

STATE OF MAINE
CUMBERLAND, SS.

BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-18

PASSAMAQUODDY WILD)
BLUEBERRY COMPANY,)
)
Plaintiff,)
)
v.)
)
CHERRYFIELD FOODS, INC. and)
OXFORD FROZEN FOODS LIMITED,)
)
Defendants.)
)

ORDER ON PENDING MOTIONS

Presently before the court are the following motions: (1) Defendants’ Cherryfield Foods, Inc. (“CFI”) and Oxford Frozen Foods Limited’s (“Oxford”)¹ motion to dismiss the complaint pursuant to Maine Rule of Civil Procedure 12(b)(6) for failure to state a claim; (2) Plaintiff Passamaquoddy Wild Blueberry Company’s (“PWBC”) motion for attachment and trustee process; and (3) PWBC’s motion for a temporary restraining order and preliminary injunction. At the June 9, 2017 oral argument on the motions, Plaintiffs were represented by Attorney Julia Pitney, and Defendants were represented by Attorney John Aromando.

I. BACKGROUND

CFI is a Maine corporation engaged in the business of farming, harvesting, processing, freezing and marketing wild blueberries in the United States, Canada, and worldwide. (Kamp Aff. ¶ 3.) CFI is believed to be a wholly owned subsidiary of Oxford. (Compl. ¶ 13.)

¹ Cherryfield Foods, Inc. and Oxford Frozen Foods Limited collectively referred to as “Defendants.”

From 1986 to 2011, the Passamaquoddy Tribe did business as the Northeastern Blueberry Company (“NEBCO”). (Paul Aff. ¶ 12.) NEBCO was engaged in the business of farming and harvesting Maine wild blueberries. (*Id.*)

On May 22, 1998, NEBCO, CFI, and Oxford executed a “Blueberry Purchase Agreement,” whereby CFI agreed to [REDACTED] [REDACTED] (the “1998 Contract”). (Paul Aff. ¶¶ 17, 20; Kamp Aff. ¶¶ 5-6.) [REDACTED] (Paul Aff. ¶ 19.)

On or about November 10, 2000, NEBCO, CFI, and Oxford executed a “First Amendment to Blueberry Purchase Agreement dated May 22, 1998” (the “2000 Amendment”). (*Id.* ¶¶ 21-22.) That same day the parties also executed an “Amended and Restated Blueberry Purchase Agreement incorporating First Amendment dated November 10, 2000” (the “2000 Contract”). (Paul Aff. ¶ 23; Kamp Aff. ¶ 18.) The 2000 Contract extended [REDACTED] [REDACTED] (Paul Aff. Ex C.) The 2000 Contract also [REDACTED] [REDACTED] (*Id.* Ex C ¶ 1.)

In 2012, NEBCO was reorganized by the Passamaquoddy Tribe as PWBC. (*Id.* ¶ 12.) On April 30, 2012, the Passamaquoddy Tribe assigned all of NEBCO’s rights and obligations in the 2000 Contract to PWBC. (*Id.* ¶ 26.) NEBCO, PWBC, CFI, and Oxford executed an “Acknowledgement of Assignment and Consent to be Bound.” (*Id.*)

Recently, trends in the blueberry market have changed to the point that the worldwide supply of frozen blueberries has exceeded worldwide demand. (Paul Aff. ¶¶ 39, 43; Kamp Aff. ¶ 21.) By letter dated September 28, 2016, Defendants notified PWBC that CFI “did not wish to further extend the agreement (not add additional years to the agreement).” (Paul Aff. ¶ 44;

Kamp Aff. ¶ 25.) However, PWBC believed that, pursuant to the terms of 2000 Contract, the [REDACTED] and Defendants remained bound under the 2000 Contract [REDACTED] (Paul Aff. ¶¶ 37-38, 48.)

By letter dated February 10, 2017, CFI's counsel notified PWBC that it viewed the 2000 Contract [REDACTED] in its entirety and that their agreement was "now over." (Paul Aff. ¶ 53; Kamp Aff. ¶ 36.) By letter dated March 15, 2017, CFI's counsel [REDACTED] (Paul Aff. ¶ 56; Kamp Aff. ¶ 39.)

PWBC filed a five-count complaint against CFI and Oxford on April 11, 2017, asserting claims for breach of contract (Count I), specific performance (Count II), declaratory judgment (Count III), intentional misrepresentation (Count IV), and negligent misrepresentation (Count V). On May 10, 2017, PWBC filed a motion for attachment and trustee process and a motion for a temporary restraining order and preliminary injunction order requiring Defendants to purchase PWBC's wild blueberry crop with supporting affidavits and exhibits. The following day, May 11, 2017, Defendants filed a motion to dismiss the complaint for failure to state a claim. Defendants filed their oppositions to PWBC's motions with supporting affidavits and exhibits on May 31, 2017. PWBC filed its opposition to the motion to dismiss on June 1, 2017. Each party timely replied to the respective motions. Oral argument on all pending motions was held on June 9, 2017.

II. DEFENDANTS' MOTION TO DISMISS

The court first addresses Defendants' motion to dismiss for failure to state a claim. Defendants contend that PWBC's complaint fails to state a claim for the following reasons: (1)

PWBC's complaint fails to state a claim for breach of contract in light of the plain language of the 2000 Contract between the parties; (2) as a matter of law, PWBC is not entitled to the remedy of specific performance for any alleged breach; (3) PWBC's claim for declaratory judgment is superfluous and inappropriate; and (4) PWBC's claims for intentional and negligent misrepresentation fail to state a claim because PWBC has failed to allege detrimental reliance, failed to allege fraud with particularity, and because PWBC cannot as a matter of law recover tort damages for what is at its essence a breach of contract claim. (Defs. Mot. Dismiss 4-13; Defs. Reply to Mot. Dismiss 7.) In its opposition, PWBC states that, if the court is inclined to consider the affidavits and additional documents that have been made a part of the record regarding the motions for attachment and preliminary injunction, the court may convert Defendants' motion to one for summary judgment. (Pl. Opp'n Mot. Dismiss 5-6.)

A. Standard of Review

A motion to dismiss pursuant to Maine Rule of Civil Procedure 12(b)(6) for failure to state a claim tests the legal sufficiency of a complaint. *State v. Weinschenk*, 2005 ME 28, ¶ 10, 868 A.2d 200. The sufficiency of a complaint is a question of law. *Bean v. Cummings*, 2008 ME 18, ¶ 7, 939 A.2d 676. On a motion to dismiss for failure to state a claim, the facts are not adjudicated. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141. The court reviews the complaint in the light most favorable to the plaintiff to determine whether the complaint sets forth sufficient allegations that would entitle the plaintiff to relief pursuant to some legal theory. *Bean*, 2008 ME 18, ¶ 7, 939 A.2d 676. Dismissal is warranted when it appears beyond a doubt that the claimant is not entitled to relief under any set of facts that the claimant might prove in support of his or her claim. *Id.*

Normally on a motion to dismiss for failure to state a claim, only the allegations in the complaint are considered by the court. *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43. If the court considers material outside of the pleading, the court typically must convert the motion into one for summary judgment under Rule 56. M.R. Civ. P. 12(b). However, in limited circumstances, the court may consider certain extraneous documents without converting a motion to dismiss to one for a summary judgment. *Moody*, 2004 ME 20, ¶ 9, 843 A.2d 43. The court may consider “official public documents, documents that are central to the plaintiff’s claims, and documents referred to in the complaint, without converting a motion to dismiss into a motion for a summary judgment when the authenticity of such documents is not challenged.” *Id.* ¶ 10.

B. Converting the Motion to Dismiss to one for Summary Judgment

The court declines to convert Defendants’ motion to dismiss to a motion for summary judgment. However, the court shall consider the 2000 Contract in deciding the motion to dismiss. Both parties have made the 2000 Contract a part of the record in this case. (*See* Paul Aff. Ex. C; Kamp Aff. Ex. C.) The 2000 Contract is repeatedly referred to in the complaint. (*See e.g.*, Compl. ¶¶ 23-34, 36, 38-41, 51-57.) Moreover, the 2000 Contract is essential to PWBC’s claims for breach for contract, specific performance, and declaratory judgment. (*See Id.* ¶¶ 59-79.) The 2000 Contract is also central to PWBC’s claims for intentional and negligent misrepresentation. (*See Id.* ¶¶ 81, 85-86, 91, 95.) Therefore, under *Moody*, the court may consider the 2000 Contract contained in the record without converting the motion to one for summary judgment.

C. Breach of Contract

To sustain a claim for a breach of contract, a plaintiff must establish: (1) the parties had a legally binding contract; (2) the defendant breached a material term of the contract; and (3) defendant's breach caused the plaintiff to suffer damages. *Tobin v. Barter*, 2014 ME 51, ¶¶ 9-10, 89 A.3d 1088. There is no dispute that the parties entered into a legally binding contract. (Defs. Mot. Dismiss 1-2; Pl. Opp'n Mot. Dismiss 1-2.)

Defendants contend that PWBC has failed to establish a breach because, pursuant to the plain language of the 2000 Contract, the parties' agreement was [REDACTED] [REDACTED] (Defs. Mot. Dismiss. 5-6.) Defendants assert that, according to that plain language of the 2000 Contract, [REDACTED] (*Id.* at 5.) Thereafter, [REDACTED] [REDACTED] (*Id.*) Defendants assert that, in order to terminate the contract [REDACTED] either party must [REDACTED] [REDACTED] [REDACTED] (*Id.* at 5-6.) Thus, according to Defendants, CFI's September 28, 2016 notice [REDACTED] in accordance with the plain terms of the 2000 Contract. (*Id.* at 6.)

PWBC contends that Defendants' interpretation of the 2000 Contract ignores the plain and unambiguous terms of the contract. (Pl. Opp'n Mot. Dismiss 8.) PWBC argues that, pursuant to the plain language of the 2000 Contract, the parties' agreement [REDACTED] [REDACTED] (*Id.* at 7.) [REDACTED] [REDACTED] (*Id.* at 7-8.) Thus, according to PWBC, the plain language of the 2000 Contract provided that there would [REDACTED]

[REDACTED]² (*Id.* at 7.) Thus, according to PWBC, CFI’s September 2016 notice

[REDACTED]

The interpretation of an unambiguous contract is a question of law for the court. *Town of Lisbon v. Thayer Corp.*, 675 A.2d 514, 516 (Me. 1996). If a contract is unambiguous, the court must give its terms their plain, ordinary, and generally accepted meaning. *Villas by the Sea Owners Ass’n v. Garrity*, 2000 ME 48, ¶ 9, 748 A.2d 457. Contract language is ambiguous only “when it is reasonably susceptible to different interpretations.” *Thayer Corp.*, 675 A.2d at 516 (internal quotation omitted). When interpreting a written contract, the court must consider the entire agreement. *Estate of Barrows*, 2006 ME 143, ¶ 13, 913 A.2d 608. The court must give effect to the intention of the parties as reflected in the written agreement and construe its terms in light of the subject matter, motive, purpose, and object of the agreement. *Id.* The court must give full force and effect to all contract terms and avoid any interpretation that renders particular terms meaningless. *Id.* The court considers extrinsic evidence of the parties’ intent only if the contract is found to be ambiguous. *Garrity*, 2000 ME 48, ¶ 10, 748 A.2d 457.

Paragraph 1 of the 2000 Contract provides:

[REDACTED]

[REDACTED]

² Hereafter, referred to by the court as the [REDACTED]

(Affs. Ex. C ¶ 1) (*italics in original*). Paragraph 25(a) of the 2000 Contract further provides, in relevant part:

[REDACTED]

(*Id.* ¶ 25(a).) The 2000 Contract also contains [REDACTED]

[REDACTED]

[REDACTED] (*Id.* ¶

20.)

The court finds the relevant language of the 2000 Contract to be unambiguous. Paragraph 1 of the 2000 Contract plainly provides for [REDACTED]

[REDACTED] Paragraph 1 unambiguously states that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Affs. Ex. C. ¶ 1*) (*emphasis supplied*). Pursuant to this plain language, beginning in

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In order to terminate the automatic extension, either party must provide [REDACTED]

[REDACTED] (*Id.*) When CFI provided its September 28, 2016 notice, [REDACTED]

[REDACTED] CFI's September 28, 2016 notice [REDACTED]

[REDACTED]

Defendants' interpretation of the 2000 Contract ignores the [REDACTED]

[REDACTED] If the parties had only intended for the contract [REDACTED]

[REDACTED]

[REDACTED]

language is completely meaningless and unnecessary. As discussed above, the court must avoid any interpretation that renders particular terms meaningless and must give full force and effect to all contract terms. *Barrows*, 2006 ME 143, ¶ 13, 913 A.2d 608. Moreover, the court finds no conflict between ¶ 1 and ¶ 25(a). The relevant language of ¶ 25(a) simply reiterates the term of the contract set forth in greater detail in ¶ 1. Paragraph 25(a) states that the [REDACTED]

[REDACTED]

Paragraph 1 states in greater detail that the contract [REDACTED]

[REDACTED] Nothing in the plain language of ¶ 25(a) [REDACTED]

[REDACTED] Therefore, the plain language of the 2000 Contract [REDACTED]

[REDACTED]

In its complaint, PWBC contends that, by letter dated September 28, 2016, Defendants notified PWBC that CFI did not wish to further extend the agreement. (Compl. ¶ 45.) PWBC further contends that, by letter dated February 10, 2017, CFI's counsel notified PWBC that it was taking the position that the 2000 Contract had been terminated as of September 28, 2016, and that the parties' agreement was "now over." (*Id.* ¶ 52.) By letter dated March 15, 2017, CFI's counsel confirmed its position that the 2000 contract has been terminated. (*Id.* ¶ 56.) PWBC contends that CFI has failed to make any payments in 2017 in accordance with the 2000 Contract. (*Id.* ¶¶ 57, 62.) Therefore, based on the plain language of the 2000 Contract and

allegations in the complaint, PWBC has sufficiently stated a claim for breach of the 2000 Contract.

D. Specific Performance

Defendants argue that, even if PWBC has stated a claim for breach of contract, the court should dismiss Count II of the complaint because PWBC is not entitled to the remedy of specific performance as a matter of law. (Def's. Mot. Dismiss 6.) Defendants contend that PWBC is not entitled to specific performance because PWBC has an adequate remedy at law and specific performance is not available to a seller of goods under the Uniform Commercial Code. (*Id.* at 6-7.) In response, PWBC argues that our Law Court has not decided whether the UCC affirmatively precludes a seller from seeking specific performance and that it has alleged sufficient facts to seek specific performance as an alternative to damages. (Pl. Opp'n Mot. Dismiss 9.)

Specific performance is an equitable substitute for damages when the legal remedy is “inadequate or impracticable.” *Ludington v. LaFreniere*, 1998 ME 17, ¶ 7, 704 A.2d 875. Specific performance will not be granted where there is an adequate remedy at law. *McIntyre v. Plummer Assocs.*, 375 A.2d 1083, 1084 (Me. 1977). In determining whether damages are adequate, the court may consider: (a) the difficulty of proving damages to a reasonable certainty; (b) the difficulty of procuring a suitable substitute by means of money awarded as damages; and (c) the likelihood that damages cannot be collected. Restatement (Second) of Contracts § 360 (1981). Damages are inadequate where the loss caused by the breach cannot be proved to a reasonable certainty, where the party's interest is incapable of being valued in money, where the goods are so unique there is no available equivalent, or where the replacement goods may be

obtainable but only at enormous expense or inconvenience. Restatement (Second) of Contracts § 360 cmt. b; Horton & McGehee, *Maine Civil Remedies* § 6-5(c)(1) at 162 (4th ed. 2004).

The Uniform Commercial Code (“UCC”) enumerates the remedies available to a seller of goods. 11 M.R.S.A. § 2-703 U.C.C. cmt. 1 (“This section is an index section which gathers together in one convenient place all of the various remedies open to seller for any breach by a buyer.”) Section 2-703 of the UCC provides, where a buyer fails to make payment when due or repudiates a contract for any goods, the seller may (1) withhold delivery of goods, (2) stop delivery by a bailee, (3) proceed under § 2-704 respecting goods still unidentified to the contract, (4) resell the goods and recover damages, (5) recover damages for non-acceptance or the contract price, or (6) cancel the sale of goods. 11 M.R.S. § 2-703. Nowhere in the UCC is specific performance enumerated as a remedy for a seller. *Id.* §§ 2-703-710. However, specific performance is expressly permitted as a remedy for a buyer in the event of a seller’s breach. *Id.* § 2-711(2)(b). Section 2-716 of the UCC expressly states, “Specific performance may be decreed where the goods are unique or in other proper circumstances[.]” *Id.* § 2-716(1). *See also* Horton & McGehee, *Maine Civil Remedies* § 6-5(c)(1) at 162 (discussing only a purchasers’ right to obtain specific performance for breach of a contract for the sale of goods).

Although our Law Court has not decided the issue, the court concludes that specific performance is generally not available to a seller under the UCC. A judgment for specific performance in favor of a seller would simply order the buyer to pay the contract price for the goods. Thus, a judgment for specific performance in favor of a seller would be indistinguishable from an action for the price under the UCC. *See* 67A Am. Jur. 2d *Sales* § 989 (“An action for the price is tantamount to an action for specific performance.”); 1 White, Summers, & Hillman, *Uniform Commercial Code* § 8:2 n.2 (6th ed.) (“The action for the price is, of course, the

analogue to the buyer’s action for specific performance.”); 11 M.R.S.A. § 2-716 U.C.C. cmt. 4 (stating that the buyer’s right to specific performance under the UCC “is intended to give the buyer rights to the goods comparable to the seller’s rights to the price of the contract”). The UCC expressly permits a seller to recover damages from a buyer who repudiates a contract. 11 M.R.S. §§ 2-708-2-709; 67A Am. Jur. 2d *Sales* §§ 955, 989.

At least one court has found that a seller is not precluded by the UCC from seeking specific performance of a contract. 1 White, Summers, & Hillman, *Uniform Commercial Code* § 8:2 n.2. In *Central Illinois Public Service Company v. Consolidated Coal Company*, a coal supplier entered into a contract with a power company to supply the power with its entire fuel requirement for a new power station. 527 F. Supp. 58, 60 (C.D. Ill. 1981). The contract required the supplier to design and construct its coal mine in such a way that coal was transportable only to the new power station. *Id.* Moreover, the mine was designed and constructed to produce raw coal and the power station was expressly designed to receive only raw coal, effectively precluding the supplier from ever selling its goods to any other buyers. *Id.* Because of the exclusive design of both the mine and power station, the parties entered to an agreement with a fixed thirty-year term after initial operation, with a right to terminate after fifteen years from initial operation if performance became uneconomical or impractical, but only upon five-years’ written notice. *Id.* at 61. The court held that, because the case involved a long-term contract with significant capital investment, damages would be difficult to calculate. *Id.* at 61, 67. Thus, under the “unusual circumstances” of the case, the court found that any legal remedy was likely inadequate and the seller was likely entitled to specific performance. *Id.*

Here, the 2000 Contract bears some similarity to the contract in *Central Illinois* in that it is [REDACTED] However, unlike *Central Illinois*, PWBC’s

allegations do not demonstrate that it has no adequate remedy at law. In its complaint, PWBC asserts that CFI [REDACTED] (Compl. ¶ 32.) CFI is obligated to [REDACTED] as those terms are defined in the 2000 Contract. (*Id.* ¶ 33; Affs. Exs. C ¶ 10.) [REDACTED] (*Id.* ¶ 34.) PWBC further asserts that for [REDACTED] (*Id.* ¶ 35.) The 2000 Contract also [REDACTED] (*Id.* ¶ 38; Affs. Exs. C ¶ 12.) As discussed above, the UCC expressly permits a seller to recover damages from a buyer who repudiates a contract. *See* 11 M.R.S. §§ 2-709-2-709. Based on the terms of 2000 Contract and the allegations set forth in the complaint, PWBC's damages are likely calculable to a reasonable certainty. Thus, PWBC has an adequate remedy at law. Accordingly, PWBC's claim for specific performance must be dismissed.

E. Declaratory Judgment

Defendants also argue that PWBC's claim for a declaratory judgment interpreting the terms of the 2000 Contract should be dismissed because it is superfluous and duplicative of its claim for breach of contract. (Def's. Mot. Dismiss 8-9.) Pursuant to Maine's Declaratory Judgment Act, any party may obtain a declaration regarding the validity or construction of a contract, and their rights, status, or other relations thereunder, before or after a breach thereof. 14 M.R.S. §§ 5954-55. "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." M.R. Civ. P. 57. The

Declaratory Judgment Act complements other relief available under applicable law. 22A Am. Jur. 2d *Declaratory Judgments* § 45. It is an alternative or additional remedy to facilitate the administration of justice and to fix and determine rights. *Id.* An action for declaratory judgment “should not be refused merely because another remedy is available.” *Id.* § 47. However, the court in its discretion may deny declaratory relief when more appropriate or effective relief exists and declaratory judgment serves no useful purpose. *Id.*; *see also* Horton & McGehee, *Maine Civil Remedies* § 3-1(d) at 36 (“The existence of another remedy can limit the availability of a declaratory judgment chiefly when the remedy is statutorily provided and applies specifically to the controversy for which relief is sought.”).

Here, the court sees no reason to deny declaratory relief to PWBC at this stage in the proceeding. Although the UCC statutorily provides remedies to PWBC on its breach of contract claim, nothing in the UCC precludes declaratory judgment or makes its remedies the exclusive remedies available to PWBC. *See* 11 M.R.S. §§ 2-703. To the contrary, the UCC expressly provides, “Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity... supplement its provisions.” *Id.* § 1-1103(2). Therefore, PWBC is not precluded from seeking a declaratory judgment interpreting the terms of the 2000 Contract simply because it has also brought a claim for breach of contract.

F. Intentional and Negligent Misrepresentation

Lastly, Defendants argue that PWBC’s claims for intentional and negligent misrepresentation must be dismissed because PWBC cannot demonstrate justifiable reliance or that any misrepresentations by CFI were material and has failed to plead intentional misrepresentation with sufficient particularity. (Defs. Mot. Dismiss 11-13.) In their reply,

Defendants further assert that PWBC cannot recover tort damages for what is at its essence a breach of contract claim. (Defs. Reply to Mot. Dismiss 7.)

Foremost, while the law of torts and the law of contracts are both predicated on the relationship between parties and the duties owed to one another, the relationships and duties involved are fundamentally different. *See Adams v. Buffalo Forge Co.*, 443 A.2d 932, 938 (Me. 1982). While nearly every breach of contract involves conduct that could be considered tortious, “if tort law and contract law are to fulfill their distinctive purposes, they must be distinguished where it is possible to do so.” *Pendleton Yacht Yard, Inc. v. Thomas*, 2003 Me. Super. LEXIS 49, at *8 (Mar. 20, 2003) (internal quotation and citation omitted). Thus, “a mere breach of contract is not actionable as a tort.” *Id.*; *see also Horton & McGehee, Maine Civil Remedies* § 15-2(b)(2) at 306. However, “circumstances surrounding the contract may give rise to an independent duty to exercise due care or similar duty in tort, in which case a breach may be actionable under both tort and contract theory.” *Id.* (internal quotation and citation omitted); *see also Horton & McGehee, Maine Civil Remedies* § 15-2(b)(2) at 306-07.

To sustain a claim for intentional misrepresentation, a plaintiff must prove by clear and convincing evidence that (1) the defendant made a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of its truth or falsity; (4) for the purpose of inducing the plaintiff to act in reliance upon it; and (5) the plaintiff justifiably relied upon the fact as true to their detriment. *Me. Eye Care Assocs., P.A. v. Gorman*, 2008 ME 36, ¶ 12, 942 A.2d 707. Pursuant to Maine Rule of Civil Procedure 9(b), averments of or circumstances constituting fraud must be pled “with particularity” in order to fairly apprise the defendant of the claim. *Stevens v. Bouchard*, 532 A.2d 1028, 1030 (Me. 1987).

Similarly, to sustain a claim for negligent misrepresentation, a plaintiff must prove that (1) in the course of a business, profession, employment or any other transaction in which the defendant has a pecuniary interest; (2) the defendant supplied false information; (3) for the guidance of others in the business transactions; (4) and the defendant failed to exercise reasonable care or competence in obtaining or communicating the information; (5) causing the plaintiff to justifiably rely upon the information as true to the plaintiff's detriment. *St. Louis v. Wilkinson Law Offices, P.C.*, 2012 ME 116, ¶ 18, 55 A.3d 443.

PWBC's complaint contains the following allegations: as of October 2015, pursuant to terms of the 2000 Contract, [REDACTED] by letter dated September 28, 2016, Defendants notified PWBC that it did not wish to further extend the agreement for additional years; PWBC acknowledged the letter at its September 29, 2016 board meeting, at which a representative of Defendants was present; At the September 29, 2016 board meeting, Defendants' representative informed PWBC that CFI [REDACTED] [REDACTED] Defendants' representative also acknowledged during the September 29, 2016 board meeting that CFI was obligated, and in fact intended, [REDACTED] [REDACTED] and specifically during a conference call with Ragnar Kamp on January 9, 2017, CFI's employees and agents continued to represent to PWBC employees that CFI was bound by the 2000 Contract [REDACTED] in reliance on those conversations, PWBC made plans for the 2017 growing season and did not seek an alternative buyer for its blueberries; by letter dated February 10, 2017, CFI notified PWBC that it was taking the position that the 2000 Contract had been terminated by the September 28, 2016 notice and the contract

was now over; CFI confirmed its position that the 2000 Contract has concluded in its March 15, 2017 letter. (Compl. ¶¶ 41, 45-52, 56.)

PWBC's complaint further contends that Defendants knowingly misrepresented or failed to disclose its intention not to perform the 2000 Contract beyond September 2016. (*Id.* ¶¶ 81-84.) PWBC contends that Defendants misrepresentations and omissions were made to prevent PWBC from seeking an alternative buyer for its 2017 harvest and to induce PWBC to renegotiate the terms of the 2000 Contract. (*Id.* ¶¶ 86-89.) PWBC also avers that Defendants failed to exercise reasonable care and competence in making their representations. (*Id.* ¶ 97.) PWBC contends that it has relied on Defendants misrepresentation and omissions to its detriment. (*Id.* ¶¶ 92-93, 98-99.)

Viewing the allegations in the light most favorable to PWBC, the court finds that PWBC has set forth sufficient facts that may give rise to an independent duty outside of the 2000 Contract, specifically the allegations that Defendants misrepresentations and omissions were made to prevent PWBC from seeking an alternative buyer for its 2017 harvest and to induce PWBC to renegotiate the terms of the 2000 Contract. (*Id.* ¶¶ 86-89.) Moreover, based on the above allegations, the court finds that PWBC's complaint states sufficient facts with particularity to state claims for intentional and negligent misrepresentation. Therefore, the court declines to dismiss PWBC's tort claims at this stage in the proceeding.

Therefore, based on the foregoing, Defendants' motion to dismiss PWBC's complaint shall granted as to Count II for specific performance and denied as to all other counts.

III. PWBC'S MOTION FOR ATTACHMENT AND TRUSTEE PROCESS

A. Standard of Review

Pursuant to Maine Rules of Civil Procedure 4A and 4B, the court shall grant an order approving attachment and trustee process only upon a finding that “it is more likely than not” that the plaintiff will recover a judgment, including interest and costs, greater than or equal to the aggregate sum of the attachment and trustee process plus any liability insurance, bond, other security, or other attached property available to satisfy the judgment. M.R. Civ. P. 4A(c); 4B(c). Thus, the plaintiff must prove, by a preponderance of the evidence, it will succeed on its claim and recover an amount equal to or greater than the amount of the attachment sought. *Trans Coastal Corp. v. Curtis*, 622 A.2d 1186, 1188 (Me. 1993). The motion for attachment and trustee process must be supported by affidavits setting forth “specific facts sufficient to warrant the required findings.” M.R. Civ. P. 4A(c), (i); 4B(c).

B. Success on the Merits

PWBC contends it is more likely than not that it will succeed on its breach of contract claim against Defendants.³ (Pl. Mot. Attach. 3.) As previously discussed, to recover on a claim for a breach of contract, a plaintiff must prove: (1) the parties had a legally binding contract; (2) the defendant breached a material term of the contract; and (3) defendant’s breach caused the plaintiff to suffer damages. *Tobin*, 2014 ME 51, ¶¶ 9-10, 89 A.3d 1088. The interpretation of an unambiguous contract is a question of law for the court. *Thayer Corp.*, 675 A.2d at 516. The court gives terms in an unambiguous contract their plain and ordinary meaning. *Garrity*, 2000 ME 48, ¶ 9, 748 A.2d 457.

³ PWBC contends it is also likely to succeed on its claims for intentional and negligent infliction of emotional distress. (Pl. Mot. Attach. 3.) However, PWBC’s damages calculations are based solely upon the remedies available on its breach of contract claim under the UCC. (*Id.* 4.) PWBC has provided no evidence regarding its damages on its tort claims. (*Id.*) Therefore, PWBC cannot demonstrate that it is more likely than not that it will recover damages in an amount equal to or greater than the amount of the attachment sought on its tort claims.

As discussed above, Paragraph 1 of the 2000 Contract plainly provides that, [REDACTED]

[REDACTED]

[REDACTED] (Affs. Ex. C.) In order to terminate the automatic extension,

[REDACTED]

[REDACTED] (*Id.*) Thus, the 2000 Contract unambiguously contains a

[REDACTED] (*Id.*)

In support of its motions, PWBC has provided an affidavit from its Manager, Darren Paul. (Paul Aff. ¶ 3.) According to the affidavit, by letter dated September 28, 2016, Defendants notified PWBC that CFI [REDACTED]

[REDACTED] (*Id.* ¶ 44, Pl. Ex. F.) By letter from CFI's counsel dated February 10, 2017, CFI notified PWBC that it viewed the 2000 Contract as terminated as of September 28, 2016 in its entirety and that the agreement was "now over." (*Id.* ¶ 53, Pl. Ex. G.) CFI's counsel then sent another letter dated March 15, 2017, confirming its position that the 2000 Contract had concluded. (*Id.* ¶ 56, Pl. Ex. H.) PWBC [REDACTED]

[REDACTED] as required by the 2000 Contract. (*Id.* ¶¶ 31, 35-36; Affs. Ex C ¶ 11(a).)

These assertions are largely undisputed by Defendants. Defendants have submitted an affidavit from Ragnar Kamp, the Chief Operating Officer of Oxford and President of CFI. (Kamp. Aff. ¶ 2.) Kamp acknowledges that, by letter dated September 28, 2016, CFI notified PWBC of its intent to terminate the 2000 Contract. (*Id.* ¶¶ 25-26, Defs. Ex. D.) Kamp further acknowledges that CFI's counsel sent letters to PWBC dated February 10, 2017, and March 15, 2017, confirming its position that the 2000 Contract had ended. (*Id.* ¶¶ 36, 39, Defs. Exs. F-G.)

Based on the foregoing, it appears there is no dispute that CFI repudiated the 2000 Contract and considered [REDACTED] This is plainly contrary to the

unambiguous terms of the 2000 Contract, which provided [REDACTED]

[REDACTED] Therefore, PWBC has sufficiently demonstrated that it is more likely than not that PWBC will succeed on the merits of its breach of contract claim.

C. Amount of Judgment

In order to demonstrate that it is more likely than not that it will recover an amount equal to or greater than the amount of the attachment sought, a plaintiff must “make a sufficiently specific showing by providing evidence from which an ‘informed projection’ can be made as to the amount of damages.” *Wilson v. DelPapa*, 634 A.2d 1252, 1255 (Me. 1993) (citation omitted). PWBC contends that it is entitled to the price of PWBC’s blueberry harvest for [REDACTED] under §2-709(1)(b) of the UCC. (Pl. Mot. Attach. 4.)

PWBC contends that an informed projection of the price for [REDACTED] [REDACTED] (*Id.*) Alternatively, if the court determines that PWBC is not entitled to the price of the contract under § 2-709, PWBC contends that it is entitled to damages based on the contract-market differential under § 2-708(1) and that an informed projection of its damages is [REDACTED] (*Id.* at 5-6.) PWBC further contends that, if the court were to rely on a market price that failed to put as good a position as if the contract had been performed, PWBC is entitled to [REDACTED] in anticipated profits under § 2-708(2). (*Id.* at 6 n.4.)

In opposition, Defendants contend that PWBC is not entitled to recover the price of the 2000 Contract under § 2-709(1)(b) because PWBC has not demonstrated that it made reasonable efforts to resell the goods at a reasonable price or that circumstances indicate such efforts would be unavailing. (Defs. Opp’n Mot. Attach. 5.) Defendants contend that, if PWBC is entitled to any remedy, PWBC is only entitled to the contract-market differential under § 2-708(1). (*Id.* at 6.) Defendants further contend that, in arriving at its projections, PWBC erroneously uses a six-

year average to calculate its contract price and its costs. (*Id.* at 6-8.) Defendants assert that PWBC's blueberry yield, the price per pound under the 2000 Contract, and its costs for 2016 are the best estimates PWBC's damages for [REDACTED] (*Id.* at 7.) Defendants assert that an informed projection of PWBC's damages under § 2-708(1) amounts to only [REDACTED] (*Id.* at 8.)

Under the UCC, a seller is generally not entitled to recover the price of goods not accepted by the buyer because the seller is usually in a position to resell the goods. 1 White, Summers, & Hillman, *Uniform Commercial Code* § 8:2. However, the UCC recognizes an exception to this general rule when a seller is unable to resell goods. *Id.* Section 2-709 of the UCC provides in relevant part:

(1) When the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages under section 2-710,⁴ the price

...

(b) Of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price, he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale become possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer ... has repudiated..., a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under section 2-708.

11 M.R.S. § 2-709. Thus, § 2-709(1)(b) permits a seller to recover the price if, after reasonable effort, the seller is unable to resell the goods at a reasonable price, or where the circumstances reasonably indicate that such effort will be unavailing. 1 White, Summers, & Hillman, *Uniform*

⁴ For the purposes of attachment and trustee process, PWC is not seeking incidental damages under § 2-710. (Pl. Mot. Attach. 4 n.3.)

Commercial Code § 8:2. The buyer is entitled to the goods upon payment of any judgment under § 2-709. *Id.*

Contrary to Defendants' argument, PWBC has sufficiently established that it is more likely than not that PWBC is unable, after reasonable efforts, to sell its blueberry crop at a reasonable price. In his affidavit, Darren Paul states that, for the past six years, PWBC has sold approximately [REDACTED] (Paul Aff. ¶ 30.) Paul states that, since March 15, 2017, he has personally contacted four other blueberry processors in Maine about purchasing PWBC's 2017 crop. (Paul Aff. ¶ 58.) According to Paul, none of the processors wished to purchase blueberries at that time. (*Id.*) Attached to Paul's affidavit are emails from the four processors. (Paul Aff. Exs. I-1-I-4.) Of the four processors, only one expressed at least some interest in purchasing some blueberries from PWBC. (Paul Aff. Ex. I-4.) The one processor stated, "As you can imagine, at the moment we are not looking for more supply of conventional fresh blueberries. We could handle a bit more, say 500,000 pounds, but it is very difficult to sell them frozen under the current market conditions." (*Id.*) The processor expressed interest in purchasing more certified organic fresh blueberries if PWBC's blueberries were certified, and stated that there may be potential for it to buy additional fresh blueberries from PWBC in future years, but not until after 2017. (*Id.*) Paul further states that the market for blueberries has changed, resulting a situation where worldwide supply will likely continue to exceed worldwide demand for 2017 and 2018. (Paul Aff. ¶¶ 39, 43.) In his affidavit in support of Defendants' opposition, Kamp acknowledges that there continues to be an oversupply of wild blueberries in the market compared to worldwide demand. (Kamp Aff. ¶ 21.)

PWBC is not required to prove that there is absolutely no market for its blueberries, only that it is "unable after reasonable effort to resell them at a reasonable price or the circumstances

reasonably indicate that such effort will be unavailing.” See *Great W. Sugar Co. v. Pennant Prods., Inc.*, 748 P.2d 1359, 1361 (Colo. App. 1987) (upholding trial courts determination that reasonable efforts resell sugar would have been unavailing because the market price for refined beet sugar declined drastically after the parties entered into their contracts and the entire sugar industry consistently had more sugar to sell than the market could absorb); *Foxco Indus., Ltd. v. Fabric World, Inc.*, 595 F.2d 976, 984 (5th Cir. 1979) (upholding jury’s determination that the plaintiff was entitled to recover the price under § 2-709 despite the presence of some market for the goods, because the jury was only required to find that plaintiff used reasonable efforts and there was no reasonable price). Therefore, based on the foregoing, PWBC has sufficiently demonstrated that it is has made reasonable efforts to resell its blueberry crop, that it is unable to resell its blueberry crop at a reasonable price, and that such efforts will be unavailing. Thus, PWBC has sufficiently demonstrated it is more likely than not that it is entitled to recover the price of its blueberries under § 2-709 of the UCC.⁵

As discussed above, PWBC asserts that an informed projection of the price for the [REDACTED] (Pl. Mot. Attach. 4.) In support of its projection, PWBC has submitted an affidavit by its Bookkeeper, Grace Falzarano. (Falzarano Aff. ¶ 3.) Falzarano avers that she arrived at the [REDACTED] projection by reviewing PWBC’s financial records from 2011 through 2016. (*Id.* ¶ 9.) During those six years, PWBC’s average annual gross revenue from its sales to CFI was [REDACTED] (*Id.* ¶ 11.) Falzarano contends that the historical average of the amounts paid to PWBC by CFI are a reasonable projection of the amounts that will be paid under [REDACTED] (*Id.*

⁵ As discussed above, CFI would still be entitled to receive PWBC’s blueberry crop upon payment of any judgment under § 2-709. 11 M.R.S. § 2-709(2); 1 White, Summers, & Hillman, *Uniform Commercial Code* § 8:2. CFI is also entitled to receive credit for the net proceeds of any resale by PWBC prior to collecting any judgment. 11 M.R.S. § 2-709(2).

¶ 10.) Thus, Falzarano contends that [REDACTED] [REDACTED] (*Id.* ¶ 11.) Paul also avers that PWBC is not aware of any insurance, bond, credit or other security available to satisfy a judgment against CFI or Oxford. (Paul Aff. ¶¶ 64-65.)

In opposition, Kamp contends using a six-year average is not an accurate measure of PWBC's damages. (Kamp Aff. ¶ 47.) Kamp avers that, in his experience as an employee of CFI since 1991, blueberry yields are driven by weather, pollination conditions, growing conditions, and other factors. (*Id.* ¶¶ 4, 48.) Thus, according to Kamp, it is impossible to predict conditions for the [REDACTED] by simply averaging the past yields. (*Id.* ¶ 48.) Kamp further contends that Falzarano's calculations assume that the average price per pound for the last six years, [REDACTED] will be the price per pound for the [REDACTED] (*Id.* ¶ 49.) Kamp contends that this assumption ignores the conditions of the current blueberry market, which is facing a gross oversupply of blueberries compared to worldwide demand. (*Id.* ¶¶ 49-50.) The market price for blueberries in 2016 was \$0.25 per pound. (*Id.* ¶ 50.) Based on the current condition of the blueberry market, and the unprecedented levels of inventory CFI and other packers have on hand, Kamp does not expect the market price for blueberries to exceed \$0.25 per pound during the [REDACTED]. (*Id.* ¶ 51.) Thus, according to Kamp, CFI would be required to pay the [REDACTED] (*Id.*) Kamp contends that the most accurate way to arrive at an informed projection for the [REDACTED] is to look solely at the previous year's blueberry yield and to multiply PWBC's 2016 yield by the [REDACTED] to determine PWBC's projected annual gross revenue. (*Id.* ¶ 64.) Kamp asserts that PWBC's projected annual gross revenue would be [REDACTED] (*Id.*) Thus, according to Kamp calculations, PWBC's projected price for the

Opp'n Mot. Attach. 8.)

Although PWBC may be able obtain a larger damages award at trial, at this stage in the proceeding, based on the affidavits submitted, the court finds that it is more likely than not that PWBC will obtain a judgment at least equal to \$12,667,320.90. Accordingly, PWBC is entitled to attachment and trustee process in that amount.

IV. PWBC'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Lastly, PWBC seeks a temporary restraining order and preliminary injunction mandating that Defendants purchase PWBC's wild blueberry crop pursuant to the term of the 2000 Contract. (Pl. Mot. Prelim. Inj. 1.) Where all parties have sufficient notice and opportunity to present evidence and legal arguments, a motion and hearing for a temporary restraining order may be treated as a motion for preliminary injunction. *Clark v. Goodridge*, 632 A.2d 125, 127 (Me. 1993). Defendants in this case had adequate notice, submitted evidence and had a full opportunity to present its legal arguments in opposition to PWBC's motion. Accordingly, this motion shall be treated as a motion solely for preliminary injunction.

A. Standard of Review

To obtain a preliminary injunction, a plaintiff must produce *prima facie* evidence demonstrating: (1) the plaintiff will suffer "irreparable injury" if the injunction is not granted; (2) the irreparable injury to the plaintiff outweighs any harm to the defendant from granting the injunction; (3) the plaintiff is likely to succeed on the merits of his or her claims; and (4) the public interest will not be adversely affected by granting the injunction. *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129. If the plaintiff fails to demonstrate any one of the elements, the motion for preliminary injunction must be denied.

Id. ¶ 10. In deciding a motion for preliminary injunction, the court may rely on evidence presented in sworn depositions, affidavits, oral testimony, or a verified complaint. 3 Harvey, *Maine Civil Practice* § 65:4 at 333 (3d ed. 2011); *Bangor Historic Track*, 2003 ME 140, ¶ 10, 837 A.2d 129.

Because PWBC’s motion seeks an injunction compelling Defendants to take an affirmative action, PWBC’s motion is one for mandatory injunctive relief. *See Horton & McGehee, Maine Civil Remedies* § 5-2 at 100. To obtain a mandatory preliminary injunction, the plaintiff must meet a higher burden. *Id.* § 5-2 n.14 at 100. The plaintiff must show “a clear likelihood of success on the merits.” *Dep’t of Env’tl. Prot. v. Emerson*, 563 A.2d 762, 771 (Me. 1989).

B. Irreparable Injury

An “irreparable injury” is an injury for which there is no adequate remedy at law. *Bangor Historic Track*, 2003 ME 140, ¶ 10, 837 A.2d 129 (citation omitted). As discussed above, the court finds it is more likely than not that PWBC will recover damages on its breach of contract claim. Therefore, PWBC has an adequate remedy at law and is not entitled to a mandatory preliminary injunction. Because PWBC has failed to demonstrate an irreparable injury, the court need not consider the other elements for preliminary injunction. Therefore, the Court denies Plaintiff’s motion for preliminary injunction.

