orders for the 2008 season. (Ex. 93; Holden, Day 6 at 1370-1378).

181) In the course of those conversations, Robert Bruce told William Holden that Worcester had to pay off the balance on its line of credit with Chittenden Bank by March 31, 2009. He also told L.L. Bean that if Worcester paid off the line of credit, Worcester would be able to automatically renew the line of credit for the 2009 season. (Bruce, Day 6 at 1541-1542).

182) When Mr. Holden reminded Morrill Worcester of Worcester's commitment to pass along savings, Mr. Worcester acknowledged the agreement, but he and Mr. Bruce suggested that Worcester could credit L.L. Bean with those savings in the forthcoming season. In the meantime, they said, Worcester needed L.L. Bean to pay Worcester's invoice in full. In response, Mr. Holden said that he was willing to consider Worcester's proposals on how to pass the savings along to L.L. Bean, but he did not agree to Worcester's request to be paid the full price on the final invoice first. (Holden, Day 6 at 1379, 1394).

183) Worcester's position that L.L. Bean should pay the full balance due on the purchase orders before Worcester credited L.L. Bean with the cost savings resulting from the cessation in production was not inconsistent with the parties' November 26, 2008 oral agreement, to which both Mr. Worcester and Mr. Holden had been party, nor was it necessarily consistent with the oral agreement. The parties never discussed on November 26, 2008 how or when L.L. Bean would be credited with Worcester's savings—they only agreed to be "fair" with each other.

184) Thus, based on the firm commitment to purchase orders that Worcester had obtained from L.L. Bean in the 2008 letter agreement and that Worcester had insisted on maintaining in the face of L.L. Bean's request to curtail production, it was

not unreasonable for Worcester to assume that it would be paid on those purchase orders and the amount and timing of L.L. Bean's credit for Worcester cost savings would be worked out later. On the other hand, it was also not unreasonable, based on Worcester's oral promise to credit L.L. Bean with Worcester's savings resulting from the curtailment of production, for L.L. Bean to assume that at least some amount in savings would be shown as a deduction on Worcester's final invoice.

185) Had the parties continued the discussion on November 26 to the point of defining how Worcester's savings would be quantified and returned to L.L. Bean, they might have achieved a meeting of the minds on precisely what cost savings Worcester would credit to L.L. Bean and how the credit would be applied in the context of L.L. Bean's payment for the purchase orders. As it was, the parties' failure to resolve the impasse on which would occur first—L.L. Bean's payment or Worcester's reduction of its invoice—and their apparent inability to accept each other's point of view when the issue surfaced in early 2009 brought to light the fundamental absence of a meeting of the minds on those crucial details during the November 26, 2008 conversation.

186) Starting in January, Worcester began to develop a proposal to submit to L.L. Bean regarding how Worcester would return its cost savings to L.L. Bean. Morrill Worcester made some handwritten calculations of what Worcester could return to L.L. Bean in savings, and came up with a savings amount in excess of $600,000. (Ex. 143). With Mr. Bruce's assistance, Worcester generated a spreadsheet toward the end of January showing a "Total 09 Discount" of $646,083.73, consisting of $303,526.29 in what the document calls "Avoided Cost" and $342,557.34 in "Value of Components." The spreadsheet appears to quantify future discounts from Worcester to L.L. Bean rather than Worcester's savings in 2008 as a result of stopping production, although the

reference to "Avoided Cost" plainly suggests otherwise.

187) On January 16, 2009, Morrill Worcester forwarded to William Holden via e-mail a proposal for Worcester to pass production savings back to L.L. Bean. (Ex. 93, 95).

188) After reviewing Morrill Worcester's proposal in the January 16 e-mail, Mr. Holden remained receptive to seeing if Worcester and L.L. Bean could work out an agreement which would include Worcester passing production savings along to L.L. Bean in Worcester discounts or other reductions of 2009 business charges. (Holden, Day 6 at 1379,1381-84).

189) On February 11, 2009, Morrill Worcester called William Holden and proposed that Worcester and L.L. Bean agree on an auditor who could assess Worcester's production savings to the satisfaction of Worcester and L.L. Bean. (Ex. 96; Holden, Day 6 at 1384-1387). In that conversation, Mr. Worcester maintained his position that L.L. Bean should pay Worcester the full amount of the invoice before Worcester returned cost savings on to L.L. Bean. (Ex. 96; Holden, Day 6 at 1384-1387). However, Mr. Worcester acknowledged that his legal counsel had advised him that, because Worcester had agreed to cut production and pass along saved costs, Worcester would likely not be able to recover the full amount due under the L.L. Bean purchase orders. (Ex. 96).

190) On February 13, 2009, Morrill Worcester advised William Holden that Worcester was willing to provide guarantees to L.L. Bean that it would pass its production savings on to L.L. Bean, but reiterated that Worcester needed L.L. Bean to make payment on the invoice before Worcester would be in a position to pass back its savings to L.L. Bean. (Ex. 96).

191) L.L. Bean considered Morrill Worcester's proposals of February 11 and February 13, 2009, (Holden, Day 6 at 1387), but the impasse on which would occur first—L.L. Bean's payment of Worcester's invoice in full or Worcester's return of savings to L.L. Bean as a credit on the invoice—remained unresolved.

192) On March 2, 2009, Rol Fessenden sent an e-mail to Morrill Worcester proposing terms based on which L.L. Bean and Worcester could close out the 2008 business. (Ex. 100; Fessenden, Day 4 at 985, 987). The e-mail made reference to Worcester's honoring L.L. Bean's stop-production requests and noted that L.L. Bean had paid Worcester for about 315,000 finished units. The e-mail proposed to pay Worcester for its "gross margin—selling price less labor and materials—on the gap between our initial PO of 344,725 units and the [315,580] units we have already paid for." (Ex. 100).

193) Mr. Fessenden's March 2, 2009 e-mail proposed that L.L. Bean and Worcester enter into a bailment agreement covering "the excess components that you are holding . . . similar to the agreement that we executed last year." The new bailment agreement would cover "approximately $450,000 worth of components," and would be "subject to our assessment of [Worcester's] audited financial statements . . ." (Ex. 100).

194) L.L. Bean's March 2, 2009 proposal was inconsistent with the parties' November 26, 2008 modification of the 2008 letter agreement in two significant respects, possibly because Mr. Fessenden was not familiar with the details of the November 26, 2008 agreement. First, L.L. Bean's proposal failed to recognize that Worcester had insisted in the November 26, 2008 conversation on retaining the benefit of all of L.L. Bean's purchase orders, not just the initial set, and it therefore failed to address Worcester's expectancy under the second round of purchase orders issued in

September 2008. Second, the November 26, 2008 agreement called for a different equation for calculating Worcester's entitlement—for L.L. Bean to be credited against the total amount due under the purchase orders for Worcester's saved costs, and not, as the March 2 e-mail proposed, for Worcester to be paid its "gross margin."

195) After Worcester received Rol Fessenden's e-mail of March 2, 2009, Michael Worcester forwarded the e-mail to Robert Bruce, asking for Mr. Bruce's reaction to L.L. Bean's proposal. Mr. Bruce responded in an e-mail by saying that the proposal was "not close to helping you" and said he would look for support in the parties' exchanges for the concept that both parties intended L.L. Bean's purchase orders to be "take-or-pay." (Ex. 101).

196) In a lengthy e-mail from Morrill Worcester to Mr. Fessenden dated March 6, 2009, Worcester responded to L.L. Bean's March 2 proposal. Worcester's March 6 response summarized Worcester's understanding of the 2008 letter agreement and the discussions leading up to it; the "take-or-pay" nature of L.L. Bean's purchase orders; the effect of the November 26, 2008 oral agreement; and Worcester's commitment to return savings to L.L. Bean in the form of "discounts" in the 2009 season. The e-mail said that L.L. Bean's failure to pay Worcester's invoice put Bean "in default of its obligations to make timely payment." Worcester pointed out that Worcester had agreed not to increase its prices in 2009, and that the discounts it would offer L.L. Bean for the 2009 season would total about $500,000 for about 77,000 items. The e-mail closed with a reiteration of Worcester's interest in continuing to supply L.L. Bean, but said its ability to secure the financing necessary to enable it to do so was dependent on L.L. Bean satisfying its "take-or-pay obligations from the 2008 season." (Ex. 102).

197) In late March or early April of 2009, Robert Bruce contacted Gregory Sanborn of Baker, Newman & Noyes in an effort to move the concept of an audit of Worcester's cost savings forward as a means of resolving the impasse. He sent Mr. Sanborn Morrill Worcester's preliminary cost savings calculations of $646,000 with the request that Mr. Sanborn keep it confidential. (Bruce, Day 6 at 1544-1545; Ex. 143).

198) During March 2009, discussions aimed at resolving the impasse continued—L.L. Bean and Worcester were able to agree on a partial payment by L.L. Bean, but the balance became a sticking point. L.L. Bean wanted Worcester to relinquish any claim to the balance, but Worcester refused, claiming that Chittenden Bank would not permit it to sign a release. (*See* Ex. 553).

199) On March 25, 2009, Rol Fessenden developed a new proposal for resolving the impasse over the December 31, 2008 invoice. (Ex. 113, 549). The terms included a provision for L.L. Bean to purchase and take actual possession of the components that L.L. Bean assumed Worcester had obtained for the 2008 season and retained on hand. (Ex. 549; Fessenden, Day 4 at 1002).

200) Rol Fessenden forwarded his March 25, 2009 settlement proposal to Morrill Worcester with a cover letter dated March 30, 2009. (Ex. 113; Fessenden, Day 4 at 1005). The March 30 cover letter read as follows:

> Bean is prepared to resolve the 2008 invoices consistent with our interpretation of the letter agreement. See attached [the March 25, 2009 letter]. 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.

(Ex. 113).

201) On the same day, March 30, 2009, with Chittenden's March 31 deadline for paying off the line of credit at hand, Morrill Worcester forwarded a settlement proposal in the form of an e-mail message to L.L. Bean, in which Worcester proposed that L.L. Bean pay Worcester, not the full amount of Worcester's December 31, 2008 invoice, but rather $1,171,749, the balance due to Chittenden on Worcester's line of credit. The March 30 message emphasized that Worcester would lose the line of credit for the 2009 season if it failed to pay the balance due, and therefore that its viability as a business was in jeopardy if the line were not paid. It also said that, although Chittenden would not permit Worcester to sign a release for the lesser amount Worcester and L.L. Bean had previously negotiated, Worcester could give L.L. Bean a release if Bean paid Worcester enough to pay off the line of credit. (Ex. 143, 553; Morrill Worcester, Day 8 at 219).

202) Rol Fessenden testified that he did not believe that he saw Worcester's March 30, 2009 proposal before sending his proposal to Worcester that same day. (Fessenden, Day 4 at 1009).

203) Neither L.L. Bean's proposal to Worcester of March 30 or Worcester's proposal of the same came to fruition, and Worcester missed Chittenden's March 31 deadline for paying off the line of credit. As a result, Worcester lost its right to an automatic renewal of the line of credit to cover expenses for the upcoming 2009 season. (Morrill Worcester, Day 8 at 219, Day 2 at 421).

204) Around the end of March or the beginning of April 2009, William Holden advised Worcester that L.L. Bean had decided to allocate 30 to 40 percent of its balsam products business to Worcester and the balance to other vendors. Morrill

Worcester was very upset at the idea of L.L. Bean turning to other vendors to supply it with balsam products, and left a voicemail message with Mr. Holden to the effect that Worcester wanted to have all of L.L. Bean's balsam products business or none of it. (Morrill Worcester, Day 4 at 467-68).

205) When Michael Worcester learned of his father's message, he promptly contacted Mr. Holden to say that his father's message did not reflect Worcester's position, and that Worcester wanted to continue doing business with L.L. Bean. He and Mr. Holden discussed how much of L.L. Bean's balsam products business for 2009 Worcester needed to get in order to survive, and Michael Worcester mentioned a figure of 200,000 units. Mr. Holden seemed receptive to that idea. (Michael Worcester, Day 9 at 34-37).

206) The month of April 2009 saw Worcester trying to salvage what it could of L.L. Bean's business by addressing L.L. Bean's concerns about Worcester's financing. (Michael Worcester, Day 9 at 39). Worcester's default on the credit line had only enhanced L.L. Bean's concerns about Worcester's financial viability with regard to meeting L.L. Bean's balsam product requirements for the 2009 season, and the impasse over payment of the 2008 year-end invoice did not help Worcester in its quest to retain at least some of L.L. Bean's business.

207) During April 2009, Worcester was also trying to convince Chittenden Bank to extend financing for the 2009 season. Moreover, Worcester had begun actively exploring ways of expanding its sales to other customers in March 2009, when the future of its relationship with L.L. Bean fell increasingly into question. (Michael Worcester, Day 9 at 43-45; Ex. 113). As of the 2008 season, its sales to L.L. Bean represented about 90% of Worcester's sales, and Morrill Worcester knew of no other

potential customer that sold balsam products on the scale of L.L. Bean. (Morrill Worcester, Day 8 at 230-233).

208) As part of the overture to Chittenden, Morrill Worcester generated sales projections for 2009, based on prospective sales to its existing customers, such as L.L. Bean and 1-800-FLOWERS, as well as sales to potential new customers, including Wal-Mart. (Ex. 134). He sent those projections to Robert Bruce, who turned them into financial projections. (Ex. 136).

209) Eventually, Morrill Worcester's 2009 sales projections, with input by Mr. Bruce, were shared with Chittenden and several other sources of potential financing for Worcester. (Ex. 137, 138, 140). However, at least some of the projections were dramatically overstated to the point of being outright incorrect and misleading. For example, Worcester referred to Wal-Mart as a customer who had made actual commitments, when in fact Worcester's overtures to Wal-Mart had not generated any tangible result in terms of a commitment by Wal-Mart to do business with Worcester. (*Compare* Ex. 140 *with* Morrill Worcester, Day 1 at 134-46, 146-48).

210) In fairness, Worcester did have various discussions with Wal-Mart about a business relationship, so the misstatements may have resulted more from Worcester's overly optimistic view of its prospects with Wal-Mart than an intent to mislead Chittenden or other prospective financing sources. However, the fact remains that Morrill Worcester generated what he had to have known was false information about Worcester's existing customer base that he knew would be circulated by Mr. Bruce to potential sources of financing.

211) In its efforts to persuade L.L. Bean to place orders for the 200,000 units Mr. Holden had said he was willing to consider, Worcester found itself in somewhat of a

cleft stick. On the one hand, before providing Worcester with any specific commitments to product lines and quantities, L.L. Bean required Worcester to show that it was financially stable and that it had obtained financing to manufacture the 200,000 units. On the other hand, in order to obtain that financing, Worcester had to show its financing source the very type of specifics L.L. Bean was not prepared to provide. (Michael Worcester, Day 9 at 38).

212) Eventually, L.L. Bean decided to discontinue its long relationship with Worcester, and notified Worcester by means of a May 1, 2009 letter to Morrill Worcester from Rol Fessenden. (Ex. 123; Michael Worcester, Day 9 at 39). Worcester responded the same day, acknowledging the end of the relationship but expressing the hope that L.L. Bean might reconsider. (Ex. 124).

213) During the rest of 2009 and thereafter, Worcester made some efforts to generate new business, mainly by contacting potential customers by e-mail, but also by going to trade shows. (Michael Worcester, Day 9 at 43-44, 55-67).

214) Over the more than two years since losing L.L. Bean's business, Worcester's efforts have resulted in it having more commercial customers for balsam products (although not more volume). (Michael Worcester, Day 9 at 53-54).

215) Michael Worcester estimated Worcester's total volume of sales to commercial customers as of October 2011 at about 60,000 units. (Michael Worcester, Day 9 at 53). In 2010, however, Worcester sold in excess of 250,000 units for well over $2.5 million (Ex. 304). Worcester has also experienced an increase in the volume of its sales to Wreaths Across America. (Michael Worcester, Day 9 at 53).

216) In 2010, based on Worcester's claim that it had substantial excess component inventory that it had not been able to use in products or re-sell, Rick

Ordway returned to Worcester's facility to do an assessment of unused component inventory.

217) During his 2010 visit to Worcester's facility, Mr. Ordway observed "a lot" of inventory that did not appear to be segregated by customer. He also observed in 2010 that there were kits stored with shrink-wrap around the cages, protected in plastic, and he did not observe any deterioration of components. (Ordway, Day 9 at 148). He did not attempt to do a complete inventory of Worcester's components. (Ordway, Day 9 at 170).

218) Because Worcester does not separate its component inventory by the customer for whom it was purchased, and because components used in L.L. Bean products are quite similar to those used in Worcester's own products sold from its website as well as the products it makes for other customers, a visual inspection would not readily enable one to differentiate between components were attributable to L.L. Bean products and components attributable to other products.

219) However, based on inventory and other records provided by Worcester, including Worcester's invoices for purchases of components, Mr. Ordway concluded that any component inventory as to which L.L. Bean had made a commitment for the 2007 season or the 2008 season had been used up by Worcester in making the 315,580 units made by Worcester in 2008, and paid for by L.L. Bean. (Ordway, Day 9 at 163-64).

THE RESULTS OF THE 2008 SEASON IN TERMS OF SALES, PAYMENTS AND LEFTOVER COMPONENTS

220) The parties agree that during the 2008 season Worcester actually finished 315,580 units of balsam products at L.L. Bean's request, all of which were paid for by L.L. Bean. (Joint Stipulations, ¶ 20; Ex. 89, 147, 175, 495, 526). Based on the

difference between that number and the 389,664 units ordered, the parties agree that there were 74,085 units reflected in L.L. Bean's purchase orders, but not made by Worcester. (Joint Stipulations, ¶¶ 14, 20).

221) The parties are in agreement that the total amount of goods actually purchased by L.L. Bean customers (and presumably direct shipped to them by Worcester) was 271,554 units. (Joint Stipulation ¶ 21).

222) The parties are in agreement that the total amount of the May 5, 2008 purchase orders and the September 22, 2008, purchase orders is $6,682,915. (Ex. 178, 448, 456). The parties also agree that the amount of payments to Worcester made by L.L. Bean with respect to the 2008 season is $5,497,306. (Ex. 147). The difference between the two numbers is $1,185,609. That figure represents L.L. Bean's outstanding obligation under the 2008 purchase orders reflecting the 74,085 items that L.L. Bean ordered but Worcester did not complete, before any of the adjustments that both parties claim should be made.

223) Worcester's decision to purchase about $456,000 in component inventory is significant and revealing in several respects.

224) The fact that Worcester purchased those additional components in 2008 means that Worcester assessed its inventory of leftover components on hand as of early 2008, and decided that an additional $456,000 worth of components—no more, no less—were needed to meet L.L. Bean's 2008 forecast plus reserve totaling 446,115 units.[5]

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[5] Some of Worcester's 2008 component purchases may have been for products destined for other customers. However, because L.L. Bean accounted for such a high percentage of Worcester's anticipated business, and because L.L. Bean's commitment to 2008 component purchases was capped at $80,228, the small percentage of the $456,000 component purchases in 2008 that may have reflected products for other customers becomes ultimately irrelevant and unnecessary to factor into the analysis.

225) As noted earlier, Worcester's total leftover component inventory at the end of the 2007 season was listed in its 2007 tax return at $1,462,326. Based on L.L. Bean accounting for 90% of Worcester's business, nearly all of those components were suitable to be used in L.L. Bean's products, although, as noted earlier, not more than $600,000 worth were components that L.L. Bean had committed itself to.

226) At an average of $4 worth of components incorporated into one finished unit for L.L. Bean, the total of 446,115 units reflected in L.L. Bean's forecast plus reserve would require a total of about $1,785,000 in components. Worcester's 2008 component purchase of $456,000 implies that Worcester had the remaining $1,330,000 worth of needed components in leftover component inventory from the 2007 season. The $1,462,326 value assigned to leftover components purchased for L.L. Bean and other customers in Worcester's tax return tends to confirm the accuracy of that conclusion.

227) Worcester's practice was to use leftover components before new components, so in 2008 it would have used the leftover components before the newly purchased ones. Because Worcester finished and received payment for 315,580 units, and because the $1.2 million component cost associated with those units would nearly equal the $1,330,000 cost of the leftover components, Worcester's FIFO practice of using leftover components first means that Worcester used nearly all of its leftover components to make the 315,580 units that it finished. (Ordway, Day 9, pgs. 158–59).

228) Thus, whatever components Worcester had left after finishing 315,580 units must have consisted mainly of the newly purchased components that, unlike leftover components from prior years, were subject to the $80,228 cap negotiated in the 2008 letter agreement.

229) Clearly, the foregoing calculations are not exact. For example, they do not take account of the fact that some SKUs require more than $4 worth of components per unit, and some SKUs call for less. To the extent, L.L. Bean's purchase orders contained a mix of products tilted toward units that use a lesser dollar value or greater dollar value in components than the $4 average, the calculations as to the value of components required to make a given number of units theoretically might be under- or over-estimates.

230) However, the evidence supports a finding that, across the mix of units involved in the 2008 season—both those specified in the forecast and reserve and those actually finished—an average component value of $4 is reasonable and applicable.

231) What this means is that, given that Worcester had on hand $1,785,000 in inventory to make up to 446,115 units, and given that Worcester finished 315,580 units incorporating about $1.2 million worth of components, there remained about $585,000 worth of components on hand after the 2008 season that were not incorporated into the finished units.

232) Because of Worcester's FIFO practice of using older components first, most of the $585,000 in components left over after the 2008 season necessarily had to consist of the $456,000 worth of components purchased in 2008 as to which L.L. Bean had made a commitment capped at $80,228. The rest consisted of components left over from the 2007 season.

233) At this point, the analysis shifts to the merits of the parties' claims and defenses. As a threshold matter, L.L. Bean's defense of intentional breach must be addressed, because L.L. Bean contends that the alleged willful breach precludes Worcester from recovering any damages, at least on a contract theory, and perhaps at

all.

II. L.L. Bean's Affirmative Defense of Intentional Breach

234) L.L. Bean claims that, in issuing its year-end invoice for the full amount claimed due with no reduction for savings achieved by reducing production, Worcester intentionally breached its promise in the November 26, 2008 conversation to credit L.L. Bean with such savings. Because Worcester's breach was willful, L.L. Bean argues, it is not entitled to any damages for breach of contract. L.L. Bean also relies on Worcester's Article 2 duty of good faith in the performance of its contract. *See* 11 M.R.S. § 1-1304.

235) Maine law affords legal support for L.L. Bean's position that a party's willful breach of contract may preclude the party's recovery of any damages for breach of the contract. *See Carvel Co. v. Spencer Press, Inc.*, 1998 ME 74 ¶ 8 n.2, 708 A.2d 1033 (recovery barred by "willful breach of the contract"); *Levine v. Reynolds*, 54 A.2d 514, 519 (Me. 1947); *Veazie v. City of Bangor*, 51 Me. 509, 512 (1863).

236) However, the facts simply do not support L.L. Bean's position.

237) Nothing in the November 26, 2008 conversation specifically addressed when or how Worcester would credit L.L. Bean with savings resulted from cutting back production. In other words, Worcester's repeated demand for payment in full of the invoice before savings were returned to L.L. Bean was not explicitly contrary to anything that the parties discussed on November 26, 2008.

238) L.L. Bean may have assumed that Worcester would be deducting savings from its invoice, just as Worcester in fact assumed that L.L. Bean would receive credit for the savings in the form of discounts during the following season. Neither assumption is contrary to the letter or spirit of what was discussed.

239) Another reason for the court's view is that from the outset, Worcester

acknowledged its obligation to return savings resulting from the production cutback to L.L. Bean in some fashion. Had it denied any such obligation, L.L. Bean's breach argument might be better founded. However, at least up to the beginning of May 2009, when Worcester learned that it would not be getting business again from L.L. Bean, Worcester was actively trying to get L.L. Bean to pay the invoice on the basis that Worcester would return savings later. The parties' dispute in early 2009 was as to when and by how much, not as to whether, Worcester would honor its oral agreement to credit L.L. Bean with savings.

240) Worcester insisted on purchase orders as part of the parties' 2008 agreement because of their contractually binding nature, in order to satisfy its financing bank. Based on Worcester's view of the purchase orders as being "take-or-pay" obligations—meaning that L.L. Bean had to pay the amount of the purchase orders whether or not it took delivery of all items ordered—and based also on Worcester's assumption that it could return savings later through future discounts, Worcester took the position that L.L. Bean was required to pay the full amount of the purchase orders immediately, with the amount to be credited back to L.L. Bean a separate matter to be worked out later, and therefore that L.L. Bean's failure to pay was a default in its contractual obligations.

241) Given the nature of purchase orders in general and given Worcester's insistence in the November 26, 2008 conversation that L.L. Bean honor the purchase orders, Worcester's position was not without legal justification.

242) It is also significant that at the time L.L. Bean did not interpret the invoice as a breach of contract. Rather, given that it had asked, and Worcester had agreed, for production to be reduced and for Worcester's savings to be credited, L.L.

Bean simply did not think it should have to pay the full amount of the invoice. L.L. Bean's position was also not without justification.

243) The reason why both parties' positions in the impasse over the invoice were justified is that in their November 2008 oral agreement there was no meeting of the minds on the material term of what savings would actually be credited to L.L. Bean, by what means and when.

244) Finally, at least under L.L. Bean's current view of the savings, Worcester could not possibly have shown all of its savings as a deduction in the year-end invoice, because some of those savings would not be realized until the 2009 season began or later. In that regard, Worcester's concept of returning the savings to L.L. Bean in the form of a discount in 2009 made sense.

245) Because Worcester's submittal of the year-end invoice for 2008 was not a breach of any contractual agreement between the parties, the doctrine of intentional breach is irrelevant and of no merit. The analysis proceeds to the elements of Worcester's claim and the deductions that should be made from it.

III. Worcester's Entitlement, Before Any Deductions, for the 2008 Season

246) The starting point for valuing Worcester's claim is the $6,682,915 in purchase orders issued by L.L. Bean. However, Worcester claims to be entitled to several different amounts above and beyond the purchase order total.[6] These additional amounts are:

- $173,794.56 in what Worcester characterizes as unpaid direct ship fees on the 271,554 units actually shipped to L.L. Bean customers.

[6] In its complaint, Worcester claimed damages due to extra interest costs incurred on a line of credit. This court has previously ruled that such costs are recoverable, *see* Order on Plaintiff's Motion for Partial Summary Judgment at 16 (Feb. 16, 2011), but Worcester did not pursue the claim at trial and the issue is thus not considered further.

- $94,564.73 for units sold to L.L. Bean above the quantities of those types of units called for in the L.L. Bean purchase orders.

- a further amount reflecting L.L. Bean's commitment in 2008 and prior seasons to reimburse Worcester for the cost of components that could not be used in L.L. Bean products in a future season.

WORCESTER'S CLAIM FOR DIRECT SHIP FEES

247) The parties agree that Worcester shipped some 271,554 units to L.L. Bean customers, and that L.L. Bean was supposed to pay Worcester a fee of $0.64 per item shipped (known as a "fulfillment cost" or a "direct ship fee"). Worcester asserts that it is entitled to $173,794.56 in direct ship fees for shipping those units, above and beyond the purchase order amounts.

248) L.L. Bean objects, claiming that the evidence indicates L.L. Bean has already paid direct ship fees because Worcester has apparently included those fees in the unit cost of products paid by L.L. Bean. (Ex. 175, 180; Holden, Day 5, at 1219–20). In addition to contesting Worcester's claim for $173,794.56 in direct ship fees for the items that Worcester actually shipped to customers, L.L. Bean claims it is entitled to a $0.64 refund on all of the items for which it has paid that were not shipped.

249) The basis for L.L. Bean's contention lies in Worcester's responses to L.L. Bean's discovery requests regarding Worcester's costs. *See* Worcester's Second Supplemental Answers to Plaintiff's First Set of Interrogatories, Worcester's Supplemental Answers to Plaintiff's First Set of Interrogatories (Ex. 237, 238; Dunham, Day 9 at 184). Worcester's discovery responses show a $0.64 shipping fee built into Worcester's cost per item. Thus, L.L. Bean claims Worcester's shipping fee claim amounts to a double charge to L.L. Bean, and should therefore not be recognized. (Holden, Day 5 at 1220-22; Dunham, Day 4 at 1064–68, Day 9 at 183-84).

250) Michael Worcester testified that this was a mistake, but was unable to

explain or resolve the mistake during his testimony. (Michael Worcester, Day 9 at 72–73).

251) For several reasons, the court concludes that Worcester is entitled to an award of $173,794.56 for direct ship fees on the 271,544 items shipped to L.L. Bean customers in 2008.

252) Worcester had been a direct ship vendor to L.L. Bean for five or six years. (Holden, Day 6 at 1400). During that time, L.L. Bean had obtained data from Worcester about Worcester's costs included in the product price, and no direct ship fee had ever been shown in that data breaking down item costs. (Holden, Day 6 at 1400-02)

253) Although the record did not elaborate on how L.L. Bean and Worcester agreed on the unit prices for Worcester's products that L.L. Bean paid over the years, there is no reason to think that they were anything other than negotiated periodically on an arms' length basis. It also seems reasonable to infer that Worcester may well have shared its cost data with L.L. Bean on previous occasions to support Worcester's pricing.

254) If Worcester had suddenly inserted a $0.64 shipping cost into its prices charged to L.L. Bean, one would expect to have seen an across-the-board increase of $0.64 in L.L. Bean's price, and the record does not suggest that anything of the kind occurred. In fact, there is nothing in the record outside Worcester's discovery responses to suggest that L.L. Bean has in fact been double charged for shipping—nothing else, in other words, to suggest that L.L. Bean has paid, or is expected to pay, any more than the negotiated unit price it agreed to pay for each product, not including shipping.

255) Ultimately whether the discovery responses are erroneous or not makes no difference, because whatever Worcester calculates its costs of production to be does not excuse L.L. Bean from paying the unit prices it has agreed to pay. Thus, 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.

256) Because L.L. Bean had agreed to pay a given price per item and also a $0.64 fee per item shipped over and above the item price, and because Worcester in fact shipped the 271,554 items in reliance on L.L. Bean's agreement to those terms, Worcester is entitled to the fee both as a matter of contract and in the alternative on a theory of unjust enrichment.

257) Certainly, it was a careless error for Worcester to create this issue by including a $0.64 cent shipping fee in its sworn responses to discovery requests, to repeat the error in a later response, and not to discover the errors and correct the responses before trial. However, in light of the foregoing, Worcester's reference to a $0.64 shipping fee in its discovery responses is more likely a mistake, as Worcester claims, than chicanery, as L.L. Bean sees it. *See* J.W. von Goethe, *Die Leiden des jungen Werthers*, Erstes Buch, Am. 4 Mai 1771 (1774) (" . . . Und ich habe, mein Lieber, wieder bei diesem kleinen Geschäft gefunden, dass Missverständnisse und Trägheit vielleicht mehr Irrungen in der Welt machen als List und Bosheit. Wenigstens sind die beiden letzteren gewiss seltener").

258) The court concludes that Worcester is entitled to the $173,794.56 charge for shipping fees. For the same reason, L.L. Bean is not entitled to a refund of $0.64 per item for the 44,026 items that L.L. Bean paid for but that were not shipped, nor a

reduction of $0.64 in the price of the 74,085 unfinished items. At the same time, L.L. Bean cannot be faulted for raising the issue, given Worcester's discovery responses.

WORCESTER'S CLAIM FOR $94,564.73 FOR UNITS SOLD BEYOND PURCHASE ORDER QUANTITIES

259) Worcester claims to be entitled to an additional $94,564.73 for items sold to L.L. Bean beyond the quantities reflected in the L.L. Bean purchase orders. L.L. Bean objects on the ground the entitlement was not established in the evidence.

260) For several reasons, the court agrees with L.L. Bean's position:

- The parties have stipulated that L.L. Bean has paid Worcester for all of the 315,580 units that Worcester finished for L.L. Bean. The stipulation does not say whether or not the 315,580 units were all within the scope of the purchase orders, but the court assumes the stipulation covers any and all finished units.

- The 2008 letter agreement says that Worcester is not entitled to be paid for unfinished units beyond those specified in the purchase orders.

- Therefore, if Worcester's $94,564.73 claim is for finished units outside the purchase order quantities, L.L. Bean has already paid for them. If the claim is for finished but unsold units or for unfinished units, Worcester is not entitled to be paid for them under the 2008 letter agreement because they are outside the scope of the purchase orders.

- Finally and in any case, as L.L. Bean suggests, the evidence is insufficient to justify a finding that Worcester is entitled to this amount.

261) For these reasons, the court concludes Worcester has not proved its claim of $94,564.73, for goods produced beyond purchase order quantities.

WORCESTER'S COMPONENT CLAIM

262) As a threshold matter it should be noted that Worcester's component claim, at least in the form it was pursued at trial, was not specifically pled in Worcester's amended counterclaim. Because both parties have requested declaratory relief on essentially all aspects of this case, the components issue is discussed in depth in this Decision and Judgment. However, in practical terms, the variance between

pleading and evidence makes no difference, for reasons that will be clear later.

263) As noted above, because Worcester had enough components on hand to make up to 446,115 units for L.L. Bean in 2008, and because it used enough of those to make 315,580 finished units, Worcester likely had about $585,000 in components left at the end of the 2008 season, consisting mostly of components purchased that year, plus some components left over from the 2007 season and again not used in 2008.

264) Many of the components not incorporated into finished products in 2008 likely were incorporated into pre-assembled units that were waiting for balsam to be added just before shipping, but that were not finished in 2008 as a result of L.L. Bean's directives to stop production.

265) L.L. Bean's obligation to Worcester covers three categories of components:

- As to the components leftover from the 2007 season, some of them probably were components within the scope of L.L. Bean's commitment, and others were purchased on Worcester's "own nickel." The evidence is simply insufficient to enable the court to determine how much of the component inventory left over after the 2007 season and again not used in the 2008 season consisted of inventory within the scope of L.L. Bean's commitment for the 2007 season or earlier seasons.

- L.L. Bean is also responsible for the components that would have been incorporated in the 74,085 units that L.L. Bean bought through its purchase orders but that were not finished as a result of the production stoppage. At an average of $4 in components per unit, the value of components associated with the 74,085 units that were ordered but not finished is $296,340.

- Finally, L.L. Bean's commitment to reserve components for the 2008 season was, as noted above, limited to $80,228 of the $456,000 in components that Worcester purchased in 2008. 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.

266) Thus, of the $585,000 in leftover components designated for L.L. Bean products, the evidence shows that L.L. Bean was committed to pay Worcester for

$376,568 ($296,340 + $80,228) worth, unless the components could be incorporated in products in future seasons. L.L. Bean's termination of the relationship after the 2008 season obviously precluded Worcester from thereafter using the components in L.L. Bean products, but Worcester remained obligated to mitigate its damages by attempting to recoup its investment in the components by other means.

267) L.L. Bean claims Worcester has recouped, or at least could reasonably have recouped, the cost of all of its leftover L.L. Bean components, either to another balsam product company or in the form of products sold to other customers. Worcester denies that contention on several grounds, including that some components have deteriorated and that some cannot be resold, or at least have not yet been resold. The mitigation issue is addressed in the next section.

268) Because L.L. Bean's component commitment covers $376,568 in leftover components, that amount is added to Worcester's total entitlement for the 2008 season, before deductions are made for savings, mitigation of damages or any other reason.

269) To recapitulate, Worcester's contractual entitlement for the 2008 season, before consideration of any deductions for payments made, savings or other reasons, consists of:

Total amount of purchase orders:	$6,682,915
Direct ship fee for items shipped	$173,794.56
L.L. Bean's total component commitment	$376,568

270) The total of these amounts is $7,233,277.56. From this figure must be deducted the stipulated amount of L.L. Bean's payments totaling $5,497,306. The difference between the two is $1,735,971.56. This amount is somewhat higher than the amount of Worcester's year-end invoice to L.L. Bean for 2008, but only because the

invoice does not reflect any charge for Worcester's leftover L.L. Bean components. At the time the invoice was sent Worcester believed, and had reason to believe, that it would be able to use most if not all of the leftover components in the 2009 season, so it had no reason to bill L.L. Bean for them.

271) The analysis now turns to what amounts should be deducted from the $1,735,971.56 figure to reflect what Worcester did save, and could reasonably have saved, as a result of cutting production, selling components and mitigating its damages in other ways.

IV. Deductions From Worcester's Claim

272) L.L. Bean argues that there should be five types of deductions from Worcester's claim[7]:

- brush deduction: L.L. Bean and Worcester agree there should be a deduction from Worcester's claim for balsam brush not used in the 74,085 units that were included in L.L. Bean's purchase orders but never finished, but disagree as to the amount of the deduction.

- component deduction: L.L. Bean asserts that Worcester's entire component claim (calculated above to be $376,568) should be disallowed and therefore deducted because Worcester has, or reasonably could have, recouped its entire investment in the components either by incorporating them in products sold to other customers or by selling them to another balsam products vendor. Worcester disagrees.

- labor deduction: again, the parties agree that there should be a deduction to reflect saved labor costs resulting from the production cutback, but disagree as to the amount

- overhead: similarly, both parties agree to certain deductions but disagree on others

- deduction for "saved returns and allowances": L.L. Bean asserts that there should be a deduction for returns and quality problems on the 271,554 items Worcester shipped to L.L. Bean customers, and a further deduction for what likely would have been the returns and quality problems on the 74,085 unfinished items. Worcester disagrees.

[7] An additional deduction urged by L.L. Bean—for a refund of $0.64 per item paid for but not shipped—associated with a "direct ship fee" supposedly included in the cost per item has already been addressed in section IV, Worcester's Claim for Direct Ship Fees, *supra*.

273) Some general discussion of mitigation of damages is in order before the inquiry turns to each of the five listed areas in which L.L. Bean argues for a reduction in Worcester's claim.

274) Initially, it should be noted that the duty to mitigate arises by operation of law, independent of any contractual or other undertakings of the parties. Thus, the fact that the savings Morrill Worcester had in mind during the November 26, 2008 telephone conversation were limited to savings in production of items does not limit Worcester's duty to mitigate. Even had the November 26 conversation never taken place, Worcester would still have a duty to mitigate its loss, although it would have had the option of finishing the remaining units and attempting to resell them, instead of stopping production as it agreed to do.

275) As the Maine Law Court has observed, "[t]he common law duty to mitigate damages survives Maine's enactment of the Uniform Commercial Code in 1963. While the U.C.C. does not explicitly require the mitigation of damages, it does provide that 'principles of law and equity' not displaced shall supplement the Code's provisions. 11 M.R.S.A. § 1-103 (1964). The duty to mitigate is also implicit in the Code's broad requirements of good faith, commercial reasonableness and fair dealing." *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722, 724-25 (Me. 1983).

276) In the same case, the court noted, "The touchstone of the duty to mitigate is reasonableness. The nonbreaching party need only take reasonable steps to minimize his losses; he is not required to unreasonably expose himself to risk, humiliation or expense." *Id.* at 725.

277) "[T]he duty to mitigate is properly characterized as a limitation on damages and simply prevents a plaintiff from recovering damages that it could

reasonably have prevented without incurring additional cost, risk, or burden." *Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals Group, Inc.*, 2011 U.S. Dist. LEXIS 80411, at *44-45 (S.D. W.Va. July 22, 2011).

278) In the present case, the limitations on the duty to mitigate mean that not all of the savings that L.L. Bean posits should be deducted.

279) Moreover, L.L. Bean as the party opposing Worcester's damages claim has the burden to prove that Worcester failed to mitigate its damages. *See Lee v. Scotia Prince Cruises Ltd.*, 2003 ME 78, ¶22, 828 A.2d 210, 216.

280) One aspect of the case that sets it apart from other instances in which mitigation of a seller's damages are analyzed is that Worcester is what the law sometimes refers to as a "lost volume seller," meaning a seller that has sufficient capacity to meet foreseeable demand, and therefore is not necessarily made whole by reselling the item for the contract price, for the reason that the seller could have and would have made both sales.

281) The Law Court has defined the concept as follows:

> Stated generally, the concept of lost-volume sales posits that a seller of goods who conducts a resale following a breach will not be "made whole" if only allowed to recover the difference between the contract price and resale price when the resale is made to a second customer, at the expense of a second sale. The concept presupposes a situation in which supply outstrips demand and in which the second customer would have been successfully solicited by the seller had the original breach not occurred. Assuming these conditions, the seller is awarded lost profits as compensation for his "loss" of a sale to one customer.
>
> *Schiavi Mobile Homes, Inc.*, 463 A.2d at 726.

282) The Maine UCC recognizes the "lost volume seller" concept: "If the measure of damages [of the difference between market price and contract price, plus incidentals and less expenses saved] is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit (including

reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale." 11 M.R.S. § 2-708(2).

283) The relevance of the "lost volume seller" concept to this case is that for Worcester to resell the 74,085 units for which L.L. Bean has not paid, even at the contract price, does not make Worcester entirely whole. "[B]y definition, a lost volume seller cannot mitigate damages through resale. Resale does not reduce a lost volume seller's damages because the breach has still resulted in its losing one sale and a corresponding profit." *R.E. Davis v. Diasonics, Inc.*, 826 F.2d 678, 682 (7th Cir. 1987).

284) Because Worcester had the capacity to sell the 74,085 items to L.L. Bean in 2008 and an additional 74,085 items in later years, Worcester would need to have received its expectancy on both sets of sales to be made whole.

285) As a practical matter, Worcester's lost volume seller status may not make much difference in the analysis, because L.L. Bean acknowledges that Worcester is, in effect, entitled to a profit on all 389,664 units reflected in the purchase orders, including the 74,085 units that L.L. Bean ordered but Worcester did not finish. However, in keeping with the approach the parties agreed to take in their November 26, 2008 telephone conversation, as explicated in court's summary judgment ruling, Worcester's entitlement on the unfinished units is reduced by subtracting what it saved and could have saved.

286) The analysis turns to each of the claimed deductions, in the order stated above.

DEDUCTION FOR BRUSH SAVINGS

287) Plaintiff Worcester (that is, Worcester Resources) purchased fresh balsam (or brush, as it is sometimes called in the wreath trade) for Worcester's balsam products from an affiliated family-owned entity called Worcester Holdings, which held title to the land from which Worcester obtained balsam for its products. As of 2008, Worcester Resources paid Worcester Holdings $0.45 per pound for brush. (Morrill Worcester, Day 9 at 171, Day 3 at 604-612).

288) Worcester has calculated savings for brush of about $65,000. L.L. Bean's calculation is that Worcester saved a total of $150,000.

289) Worcester's calculation appears to focus on what Worcester Holdings, the affiliate of Plaintiff Worcester Resources that owns and operates the forestlands from which the brush is obtained, was able to save by not cutting brush. As a result of the production cutbacks, Worcester Holdings did not have to harvest as much brush for sale to Worcester Resources.

290) Worcester's rationale for including Worcester Resources in the brush equation is that the reason Worcester Wreath acquired forestlands that later were transferred to Worcester Holdings was to meet L.L. Bean's requirement that Worcester's products incorporate "Maine balsam," by assuring itself of a sufficient supply of balsam in Maine. (Morrill Worcester, Day 1 at 176,78, 182-183).

291) L.L. Bean's expert witness, Randall Dunham, focused instead on the amount that Worcester Resources saved by not having to purchase brush for the 74,085 units from Worcester Holdings. He assumed that Worcester's products use about four and a half pounds of brush on average. Mr. Dunham calculated that Worcester saved about $150,000 by not having to purchase the 300,000 pounds of brush needed to finish 74,085 units at $0.45 per pound. His calculations are based on Worcester's own

purchasing records and discovery responses.

292) L.L. Bean also notes that its production cutbacks were all issued by December 9, with two weeks remaining in the production season. Because brush is affixed to items as close as possible to the time the items are shipped, so as to optimize freshness, L.L. Bean suggests that Worcester had ample time to avoid purchasing unnecessary brush for the 74,085 units that L.L. Bean ordered but that Worcester did not finish.

293) Ultimately, the court agrees with L.L. Bean that it is Worcester Resources's savings that must be the focus. Worcester Holdings is not a party to the case, nor a party to any contract with L.L. Bean as far as the record shows. The record does not support disregarding the corporate form in the manner that Worcester's calculation would require.

294) The court deducts from Worcester's claim the sum of $150,000 to reflect savings for brush.

DEDUCTION FOR RE-USE OF COMPONENTS

295) For the reasons previously noted, the court finds that, at the end of the 2008 season, Worcester had on hand about $585,000 in leftover components designated for L.L. Bean products. Of that quantity, L.L. Bean was contractually committed, by virtue of the March 2008 commitment letter and the subsequent purchase orders, to purchase or pay for $376,568 worth, unless those components could be incorporated in products in future seasons.

296) L.L. Bean contends that Worcester's own inventory records and records of sales since the end of 2008 demonstrate that it has used essentially all of these components. Exhibits 156, 166 and 168 do, as L.L. Bean suggests, indicate that

Worcester has used most of the leftover components.

297) Worcester contends that some of the components designated for L.L. Bean products have deteriorated to the point of being unusable. That may well be, but as noted above, some of those components were items L.L. Bean had committed to purchasing and others were not.

298) The court finds persuasive L.L. Bean's evidence that Worcester has incorporated hundreds of thousands of dollars in leftover components into products sold in 2009 and thereafter.[8] On the other hand, the court also finds that due to deterioration, not all of the components to which L.L. Bean had committed itself could be re-used. The deterioration was observed in 2011 but likely began in prior years. (Scott, Day 8 at 28, 36, 43, 45, 48, 68-69, 78, 84, 85).

299) Because deterioration was observed in partially completed items in storage from prior years, the court infers that those items likely were among the 74,085 units that L.L. Bean had ordered but Worcester never completed.

300) Moreover, it is undisputed that at least some components—anything with the L.L. Bean name or logo on it at least—could not be reused.

301) L.L. Bean has proved that Worcester has or could reasonably have recouped 90% of the value of the components to which L.L. Bean was contractually committed by using them in products sold to other buyers in 2009 and thereafter.

302) The remaining $37,657—one-tenth of the total value of the components that L.L. Bean had committed to purchase—fairly reflects the value of deteriorated components that L.L. Bean had committed to buy and that cannot be reused, and

[8] L.L. Bean also suggests that Worcester also could have and should have sold any components it could not use to another wreath company, such as its competitor, Whitney Wreath. Such a drastic step—tantamount to a partial liquidation of assets—goes beyond Worcester's express oral agreement to pass along savings and its UCC duty to mitigate damages.

components that by their nature cannot be sold in products to other customers.

303) The ninety percent of L.L. Bean's outstanding component commitment that the evidence shows Worcester was able to re-use has a value of $338,911, and that amount will be deducted from Worcester's claim.

DEDUCTION FOR SAVINGS OF DIRECT COSTS OF LABOR

304) The parties agree that there should be a deduction from the amount due to Worcester for the amount that Worcester saved in labor costs as a result of the production cutback, but they have a disagreement amounting to about $21,000 regarding the amount of the deduction.

305) Worcester calculated the total labor savings from ceasing production at $128,164.77. (Morrill Worcester, Day 8 at 235). However, its calculation appears to focus on only one of the three labor components associated with completing an item. The three components are the cost of assembling the item, the cost of decorating it with balsam, and what the parties refer to as "support labor." Worcester's estimate appears to cover only the first factor, which admittedly accounts for most of the labor cost.

306) L.L. Bean, through its witness, Randall Dunham, calculates Worcester's labor savings to be $149,158, based primarily on Worcester's own documents, including discovery responses, a figure that covers all three of the just-mentioned components of the labor cost of an item that is actually completed. By not having to complete 74,085 of the units covered in L.L. Bean's purchase orders, Worcester saved the cost to it of the labor associated with completing the units. That savings clearly falls within both Worcester's express promise to credit L.L. Bean with savings and its UCC duty to mitigate.

307) The evidence supports Mr. Dunham's analysis and therefore the court

deducts an additional $149,158 from Worcester's entitlement.

DEDUCTION FOR VARIABLE OVERHEAD

308) L.L. Bean asserts that an additional $189,816 should be deducted from Worcester's claim to reflect "variable overhead" expenses that Worcester would have incurred had it completed the entire quantities specified in L.L. Bean's purchase orders, but did not incur with respect to the 74,085 items that Worcester did not complete.

309) L.L. Bean's expert witness, Randall Dunham, testified that he calculated Worcester's variable overhead by analyzing Worcester's internal books and records, including its QuickBooks detail income and expense, and Worcester's internal profit and loss statements. (Dunham, Day 4, at 1068–69; Day 9, at 175–78). Mr. Dunham testified that through this analysis he was able to determine which of Worcester's expenses are properly characterized as fixed overhead, and those that should be characterized as variable overhead.

310) Fixed overhead includes expenses such as rent and office compensation, that do not vary according to volume of production. (Dunham, Day 4 at 1069). Variable overhead, on the other hand, includes expenses that do vary with the volume of production, such as workers' compensation premiums and payroll taxes, both of which are a function of labor costs, and other items such as repairs, maintenance to equipment, utilities, small tools, and fuel costs for equipment used in production. (Dunham, Day 4 at 1069, 1074–75).

311) Mr. Dunham's analysis of Worcester's savings as a result of the production cutback focuses on variable overhead only, because fixed overhead costs by definition would not be affected by the cutback.

312) Mr. Dunham calculated Worcester's total overhead (fixed and variable)

for the 74,084 unfinished items to be $518,589, based on Worcester's own total overhead figures of between $7.00 and $7.72 per item. (Dunham, Day 4 at 1068–71; Ex. 141, 237 (Ex. A)). Based on the costs assigned in Worcester's books and records to fixed overhead items and variable overhead items, Mr. Dunham calculated that variable overhead items average 16.01% of total sales. That percentage of the $1,185,609 price of the 74,085 items is $189,816. (Dunham, Day 4 at 1068–71).

313) According to Mr. Dunham, Worcester's "variable overhead" saved as a result of not having to finish the 74,085 items falls into three categories:

- payroll taxes and workers compensation premiums that vary as a function of payroll (Dunham, Day 4 at 1074).
- royalties that L.L. Bean claims Worcester would have been obligated to pay if the remaining 74,084 units had been completed and sold, but did not have to pay as a result of the production cutbacks. (Dunham, Day 4 at 1072–74; Day 9 at 174).
- miscellaneous variable expenses, such as repairs, maintenance to equipment, utilities, small tools, and fuel costs for fork lifts.

314) Of the three areas, only the first mentioned can be said to have been within the contemplation of the parties to the November 26, 2008 telephone conversation because such costs are a direct function of Worcester's level of production. In other words, there is nothing to indicate that Morrill Worcester or the L.L. Bean representatives had royalties or fuel costs, for example, in mind. However, if Worcester did save royalties or the miscellaneous expenses, or could reasonably have saved them, Worcester's duty to mitigate requires that such savings be deducted from Worcester's entitlement. As on any issue involving mitigation of damages, L.L. Bean bears the burden of persuasion.

315) Worcester plainly would have incurred additional payroll tax and workers compensation costs had it completed the 74,085 items. Mr. Dunham's

calculation of savings at $33,000 is justified and the court adopts it.

316) The other two items, however, were not proved.

317) The evidence indicated that Worcester has paid royalties, or at least reflected payment on its books of royalties, to a related Worcester company for Morrill Worcester's "knowledge of the wreath making business." (Worcester 30(b)(6) depo. (Morrill Worcester) at 299; Bruce, Day 7 at 1770; Michael Worcester, Day 9 at 20; Ex. 203, Ex. 212; Dunham, Day 4 at 1073-74, Day 9 at 174). Mr. Dunham assumed that royalties were paid on a per item basis, and calculated savings attributable to the 74,085 items accordingly. However, Worcester's royalty cost was not shown to be tied directly to the volume of sales or production in the sense that labor costs or payroll taxes are.

318) For similar reasons, the miscellaneous savings were not shown to be sufficiently tied to the volume of production or sales to support a finding that Worcester actually saved those costs by not having to finish the 74,085 items. At least some of the included costs—the cost of purchasing tools, for example—would be incurred with any level of production. Equipment maintenance, too, is necessary to support any level of production and is not necessarily a direct function of how many items are produced.

319) Moreover, the evidence did not suggest that Worcester closed down production entirely as a result of the cutback,[9] so its utility costs would not necessarily be any lower as a result of not having to finish 74,085 items.

320) With regard to variable overhead, $33,000 will be deducted from Worcester's entitlement to reflect saved payroll taxes and workers compensation premiums.

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[9] As noted in paragraph 160), *supra*, production continued after the stop order, albeit as to just a few product lines.

DEDUCTION FOR RETURNS AND ALLOWANCES

321) L.L. Bean also asserts that there should be a deduction from Worcester's entitlement to reflect chargebacks against Worcester for returned items and quality problems. This proposed deduction has two components: one relates to the 271,554 items that Worcester actually shipped to customers, and the other relates to the 74,085 items that Worcester did not complete but would have shipped had the items been completed.

322) L.L. Bean asserts there should be a deduction of $81,538 to reflect returns and allowances for the 271,554 shipped items. Worcester's main objection is that, because L.L. Bean terminated the relationship, Worcester was deprived of the ability to negotiate L.L. Bean's figure downward. Michael Worcester testified that Morrill Worcester, "being who he is . . . likes to negotiate anything". (Michael Worcester, Day 9 at 17, 11–12).

323) In the court's view, Worcester's point is irrelevant. This is fundamentally an action for accounting. The parties could have settled accounts in their usual manner through the year-end meeting, but the fact that the meeting never happened does not mean the issue cannot be raised here, and Worcester had an opportunity in this case to show that L.L. Bean's proposed chargeback figure should be reduced.

324) L.L. Bean's proposed deduction of $81,538 for the 271,554 shipped items is supported in the evidence. Consistent with the methodology employed at the end of previous seasons, L.L. Bean calculated the amount of returned or defective orders for which Worcester was responsible in the 2008 season at $81,538. (Ex. 176; Holden, Day 5 1196–1202).

325) As to the 74,085 unfinished items, L.L. Bean asserts that there should be a deduction of $17,884, based on the assumption that the total chargeback would equal at least 1.5% of the price of the items. Worcester's primary objection to this deduction is that it is based on speculation. However, L.L. Bean's position has a solid foundation in the historical data—just as a profits history provides a basis for awarding future lost profits, so the historical chargeback data supports L.L. Bean's position on this issue.

326) The chargeback percentages for the previous five years was as follows: 2003 1.9%, 2004 1.5%, 2005 2.7%, 2006, 3.1%, and 2007 1.88%. (Ex. 40, 50, 48, 52, 423; Holden, Day 5 at 1203–04). This data indicates that a 1.5% figure is reasonable, even modest. Moreover, although Worcester maintains the entire calculation is speculative, Morrill Worcester did not dispute the reasonableness of the 1.5% figure. (Morrill Worcester, Day 2 at 468).

327) For all of these reasons, the court finds that a further deduction of $17,884 to reflect the probable amount of the chargeback on the 74,085 unfinished items, had they been finished and shipped, is appropriate.

328) It should be noted that, unlike prior deductions, this does not fall under the mitigation of damages heading. Rather, it reflects the historical reality that Worcester netted something less than the nominal purchase price as a result of chargebacks. Thus, the $17,884 deduction conceptually should be considered an adjustment to Worcester's entitlement rather than a savings to Worcester.

V. Summary and Conclusion

WORCESTER'S NET ENTITLEMENT

329) As noted in paragraph 270), Worcester's entitlement before any deductions is $1,735,971.56.

330) From this figure are deducted the following:

- $150,000 for brush savings
- $338,911 in savings through re-use of components to which L.L. Bean was contractually committed
- $149,158 in saved labor costs
- $33,000 in saved payroll taxes and workers compensation premiums
- $85,538 in chargebacks for the 271,554 items shipped in 2008
- $17,554 in probable chargebacks on the 74,085 unfinished items

331) The total of these deductions is $774,161, higher than Morrill Worcester's rough calculation of $646,000 in "avoided costs," (Ex. 143), presumably because it includes items that he did not include, but still less than L.L. Bean suggests.

332) Deducting $774,161 from $1,735,971.56 yields $961,810.56. Judgment shall be entered for Worcester in that net amount.

333) Applied to the parties' pleadings, the foregoing analysis results in the following:

- The sole count of L.L. Bean's complaint is for a declaratory judgment. The findings of fact and conclusions of law contained in this Decision and Judgment represent the court's grant of declaratory relief, as requested. Worcester's answer joins in the request.
- Count I, II, III and IV of Worcester's amended counterclaim are all claims for breach of contract.
- Count I relates to the 344,725 units in the initial purchase orders. Count II relates to the 44,939 items that were the subject of the September 22, 2008 purchase orders. Count III is for the entire purchase order quantity of 389,664 items. Worcester is entitled to judgment on Count III in the amount of $750,359 (the face amount of the purchase orders, plus the "direct ship fee" on items actually shipped,[10] minus L.L.

[10] None of Worcester's four breach of contract counts alludes specifically to the "direct ship fee" claim, or for that matter to components. However, the combination of the fact that L.L. Bean requested declaratory relief on all issues and that the "direct ship fee" was in contention, both as an addition to Worcester's claim for the purchase order amounts

Bean's payments, and minus the deductions for actual savings and/or mitigation of damages, regarding brush, saved labor, saved variable overhead and the chargeback amount for both finished and unfinished items). Worcester is entitled to judgment on both Count I and II, but, because they are surplusage in light of Count III, not for any additional damages.

- Count IV is a claim for breach of contract, based on L.L. Bean's oral promise of November 26, 2008 to remain "responsible for the full value of the purchase orders minus savings." L.L. Bean is entitled to judgment on this count, because L.L. Bean never disputed its obligation to pay the full value of the purchase orders less savings—the issue has been as to what should be deducted to reflect savings.

- Count V, captioned Unconscionable Term, appears to be a request for the court to invalidate the November 26, 2008 agreement. Because the agreement is enforceable, judgment is granted to L.L. Bean on this count.

- Count VI of Worcester's amended counterclaim is for breach of contract, specifically with regard to L.L. Bean's position regarding chargebacks for the finished items. Judgment is granted to L.L. Bean on this count.

- Counts VII (fraud/misrepresentation) and VIII (negligent misrepresentation) of Worcester's amended counterclaim were address in the court's grant of partial summary judgment by virtue of the February 16, 2011 order on L.L. Bean's motion for partial summary judgment. Final judgment is entered for L.L. Bean on counts VII and VIII.

COSTS

334) By rule, "costs shall be allowed as of course to the prevailing party, as provided by statute and by these rules, unless the court otherwise specifically directs." M.R. Civ. P. 54(d). Considering both the summary judgment phase of this case as well as the trial phase, each party prevailed on significant issues, to the extent that it cannot be said that either party prevailed overall. Accordingly, the court declines to award

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and as a deduction from the purchase order amounts from L.L. Bean's viewpoint put it firmly among the central contested issues from both parties' perspectives. Also, the components in the 74,085 unfinished units were included in the purchase orders amounts that were specifically pleaded in Counts I-IV of Worcester's amended complaint. So both direct ship fees and components were clearly significant issues tried by consent in the case, as elements of damages from Worcester's perspective and as offsets against damages from L.L. Bean's standpoint.

costs to either party, and specifically directs that each party bear its own costs. There is no contractual, statutory or other basis in the various claims or defenses for awarding attorney fees, nor has either party made such a claim.

INTEREST

335) The evidence did not reveal any contractual rate of interest, so the statutory pre- and post-judgment rates apply. Pre-judgment interest runs from the date of filing to the date of entry of judgment at the annual rate of 3.40 percent. Post-judgment interest shall run from the date of entry of judgment at the rate of 6.12 percent.

Judgment

Plaintiff L.L. Bean is hereby granted judgment on its complaint for declaratory judgment, to the extent of the findings of fact and conclusions of law herein.

Defendant Worcester is hereby granted judgment on its counterclaim in the amount of $961,810.56, with pre- and post-judgment interest as allowed by law.

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 2012

A. M. Horton
Justice, Business and Consumer Court