STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: Portland
DKT. NO. BCD-CV-20-20

BRETT DEANE, *et al.*,

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

ORDER ON DEFENDANT'S MOTION TO DISMISS

Defendant Central Maine Power Company ("CMP") filed a motion to dismiss Plaintiffs'[1] Corrected Second Amended Complaint ("SAC") for failure to state a claim.[2] The SAC alleges several claims that arise from CMP's use of ostensibly misleading disconnection notices issued to its residential customers in the winter months. Plaintiffs, as proposed representative class plaintiffs, seek to have this certified as a class action. The Court has reviewed all briefing, relevant law, and considered the parties' arguments from the hearing held on October 23, 2020. It issues the following decision.[3]

LEGAL STANDARD

"A motion to dismiss tests the legal sufficiency of the complaint, the material allegations

[1] The individual plaintiffs in this matter are Brett Deane, Henry Lavender, Joleen Mitchell, Pauline Nelson, and Susan Solano.

[2] The Court disagrees with Plaintiffs' contention that CMP's motion relies on facts outside the pleadings. CMP simply pointed to the absence of certain factual allegations, which is wholly permissible on a motion to dismiss for failure to state a claim.

[3] While the motion to dismiss was under advisement, three additional proposed plaintiffs sought intervention in the case based on revised disconnection notices they received in November 2020. These proposed intervenors also requested this Court issue a temporary restraining order or preliminary injunction prohibiting CMP from using putatively misleading disconnection notices during the winter. The Court will address those issues in a separate order after it has been fully briefed.

of which must be taken as admitted . . . ." *Packgen, Inc. v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2019 ME 90, ¶ 16, 209 A.3d 116 (citations omitted). While the Court must accept as true all well-pleaded factual allegations in the complaint, it is "not bound to accept the complaint's legal conclusions." *Bowen v. Eastman*, 645 A.2d 5, 6 (Me. 1994) (citing *Robinson v. Washington Cnty.*, 529 A.2d 1357, 1359 (Me. 1987)). "A dismissal is only proper when it appears beyond doubt that [the] plaintiff is entitled to no relief under any set of facts that [it] might prove in support of [its] claim." *Packgen*, 2019 ME 90, ¶ 16, 209 A.3d 116 (alterations in original).

A complaint only needs to consist of a short and plain statement of the claim to provide fair notice of the cause of action. *Johnston v. Me. Energy Recovery Co., Ltd. P'ship*, 2010 ME 52, ¶ 16, 997 A.2d 741. While Maine is a notice pleading state, that does not mean a plaintiff can "proceed on a cause of action if that party's complaint has failed to allege facts that, if proved, would satisfy the elements of the cause of action." *Burns v. Architectural Doors & Windows*, 2011 ME 61, ¶¶ 16-17, 19 A.3d 823. Thus, the plaintiff must "allege facts sufficient to demonstrate that [she] has been injured in a way that entitles . . . her to relief." *Id.* ¶ 17. When it comes to allegations of fraud, the law requires a plaintiff to plead those allegations with particularity. *See Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 6, 54 A.3d 710; *Bean v. Cummings*, 2008 ME 18, ¶ 8, 939 A.2d 676; M.R. Civ. P. 9(b).

ALLEGATIONS

The following are the allegations made by Plaintiffs. Plaintiffs Deane, Lavender, Mitchell, Nelson, and Solano are residential customers of CMP living in various parts of the State. (Pl.s' SAC ¶¶ 31-35, 39, 44, 53, 58, 65-66.) Each received notice(s) from CMP either in 2019 or early 2020 threatening disconnection if payment was not made. (Pl.s' SAC ¶¶ 40-41, 46-47, 53-54, 59, 61, 66, 70.) Plaintiffs claim that receiving these notices under the perceived threat of losing their

power in the winter months caused extreme distress to each of the Plaintiffs. (Pl.s' SAC ¶¶ 43, 50, 52, 57, 60, 63, 68, 72, 74.) The relevant background of Plaintiffs' complaint revolves around the prohibition against disconnecting residential customers' electricity during winter months without securing the requisite approvals first and CMP's related disconnection notices.

CMP transmits and delivers electricity to more than 624,000 customers in an 11,000-square-mile area in Maine. (Pl.s' SAC ¶ 6.) It bills its residential customers for the transmission and distribution services, and bills for electric power purchased by these customers, whether pursuant to the "Standard Offer" or contracts with purveyors of electric power transmitted and distributed by CMP. (Pl.s' SAC ¶ 7.) CMP retains the right to disconnect its service and stop the provision of electricity to customers who fail to pay bills rendered by CMP for transmission and distribution services rendered and electric power supplied, if allowable under the rules governing such practices. (Pl.s' SAC ¶ 8.) As a public utility subject to regulation by the Maine Public Utilities Commission ("PUC" or the "Commission"), it is required to abide by rules promulgated by the PUC in many of its practices, including its disconnection practices. (Pl.s' SAC ¶ 8.)

The PUC has promulgated rules governing CMP as well as other Maine gas and electric public utilities that regulate many aspects of the disconnection procedure and forbid disconnection in certain cases. (Pl.s' SAC ¶ 9.) These rules are collected at Chapter 815, Section 10 of the Maine Code of Administrative Regulations. (Pl.s' SAC ¶ 9.) Since 2008 the PUC has had in effect certain special rules that restrict and govern the right of CMP to disconnect customers during a "Winter Disconnection Period" extending from November 15 to April 15 in each year (Chapter 815, Section 2(GG)), used in order to protect vulnerable consumers from potentially severe hardship caused by loss of electricity during the winter months (the "Winter Disconnection Rules")). (Pl.s' SAC ¶ 9.) These rules are set forth at Section 10(M) of Chapter 815 and provide

in pertinent part as follows:

> M. Winter disconnection of residential customers
> [. . .]
> 2. Failure to make personal contact with customer
> [. . .]
> b. Occupied premises. If the utility is unable to make personal contact with the customer after at least one visit to the residential unit and is uncertain after an on-site inspection whether the unit is inhabited, the utility shall provide a written Notice of Customer Rights by first class mail to the last recorded billing address of the customer. This Notice shall be accompanied by a warning that if a response is not received by the utility within five business days, the utility may either seek permission to disconnect from the [Consumer Assistance and Safety Division ("CASD" or "CAD")] or may cycle disconnect the customer pursuant to paragraph 3 below. If a response is received within five business days after the receipt date of the mailing, the utility shall proceed in accordance with the requirements of Section 9(F)(5). If no response has been received by the utility within five business days after the receipt date of the mailing or the mailing is returned to the utility undelivered, the utility may seek permission to disconnect from the CASD pursuant to paragraph 4 below or may cycle disconnect pursuant to paragraph 3 below.
> [. . .]
> 4. CASD permission required to disconnect in winter
>
> a. During the Winter Disconnection Period, a utility may not disconnect any customer except in one of the following circumstances and only after it has received the authorization of the CASD:
>
> i. The customer rejects the opportunity to make a payment arrangement, if applicable, or does not agree to the terms specified by the CASD.
> ii. The customer fails to comply with the terms of a second or subsequent Special Payment Arrangement or the terms of any other payment arrangement, if applicable.
> iii. The utility is not able to make contact with the customer as specified in Section 10(M)(2) above.
>
> b. Any utility seeking to disconnect a customer shall submit its request including all supporting reasons in writing and send a copy to the customer. The CASD will render its decision as soon as possible, which decision shall be confirmed in writing. In making a

> decision with respect to such authorization, the CASD shall consider the individual circumstances of the customer, including the customer's efforts with respect to communication and cooperation with the utility and the CASD, ability to pay, need for utility service during the Winter Disconnection Period, and compliance with the provisions of previous Special and Regular Payment Arrangements and shall also consider the utility's compliance with the requirements of this subsection with respect to the customer. In denying a request to disconnect, the CASD may set the terms for a payment arrangement for the customer.

(Pl.s' SAC ¶ 9.)

The purpose of Section 10(M)(4) is to ensure that CMP's decision to disconnect an existing residential customer during the winter season, when disconnection could have drastic effects on the customer's health and very survival, has been reviewed by the CAD of the Commission to determine whether such disconnection should be allowed under the criteria set forth in subsection (10)(M)(4)(b) above and that the customer has a last opportunity to appeal to the CAD for relief from the disconnection before it takes place. (Pl.s' SAC ¶ 10.) Among the purposes of Section 10(M)(2) is to ensure that customers are fully informed of what they need to do to avoid disconnection and when the earliest date their power can be disconnected if they don't contact CMP, as well as to identify CMP's duty to customers who contact CMP within five business days of a customer's receipt of the Notice of Customer Rights. (Pl.s' SAC ¶ 11.)

It is CMP's customary practice to conduct a premises visit and simultaneously deliver to the customer the Notice of Customer Rights only after the stated "disconnection date" on the disconnection notice CMP previously sent to the customer has passed without the customer satisfying CMP. (Pl.s' SAC ¶ 12.) Thus, CMP knows the recipient of CMP's Notice of Customer Rights and other communications described has previously been told that their electric service was scheduled for disconnection. (Pl.s' SAC ¶ 13.) Throughout CMP's disconnection process, that is, its use of its winter disconnection communications, CMP intends for the customer to believe the

customer must pay their account balance in full or enter into a payment arrangement plan that CMP dictates in order to avoid unilateral disconnection, which does cause customers to make immediate payments in order to avoid disconnection. (Pl.s' SAC ¶¶ 14-15.) CMP's form disconnection notice described above is the same form CMP utilizes year-round, including the non-winter months where CMP does possess and exercise its authority to disconnect service when customers do not satisfy CMP prior to the stated disconnection date on said notice. (Pl.s' SAC ¶ 16.)

Plaintiffs allege that these disconnection notices and other communications to its customers regarding disconnection of their services during the Winter Disconnection Period subject to Chapter 815, Subsection 10(M) deceptively fail to inform the customers to whom such communications were directed that the threatened disconnection can only take place with the consent of the CAD, and thus give the misleading impression that the customers will be disconnected without recourse at the sole discretion of CMP. (Pl.s' SAC ¶ 17.) Plaintiffs further allege that these notices purposely deprive the customer of information she is entitled to as part of a strategy to impose emotional distress and force a customer to make payment as soon as possible, irrespective of what the Chapter 815 regulations require. (Pl.s' SAC ¶ 18.) Plaintiffs contend CMP's intent is evidenced through, among other things, (i) CMP's prior efforts to obtain Commission approval for use of certain language in its winter disconnection notices and its actions in response thereto, (ii) the express language used in CMP's notices and letters, and (iii) the language CMP is required to use but which CMP omits. (Pl.s' SAC ¶ 20.)

By letter dated February 22, 2015, Susan E. Cottle, then the Deputy Director of the CAD, warned CMP that the following statement CMP was then including in its Notice of Customer Rights form was contrary to the Chapter 815 regulations: "Failure to contact us may result in disconnection of your electric service. Approval of the Consumer Assistance Division of the

Maine Public Utilities Commission is not required." (Pl.s' SAC ¶ 21.) On October 7, 2015, just prior to the commencement of the 2015/2016 Winter Disconnection Period, CMP submitted to the PUC a request for waiver from the requirement to use the verbatim language of Appendix A to Chapter 815 "and instead use a modified version that still complies with the intent and requirements of Sections 10(M)(5)(b) and (6)." (Pl.s' SAC ¶ 22.) Attached to its request for waiver was CMP's proposed new Notice of Customer Rights form. (Pl.s' SAC ¶ 23.) CMP's requested modifications to the form Notice of Customer Rights the Chapter 815 regulations require included eliminating language referencing the availability of a Special Payment Arrangement, and also included the same language quoted above which the CAD warned CMP in February 2015 was not allowed. (Pl.s' SAC ¶ 24.) Noticeably absent from CMP's request and explanation as to how their proposed new form Notice of Customer Rights differed from Appendix A but yet still complied with the Chapter 815 regulations, was CMP's inclusion of the language CMP was warned in February 2015 that it could not use. (Pl.s' SAC ¶ 25.)

In response to the waiver request, Susan Cottle emailed Ann Brooks on October 8, 2015, to inform her that "as written, the request will not be granted" since the language of concern was "problematic" and "not only different from what is in Appendix A, it is in direct contradiction to Section 10(M)(4)(a)." (Pl.s' SAC ¶ 26.) CMP then revised its request to eliminate the problematic language from its proposed new Notice of Customer Rights. (Pl.s' SAC ¶ 27.) This request was granted. (Pl.s' SAC ¶ 27.) CMP then removed the problematic language from its Notice of Customer Rights, but that has not stopped CMP from threatening customers in writing with this language tens of thousands of times over the subsequent four Winter Periods with clear knowledge of the impropriety of doing so. (Pl.s' SAC ¶ 28.)

CMP has utilized two other types of disconnection notices since at least the commencement

of the 2015/2016 Winter Disconnection Period, which CMP calls its "PV Notice" and its "Letter 180." (Pl.s' SAC ¶ 29.) The PV Notice and Letter 180 were self-created by CMP and have been used abusively as part of CMP's winter disconnection process in order to impose maximum pressure and emotional upset on the customer to make immediate payment to CMP. (Pl.s' SAC ¶ 29.) CMP has utilized its PV Notice and Letter 180 in a manner that obfuscates and directly misstates the winter disconnection process mandated by Chapter 815 to the detriment of the customer, in part by incorrectly stating to the customer that if they fail to contact CMP, CMP can disconnect their electric service during the winter months without the approval of the Commission. (Pl.s' SAC ¶ 30.)

ANALYSIS

On the basis of the above allegations, Plaintiffs bring claims for fraud (one requesting legal relief and one requesting "equitable relief" in the form of CMP returning to Plaintiffs payments made in response to the disconnection notices), negligent misrepresentation, what purports to be a statutory claim under 35-A M.R.S. § 1501, a claim for violation of the Maine Unfair Trade Practices Act ("MUTPA"), and a claim for intentional infliction of emotional distress ("IIED").[4] CMP raises a broad argument for dismissal of all six claims for relief, namely that Plaintiffs have not alleged facts supporting cognizable harm. CMP also raises alternative arguments for dismissal of the "equitable relief" fraud claim, the section 1501 claim, and the IIED claim.

1. Counts I through V

CMP argues for dismissal of all claims due to the lack of allegations of cognizable harm. One of the arguments for this is that emotional distress is not a cognizable harm when the underlying alleged wrongdoing is misrepresentation. This would seemingly apply to the IIED

[4] Plaintiffs also included a request for punitive damages.

claim as well as all other claims. As the Court will discuss in the next section, however, it does not view the alleged underlying tort being a misrepresentation as precluding the IIED claim. Therefore, the Court covers only Plaintiffs' first five claims (both variations of fraud, negligent misrepresentation, violation of section 1501, and violation of MUTPA) in this section.

The Court concludes that CMP's primary argument is dispositive of all claims other than the IIED claim, and therefore requires dismissal of Count I (fraud), II ("equitable relief" fraud), III (negligent misrepresentation), IV (violation of section 1501), and V (violation of MUTPA). This argument is that none of the Plaintiffs make any allegations regarding pecuniary harm. Specifically, CMP points out that three Plaintiffs (Deane, Lavender, and Mitchell) do not allege making any payments at all in response to the disconnection notices. Instead, Plaintiffs broadly allege "that CMP customers have made burdensome payment decisions that they would not have made were they accurately informed about the requirement that CMP obtain CAD consent to proposed disconnections . . . ." (Pl.s' SAC ¶ 19.) Nonetheless, in order to state claims for relief, Plaintiffs must "allege facts sufficient to demonstrate that [they] ha[ve] been injured in a way that entitles . . . [them] to relief." *Burns*, 2011 ME 61, ¶ 17, 19 A.3d 823. This is especially clear with the fraud, negligent misrepresentation, and MUTPA claims, each of which can only survive this stage upon allegations of a *financial* loss.[5]

[5] For this reason, Plaintiffs' allegations of harm in the form of the disconnection notices causing them to be "unable to raise questions and defenses to CMP's charges" are not sufficient to constitute cognizable harm. (Pl.s' SAC ¶ 89.) Moreover, even if 35-A M.R.S. § 1501 were deemed to be a stand-alone cause of action, the Court does not believe it could permit recovery for anything other than pecuniary harm. Thus, the requirement of pecuniary harm is as relevant to the section 1501 claim as it is to the fraud, negligent misrepresentation, and MUTPA claims. As CMP notes, freestanding emotional distress damages are particularly circumscribed in Maine law and rarely available. *See, e.g.*, *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, ¶ 15, 711 A.2d 842 (requiring "atrocious" and "utterly intolerable" conduct for IIED claims). If the Legislature had intended to create an avenue to circumvent Maine's limitation on freestanding emotional distress damages, it would have said so clearly. *Cf. Fuhrmann v. Staples the Office Superstore E., Inc.*, 2012 ME 135, ¶ 34, 58 A.3d 1083 ("If the Legislature had intended to create individual supervisor liability it would have done so explicitly in much clearer terms.").

In Maine, in order to sufficiently plead a fraud claim, a plaintiff must allege (under M.R. Civ. P. 9(b)'s more stringent standard) the following facts: (1) a party made a false representation; (2) the representation was of a material fact; (3) the representation was made with knowledge of its falsity or in reckless disregard of whether it was true or false; (4) the representation was made for the purpose of inducing another party to act in reliance upon it; and (5) the other party justifiably relied upon the representation as true and acted upon it to the relying party's damage. *Barr v. Dyke*, 2012 ME 108, ¶ 16, 49 A.3d 1280 (citing *Flaherty v. Muther*, 2011 ME 32, ¶ 45, 17 A.3d 640); *see generally Jourdain v. Dineen*, 527 A.2d 1304, 1307 (Me. 1987) ("[P]ecuniary loss is an essential element of a fraud action and . . . damages for emotional or mental pain and suffering are not recoverable."); 2 Harvey & Merritt, *Maine Civil Practice* § 9:2 at 384 (3d, 2011 ed.) (emphasis added) ("The misrepresentation itself, including its materiality, the reliance thereon *and the damages resulting therefrom*, must be set forth with particularity."). Next, in order to plead a claim for a violation of MUTPA, a complaint must contain facts sufficient to show the Plaintiffs (1) purchased services (2) primarily for personal use and (3) suffered monetary loss (4) caused by (5) an unfair or deceptive trade practice. *See* 5 M.R.S. § 213(1); *see generally Tungate v. MacLean-Stevens Studios, Inc.*, 1998 ME 162, ¶ 13, 714 A.2d 792 (quotation marks omitted) ("To be entitled to the remedial measures authorized by the UTPA, the [plaintiffs] must show a loss of money or property as a result of the UTPA violation."). Lastly, the tort of negligent misrepresentation is defined as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for *pecuniary loss* caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Chapman v. Rideout, 568 A.2d 829, 830 (Me. 1990) (emphasis added) (quoting Restatement (Second) of Torts § 552(1) (1977)).

Here, none of the Plaintiffs allege any harm even approaching pecuniary harm. Most crucially, Plaintiffs set the bar high for the allegations of damages by bringing a fraud claim, which, as noted above, requires stating damages suffered in reliance on the misrepresentation with particularity. Though the negligent misrepresentation and MUTPA claims are not subject to heightened pleading, there would be a practical trickle-down effect from the damages allegations for fraud to the damages allegations for negligent misrepresentation and MUTPA because all require allegations of pecuniary harm. Conversely, the fact that Plaintiffs do not allege any form of pecuniary harm under even an unheightened pleading standard is particularly fatal to the fraud allegations.

In opposition to CMP's motion, Plaintiffs point to several specific paragraphs of the current iteration of the complaint. Two allege specific acts of payment:

- "In direct response to and in reliance upon these threats of immediate and unilateral disconnection, Plaintiff Nelson entered into a payment arrangement with CMP, wherein she agreed to pay $60.00 per month toward her outstanding balance in addition to her monthly usage." (Pl.s' SAC ¶ 62); and
- "Plaintiff Solano made payment to CMP in the amount of $235.03 on January 13, 2020, which was the amount cited in the disconnection notice as the 'Amount to stop disconnection' in direct response to and in reliance upon CMP's misrepresentations and threats of imminent disconnection." (Pl.s' SAC ¶ 69).[6]

[6] Though not pointed to in opposition by Plaintiffs, Plaintiff Solano alleged making an additional payment to CMP: "Plaintiff Solano made payment to CMP in the amount of $315.25 on February 11, 2020, which was the amount cited in the disconnection notice as the 'Amount to stop disconnection' in direct response

Otherwise, Plaintiffs point to the general recitation of elements of each claim.[7] (Pl.s' SAC ¶¶ 88, 99, 106, 112.)

Notably lacking from even the most generous readings of any portion of the complaint are allegations that any Plaintiffs paid money they did not owe based on these notices.[8] Plaintiffs Nelson and Solano do at least allege making payments in response to the notices, but neither alleges the amounts owed were wrong in any way. Neither side pointed the Court to a Maine case on the issue of whether payment of a presumably valid debt in response to allegedly deceiving notices could constitute pecuniary harm. CMP did point to two cases from other jurisdictions supporting the notion that payment of an otherwise valid debt is not a type of pecuniary harm. The Court finds to be logically sound the proposition that paying a debt owed is not pecuniary harm. *See Moritz v. Daniel N. Gordon, P.C.*, 895 F. Supp. 2d 1097, 1116-17 (W.D. Wash. 2012) (reviewing caselaw and concluding "that Ms. Moritz cannot recover the amounts she paid to DNG because those amounts were less than the total amount she owed to CACV on a valid debt"); *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1406, 48 Cal. Rptr. 3d 770, 779 (2006)

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to and in reliance upon CMP's misrepresentations and threats of imminent disconnection." (Pl.s' SAC ¶ 73.)

[7] The Court does not see rote recitation of general damages allegations to be sufficient in the context of this case where Plaintiffs Solano and Nelson make specific allegations of payment in response to the notices. This is particularly so when it comes to alleging damages for fraud. *See Ramsey v. Baxter Title Co.*, 2012 ME 113, ¶ 7, 54 A.3d 710 (finding inadequate "merely recit[ing] in conclusory fashion the elements of a fiduciary relationship," i.e., another claim subject to heightened pleading). Notwithstanding other deficiencies that are fatal to the claims highlighted above, there does not appear to be any reason why Plaintiffs Deane, Lavender, and Mitchell could not have made such specific allegations regarding payment in response to notices had they made such payments.

[8] Plaintiffs' opposition appears to posit that the bills *may* have been inaccurate: "The named Plaintiffs . . . strongly dispute the accuracy of CMP's metering and billing," and "It is plausible that these Plaintiffs did not actually owe all that was being demanded of them." (Pl.s' Opp. 1 n.1 & 10.) Moreover, during the hearing, Plaintiffs' counsel stated he believed the complaint contained allegations regarding the inaccuracy of Plaintiffs' bills, but the Court could not find any in the complaint. Assertions in briefs and at hearing are not allegations in the complaint, which is lacking any allegations that Plaintiffs were billed improper amounts or paid amounts not actually owed in response to disconnection notices.

("Since Camacho was liable for the damages arising from the accident, it does not violate his rights to attempt to collect those damages. In other words, he was not injured."). *But see McMahon v. LVNV Funding, LLC*, 301 F. Supp. 3d 866, 882 (N.D. Ill. 2018) ("The Court agrees with plaintiff that the amount class members paid as a result of receiving deceptive dunning letters is at least a permissible measure of damages under the FDCPA, and it may well be a proper measure of damages in this case.").

Plaintiffs do contend in general recitations of claims that "their funds were misdirected," (E.g., Pl.s' SAC ¶ 89), but this does not state any sort of pecuniary harm. Had Plaintiffs alleged, for example, that these purportedly deceptive notices caused them immediately to pay CMP because they thought they had no other option, and they then lacked funds to pay their mortgages and the bank foreclosed on the mortgages and secured deficiency judgments as a result, then they would have a stronger argument that they alleged pecuniary harm because their funds were misdirected. Yet, the complaint contains nothing of the sort. Simply stating "funds were misdirected" does not automatically equate to allegations of pecuniary harm.

Because Plaintiffs did not allege for Counts I through V any facts to state they suffered cognizable harm, these claims must be dismissed. Even if this were not enough, the Court agrees with CMP that Plaintiffs' repurposing of the fraud claim in Count II to request the return of payments made as "equitable relief" does not state a claim for relief beyond that in Count I (which, as discussed, must be dismissed). "Where a plaintiff seeks damages as full compensation for an injury, the claim is legal . . . ." *DesMarais v. Desjardins*, 664 A.2d 840, 844 (Me. 1995) (citation omitted) (quotation marks omitted). On the other hand, equitable claims are "those requiring creative, injunctive, or unique action by the court . . . ." *Thermos Co. v. Spence*, 1999 ME 129, ¶ 18, 735 A.2d 484. Asking for money damages as a form of "equitable relief" is inherently

contradictory unless the claim is for rescission of the transaction. As CMP notes, however, it would be impossible for Plaintiffs to return electricity used which therefore means Plaintiffs are not seeking a rescission of the transaction. Because the essence of fraud is pecuniary harm (i.e., money damages), *Jourdain*, 527 A.2d at 1307, Count II does not state a claim for relief. Additionally, the Court does not view 35-A M.R.S. § 1501 as providing a freestanding cause of action. It simply confirms that individual persons are not deprived of pursuing common law causes of action if they are harmed by a utility's violation of title 35-A. Otherwise, the Law Court's footnote in *Smith* would be superfluous: "By statutes and by common law, violation of a safety statute or regulation may be evidence of negligence but does not constitute negligence per se. *See* 35-A M.R.S. §§ 1501, 2305-A(1)(C), (2), (5) (2009); *Castine Energy Constr., Inc. v. T.T. Dunphy, Inc.*, 2004 ME 129, ¶ 10, 861 A.2d 671, 675; *French v. Willman*, 599 A.2d 1151, 1152 (Me. 1991)." *Smith v. Cent. Me. Power Co.*, 2010 ME 9, ¶ 10 n.3, 988 A.2d 968.

For the foregoing reasons, Counts I through V must be dismissed.

2. The IIED claim

As the Court noted above, it does not view the alleged underlying tort being a misrepresentation as precluding the IIED claim. There are two reasons for this. First is the case in which the Law Court vacated a dismissal of an IIED claim in an action involving numerous misrepresentations by the defendant. *See Rubin v. Matthews Int'l Corp.*, 503 A.2d 694, 700 (Me. 1986) ("Although Matthew's misrepresentations in this case were not so extensive, given the allegations of repeated misrepresentation of a timely delivery of the monument for the unveiling ceremony and the circumstances in which they were made, we conclude that the complaint states a cause of action for intentional infliction of emotional distress."). Second is Justice Hjelm's sound and persuasive analysis in a Superior Court decision issued on a closely analogous issue. In that

case, the defendant "argue[d] that [the plaintiff] may not maintain an action for IIED in count 3, because the latter claim has the same factual basis as the misrepresentation claim, and because she cannot recover non-pecuniary damages for misrepresentation, she cannot recover them for IIED." *Wood v. Patrons Oxford Mut. Ins. Co.*, No. CV-03-238, 2004 Me. Super. LEXIS 137, at *12 (June 30, 2004). Though Justice Hjelm noted that the "argument enjoy[ed] superficial support in Maine law," he focused on the fact that "'*any person may be liable* for the infliction of emotional distress if the conduct causing the harm is sufficiently outrageous and is intentional or reckless . . . .'" *Id.* at *12-13 (quoting *Curtis v. Porter*, 2001 ME 158, ¶ 17, 784 A.2d 18). He ultimately concluded that the "claim for non-pecuniary damages is not foreclosed as a matter of law because of any identity of factual allegations between her claims for misrepresentation and IIED." *Id.* at *13. The Court does not view *Veilleux* as binding on this point because it did not involve an IIED claim. *See Veilleux v. Nat'l Broad. Co.*, 206 F.3d 92, 130 (1st Cir. 2000). Therefore, the Court proceeds to determine whether, as a matter of law, Plaintiffs have alleged conduct sufficiently extreme and outrageous for the IIED claim to withstand the motion to dismiss.

Simply put, though it is a close call, taking Plaintiffs allegations as true (including the disconnection notices attached to the complaint) as the Court must at this stage, the Court concludes Plaintiffs have alleged enough. In order to withstand a motion to dismiss for failure to state an IIED claim, Plaintiffs must allege facts regarding the following elements:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from her conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable [person] could be expected to endure it.

Curtis, 2001 ME 158, ¶ 10, 784 A.2d 18 (quotation marks omitted). "The determination of whether the facts alleged are sufficient to establish that the defendant's conduct is 'so extreme and outrageous to permit recovery' is a question of law for the court to decide." *Argereow v. Weisberg*, 2018 ME 140, ¶ 27, 195 A.3d 1210. The parties directed the Court to federal court cases they viewed as being factually analogous, but the Court chose to canvas Law Court cases to determine what conduct has and has not been deemed sufficiently extreme and outrageous in order to determine where Plaintiffs' allegations here fall on that spectrum. While not every case discussed herein was decided at the 12(b)(6) stage, the Court nonetheless views them as relevant to consider because they help inform the question of law regarding what level of conduct can be enough to proceed on an IIED claim.

Two cases in which the Law Court viewed the conduct at issue to be insufficient are *Argereow*, 2018 ME 140, 195 A.3d 1210, and *Champagne v. Mid-Maine Med. Ctr.*, 1998 ME 87, 711 A.2d 842. In *Argereow*, the plaintiff alleged that she was a former employee at one of Weisberg's medical offices and that Weisberg communicated negative information to someone at Mercy Hospital when the plaintiff was set to begin employment there, which resulted in Mercy suggesting she withdraw her application. 2018 ME 140, ¶¶ 3-8, 195 A.3d 1210. The Law Court concluded that the plaintiff's allegations "that Mercy acted on Weisberg's report concerning her professional qualifications and performance, where he suggested that she was professionally incompetent, by encouraging her to withdraw her employment application . . . [, a]s a matter of law, . . . falls short of the standard for actionable conduct necessary for a claim for intentional infliction of emotional distress." *Id.* ¶ 28. In *Champagne*, the plaintiff was a mother who gave birth to a son at the hospital; a nursing student mistakenly took the child to a different maternity patient who breastfed the child for three to five minutes before anyone realized it was the wrong

mother; no adverse effects to the child were reported; and plaintiff-mother did not see any of this occur. 1998 ME 87, ¶ 2, 711 A.2d 842. The Law Court saw no error in the trial court's grant of summary judgment based on the lack of extreme and outrageous conduct:

> It is undisputed that Hutchins brought Makita to a maternity patient who was not his mother; that Makita was permitted to nurse from the maternity patient for three to five minutes; that Makita was returned promptly and unharmed to the nursery when the error was discovered; and that Champagne was notified of the incident about one hour after it occurred. Such conduct, while troubling and unfortunate, cannot be characterized as "so extreme and outrageous as to exceed all possible bounds of decency in a civilized community."

Id. ¶ 16. Neither of these cases involved anything close to—as alleged here—the deceptively misleading actions meant to invoke emotionally distressed reactions over an individual or family's functional livelihood in the harsh Maine winter months.

On the other hand, the Court reviewed two Law Court IIED cases that contain factors more relevant to the present action. Those two cases are *Rubin v. Matthews Int'l Corp.*, 503 A.2d 694 (Me. 1986), and *Bratton v. McDonough*, 2014 ME 64, 91 A.3d 1050. In *Rubin*, the plaintiff ordered a memorial stone for her mother's grave from the defendant and the defendant was aware of the religious significance of the memorial stone. 503 A.2d at 696. The defendant repeatedly reassured the plaintiff that it had shipped, and that it would arrive before the ceremony, even though the defendant instead shipped it only five days before the ceremony and the stone did not arrive in time. *Id.* The trial court had granted the defendant's 12(b)(6) motion to dismiss because it did not view the conduct as sufficiently extreme and outrageous, but the Law Court determined otherwise:

> Where reasonable men may differ, it is for the jury, subject to the control of the Court, to determine whether, in a particular case, the conduct has been sufficiently extreme and outrageous to result in liability. . . . [G]iven the allegations of repeated misrepresentation

> of a timely delivery of the monument for the unveiling ceremony and the circumstances in which they were made, we conclude that the complaint states a cause of action for intentional infliction of emotional distress. *See* Restatement (Second) of Torts § 46 comment d, at 73. Our conclusion draws further support from the alleged contractual nature of the relationship between the parties. *See* D. Givelber, *The Right to Minimum Social Recovery and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Col. L. Rev. 42, 69 (1982) (courts most likely to recognize a claim of outrageousness when the parties are "apparently bound by contracts regulating an economic relationship"). Thus, the allegations of this complaint sufficiently set forth conduct upon which liability for intentional infliction of emotional distress may be predicated.

Id. at 699-700. The Court finds two aspects of *Rubin* particularly noteworthy. First is the circumstance of the knowing misrepresentations by the defendant. Second is the Law Court's citation regarding outrageousness being more likely to be found when parties are bound by contracts regulating an economic relationship, such as the relationship between CMP and its customers to whom it provides electricity in exchange for money. For these reasons, the Court sees this case as relevant here.

Further, in *Bratton*, the trial court had granted judgment as a matter of law at a trial to a landlord because it concluded the following was not sufficiently extreme and outrageous:

- Plaintiffs (adults and their minor children) rented a house from the defendant-landlord in which they were exposed to lead paint (evidenced by the blood of children having elevated levels of lead);
- The landlord originally denied that the paint had lead, which led to plaintiffs continuing to live in the home;
- Plaintiffs then had a third child who was born while living there with elevated lead levels in blood, which prompted DHHS to become involved at this point, test the paint, and determine the presence of lead; and,

- The landlord was statutorily required to relocate the plaintiffs to another residence, but he refused to pay for it which prevented it from happening for several months; the plaintiffs were forced to continue to live in the lead-laden house.

2014 ME 64, ¶¶ 2-4, 91 A.3d 1050. The Law Court concluded it was error for the trial court to grant judgment as a matter of law:

> Viewed in the light most favorable to the plaintiff, the evidence shows that McDonough allowed a family with young children to live in a house that exposed the children to toxic levels of lead for several years. It further shows that, even after the house had been declared a lead hazard by the State and although McDonough had a legal duty to relocate the Brattons, he failed to do so for four months. We cannot say as a matter of law that no reasonable juror could find McDonough's actions extreme and outrageous.

Id. ¶ 23. While the conduct in *Bratton* was more extreme and outrageous than the conduct alleged here because it tangibly affected the health and safety of the plaintiffs (whereas here CMP's alleged conduct instilled fears of health and safety effects), it is not irrelevant to the Court's consideration. This is particularly so when the circumstances in both situations revolve around an indispensable necessity in life: functional shelter.

Here, Plaintiffs allege that CMP—despite knowing the Consumer Assistance Division of the Maine Public Utilities Commission did not approve of language in disconnection notices stating that the CAD or PUC's approval was not needed to disconnect in winter—continued to send notices out containing such language, as evidenced by several of the exhibits attached to the complaint and the allegations in paragraphs 40-41, 46, 54, and 59. According to the allegations in the complaint, these notices were sent essentially to compel CMP's customers into paying money before it may otherwise have been necessary to pay. Plaintiff Solano is the only one who does not allege receiving such a notice, but she does allege that the notice did not contain information that makes the other notice misleading in a different context. In other words, she alleges that the notice

did not indicate to her that CAD's approval was necessary to disconnect which, though not as misleading as notices stating CAD's approval was not necessary, still has the overwhelmingly negative effect as alleged by Plaintiffs in the complaint. When the foregoing is considered in the context of an existential necessity in the Maine winter months, the Court cannot say Plaintiffs have failed to allege conduct that is sufficiently extreme and outrageous. *Cf. Colford v. Chubb Life Ins. of Am.*, 687 A.2d 609, 616 (Me. 1996) (alteration omitted) (quotation marks omitted) ("Where reasonable people may differ, it is for the jury . . . to determine whether, in a particular case, the conduct has been sufficiently extreme and outrageous to result in liability."). Therefore, CMP's motion to dismiss the IIED claim is denied.

CONCLUSION

As the Court has detailed, Count I (fraud), II ("equitable relief" fraud), III (negligent misrepresentation), IV (violation of section 1501), and V (violation of MUTPA) must be dismissed due to a failure to allege cognizable harm. On the other hand, the Court denies the motion to dismiss regarding the IIED claim.

The entry is:

1. Defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**.
2. The following counts are dismissed: I (fraud), II ("equitable relief" fraud), III (negligent misrepresentation), IV (violation of section 1501), and V (violation of Maine Unfair Trade Practices Act).
3. The motion is denied regarding Count VI (intentional infliction of emotional distress).
4. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: December 7, 2020

/s/M. Michaela Murphy
Hon. M. Michaela Murphy
Justice, Maine Superior Court