STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER DOCKET

L.L. BEAN, INC.

Plaintiff/Counterclaim Defendant

v.

Docket No. BCD-CV-09-39

WORCESTER RESOURCES, INC.

Defendant/ Counterclaim Plaintiff

ORDER ON POST-JUDGMENT MOTIONS

Plaintiff L.L. Bean, Inc. ["L.L. Bean"] has filed a timely Motion to Alter or Amend The Judgment pursuant to Rules 52(b) and 59(e) of the Maine Rules of Civil Procedure. Defendant Worcester Resources, Inc. ["Worcester"] has filed an opposition to the motion and has also filed a Motion To Exclude and To Strike regarding an exhibit to L.L. Bean's reply memorandum. The court elects to decide both without oral argument, *see* M.R. Civ. P. 7(b)(7). The court also elects not to await full briefing on Worcester's motion, and dismisses it as moot, given the court's resolution of L.L. Bean's motion.

For the reasons set forth below, the court grants L.L. Bean's motion in part and otherwise denies it. The motion sets forth four areas in which L.L. Bean asserts the judgment in this case issued after trial ["the Judgment"] should be amended. They are addressed in the order presented in L.L. Bean's motion. The only one of the four changes requested that the court agrees to and adopts is the first listed.

1. Double-Counting of L.L. Bean's Component Liability

L.L. Bean's first point is that the Judgment in effect double-counts Worcester's damages relating to components in the 74,085 units ordered but not finished, by calculating damages based on the total value of L.L. Bean's purchase orders and adding to that figure L.L. Bean's liability for the $296,340 in components incorporated into the unfinished 74,085 items. L.L. Bean is correct—the $296,340 figure was already included in the total purchase order figure and should not have been added again.

Worcester's opposition to that correction rests on the argument that Worcester is a "lost volume seller." The "lost volume seller" concept means simply that, because Worcester's capacity to produce balsam products is not limited to what L.L. Bean ordered, Worcester is entitled to its profit on a unit even if the unit could be resold or reused. The court mentioned the concept in the judgment, mainly to show that it had not been overlooked, but it does not apply to the components in question. It does not apply because L.L. Bean has not contested Worcester's right to its profit (measured as agreed by the difference between the total purchase order amount and savings that were or reasonably could have been realized by Worcester) on all items ordered by L.L. Bean.

The judgment as issued would compensate Worcester twice for the same damages, and therefore needs to be revised. The court is today issuing an Amended Decision and Judgment with the requested adjustment.

2. Damages for Worcester's Reserve Component Claim

L.L. Bean's second request is for the court to reduce damages by the $80,228 amount of L.L. Bean's reserve component. L.L. Bean's premise is that the Judgment erroneously shifted the burden of proof to L.L. Bean. The court disagrees.

The conclusion that gives rise to L.L. Bean's request appears in paragraph 265 of

the Judgment:

- L.L. Bean's proof did not indicate that very many if any, of the items listed in the attachment to the 2008 letter agreement were incorporated into the 315,580 finished units L.L. Bean has paid for, so the court concludes that essentially all of that commitment remained outstanding at the end of the 2008 season.

Contrary to L.L. Bean's interpretation, that finding and conclusion does not reflect any re-allocation of the burden of proof. L.L. Bean set out to show that Worcester had used up all of the components as to which L.L. Bean had a contractual commitment, and the reference to "L.L. Bean's proof" is to the evidence elicited by L.L. Bean on whether the $80,228 in reserve components still remained in Worcester's component inventory after the 2008 season.

Worcester's evidence affirmatively showed, first, that L.L. Bean promised to pay Worcester for $80,228 in reserve components if they could not be incorporated into L.L. Bean products; second, that Worcester had on hand the reserve components on the basis of L.L. Bean's commitment, and third, that L.L. Bean actually ordered 389,664 units, fewer than the 405,559 units in the forecast, meaning that L.L. Bean never ordered and Worcester never made the units to which the $80,228 in reserve component applied. Therefore, the evidence positively established that the reserve components had not been incorporated into L.L. Bean products. Given that evidence, L.L. Bean's countervailing evidence was unpersuasive.

So that the court's reasoning is clear, the preceding paragraph is incorporated into paragraph 265 of the Amended Decision and Judgment.

However, although the court did not accept L.L. Bean's position on the status of the reserve components at the end of the 2008 season, the court did go on to find that 90% of the components as to which L.L. Bean was contractually committed were used later in products sold to other customers, and reduced Worcester's component damages

by 90%. Judgment ¶¶301-303. Thus, the net damages awarded to Worcester attributable to the $80,228 in reserve components is 10% of that amount—just over eight thousand dollars.

3. The Royalty Issue

L.L. Bean's third requested change is that the court reconsider its conclusion in paragraph 317 of the Judgment that L.L. Bean failed to prove that Worcester's damages should be reduced by royalty payments that L.L. Bean claims Worcester saved by not having to complete all 389,664 units encompassed in L.L. Bean's purchase orders.

Worcester's November 2008 oral agreement to pass along savings did not encompass royalties, so the issue is analyzed under Worcester's UCC and common duties to mitigate damages, with L.L. Bean having the burden of proof. The evidence clearly indicated the existence of the royalty agreement on which L.L. Bean's argument depends. However, the evidence also indicated that royalties were not in fact paid by Worcester except in one year (Michael Worcester, Day 9 at 22), and instead were simply entered on Worcester's books and records as accrued liabilities or as an outstanding debt, that might be paid at some time in the future. (Bruce, Day 7, at 1569–71; Michael Worcester, Day 9 at 22). The evidence that the court found persuasive is that, despite the royalty agreement and the occasional payment made in the past, Worcester usually has not paid royalties, and, most importantly, did not pay royalties for the units that it did complete in 2008. If Worcester did not pay royalties on the units it did complete in 2008, there is no reason to think it would have paid royalties on the units it did not complete. Therefore, L.L. Bean failed to prove that Worcester saved any royalty payments by not having to complete all of the units that L.L. Bean had ordered. The analysis to the contrary by Mr. Dunham on which L.L. Bean's

position largely depends is largely hypothetical and ignores the just-mentioned realities reflected in the evidence. Moreover, even if Worcester's royalty obligation to Morrill Worcester for the 2008 season is shown as a liability on Worcester's balance sheet, the evidence fails to persuade the court that should be any deduction for damages for saved royalties.

Because the Judgment devoted only a paragraph to royalties, and to assure the court's reasoning is clear, the foregoing paragraph has been incorporated into paragraph 317 of the Amended Judgment.

4. The Direct Ship Fee Issue

In its last request, L.L. Bean asks the court to reconsider and change its findings and conclusions to the effect that Worcester did not double-bill Worcester for shipping fees by both including the fee in the unit cost and then billing it separately.[1] The Judgment analyzes the evidence in detail on this issue, Judgment ¶¶247-58, and on this issue, nearly all that can productively be said has been said. It is worthy to note that in the face of the conflicting evidence—Worcester's discovery responses indicating that the fee was included in unit costs and Worcester's insistence that the discovery responses were mistaken—the court chose to resolve the issue by looking at the historical evidence, and found persuasive the fact that L.L. Bean had verified

[1] L.L. Bean's particular concern seems to be with the court's statement that, "even if Worcester had in fact incorporated a shipping cost in its cost assumptions, nothing prevents Worcester from taking advantage of L.L. Bean's willingness to pay a shipping fee over and above the cost of the product itself. " L.L. Bean's motion cites testimony by Michael Worcester that Worcester agreed that it could not do that. That very testimony was part of the basis for the court's finding that Worcester had in fact not done that. The "even if" comment was simply intended to point out that, if Worcester had not agreed to bill the shipping fee separately instead of including the cost in its unit price, nothing prevented Worcester from factoring that cost into its unit prices. Again to clarify the court's reasoning, the court has modified paragraph 255 of the Judgment.

Worcester's costs a few years before and there was nothing to indicate that the costs had changed since then to include the cost of shipping. Judgment ¶254.

The court stands by its previous findings and conclusions to the effect that there was no double-billing of the shipping fee.

Worcester's Motion To Exclude and To Strike

In light of the resolution of L.L. Bean's motion as to the direct shipping fee issue, it is clear that the court's review of Exhibit A to L.L. Bean's reply memorandum has not worked to Worcester's detriment, and the court sees no point to extending the already prodigious legal efforts expended in this case by letting the briefing on Worcester's Motion To Exclude and To Strike play out. The motion is dismissed.

IT IS HEREBY ORDERED:

1. Plaintiff L.L. Bean Inc.'s Motion to Alter or Amend The Judgment is granted to the extent set forth herein and in the Amended Decision and Judgment issued herewith as a final judgment, and is otherwise denied.
2. The Motion To Exclude and To Strike filed by Defendant Worcester Resources, Inc. is denied.

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

Dated April 6, 2012

A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 4.6.12
Copies sent via Mail __ Electronically ✓