer withdraws from the case, Britz agrees to waive any conflict and allow attorneys retained by Bayer in this manner to continue to represent Bayer if Bayer is included as a party.
>
> Britz agrees that it will cooperate fully with Bayer in connection with the defense of this case. Both Bayer and Britz reserve the issue of indemnity until a later date.
>
> Please sign below to indicate acceptance of Britz Fertilizers, Inc. to this letter agreement.
>
> Please let me know if you have any questions.
>
> Very truly yours,
>
> [Signature of James L. Moore]
>
> James L. Moore
> Of Baker & Hostetler

FAC, Exhibit A. Britz alleges Moore was employed and acting as Defendants' outside legal counsel for all litigation claims in connection with Defendants' agricultural chemicals. FAC ¶ 24. Britz further alleges Moore had been Defendants' outside counsel since 1993 and had significant experience representing Defendants in crop damage lawsuits. FAC ¶ 24. Moore's primary

responsibilities included securing, employing, supervising, and managing local trial counsel retained to represent and defend Defendants in litigation involving Defendants' products. FAC ¶ 24.

Britz believed that Defendants agreed to Defend Britz in the Skouti lawsuit because Britz was one of Defendants' largest accounts, and Defendants did not want to lose or damage the business relationship with Britz. FAC ¶ 25. Defendants agreed to and did pay for Hoppe's subsequent legal services in the Skouti Lawsuit. FAC ¶ 26. Defendants also retained and paid for the legal services of James Rushford ("Rushford") of Rushford & Bonotto LLP to act as co-counsel to defend Britz in the Skouti Lawsuit. FAC ¶ 26. On June 3, 2003, Britz dismissed its cross-complaint against the Defendants in reliance on Defendants' agreement to defend Britz in the Skouti Lawsuit. FAC ¶ 27. On June 18, 2003, Rushford became co-counsel of record for Britz. FAC ¶ 26. Beginning June 18, 2003, and continuing through November 22, 2004, Rushford represented Britz in the Skouti Lawsuit. FAC ¶ 28.

Britz alleges that Rushford, while representing Britz in the Skouti Lawsuit, was acting as counsel for Defendants without Britz's knowledge or consent. FAC ¶ 29. While acting as co-counsel to Britz, Rushford continuously reported the status of the litigation and the substance of privileged attorney-client or work-product information between Hoppe and himself to Moore and Ferguson. FAC ¶ 30. Moore reported his communications with Rushford to Ferguson. FAC ¶ 31. Ferguson, in his capacity as Defendants' vice president and assistant general counsel, was

responsible for the overall management of Britz's defense in the Skouti lawsuit. FAC ¶ 31.

While Rushford was representing Britz, he concluded Hoppe was not properly defending Britz in the Skouti Lawsuit and repeatedly communicated this information to Moore or Ferguson, or both. FAC ¶ 32. Rushford failed to take any measures to correct or mitigate Hoppe's acts or omissions to ensure Britz received a proper defense. FAC ¶ 33. Rushford also failed to communicate to Britz the propriety of Hoppe's representation of Britz. FAC ¶ 33. Britz believed in good faith that it was being properly defended in the Skouti Lawsuit under the supervision of Bayer. FAC ¶ 33. Although Defendants, Moore, and Ferguson were aware of Rushford's conclusion that Hoppe was not competently defending Britz, they failed to take any measures to ensure Britz received a proper defense. FAC ¶ 34. Defendants, Moore, and Ferguson also failed to communicate to Britz any of Rushford's conclusions regarding the inadequacy of Britz's defense in the Skouti Lawsuit, so Britz could have taken corrective measures. FAC ¶ 34.

On November 22, 2004, Rushford withdrew as counsel for Britz in the Skouti Lawsuit without Britz's consent. FAC ¶ 35. Britz alleges Rushford represented Defendants regarding Skouti's claims after he withdrew as Britz's counsel and without Britz's consent. FAC ¶ 35.

Based on these facts, Britz asserts three claims for relief. The first claim for relief is for negligence. Britz asserts Defendants agreed to defend Britz in the Skouti Lawsuit, and therefore undertook a duty to exercise reasonable care in

managing Britz's defense. According to Britz, Defendants breached their duty to exercise care in managing Britz's defense in the Skouti Lawsuit by failing to take measures to ensure Britz received a proper defense. Britz also asserts Defendants failed to properly manage Britz's defense and to inform it of Rushford's dual agency (and conflict), which resulted in a judgment in the Skouti Lawsuit against Britz in the amount of $7,596,247 plus costs, which is the legal cause of Britz's injuries. Britz's second claim for relief is for gross negligence. In its claim for gross negligence, Britz asserts that Defendants failed to act with any modicum of diligence or care, and Defendants' actions constituted a wanton and reckless disregard of its obligations to Britz. Britz also seeks exemplary and punitive damages for its gross negligence claim. Britz's third and final claim for relief is for breach of contract. Britz asserts Defendants' express agreement to defend Britz in the Skouti Lawsuit contained a necessary and implied condition to adequately defend Britz. According to Britz, Defendants breached their agreement to adequately defend Britz by failing to take measures to ensure Britz received an adequate defense, and by failing to inform Britz of the facts or circumstances indicating Britz was not being adequately defended as Rushford had indicated to Moore and Ferguson. Throughout the Skouti Lawsuit, Britz relied on Defendants' agreement to adequately defend Britz. Britz alleges it did not become aware of Defendants' breach of its obligations until after June 10, 2005, when the $7,596,247 judgment was entered against Britz.

2. ***Britz I***.

The following is an overview of the allegations in *Britz I* that are not otherwise set forth in *Britz II*. In January 2002, Britz and Bayer Corp. entered into a distributorship agreement ("Distribution Agreement") that entitled Britz to distribute itemized formulations of Bayer Products. *Britz I* Compl. ¶ 7. Britz agreed to use its best efforts in selling Bayer Products. *Britz I* Compl. ¶ 9. One of the terms and conditions in the Distribution Agreement required Britz to promptly investigate and report to Bayer Corp. all customer complaints concerning the use and application of Bayer Products and to cooperate with Bayer Corp. in handling claims. *Britz I* Compl. ¶ 10. An additional term and condition in the Distribution Agreement required Bayer Corp. to indemnify Britz against all claims for property damage or personal injury to third parties, whether arising in warranty, negligence, or otherwise, with certain exceptions, caused by goods supplied to Britz by Bayer Corp. under the Distribution Agreement. *Britz I* Compl. ¶ 11.

Britz seeks the following relief in *Britz I*: damages in the amount of $7,596,247, plus costs and interest, under express indemnity, implied contractual indemnity, and implied equitable indemnity theories; an unspecified amount in damages, including punitive damages, for fraud and false promise; unspecified damages for negligent misrepresentation; and declaratory relief. Britz also seeks attorney's fees.

Britz filed the complaint that initiated *Britz I* on March 14, 2006. On August 30, 2006, a scheduling conference order was entered setting the discovery cutoff date as June 29, 2007, a

settlement conference date on July 12, 2007, the non-dispositive motions deadline on July 16, 2007, a dispositive motions deadline on July 30, 2007, a pre-trial conference date on September 24, 2007, and the trial date for October 30, 2007.[2] On May 24, 2007, and upon the parties' request, Magistrate Judge Snyder extended the discovery cutoff date to July 30, 2007. On June 7, 2007, and upon the parties' request, the pre-trial motions schedule was modified requiring non-dispositive motions to be filed by August 12, 2007, and all dispositive motions to be filed by August 27, 2007. On July 10, 2007, the parties filed a joint request for a new scheduling order.[3] By minute order dated August 1, 2007, the following dates were set. The discovery cutoff date is December 21, 2007. Non-dispositive motions are due January 4, 2008. Dispositive motions are due January 14, 2008. The final pretrial conference is set for March 17, 2008. A jury trial is set to begin on May 6, 2008.

III. Legal Standard.

Federal Rule of Civil Procedure 12(b)(6) provides that a motion to dismiss may be made if the plaintiff fails "to state a claim upon which relief can be granted." The question before the court is not whether the plaintiff will ultimately prevail, rather, it is whether the plaintiff could prove any set of facts in support of his claim that would entitle him to relief. *See*

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[2] The parties did not anticipate filing any amendments to the pleadings as of August 30, 2006. (Doc. 12) Sched. Conf. Order at p. 3, lns. 25-26.

[3] The parties filed this request prior to Defendants' filing of this Motion.

Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. CNN, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

In deciding whether to grant a motion to dismiss, the court "accept[s] all factual allegations of the complaint as true and draw[s] all reasonable inferences" in the light most favorable to the nonmoving party. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); *see also Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002). A court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

IV. Defendants' Request for Judicial Notice.

Defendants request the court to take judicial notice of several documents that were filed in *Britz I* under Federal Rule of Evidence ("FRE") 201. These documents are attached to the declaration of Defendants' counsel in support of Defendants' Motion and include copies of the Joint Scheduling Conference Statement, Britz's Opposition to Defendants' Motion to Compel Answers Posed at Deposition, the Declaration of Robert Glassman (Britz's chief financial officer) in Opposition to Defendants' Motion to Compel Answers Posed at Deposition, the Declaration of Theodore W. Hoppe in Opposition to Defendants' Motion to Compel Answers Posed at Deposition, and the Declaration of Roger Schrimp (Britz's current counsel) in Opposition to Defendants' Motion to Compel Answers Posed at Deposition.

Defendants also request the court to take judicial notice of a letter from Mr. Hoppe to Mr. Moore dated May 27, 2003, indicating Britz agrees to Defendants' proposal in Moore's May 14, 2003, letter. Britz does not object to Defendants' request for judicial notice.

"A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "A court shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). Judicially noticed facts often consist of matters of public record, such as prior court proceedings, *see, e.g.*, *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988).

In reviewing a Rule 12(b)(6) motion, a court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. Federal Deposit Ins. Corp.*, 139 F.3d 696, 699 (9th Cir. 1998). A court may consider facts subject to judicial notice outside the pleadings in a motion to dismiss. *Mullis v. United States Bankr. Court for the Dist. of Nevada*, 828 F.2d 1385 (9th Cir. 1987) (citing *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

Each document that Defendants' request the court to take judicial notice of is a part of the court record in *Britz I*, except for the May 27, 2003, Hoppe Letter. These documents are the proper subject of judicial notice under FRE 201(b) and

Emrich, 846 F.2d at 1198. The Hoppe Letter, which is Britz's acceptance of Defendants' offer to pay Britz's attorney's fees and to provide Rushford as counsel in the Skouti Lawsuit, is central to Britz's claims for breach of contract, negligence, and gross negligence. *See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998) (holding that "a district court ruling on a motion to dismiss may consider a document the authenticity of which is not contested, and upon which the plaintiff's complaint necessarily relies."). The Hoppe Letter is also the proper subject of judicial notice under FRE 201(b) as its existence is not reasonably subject to dispute.

Defendants' request for judicial notice of the documents attached to the declaration of T. Mark Smith is GRANTED.

V. Discussion.

A. Whether Britz's FAC States a Claim for Relief for Negligence and Gross Negligence.

Defendants contend a party may not recover in tort for breach of a contractual obligation (tortious breach of contract). Defendants maintain each of the causes of action in *Britz II* are based on the May 14, 2003, letter from Moore to Hoppe, a contract between the parties. Defendants argue Britz does not allege Defendants have any duties independent of the May 14, 2003, letter, and Britz has only pleaded negligent performance of a contract.

Britz contends its negligence and gross negligence claims arise from Defendants' duty to exercise reasonable care in furnishing a defense to Britz, including a duty to inform Britz of material facts or circumstances which became known to

Defendants during its defense. Britz also contends that Defendants' agreement to defend Britz crated a special relationship between Britz and Defendants that is analogous to the relationship between an insurer and an insured.

"The distinction between tort and contract is well-grounded in common law, and divergent objectives underlie the remedies created in the two areas." *Erlich v. Menezes*, 21 Cal. 4th 543, 550 (1999). "Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate social policy." *Id.* at 550-51. "While the purposes behind contract and tort law are distinct, the boundary line between them is not[,] and the distinction between the remedies for each is not found ready made." *Id.* (citations and internal quotations omitted). The California Supreme Court has commented that the distinction "arises from the nebulous and troublesome margin between tort and contract law." *Aas v. Superior Court*, 24 Cal. 4th 627, 635 (2000).

A trio of California Supreme Court cases address whether Britz can state a claim against Defendants for negligence and gross negligence arising out of the May 14, 2003, letter. *See, e.g., Aas v. Superior Court*, 24 Cal. 4th 627 (2000); *Erlich v. Menezes*, 21 Cal. 4th 543 (1999); and *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85 (1995). "A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations." *Aas*, 24 Cal. at 643. "[C]ourts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the

imposition of tort remedies." *Id.* (citing *Menezes*, 21 Cal. 4th at 552 (1999)).

In *Menezes*, the California Supreme Court was faced with the issue of whether a homeowner could recover emotional distress damages against a homebuilder for shoddy construction work. The facts of *Menezes* are straight forward. The homeowners contracted with the homebuilder, a licensed general contractor, to build a "dreamhouse" on their ocean-view lot. *Menezes*, 21 Cal. 4th at 548. The rains came and the nightmares began shortly after the homeowners moved into their new home. *Id.*

> The house leaked from every conceivable location. Walls were saturated in an upstairs bedroom, two bedrooms downstairs, and the pool room. Nearly every window in the house leaked. The living room floor filled with three inches of standing water. In several locations water poured in . . . streams from the ceilings and walls. The ceiling in the garage became so saturated . . . the plaster liquified and fell in chunks to the floor.

Id. (alterations in original omitted). The homebuilder's attempts to stop the leaks proved ineffectual. *Id.* The homeowners eventually had another general contractor and structural engineer inspect their home. *Id.* This inspection revealed substantial defects in the workmanship of the house. In addition to confirming defects in the roof, windows, and waterproofing, the inspection revealed none of the load-bearing walls were properly installed, turrets on the roof were inadequately connected to the roof beams and had begun to collapse, other parts of the roof framing were improperly constructed, and three decks were in danger of catastrophic collapse. *Id.* at 549. The homeowners sought recovery against the homebuilder on several theories including breach of contract,

fraud, negligent misrepresentation, and negligent construction. *Id.*

At trial, the homeowners testified that they suffered emotional distress as a result of the defective condition of the house and the homebuilder's invasive and ineffectual repairs. *Menezes*, 21 Cal. 4th at 549. One of the homeowners felt "absolutely sick" and had to be removed by an ambulance after learning of the full extent of the structural problems. *Id.* The jury found the homebuilder breached his contract with the homeowners by negligently constructing their home and awarded the homeowners $406,700 as the cost of repairs. *Id.* Each homeowner was awarded $50,000 for emotional distress. *Id.*

The court of appeal affirmed the judgment, including the emotional distress awards, noting that the breach of a contractual duty may support an action in tort. *Id.* at 550. The supreme court reversed holding that emotional distress damages are not available in breach of contract and negligent construction cases, disagreeing with the court of appeals' reliance on the proposition that a contractual obligation may create a legal duty and the breach of that duty may support an action in tort. *Id.* Recognizing this proposition is true, the court stated, "however, conduct amounting to a breach of contract only becomes tortious when it also violates a duty independent of the contract arising from principles of tort law." *Id.* The supreme court reviewed several cases and concluded that in each case "the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct that is both intentional and intended to harm." *Id.*

Aas **is also a construction defect case. In *Aas*, the homeowners alleged that their dwellings suffered a variety of construction defects affecting virtually all components and aspects of construction. *Aas*, 24 Cal. 4th at 633. Based on these defects, the plaintiffs asserted causes of action for negligence, strict liability, breach of implied warranty, breach of express warranty, and breach of contract. *Id.* The plaintiffs sought damages for the cost of repairing the alleged defects and for damages representing the diminution in value of their residences. *Id.* Before the trial began, the defendants moved for orders in limine seeking to exclude evidence of the alleged construction defects that had not caused property damage. *Id.* The trial court granted the defendants' motions as to the homeowners' tort claims only. *Id.* at 633-34. The homeowners sought a writ of mandate, which the court of appeal denied, and the California Supreme Court granted review of that decision. *Id.* at 634.**

The question in *Aas* was whether the homeowners could "recover in negligence from the entities that built their homes a money judgment representing the cost to repair, or the diminished value attributable to, construction defects that have not caused property damage." *Aas*, 24 Cal. 4th at 635. The *Aas* homeowners relied on *North Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 777 (1997) for the proposition that "a contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner[,] and that a negligent failure to do so may be both a breach of contract and a tort." *Aas*, 24 Cal. 4th at 643. The homeowners

argued the defendant's "negligent breach of contractual duties owed directly to [the homeowners] to deliver homes in compliance with the applicable building codes is a tort, for which [they] may recover the amount which will compensate for all the detriment proximately caused thereby." *Id.* The supreme court found the homeowners' argument unpersuasive in light of *Menezes* and *Belcher Oil*.

> A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, courts will generally enforce the breach of a contractual promise through contract law, except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.

Id. (internal quotations and alterations in original omitted). The supreme court had "recently rejected the argument that the negligent performance of a construction contract, without more, justifies an award of tort damages" in *Menezes*. *Id.* The court emphasized its *Menezes* finding where it "reiterated that conduct amounting to a breach of contract becomes tortious when it also violates a duty independent of the contract arising from principles of tort law." *Id.* The supreme court affirmed the court of appeals' denial of the homeowners' petition for writ of mandate to require admission of evidence of construction defects that did not cause damage. *Id.* at 653.

Britz argues that its breach of contract claim arises out of Defendants' breach of its promise to defend Britz in the Skouti lawsuit. The negligence and gross negligence claims, Britz argues, arise from a duty to exercise reasonable care in providing a competent defense with competent counsel and a duty to inform Britz of material facts or circumstances Defendants

became aware of in the course of defending Britz.

Britz's arguments ignore the California Supreme Court's opinions in *Menezes* and *Aas*. Like the homeowners in *Aas*, Britz relies on the language in the court of appeals' decision in *North American Chemical Company*, a case pre-dating *Menzes* and *Aas*, that held where the contract is one for services, the contract gives rise to an implied duty of care which requires that such services be performed in a reasonable manner, and that a negligent failure to do so may be both a breach of contract and a tort. The *Menezes* court noted that this statement was true, but unequivocally qualified that, "conduct amounting to a breach of contract becomes tortious *only when it also violates a duty independent of the contract arising from principles of tort law.*" *Menezes*, 21 Cal. 4th at 551 (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515 (1994). The contract was one for services, a competent performance of such services was a contractual duty.

Here, Britz does not allege that Defendants had a duty to defend independent of the May 14, 2003, letter whereby Defendants undertook to provide Britz a defense in the Skouti Lawsuit. Britz's negligence allegations that Defendants undertook a duty to exercise reasonable care in managing Britz's defense and should have informed Britz of Rushford's communications with Moore and Ferguson that Hoppe was inadequately representing Britz, premised on the May 14, 2003, letter by which Defendants undertook Britz's defense, was an integral part of and not independent of Bayer's defense obligation.

Britz admits that Defendants agreed to defend Britz in the

Skouti Lawsuit because of their prior business relationship. It is this prior business relationship that resulted in the Defendants' offer to defend Britz in the Skouti Lawsuit, not an independent duty arising under tort law. Defendants' failure to inform Britz of Rushford's conclusion that Hoppe was not providing Britz with an adequate defense in the Skouti Lawsuit is part of defense counsel's duty to keep a client informed when representing a client as part of a defense tender and does not implicate any social policy that merits the imposition of tort remedies.

Britz contends that Defendants' argument that a party may not recover in tort for breach of a contractual obligation ignores well-established case law. In support of this position, Britz cites the venerable California Supreme Court decision in ***Eads v. Marks***, 39 Cal. 2d 807 (1952) for the proposition that "the same act may be both a tort and breach of contract."

In ***Eads***, a father had entered into an agreement with a dairy for the delivery of milk, cream, butter, and eggs to his residence. ***Eads***, 39 Cal. 2d at 809. About a year after entering into the delivery agreement, the parents of the plaintiff, a one-year old child, informed the dairy that it should not leave glass containers, among other things, at the residence other than in the refrigerator. *Id.* The plaintiff's parents informed the dairy that the child might become injured by picking up, dropping, or tripping over the dairy products or glass containers. *Id.* About nine months later, the dairy left a glass milk container on the back porch of the residence. *Id.* The child picked up the glass container and fell off the porch

causing the container to break near his face. *Id.* The child sustained severe injuries in the fall. *Id.*

Plaintiffs sued the dairy for negligence. In the complaint, the plaintiffs alleged they made an agreement with the dairy regarding the place of delivered dairy products and, implicit in the agreement, is the allegation that it was made expressly for the benefit of their minor child, a third-party beneficiary. ***Eads***, 39 Cal. 2d at 810. Defendants demurred on the ground that the complaint was uncertain because it alleged no facts showing any duty was owed to the child. *Id.* The trial court sustained the demurrer without leave to amend.

On appeal, the court reversed holding that the same act may be both a tort and a breach of contract. *Id.* The court reasoned "[e]ven where there is a contractual relationship, between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed, or out of a failure to perform such duty." *Id.* According to ***Eads***, the duty of care arose by reason of the contract. *Id.* at 811. "The contract is of significance only in creating the legal duty, and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by the rule of torts." *Id.*

Britz's reliance on ***Eads*** is misplaced. ***Eads*** has been refuted by later California case law that establishes the independent duty requirement. In ***Eads***, although the agreement to deliver dairy products, with all deliveries to be placed in the refrigerator, was between the injured child's parents and the dairy, the duty underlying the negligence cause of action was to

the injured child, who was not a party to the contract. Characterizing the independent duty of care in ***Eads*** as applying to the child is consistent with ***Menezes*** and ***Aas***. Here, by contrast, Britz maintains the Defendants owed it a duty of care arising out of the May 14, 2003, letter. In ***Eads***, it was the injured young child who was a not a party to the agreement for the delivery of dairy products to whom a duty was owed, in contrast to the case at hand where Britz, a party to the May 14, 2003, letter, was injured by a breach of the very duty of defense the contract provides.

Britz contends Defendants' agreement to defend it in the Skouti Lawsuit created a "special relationship" that is analogous to the relationship shared between an insurer and an insured. This special relationship, according to Britz, creates a duty of care independent of the contract and arising from principles of tort law. Defendants rejoin no "special relationship" existed between the parties. Instead, Defendants suggest that the May 14, 2003, letter was simply an offer to pay Britz's attorney's fees associated with its defense in the Skouti Lawsuit to keep a commercial customer happy. Defendants also assert Britz's interpretation of the May 14, 2003, letter implies that Defendants agreed to assume control over the litigation in the Skouti Lawsuit. Defendants deny any insurance contract-type duty of defense by their undertaking to provide counsel. The facts allege that Britz was an agricultural chemical dealer to whom Bayer was a commercial product supplier. There is no "special" insurance-like relationship in the providing of a defense to a customer and to defend the manufacturer-seller's product.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 683 (1988). The covenant, however, is a contract term and "compensation for its breach has almost always been limited to contract rather than tort remedies." *Id.* at 684. "As to the scope of the covenant, the precise nature and extent of the duty imposed by such an implied promise will depend on the contractual purposes." *Id.* (alterations in original omitted). "As a contract concept, breach of the duty led to imposition of contract damages determined by the nature of the breach and standard contract principles." *Id.*

An exception to this general rule exists in the context of insurance contracts, "where, for a variety of reasons, courts have held that breach of the implied covenant will provide the basis for an action in tort." *Foley*, 47 Cal. 3d at 684. In the insurance context

> the duty to comport with the implied covenant of good faith and fair dealing is immanent in the contract whether the company is attending on the insured's behalf to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

Id. (alterations in original omitted).

Tort recovery is permitted in the insurance context because of circumstances that do not exist in typical commercial contracts. An insured in an insurance contract "does not seek to obtain a commercial advantage by purchasing the policy – rather, he seeks protection against the calamity." *Id.* (citing *Egan v.*

Mutual of Omaha Ins. Co., 24 Cal. 3d. 809, 819 (1979)). "The insurers' obligations are rooted in their status as purveyors of a vital service labeled quasi-public in nature." *Foley*, 47 Cal. 3d at 684-85 (alterations in original omitted). "Suppliers of services affected with a public interest must take the public's interest seriously, where necessary placing it before their interests in maximizing gains and limiting disbursements." *Id.* at 685. "As a supplier of a public service rather than a manufactured product, the obligations of insurers go beyond meeting reasonable expectations of coverage." *Id.* Additionally, "the relationship of insurer and insured is inherently unbalanced: the adhesive nature of insurance contracts places the insurer in a superior bargaining position." *Id.*

Britz and the Defendants do not share the "special relationship" that exists between an insured and insurer. The relationship between Britz and Defendants is a commercial one, that of a purchaser and seller in the commercial context of agricultural chemical sales. Defendants' offer to defend Britz in the Skouti Lawsuit arises out of their commercial relationship, and the May 14, 2003, letter specifically indicates Defendants would defend Britz "because of Bayer's relationship with Britz." Britz has not cited any cases extending the "special relationship" status to commercial dealings between parties outside of the insurance context. Defendants are in the business of manufacturing and selling agricultural chemical products. Defendants do not provide a catastrophe avoidance service to the public or peace of mind to customers in the way an insurance company does. Defendants do not hold a superior

bargaining position over Britz, and there is nothing adhesive about Defendants' May 14, 2003, letter voluntarily offering to defend Britz in the Skouti Lawsuit. Defendants sought to keep a good customer happy, not to become its insurer. There is no valid reason to extend the "special relationship" status to Britz and Defendants.

The motion to dismiss the negligent breach of contract claim is GRANTED WITHOUT LEAVE TO AMEND.

Defendants contend Britz's gross negligence cause of action fails to state a claim because it is merely an allegation of punitive damages by stating Defendants

> failed to act with any modicum of diligence or care, and Defendants actions constituted a wanton and reckless disregard of its obligations to Britz and as a voluntary and conscious disregard for Britz's rights and any consequences which were a foreseeable result of Defendant's action or inaction, thereby justifying an award of exemplary and punitive damages. Defendant's conduct was despicable by any standard.

Britz rejoins that the language above sufficiently pleads a cause of action for gross neglience. California tort law recognizes the difference between negligence and gross negligence. *Santa Barbara v. Superior Court*, 41 Cal. 4th 747 (2007). Gross negligence has long been defined as either "the want of even scant care or an extreme departure from the ordinary standard of conduct." *Id.* at 754. "A breach of legal duty may, of course, consist of either ordinary negligence or gross negligence." *Van Meter v. Bent Constr. Co.*, 46 Cal. 2d 588, 595. Whether a party acted with gross negligence is a question of fact. *Cooper v. Kellogg*, 2 Cal. 2d 504, 511 (1935) (stating "whether there has been such a lack of care as to constitute

gross negligence is a question of fact for the determination of the trial court or jury, even where there is no conflict in the evidence if different conclusions upon the subject can rationally be drawn therefrom.").

Here, Britz has pleaded a cause of action for gross neglience, albeit marginally, to survive a motion to dismiss. Britz has alleged that Defendants did not act with any modicum of diligence and disregarded its obligations while defending Britz in the Skouti Lawsuit. The FAC also incorporates by reference all of the facts surrounding Defendants' offer to defend Britz, pay Hoppe's attorney's fees, and provide Rushford as counsel. Gross negligence is another species, an exacerbated form of negligence. Like negligence, gross negligence still requires an independent duty not arising from contract. Defendants owed no duty of care to Britz independent of that it assumed under the contract. Britz cannot state a claim for gross negligence in tort.

The motion to dismiss the gross negligence claim is GRANTED WITHOUT LEAVE TO AMEND.

B. Whether Britz's FAC States a Claim for Relief for Breach of Contract.

Defendants contend the FAC fails to state a claim for relief for breach of contract. The FAC alleges the May 14, 2003, letter contains a necessary and implied condition that the Defendants would "adequately" defend Britz in the Skouti Lawsuit. The FAC also alleges Defendants failed to take adequate measures to ensure Britz received an adequate defense, and Defendants failed

to inform Britz of facts or circumstances indicating it was not receiving an adequate defense. These allegations, according to Defendants, are insufficient to state a claim for breach of contract.

Britz contends that the May 14, 2003, letter constituted an express agreement that Defendants would defend Britz in the Skouti lawsuit. Incidental and necessary to Defendants' agreement to Defend Britz is an implied condition to do so in a reasonable manner. Britz maintains this condition is so obvious and incidental to the agreement, "there was no reason to state the covenant at the time the agreement was entered into."

California recognizes "an implied covenant of good faith and fair dealing in every contract . . . ." *Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000). "Broadly stated, that covenant requires neither party do anything which will deprive the other of the benefits of the agreement. *Belcher Oil Co.*, 11 Cal. 4th at 91. The covenant imposes a duty on each party to do that which is necessary to accomplish the purpose of the contract. *Andrews v. Mobil Aire Estates*, 125 Cal. App. 4th 578, 589 (2005). "To effectuate the intent of the parties, implied covenants will be found if after examining the contract as a whole it is so obvious that the parties had no reason to state the covenant, the implication arises from the language of the agreement, and there is a legal necessity." *Ben-Zivi v. Edmar Co.*, 40 Cal. App. 4th 468, 473 (1995). While courts have implied covenants in a contract, "such covenants are justified only when they are not inconsistent with some express term of the contract and, in the absence of such implied terms,

the contract could not be effectively performed." *Tanner v. Title Ins. & Trust Co.*, 20 Cal. 2d 814, 824 (1942). "Implied terms should never be read to vary express terms." *Carma Developer v. Marathon Dev.*, 2 Cal. 4th 342, 374 (1992).

The parties do not dispute that a defense agreement exists. The controlling terms of the agreement are found in the May 14, 2003, letter from Defendants' outside counsel to Hoppe. The May 14, 2003, letter contains the following contractual terms:

> (1) Bayer agrees to defend Britz Fertilizers, Inc. at this time.
>
> (2) Bayer will not pay past attorney's fees or costs in this case.
>
> (3) Bayer will retain Jim Rushford of Rushford & Bonotto in Sacramento, to defend this matter with you.
>
> (4) If there is any evidence in this case of negligence or fault on the part of Britz (whether credible or not), Bayer may at its option withdraw from the defense of this case.
>
> (5) In the event that Bayer withdraws from the case, Britz agrees to waive any conflict and allow attorneys retained by Bayer in this manner to continue to represent Bayer if Bayer is included as a party.
>
> (6) Britz agrees that it will cooperate fully with Bayer in connection with the defense of this case.
>
> (7) Both Bayer and Britz reserve the issue of indemnity until a later date.

(Emphasis added).

The agreement specifically states Bayer will defend Britz "at this time" and will retain Rushford to do so in the Skouti Lawsuit. The parties do not dispute that Defendants paid Hoppe's fees and that Rushford represented Britz for approximately seventeen months and then withdrew from representation several months before the Skouti Lawsuit went to trial. The record does

not show why Rushford withdrew from its representation of Britz. Term four, above, expressly reserves the right to withdraw from the defense of this case in the event of any negligence by Britz. There is no provision that Bayer was further obligated to provide a defense or counsel to Britz. Defendants' failure to provide replacement counsel for Britz after Rushford withdrew may or may not have breached terms number one and three in view of the temporal limitation "at this time," which introduces material ambiguity into the extent and length of the defense commitment.

There is no allegation of any representation by express language in the May 14, 2003, letter that Defendants had an obligation to "adequately" defend Britz. Contract terms one and three, above, simply require Defendants to defend Britz "at this time" and to provide Rushford to do so. Defendants are sellers of agricultural products. Defendants could only provide a defense to Britz by providing and paying counsel. The payment of Hoppe's fees (term two) and providing Rushford to assist with Britz's defense (term three) explained how Defendants would defend Britz. Britz's allegation that Defendants didn't do "enough" to defend Britz is colorably sufficient at the pleading stage to withstand a motion to dismiss the contract claim that Defendants breached their obligation to defend Britz, in view of the manifest ambiguity of the defense agreement.

The motion to dismiss the contract claim is DENIED.

C. Whether *Britz II* is Duplicative of *Britz I*.

Defendants contend *Britz II* should be dismissed because it is duplicative of *Britz I*. Defendants maintain that Britz has

sought to litigate claims arising from a common nucleus of operative fact in two separate cases. According to Defendants, both *Britz I* and *Britz II* arise from an alleged breach of certain obligations related to the Skouti Lawsuit. Both cases concern the Defendants' alleged defense and indemnity obligations emanating from the Skouti Lawsuit, and by filing *Britz II*, Britz has in effect "split its claims."

Britz contends the claims asserted in the FAC are not duplicative of the claims asserted in the *Britz I* complaint. Britz maintains Defendants fail to understand the key distinctions between the two cases, and that *Britz I* and *Britz II* are based on different duties, which arise from separate agreements, and are based on different "factual nuclei." According to Britz, *Britz I* is based on Defendants' contractual duty to indemnify Britz under an indemnification provision in the Distribution Agreement. In *Britz II*, however, Britz claims Defendants undertook an express separate duty to defend Britz in the Skouti Lawsuit, and this duty arose out of Moore's May 14, 2003, letter.

In a recent opinion, the Ninth Circuit succinctly described the analytical framework to determine whether a later-filed complaint should be dismissed as duplicative of an earlier-filed complaint. *Adams v. California Dep't of Health Servs.*, 487 F.3d 684 (9th Cir. 2007). "Plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." *Id.* (citing *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977) (en banc)). The test for claim preclusion is used

to determine whether a suit is duplicative. *Adams*, 487 F.3d at 688. The Supreme Court has stated "the true test of the sufficiency of a plea of other suit pending in another forum [i]s the legal efficacy of the first suit, when finally disposed of, as the thing adjudged, regarding the matters at issue in the second suit." *Id.* at 689 (citing *United States v. The Haytian Republic*, 154 U.S. 118, 124 (1894)). "In the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion." *Adams*, 487 F.3d at 689. "The normal claim preclusion analysis applies and the court must assess whether the second suit raises issues that should have been brought in the first." *Id.*

In assessing whether the second action is duplicative of the first, a court "examine[s] whether the causes of action and relief sought, as well as the parties or privies to the action, are the same. *Adams*, 487 F.3d at 689. "There must be the same parties, or, at least, such as represent the same interests; there must be the same rights asserted and the same relief prayed for; the relief must be founded upon the same facts, and the . . . essential basis, of the relief sought must be the same." *Id.* (citing *The Haytian Republic*, 154 U.S. at 124). "A suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions." *Adams*, 487 F.3d at 689 (citing *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993)).

The Ninth Circuit uses a "transaction test" developed in the context of claim preclusion to ascertain whether successive

causes of action are the same. *Adams*, 487 F.3d at 689. "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Id.* The following four criteria are examined when applying the transaction test:

> (1) Whether rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action;
>
> (2) Whether substantially the same evidence is presented in the two actions;
>
> (3) Whether the two suits involve infringement of the same right; and
>
> (4) Whether the two suits arise out of the same transactional nucleus of facts.

Id. The last of these criteria is the most important. *Id.* (citing *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982)).

Britz II is entirely duplicative of *Britz I*. It simply adds an additional claim for a more particularized duty to defend. The parties are identical in both Britz *I* and *Britz II*. The relief sought in both Britz *I* and *Britz II* is almost identical. Britz seeks damages in both cases to indemnify it for the $7,596,247 judgment entered against Britz in the Skouti Lawsuit and any defense costs. *Britz I* seeks indemnification for the judgment against it in the Skouti Lawsuit plus punitive damages for its fraud and false promise claims for relief. Britz seeks $10,000,000.00 in damages in *Britz II* for Defendants' negligence and breach of contract in failing to adequately defend Britz in the Skouti Lawsuit. In both cases, Britz is seeking damages to cover the judgment in the Skouti Lawsuit.

A review of the complaint in *Britz I* and the FAC in *Britz II* reveals numerous allegations of identical facts. Both the complaint and FAC describe Britz's sale of Defendants' chemical Ethrel to Skouti, the damages to Skouti's vineyards, the Skouti Lawsuit where judgment was entered against Britz for $7,596,247 for harm to those vineyards, Ferguson's communications that it was Bayer's position that it would defend and indemnify any claim related to its products where Britz acted as a pass-through entity. Britz's fraud cause of action in *Britz I* alleges Ferguson's representation that Defendants would indemnify Britz was false, and Britz relied on Ferguson's representation that Defendants would defend and indemnify Britz. The fraud cause of action also alleges Britz would refrain from filing a cross-complaint in the Skouti Lawsuit against Britz. *Britz II* alleges Britz dismissed a cross-complaint against Defendants after Defendants agreed to defend Britz in the Skouti Lawsuit. *Britz I* alleges Britz is continuing to incur attorney's fees following judgment in the Skouti Lawsuit. Under the agreement to defend Britz, which is at issue in *Britz II*, Defendants paid Hoppe's attorney's fees; attorney's fees post-judgment in the Skouti Lawsuit are claimed in *Britz I.*

These complaints should be consolidated for all purposes including trial or Britz should be required to plead any supplemental or additional claims for relief and damages in its original complaint. One trial embracing all of Britz's claims against Defendants for the defense of and any indemnity obligations in the Skouti Lawsuit will serve the interests of justice, promote judicial economy, preserve party and judicial

resources, and prevent unjustified duplication of evidence and potentially inconsistent results in the second lawsuit concerning the same underlying transactions. To that end, *Britz II* is consolidated with *Britz I*. *See Adams*, 487 F.3d at 692 (explaining that a district court may dispense with a duplicative complaint by dismissing the later-filed complaint with or without prejudice, by staying or enjoining the later-filed proceeding, or by consolidating the two actions). Britz shall amend the original complaint to succinctly state all surviving claims and remedies sought.

VI. Conclusion.

For the foregoing reasons, Defendants' motion to dismiss is GRANTED in part and DENIED in part as set forth below.

(1) Defendants' motion to dismiss as to Britz's neglience claim is GRANTED WITHOUT LEAVE TO AMEND.

(2) Defendants' motion to dismiss as to Britz's gross neglience claim is GRANTED WITHOUT LEAVE TO AMEND.

(3) Defendants' motion to dismiss Britz's breach of contract claim is DENIED.

(4) Defendants' motion to dismiss as to whether *Britz II* is duplicative of *Britz I* is GRANTED. Case number 1:07-cv-00846-OWW-SMS (*Britz II*) is consolidated for all purposes with *Britz I*. The complaint shall be restated to allege the surviving claims within twenty (20) days following service of this decision. Defendants shall have fifteen (15) days to answer, if any further response is required to the consolidated

complaint.

(5) Case number 1:07-cv-00846-OWW-SMS (*Britz II*) shall be administratively closed and all pleadings shall hereafter be filed in case number 1:06-cv-00287-OWW-SMS (*Britz I*).

Defendants shall file an order consistent with this memorandum decision within five (5) days following service by the clerk of this decision.

IT IS SO ORDERED.

Dated: February 5, 2008 **/s/ Oliver W. Wanger**
UNITED STATES DISTRICT JUDGE