CISG-online 6047	
Jurisdiction	U.S.A.
Tribunal	U.S. District Court for the Central District of California
Date of the decision	01 June 2022
Case no./docket no.	2:21-cv-06518-SB-ADS
Case name	*Goodman Food Products, Inc. v. Sunrise Foods Int'l Inc.*

Order on Joint Motions for Summary Judgment or Summary Adjudication

Stanley Blumenfeld, Jr., U.S. District Judge

Plaintiff Goodman Food Products, Inc. d/b/a Don Lee Fanns (DLF) purchased more than 100,000 pounds of sunflower seeds from Defendant Sunrise Foods International Inc. (Sunrise) for use in DLF's food products. DLF contends that the seeds were contaminated with rocks and other foreign material and that after discovering the contamination, DLF was unable to sell its products made from the contaminated seeds, resulting in lost profits and other related damages totaling nearly $1 million. Both parties now seek summary judgment on a variety of claims and issues. The Court finds this matter suitable for decision without oral argument. Fed. R. Civ. P. 78; L.R. 7-15. DLF's negligence and common count claims fail as a matter of law, and DLF is not entitled to recover attorney's fees, but fact issues preclude summary judgment on the other issues raised by the parties. 1

I. Background

DLF produces food products, including Organic Veggie Bites, Organic Cauliflower Bites, and Organic Veggie Patties, which it sells to wholesalers, retail grocery stores, school districts, and other customers. Sunrise specializes in the sourcing and sale of agricultural commodities, including organic sunflower seeds. DLF uses sunflower seeds in some of its products. 2

In May 2020, Sunrise offered to sell organic sunflower seeds to DLF. Joint Appendix of Facts (JAF) 1, Dkt. No. 21-2.[1] In July 2020, Sunrise sent DLF two documents about its products. One was a letter of continuing guarantee, which stated that Sunrise «guarantees that, as of the date of delivery, no products shall be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic act, and all guidelines of the act shall be followed» and «also guarantees compliance with all laws, and that merchandise shall be fit for their intended purpose, and shall pass without objection in trade.» The other was a specification sheet for 3

[1] Unless otherwise noted, citations to the JAF involve facts that are undisputed, including the undisputed portions of partially disputed facts.

Sunrise's «Organic Sunflower Kernels» product. The «Physical Properties» section of the specification sheet contained statements about purity and impurities, as follows:

PHYSICAL PROPERTIES	
KERNEL COUNT PER 28g	600 +/- 50
PURITY	Min. 99.95%
FOREIGN PLANT REMAINS	Max. 0.05%
MOISTURE	Max. 8%
IMPURITIES (metal, glass, and similar materials)	0
COLOR DEVIATION	Max. 2%
UNSHELLED KERNELS	Max. 0.2%
BROKEN KERNELS	Max. 8%

Dkt. No. 23-2 at 76 of 100.

4 In October 2020, DLF issued four purchase orders for Sunrise's organic sunflower seeds that are central to the parties' dispute: (1) Purchase Order I-PO132453, dated October 2, 2020, for 400 bags at $39.50 per bag; (2) Purchase Order I-PO133469, dated October 2, 2020, for 800 bags at $44.50 per bag; (3) Purchase Order I-PO133470, dated October 2, 2020, for 340 bags at $44.50 per bag; and (4) Purchase Order I-PO132796, dated October 21, 2020, for 40 bags at $39.50 per bag. Three of these contained identical terms and conditions stating that «[a]cknowledgment and or delivery of this purchase order confirms pricing, terms and conditions and quantities stated herein»; the record does not contain the terms and conditions for I-PO132796 because the parties were unable to locate them. The terms and conditions also provide that Sunrise «agrees to protect, indemnify, [and] defend Don Lee Farms ... from any and all losses of any type suffered as a result of [Sunrise's] product, including attorneys' fees and court costs.»

5 Sunrise issued four sales contracts for «Certified Organic Sunflower Kernels – Hulled» corresponding to the four purchase orders: (1) SC0000833, dated October 2, 2020 for 20,000 lbs. of sunflower seeds at $0.79 per lb.;[2] (2) SC0000871, dated October 21, 2020 for 40,000 lbs. of sunflower seeds at $0.79 per lb.; (3) SC0000979, dated December 10, 2020 for 40,000 lbs. of sunflower seeds at $0.89 per lb.; and (4) SC0000985, dated December 15, 2020 for 17,000 lbs. of sunflower seeds at $0.89 per lb. Each of the sales contracts Sunrise issued contained specifications similar to those in the specification sheet:

[2] It appears that each bag weighed 50 lbs. Thus, 400 bags at $39.50 per bag (the terms of the first purchase order) is the same as 20,000 lbs. at $0.79/lb. (the terms of the corresponding sales contract).

Specifications:

- Crop year: 2019
- Organic certification: NOP
- Broken Kernels Max 8%
- Kernel Count per 28g 600 +/- 50
- Purity Min 99.95%
- Foreign Plant Remians Max 0.05%
- Moisture Max 8%
- Impurities (metal, glass) 0%
- Color Deviation Max 2%
- Unshelled Kernels Max 0.2%

Sunrise delivered its sunflower seeds, which came from lots 270020186-08-1713 and 270020186-08-1538, in December 2020 and January 2021, and DLF paid for the seeds. In late January, a customer contacted DLF to report finding a metal wire in a sunflower burger produced by DLF. The next month, another customer reported a pebble in one of DLF's cauliflower bites. DLF began investigating, and on February 15 and 16, DLF's employees reported that they had discovered rocks and a piece of metal in seeds from Sunrise; by February 18, DLF stopped production of all products containing sunflower seeds.[3] 6

DLF notified Sunrise on February 15 that it had found foreign objects in Sunrise's seeds, and the parties corresponded about the issue for the next few days. DLF sent Sunrise a Corrective and Preventive Action Log (CAPA Log), which Sunrise completed and returned on February 18. In the «Root Cause» portion of the CAPA Log, Sunrise wrote: 7

> Stones/metal: it is not uncommon for stones to be in the raw material. Processing steps are in place to remove stones from sunflower kernels. In this case, due to a fault in the xray machine, some foreign material was not detected at this step of processing. During manual checks, some stones were detected and the product was therefore reprocessed and manually rechecked. Stones were not detected on the manual recheck.
>
> Hard seeds: per photos provided, it appears the hard seeds are soybeans which would fall under 'foreign plant remains' in the specification sheet at 0.05% max.

In the «Corrective Action» section, Sunrise wrote, «Xray machine fault was corrected. Staff received additional training and additional checks on xray machine were implemented. Number of quality analyses increased.» Sunrise also sent emails to its seed producer 8

[3] Sunrise does not dispute that DLF found rocks and metal in DLF's sunflower seeds or that DLF's employees sent the emails and photographs in the record reporting that the foreign objects came from batches of seeds DLF received from Sunrise, but it objects that DLF has not produced evidence from anyone with personal knowledge that the rocks and metal were found in Sunflower's seeds.

describing multiple complaints from customers, including one in which Sunrise appeared to implicitly acknowledge that the seeds did not meet its specifications, although Sunrise disputes any such acknowledgement.

Sunrise also hired a third-party cleaner to investigate, and the cleaner found stones in Sunrise's sunflower seeds. A «Run Report» apparently produced by the third-party cleaner in March 2021 included pictures of rejected items including stones and listed the «Grade Out %» as «1.29%,» although the document does not explain what the percentage represents and the parties dispute its meaning. 9

DLF had contracted with Costco to supply DLF's Veggie Bites for a promotion in which Costco projected it would sell 826,700 units during March and April of 2021. Costco's designated regions began placing purchase orders with DLF for Veggie Bites by late January 2021. But after its investigation, DLF placed a quality control hold on approximately 11,000 warehoused cases of two varieties of Veggie Bites made with Sunrise's sunflower seeds. DLF produces uncontroverted evidence that because of its quality control hold, DLF «fell short of its obligations to the various Costco regions, resulting in complaints from Costco and the cancellation of purchase orders.»[4] DLF contends that it suffered lost sales in excess of $790,000 for the Veggie Bites it produced from Sunrises seeds but was unable to sell, along with various other losses including the cost of returned seeds, overtime labor to produce the Veggie Bites, sorting costs, higher prices for replacement seeds, payment of an injured customer's dental claim, and payment of storage fees. Sunrise disputes both the necessity and amount of most of these claimed damages. 10

DLF sued Sunrise in state court, alleging claims for breach of contract, negligence, and common count and seeking to recover damages of at least $968,317. Sunrise removed the case based on diversity jurisdiction. In the joint motions for summary judgment, DLF argues that it is entitled to summary judgment on the following issues: (1) Sunrise breached the contract by delivering adulterated seeds, (2) Sunrise's breach caused DLF damages in the amount of $931,018.82, (3) Sunrise was negligent, and (4) Sunrise's negligence caused DLF damages in the amount of $931,018.82. Sunrise argues that it is entitled to summary judgment on the following issues, as numbered in the motion: (5) DLF cannot prove a breach of the purchase order identified in the complaint, (6) the contract does not provide for an award of attorney's fees to DLF, (7) DLF's request for lost sales damages is not recoverable, (8) DLF cannot recover damages for reputational harm, (9) DLF's negligence claim is barred by the economic loss doctrine, and (10) DLF has not alleged a viable common count claim. 11

II. Legal Standard

Summary judgment is appropriate where the record, taken in the light most favorable to the opposing party, shows «that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.» Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). «The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.» *Anderson*, 477 U.S. at 255. 12

[4] Sunrise's foundation objection in JAF 63 is overruled on this point.

The moving party has the initial burden of establishing that there are no disputed material facts. *Id.* at 256. «If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact ... the court may ... consider the fact undisputed.» Fed. R. Civ. P. 56(e)(2). Furthermore, «Rule 56[(a)] mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.» *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

A court «may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically referenced therein.» *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001). Arguments based on conjecture or unfounded belief do not raise a genuine issue of material fact. Moreover, «there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.» *R.W. Beck & Assocs. v. City of Sitka*, 27 F.3d 1475, 1481 n. 4 (9th Cir. 1994) (citing *Anderson*, 477 U.S. at 249). 13

III. Evidentiary Objections

In connection with the parties' joint summary judgment motion, they originally filed 192 pages of objections. The Court struck the original Joint Appendix of Objections (JAO) and ordered the parties to file an amended JAO containing only the objections that reflected genuine disputes between the parties and that were material to the Court's ruling. The parties then filed an amended 68-page JAO. Many of these objections still are not material to the Court's analysis, and the Court declines to address each objection individually. To the extent the Court relies on evidence to which an evidentiary objection was raised, the Court overrules the objection, having found the contents of the evidence could be admitted at trial. *See, e.g.*, *Sandoval v. County of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021) («If the contents of a document can be presented in a form that would be admissible at trial – for example, through live testimony by the author of the document – the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment.»). To the extent the Court does not rely on evidence objected to by the parties, the objections are overruled as moot. 14

IV. Discussion

A. Breach of Contract

1. Pleading Issues

Sunrise raises two challenges to DLF's breach of contract claim that relate to DLF's pleading, arguing that DLF impermissibly seeks to recover on factual and legal theories not contained in the complaint. DLF's complaint, which it filed in May 2021, identifies only a single contract (Purchase Order 1-PO133471, issued on October 2, 2020 for 800 bags of sunflower seeds) and alleges that the seeds were contaminated with foreign material, including rocks and hard non-sunflower seeds. It is undisputed that DLF cancelled this purchase order and did not receive 15

any seeds related to it. DLF instead seeks to recover for breach of contract related to four different purchase orders for which it did receive seeds. DLF also relies on terms in other documents not mentioned in the complaint and contends that Sunrise's breach included delivering seeds that contained metal, which was not expressly referenced in the complaint.

DLF describes its reference in the complaint to Purchase Order 1-PO133471, rather than the four other orders on which it seeks to recover, as a «ministerial error» and offers to file a notice of errata or an amended complaint if the Court requires it. The substitution of four different purchase orders for the sole contract listed in the complaint is not a minor ministerial correction, and the Court agrees with Sunrise that DLF should have sought leave to amend its pleadings months ago, when it became aware of the issue. **16**

Nevertheless, the Court is unpersuaded that Sunrise is entitled to summary judgment on this basis. In general, because the complaint guides the parties during discovery and frames the issues on summary judgment, «a plaintiff cannot oppose summary judgment based on a new theory of liability,» since doing so «would essentially blind side the defendant with a new legal issue after the bulk of discovery has likely been completed.» *Ortiz v. Lopez*, 688 F. Supp. 2d 1072, 1082 (E.D. Cal. 2010) (granting summary judgment for defendant on First Amendment claim where «[t]here is no indication that Plaintiff raised a First Amendment issue during discovery or communicated the theory to the City in any way»). But here, unlike in *Ortiz*, Sunrise was on notice of the correct purchase orders giving rise to DLF's claims and was able to conduct an investigation into those shipments even before DLF filed suit. DLF notified Sunrise as early as February 16, 2021 that it had found metal in Sunrise's seeds. Two days later, DLF sent Sunrise its CAPA Log claiming that rocks and hard seeds had been identified in the four purchase orders for which it now seeks to recover on its breach of contract claim. And in March 2021, Sunrise compiled information relating to the four purchase orders in connection with its investigation into stones in the seeds. **17**

The litigation history confirms that Sunrise was not blindsided by DLF's summary judgment arguments. Sunrise's answer, filed on August 12, 2021, admitted that the seeds were timely paid for and delivered, which is consistent with the delivery of the seeds in the four relevant purchase orders and inconsistent with the single cancelled purchase order incorrectly referenced in the complaint. Similarly, the parties' joint Rule 26(f) report described a dispute about seeds that were received by DLF, which further confirms that Sunrise knew the complaint's reference to the cancelled purchase order was an error and that DLF's claims arose from the purchase orders that *did* result in delivery. And it is undisputed that DLF's counsel informed Sunrise's counsel that DLF's claims pertained to purchase orders I-PO132453, I-PO133469, I-PO133470, and I-PO132796, that Sunrise's expert report discusses documents referencing these four purchase orders, and that Sunrise questioned DLF's witnesses about the seeds delivered pursuant to these four purchase orders during their depositions. **18**

Thus, it is plain that even though DLF should have amended its pleadings to correct its mistake, the parties have known from the outset which purchase orders are in dispute, and Sunrise is not unfairly surprised by DLF's position. «When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the **19**

pleadings.» Fed. R. Civ. P. 15(b)(2). The Ninth Circuit has held that a district court abused its discretion by refusing on summary judgment to consider the merits of a challenge not expressly raised in the complaint where the defendant had notice of the challenge in time to conduct discovery. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014) (explaining that «when issues are raised in opposition to a motion to summary judgment that are outside the scope of the complaint,» the district court should construe the matter raised as a request pursuant to Rule 15(b) to amend the pleadings out of time). The Court concludes that parties have litigated DLF's claim for breach of the four purchase orders by implied consent, and Sunrise is not entitled to summary judgment based on the pleading error. However, the Court will allow DLF no later than June 8, 2022 to file a First Amended Complaint to align the pleadings with the facts in dispute, and Sunrise shall file an answer seven days thereafter.[5]

Sunrise also argues that DLF is improperly using its summary judgment motion to introduce a new legal claim for breach of contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG). **20**

The parties agree that CISG governs their contracts, but Sunrise contends that the complaint alleges only a common-law claim for breach of contract, and that this claim is preempted by CISG. *See Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1152 (N.D. Cal. 2001) («[T]he CISG ... can and does preempt state contract law to the extent that the state causes of action fall within the scope of the CISG.»). **21**

DLF's pleading does not expressly mention the CISG, but neither does it expressly allege a common-law claim. It simply alleges a cause of action for «Breach of Contract.» This is all that was required to satisfy DLF's pleading obligations. The Ninth Circuit has rejected dismissal of a claim that failed to cite the relevant statute, explaining that «[n]otice pleading requires the plaintiff to set forth in his complaint *claims for relief*, not causes of action, statutes or legal theories» and «[a] complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss.» *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008). And Sunrise cites no authority granting summary judgment (or dismissal) on a breach of contract claim because the complaint did not mention the CISG. The case law is to the contrary. *See Citgo Petroleum Corp. v. Odfjell Seachem*, No. CIV.A. H-07-2950, 2013 WL 2289951, at *5 (S.D. Tex. May 23, 2013) (rejecting an identical preemption argument where the complaint alleged a generic breach of contract claim without mentioning the CISG); *U.S. Nonwovens Corp. v. Pack Line Corp.*, 4 N.Y.S.3d 868, 872 (Sup. Ct. 2015) (denying motion to dismiss breach of contract claim even though complaint did not mention the CISG). Sunrise relies on *Shagrow Telecom Tech Co. v. Gentec Enters., Inc.*, in which the court denied a motion to dismiss a breach of contract claim where the body of the complaint referenced the CISG but the claim itself did not. No. CV 13-08799-RGK-SSx, 2014 WL 12688419, at *2 (C.D. Cal. Feb. 28, 2014). But nothing in *Shagrow* suggests the converse – that dismissal would be warranted if the complaint had not mentioned the CISG – and such a conclusion would be **22**

[5] Given the advanced stage of this litigation and the nature of DLF's amendment, the Court does not expect that Sunrise will have any basis for challenging DLF's amended pleading through a Rule 12(b)(6) motion. If Sunrise nevertheless wishes to file a motion to dismiss, it must promptly seek leave of Court to do so.

inconsistent with the Ninth Circuit's rule that the source of authority for a claim need not be pleaded. Accordingly, the Court construes DLF's breach of contract claim as arising under the CISG, and Sunrise is not entitled to summary judgment based on preemption.[6]

2. Merits

The elements of a claim for breach of contract under the CISG are «the traditional four elements of a breach of contract claim: formation, performance, breach and damages.» *Shagrow Telecom Tech Co. v. Gentec Enters., Inc.*, No. CV 13-08799-RGK-SSx, 2014 WL 12695567, at *2 (C.D. Cal. May 16, 2014) (quoting *Dingxi Longhai Dairy, Ltd. v. Becwood Tech. Grp., LLC*, 718 F. Supp. 2d 1019, 1022 (D. Minn. 2010)). Both parties move for summary judgment on the elements of breach and damages. **23**

Although DLF's failure to correctly plead the relevant contracts does not require dismissal of its claim, it does make evaluation of the issue of breach more difficult. The uncontroverted summary judgment evidence appears to establish that some of the sunflower seeds Sunrise sold to DLF contained stones and possibly even metal fragments, which likely violates some of the terms to which Sunrise agreed. Sunrise therefore is not entitled to summary judgment on the issue of breach. But it is not clear on this record whether *all* of the seeds delivered by Sunrise contained foreign material; what quantity and type of foreign material was contained in each batch of seeds (for example, whether metal was found in all of them); or – if only some of the seeds were contaminated – *which* purchase orders resulted in shipment of contaminated seeds. Thus, DLF has not proven the breach of any particular contract. The Court therefore concludes that genuine issues of material fact preclude summary adjudication on the issue of breach.[7] **24**

Both parties seek summary adjudication on the issue of damages. Even if DLF were able to establish breach as a matter of law, genuine issues of material fact – including issues relating to rebates and estimated sales volumes – would preclude DLF's requested summary judgment finding that it is entitled to $931,018.92 in damages. Nor has Sunrise shown that it is entitled to summary judgment on damages for any of the three reasons it advances. First, Sunrise has not shown that DLF's lost sales damages are unrecoverable as a matter of law. Article 74 of the CISG provides that «[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach.» **25**

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[6] Where a complaint expressly pleads separate claims for common-law breach of contract and CISG breach of contract, summary judgment on the state claims based on preemption is appropriate. *E.g.*, *Granjas Aquanova S.A. de c.v. v. House Mfg. Co.*, No. 3:07-CV-00168 BSM, 2009 WL 10675376, at *2 (E.D. Ark. June 25, 2009). But no such separate claim is alleged here, and in any event, the plaintiff in *Granjas* was allowed to proceed with a breach of contract claim under the CISG. Sunrise's reliance on *Granjas* is therefore unavailing.

[7] It is therefore unnecessary at this stage to resolve the parties' disputes about the meaning of the related documents that may provide additional terms for the contracts created by the purchase orders – including whether Sunrise's Letter of Continuing Guarantee and specification sheet permit up to 0.05% impurities; if so, what those permitted impurities include; and whether any or all of the shipments were adulterated within the meaning of the Federal Food, Drug, and Cosmetic Act.

Damages under the CISG are meant to place the injured party in the same economic position as if the contract had been performed. *Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1029 (2d Cir. 1995); *Sunrise Foods Int'l Inc. v. Ryan Hinton Inc.*, No. 1:17-CV-00457-CWD, 2019 WL 3755499, at *6 (D. Idaho Aug. 8, 2019). If DLF can establish that Sunrise's breach prevented DLF from selling the food products it made with Sunrise's seeds, then DLF's expected profits are insufficient to put DLF in the position it would have occupied absent the breach. DLF would still need to be paid for the costs incurred in producing the products it is now unable to sell, which it would have otherwise recovered from the portion of the expected sale price that is not profit.[8] The remaining two reasons advanced by Sunrise are so insubstantial that they warrant only brief mention: Sunrise clearly has not shown either that the sole cause of DLF's losses was incontrovertibly its failure to inspect the seeds or that DLF's damages are so speculative that they are unrecoverable as a matter of law. Thus, neither party is entitled to summary judgment on the issue of damages. **26**

3. Attorney's Fees

Sunrise argues that DLF is not entitled to recover attorney's fees under the contracts. DLF raises two arguments in response. **27**

DLF first invokes Article 74 of the CISG which states that «[d]amages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach,» and argues that this language should be read broadly to include attorney's fees. But DLF cites no authority for this proposition, which several courts – including the only circuit court to decide the issue – have rejected. *See Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., Inc.*, 313 F.3d 385, 388–89 (7th Cir. 2002) (concluding that although the background of Article 74 is silent as to whether «loss» was intended to include attorney's fees, context and policy indicate it does not cover such fees); *Victory Foodservice Distributors Corp. v. N. Chr. Laitsos & Co.*, No. 17CV2227, 2017 WL 5256762, at *2 (S.D.N.Y. Nov. 13, 2017) («[T]he scant authority on this issue holds that attorneys' fees are not a recoverable 'loss' under CISG Article 74.»). Thus, Article 74 does not itself provide for an award of attorney's fees. **28**

DLF next argues that it may recover fees under the indemnity provision in the contracts. Three of the relevant purchase orders contain identical indemnity provisions that reference attorney's fees: **29**

> [Sunrise] hereby agrees to protect, indemnify, defend Don Lee Farms and its employees, officers, directors and customers from any and all losses of any type suffered as a result of [Sunrise's] product, including attorneys' fees and court costs, as

[8] If DLF had discovered the contamination before using Sunrise's seeds to manufacture its products, it would have avoided these expenses, and lost profits would have been the proper measure of damages to restore DLF to the economic position it would have been in but for the breach.

well as any and all claims, charges, actions and proceedings brought regarding any alleged adulteration, misbranding or other legal violations.[9]

Courts applying the CISG have looked to the law of the forum state to determine whether attorney's fees should be awarded, even though the CISG itself does not provide for such fees. *Hefei Ziking Steel Pipe Co. v. Meever & Meever*, No. 4:20-CV-00425, 2021 WL 4267162, at *8 (S.D. Tex. Sept. 20, 2021) (collecting cases). Under California law, the general rule is that an indemnity provision does not allow recovery of attorney's fees for a first-party breach of contract claim, although such fees may be awarded if the parties intended to allow them. *See Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1024 (2011) («Although indemnity generally relates to third party claims, this general rule does not apply if the parties to a contract use the term 'indemnity' to include direct liability as well as third party liability.» (cleaned up)). Determining the scope of an indemnity provision is a matter of contract interpretation, giving effect to the parties' mutual intent based on the contract's clear and explicit language. *Alki Partners, LP v. DB Fund Servs., LLC*, 4 Cal. App. 5th 574, 600 (2016). Without other indications of an intent to shift fees in first-party actions, «the inclusion of attorney fees as an item of loss in a third-party claim-indemnity provision does not constitute a provision for the award of attorney fees in an action on the contract.» *Carr Bus. Enters., Inc. v. City of Chowchilla*, 166 Cal. App. 4th 14, 20 (2008). As in *Carr*, the purchase orders' indemnity provisions on which DLF relies contain «no express language authorizing recovery of fees in an action to enforce the contract» and therefore do not provide for recovery of DLF's fees in a first-party action against Sunrise for breach of contract. *Id.* at 23; *accord Alki Partners, LP v. DB Fund Servs., LLC*, 4 Cal. App. 5th 574, 600–01 (2016) («The court will not infer that the parties intended an indemnification provision to cover attorney fees between the parties if the provision 'does not specifically provide for attorney's fees *in an action on the contract.*'» (quoting *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 970 (1993)). DLF cites no authority suggesting otherwise, nor has it identified any other language suggesting that the parties intended to shift attorney's fees in a first-party breach of contract action. **30**

Accordingly, DLF has not shown a valid basis for its request for attorney's fees and Sunrise is entitled to summary judgment on that claim.[10] **31**

4. Reputational Harm

The CISG Advisory Council states in its published opinions on Article 74 that «[t]he aggrieved party is entitled to damage for loss of goodwill as a consequence of the breach.» Sunrise nevertheless argues that it is entitled to summary judgment on DLF's claim for reputational harm because DLF did not calculate the costs of such harm in its initial disclosures and has not **32**

[9] As noted above, the parties were unable to locate the terms and conditions associated with Purchase Order 1-PO132796.

[10] Sunrise raises two additional arguments that the Court need not reach – i.e., that DLF did not suffer any losses in connection with the purchase order erroneously referenced in the complaint and that DLF waived attorney's fees by not disclosing any fee calculation.

disclosed an expert on the issue.[11] Sunrise relies on *Mee Industries v. Dow Chemical Co.*, in which the Eleventh Circuit affirmed the exclusion at trial of evidence of lost goodwill where the plaintiff had not identified loss of goodwill as a category of damages in its Rule 26 disclosures or at any time before the joint pretrial statement. 608 F.3d 1202, 1221–22 (11th Cir. 2010). Here, although DLF has not yet provided a *computation* of its reputational damages, Sunrise has been on notice that DLF seeks such damages since the very beginning of this suit in May 2021. *See* Dkt. No. 1-1 at 5 (alleging that «Plaintiff has incurred ... a currently-unknown reputational cost with its customers or potential customers, as a result of the contaminated Seeds.»). Thus, *Mee* does not establish that Sunrise is entitled to summary judgment.

The other case on which Sunrise relies in its supplemental brief merely cautioned that a plaintiff who failed to disclose a computation of emotional distress damages might be foreclosed from suggesting a specific amount to the jury, without prohibiting the plaintiff from seeking such damages. *E.E.O.C. v. Wal-Mart Stores, Inc.*, 276 F.R.D. 637, 639–40 (E.D. Wash. 2011). It is unnecessary to determine at this stage whether and how DLF's presentation of its damages at trial may be limited based on its failure to produce calculations up to this time. Sunrise has not shown that DLF's claim for reputational harm must be dismissed on summary judgment. **33**

B. Negligence

Sunrise argues that DLF's negligence claim is barred as a matter of law by the economic loss rule. That rule «requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.» *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004). Thus, absent personal injury or damage to other property, a party to a contract generally cannot recover in negligence for «pure economic loss – *i.e.*, damages that are solely monetary – that resulted from a breach of contract unless he can show a violation of some independent duty arising in tort.» *Rattagan v. Uber Techs., Inc.*, 19 F.4th 1188, 1191 (9th Cir. 2021) (citing *Erlich v. Menezes*, 21 Cal. 4th 543, 552 (1999)). **34**

DLF relies on *Mexicali Rose v. Superior Ct.*, 1 Cal. 4th 617, 632 (1992), for the proposition that California law «allow[s] an action in negligence for injuries caused by both natural and foreign substances in food.» But *Mexicali Rose* involved a negligence claim against a restaurant by a patron who was injured by a chicken bone in his food; the sentence DLF quotes specifically addresses «a restaurateur's potential liability» to patrons. *Id.* Because the parties in *Mexicali Rose* had not entered into a contract, the economic loss rule was neither implicated nor discussed in the opinion. **35**

DLF also invokes the exception to the economic loss rule for parties that have a «special relationship» in which «the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out.» *Southern Cal. Gas Leak* **36**

[11] DLF disclosed a damages expert who, in addition to other specifically identified damages, «is also expected to testify as to additional amounts of future damages yet to be determined,» which DLF contends encompasses reputational harm.

Cases, 7 Cal. 5th 391, 400 (2019). But this exception, tracing back to *Biakanja v. Irving*, 49 Cal. 2d 647 (1958), was developed to address situations in which the parties lack contractual privity, as the Supreme Court of California has repeatedly emphasized. *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 937 (2022) («*Biakanja* itself thus makes clear that its multifactor test finds application only when the plaintiff is a 'third person not in privity' with the defendant. Under its terms, *Biakanja* does not apply when the plaintiff and defendant are in contractual privity for purposes of the suit at hand.» (citation omitted)); *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979) («Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity.» (citing *Biakanja*)). Thus, for example, the court in *J'Aire* allowed a lessee restaurant operator to pursue negligence claims against a contractor working on the premises who was hired by the property owner, finding that the contractor owed the restaurant operator a duty of care even though his contract was only with the property owner.

DLF's negligence claim, in contrast, falls squarely in the heartland of the economic loss rule. DLF contracted directly with Sunrise to purchase sunflower seeds, and DLF seeks to recover for the economic harm caused by Sunrise's delivery of seeds that did not satisfy DLF's expectations. DLF cites no authority permitting a negligence claim under these circumstances. DLF invokes the court's statement in *Sheen* that «[n]ot all tort claims for monetary losses between contractual parties are barred by the economic loss rule,» but omits the sentence that immediately follows: «But such claims are barred when they arise from – or are not independent of – the parties' underlying contracts.» 12 Cal. 5th at 923. Because DLF's negligence claim is barred by the economic loss rule, Sunrise is entitled to summary judgment on the negligence claim.[12] **37**

C. Common Count

The parties briefly dispute the viability of DLF's final claim for common count. Common count «is an alternate theory of recovery based on a contract that is either 'implied in fact' or 'implied in law.'» *Katsura v. City of San Buenaventura*, 155 Cal. App. 4th 104, 109 (2007). In general, «common counts cannot be used to recover for breach of an express contract,» *Martini E Ricci Iamino S.P.A. - Consortile Societa Agricola v. Trinity Fruit Sales Co.*, 30 F. Supp. 3d 954, 977 (E.D. Cal. 2014), but «[f]or an express contract that is no longer executory, a common count is appropriate when the only remaining obligation is the payment of money by the defendant.» *Bear, LLC v. Marine Grp. Boat Works, LLC*, No. 3:14-CV-02960-BTM, 2015 WL 4255061, at *4 (S.D. Cal. July 14, 2015). **38**

Here, DLF does not allege the existence of any implied contract between the parties or that Sunrise failed to pay as required by their agreement or course of dealings. Indeed, the contracts are purchase orders that contemplate only payments from DLF, whose claim for breach is based on an allegation that Sunrise failed to provide goods that conformed with the specifications of the express agreement. DLF identifies no legal authority allowing it to **39**

[12] The Court therefore does not reach Sunrise's additional challenges to DLF's negligence claim and the damages associated with it.

shoehorn its breach of contract claim into a separate common count claim under these circumstances. *Cf. Eisenberg v. Alameda Newspapers, Inc.*, 74 Cal. App. 4th 1359, 1387 (1999) («There cannot be a valid express contract and an implied contract, each embracing the same subject, but compelling different results.»). Accordingly, Sunrise is entitled to summary judgment on DLF's common count claim.

V. Order

For the reasons discussed above, the joint motions for summary judgment are **GRANTED IN PART**, and Sunrise is entitled to summary judgment on DLF's claims for negligence and common count and on DLF's request for attorney's fees in connection with its claim for breach of contract. The motion is otherwise **DENIED** because genuine issues of material fact preclude summary judgment for either side on DLF's breach of contract claim. DLF no later than June 8, 2022 shall file a First Amended Complaint that identifies the correct contracts and terms that give rise to its claim for breach of contract, and Sunrise shall file its answer within seven days thereafter. 40