UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

PEOPLE'S UNITED FINANCIAL, INC., Appellant,	)	
v.	)	Case No. 5:14-cv-00122
JOHN R. CANNEY, III and KONRAD EDWARD SCHELTEMA, Appellees.	)	

OPINION AND ORDER AFFIRMING THE BANKRUPTCY COURT'S APRIL 25, 2014 ORDER DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT
(Doc. 1)

People's United Financial, Inc. (the "Bank") appeals an April 25, 2014 Order from the United States Bankruptcy Court for the District of Vermont, denying the Bank's motion for relief from judgment (the "Motion for Relief"). At issue is whether the Bankruptcy Court erred in refusing to grant relief from a judgment arising out of a stipulation between the Bank and the Chapter 7 Trustee regarding the Trustee's sale of a 2004 GMC C4500 box truck (the "Box Truck") and certain other collateral.

Heather Z. Cooper, Esq. and Rodney E. McPhee, Esq. represent the Bank. Antonin Robbason, Esq. represents the Chapter 7 Trustee, John R. Canney, III. Joan Adler, Esq. represents Debtor Konrad Edward Scheltema ("Debtor").

I. Factual and Procedural Background.

Prior to filing for bankruptcy, Debtor conducted business under several names, including Evergreen Homebuilders ("Evergreen") which is a trade name registered to Evergreen Building Contractors, LLC. On July 9, 2009, the Bank loaned $15,000 to Evergreen for which Debtor, as a member of Evergreen, executed and delivered a note to the Bank in the same amount. Debtor guaranteed the loan and Evergreen granted the Bank a security interest in certain owned and after-acquired collateral, including all of

Evergreen's goods, instruments, and accounts. The Bank perfected its security interest in the collateral by filing a UCC Financing Statement with Vermont's Secretary of State. On January 26, 2010, the Bank made a second loan to Evergreen for $40,000 under the same terms as the first: Debtor guaranteed the loan, Evergreen pledged collateral to secure the loan, and the Bank perfected its security interest in the collateral through a UCC Financing Statement filed with Vermont's Secretary of State.

On January 7, 2010, the Bank loaned Evergreen $16,100, and Debtor, as a member of Evergreen, executed and delivered a note in the same amount and guaranteed payment. Evergreen pledged the Box Truck as collateral for the loan through a security agreement. To perfect its security interest in the Box Truck, the Bank was required to apply for a title that noted its lien. *See* 23 V.S.A. § 2042(b) ("A security interest is perfected by the delivery to the commissioner of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the lienholder and the date of his or her security agreement and the required fee."); *see also Gen. Motors Acceptance Corp. v. Lefevre*, 38 B.R. 980, 983 (D. Vt. 1983) ("The title application alone satisfies the requirement for perfection of a security interest in a motor vehicle.").

On August 22, 2013, the Debtor filed a voluntary Chapter 7 bankruptcy petition. The petition identified the Bank as a secured creditor holding an interest in the Box Truck and as an unsecured creditor holding non-priority claims on a "Line of Credit for Evergreen Building," a "Term Loan in the name of Evergreen Building Contractors," and an "Overdrafted Bank Account." (Doc. 1-6 at 28.)

On December 13, 2013, the Trustee filed a Notice of Intent to Sell Personal Property Pursuant to 11 U.S.C. § 363 (the "Trustee's Notice") which stated the auctioneer would sell items of Debtor's property without liens, including the Box Truck, at a public auction on January 16, 2014. The Trustee's Notice further stated that the Debtor owns the Box Truck "free and clear" based on Debtor's representations during a meeting of creditors convened by the Trustee under 11 U.S.C. § 341(a). (Doc. 1-16 at 1, ¶ 2.)

On January 2, 2014, the Bank objected to the Trustee's Notice, arguing it had a perfected security interest in some of the property the Trustee sought to sell. With regard

to the Box Truck, the Bank advised that it "attempted unsuccessfully to receive a duplicate title to perfect its interest" and was therefore "not reflected as lienholder on the title to the vehicle." (Doc. 1-11 at 4, ¶ 12.)

On January 10, 2014, the Bankruptcy Court held a hearing on the Trustee's Notice, at which the Bank and Trustee advised the Bankruptcy Court that they had reached a stipulation concerning the Bank's asserted interest in the contested property. The Trustee explained that during a meeting of creditors Debtor had claimed that certain items belonged to him rather than to his businesses. The Trustee also noted Debtor used various company names interchangeably and the Bank's position was that some of the property Debtor used while doing business as Evergreen was subject to the Bank's liens. The stipulation provided that the Trustee waived its claim to the property that Debtor allegedly used in connection with Evergreen and the Bank waived its claim to a perfected security interest in the Box Truck:

> [Trustee]: The Bank is waiving its claim to [the Box Truck] and in return we are conceding that the Bank has a security—a valid security interest in the other items of property and that they can be sold at the auction that's already scheduled.
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> . . .
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> [Bank]: That is correct, Your Honor.

(Doc. 1-5 at 3:1-3:16.) "[T]he Bank recognize[d] that its interest was not perfected as to that vehicle" "due to lack of forthcoming information." *Id.* at 4:10-4:12. In light of the parties' stipulation, the Bankruptcy Court treated the Bank's objection to the Trustee's Notice as withdrawn. The Trustee later submitted a proposed Order that embodied the stipulation to which the Bank consented. On January 13, 2014, the Bankruptcy Court issued an Order (the "January 13, 2014 Order"), which described the agreement and approved the stipulated sale.

Prior to the sale, the auctioneer requested a duplicate title for the Box Truck from the Vermont Department of Motor Vehicles and discovered the Bank was listed as a lienholder on the title. The date of the Bank's lien is identified as August 14, 2013, which is eight days before Debtor filed his bankruptcy petition.

On March 6, 2014, pursuant to Federal Rule of Civil Procedure 60(b), as incorporated by Federal Rule of Bankruptcy Procedure 9024, the Bank filed its Motion for Relief from the January 13, 2014 Order. The Bank argued the stipulation should be modified because it was the product of a mutual mistake of fact regarding the status of the Bank's security interest in the Box Truck. It further asserted that the net proceeds from the sale of the Box Truck should go to the Bank rather than to the Estate. The Bank represented it was unable to prove its perfected interest before entering the stipulation because "there was no title in the Bank's file." (Doc. 1-14 at 1.)[1]

The Trustee opposed modifying the stipulation, arguing that there was no mutual mistake of fact because, in entering into the stipulation, it advised the Bank that it was relying only upon the Debtor's representations. The Trustee asserted that, pursuant to the stipulation, the parties released claims to property other than the Box Truck and that it would be improper to rescind only one part of a multi-faceted stipulation.[2]

On April 25, 2014, after oral argument, the Bankruptcy Court denied the Bank's Motion for Relief in a bench ruling:

> I think this matter raises, you know, an important sort of balancing question because it does appear that in retrospect the facts are different than what everyone may have thought at the time of sale. However, ultimately it is

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[1] The court does not reach the Bank's argument that it could not obtain a duplicate title because it required the Box Truck's odometer reading and the Box Truck was in the auctioneer's possession. These facts are not contained in the record before the court. *Dubnoff v. Goldstein*, 385 F.2d 717, 720 (2d Cir. 1967) ("In a bankruptcy case, the scope of this Court's review is limited to the record and to that which was presented below."); *see also Kulhawik v. Holder*, 571 F.3d 296, 298 (2d Cir. 2009) ("An attorney's unsworn statements in a brief are not evidence."). If the court addressed this argument, it would have to determine whether the Bank's failure to request the Box Truck's odometer reading from the auctioneer before entering into the stipulation constituted due diligence.

[2] The Trustee further argues that the duplicate title for the Box Truck did not establish the Bank's perfected security interest in the Box Truck because the title reflects a lien date that does not correspond to any of the Bank's loans and is eight days prior to Debtor's bankruptcy petition. Because the Trustee did not raise this argument before the Bankruptcy Court, the court declines to address it. *See Adelphia Bus. Solutions, Inc. v. Abnos*, 482 F.3d 602, 607 (2d Cir. 2007) (declining to consider issue not raised before bankruptcy court and noting that the "failure to raise the issue in the bankruptcy court deprived that court of the opportunity to fashion relief").

> the Bank's responsibility to get their lien perfected and to have proof of that perfection. There was ample opportunity here for the Bank to do that before the sale occurred, and it does seem as if the transaction that led to the sale was a compromise between the parties in which the Estate gave up something and ultimately the Bank may have given up more than it intended, but that was the deal that it struck, and I think that finality of sales in this Court are very important, and even though it's an unfortunate circumstance here I'm going to deny the Bank's motion, and the sale order stands and the proceeds will be distributed pursuant to the order.

(Doc. 1-5 at 10:22-11:17.)

The Bank appeals from the April 25, 2014 Order denying its Motion for Relief, contending the Bankruptcy Court erred by: (1) failing to modify the terms of the stipulation based on a mutual mistake of fact; (2) failing to modify the terms of the stipulation based on the Trustee's misrepresentation to the Bank that the Bank did not have a security interest in the Box Truck; (3) requiring the Bank to proffer a duplicate title to prove its perfected security interest; (4) failing to recognize the Bank had a perfected security interest; and (5) relying on the importance of the finality of bankruptcy sales and disregarding state law addressing reformation of an agreement based on a mutual mistake of fact. The Trustee asks the court to affirm the Bankruptcy Court's April 25, 2014 Order and to find that the Bankruptcy Court considered the totality of the circumstances, performed an appropriate balancing test, and correctly denied relief.

II. Conclusions of Law and Analysis.

A. Standard of Review.

This court examines the April 25, 2014 Order pursuant to 28 U.S.C. § 158(a)(1), which provides in relevant part: "district courts. . . have jurisdiction to hear appeals … from final judgments, orders, and decrees" of bankruptcy courts. The court "review[s] independently the factual findings and legal conclusions of the bankruptcy court, accepting its findings of fact unless they are clearly erroneous and reviewing its conclusions of law de novo." *In re Smith*, 507 F.3d 64, 71 (2d Cir. 2007). "On an appeal the district court … may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013.

The district court reviews a bankruptcy court's denial of a motion for relief from a final order under Rule 60(b) for an abuse of discretion. *In re 310 Assocs.*, 346 F.3d 31, 34 (2d Cir. 2003). A bankruptcy court abuses its discretion when "(1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). "An appeal from an order denying a Rule 60(b) motion brings up for review only the denial of the motion and not the merits of the underlying judgment." *Malik v. McGinnis*, 293 F.3d 559, 561 (2d Cir. 2002) (internal quotation marks omitted). The court "may affirm on any ground that finds support in the record." *In re Lehman Bros. Holdings Inc.*, 761 F.3d 303, 308 (2d Cir. 2014).

Federal Rule of Bankruptcy Procedure 9024 provides that Federal Rule of Civil Procedure 60 "applies in cases under the [Bankruptcy] Code," subject to certain exceptions not relevant here. Rule 60(b) provides in relevant part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "'Insufficient showings for relief [under Rule 60(b)(1)] . . . include when the party or attorney did not act diligently.'" *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 177 (2d Cir. 2004) (citation omitted). Correspondingly, "[t]o prevail on a motion for relief pursuant to Rule 60(b)(2), a movant must demonstrate that he was justifiably ignorant of the newly discovered evidence despite due diligence." *Id.* at 178. Where, as here, "the parties submit to an agreed-upon disposition instead of seeking a resolution on the merits. . . the burden to obtain Rule 60(b) relief is heavier than if one party proceeded to trial, lost, and failed to appeal." *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986).

B. Whether the Bankruptcy Court Erred in Its Rulings Regarding the Bank's Security Interest in the Box Truck.

The Bank contends that the Bankruptcy Court should have granted relief from judgment and directed that the Bank receive the proceeds of the Box Truck's sale once the parties determined that the Bank's security interest in the Box Truck was perfected. In denying this relief, the Bank contends that "[t]he Bankruptcy Court erred by creating an affirmative obligation upon the Bank that does not otherwise exist under Vermont law, to wit, the ability to produce the title." (Doc. 5 at 13.) The problem with this argument is two-fold.

First, the Bankruptcy Court did not actually make any findings of fact or reach any conclusions of law regarding the status of the Bank's security interest in the Box Truck. Correspondingly, it did not require the Bank to establish that interest. Instead, the court merely accepted the parties' stipulation that they had reached a compromise with regard to certain collateral, which included the Bank's waiver of any interest it may have had in the Box Truck. The Bankruptcy Court therefore did not erroneously require the Bank to offer a duplicate title to prove that its security interest in the Box Truck was perfected.

Second, a creditor asserting an interest in property to be sold has "the burden of proof" to show the "validity, priority, or extent of such interest." 11 U.S.C. § 363(p)(2); *see also In re Premier Golf Props., LP*, 477 B.R. 767, 772 (B.A.P. 9th Cir. 2012) ("The Bank has the burden of establishing the existence and the extent of its interest in the property it claims as cash collateral."). Although Vermont law determines the nature and extent of the Bank's security interest in the Box Truck, section 363(p)(2) of the Bankruptcy Code places the burden on the Bank to assert and prove its interest in opposing the Trustee's Notice of Sale.[3] Accordingly, the Bankruptcy Court did not err

[3] This was not the only option available to the Bank:

> [A] secured creditor: (1) "may disregard the bankruptcy proceeding," subject to the provisions of 11 U.S.C. § 362(a), "and rely solely upon his security"; (2) may file a secured claim with the bankruptcy court; (3) may "surrender or waive his security and prove his entire claim as an unsecured one"; or (4) may "avail

when it observed that, in opposing the Notice of Sale, it was "the Bank's responsibility to get their lien perfected and to have proof of that perfection." (Doc. 1-5 at 10:22-11:17.) Although the Bankruptcy Court made this observation, it required no evidence from either party before accepting the parties' stipulation.

C. Whether the Bankruptcy Court Found a Mutual Mistake of Fact and Whether a Mutual Mistake of Fact Requires Relief from Judgment.

The parties disagree whether the Bankruptcy Court found a mutual mistake of fact which is the factual and legal basis for the Bank's requested relief. The Bank points to the Bankruptcy Court's ruling that "the facts are different than what everyone may have thought at the time of the sale," (Doc. 1-5 at 10:25-11:2), and argues that the mutual mistake of fact arose because "[t]he Trustee affirmatively represented to the Bank and the Court that the Debtor held the title to the [Box Truck]." (Doc. 7 at 7.) It further asserts that the Trustee cannot argue on appeal that no mutual mistake of fact existed in the absence of a cross-appeal.

The Trustee counters that he never conceded that there was a mutual mistake of fact and points to his statements at the April 25, 2014 hearing: "I don't think there was a mutual mistake of fact, Your Honor. We represented in our notice order the items that we were selling based upon the information we received from the Debtor." (Doc. 1-5 at 7:2-7:7.)

The Bankruptcy Court's April 25, 2014 Order is ambiguous regarding whether it found a mutual mistake of fact. Although the Bankruptcy Court found that the facts were different than "what everyone may have thought at the time," it also found that the Bank had "ample opportunity" to investigate its interest in the Box Truck before it entered into the stipulation. (Doc. 1-5 at 10:22-11:17.)

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himself of his security and share in the general assets [of the bankruptcy estate] as to the unsecured balance" of the debt.

In re Bailey, 664 F.3d 1026, 1029 (6th Cir. 2011) (quoting *U.S. Nat'l Bank in Johnstown v. Chase Nat'l Bank of N.Y.C.*, 331 U.S. 28, 33 (1947)).

"A mutual mistake must be a mistake reciprocally involving both parties, a mistake independently made by each party." *Inkel v. Pride Chevrolet-Pontiac, Inc.*, 2008 VT 6, ¶ 18, 183 Vt. 144, 945 A.2d 855. "The mistake must be one vitally affecting a fact or facts on the basis of which the parties have contracted[.]" *Enequist v. Bemis*, 55 A.2d 617, 619 (Vt. 1947). A mutual mistake of fact does not occur when the parties knowingly enter into a transaction with a limited understanding of the facts. *See Shavell v. Thurber*, 414 A.2d 1152, 1154 (Vt. 1980) (affirming trial court's refusal to rescind or reform an agreement because, "[u]nder the facts here, not only is there no mutual mistake of fact relied upon by the injured party, but the buyers entered the transaction knowingly."); *see also Loewenson v. London Mkt. Companies*, 351 F.3d 58, 63 (2d Cir. 2003) (affirming denial of motion to reform settlement pursuant to Rule 60(b) because there was no mutual mistake of fact; rather the "flawed" methodology underpinning the parties' agreement was "explicitly agreed to by the parties").

A party assumes the risk of the mistake when:

. . .

> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
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> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Restatement (Second) of Contracts § 154(b)-(c).

In this case, the Bank represented to the Bankruptcy Court that the Bank did not believe its interest in the Box Truck was perfected "due to lack of forthcoming information." (Doc. 1-5 at 3:1-3:16.) Although the Bank claims it was entitled to rely on the Trustee's representation that the Debtor claimed ownership of the Box Truck "free and clear," it cannot demonstrate that any such reliance was reasonable. The Trustee made no representation that he had investigated the accuracy of the Debtor's claim, which the Debtor's bankruptcy petition and the Bank's own loan documents contradicted. The Bank was thus aware that it was entering into the stipulation with the status of its

interest in the Box Truck uncertain. Relief is unavailable where the moving party "is aware" that he "has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement (Second) of Contracts § 154(b) (1981); *see Rancourt v. Verba*, 678 A.2d 886, 888 (Vt. 1996) (citing Restatement (Second) of Contracts § 154).

Assuming *arguendo* that the Bankruptcy Court found a mutual mistake of fact, such a finding would not require the court to grant the Bank's Motion for Relief. "The doctrine of mutual mistake provides that where a contract has been entered into under a mutual mistake of the parties regarding a material fact affecting the subject matter thereof, it may be avoided at the instance of the injured party[.]" *Will v. Mill Condo. Owners' Ass'n*, 2004 VT 22, ¶ 5, 176 Vt. 380, 848 A.2d 336 (internal quotation marks omitted and alterations omitted). "The usual remedies applied to a mistake in contract formation are rescission and reformation." *Paradise Rest., Inc. v. Somerset Enters., Inc.*, 671 A.2d 1258, 1262 (Vt. 1995). "Whether a mistake is to be corrected depends always upon the circumstances of the case." *Ward v. Lyman*, 188 A. 892, 896 (Vt. 1937).

Reformation is appropriate where the party seeking relief can prove the "terms of the actual agreement, which the writing in question failed to record." *Paradise*, 671 A.2d at 1262; *see also* Restatement (Second) of Contracts § 155 (1981) cmt. a (noting that reformation concerns a mistake of "expression" where the parties have entered into an agreement but failed to "express it correctly" in writing). Here, the Bank does not claim any error in recording the terms of the parties' stipulation and therefore reformation is unavailable.

Rescission permits the injured party to avoid the contract, provided restitution of the consideration received by that party is possible. It thus returns the parties to the pre-contract status quo. *See Rancourt*, 678 A.2d at 887 ("Where a contract has been entered into under a mutual mistake of the parties regarding a material fact affecting the subject matter thereof, it may be avoided . . . at the [insistence] of the injured party, and an action lies to recover money paid under it.") (citation omitted); *see also* 13 Williston on Contracts § 1557, at 240 (3d ed. 1970) ("[W]here the error is in the substance of the

bargain . . . rescission with restitution of whatever has been parted with is the only permissible relief . . . . "). "[A] party seeking rescission of a contract entered into by mutual mistake is not entitled to retain favorable portions of the contract and disregard the rest." *Rancourt*, 678 A.2d at 888. "In essence, the injured party is given an all-or-nothing option in situations involving mutual mistake." *Id.*

In its Motion for Relief, the Bank argues that the court may cure the alleged mistake of fact by directing that the Bank receive the auction proceeds for the Box Truck as opposed to having those proceeds go to the Debtor's Estate. In this respect, the Bank seeks to retain the benefits of the stipulation while avoiding its less favorable provisions. The Bank's proposed remedy would not only fail to restore the parties to the status quo, it would allow the Bank to forego restitution of the consideration it received. As rescission is an "all or nothing option," *id.*, the Bank would have to give up the proceeds of "the other items of property" referenced in the stipulation in order to receive the Box Truck proceeds. Even this may not restore the parties to the status quo because their compromise reflected an assessment of the strengths and weaknesses of various claims to contested collateral that cannot be reduced to a simple mathematic calculation of what was given and what was received.

Moreover, regardless of whether the Bankruptcy Court actually found a mutual mistake of fact, it properly concluded that the Bank assumed the risk of that mistake when, with limited information regarding the extent of its interest in the Box Truck, it agreed to "a compromise between the parties in which the Estate gave up something and ultimately the Bank may have given up more than it intended, but that was the deal that it struck[.]" (Doc. 1-5 at 10:22-11:17.) "[W]hen a court finds that the party requesting rescission has assumed the risk of mistake, rescission will be denied." *Rancourt*, 678 A.2d at 229 (citing Restatement (Second) of Contracts § 154, at 402-03; *Shavell*, 414 A.2d at 1153-54 (even if the court finds mutual mistake, no relief is granted where buyer assumes risk of mistake by entering transaction knowingly); *Enenquist*, 55 A.2d at 620 ("If it is shown that the hazard of gain or loss, whatever it may be, was accepted by the parties and entered into the contract, relief will be refused.")).

Finally, the Bankruptcy Court did not abuse its discretion or commit an error of law when it considered the importance of the finality of sales in deciding whether to grant the Bank's Motion for Relief. "'Rule 60(b) strikes a balance between serving the ends of justice and preserving the finality of judgments.'" *In re Terrorist Attacks on September 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013) (citation omitted); *see also Manson v. Duncanson*, 166 U.S. 533, 547 (1897) ("It is certainly the policy of the law to maintain judicial sales, and every reasonable inducement should be indulged to uphold them[.]") (internal quotation marks omitted). In the context of a bankruptcy auction sale, the finality of sales has even greater import because "[o]therwise, potential buyers would discount their offers to the detriment of the bankrupt's estate by taking into account the risk of further litigation and the likelihood that the buyer will ultimately lose the asset, together with any further investments or improvements made in the asset." *United States v. Salerno*, 932 F.2d 117, 123 (2d Cir. 1991); *see also In re Gucci*, 105 F.3d 837, 840 (2d Cir. 1997) (emphasizing "the policy of finality in bankruptcy sales").

The Bank's request for the proceeds of the Box Truck's sale would require a re-examination of the sale of all of the collateral subject to the stipulation. Under Fed. R. B. Proc. 9024 and Fed. R. Civ. P. 60(b), the Bankruptcy Court properly considered the interest in the finality of sales when it denied the Bank's request for relief from judgment.

CONCLUSION

For the foregoing reasons, the court AFFIRMS Bankruptcy Court's April 25, 2014 Order.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 17th day of November, 2014.

Christina Reiss, Chief Judge
United States District Court