IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SUPERL SEQUOIA LIMITED,

Plaintiff,

v.

THE C.W. CARLSON COMPANY, INC.,
a/k/a THE CARLSON COMPANY, INC.,

Defendant.

OPINION and ORDER

07-cv-640-bbc

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In early 2007, Federated Department Stores, Inc. solicited bids for equipment and services needed to launch a promotion of Martha Stewart merchandise. Defendant C.W. Carlson Co., a furniture manufacturer based in Madison, Wisconsin, proposed to supply 4000 fixtures for the promotion. Before submitting a bid to Federated Department Stores, defendant proposed a joint venture with plaintiff Superl Sequoia Limited, a manufacturer based in Hong Kong, under which plaintiff would manufacture most of the fixtures, defendant would install the fixtures and displays and the parties would split any profits above each party's quoted costs equally. Plaintiff gave defendant a quote of approximately $3.4 million, including shipping, for the fixtures. Defendant accepted the quote, applied a

markup of 22% plus defendant's estimate of its own costs and bid approximately $5 million to Federated, which accepted the bid on March 1, 2007. Although Federated was ultimately satisfied with the fixtures installed by defendant and paid defendant in full, the project required defendant to put in more work than it had anticipated. Among other problems, plaintiff's shipments from China were late, fixtures arrived in damaged or defective condition and the costs of transportation exceeded the parties' expectations. Defendant paid plaintiff about $2 million, rather than $3.4 million plus profits.

Plaintiff filed this lawsuit in November 2007, asserting breach of contract for defendant's failure to pay amounts due on the Martha Stewart contract. Defendant counterclaimed for breach of contract, alleging that plaintiff's quoted prices included profit as well as direct costs, in violation of their agreement, and that plaintiff breached its implied warranties of merchantability and fitness by sending defective and damaged fixtures. Defendant also filed a counterclaim for misrepresentation against plaintiff and third party defendants Gary Dembart and Sequoia Group Holdings LLC.

In February 2008, I dismissed defendant's misrepresentation counterclaim and third-party complaint and in July 2008, I granted defendant's motion for summary judgment for liability on its counterclaims for breach of contract and breach of implied warranties. In November 2008, I held a bench trial to determine the amount of money each party was entitled to receive under the agreement and what damages, if any, defendant was due for

plaintiff's breach of warranty and failure to make timely deliveries. When all was said and done, I concluded that plaintiff owed defendant $9,550. Plaintiff appealed to the Court of Appeals for the Seventh Circuit.

On August 11, 2010, the court of appeals vacated the judgment in defendant's favor, concluding that although the factual findings of this court regarding the amount and allocation of costs were reasonable, defendant was entitled to charge the venture only its out-of-pocket costs for repair and replacement, while plaintiff was entitled to charge $3.4 million in costs because that amount was part of the parties' agreement. Superl Sequoia Ltd. v. Carlson Co., 615 F.3d 831 (7th Cir. 2010). The case was remanded with instructions to recalculate the figure for defendant's repair and replacement costs and the net judgment using plaintiff's $3.4 million quoted costs.

The parties are unable to agree on a recalculated judgment and have each submitted proposed recalculations, dkts. ##152, 155. Their disputes concern whether defendant may charge certain costs to the joint venture as damages and whether plaintiff is entitled to prejudgment interest. In addition, defendant has filed a motion for reconsideration and reversal of the February 26, 2008 opinion and order dismissing its claims for misrepresentation, dkt. #153. Plaintiff filed a brief in opposition to the motion for reconsideration, dkt. # 157, and a motion to strike defendant's reply brief, dkt. #159.

I conclude that defendant waived its opportunity to challenge the dismissal of its

misrepresentation claims by failing to appeal the issue. Therefore, I will deny defendant's motion for reconsideration of the February 26, 2008 dismissal order. I will strike defendant's reply brief associated with the motion for reconsideration, dkt. #158, because it was not requested by the court and was not necessary to decide the merits of defendant's motion for reconsideration.

With respect to the recalculation of damages, I conclude that defendant is entitled to charge costs plus a markup for profit and overhead for the labor and materials associated with production of the 102 fixtures for the first six stores. I also conclude that defendant may not charge the wages of its salaried administrative employees to the joint venture, but may charge the wages of its hourly employees. Finally, I conclude that plaintiff is not entitled to prejudgment interest and that defendant owes plaintiff $1,015,434.50.

OPINION

A. Defendant's Motion for Reconsideration

In its counterclaim and third party complaint, defendant alleged that plaintiff and third party defendants Gary Dembart and Sequoia Holdings, LLC falsely represented that plaintiff's initial quoted costs did not include profit, indirect costs or overhead. In the February 26, 2008 opinion and order , I concluded that defendant's misrepresentation claim should be dismissed under the economic loss doctrine because the misrepresentation alleged

by defendant was "interwoven with issues addressed by an agreement between plaintiff and defendant." Dkt. #14, at 2. In particular, I found that the written agreement between the parties (an email dated May 7, 2007) required "costs" to be calculated in a certain way, and the misrepresentation alleged by defendant concerned plaintiff's and the third party defendants' statements regarding the calculation of costs. Id. at 8.

The court of appeals concluded that the May 7 email did not govern the calculation of costs owed to plaintiff on its own. Instead, that calculation was controlled by plaintiff's initial quoted costs, including profit and markup. Superl Sequoia, 615 F.3d at 836. Defendant argues that because this court's decision dismissing its misrepresentation claim was grounded on the erroneous conclusion that the May 7 email controlled the parties' agreement concerning plaintiff's costs, its misrepresentation claims should not have been dismissed.

The problem for defendant is that it should have raised its argument in a cross-appeal before the court of appeals. The order dismissing its misrepresentation claim was issued more than two and a half years ago. That order was adverse to defendant and finally disposed of all claims against third-party defendants Sequoia Group Holdings and Gary Dembart; they are no longer parties to this case. The dismissal order was integrated into this court's final judgment entered on May 1, 2009 and became appealable at that time. Plaintiff filed its notice of appeal on May 29, 2009. Under Fed. R. App. P. 4, defendant's deadline

to cross-appeal was June 12, 2009. Defendant should have anticipated that plaintiff's appeal would address the nature of the agreement between the parties, particularly because plaintiff's position throughout this lawsuit has been that its $3.4 million bid was part of the parties' agreement and was integrated into any email agreement between the parties. E.g., plf.'s br., dkt. #24, at 7-8.

If a party fails to file a cross-appeal, the appellee may not resurrect the issue on remand. United States v. Husband, 312 F.3d 247, 250 (7th Cir. 2002) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded."); see also United States v. Morris, 259 F.3d 894, 898 (7th Cir. 2001) ("[P]arties cannot use the accident of remand as an opportunity to reopen waived issues."); Barrow v. Falck, 11 F.3d 729, 730 (7th Cir. 1993) ("An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand and used as a reason to disregard the court of appeals' decision."). Moreover, any issue decided conclusively by the appellate court is not remanded. Husband, 312 F.3d at 251; see also United States v. Bell, 5 F.3d 64, 66 (4th Cir. 1993) (mandate rule "forecloses relitigation of issues expressly or impliedly decided by the appellate court.")

The case is now before this court to carry out the mandate of the court of appeals, which is "to recalculate the net judgment consistently with this opinion." Superl Sequoia, 615 F.3d at 836. It is too late to reconsider the February 26, 2008 dismissal order because

defendant waived its right to appeal. In any event, it should be clear from the court of appeals' opinion that defendant's misrepresentation claim would not have prevailed on appeal, making the question of waiver a moot point. The court of appeals considered whether the plaintiff's quoted costs, rather than the May 7 email, should control the parties' agreement and concluded that the pre-email bid governed plaintiff's costs under the agreement. The court determined that plaintiff's price quotation included profit and overhead, was valid, was accepted by defendant and bound both parties. In addition, the court of appeals concluded that plaintiff's decision to include overhead and a reserve for risk in its quoted cost was commercially reasonable because it served as both "as a floor, and as a ceiling." Superl Sequoia, 615 F.3d at 834-35. If the plaintiff had to spend more than its quoted costs on manufacturing and shipping the furniture, plaintiff would "swallow the loss rather than charge the excess expenses to the joint venture," thereby providing price protection to defendant. Id. The court of appeals found that it made "economic sense" that plaintiff would require compensation for offering this price protection. This is the same argument that plaintiff asserted in response to defendant's motion for summary judgment. Plf.'s br., dkt. #24, at 6-8 ("[G]iven the uncertainties involved in manufacturing goods in China for shipment to the USA, especially when the project involves a large quantity of fixtures such as was the case here, the idea that [plaintiff] would not build a contingency into an agreed upon fixed manufacturing cost is absurd.")

In sum, this court lacks the authority to re-open issues related to the validity of plaintiff's cost quote, including charges that the quote did not include profit or overhead. The court of appeals' rulings are the law of the case. The only issue on remand is the recalculation of amounts due under the parties' price contract and for breach of warranty damages.

B. Recalculation of Judgment

In a text order dated September 8, 2010, I directed the parties to meet and confer on a recalculated net judgment that is consistent with the court of appeals' opinion. Although the parties were able to agree on some elements of the recalculation, they dispute the recalculation of four main categories of costs incurred by defendant: (1) defendant's charge for materials; (2) defendant's charge for labor; (3) defendant's charge for administrative wages; and (4) prejudgment interest.

In reversing this court's calculation of damages, the court of appeals did not disturb the factual findings made by this court regarding the cost of manufacturing, shipping, assembly and delivery of the furniture. Superl Sequoia, 615 F.3d at 833. Thus, the parties do not dispute the specific amounts that this court found regarding plaintiff's and defendant's costs; rather, they dispute whether defendant should be allowed to charge certain costs to the joint venture. The court of appeals held that defendant may charge only its

"out-of-pocket costs" for repair and replacement, rather than its "sell price," which would include "any markup for overhead, the cost of capital, or a reserve for risk." Id. The court of appeals noted that the May 7 email agreement between the parties indicated that only out-of-pocket costs should be recoverable, with the exception of plaintiff's quoted costs, to which the parties had reached agreement before the May 7 email. Thus, the questions are whether certain types of charges are "out-of-pocket costs" chargeable to the joint venture and whether defendant may be entitled to other, non-out-of-pocket costs that were not covered by the May 7 email, including administrative wages and labor and materials used in producing 102 fixtures for the first six Federated stores.

1. Materials and labor

In the May 1, 2009 opinion, I found that defendant spent $170,035.57 on materials and $130,731 on labor necessitated by plaintiff's breach. Dkt. #128, at 20-21. The labor costs represent 8706 hours of standard hours, 3579 of which were spent producing 102 fixtures for the first six stores that plaintiff was unable to produce, and 1642 hours of overtime, 1638 of which were spent on the 102 fixtures. Tr. exh. ##801, 820; Dep. of Joseph Prey, dkt. #87, at 25-32. Defendant spent $68,349.82 of the $170,035.57 costs for materials to produce the 102 fixtures. The parties agree that defendant may charge only its out-of-pocket costs for the time spent on *repairing and replacing* fixtures that were delivered

to defendant in poor condition. However, the parties dispute whether defendant may charge its "sell" price, which includes a mark-up for profit and overhead, rather than only its out-of-pocket-costs, for the materials and labor used to *produce* the additional 102 fixtures.

Plaintiff contends that the out-of-pocket limitation applies to the material and labor defendant used to produce the 102 fixtures because these should be treated the same as any other costs defendant incurred as a result of plaintiff's breach. Defendant contends that it should be allowed to charge its sell price for the materials and labor used to produce the 102 fixtures because unlike other repair and replacement costs, the parties had an agreement that defendant could take a credit for its actual costs plus profits for the fixtures. Defendant points to Gary Dembart's trial testimony in which he admitted that he told defendant that it should add profit to the costs of manufacturing the 102 fixtures:

> Question: "Isn't is true that at the time you asked [defendant] to manufacture those first 102 fixtures, you told Mr. Carlson that [defendant] should be able to add profit to those costs?
>
> Answer: Yes

Tr. trans. 2-A-26, dkt. #103, at 26-27. Also, defendant points to the following factual findings made by this court in the May 1, 2009 post-trial decision:

> On April 27, Dembart emailed defendant's owner, Chris Carlson, asking whether the parties would share the cost of air freighting the fixtures for the first six stores, which would cost between $80,000 and $100,000. Alternatively, he suggested, defendant could try to manufacture the fixtures for shipment by May 25. He added, "the real cost of this in your shop including

> profit is probably $100,000 and you would have to bust ass to do it." Exh. #840. [Dembart's $100,000 estimate was apparently based on his understanding that defendant would be producing 60 fixtures.]
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> * * *
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> On May 2, in a series of emails exchanged during the day, following an early morning telephone call, the parties agreed that defendant would produce 102 of the 144 fixtures needed for the first six stores. . . . Plaintiff suggested that defendant take as a credit the cost it incurred in making the fixtures, minus the cost of the materials that plaintiff was providing. Exh. #595. Later, it confirmed that defendant's costs of manufacturing would include all overtime costs. Exh. #605.

Dkt. #128, at 13-14.

In the post-trial decision I concluded that defendant could charge its "sell price" in connection with its production of the 102 items for the first six stores because plaintiff had promised defendant it could add profit to its costs for coming to plaintiff's assistance and "scrambl[ing] to build 102 fixtures." Id. at 38-39. I conclude that the court of appeals' decision does not disturb the finding that plaintiff promised defendant that it could add profit to its costs for producing the 102 fixtures. The court of appeals held only that defendant could not charge its sell price for "replacement and repairs." Defendant's repair and replacement work occurred because plaintiff shipped defective or damaged furniture to defendant. The parties had not anticipated that the repair or replacement work would be necessary and had not agreed to any particular rate of compensation for defendant's work. Thus, as the court of appeals concluded, the parties' May 7 email agreement controlled the

damages to which defendant could claim for those repairs. The 102 fixtures do not fall under the same category as the defendant's other repairs and replacements, however, because the parties agreed *before* defendant actually produced the fixtures and *before* the May 7 email agreement that defendant would produce the fixtures and charge costs plus profit. Therefore, defendant may charge its sell price, which includes a markup for profit and overhead, for producing the 102 fixtures. These are not considered shared costs, however, because they are the result of defendant's breach of the agreement.

a. Out-of-pocket costs for repair and replacement (not including the 102 fixtures)

After subtracting the material costs for producing the first 102 fixtures ($68,349.82) from the total material cost of $170,035.57, there is a remaining cost (with no markup) of $101,686 for materials used in defendant's repair and replacement work. I am subtracting $3000 to insure that defendant is not paid for costs it incurred in doing post-bid work, for a total of **$98,686** for materials.

After subtracting the labor hours for producing the first 102 fixtures (3579 straight time and 1638 overtime hours) from the total labor hours of 8706 straight hours and 1642 overtime hours, there is a remaining total of 5127 straight time and 4 overtime hours. The raw wage associated with the 8706 hours was $130,731, or $15.02 per hour. May 1, 2009 Op., dkt. #128, at 21. Thus, defendant's charge for straight labor for repairs and

replacement totals $77,007.54 (5127 x $15.02). Defendant's benefit load of 32.03% is $24,665.51, for a total of $101,673.05 for straight time. The raw wage associated with the overtime hours was $40,537.65, or $24.69 per hour. Thus, defendant's charge for the 4 overtime hours spent repairing and replacing fixtures sent by plaintiff totals $98.76 (4 x $24.69). Defendant's overtime benefit load of 17.27% is $17.05 for a total of $115.80 for overtime. In total, defendant may charge **$101,789** for labor spent on repairs and replacement.

b. Sell price for materials and labor used to produce the 102 fixtures

The sell price for the materials used to produce the 102 fixtures, after adding a profit and overhead markup of 26.28% to $68,349.82, is **$92,715**.

Defendant's sell price for labor is $55 an hour for straight time and $64 an overtime hour. Applying these rates to the 3579 straight time and the 1638 overtime hours spent producing the 102 fixtures results in $198,845 for straight time and $104,832 for overtime, for a total of **$301,677** for labor hours spent producing the 102 fixtures.

2. Administrative wages and benefits

Plaintiff argues that the wages and benefits defendant paid to its administrative employees constitutes overhead that is not recoverable because defendant would have paid

its administrative employees regardless of any breach by plaintiff. I agree with plaintiff that any salaries defendant would have paid regardless of plaintiff's breach are overhead costs, not out-of-pocket costs chargeable to the joint venture. Defendant does not deny that it would have continued to employ and pay its administrative employees even if plaintiff had not breached its warranties, but argues that the wages should be recoverable because defendant did not receive the usual value of the services provided by its administrative employees in return for the wages paid. In other words, the administrators were required to work on remedying plaintiff's breach, rather than on projects to benefit defendant directly. However, even if administrative employees would have worked on other projects but for plaintiff's breach, defendant suffered no out-of-pocket costs by paying the fixed salaries of these employees.

In the post-trial order dated May 1, 2009, I found that defendant's administrative employees worked many extra hours and whole days in order to complete the project and repair the defective fixtures, that their wages for the time they would not have worked but for the need to repair the fixtures total $114,055 and that the benefit load of 21.35% for the administrators is $24,351. Dkt. #128, at 22. The $114,055 figure represents the wages and salaries of nine administrative employees. Tr. exh. #801, CC013248. All but two of the employees are salaried employees whom defendant did not have to pay any more for their work on the Martha Stewart project than they were otherwise paid for their normal salaries.

Dep. of Faye Ann Wright, dkt. #91, at 83. However, two of the employees listed as administrative employees, Juan Espinoza and Bill Peiss, are company drivers and hourly employees. Espinoza worked 33 days on the Martha Stewart Project and Peiss worked 34.5 days, for a total of $8000 in wages. I conclude that defendant may charge the $8000 for its two hourly administrative employees and a benefit load of 21.35% ($1708), for a total of **$9708**, to the joint venture as damages but may not charge the wages for its salaried employees.

3. Prejudgment interest

Finally, plaintiff contends that it is entitled to prejudgment interest on the net judgment. Under Wisconsin law, prejudgment interest is recoverable at the legal rate of five percent for contract damages, starting when demand for payment is made. United States Fire Insurance Company v. Good Humor Corp., 173 Wis. 2d 804, 833-34, 496 N.W.2d 730, 834 (1993); Wis. Stat. § 138.04. "[P]rejudgment interest should be awarded where the amount owed is readily determinable." Good Humor, 173 Wis. 2d at 833-34, 496 N.W.2d at 741 (citation omitted). To recover prejudgment interest, there must be a fixed amount due that could have been tendered, thereby stopping interest. Waukesha Concrete Products Company v. Capitol Indemnity Corp., 127 Wis. 2d 332, 336, 379 N.W.2d 333, 340 (1985). The equitable policy supporting such recovery is that a plaintiff should be compensated for

the time value of the money it would have had if the payment had been made when due.

Plaintiff contends that defendant could have determined easily the amounts owed to it no later than the end of August 2007 when it received Federated's final payment. I disagree. The amount defendant owed to plaintiff was not "readily determinable" in August 2007 because defendant continued to incur damages as a result of plaintiff's breach of warranty as late as April 2008, Tr. exh. #801. More important, throughout this case there has been a genuine dispute about what statements constituted the agreement between the parties and the amount due either party under the agreement. On July 23, 2008, this court entered summary judgment on defendant's behalf on its breach of contract and breach of warranty claims and concluded that a trial must be held to determine damages. Even after remand, the parties dispute the amounts due under the agreement. The existence of these genuine disputes defeats plaintiff's claim for prejudgment interest because until those questions were resolved, no one could have determined the amount of the claim. Allen & O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F.2d 512, 517 (7th Cir. 1990) (applying Wisconsin law) ("A genuine dispute as to the amount due will defeat the claim for interest because the defendants cannot reasonably determine the amount due and tender it."); Tony Spychalla Farms, Inc. v. Hopkins Agricultural Chemical Co., 151 Wis. 2d 431, 444, 444 N.W.2d 743, 750 (Ct. App. 1989) (genuine dispute as to amount of damages precludes award of prejudgment interest). Therefore, plaintiff is not entitled to prejudgment interest.

4. Summary

The judgment is recalculated as described in the chart and text below:

1	Federated's total payment to defendant	$4,992,494
	Less payments belonging solely to defendant: [$137,374]	
2	Backcharge by Federated	$22,100
3	Visual handling	$11,150
4	Extra freight	$6055
5	Storage	$6007
6	Armoire split	$69,962
7	Subtotal – Amount subject to sharing:	$4,877,220
	Less shared costs: [$3,803,471]	
8	Plaintiff's quoted costs	$3,384,059
9	Plaintiff's share of Corian crating	$5,463
10	Defendant's handling and distribution	$198,111
11	Defendant's purchase of mattresses	$210,375
12	Defendant's share of Corian crating	$5,463
13	Subtotal – Amount subject to split:	$1,073,749
14	Divide amount for split by 2 to determine share of profits for each party: [$1,073,749/2 = $536,874.50]	$536,874.50
15	Plaintiff's share of profits plus plaintiff's quoted costs: [$536,874.50 + $3,384,059]	$3,926,396.50

16	Less actual payments to plaintiff from defendant:	$1,972,066
17	Less cost of materials paid for by defendant:	$114,952
18	Subtotal – Amount defendant owes plaintiff before backcharge for damages is subtracted:	$1,839,378.50
	Less backcharge: [$750,722]	
19	Freight	$63,691
20	Installation	$11,030
21	Incremental overtime	$21,072
22	Bonuses	$9427
23	Tax and benefit load for incremental overtime	$5185
24	Costs not coded to the job	$35,742
25	Materials used in repair and replacement work	$98,686
26	Labor used in repair and replacement	$101,789
27	Materials used in producing the 102 fixtures	$92,715
28	Labor used in producing the 102 fixtures	$301,677
29	Wages and tax and benefit load of hourly administrative employees	$9708
30	Subtotal:	$1,088,656.50
31	Less Link credit (stipulated)	$73,222
32	Total owed to plaintiff:	$1,015,434.50

Line 1 of the chart is the total amount of money paid by Federated to defendant, $4,992,494. (I am rounding all numbers to the nearest dollar.) Lines 2 – 6 are payments Federated made to defendant for post-bid work. After subtracting these payments (which total $115,274) from the total paid by Federated on line 1, the payment subject to sharing

between plaintiff and defendant is $4,877,220, as seen on line 7.

Lines 8 – 12 are the parties' shared costs under the agreement. Deducting the parties' shared costs ($3,803,471) from the $4,877,220 payment subject to sharing leaves $1,073,749, as seen on line 13. This $1,073,749 amount is the amount of profit subject to splitting between the parties. Each party is entitled to one-half of $1,073,749 or $536,874.50, as seen on line 14.

Plaintiff's share of profits ($536,874.50) plus its costs of $3,389,522 (the sum of lines 8 and 9) is $3,926,396.50, as seen on line 15. From line 15, I am subtracting the amount defendant has already paid plaintiff ($1,972,066, line 16) and the amount defendant has already paid for materials ($114,952, line 17). This brings us to line 18, the subtotal owed to plaintiff of $1,839,378.50 before the backcharge for defendant's damages is subtracted.

Lines 19 – 29 are defendant's damages caused by plaintiff's breach of the agreement. The backcharge includes the extra costs defendant incurred to repair, replace and deliver fixtures that were defective or delayed and the costs incurred in producing the 102 fixtures for the first six stores. After subtracting defendant's total backcharge of $750,722 from the amount owed plaintiff of $1,839,378.50, the sum defendant owes plaintiff is $1,088,656.50, as seen on line 30. The parties stipulated that plaintiff owes defendant $73,222 from a previous project for Sheraton known as Link. Thus, the final recalculation results in defendant owing plaintiff $1,015,434.50.

ORDER

IT IS ORDERED that

1. Plaintiff Superl Sequoia Limited's motion to strike defendant the C.W. Carlson Company's reply brief, dkt. #159, is GRANTED.

2. Defendant's motion for reconsideration and reversal of the February 26, 2008 order and opinion dismissing its claims for misrepresentation, dkt. #153, is DENIED.

3. Defendant is directed to pay plaintiff $1,015,434.50.

4. The clerk of court is directed to enter judgment for plaintiff in the amount of $1,015,434.50 and close this case.

Entered this 2d day of December, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge