STATE OF MAINE
Sagadahoc, ss.

BUSINESS AND CONSUMER DOCKET

L.L. BEAN, INC.

Plaintiff/Counterclaim Defendant

v.

Docket No. BCD-WB- CV-09-39

WORCESTER RESOURCES, INC.

Defendant/Counterclaim Plaintiff

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff L.L. Bean, Inc. has filed a Motion for Partial Summary Judgment regarding the counterclaim of Defendant Worcester Resources, Inc. L.L. Bean's Motion has four aspects:

- Bean essentially seeks to limit Worcester's recovery on its breach of contract counterclaim to Worcester's profit except as to finished products
- Bean asserts that Worcester's claim for interest and penalties on its financing is for consequential damages not recoverable in this context
- Bean asserts that Worcester's claim for storage fees is likewise unsustainable as a matter of law because not proven
- Bean seeks summary judgment on Worcester's counterclaim for fraud and for negligent misrepresentation

Worcester opposes L.L. Bean's Motion on all grounds. The parties presented oral argument on the Motion February 8, 2011 at the Sagadahoc County Superior Court.

For the reasons given below, the court grants the Plaintiff's Motion for Partial Summary Judgment in part.

BACKGROUND

The relevant factual history can be summarized as follows[1]:

L.L. Bean, Inc., is a retailer of outdoor equipment and apparel headquartered in Freeport, Maine. It sells its products through its retail stores, catalogs, and internet site. Worcester Resources, Inc., manufactures balsam products and is located in Harrington, Maine. Worcester's predecessor company, Worcester Wreath Company, began making balsam products such as wreaths, table-top trees, and holiday centerpieces in the early 1970s. These products consist of frames, bells, ribbons, and other decorative components combined with fresh balsam fir tips.

Worcester Wreath Company began selling its products to L.L. Bean in 1983, starting a relationship that would last until 2009. Worcester functioned as a "drop-ship" vendor for L.L. Bean, meaning that, as L.L. Bean's customers placed orders for balsam products, L.L. Bean would inform Worcester, and Worcester would ship the products directly to those customers. Most of the customer orders came immediately before and during the winter holiday season surrounding Christmas. To meet the seasonal demand, Worcester had to order the necessary components early in the calendar year, typically in mid to late spring.

In the years relevant to this litigation, in February or March L.L. Bean would forecast the expected demand for different balsam products in the upcoming season and negotiate letter agreements for production with suppliers such as Worcester. Different product lines were broken down into separate stock keeping units (SKUs), each manufactured in whole or in part to L.L. Bean's specifications. Once it had an agreement with Bean for the forthcoming season, Worcester could purchase the necessary components and begin

[1] This summary omits some of the factual material tendered by the parties that the court finds not relevant to the motion, e.g. Worcester's connection with Disney.

assembling the non-perishable elements during the summer and early fall. There was no continuing contract between Bean and Worcester, and each year required the new negotiation of a separate commitment letter.

While the parties were doing business, Worcester's sales to L.L. Bean comprised the majority of its sales of balsam products. Early in the parties' relationship, L.L. Bean discouraged Worcester from pursuing similar relationships with Bean's competitors, but stopped trying to do so in the early 2000s. Instead, in response to Worcester's developing relationships with L.L. Bean's competitors, Bean itself began exploring other suppliers of balsam as an alternative to Worcester.[2]

As the 2007 holiday season ended, Worcester set out to change its banking relationship. Worcester traditionally had done its banking with Machias Savings Bank, but in 2008 it moved its accounts to Chittenden Bank.[3] Worcester required a large cash infusion to obtain financing from Chittenden for its 2008 operations, and it looked to L.L. Bean for assistance.

---

[2] For example, in 2002 Worcester informed L.L. Bean that it was going to sell balsam products to 1-800-FLOWERS, a national ship-to-gift business that could compete with Bean's catalog sales. L.L. Bean's Divisional Merchandise Manager of Furniture and Accessories, Kim Nowak (nee Philippone) indicated in an e-mail exchange that she was taken "off guard" and felt "betrayed." Mrs. Nowak wrote that L.L. Bean had "for years" been telling Worcester "to protect [Bean's] business by not selling [to] competitors whenever possible," but that Worcester had begun selling to Home Depot the year before. (Def.'s Add'l S.M.F. ¶ 126; *see* Ingram Dep. Ex. 167.) In light of Worcester's relationship with 1-800-FLOWERS, Mrs. Nowak suggested that L.L. Bean renew its consideration of adding alternate resources for their balsam products, and that a "come to Jesus" meeting be held with Worcester to ask for lower prices as a result of efficiencies it would gain from its new business. (Def.'s Add'l S.M.F. ¶ 130; *see* Ingraham Dep. Ex. 167.) Anne Ingraham, the recipient of this e-mail, testified that L.L. Bean was concerned that Worcester would reveal the volume of Bean's balsam business to Bean's competitors and prompt them to cut into that market. (Def.'s Add'l S.M.F. ¶ 132.) It is not clear whether Worcester went on to do business with 1-800 FLOWERS, but it did continue to do business with L.L. Bean.

[3] In 2008, Chittenden Bank became part of People's United Bank.

L.L. Bean agreed to provide Worcester with an infusion of $582,916.00 through a bailment and purchase agreement that called for L.L. Bean to purchase and take legal ownership of Worcester's inventory for a short period of time while Worcester paid off one line of credit and secured another. Before entering the bailment agreement, L.L. Bean reviewed Worcester's financial statements and inventory record with Worcester's business advisor, Robert Bruce.

L.L. Bean viewed this arrangement, whereby it provided one of its vendors with financial assistance, as an extraordinary measure that it was able to justify in part due to its interest in having a Maine company supply its balsam products, and in part due to its long and proven relationship with Worcester. However, Worcester's need for financial help raised concern within L.L. Bean, which already had some unease about Worcester's environmental and human resources record. As a result of all these concerns, at some point before May 1, 2008, L.L. Bean informed Worcester that it had selected a secondary balsam vendor, Whitney Wreath, to supply one line of its balsam wreaths in the 2008 season.

While the parties were arranging their bailment and purchase agreement, they were also preparing for the 2008 production. L.L. Bean and Worcester entered into their first letter agreement for the season on March 14, 2008. Worcester's new bank, Chittenden, required purchase orders and a firm commitment from L.L. Bean before it would grant Worcester a line of credit. The parties' agreement was subsequently revised twice, with the final letter agreement being issued on May 1, 2008. That letter reads in material part:

> The current sales forecast for finished goods is 405,449 units. L.L. Bean will issue purchase orders for 85% of the forecast or 344,725 units. L.L. Bean will pay Worcester Resources for these orders regardless of customer demand. . . .
>
> 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. . . . [T]he 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. . . .
>
> Below is the agreed timeline for L.L. Bean's production commitment.
> - On 5/6/08, L.L. Bean will issue purchase orders for 344,735 units.
> - On 9/12/08, L.L. Bean will issue purchase orders for the balance of the season's need, up to 110% of the sales forecast.
>
> If L.L. Bean's purchase order quantities exceed actual sales, we will pay Worcester Resources for any finished goods that were produced but not sold. . . .

(Def.'s Add'l S.M.F. ¶¶ 35–41, 43–46; Morrill Worcester Aff. Ex. D.)

L.L. Bean issued a purchase order to Worcester for 344,725 balsam units on May 5, 2008, and a second purchase order for 44,940 units on or around September 22, 2008. There is a material dispute over the extent of Worcester's commitments made in reliance on these orders.[4] As the 2008 holiday season approached, it became apparent to L.L. Bean that it had overestimated its need for balsam products. The market for balsam products slackened in November 2008, and L.L. Bean asked Worcester to slow its production.

A telephone conversation was held on November 26, 2008, involving Bill Holden and Anne Richard on behalf of L.L. Bean and Morrill Worcester on behalf of Worcester. During that telephone conversation, the parties agreed to modify their May 1, 2008 letter agreement such that Worcester would slow or stop production of balsam products, and would pass along any cost savings realized from doing so to L.L. Bean. Initially, L.L. Bean asked Worcester to agree to reduce Bean's commitment by modifying the already issued

[4] L.L. Bean contends that Worcester did not in fact have enough specific components on hand to manufacture the products it claims could have been required during the 2008 season. (Pl.'s Resp. to Def.'s Add'l S.M.F. ¶ 87; Ordway Aff. ¶ 7.)

purchase orders. Worcester insisted that the purchase orders remain as they were, but agreed to reduce production. Anne Richard wrote in her notes that Worcester had "to go [with the purchase orders] he has now," but that Worcester would "reduce by balsam [and] labor," and that "when all is said [and] done, [Worcester would] not make product if not needed." (Def.'s Add'l S.M.F. ¶¶ 95–96; Richard Dep. Ex. 182.) Bill Holden's note indicates that Worcester "wasn't willing to reduce [purchase orders and] said Chittenden wouldn't agree," but that Worcester would reduce production and "would not make product [L.L. Bean] does not need." (Def.'s Add'l S.M.F. ¶¶ 90–93; Holden Dep. Ex. 140.)

When Morrill Worcester was asked during his deposition whether he had agreed to "cut production and pass on cost savings to L.L. Bean as a result of the cessation of production," he answered: "That's fair." (Supp. S.M.F. ¶ 5; Worcester Dep. at 217.) L.L. Bean asked Worcester to cease production of certain lines completely on December 9, 2010. (Def.'s Add'l S.M.F. ¶ 100.)

Ultimately, Worcester produced 315,580 finished balsam products for L.L. Bean during the 2008 season. L.L. Bean paid the full contract price for these finished products. However, on December 31, 2008, Worcester issued an invoice to L.L. Bean charging the full contract price for an additional 97,756 balsam products that were never finished, plus 55,000 units of unused brush. According to the invoice, the billed amount of $1,654,482.26 represented the balance due on the full price represented by the purchase orders of May 5, 2008, and September 19, 2008.[5] L.L. Bean refused to pay the invoice on the ground that it

[5] The quantity of balsam products reflected in the December 31, 2008 invoice, together with the balsam products actually finished and paid for by L.L. Bean, amount to a total of 413,336 units. This exceeds the 389,665 units requested in the purchase orders. The parties do not address this apparent inconsistency.

failed to reflect cost savings Worcester could realize and pass on to L.L. Bean, and continues to do so.

In 2009, L.L. Bean began to seriously investigate the possibility of diversifying its sources for balsam products in the 2009 holiday season. L.L. Bean was concerned by news that Worcester and/or its principals were the subjects of an investigation regarding the use of undocumented workers. Also, though Worcester appeared to have met the benchmarks L.L. Bean had set for it as of December 2008, Bean had ongoing concerns about Worcester's financial condition. L.L. Bean continued to view Worcester as a "high risk" vendor due in part to the harm an indictment could cause to Bean's reputation and supply chain. (Supp. S.M.F. ¶ 22; Pl.'s Resp. to Def.'s Add'l S.M.F. ¶ 144.)

In January 2009, L.L. Bean prepared an internal balsam assessment for the 2009 holiday season recommending that Worcester receive approximately 55% of the total production. Handwritten notes outline contingency plans "in case [of] indictment." L.L. Bean explored arrangements with vendors Whitney Wreath and Teufel Holly Farms throughout February and March of 2009.

During this period, L.L. Bean and Worcester were engaged in ongoing negotiations to resolve their dispute over the 2008 season.[6] (Pl.'s Resp. to Def.'s Add'l S.M.F. ¶¶ 190–92.) Internal e-mail correspondences within L.L. Bean show considerable confusion over the future of the parties' business relationship. On March 9, 2009, a second balsam scenario assessment was prepared with Worcester omitted from the sourcing mix. (Def.'s Add'l S.M.F. ¶ 179; Scammell Dep. Ex. 160.) On March 13, 2009, an e-mail from Anne Ingraham

[6] While the Plaintiff has placed extensive documentation of these negotiations in the record, they are raised for the first time in the Plaintiff's response to the Defendant's statement of additional facts. They are mentioned here because they provide context to the events of 2009 as recounted in the parties' initially filed statements.

indicated that Bill Holden had met with Worcester the day before, that L.L. Bean's representatives were reviewing avoided costs with Worcester, and that there was "[n]o date on when [a] decision will be made." (Def.'s Add'l S.M.F. ¶ 178 [sic]; Ingraham Dep. Ex. 173.) Undated handwritten notes on the e-mail read: "WORC decision late next week." (Def.'s Add'l S.M.F. ¶ 178 [sic]; Ingraham Dep. Ex. 173.) Another e-mail exchange that occurred within L.L. Bean between March 23 and March 25, 2009, indicated that L.L. Bean employees believed "Worcester [was] out," but concluded by reporting that Bill Holden was "after Rol [Fessenden] to let [them] pull the triggers but nothing [had] been settled at the higher level . . . ." (Def.'s Add'l S.M.F. ¶¶ 181–83; Pl.'s Resp. to Def.'s Add'l S.M.F. ¶¶ 181–83; Woodcock Aff. Ex. C.)

In a letter dated March 30, 2009, Rol Fessenden, L.L. Bean's senior vice president of supply chain management, wrote to Morrill Worcester:

> Bean is prepared to resolve the 2008 invoices consistent with our interpretation of the letter agreement. See attached.[7] The offer is dependent on you signing a release from potential litigation. Even though you have agreed to payment based on that offer, you will not sign the release from potential litigation. I cannot issue you any payment until the release is signed.
>
> As previously discussed, I cannot issue purchase orders for 2009 to Worcester Wreath until I have received your 2008 audited financial information, in order to confirm your ability to finance the business. We are moving forward with alternative suppliers.

(Def.'s Add'l S.M.F. ¶ 153; Worcester Dep. Ex. 50.)

The referenced offer appears to be a settlement offer that L.L. Bean made on March 25, 2009, whereby L.L. Bean agreed to pay Worcester $650,000 for the difference between the 315,580 balsam products actually produced and the 344,725 ordered in the May 6, 2008

[7] The Defendant's filing omitted the mentioned attachment, but it appears that the Plaintiff included it in its responsive materials.

purchase order. L.L. Bean would receive the $155,000 worth of raw materials needed to produce these units. L.L. Bean would also pay Worcester an additional $270,000 for the components that Worcester purchased in anticipation of additional orders in 2008, provided that these components were actually sent to L.L. Bean. The written offer expressly indicated that L.L. Bean would not lend any money to Worcester beyond the terms outlined above. (*See* Def.'s Add'l S.M.F. ¶¶ 156-58; Pl.'s Resp. Ex. J.)

On or shortly before March 30, 2009, Bill Holden told Morrill Worcester that Worcester Resources would only receive approximately thirty or forty percent of L.L. Bean's 2009 holiday business. (Def.'s Add'l S.M.F. ¶ 162; Pl.'s Resp. to Def.'s Add'l S.M.F. ¶ 162.) There is some disagreement as to whether this was, or should have been, a surprise to Mr. Worcester, but he responded by telling Mr. Holden that Worcester deserved all of the business and that they should get all of it or none of it. Also on March 30, 2009, an employee in L.L. Bean's Sourcing Department sent an e-mail to Teufel Holly Farms, advising Teufel that it had been confirmed as a vendor for the 2009 season and that it should delay purchasing raw materials because "[t]here [was] a very good chance that L.L. Bean [would] be able to purchase some leftover components." Finally, on March 27, 2009, Bill Holden informed Whitney Wreath that L.L. Bean would engage Whitney to produce approximately 165,000 units of balsam for 2009.

On April 1, 2009, Worcester Resources failed to make a payment due on its line of credit to Chittenden Bank. That same day, Michael Worcester, Morrill Worcester's son, called Bill Holden in an attempt to obtain some of L.L. Bean's business in 2009. He informed Mr. Holden that Worcester would need an order of 200,000 balsam units to make it through the year. Mr. Holden told Michael that such an order could be done, but that there would be preconditions. One precondition was that Worcester provide its 2008 audited

financial information to confirm its ability to finance the business prior to the issuance of any orders. Another precondition appears to have been that Worcester actually secure financing. Mr. Worcester claims he was originally given thirty days to obtain this financing, but the deadline was shortened to April 13, and then extended to April 20th.

L.L. Bean generated a new internal balsam assessment dated April 1, 2009 projecting an order with Worcester for between 197,000 and 209,900 units of balsam product in 2009. That afternoon, Bill Holden informed David Whitney of Whitney Wreath that L.L. Bean might reduce its order for balsam products to accommodate Worcester. (Supp. S.M.F. ¶ 27; Pl.'s Resp. to Def.'s Add'l S.M.F. ¶ 172; Pl.'s Resp. Ex. I, LLB 305264.) L.L. Bean employee Christine Scammell sent a similar message to Teufel Holly Farms on April 2, 2009. (Supp. S.M.F. ¶ 27; Pl.'s Resp. to Def.'s Add'l S.M.F. ¶ 172; Pl.'s Resp. Ex. I, LLB 304560.)

On April 6, 2009, Morrill Worcester called Bill Holden to ask for purchase orders, because he could not apply for a line of credit without them. (Def.'s Add'l S.M.F. ¶ 184; Woodcock Aff. Ex. D.) Two days later, Mr. Holden wrote an e-mail to Rol Fessenden relaying a second conversation with Mr. Worcester in which Mr. Worcester indicated that he needed until April 27, 2009 to secure financing. Mr. Worcester also understood that L.L. Bean would not issue purchase orders without financing in place, but asked for a list of items Bean planned to purchase so he could present some assurance to the bank. Mr. Holden indicated to Mr. Fessenden that he could give Mr. Worcester such a list, but did not tell Mr. Worcester that it would be possible. No such list was ever given. (Def.'s Add'l S.M.F. ¶ 186-87.)

In an April 9, 2009 e-mail exchange, L.L. Bean employee Jean Taylor-Kiley asked Mr. Holden how much longer they were going to wait on Worcester, as it was getting late in the season. Mr. Holden replied that it could be another week before they knew whether

Worcester would be a vendor in 2009, or even until April 20, 2009. In response to an inquiry from another employee on April 15, 2009, Mr. Holden wrote that Worcester was "[n]ot a done deal," and that it had until April 20, 2009 to secure financing and secure a spot as one of L.L. Bean's 2009 balsam vendors. Christine Scammell relayed the same information in an e-mail dated April 16, 2009.

Teufel Holly Farms sent an e-mail to Bill Holden on April 23, 2009, indicating that they were "at the end of the window to order hard goods" for the upcoming season, and that further delay in a sourcing decision would affect their ability to retain favorable pricing. Mr. Holden replied by thanking Teufel for the information, and expressing appreciation for their patience as L.L. Bean worked to finalize its balsam plan, and indicated there might be "more concrete direction . . . early next week." (Supp. S.M.F. ¶ 31; Pl.'s Ex. M.)

On Tuesday April 28, 2009, Mr. Holden circulated an internal e-mail to L.L. Bean's employees announcing that Bean would not be using Worcester Resources as a supplier for the 2009 season. Worcester was informed of this decision in a letter dated May 1, 2009. (Supp. S.M.F. ¶¶ 32-33; Pl.'s Ex. O.)

On June 9, 2009, L.L. Bean filed its complaint against Worcester Resources requesting a declaratory judgment resolving its remaining obligations under the parties' agreement for the 2008 holiday season. Worcester responded with a counterclaim that initially levied five counts for breach of contract relating to the purchase orders of May 6, 2008, and September 19, 2008, and one count for "unconscionable term." The counterclaim was later amended to add claims of fraud and negligent misrepresentation.

DISCUSSION

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *Levine v.*

R.B.K. Caly Corp., 2001 ME 77, ¶ 4, 770 A.2d 653, 655. An issue of "fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Inkell v. Livingston*, 2005 ME 42, ¶ 4, 869 A.2d 745, 747 (quoting *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶ 2, 845 A.2d 1178, 1179). Any ambiguities "must be resolved in favor of the non-moving party." *Beaulieu v. The Aube Corp.*, 2002 ME 79, ¶ 2, 796 A.2d 683, 685 (citing *Green v. Cessna Aircraft Co.*, 673 A.2d 216, 218 (Me. 1996)).

A motion for summary judgment must be supported by a separate statement of material facts with citations to record evidence of a quality that would be admissible at trial. *Levine*, 2001 ME 7, ¶ 6, 770 A.2d at 656 (citing M.R. Civ. P. 56(e)). Separate statements should each address only one discrete fact or issue. *Doyle v. Dept. of Human Servs.*, 2003 ME 61, ¶ 11, 824 A.2d 48, 53. The court may ignore statements that are "unnecessarily long, repetitive, or otherwise convoluted," or that commingle new and responding facts. *Stanley v. Hancock County Comm'rs*, 2004 ME 157, ¶ 29, 864 A.2d 169, 179; *Doyle*, 2003 ME 61, ¶ 11, 824 A.2d at 53. Summary judgment is appropriate on issues such as motive or intent "if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Dyer v. Dept. of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821, 825 (quoting *Vives v. Fajardo*, 472 F.3d 19, 21 (1st Cir. 2007)) (quotations omitted).

Within that framework, this analysis turns to the four aspects of L.L. Bean's Partial Motion for Summary Judgment.

1. Worcester's Expectancy Damage Claim

The parties concur that balsam products are "goods" and that their agreement for the purchase and sale of such products in 2008 is governed by Maine's UCC. 11 M.R.S. §§ 2-102, 2-105 (2009).

Worcester seeks to recover the entire face value of L.L. Bean's purchase orders date May 5, 2008, and September 22, 2008, minus "all cost savings associated with" the production stoppage agreed to on November 26, 2008. Worcester identifies these savings as "labor" and "brush." Should the November 26, 2008 agreement be deemed unenforceable, Worcester seeks the full contract price pursuant to UCC section 2-709 with no reduction for the unfinished goods.

L.L. Bean, in turn, seeks to limit Worcester's recovery to its expected profit, with reasonable overhead, under the purchase orders dated May 5, 2008, and September 22, 2008, plus actual costs incurred in connection with work performed on the unfinished goods. Bean points out that the resulting total should theoretically reflect cost savings realized by Worcester as a result of the work stoppage, consistent with the parties' November 26, 2008 agreement. Should the November 26, 2008 agreement not be enforced, L.L. Bean requests that Worcester be limited to its expectation damages under UCC sections 2-208 and 2-710.

The court sees no reason not to enforce the parties' oral modification of their written contract, mainly because there is no real disagreement about the terms of the modification. Both sides agree that the November 26, 2008 agreement was valid and binding, and that under that agreement Worcester pledged to "cease production of balsam products, and to pass along to Bean all cost savings associated with that stoppage." (Def.'s Opp. to Pl.'s Mot. Summ. J. at 7.)

Despite this common ground, Worcester insists that its agreement to "pass along . . . all cost savings associated with the stoppage" is different from L.L. Bean's agreement to pay Worcester "its profit plus costs incurred in connection with its work on the unfinished goods . . . ."

On the one hand, despite their disparate phrasing, the parties' characterizations of Worcester's measure of recovery are grounded in expectation damages—putting Worcester in the same position it would have been had L.L. Bean fully performed the written contract—and their separate approaches should theoretically yield the same result.[8]

On the other hand, the record is clear that Worcester bargained for a specific equation to be used in calculating its entitlement. Morrill Worcester's testimony as well as the contemporaneous notes of Ms. Richards and Mr. Holden confirm that Worcester did not agree to L.L. Bean's proposal to reduce the amount of the purchase orders and pay Worcester for finished goods plus profit and costs incurred on unfinished goods. Instead, Worcester insisted—and L.L. Bean agreed—that the calculus of Worcester's entitlement be to subtract from the total amount due to Worcester under the written orders the amount Worcester could avoid incurring or spending on the contract by curtailing production.

The Maine Uniform Commercial Code allows parties to modify Code remedies by agreement, as in substance L.L. Bean and Worcester did by virtue of their November 2008 oral agreement. *See* 11 M.R.S. § 2-719(1)(a) (2010). Whether there is any real dollar difference between the calculation that L.L. Bean proposed initially and what Worcester insisted upon instead remains to be seen. There will, however, be a difference in focus. Instead of the focus being on Worcester's profit plus costs incurred on unfinished units, the focus will be on what costs Worcester did avoid—and could have avoided—once it agreed to curtail production. Whether Worcester's contractual undertaking to pass on avoided costs is or is not entirely congruent with its duty to mitigate damages and/or its statutory duty to deduct

[8] The parties' theoretically identical positions comport with the UCC section 2-708's remedy for a buyer's repudiation, as well as the UCC's general goal of putting an "aggrieved party 'in as good a position as if the other party had fully performed.'" *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481, 484 (2d Cir. 1982) (quoting UCC § 1-106(1) (codified as amended at UCC § 1-305(a))); *see* 11 M.R.S. § 1-1305 (2010) (goal is to put aggrieved parties "in as good a position as if the other party had fully performed").

"expenses saved" under section 2-708, is a question that can be deferred to trial, but the court assumes some variant of commercial reasonableness governs. *See Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 724-25 (Me. 1983) (common law duty to mitigate damages survives enactment of Maine Uniform Commercial Code).

Thus, the equation that applies to Worcester's claim for expectation (or benefit of the bargain) damages for breach of contract is as follows (excluding any entitlement to pre-judgment interest and the claimed incidental and consequential damages):

- The starting point is the total amount due to Worcester under the written purchase orders of May 5 and September 22, 2008
- From that figure must be subtracted the amount that Worcester actually saved as a result of curtailing production as agreed in the November 26, 2008 conversation. The court assumes the amount actually saved by Worcester is in dispute.
- In addition to disputing Worcester's claimed actual savings, L.L. Bean contends that Worcester could and should have saved more than it actually did. In effect, this is a claim by L.L. Bean that Worcester breached the November 26, 2008 oral agreement by failing to save what it could, and pass the savings on. Although a final assignment of the burden of persuasion on this issue can await trial, the court leans toward the view that L.L. Bean bears the burden of proving that Worcester could and should have saved more than it actually did. In any event, any additional amount beyond Worcester's actual savings that Worcester should have saved pursuant to the November 26, 2008 oral agreement would be deducted from its recovery.
- Finally, L.L. Bean asserts an affirmative defense of failure to mitigate that, in theory, could result in the deduction of an additional amount from Worcester's recovery, although in practice it may not.

2. *Worcester's Claims for Bank Charges and Storage Costs*

Worcester seeks to recover interest on its line of credit, storage costs associated with the unused component inventory, and a two percent per day "out-of-form" bank penalty incurred on its line of credit. L.L. Bean characterizes the interest and penalties as consequential damages resulting from a breach of the 2008 agreement. Bean does not oppose Worcester's claim to incidental damages per se, but does contend that such damages must have been actually incurred by the defendant.

It is clear that "neither consequential or special nor penal damages may be had except as specifically provided" for by the UCC in connection with a sale of goods. 11 M.R.S. § 1-106(1) (2009) (codified as amended at 11 M.R.S. § 1-1305(1) (2010)). While the UCC does allow buyers of goods to recover consequential damages in some circumstances, 11 M.R.S. § 2-715 (2009), it does not afford such damages to sellers. *See* 11 M.R.S. §§ 2-703, 2-708 to 2-710 (2009). Sellers of goods are limited to recovering incidental damages, which "include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the . . . care and custody of goods after the buyer's breach, in connection with return or resale of the goods, or otherwise resulting from the breach." 11 M.R.S. § 2-710 (2009).

The law Worcester cites to the contrary either concerns contracts not subject to the UCC, *see Williams v. Ubaldo*, 670 A.2d 913 (Me. 1996) (contract for real estate); Restatement (Second) of Contracts § 351 (1981) (stating general principles of contract damages under the common law); predates adoption of the UCC, *see Keeling-Easter Co. v. R.B. Dunning & Co.*, 113 Me. 34, 92 A. 929 (1915); or concerns a buyer's remedy, *see Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep 145 (1854) (English case predating the UCC that concerns buyer's remedy against seller's breach).

The two percent per day "out of form" bank penalty is properly characterized as a consequential damage of L.L. Bean's alleged breach. *See* Def.'s Opp. to Pl.'s Mot. Summ. J. at 15;) *see Petroleo Brasileiro, S.A. Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503, 507–09 (E.D.N.Y. 1974) (interest imposed as bank penalty constitutes consequential damage not recoverable by seller under UCC). As such, Worcester may not recover this element of its damages in this action. L.L. Bean's motion should be granted on this point.

In contrast to the bank penalty, settled Maine law allows a seller to seek ordinary interest accruing on a line of credit following the buyer's breach, provided the interest is commercially reasonable and the seller has actually expended funds paying it. *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 726–27 (Me. 1983). Only actual, commercially reasonable expenditures are recoverable as incidental damages. *Id.* at 727 (citing U.C.C. § 2-710 official comment). Worcester thus may attempt to prove and recover its ordinary interest expenditures made on the line of credit drawn to finance production of balsam products for L.L. Bean in 2008. Such expenditures must have been made as a result of the buyer's breach to qualify as compensable incidental damages, *see* 11 M.R.S. § 2-710 (2009).

L.L. Bean argues that Worcester has not shown it is actually liable to Chittenden for what it is claiming. Because the applicable Code provision refers to expenses "incurred," *see id.*, Worcester need not prove it has actually paid the bank interest it claims, but it must prove that it is actually being charged for the interest. The court sees this issue as essentially a matter of proof that does not need to be addressed further at this point.

Accordingly, L.L. Bean's motion is granted with regard to the two percent per day and denied as to the ordinary interest charge.

Storage expenses are expressly included in the statutory definition of incidental damages. *Id.* However, Worcester has failed to show it has incurred any "charges, expenses or commissions" for storage within the meaning of section 2-710. *See Schiavi Mobile Homes, Inc. v. Gironda, supra,* 463 A.2d at 727 (seller's incidential damages are limited to actual expenses). Worcester instead argues that the inventory it is holding is taking up valuable space in its facility, and seeks the value of that space, measured in terms of lost rental income. This simply does not represent an expense incurred by Worcester within the meaning of section 2-710. L.L. Bean's motion is granted as to the claimed storage cost.

3. Worcester's Claims for Fraud & Negligent Misrepresentation

Worcester claims that L.L. Bean either fraudulently or negligently misrepresented its willingness to use Worcester as a balsam vendor in the 2009 season. To make its case for fraud, Worcester must demonstrate by clear and convincing evidence that L.L. Bean:

> (1) [made] a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance upon it, and (5) [Worcester] justifiably relie[d] upon the representation as true and act[ed] upon it to [its] damage.

Francis v. Stinson, 2000 ME 173, ¶ 38, 760 A.2d 209, 217 (quoting *Letellier v. Small*, 400 A.2d 371, 376 (Me. 1979)). "A claim for fraud must be proved by evidence that shows that the existence of fraud is 'highly probable.'" *Id.* ¶ 39, 760 A.2d at 217 (quoting *Barnes v. Zappia*, 658 A.2d 1086, 1089 (Me. 1995)).

To prevail on the separate tort of negligent misrepresentation, Worcester must show that L.L. Bean, (1) "in the course of [its] business" or in a "transaction in which [it] has a pecuniary interest," (2) supplied false information (3) after failing "to exercise reasonable care or competence in obtaining or communicating the information," (4) for the purpose of guiding Worcester in its own business transaction, and (5) Worcester justifiably relied on the false information to its damage. *Rand v. Bath Iron Works Corp.*, 2003 ME 122, ¶ 13, 832 A.2d 771, 774 (citing Restatement (Second) of Torts § 552(1) (1977)).

The common thread between fraud and negligent misrepresentation is that both require the accused party to have communicated false information on which the other party relied to its detriment.

Worcester contends that between January and April of 2009, "L.L. Bean engaged in a concerted effort to both string Worcester along until well into the season . . . to the point when Worcester would effectively lose the opportunity to find other large-scale buyers for its

products and to press Worcester to settle its 2008 claims on terms dictated by L.L. Bean." (Def.'s Opp. to Pl.'s Mot. Summ. J. at 25.)

As Worcester interprets the events of this period, L.L. Bean secretly made arrangements with alternative vendors Whitney and Teufel so that it would not have to do business with Worcester. This would have been during February and March of 2009, as L.L. Bean and Worcester continued to negotiate a settlement for the unresolved 2008 season. By the end of March, L.L. Bean was ready to eliminate Worcester from its business plan entirely. Worcester cites as evidence L.L. Bean's balsam scenario dated March 9, 2009, omitting Worcester from the sourcing mix; an internal e-mail from Jean Taylor-Kiley dated March 23, 2008, stating that "[i]t looks like Worcester is out;" a March 27, 2009 order for balsam products from Whitney consistent with the March 9, 2009, scenario; and L.L. Bean's confirmation of Teufel as one of two new vendors.

With its alternative suppliers in place, L.L. Bean then allegedly delivered its ultimatum just as Worcester was about to default on its line of credit. On March 30, 2009, L.L. Bean sent Worcester its settlement offer with the letter informing Worcester that Bean would be moving ahead with other vendors. Bean also informed Worcester that it would be receiving thirty to forty percent of Bean's 2009 balsam business on or around this date. Worcester contends that this was a lie, and L.L. Bean never intended place any orders with Worcester whatsoever. In response to the news that it would receive less than half of the 2009 orders, Worcester told L.L. Bean that it deserved all of the orders, and it wanted all of L.L. Bean's business or none of it.

After its initial rejection of L.L. Bean's offer for 2009, Worcester had second thoughts and called to request an order of 200,000 balsam units. L.L. Bean agreed, subject to certain conditions. One condition was that Worcester provide financial information proving

that it could finance the necessary production prior to the issuance of any order. A second condition was that Worcester actually secure such financing. Worcester contends that L.L. Bean knew or should have known that these conditions would be almost impossible to meet, and that its offer to purchase 200,000 units was illusory from the first. Worcester cites L.L. Bean's willful withholding of information about the details of its proposed order as evidence of its bad faith.

The first problem with Worcester's claim is that it fails to identify any statement whose falsity is "highly probable." To begin, Worcester does not allege that L.L. Bean ever made a firm promise to provide it with any business in 2009. The only specific indication that Worcester would receive orders that year came prior to May 1, 2008. At that time L.L. Bean had told Worcester that it was shifting some production to Whitney, but that production would return to Worcester if it met certain benchmarks.

It is true that while the general rule holds that a promise to perform an act in the future cannot form the basis of an action for deceit, such a promise may be transformed into an actionable statement of fact where "[t]he relationship of the parties or the opportunity afforded for investigation" justify reliance. *Boivin v. Jones & Vining, Inc.*, 578 A.2d 187, 188–89 (Me. 1990). Here, the alleged promise to return production to Worcester in 2009 was contingent and predated the downturn in balsam demand and subsequent contact dispute between the parties. Worcester admits that there was no guaranty from year to year that it would receive L.L. Bean's business. As of January 2009, Worcester could not reasonably have relied upon L.L. Bean's contingent promise from a year earlier as a statement of fact about future conduct under the circumstances.

It may be true that L.L. Bean did not tell Worcester that it was diversifying its sourcing plan in the first quarter of the year, but there is no indication that it had a duty to

do so. The first affirmative statement L.L. Bean made to Worcester about prospective business for the 2009 holiday season came at the end of March 2009 when Bill Holden informed Worcester that it would get between thirty and forty percent of Bean's balsam orders. This statement came in conjunction with L.L. Bean's settlement offer indicating that future business was contingent upon the resolution of prior accounts.

Worcester claims that Mr. Holden's statement about Worcester getting a percentage of the balsam business was false. However, Worcester has not submitted any evidence that a reasonable fact finder could accept as sufficient to establish falsity, or sufficient to establish that Mr. Holden knew what he was saying was false.

Moreover, Worcester has failed to present any evidence that it in fact relied on Mr. Holden's statement. Upon learning that Worcester would receive less than half of L.L. Bean's balsam business, Morrill Worcester told Mr. Holden that Worcester wanted all of Bean's business or none of it. Thus, even if Worcester were correct and Mr. Holden's statement was false, Worcester's rejection of Mr. Holden's overture can hardly be characterized as detrimental reliance. If there was reliance by Worcester, it came only later, when Worcester went back to L.L. Bean and asked for some of Bean's business.

Worcester contends that L.L. Bean's conditional agreement on the 200,000 unit order was a fraud, and that L.L. Bean never intended to place the requested order. It is difficult to see how a conditional offer of business can constitute a false statement of fact. Even if it could, the record does not support Worcester's premise, because L.L. Bean took steps internally to implement its conditional commitment.

Following the April 1, 2009 discussion about the 200,000 unit order, L.L. Bean prepared an new internal balsam scenario allocating the units to Worcester. L.L. Bean also informed Whitney and Teufel that their business volume might be reduced to accommodate

Worcester. Internal L.L. Bean communications from April 2009 show that its employees understood Worcester to be a potential vendor in the upcoming holiday season.

As proof of L.L. Bean's insincerity, Worcester points to the conditions L.L. Bean placed on the 200,000 balsam unit order and its failure to provide Worcester with information that would help Worcester satisfy those conditions. L.L. Bean allegedly knew that Worcester would not be able to meet Bean's demands without assistance. While this might be true, the conditions themselves were straightforward and reasonable, and L.L. Bean did not have an obligation to help Worcester meet them. Indeed, one of the conditions that L.L. Bean imposed and Worcester accepted was that Worcester be able to secure financing *without help from L.L. Bean.* Worcester ultimately had twenty-eight days to do so, but was unable to close a deal.

Thus, for a fact finder to conclude that L.L. Bean made any false representations, whether intentionally or negligently or with some level of *scienter* between those, would require the fact finder to disregard the evidence in the record and speculate on L.L. Bean's motive and awareness without any real basis in fact. No reasonable fact-finder could conclude that L.L. Bean's offer was illusory without indulging in speculation.

Moreover, Worcester has not brought forward sufficient evidence that it *detrimentally* relied on L.L. Bean's conditional agreement to place an order of 200,000 units.

For these reasons, the court grants L.L. Bean's motion as to Worcester's counterclaims for fraud and negligent misrepresentation.

CONCLUSION

It is hereby ORDERED as follows:

1. Plaintiff's Motion for Partial Summary Judgment is granted in part and otherwise denied.

2. Defendant's damages for breach of contract (excluding recoverable pre-judgment interest and costs) are defined to be the amount derived from the following equation:

- the total amount due to Defendant under the written purchase orders of May 5 and September 22, 2008
- plus the amount of interest incurred by Defendant on its line of credit as a result of any breach by Plaintiff
- less the amount that Defendant saved as a result of curtailing production as agreed in the November 26, 2008 conversation
- less any additional amount that the Defendant could and should have saved through performing its obligations under the November 26, 2008 oral agreement.
- less any additional amount by which the Plaintiff proves that the Defendant failed to mitigate its damages

3. Plaintiff is granted summary judgment on Defendant's claims for fraud and negligent misrepresentation, and on its claim for bank penalties.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this order by reference in the docket.

Dated 17 February 2011

A. M. Horton
Justice, Superior Court