

Cumberland, ss.

L.L. BEAN, INC.

Plaintiff/Counterclaim Defendant

v.

WORCESTER RESOURCES, INC.

Defendant/Counterclaim Plaintiff

Docket No. BCD-CV-09-39

DECISION AND JUDGMENT

This civil action involves a claim for declaratory judgment by Plaintiff L.L. Bean, Inc. ("L.L. Bean" or "Bean") against Defendant Worcester Resources, Inc. ("Worcester") regarding the parties' contract for the 2008 holiday season, and a counterclaim by Worcester seeking payment.

The case came to trial on a jury-waived basis over the course of nine days in October 2011. The evidentiary record includes the testimony and exhibits presented by both parties during the trial, and also a number of Joint Stipulations presented by the parties and adopted by the court. Those Joint Stipulations are hereby incorporated by reference in their entirety in these Findings and Conclusions. After trial, the parties filed proposed findings of fact and conclusions of law and presented oral argument.

After the oral argument, the parties were given leave to submit demonstrative exhibits and written argument related thereto, all admitted solely as aids to the court and not for any evidentiary purpose. Based on the entire record, the court makes and adopts the following findings of fact and conclusions of law, and directs the entry of judgment accordingly.

This decision is structured as follows:

- The first section contains what are referred to as “General Findings of Fact,” focusing mainly on the history of the parties’ business relationships; the events and documents culminating in their contract for the 2008 season (“the 2008 letter agreement”); their dealings during the 2008 season; their disagreement in early 2009 about payment by L.L. Bean to Worcester for the 2008 season; their efforts to resolve it, and the eventual termination of their relationship.
- The second section addresses L.L. Bean’s affirmative defense to the effect that Worcester has forfeited any entitlement to damages against L.L. Bean as a result of what L.L. Bean characterizes as Worcester’s intentional breach of contract. For the reasons set forth in that section, the court concludes that L.L. Bean has failed to show that Worcester intentionally or willfully breached the contract between the parties.
- The third section calculates Worcester’s total entitlement *before* any deductions for savings or other reasons are applied. Worcester’s total entitlement is calculated based on (1) the face amount of the purchase orders, (2) direct ship fees for the items actually shipped, and (3) the value of L.L. Bean’s commitment to reimburse Worcester for the cost of components, less the amount paid to Worcester by L.L. Bean for the 2008 balsam product season.
- The fourth section addresses each of the deductions that L.L. Bean claims should be made from Worcester’s claim—deductions for what Worcester saved or could have saved in stopping production; a deduction from L.L. Bean’s component liability for what Worcester has or should have done to recoup its investment in components by selling the components or using them in products for sale to other customers. L.L. Bean’s claim that it is entitled to a credit for being double-charged for shipping fees is addressed in the previous section.
- The final section nets deductions against what would otherwise be due to Worcester and addresses costs and interest.

### **I. General Findings Of Fact**

#### **THE HISTORY AND NATURE OF THE WORCESTER-L.L. BEAN RELATIONSHIP AND THE GOODS AND THE MARKET INVOLVED**

1) The long-standing relationship between Worcester and Bean is described in the Court’s prior orders on motions for partial summary judgment and also in the parties’ Joint Stipulations and therefore need not be set forth here, at least in detail.

2) In summary, L.L. Bean is a retailer of outdoor, clothing and home products through stores and catalogs based in Freeport, Maine, and Worcester Resources (formerly Worcester Wreath) is a manufacturer and retailer of balsam products based in Harrington, Maine.

3) L.L. Bean and Worcester had a business relationship that began in 1983 and that continued without interruption through 2008. (Joint Stipulations, ¶ 5). There was no continuing contract between L.L. Bean and Worcester, and each year required the negotiation of a new contract. (Joint Stipulations, ¶ 7).

4) That arrangement meant that Worcester had no enforceable expectation or claim regarding L.L. Bean's business, and that either party was free to terminate their relationship prospectively.

5) Throughout their relationship, Worcester produced balsam products that L.L. Bean purchased and sold to its customers. (Joint Stipulations, ¶ 5).

6) Each of Worcester's balsam products—whether sold to L.L. Bean or elsewhere—was created according to particular specifications, somewhat akin to, and in fact sometimes referred to as, a "recipe." (Ex. 449, 450; Scott, Day 7 at 1801).<sup>1</sup>

7) L.L. Bean's specifications for its balsam products were based in part on input from Worcester. (Ex. 449, 450; Morrill Worcester, Day 2 at 463). Worcester was required to manufacture finished products for L.L. Bean in accordance with L.L. Bean's specifications. (Ex. 449, 450; Scott, Day 7 at 1801).

8) These balsam products were composed of perishable balsam and, non-perishable decorative items, such as bells and artificial berries, and in certain products metal frames as well. The non-perishable ingredients of the products Worcester sold

---

<sup>1</sup> This and similar citations to witness testimony through this document include the witness's name, trial day, and transcript page number.

to L.L. Bean—the decorations, metal frames and the like—are called “components.” (Joint Stipulations, ¶9).

9) Because Worcester’s products contained perishable balsam, they could not be fully assembled too early in the season or the balsam elements would deteriorate before or shortly after reaching the L.L. Bean customer. Worcester’s practice was to assemble the non-perishable parts of a product well ahead of time, and add the perishable balsam shortly before the product was actually shipped. (Morrill Worcester, Day 1 at 166, 217-22). Worcester assembled some of the durable parts of some of its products after the components arrived, sometimes in the summer time. (Morrill Worcester, Day 1 at 219-225, Scott, Day 7 at 1782).

10) During most if not all of the parties’ long relationship, Worcester was a “direct ship” vendor, meaning that it shipped the balsam products directly to L.L. Bean customers, instead of shipping the items to L.L. Bean for re-shipment to the customers. Under that arrangement, after receiving an order for a balsam product from a customer, L.L. Bean relayed the order to Worcester, and Worcester shipped the product directly to the L.L. Bean customer. (Joint Stipulations, ¶ 6).

11) At some point before 2008, L.L. Bean began to pay Worcester and other direct ship vendors a charge to compensate those vendors for the costs associated with L.L. Bean’s “direct ship” program. L.L. Bean paid this cost for items actually shipped by its direct ship vendor to L.L. Bean’s customers. Direct ship vendors billed L.L. Bean for this cost on a per-item-shipped basis. L.L. Bean referred to this charge as a “direct ship fee” or “fulfillment” cost. (Holden, Day 5 at 1229-1233, Day 6 at 1397-1398).

12) The direct ship fee was \$0.25 per unit when Mr. Holden first started dealing with Worcester and increased over time. (Holden, Day 6 at 1398).

13) Worcester cooperated with L.L. Bean in converting its shipping systems to become one of the direct ship vendors in L.L. Bean's system. (Michael Worcester, Day 9 at 14; Holden, Day 5 at 1231).

14) In 2008, the direct ship fee for Worcester shipments to L.L. Bean customers was \$0.64 per item shipped. (Holden, Day 6 at 1398; Michael Worcester, Day 9 at 19-21).

15) The market for Worcester's balsam products with L.L. Bean customers was limited to the holiday period from around Thanksgiving to Christmas. There was no market of any significance for Worcester's balsam products with L.L. Bean customers any other time of year. (Morrill Worcester, Day 4 at 166).

16) Because Worcester's products included perishable balsam elements, if they were not sold in the year in which the product was fully assembled, they could not be preserved in fully assembled form until sold in the next season. (Scott, Day 8 at 31-33; Philip, Day 3 at 538, 566).

17) In most years from 1983 through 2007, demand for Worcester products from L.L. Bean customers increased over the prior year. (Morrill Worcester, Day 1 at 170-171, 185-186; Day 2 at 381). There were significant increases from 1994 forward. (Philip, Day 3 at 542-544).

18) At no point in their 26-year relationship did Worcester fail to meet any order that L.L. Bean placed with them. (Morrill Worcester, Day 8 at 220). At no point from 2002 forward, did Worcester fail to fill any order that L.L. Bean customers placed for Worcester products. (Holden, Day 6 at 1343; Philip, Day 3 at 561).

19) Worcester has numerous facilities in the Washington County area. As of 2008, centerpieces were manufactured at the Topsfield facility; tabletop trees were

manufactured at the Baileyville (also known as the Woodland) facility and in the Columbia facility. There are three facilities in Harrington. Wreaths are manufactured at Worcester's main facilities in Harrington. (Scott, Day 7 at 1786-88, 1822).

20) In 2007, L.L. Bean sold approximately 478,000 units of Worcester's balsam products to its customers. (Morrill Worcester, Day 8 at 220).

21) Worcester took steps to ensure that its production and shipping capabilities could meet the increase in demand from L.L. Bean's customers including erecting buildings for product assembly, product and component storage, and shipping of L.L. Bean products. (Morrill Worcester, Day 8 at 232; Philip, Day 3 at 533-537). Worcester's expansion resulted from a combination of a steady increase in L.L. Bean's annual requirements and Worcester's eagerness to grow its business. (Philip, Day 3 at 544-45).

22) L.L. Bean asked Worcester to "make an effort to get Maine balsam" for its products, in keeping with the L.L. Bean's "Maine made" marketing approach, so that L.L. Bean could market its products as "Maine balsam." (Morrill Worcester, Day 1 at 176-177, 180-83).

23) By acquiring forestland and preparing it for the growth of a balsam forest, Worcester was able to meet L.L. Bean's "Maine balsam" requirements. (Morrill Worcester, Day 1 at 182-183). However, this land was not purchased by and is not owned by Worcester Resources, but by a different entity owned by members of the Worcester family. (*Id.* at 184). Worcester Resources itself did not make any investment in balsam forestland, and instead it purchased cut balsam from its sister entity.

WORCESTER'S OTHER BUSINESS DURING ITS RELATIONSHIP WITH L.L. BEAN

24) During the 1980s and 1990s, L.L. Bean had a policy of discouraging its vendors from soliciting business or doing business with L.L. Bean's competitors in the catalog business. (Fessenden, Day 4 at 811-812; Morrill Worcester, Day 1 at 171-174).

25) Worcester abided by L.L. Bean's restriction not to solicit business from L.L. Bean's competitors. (Morrill Worcester, Day 1 at 171-174). However, Worcester for many years did sell balsam product to other retailers who competed with L.L. Bean, if at all, only in narrow areas such as balsam products, including internet sellers such as 1-800-FLOWERS. (Holden, Day 5 at 1188-1196). Worcester also made mail order sales directly to customers through Worcester's own website, without objection by L.L. Bean. (*Id.*).

26) At some point in the 1990s, Rol Fessenden of L.L. Bean changed L.L. Bean's position and permitted L.L. Bean vendors, such as Worcester, to solicit business from L.L. Bean's competitors. (Fessenden, Day 4 at 811-812).

27) Neither Rol Fessenden nor anyone else at L.L. Bean advised Morrill Worcester or anyone else at Worcester that L.L. Bean had changed this position and that Worcester was free to solicit business from L.L. Bean's competitors. (Fessenden Day 4 at 812; Morrill Worcester, Day 2 at 470-471).

28) In 2008, L.L. Bean orders constituted approximately 90% of Worcester's business. (Morrill Worcester, Day 2 at 264, 471; Fessenden, Day 3 at 756).

WORCESTER'S COMPONENT PURCHASING PRACTICES BASED ON L.L. BEAN FORECASTS

29) L.L. Bean's requirements varied from year to year, but by mid-February of each year, L.L. Bean would issue its initial forecasts for particular balsam items

produced by Worcester. Those forecasts would project L.L. Bean's estimate of customer demand for each Worcester item. (Ex. 406, 653, 654, 68, 443; Morrill Worcester, Day 1 at 188-189).

30) L.L. Bean's forecasts of customer demand were set forth in terms of each product type, referred to as Stock Keeping Units (SKUs). The SKUs were sometimes identified by letter-number designations used commonly by Worcester and L.L. Bean. (Joint Stipulations, ¶ 8; Morrill Worcester, Day 1 at 188-189, 198-199).

31) In 2005 through 2007, and prior to the 2008 season, L.L. Bean sent letters to Worcester setting forth L.L. Bean's initial forecast of expected customer demand for Worcester products for the coming fall season. (Ex. 406, 653, 654, 68, 443; Morrill Worcester, Day 1 at 188-189; Holden, Day 6 at 1325; Fessenden, Day 4 at 814, 819-820).

32) Such letters were typically drafted by L.L. Bean and issued by L.L. Bean to Worcester, sometimes with input from Worcester through a negotiated process. Such letters were sometimes referred to as letter agreements. (Fessenden, Day 4, at 812-814, 819-821).

33) L.L. Bean's forecasts were stated in terms of the types and quantities of particular products that L.L. Bean projected it would be purchasing from Worcester. (Joint Stipulations, ¶ 11)

34) In the letter agreements before the one in 2008, L.L. Bean would not fully commit to Worcester for the season's production until a date specified in L.L. Bean's letter agreement. (Ex. 406, 433, 435, 653, 654, 68, 443). On the other hand, L.L. Bean expected Worcester to have an adequate supply of components on hand to meet L.L. Bean's requirements in timely fashion.



35) To assure that it could meet L.L. Bean's needs in a timely way, Worcester made efforts to have ready a sufficient quantity of components to meet L.L. Bean's forecast for each item as well as a percentage above forecast for each item ranging from 10 per cent to 20 per cent depending on the item. (Ex. 653, 654, 68, 443; Morrill Worcester, Day 1 at 205-206). In the letter agreements for the years before 2008, Bean had required Worcester to purchase an additional percentage of components beyond forecasts, to assure that Worcester would be able to produce and ship items ordered above forecast amounts in a timely way. (Ex. 406, 433, 435, 653, 654, 68, 443).

36) Worcester would arrange for a sufficient supply of components by first determining what components it already had that were left over from the previous season and that could be used in the upcoming season, and then purchasing what else was needed to meet L.L. Bean's forecasts (with additional percentages as noted above) for the upcoming season. (Scott, Day 8 at 94-95).

37) This was consistent with what might be called Worcester's FIFO (first in, first out) practice regarding drawing upon its inventory of components for incorporation into products for L.L. Bean. Worcester used components left over from prior seasons before using newly purchased inventory. (Scott, Day 7 at 1805, Day 8 at 16, 18-19, 113-14).

38) To assure timely delivery of components sufficient to meet L.L. Bean's requirements, Worcester had to make its purchases for the upcoming season by no later than April to meet L.L. Bean's annual forecast as well as any amount above that forecast. (Scott, Day 7 at 1789-1791, 1795).

39) Until 2008, if Worcester purchased any components for L.L. Bean products beyond what was necessary to fill L.L. Bean's orders, Worcester would retain

the components for use in the next year's season. If any such components were not usable in the following year as a result of L.L. Bean discontinuing a product line, L.L. Bean would pay Worcester for them; otherwise, Worcester would be paid when it made and shipped a product in the following season incorporating the leftover components. (Ex. 406, 653, 654; Fessenden, Day 4 at 881-883; Scott, Day 8 at 19-20; Dunham, Day 5, 1106-09).

40) Worcester's inventory controls were by no means exact. Instead of tracking inventory continuously via computer or by hand counts of every item, Worcester relied on visual estimates of what quantities of different component items were on hand in Worcester's several component storage facilities.

41) The products that Worcester made for sale to L.L. Bean were "very similar," and in some cases "identical," in terms of appearance and components used, to products Worcester made for sale to other customers. (Michael Worcester, Day 9 at 49, 104-09). That fact, and the fact that components designated for Bean products were not necessarily stored separately from components designated for non-Bean products, created the potential for commingling of inventory. (Scott, Day 8 at 72-73, 111-112).

#### THE PARTIES' PRACTICES REGARDING YEAR-END INVOICES AND MEETINGS

42) At the end of each season from 2002 to 2008, L.L. Bean and Worcester would typically meet to review the immediately past season. (Holden, Day 5 at 1279-80).

43) From 2002 to 2008, the meetings between Worcester and L.L. Bean typically took place very early in the year following the sales year that had just concluded. (Holden, Day 5 at 1279-1281).

44) Before the year-end meeting, Worcester would submit an invoice to L.L. Bean in the amount that Worcester calculated was due for purchase orders, shipping fees and other items, with a credit to L.L. Bean for amounts already paid. L.L. Bean did not pay the invoice in full, however, because there were usually further deductions from the invoice to be discussed. That discussion took place at the annual post-season meeting.

45) Discussion at post-season meetings covered, among other things, the experience in the year just passed, including, among other things, customer charge-backs. (Holden, Day 5 at 1279-1281; Fessenden, Day 4 at 845-847).

46) L.L. Bean would track customer complaints leading L.L. Bean to issue refunds or to send replacement products to its customers. L.L. Bean's refunds and replacement products were referred to as "charge-backs." (Holden, Day 5 at 1196-1198).

47) L.L. Bean would typically withhold an amount from its final year-end payment to Worcester primarily to account for charge-backs that L.L. Bean assessed against Worcester. (Holden, Day 5 at 1294-1295).

48) L.L. Bean tracked customer complaints through 14-16 different reason codes. Depending on the reason given by the customer for the complaint, responsibility for the cost of a charge-back could be on Worcester, on the shipper involved, or on L.L. Bean. (Philip, Day 3 at 564-569; Holden, Day 5 at 1198-99).

49) At the year-end meetings, L.L. Bean shared with Worcester the reasons given for charge-backs relating to Worcester's products. For example, in advance of a meeting in late January 2008 to discuss the 2007 season, L.L. Bean generated a "post-

mortem” agenda and a memorandum summarizing its perspective on Worcester’s performance during the 2007 season. (Ex. 425).

50) Through a process of give-and-take, Worcester and L.L. Bean would reach agreement on an appropriate dollar amount to be subtracted from the amount due from Bean to Worcester. Sometimes that dollar figure was lower than the charge-back figure that L.L. Bean had initially identified as being Worcester’s responsibility. (Morrill Worcester, Day 1 at 237-238, Day 9 at 16; Michael Worcester, Day 9 at 86).

51) Ultimately, although the amount deducted by agreement from Worcester’s year-end invoice was influenced by each party’s position on the amount and reason for chargebacks and other issues, it was a negotiated figure, not a mathematically derived figure.

52) The practice before the 2008 season of L.L. Bean holding back a portion of the amount otherwise due to Worcester pending discussion of charge-backs at the year-end meetings is plainly relevant to Worcester’s understanding of how it and L.L. Bean would reach agreement on the amount due to Worcester for the 2008 season.

#### THE TERMS OF THE PARTIES’ FEBRUARY 13, 2007 LETTER AGREEMENT

53) As was the case in prior years, the essential terms of the parties’ contract for the 2007 season were memorialized in a letter agreement signed by the parties and dated February 13, 2007. The parties’ respective rights and obligations for the 2007 season are not directly at issue in this case, but the terms of their 2007 letter agreement are relevant, chiefly for how they compare to the terms of the 2008 letter agreement that does govern the issues in this case.

54) The parties’ letter agreement of February 13, 2007 was representative of such agreements for preceding years in most respects.

55) L.L. Bean's February 13, 2007 letter agreement set the initial forecast for the 2007 season at 470,000 units, but it also permitted L.L. Bean to revise its forecast upward or downward "based on customer demand" until January 2, 2008. (Ex. 406, 653). It also provided that Worcester should be capable of producing more units at a rate of as much as 20% above the forecast for certain items, if requested and agreed upon by the parties. (Ex. 654).

56) The term "customer demand" was a term used by L.L. Bean in the regular course of its business and, as it appeared in L.L. Bean's letter agreements to Worcester "customer demand" meant "actual sales" or projected sales of Worcester-produced items to customers of L.L. Bean. (Ex. 406, 653, 654, 68, 443; Fessenden, Day 3 at 769).

57) By allowing L.L. Bean to "revise" its forecasts upward or downward "based on customer demand" the 2007 letter agreement permitted L.L. Bean, at least in theory, to direct Worcester to increase or decrease production as late as early January, or to request Worcester to stop production if L.L. Bean concluded that its customer demand warranted an order to stop production. (Ex. 406, 409, 653, 45, 654; Fessenden, Day 3 at 768-772, 783-784).

58) The February 13, 2007 letter agreement also did not obligate L.L. Bean to pay Worcester for any products it ordered from Worcester other than those products L.L. Bean actually sold to its customers or which became "finished goods," provided the goods were not produced above L.L. Bean's commitment quantity. (Ex. 45, 654).

59) L.L. Bean's obligation to pay for "finished goods" arose in the event that L.L. Bean ordered or requested Worcester to stop production of any or all items in L.L. Bean's forecast and before Worcester could bring production to halt, some additional

items were completed and became “finished goods” for which there was no concomitant “customer demand.” (Fessenden, Day 4 at 855).

60) Under the 2007 letter agreement, L.L. Bean’s commitment to pay for “finished goods” did not extend to finished goods that Worcester might produce that exceeded L.L. Bean’s commitments for the particular item or items in question. (Ex. 45, 654).

61) In order to be capable of meeting both the February 13, 2007 forecast and the projection above that forecast, Worcester had to purchase or have on hand sufficient quantities of components to meet L.L. Bean’s requirements, in order avoid a potential breach of contract claim. (Ex. 45, 654; Morrill Worcester, Day 1 at 205-206).

62) In issuing its letter agreements, L.L. Bean expected that Worcester would purchase or have on hand sufficient quantities of components to meet L.L. Bean’s forecast and L.L. Bean’s projection above forecast. (Ex. 406, 653, 654, 68, 443; Morrill Worcester, Day 1 at 205-206; Fessenden, Day 3 at 778).

63) By the end of the 2007 season, L.L. Bean had sold more Worcester products than in any previous year, with more than 478,000 balsam items having been sold. (Morrill Worcester, Day 1 at 170).

#### WORCESTER’S COMPONENT INVENTORY AFTER THE 2007 SEASON

64) At the end of the 2007 season, Worcester had significant quantities of components left over and not incorporated in any finished products. Some of the leftover components were purchased for the products L.L. Bean had ordered from it and which L.L. Bean had included in its projection above forecast, and an additional quantity reflected purchases made by Worcester beyond Bean’s forecasts, to assure it would be

able to fill L.L. Bean's orders. (Morrill Worcester, Day 1 at 37). Still other leftover components were undoubtedly purchased for products to be sold to other customers.

65) Total numbers for Worcester's year-end inventories do appear, however, in its tax returns that were entered as exhibits at trial. According to those returns, Worcester's total inventory at the end of 2006 was \$293,180. (Ex. 202) and Worcester's total inventory at the end of 2007 was \$1,462,326. (Ex. 202, 203).

66) In early 2008, Morrill Worcester told Bill Holden that he had in excess of \$1,000,000 worth of inventory left over after the 2007 season. When asked why he had so much left over inventory, Mr. Worcester explained to Mr. Holden that he should not worry, that not all of it was L.L. Bean's, and that he purchased the rest "on his own nickel." (Holden, Day 5, pgs. 1208-09).

67) The portion of Worcester's leftover inventory as to which L.L. Bean had a commitment obligation from 2007 and/or prior years was between \$300,000 and \$600,000. (Morrill Worcester, Day 1 at 42, 43-45; Scott, Day 8 at 96). What gives the higher figure credence is that Worcester only purchased about \$456,000 worth of components in preparation for the 2008 season, meaning that it had a substantial quantity of inventory left from 2007 and prior years, as to which L.L. Bean had made a much broader component commitment than it did for the 2008 season.

68) Worcester's products made for L.L. Bean incorporate components having an average value of \$4.00. (Ordway, Day 9 at 158). Components sufficient to make 75,000 to 80,000 units equate to about \$300,000 to \$320,000 in component inventory.

69) Thus, at the end of the 2007 season Worcester's total inventory of \$1,462,326 consisted of up to \$600,000 worth of components as to which L.L. Bean had made a commitment in 2007 (including any reserve) or prior years, and an even larger

quantity bought in 2007 or prior years on Worcester's "own nickel" to meet what Worcester projected it would need to meet the requirements of L.L. Bean and its other customers.

#### THE PARTIES' BAILMENT AND PURCHASE AGREEMENT

70) In early 2008, Worcester took steps to switch its banking relationship from Machias Savings Bank to Chittenden Bank and to the Massachusetts Business and Development Bank. (Bruce, Day 6 at 1489-1494). Machias had provided Worcester with a line of credit to finance Worcester's purchases of inventory, among other things, and the plan was for Chittenden to take over. As a condition of Chittenden's involvement, however, Worcester had to pay off the Machias line.

71) Partly because of the quantities of excess inventory purchased but not used, and partly because of significant other expenses—some of them questionable and outside the ordinary course of business<sup>3</sup>—Worcester found itself without the cash needed to satisfy Chittenden's requirement that the Machias line be paid off before Chittenden made a new source of credit available to Worcester.

72) Worcester approached L.L. Bean for funds sufficient to enable Worcester to pay off the Machias line of credit and thereby induce Chittenden to extend a new line. (Morrill Worcester, Day 1 at 43-45). Once the Chittenden line was in place, Worcester could draw upon it to reimburse L.L. Bean.

---

<sup>3</sup> For example, Worcester Resources paid \$441,885.51 to cover the personal tax payments of Morrill Worcester and Karen Worcester and a further \$212,574 for another company also controlled by the Worcester family, County Concrete. (Morrill Worcester, Day 1 at 56-58). Hundreds of thousands of dollars were paid in shareholder distributions, the total of which were greater than Worcester's reported income. (Michael Worcester, Day 9 at 91; Dunham, Day 5, 1155). Worcester also paid what L.L. Bean claims to be exorbitant rental amounts to a sibling entity, Worcester Holdings. One Worcester principal acknowledged that the so-called rent payments, which totaled about one million dollars over a period of time, were a "concoction" designed to transfer money from Worcester to another entity. (Karen Worcester, Day 3 at 678-79). Clearly, these expenses, along with Worcester's substantial inventory purchases in 2007 and perhaps earlier, contributed significantly to Worcester's cash-poor position in early 2008.



73) For L.L. Bean to provide a vendor with financial assistance of the magnitude requested by Worcester was an “extremely rare” measure. L.L. Bean already held some concerns about Worcester’s viability as a vendor due to very large environmental fines assessed against Worcester and what L.L. Bean considered to be dubious hiring practices inconsistent with its expectations for itself and its vendors. (Fessenden, Day 3 at 705-718, 724-738).

74) Nonetheless, Bean decided to accede to Worcester’s request, to be sure Worcester could meet Bean’s balsam product needs for the forthcoming season. (Fessenden, Day 3 at 735).

75) L.L. Bean and Worcester eventually worked out an agreement whereby L.L. Bean would take title to a certain quantity and value of components purportedly purchased by Worcester for L.L. Bean products and would pay Worcester an amount of money equal to the agreed-upon value of those components until such time as Worcester could obtain financing from a financial institution. When Worcester obtained the necessary financing, Worcester would then repurchase the components from L.L. Bean in the full amount of the price that L.L. Bean had paid for the components as part of the bailment. L.L. Bean and Worcester both anticipated that Worcester would be able to re-pay L.L. Bean for the monies extended by L.L. Bean within a short period of time. (See Joint Stipulations ¶ 13; Ex. 66, 67).

76) The terms of that agreement were set forth in a Bailment and Purchase Agreement that was signed by Worcester and L.L. Bean, as well as Chittenden Bank and Massachusetts Business and Development Corporation, and went into effect on April 29, 2008. (Ex. 66). The Bailment and Purchase Agreement was amended by the

parties on May 20, 2008 for the purpose of extending the deadline by which Worcester was to re-pay L.L. Bean. (Ex. 67).

77) The amount of funds involved in the Bailment and Purchase Agreement was about \$582,000. (Ex. 66, 67). Inferentially, that was the amount Worcester needed in order to be able to pay off the Machias Savings line of credit and switch its financing to Chittenden Bank.

78) Morrill Worcester, asked Sherry Scott, the Worcester employee primarily responsible for tracking Worcester's component inventory, to confirm that Worcester had sufficient quantities of components on hand to meet the figure that L.L. Bean had agreed to provide to Worcester. (Scott, Day 8 at 11).

79) Pursuant to Morrill Worcester's instructions, Sherry Scott produced a document showing that Worcester had on hand \$582,960.76 of component inventory that Worcester had allegedly purchased for L.L. Bean products. (Ex. 153; Scott, Day 8 at 10). That figure did not, nor was it intended to, reflect the actual total of component inventory Worcester had on hand, which was valued far higher at \$1,462,326.

80) In April of 2008, Rick Ordway, an L.L. Bean employee with responsibility for inventory management, went to Worcester's facility to verify that Worcester had on hand sufficient components for products that Worcester could use for L.L. Bean products to secure the monetary amount that Worcester and L.L. Bean had agreed upon for the Bailment and Purchase Agreement. (Ordway, Day 9 at 167).

81) Mr. Ordway's assessment focused on total components suitable for use in L.L. Bean products because L.L. Bean was at least temporarily purchasing those components under the bailment agreement. Because the bailment agreement simply covered inventory, regardless of whether it was inventory as to which L.L. Bean had

made a commitment, it was not necessary for Mr. Ordway's assessment to distinguish between inventory as to which L.L. Bean was contractually committed and inventory as to which it was not.

82) Rick Ordway visited Worcester's storage facilities and stayed for a part of one day. During his visit, he was able to verify that Worcester had sufficient component inventory on hand to provide security with a value at least the amount involved in the Bailment and Purchase Agreement. (Ordway, Day 9 at 167).

83) In verifying that Worcester's inventory at least met the figure chosen for the Bailment and Purchase Agreement, Mr. Ordway noted that Worcester possessed large amounts of component inventory beyond what he had verified. (Ordway, Day 9 at 142-143, 169).

84) Worcester's component purchases in 2008 totaled about \$456,000 worth of inventory. Based on Worcester's testimony that its practice was to use leftover components before using new ones, it seems reasonable to infer that Worcester would not have made additional purchases of \$456,000 in 2008 unless it had determined that there were not enough leftover components in its storage facilities to meet L.L. Bean's requirements.

L.L. BEAN'S CONCERNS ABOUT WORCESTER AND ITS DECISION TO MOVE ITS TARTAN WREATH BUSINESS TO ANOTHER VENDOR IN EARLY 2008

85) Around the same time as the bailment discussions, L.L. Bean advised Worcester that Worcester was not in compliance with L.L. Bean's ethical standards and advised Worcester that Worcester would have to come into compliance in all respects or risk the loss of L.L. Bean's business. (Morrill Worcester, Day 1 at 48).

86) In a letter to Worcester dated February 8, 2008, Rol Fessenden of L.L. Bean noted that Worcester had for years ignored L.L. Bean's very clear directives to

address L.L. Bean's required human rights, safety, and other standards. He also informed Worcester, that Worcester's status as a vendor for L.L. Bean was at risk due to this noncompliance, and that there was a zero-tolerance for violations. (Ex. 7).

87) For these and other reasons, L.L. Bean decided that it should not place all of its balsam product business with Worcester and decided to find another vendor for one of the balsam product lines that it had purchased from Worcester, the "Tartan Wreath." (Fessenden, Day 3 at 700-734).

88) Soon after that, L.L. Bean advised Worcester that L.L. Bean would no longer be purchasing the Tartan Wreath product from Worcester, and would instead be buying it from a competitor of Worcester's, Whitney Originals, which was located in Washington County, close to Worcester's operations. (Morrill Worcester, Day 2 at 463-464).

89) Morrill Worcester was upset by the loss of the Tartan Wreath to a competitor and expressed his frustration to Rol Fessenden. (Fessenden, Day 4 at 1010-1011; Morrill Worcester, Day 2 at 465-467).

90) Rol Fessenden told Morrill Worcester that, if Worcester came into compliance with all of L.L. Bean's standards, it was possible Worcester could regain the Tartan Wreath. (Morrill Worcester, Day 2 at 465-467). However, Bean's concerns about Worcester remained and, as discussed later in this decision, influenced Bean's decisions in 2009.

#### THE PARTIES' NEGOTIATIONS PRECEDING THE FINAL VERSION OF THEIR LETTER AGREEMENT FOR THE 2008 SEASON

91) From approximately 2004 through 2008, Robert Bruce of Oakmont Associates served as a financial and business advisor to the Worcester companies. (Bruce, Day 6 at 1480-1481).

92) On March 14, 2008, L.L. Bean sent its proposed letter agreement to Worcester for the upcoming 2008 season. The March 14 letter was in some ways consistent with the terms of the parties' letter agreement governing the 2007 season. (Ex. 433).

93) Among other things, the March 14 letter reserved to L.L. Bean the right to order Worcester to increase or decrease its commitments to forecasts based on L.L. Bean's "customer demand." (Ex. 433).

94) The March 14 letter also required Worcester to purchase or to have on hand sufficient components for programs forecast by L.L. Bean including, as well, as percentages above the forecast, and for L.L. Bean to be responsible for unused components up to and including a reserve if consumer purchases for the season fell short of projections, and L.L. Bean deleted the product from its line (Ex. 433).

95) Thus, as in prior years, L.L. Bean's component commitment, as stated in the March 14 letter, extended to all components purchased by Worcester for L.L. Bean products up to Bean's forecast plus a stated percentage beyond that.

96) This commitment was unacceptable to Worcester's new source of bank financing, Chittenden Bank. After consulting with Chittenden, Robert Bruce advised Rol Fessenden or William Holden that L.L. Bean's March 14 proposal was not acceptable because it did not commit Bean to purchase any specific dollar amount of products from Worcester.

97) To induce Chittenden to establish the line of credit that Worcester needed in order to be able to meet L.L. Bean's requirements, Worcester needed L.L. Bean to commit itself to purchasing at least a minimum number of units by means of

purchase order. (Bruce, Day 6 at 1509-10, 1513, 1541-1542; Holden, Day 6 at 1375; Fessenden, Day 4 at 891-893).

98) L.L. Bean was made aware of the nature of Chittenden's objection and of the fact that Worcester needed L.L. Bean to commit itself to purchase orders that could serve as security for a line of credit from Chittenden that Worcester could use to fund at least some of the expenses of the 2008 season. (Holden, Day 6 at 1376).

99) In an effort to meet Worcester's needs, L.L. Bean issued a second proposed letter agreement dated March 25, 2008. (Fessenden, Day 4 at 899-900).

100) The draft March 25, 2008 letter differed from the March 14 letter in that it specifically provided that L.L. Bean would issue purchase orders and pay for finished goods within the purchase order quantities irrespective of customer demand.

101) The March 25, 2008 letter also included L.L. Bean's commitment to pay for purchase order quantities "regardless of customer demand," provided Worcester actually finished the goods within those purchase order quantities. In including this provision, L.L. Bean was acceding to the requirement imposed by Chittenden and conveyed to L.L. Bean by Robert Bruce that Worcester needed L.L. Bean to issue firm purchase orders to Worcester for the 2008 season. (Ex. 435; Fessenden, Day 4 at 900-901; Bruce, Day 6 at 1497-1498).

102) The March 25, 2008 letter included L.L. Bean's commitment to issue purchase orders for 344,725 balsam units from Worcester. L.L. Bean chose this number at its sole discretion. (Ex. 435; Fessenden, Day 4 at 932).

103) The purchase order quantity to which L.L. Bean was willing to commit in its March 25, 2008 letter contrasted with L.L. Bean's forecast of 470,000 in its Letter Agreement of February 13, 2007. (Ex. 654, 435; Holden, Day 5 at 1274).

104) The March 25 letter reserved to L.L. Bean the right to increase its purchase order commitment of 344,725 balsam units by any number its chose up to and including its forecast number of 405,559 balsam units and a 10% projection above forecast for a total of 446,115 balsam units, provided that L.L. Bean placed purchase orders for the increased amounts by no later than September 12, 2008. (Ex. 435; Fessenden, Day 4 at 902.).

105) L.L. Bean was under no obligation to increase its purchase order commitment of 344,725 balsam units. (Ex. 435; Fessenden, Day 4 at 903).

106) The March 25, 2008 letter also set forth terms describing L.L. Bean's responsibility for any excess components that are purchased by Worcester but not ultimately incorporated into finished goods. The portion of the letter that addresses this responsibility begins with the phrase "As we have for the past several seasons..." (Ex. 435; Fessenden, Day 4 at 906-907).

107) The March 25, 2008 letter agreement provided that Worcester would purchase or have on hand components that would be necessary to complete all quantities for all Worcester products lines including not only those items for which L.L. Bean was prepared to issue purchase orders—344,725 balsam units—but for L.L. Bean's forecast and its projection above forecast as stated in the March 25 letter. (Ex. 435).

108) The March 25, 2008 letter agreement specifically divided the financial responsibility of L.L. Bean and Worcester for components making up the 10% reserve above forecast, with L.L. Bean assuming the limited financial responsibility for 6% (that is, 60% of the 10%) of the components for the SKUs projected above forecast and Worcester assuming 4% (that is, 40% of the 10%) of the components for the SKUs projected above forecast. (Ex. 435). The March 25, 2008 letter did not specifically say

which party would be responsible for unused components up to the amount of the forecast, and that silence later generated a dispute, addressed below.

109) Worcester's explicit assumption of ultimate financial liability for a portion of the reserve components purchased to make products ordered, forecasted, or projected by L.L. Bean as proposed in the March 25, 2008 letter had never been included in any previous year's agreement between Worcester and L.L. Bean. (Ex. 654, 435; Holden, Day 6 at 1314-1317).

110) The March 25 letter did not reserve to L.L. Bean the right to order Worcester to stop production. (Ex. 654, 435).

111) The March 25 letter substantially addressed Chittenden Bank's concerns, but it was eventually superseded by yet another letter to Worcester from L.L. Bean, dated May 1, 2008. (Ex. 68, 443; Fessenden, Day 3 at 779-780). This letter governed L.L. Bean's ordering of balsam products from Worcester until it was modified orally in November of 2008, and is referred to in this decision as the May 1, 2008 letter agreement or simply as the 2008 letter agreement.

#### THE MAY 1, 2008 LETTER AGREEMENT

112) The May 1, 2008 letter agreement was drafted by L.L. Bean with assistance of its counsel, Brann & Isaacson, with substantial input from Worcester after lengthy negotiations with Bob Bruce and others on behalf of Worcester. (Ex. 651; Holden, Day 6 at 1319). Worcester did not draft any part of the May 1 letter agreement, but its terms reflect modifications demanded and approved by Worcester. (Ex. 651; Holden, Day 6 at 1319).

113) In broad terms, the May 1, 2008 letter agreement fundamentally differed from all of the parties' letter agreements in prior years, in that L.L. Bean was issuing



purchase orders simultaneously, and Worcester agreed to purchase or otherwise have available sufficient components to fill any and all orders L.L. Bean might place with Worcester up to and including L.L. Bean's forecast and projection-above-forecast without any component commitment on the part of L.L. Bean apart from the percentage of an over-forecast reserve. (Ex. 406, 653, 654, 68, 443).

114) The May 1, 2008 letter agreement repeated many if not all of the material terms of the March 25 letter:

- It stated a forecast of 405,559 units and a reserve of 10%, or an additional 40,556 units, for a total of 446,115 units projected.
- It obligated Bean to issue purchase orders for 344,725 units forthwith.
- It provided for L.L. Bean to have the right—but not the obligation—to supplement its initial purchase orders by any amount up to and including 110% of forecast—446,115 units, provided it did so by no later than September 12, 2008.
- It allotted responsibility for the reserve components of 10% above forecast similarly—6% of the 10% to L.L. Bean and 4% to Worcester.
- It committed L.L. Bean to pay for finished goods up to the total quantity of units covered in purchase orders issued by L.L. Bean, regardless of whether the finished units were sold, but also provided that L.L. Bean was not required to pay for finished but not sold goods beyond the total quantity of units reflected in purchase orders.

115) Like the March 25 letter, the May 1, 2008 letter did not reserve to L.L. Bean the right to direct Worcester to stop production of units being produced pursuant to purchase orders.

116) The May 1, 2008 letter agreement was the last in the series of letters drafted and it proved to be the definitive agreement between the parties for the 2008 season, at least until it was orally modified by agreement in November 2008.

117) L.L. Bean chose the number of Worcester products for which it committed to issue purchase orders—344,725 balsam units—at its sole discretion.

This figure was 85% of its forecast of 405,559 and 77% of its 10% projection-above-forecast. (Ex. 443, 68). This figure was more than 130,000 lower than L.L. Bean's sales of Worcester products in the immediately preceding 2007 season. (Ex. 443, 68; Morrill Worcester, Day 8 at 220; Fessenden, Day 4 at 812-814, 819-821).

118) To be sure of meeting its obligations to L.L. Bean, Worcester had to purchase or otherwise have on hand sufficient quantities of components to produce and ship up to 446,115 units—the amount of Bean's forecast plus a 10% reserve.

119) Under the 2008 letter agreement, each party gained something it had not obtained in the letter agreements covering prior years, and each party gave up something it had been granted in the agreements for prior years. Whereas the prior letter agreements had never committed L.L. Bean in advance to ordering any specific quantity of units from Worcester, Worcester gained such a commitment in the 2008 letter agreement, and thereby satisfied its financing bank, Chittenden. On the other hand, whereas L.L. Bean had committed itself in prior years to buying all leftover components, either in the form of finished units in the following year or as components in the case of discontinued products, Worcester agreed to a more limited commitment on L.L. Bean's part in the 2008 letter agreement.

120) The May 1, 2008 letter agreement differed fundamentally from the parties' letter agreements in prior years in that L.L. Bean was issuing purchase orders simultaneously, and Worcester agreed to purchase or otherwise have available sufficient components to fill any and all orders L.L. Bean might place with Worcester up to and including L.L. Bean's forecast and projection-above-forecast with a limited component commitment from L.L. Bean. (Ex. 406, 653, 654, 68, 443).

121) The extent of L.L. Bean's component commitment as set forth in the May

1, 2008 letter agreement is the subject of a dispute between the parties.

122) Like the March 25 letter, the May 1, 2008 letter agreement explicitly allotted responsibility for the 10% of units above forecast, but did not explicitly address responsibility for unused units up to the forecast amount.

123) With respect to components, the May 1, 2008 letter agreement provided as follows:

As we have for the past several seasons, L.L. Bean has identified those items on which we will commit to reserve components. This reserve commitment may be up to 6% of the season's forecast for the item. Per the attached commitment spreadsheet, the total value of the components L.L. Bean is instructing Worcester Resources to purchase over and above our current forecast of 405,559 units is \$80,228. These components will be used in 2008 production, or, if there are excess components and the product is to be offered in the 2009 season, Worcester Resources will hold these components at its cost until they are needed for production in 2009. If any unused components are for products that are dropped from L.L. Bean's line, L.L. Bean will pay Worcester Resources the cost of the excess components. Attached is a breakdown of our commitments by item. (Ex. 68, 69).

124) The attachment to the letter contained a list of the SKUs involved in the 10% reserve beyond forecast; the number of units for each SKU, the total dollar value of the units, and a breakdown of the parties' respective six-tenths and four-tenths shares of responsibility for the 10% reserve. L.L. Bean's stated share was \$80,228.

125) At trial, Worcester argued that the letter should be interpreted to establish essentially the same component commitment L.L. Bean had made in the 2007 letter agreement and in prior years—namely that L.L. Bean would commit itself to buying all leftover components purchased by Worcester up to the amount of the forecast plus the reserve percentage, either in the form of finished units in the following year, or by paying for the components for any discontinued products.

126) Worcester points to the prefatory phrase, "As we have for the past

several seasons...” to bolster its claim that the 2008 letter agreement essentially restated the same component commitment as L.L. Bean had made in prior years. Worcester also suggests that any ambiguity in L.L. Bean’s component commitment as stated in the letter should be resolved against L.L. Bean.

127) There is an ambiguity in the body of the letter itself as to the extent of L.L. Bean’s component commitment because the letter does not expressly say whether L.L. Bean’s component commitment extends beyond 6% of the 10% reserve and embraces any of the 405,559 units in the forecast, and the “As we have in prior years” reference only deepens the ambiguity rather than resolving it.

128) However, the letter refers to the attachment containing “a breakdown of our commitments by item,” and the attachment plainly limits L.L. Bean’s component commitment for 2008 to \$80,228 worth of reserve components—the value of L.L. Bean’s share of the 10% reserve amount.

129) If there were any lingering uncertainty about the extent of L.L. Bean’s 2008 component commitment, the extrinsic evidence, in particular the testimony of Robert Bruce, who was Worcester’s primary representative in the discussions that culminated in the May 1, 2008 letter agreement, conclusively resolves it. Mr. Bruce confirmed L.L. Bean’s position that the parties intended in the 2008 letter agreement that L.L. Bean’s component commitment for 2008 be limited to six-tenths of the 10% reserve and that the commitment was valued at \$80,228.00. (Bruce, Day 7 at 1728, 1969).

130) Thus, under the 2008 letter agreement, L.L. Bean assumed the risk that the market for Worcester’s products might not equal the orders that L.L. Bean placed with Worcester if Worcester actually made the finished products within the purchase

quantities ordered by L.L. Bean. Similarly, Worcester assumed risks of production, including, any changes in prices for raw materials, costs of production, costs of operation and all other production-related costs, including the cost of all components needed to produce balsam products ordered by L.L. Bean pursuant to the purchase orders, as well as, amounts up to the reserve quantity and a portion of the amount above the reserve. (Ex. 68, 443).

131) Consistent with the terms of the 2008 letter agreement, L.L. Bean issued purchase orders on May 6, 2008, to Worcester for 344,725 units. (Joint Stipulation, ¶ 14, Ex. 448).

132) Shortly after L.L. Bean issued its May 6, 2008 purchase orders to Worcester, Worcester obtained a line of credit from Chittenden Bank. (Morrill Worcester, Day 2 at 267-268).

#### L.L. BEAN'S SEPTEMBER 22, 2008 PURCHASE ORDER

133) On September 22, 2008, L.L. Bean issued purchase orders to Worcester for an additional 44,939 items, bringing L.L. Bean's purchase orders for the 2008 season to a total of 389,664 items. (Joint Stipulation, ¶ 14, Ex. 456). The purchase orders followed a telephone conversation that Morrill Worcester made to Lisa Richard of L.L. Bean to see whether L.L. Bean wanted to supplement its May 6, 2008 purchase order with further purchase orders.

134) Under the terms of the May 1, 2008 letter, L.L. Bean had the right, but not the obligation, to supplement its purchase orders of May 6, 2008 with additional purchase orders, provided it did so, if at all, by September 12, 2008. (Ex. 68, 443).

135) After L.L. Bean issued the second set of purchase orders, L.L. Bean made internal changes showing the purchase order cancelled in its records, because its

computer system did not allow it to record purchase orders being issued to a direct ship vendor. (Ex. 455).

THE PARTIES' NOVEMBER 26, 2008 ORAL AGREEMENT

136) On or about November 26, 2008, the parties made an oral agreement in the course of a telephone conversation that served to modify the May 1, 2008 letter agreement.

137) The parties' stipulations summarize the modification as follows: "As sales for the fall 2008 balsam progressed, L.L. Bean informed Worcester that market demand appeared slack. Worcester agreed to slow or stop production of balsam products as Bean directed. Worcester also agreed to pass along to L.L. Bean all cost savings from not producing balsam products." (Joint Stipulation, ¶ 15, 16). The following findings summarize the additional evidence leading up to and covering that conversation, to put more flesh on the stipulation.

138) Due to the economic downturn in the late summer and fall of 2008, L.L. Bean saw sales falling below projections in many product areas. It generated significantly less favorable sales forecasts and decided to ask its various vendors to be prepared to cut back production. (Fessenden, Day 4 at 944-945, 950-952).

139) The L.L. Bean employee with day-to-day responsibility for L.L. Bean's relationship with Worcester, William Holden, was thus instructed by his superior, Rol Fessenden, to call Worcester and all other vendors for which Mr. Holden was responsible within L.L. Bean, to tell the vendors to be ready to cut back on production as quickly as possible due to the significant decrease in sales projections as a result of the 2008 economic downturn. (Fessenden, Day 4 at 944-945, 950-952).

140) On November 19, 2008, Mr. Holden called Morrill Worcester. Neither

Mr. Holden nor Morrill Worcester recalled the specifics of that telephone call, but consistent with his habit of taking notes of significant conversations, (Holden, Day 4 at 1276), Mr. Holden took notes. Mr. Holden's notes reflect that he reported that L.L. Bean's forecasts had been reduced because sales of Worcester products were much lower than projected and that he asked that Worcester Resources slow production. Morrill Worcester agreed to slow production, and told Holden that "he would work with L.L. Bean to make what we need." (Ex. 73; Holden, Day 6 at 1347-1349, Morrill Worcester, Day 2 at 377).

141) On November 26, 2008, Mr. Holden and Lisa Richard on behalf of L.L. Bean had a further telephone conversation with Morrill Worcester about the status of sales of Worcester products. (Ex. 74, 75; Holden, Day 6 at 1349-1351). Michael Worcester, the vice-president of Worcester, was also present for the telephone conversation. (Morrill Worcester, Day 2 at 376; Michael Worcester, Day 9 at 22-23).

142) Mr. Holden and Ms. Richard took notes of the conversation. (Ex. 74, 75). Neither of the Worcesters took any notes. (Morrill Worcester, Day 2 at 376).

143) Mr. Holden told Morrill Worcester that L.L. Bean's sales of Worcester products were quite a bit below projections and said L.L. Bean needed Worcester to cut back production. (Ex. 74; Morrill Worcester, Day 2 at 377-378; Holden, Day 6 at 1347). Morrill Worcester replied by saying that Worcester could not agree to reduce the purchase orders that L.L. Bean had placed with Worcester because Chittenden Bank would not let him, but said that Worcester would not make any products L.L. Bean does not need. (Ex. 74, 75; Michael Worcester, Day 9 at 22-23).

144) Morrill Worcester told Mr. Holden that Worcester would stop production as L.L. Bean directed and that Worcester would pass any and all savings

resulting from its cessation of production along to L.L. Bean. (Ex. 74, 75; Morrill Worcester, Day 8 at 206). Mr. Worcester said that the only two examples of the savings that he could think of at the time that would result from a cessation of production were labor costs and the costs that Worcester paid for cutting balsam tips, also known as “brush.” (Ex. 74, 75; Michael Worcester, Day 9 at 22). Lisa Richards notes state: “W.W. asking for difference of PO to production – would reduce by labor/balsam overhead – components.” (Ex. 75) Her notes are not clear as to whether the references to overhead and components were mentioned by Mr. Worcester or were her own inferences as to what could be saved by cutting back production.

145) Morrill Worcester also told William Holden that Worcester would “save what it can” and “we would do anything we could to save them [L.L. Bean] money” and “if there ‘s anything else we could save, we certainly would” as a result of ceasing production. (Ex. 74; Morrill Worcester, Day 2 at 378-379, Day 3 at 605).

146) Messrs. Holden and Worcester agreed that the parties would be fair to each other at the end of the season. (Holden, Day 6 at 1350; Morrill Worcester, Day 2 at 383-384). Morrill Worcester took this to mean that Worcester would “do anything we could to help them out” and that “we would do anything we could to save them money.” (Morrill Worcester, Day 2 at 378-79, 383).

147) Based on the parties’ history of resolving what was owed at their year-end meetings, both Mr. Holden and Morrill Worcester likely contemplated that the parties would meet early in the following year to work out an agreed-upon year-end payment from L.L. Bean to Worcester to close the 2008 season. That plainly was Mr. Worcester’s understanding. (Morrill Worcester, Day 8 at 207).

148) Although Worcester clearly promised that it would save what it could by



stopping production when and as directed by L.L. Bean, when and how such savings would be passed back to L.L. Bean was not discussed.

149) However, in offering to pass savings along to L.L. Bean, Morrill Worcester was referring to savings arising from production. The examples that he gave of possible areas of savings—labor and brush—were costs associated with the Worcester’s production of items for L.L. Bean that could be saved if Worcester actually stopped production. (Morrill Worcester, Day 2 at 379-380.)

150) When he agreed to credit L.L. Bean with savings realized by Worcester in cutting back production, Morrill Worcester reasonably believed that Worcester could do so by giving L.L. Bean discounts on its purchases during the following season in 2009. In fact, the representatives of Worcester and L.L. Bean who participated in the conversation had every reason to expect that the business relationship between the two companies would continue into 2009 and thereafter.

151) In summary, the November 26, 2008 telephone conversation modified the May 1, 2008 letter agreement in this significant respect: although the purchase orders committing L.L. Bean to purchase 389,664 units remained in force, Worcester agreed to subtract from the amounts due on those purchase orders what it could save in production costs by reducing production in compliance with L.L. Bean’s request.

152) The fact that the purchase order commitment remained in place after the November 26, 2008 conversation is relevant for several reasons, including that it helps explain and justify, Worcester’s decision at the end of 2008 to send L.L. Bean an invoice for the full outstanding amount of the purchase orders. That decision is discussed in detail below.

153) Sometime after the telephone conversation between William Holden and

Lisa Richard and Morrill Worcester and Michael Worcester on November 26, 2008, Rol Fessenden saw William Holden in a corridor of L.L. Bean and Mr. Holden confirmed that he had spoken to Worcester and that Worcester had agreed to cease production at L.L. Bean's direction. Mr. Fessenden did not recall if Mr. Holden provided him with any other information about the conversation, but he was aware that Mr. Holden had spoken to Worcester in November as requested. (Fessenden, Day 4 at 949-950). However, Mr. Fessenden was unaware of the details of the November 26, 2008 conversation until he attended the trial of this case in October 2011. (Fessenden, Day 4 at 986).

154) In effect, by refusing to release L.L. Bean from its previously issued purchase orders, Worcester was attempting to reserve its right to the Uniform Commercial Code (UCC) seller's remedy based on an action for the price, instead of the alternate remedy granting the seller the difference between market value and contract price, less expenses saved. *Compare* 11 M.R.S. § 2-708(1) ("the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (section 2-710), but less expenses saved in consequence of the buyer's breach") *with* 11 M.R.S. § 2-709(1)(b) ("When the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages under section 2-710, the price [o]f goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.").

155) However, as L.L. Bean points out, when Worcester agreed to stop production, Worcester can be deemed to have surrendered its ability to bring an action

for the price under section 2-709, and to have limited its remedy to those available under section 2-708. *See Detroit Power Screwdriver Co. v. Ladney*, 181 N.W.2d 828, 832 (Mich. App. 1970) (“the language of 2709(1) which allows a suit for the price ‘when the buyer fails to pay the price as it becomes, due,’ implies the completion of contractual conditions precedent to payment before the seller can sue on the price. . . . the seller must complete the machine and tender performance consistent with the contract before it can sue on the price.”); accord *E-Z Roll Hardware Mfg. Co., Inc. v. H & H Prods & Finishing Corp.*, 4 U.C.C. Rprt. 1045, 1047–48 (N.Y. Civ. Ct. 1968) (“A seller . . . who elects to cease manufacture on repudiation by the buyer does not have an action for the purchase price as such”); *Rowland Meledandi, Inc. v. Kohn*, 7 U.C.C. Rptr. 34 (N.Y. Civ. Ct. 1969) (same).

156) On the other hand, during the November 26, 2008 telephone conversation, L.L. Bean did agree to pay the full face amount of the purchase orders minus whatever Worcester was able to save by stopping production. Thus, what the parties agreed to on November 26, 2008 was different than the section 2-708(1)(b) remedy of contract price plus incidental costs minus market value and expenses saved. What they agreed to was, in substance, a hybrid of the UCC remedies in sections 2-708 and 2-709 and could be characterized as a modified seller’s remedy, as allowed by the UCC. *See* 11 M.R.S. § 2-719(1) (parties to a sales contract may agree to “remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article”).

#### L.L. BEAN'S REQUESTS FOR CESSATION OF PRODUCTION AND WORCESTER'S RESPONSE

157) In early December, L.L. Bean requested that Worcester stop production of certain products. On December 9, L.L. Bean told Worcester to stop production of all

products. (Joint Stipulations, ¶¶ 17-18; Ex. 80, 81, 82, 83, 84; Michael Worcester, Day 9 at 26).

158) Morrill Worcester was made aware of the requests and gave orders to stop production of the items L.L. Bean had identified. (Morrill Worcester, Day 8 at 209).

159) Worcester released production workers that Worcester concluded that it could safely release as a result of the cessation of production. (Michael Worcester, Day 9 at 32). By December 10, 2008, however, Worcester's production was essentially completed for the season, having already made 95% of the products it completed that year.

160) After the stop order, Worcester's production on most items was stopped entirely, with some items continuing on skeleton crew levels, with production down to extremely small numbers. In fact, all wreath manufacturing stopped by December 12, with the remainder of production limited to certain centerpieces and a tartan tree. (Ex. 253).

161) Worcester did not release its entire support staff because Worcester was still making some balsam products for L.L. Bean, and Worcester was also concerned that if it released those workers it could not get them back in the event that a need for their services unexpectedly arose. (Michael Worcester, Day 9 at 32-33).

162) Up to and including December 20, 2008, Worcester continued production of only four to five product types (or SKUs) out of the 22 product types Worcester produced in 2008, and only on a very limited basis after L.L. Bean had requested that Worcester stop production. (Michael Worcester, Day 9 at 28, 31; Ex. 253).

163) Worcester continued shipping only a very small amount L.L. Bean products up to and including December 23, 2008. (Michael Worcester, Day 9 at 32).

164) As a cost savings, as a result of stopping production, Worcester did not have to pay Worcester Holdings the \$.45 per pound for balsam tips for all of the items reflected in L.L. Bean's purchase orders. (Morrill Worcester, Day 3 at 604-612).

#### L.L. BEAN DISTRIBUTION OF WORCESTER'S FINISHED GOODS

165) By the end of the 2008 season, Worcester had manufactured 315,580 units, more than 40,000 units beyond what L.L. Bean had been able to sell to customers. (Joint Stipulations ¶¶ 19-21). Worcester shipped 271,554 items to customers and did not ship the rest. Consistent with its obligations under the 2008 letter agreement, L.L. Bean paid Worcester for the 315,580 units and took possession of approximately 20,000 finished units in the form of wreaths and gave them away to L.L. Bean customers and employees. (Ex. 489; Fessenden, Day 4 at 954; Holden, Day 6 at 1365).

166) L.L. Bean left approximately 20,000 finished units on Worcester's premises. (Scott, Day 8 at 31). Worcester did not incur any direct shipping costs on these goods. Although Worcester testified that it disposed of these goods, and that it did not salvage any components from them, it provided no evidence of any expenses incurred in such disposal nor has it made any claim against L.L. Bean for such expenses.

#### THE END OF THE 2008 SEASON AND WORCESTER'S DECEMBER 31, 2008 INVOICE TO L.L. BEAN

167) By the end of the 2008 season, Morrill Worcester believed that Worcester had met all of L.L. Bean's expectations and requirements for the 2008 season. (Morrill Worcester, Day 2 at 408; Ex. 24). Although L.L. Bean still had serious concerns with Worcester's viability as a vendor, Worcester had made progress over the course of the year in addressing the concerns Rol Fessenden had conveyed to Worcester

early in 2008. (Fessenden, Day 4 at 956-957). At the end of 2008, William Holden, who had primary responsibility for L.L. Bean's relationship with Worcester, assumed that Worcester would be doing business with L.L. Bean in the 2009 season. (Ex. 93, 96; Holden, Day 6 at 1377).

168) "Year-end" was when Worcester customarily sent a final invoice to L.L. Bean for the just-ended season. Morrill and Michael Worcester consulted with Worcester's financial advisor, Robert Bruce, on Worcester's final bill to Bean. (Ex. 85, 86).

169) Robert Bruce advised Worcester to bill L.L. Bean for the full amount of the remaining value on the combined purchase orders L.L. Bean had placed for 389,664 balsam items. (Ex. 87). Worcester was under great pressure from Chittenden, its financing bank, to repay the line of credit, which as of early 2009 stood at more than \$1.4 million, according to Morrill Worcester. (Ex. 96).

170) Mr. Bruce's view was that the 2008 letter agreement was a "take-or-pay" contract, under which L.L. Bean was committing itself unconditionally to pay the amount due for all units covered in its purchase orders, whether or not it needed or even took delivery of the units involved.<sup>+</sup> Although the term "take-or-pay contract" may not be a widely used term of art outside the oil and gas industry, it fairly captures the unconditional nature of L.L. Bean's contractual commitment for the 2008 season, at least as it stood before the November 2008 oral modification.

171) Like Mr. Fessenden on L.L. Bean's side of the table, Mr. Bruce was not a

---

<sup>+</sup> A take-or-pay contract is one in which the purchaser of goods agrees to pay for goods ordered regardless of whether the purchaser takes delivery. "The buyer would be motivated to enter into a take-or-pay contract to be reasonably confident that a minimum quantity of the goods desired would be available on a regular basis. The seller would be motivated by the steady cash flows and assured market for its product." See B. Jarnagin, Master GAAP Guide, at 533 (CCH 2008). Take-or-pay contracts are common in the energy industry, if not in the balsam product industry.

party to the November 2008 conversation on behalf of Worcester, and it seems likely that, like Mr. Fessenden, he was not made fully aware of the oral agreement reached in that conversation. Their incomplete grasp of the oral agreement may help explain why the positions that each took on behalf of their respective principals—Mr. Bruce in insisting that L.L. Bean had to pay in full before any consideration of credit for Worcester’s savings would be given, and Mr. Fessenden in proposing in his March 2, 2009 communication that Worcester accept a different and potentially less favorable resolution than was discussed between the Worcesters and Mr. Holden and Ms. Richards on November 26, 2008—were deemed unacceptable by the other.

172) Worcester had never before charged L.L. Bean for unfinished products. (Joint Stipulations, ¶ 24). On the other hand, under the parties’ 2008 letter agreement, as modified by the November 26, 2008 conversation, Worcester was entitled to be paid for the products reflected in L.L. Bean’s purchase orders, whether or not they were needed or finished, less any costs Worcester could save by not continuing to make those products after L.L. Bean directed it to stop production. (Ex. 68).

173) Thus, if a particular unit was only partially finished as of when L.L. Bean directed Worcester to stop production of the SKU for that unit, L.L. Bean would be liable to pay Worcester the purchase order price of that unit, minus any costs Worcester did save or could reasonably have saved by not having to complete the unit.

174) Jill Stevens, the bookkeeper for Worcester prepared an invoice for L.L. Bean dated December 31, 2008 for the balance due from L.L. Bean on the full amount of the purchase orders, plus other charges. (Ex. 88; Stevens, Day 6 at 1415-1419).

175) The December 31, 2008 invoice also included a charge for products that L.L. Bean had ordered and that Worcester had converted into finished goods but for

which L.L. Bean had no customers. (Ex. 87; Stevens, Day 6 at 1415-1419).

176) On January 5, 2009, William Holden asked Morrill Worcester if Worcester would hold its 2009 prices to 2008 levels. Morrill Worcester agreed that Worcester would do so. (Ex. 498; Holden, Day 6 at 1358). Given the 2008 economic downturn, this request was made of all of L.L. Bean's vendors, not just Worcester. (Holden, Day 6, 1357).

177) When Morrill Worcester instructed Jill Stevens to send the December 31, 2008 invoice to L.L. Bean, he expected Worcester and L.L. Bean would have a year-end meeting sometime early in 2009 to wrap up the 2008 season and to make plans for a possible 2009 season. (Stevens, Day 6 at 1415, 1457; Morrill Worcester, Day 2 at 400-402).

178) On January 7, 2009, Jill Stevens forwarded the December 31, 2008 invoice to Kim Best, a contact at L.L. Bean to whom, at the end of the preceding production and sales year, Jill Stevens had sent the year end invoice. Jill Stevens sent the invoice by telefax. (Ex. 65, 89; Stevens, Day 6 at 1412-1413, 1415).

THE PARTIES' DISCUSSIONS SURROUNDING WORCESTER'S YEAR-END INVOICE AND THEIR EFFORTS TO RESOLVE THEIR DIFFERENCES

179) The invoice was forwarded to William Holden, who contacted Morrill Worcester to ask him about it. William Holden spoke to Morrill Worcester and Robert Bruce on January 9 and January 15, 2009. (Ex. 93; Holden, Day 6 at 1370-1373).

180) During those conversations, Messrs. Worcester and Bruce explained that Worcester had to submit an invoice for the full amount remaining on the invoice because Worcester needed L.L. Bean to pay Worcester so Worcester could in turn pay the approximately one million dollars Worcester owed to Chittenden Bank, the bank that had issued the line of credit enabling Worcester to finance L.L. Bean's purchase