STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-2017-18

PASSAMAQUODDY WILD BLUEBERRY CO.,

Plaintiff,

v.

CHERRYFIELD FOODS, INC., et al.,

Defendants.

ORDER ON PLAINTIFF PASSAMAQUODDY WILD BLUEBERRY COMPANY'S MOTION FOR LEAVE TO AMEND COMPLAINT

This matter comes before the Court on Plaintiff Passamaquoddy Wild Blueberry Company's ("PWBC") motion for leave to amend its Complaint against Cherryfield Foods, Inc. ("CFI") and Oxford Frozen Foods Limited (collectively "Defendants"). Defendants opposed the motion, and PWBC timely replied. The Court heard oral argument on the motion on March 25, 2018. Dan Mitchell, Esq. appeared for PWBC and John Aromando, Esq. appeared for Defendants.

BACKGROUND

This case arises out of CFI's termination of a multi-year contract (the "Agreement")[1] for the purchase of PWBC's annual harvest of wild blueberries. (Pl's Compl. ¶¶ 14,18, 45, 52.)[2] CFI first gave PWBC notice of its intent to terminate the contract by a letter dated September 28, 2016. (Pl's Compl. ¶ 45.) By letter dated February 10, 2017, CFI notified PWBC that it considered its termination effective as of the 2017 harvest. PWBC filed its Complaint against Defendants on

[1] The Agreement was initially executed in May 1998 and re-executed in November 2000 to incorporate certain amendments which, *inter alia*, extended the term of the Agreement through 2010 and provided for automatic extension beyond 2010.

[2] Except where indicated otherwise, citations and references are to the Complaint filed in April 2017 and not the Proposed First Amended Complaint.

April 11, 2017, alleging *inter alia* that CFI's termination breached the Agreement's termination provision because the Agreement's automatic extension provision obligated CFI to purchase PWBC's annual harvest through 2020. (*See* Pl's Compl. ¶¶ 58-65.) On page 8 of its Order on Pending Motions entered June 20, 2017, this Court denied CFI's motion to dismiss the Complaint, finding that the plain language of the Agreement's termination provision unambiguously provided a four-year tail following a notice of termination by either party. On September 12, 2017, Defendants made an unqualified offer to purchase PWBC's entire blueberry harvest for the years 2018, 2019, and 2020, according to the same terms as the prior contract. Plaintiffs accepted the offer by letter dated September 26, 2017. Defendants served PWBC with an offer of judgment dated December 4, 2017; this offer was rejected. *See* M.R. Civ. P. 68.

Meanwhile, Defendants started a rolling production of documents in response to PWBC's discovery requests on September 8, 2017. After having last produced documents on November 4, 2017, Defendants made another production on January 12, 2018. This January production led PWBC to conclude that CFI had manipulated the "sales-based price" so that it would not appear to be the highest of three possible price alternatives CFI was obligated to pay PWBC pursuant to the Agreement.[3] The parties do not agree as to whether during the performance of the agreement CFI provided PWBC with adequate information as to how it calculated the sales-based price or its ultimate determination of the sales-based price. Now that PWBC has discovered what it believes to be evidence of allegedly results-oriented methodology in determining the sales-based price, PWBC seeks to amend its Complaint to bring claims for breach of contract (Proposed Count II),

[3] Under the Agreement, CFI was obligated to pay PWBC the highest of three possible calculations: (1) a "premium price," (2) a "minimum price," or (3) a "sales-based price." The minimum price was a sum certain; the premium price was calculated based on what CFI paid other suppliers that year; and the sales-based price was calculated based on what CFI would charge a defined sample of its customers the following year.

intentional misrepresentation (Proposed Count IV), and negligent misrepresentation (Proposed Count VII) based on this alleged manipulation.

STANDARD OF REVIEW

Maine Rule of Civil Procedure 15(a) states that after a responsive pleading is served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party . . . ." *Id*. "Leave to amend a complaint 'shall be freely given when justice so requires.'" *Sherbert v. Remmel*, 2006 ME 116, ¶ 7, 908 A.2d 622 (quoting M.R. Civ. P. 15(a)). "A motion to amend a pleading . . . is committed to the sound discretion of the trial court." *Bangor Motor Co. v. Chapman*, 452 A.2d 389, 392 (Me. 1982).

DISCUSSION

Defendants argue that these newly discovered claims would be more appropriately brought in a separate action. (Def's Opp. Mot. Amend 1-2, 10.) First, Defendants claim that PWBC's motion is untimely. (Def's Opp. Mot. Amend 5-7.) Second, Defendants claim that allowing PWBC to amend its claim will unfairly prejudice Defendants. (Def's Opp. Mot. Amend 7-9.)

I. PWBC'S MOTION IS TIMELY

Defendants claim that PWBC should have brought this motion earlier, after Defendants' first two productions in the Fall of 2017.[4] PWBC counters that although some of the documents that form the basis of its new claim were produced in the Fall, the relevance of these documents to the new claim were not evident until the January 2018 production. At the oral argument, counsel for PWBC explained that while some documents produced earlier are cited in the amendments, it

[4] Defendants also suggest that PWBC should have had notice of the claims even earlier, because PWBC had the right to audit CFI's annual determination of the sales-based price under the Agreement but never exercised that right. (Def's Opp. Mot. Amend 7.) The Court disagrees with the implication that this renders the instant motion untimely. As counsel for PWBC pointed out at oral argument, PWBC's failure to exercise its audit rights may be relevant to a determination on the merits, but it does not foreclose PWBC from pursuing the claims in the proposed amendments.

was the documents produced in January that "tied it together" and prompted PWBC to bring the instant motion.

The Court accepts PWBC's characterization of how it became apprised of the factual underpinning to its new claims, and therefore agrees with PWBC that its motion is timely. The Court appreciates both parties' attempts to bring this suit to a speedy resolution, but PWBC cannot be faulted for conducting a diligent analysis of Defendant's produced documents. PWBC's motion to amend is timely under the circumstances.

As discussed *infra*, the proposed amendments will require a modification of the current schedule and delay trial. However, resulting delay alone is insufficient grounds for denying a motion to amend. *See Kelly v. Michaud's Ins. Agency*, 651 A.2d 345, 347 (Me. 1994). Furthermore, allowing PWBC to bring these new claims now will ultimately serve to conserve judicial resources. Defendants do not argue futility of amendment; they concede that if the Court denies PWBC's motion that PWBC should still be allowed to pursue its claims relating to the manipulation of the sales-based price. (Def's Opp. Mot. Amend 1-2, 10.) At oral argument, Defendant's counsel reaffirmed this position unequivocally. But the proposed amendments bring claims arising out of the same contract, involve the same parties, and—despite Defendants' assertions to the contrary—it is plausible that there will be some factual overlap. All of the procedural requirements necessary for starting a new lawsuit—and the motion practice necessary to transfer the second suit to this Court—are bypassed by simply allowing PWBC to bring its proposed claims now. In sum, allowing PWBC to amend its Complaint to bring the proposed claims will result in a net reduction of the time required to resolve all pending claims between these parties.

II. ALLOWING AMENDMENT WILL NOT UNFAIRLY PREJUDICE DEFENDANTS

Defendants next argue that the motion to amend should not be granted because it would

cause them undue prejudice. In particular, Defendants claim that the time and expense associated with further delay will result in unfair prejudice, and that Defendants would be further prejudiced by the proposed amendment because of the offer of judgment served on PWBC in December 2017.

The Court recognizes that allowing PWBC to amend its Complaint to bring these new claims will result in further commitments of time and resources by both parties. However, amendments that add new claims to a complaint almost always require a defendant to commit additional resources in order to defend against those claims. As counsel for PWBC pointed out at oral argument, the proposed amendments are expected to prejudice Defendants to the extent that they represent a new potential for liability. The prejudice Defendants allege in their opposition amounts to the additional commitment of resources to defend against the new proposed claims. The Court disagrees that this prejudice is unfair. The cases cited by Defendants fail to support their position. *See Bangor Motor Co. v. Chapman*, 452 A.2d 389. 393 (Me. 1982) (no undue prejudice where movants sought to assert a claim of negligence directly against third-party defendant); *Holden v. Weinschenk*, 1998 ME 185, ¶ 7, 715 A.2d 915 (affirming denial of motion to amend because of undue delay, as opposed to undue prejudice, when motion was brought after a motion for summary judgment was filed by the opposing party).

Similarly, the Court is not convinced that Defendants' service of an offer of judgment pursuant to M.R. Civ. P. 68 is relevant to the analysis of whether PWBC's proposed amendments would result in undue prejudice to Defendants. The Court acknowledges that Defendants made their offer based on the claims that were then in issue—and which had been narrowed to a calculation of damages resulting from CFI's failure to purchase PWBC's 2017 blueberry harvest—but this is true of all strategic decisions Defendants have made thus far in litigation. Furthermore, the Court is not aware of any authority that prohibits the Defendants from serving a second or

amended offer of judgment on PWBC, and Defendants do not direct the Court's attention to any such authority. In sum, while the proposed amendments may prejudice Defendants, the Court rules that any resulting prejudice would not be unfair.

CONCLUSION

Based on the foregoing it is hereby ORDERED:

That Plaintiff PWBC's motion for leave to amend the Complaint is granted.

Unless otherwise agreed by the parties, the Case Management Scheduling Order is amended as follows:

Plaintiff's Expert Designations:	**May 25, 2018**
Defendant's Expert Designations:	**June 29, 2018**
Deadline to Complete Discovery:	**August 3, 2018**
Deadline for Dispositive Motions:	**September 28, 2018**
Trial Month:	**January 2019**
Deadline for Joint Pretrial Statement:	**December 7, 2018**
Telephonic Pretrial Conference:	**December 21, 2018 at 9:00 am.**

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporated this Order by reference in the docket.

Dated: April 12, 2018 _____/s_____

Justice, Business & Consumer Court