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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

| | | |
|---|---|---|
| T-PEG, INC and<br>TIMBERPEG EAST, INC.,<br>Plaintiffs, | ) | |
| vs. | ) | No. 03-CV-462-M |
| VERMONT TIMBER WORKS, INC.,<br>And DOUGLAS FRIANT,<br>Defendants. | ) | |

DEFENDANTS' MOTION TO AWARD ATTORNEYS FEES

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant") move the Court, under 17 U.S.C. §505 for an award of its attorneys fees as prevailing party in the case.

The undersigned conferred with plaintiffs' counsel. Plaintiffs did not offer to pay any amount at all and do not assent to the relief sought in the motion.

In support of this motion, VTW submits the following memo.

MEMO IN SUPPORT

I. GOVERNING LEGAL STANDARDS

Congress has provided that in any case under the Copyright Act, the court "may allow the recovery of full costs . . . and may also award a reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. §505. The term "attorneys fees" includes all traditional "expense" or "cost" items advanced by counsel in connection with the case. Invessys, Inc. v. McGraw-Hill Companies, Ltd., 369 F. 3d 16 (1st Cir. 2004).

The Supreme Court in 1994 clarified that under Section 505 "[p]revailing plaintiffs and prevailing defendants are to be treated alike." Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994).

The Supreme Court approved a "non-exclusive" list of factors to be considered, including "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." 510 U.S. at 534, note 19.

The First Circuit has announced additional principles. "Dishonesty is not required for an award; even a case that is merely objectively weak can warrant such an award." Invessys, Inc. v. McGraw-Hill Companies, Ltd., 369 F. 3d 16, 20-21 (1st Cir. 2004); Matthews v. Freedman, 157 F. 3d 25, 29 (1st Cir. 1998). See also Yankee Candle Company, Inc. v. Bridgewater Candle Company, 140 F. Supp. 2d 111, 115-16 (D. Mass. 2001) ("An unreasonable claim need not be frivolous to be compensable . . . . Had Congress intended to condition the award of fees on the presence of bad faith, the statutory provision would have been surplusage. Indeed, unreasonableness is not even a requirement of a fee award.") This Court quoted and relied on the above authorities in its ruling in Ferraris Medical, Inc. v. Azimuth Corporation, No. 2002 DNH 140, at 8.

Additionally, the Court is not required to make any reduction for fees having application to defense of state claims in the case, particularly where the state claims are based on identical fact allegations as the copyright claim, as here. Invessys, Inc. v. McGraw Hill Companies, Ltd., 369 F. 3d. 16, 19-20 (1st Cir. 2004); Yankee Candle Company, Inc. v. Bridgewater Candle Company, LLC, 140 F. Supp. 2d 111, 122-23 (D. Mass. 2001) (state law claims rested on violations of copyright law, making claims sufficiently interwoven to make segregation impossible). Here, defendant prevailed on three state claims which the court found to be preempted because they were exactly coextensive with the copyright infringement claims. As to each, the Court made an express finding that the claim "alleges no conduct other than copying,

and [plaintiff] suggests no additional element necessary." February 9, 2005 Order at 24, 26-27. Thus the factual predicates for these counts were identical to those in the copyright allegations, and the legal work to prevail on these counts was based on the preemption clause contained in the Copyright Act itself, 17 §301(a). The Court should not reduce the legal fee award for defense of the state claims.

Additionally, time spent litigating in order to recover fees is compensable as part of the fee award. Harris v. McCarthy, 790 F. 2d 753 (9th Cir. 1986); Lund v. Affleck, 587 F. 2d 75, 77 (1st Cir. 1978); Souza v. Southworth, 564 F. 2d 609, 614 (1st Cir. 1977) ("to hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award").

Other legal principles will be cited in connection with the appropriate sections of the argument, below.

## II. APPLICATION OF THE *FOGARTY* FACTORS

As shown below, each of the Fogarty factors strongly favors a fee award here.

### A. Objective Unreasonableness; Frivolousness.

Objective unreasonableness of the action is strongly indicated by the grant of summary judgment, which necessarily held that plaintiffs did not have a genuine fact dispute sufficient to go to trial on any material issue.

In addition, the suit was objectively unreasonable for a variety of reasons, many of which were specifically identified by the court in its two rulings on summary judgment.

1. Objectively, "no probative similarity." As found by the Court, VTW's shop drawings objectively "lacked probative similarity" to plaintiffs' copyrighted preliminary plans. February 9, 2005 Order at 17.

2. Plaintiffs visited the site but made allegations clearly at odds with what they saw on the ground. Plaintiffs could not have been confused about the dissimilarity.

They (including their in-house General Counsel) visited the site and took photos of the frame erected by VTW, which clearly indicated it was an entirely independent work. (Woods Deposition, Ex. 1 at 46-47, 54) The site visits and photographs they took showed them that the Isbitski project was just a frame, open on one or more sides, with no windows in the house and no roof. (Woods Deposition, Ex. 1 at 46-47). And Vincent, plaintiffs' Chief of Design and expert witness, admitted that "the framing would be different, definitely." (Vincent Deposition, Ex. 2, at 105-106.) Nonetheless, Woods wrote in his threat letter that "Isbitski and Vermont Timber Works, Inc. have built a home (provided a timber frame) … that is substantially similar, if not virtually identical, to the home designed for Mr. Isbitski by Timberpeg." (Ex. 3). Plaintiffs alleged in their complaint that their plans had been "utilized in the construction of a house [on the Isbitski property]." Cplt. ¶32. These statements were simply in bad faith; if plaintiffs had reacted properly after visiting the site, they would never have filed suit here.

3. Plaintiffs never made frame drawings. As admitted by plaintiffs and found by the Court, plaintiffs' drawing set "includes no frame drawings" at all, and defendants' shop drawings "depict nothing other than a timber frame." February 9, 2005 Order at 17.

4. 25 of 27 posts different. As admitted by plaintiffs' in-house expert, and found by the Court, 25 of the 27 posts on the supposedly infringing plan were different from those on plaintiffs' plan. February 9, 2005 Order at 17.

5. No similarity other than "general relation to houses with same basic dimensions." As found by the Court, defendants' drawings "do not bear any probative similarity to [the copyrighted plans] beyond the reality that both relate, generally, to houses with the same basic dimensions." February 9, 2005 Order at 18.

6. No state law facts other than copying. In each of the state law claims, plaintiff never alleged any wrongful conduct other than "copying." Cplt ¶¶ 53-67.

7. Defendant "took nothing of substance and value." The Court stated that it "has no difficulty concluding, as a matter of law, that neither VTW's shop drawings nor its timberframe is so similar to the [plaintiffs' work] that an ordinary reasonable person would conclude that the defendant [took] material of substance and value." April 6, 2005 Order at 8.

8. Ridiculous characterization of counsel letters. Concerning plaintiffs' claim that defendants "admitted" copying, the Court found that "No reasonable fact-finder could conclude that the letters . . . constitute admissions of unlawful copying." April 6, 2005 Order at 9.

9. Knowledge that work could be finished in unrelated manner. Plaintiffs indicated to Sugar River Savings Bank, in October 2003 – a month prior to filing suit – that

the VTW frame could be finished in a way unrelated to the Timberpeg plans, yet they filed suit anyway. April 6, 2005 Order at 7, fn. 1.

10. Failure to heed repeated warnings. VTW repeatedly warned plaintiffs that their case was frivolous, and advised plaintiffs in plain English that VTW would seek fees at the end of the case.

- In response to Woods' initial threat letter, VTW's pre-litigation attorney stated "The drawings that Mr. Isbitski gave my client had no specific frame details, drawings or specifications. . . . Timberpeg does not have a case against my client, my client did not copy their drawings or their frame design. Should Timberpeg continue against my client, my client will defend itself and take action to recover its damages and legal costs Timberpeg, against an allegation that we view as groundless. (Ex. 7)

- VTW's litigation counsel, before filing a single pleading, met with Woods at Woods' office to (unsuccessfully) try to dissuade plaintiffs from continuing the suit, and gave Woods a copy of this Court's ruling in the Ferraris case (in which fees were awarded against a copyright infringement plaintiff). After the meeting, he confirmed in writing to Woods that "I want it clearly expressed, now, that VTW will seek . . . legal fees for the case you have brought. Concerning fees, I gave Steve this morning a copy of Judge McAuliffe's recent *Ferraris Medical* ruling . . . . Steve gave it back, saying he already had it. So you have notice. . . . It may be that you are still considering your position and will dismiss the suit . . . . If you continue, I want no doubt as to the course VTW will employ, and no doubt that you have been duly warned. (Ex. 8)

In short, this case was not merely an "objectively weak" case, it was a frivolous case which never had a chance of succeeding. As shown below, its only real purpose was to attempt to extract an unjust settlement out of a defendant unwilling to incur legal fees in defense.

## B. Motivation

The second Fogarty factor is motivation. "Should it appear that plaintiff's motivation was not a good faith intent to protect a valid interest, but rather a desire to discourage and financially damage a competitor by forcing it into costly litigation, an award of fees is more likely." Yankee Candle Company, Inc., v. Bridgewater Candle Company, LLC, 140 F. Supp. 2d 111, 116 (2001).

Numerous points demonstrate that plaintiffs' motivation here was to extract quick payment, not to prosecute a meritorious claim:

1. Threat letter designed to terrorize, not inform. The threat letter (Ex. 3) to VTW, signed by plaintiffs' in-house General Counsel, contained grossly overstated fact claims and dubious legal principles, listed large damages figures, and was designed to scare VTW without providing any useful information.

2. Hiding of identity of copyrighted plans. Plaintiffs deliberately prevented VTW from seeing the allegedly infringed plans for as long as they could. Plaintiffs did not include a set of their plans in their threat letter (Ex. 3), they did not attach them or even identify them in their complaint, and they refused VTW's many requests for them until the discovery process forced production. If VTW had seen the plans early, it would have been obvious that the plans were not "substantially similar" and the case would have ended sooner. Even after VTW obtained the copyrighted plans in discovery, plaintiffs purposely tried to confuse the Court by relying on early or later plans – which were never copyrighted – as if they were the plans at issue.

3. History of using copyright infringement threats/litigation to extract settlements. Plaintiffs have a strong history (Ex. 1) of accusing others of copyright infringement and collecting settlement payments. In the period 1999-2003, plaintiffs collected total settlement payments aggregating at least $126,000 from at least 14 targets,[1] in most cases receiving payment merely upon sending of threat letters. Indeed, the initial threat letter to VTW here (Ex. 3) contains near verbatim sections of the letter plaintiffs used with nearly all the others. All threat letters were handled by plaintiffs' in-house counsel, apparently in the hope that actual litigation would not follow. In accepting settlements ranging between $5,000 and $25,000 – amounts which wouldn't cover even the attorneys fees necessary to prosecute a legitimate case – plaintiffs' actions suggest that they never intended to prosecute any of these cases to judgment.

In addition, as shown by a PACER search (Ex. 5), there were apparently other such suits for which plaintiffs did not produce documents.

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[1] Plaintiffs' document production on these threats is attached as Exhibit 2. A summary of the threats and the amounts netted is as follows:

| Bates numbers | Target | Year | Amount Paid | Extent of Legal Action |
|---|---|---|---|---|
| | | | | |
| 1032 ff | Pinsak | 2003 | $13,000 | Threat letter, no cplt filed |
| | Mill Creek | | For both | |
| | | | | |
| 1010 ff | Jones | 2001 | 17,500 | Cplt, no answer filed |
| | Corey | | For both | |
| | | | | |
| 1000 ff | Lorence | 2001 | 4,000 | Threat letter |
| | Timberpike Contractors | | For both | |
| | | | | |
| 970 ff | McAfee | 2002 | 25,000 | Cplt, no answer filed |
| | Lentz | | All 3 | |
| | Lentz Construction | | All 3 | |
| | | | | |
| 944 ff | Anderson | 2003 | 12,500 | Cplt, no answer filed |
| | Schmitt Bldg Contractors | | 12,500 | |
| | | | | |
| 938 ff | Tobin Construction | 1999 | 5,000 | Threat letter, no cplt filed |
| | | | | |
| 902 ff | Micley | 2000 | 17,500 | Cplt, settled during discovery |
| | Oak Post & Beam | | 5,000 | |
| | Robert Smith Constr Co | | 10,000 | |
| | | | | |
| 3136 ff | Sugar River Sav Bank | 2003 | 4,000 | Threat letter, no cplt filed |
| | | | | |
| TOTAL | | | $126,000 | |

Plaintiffs' in-house General Counsel, Steve Woods, concedes that as to each of the persons from whom he demanded money, (1) "none of those individuals or entities ever admitted copyright infringement," (2) "there's no court language that [he was] aware of anywhere finding that anyone ever infringed a Timberpeg design," and (3) "of all those claims that we just went through in that file, [only one, Micley, ever] went beyond the initial complaint being filed." (Ex. 1 at 65-66.)

Apparently plaintiffs engaged in a long-term, strategic gamble to create a profit center out of defendants who would pay quickly rather than defend legitimate claims; their gamble backfired in this case when VTW stood on principle.

4. Settlement extraction policy also shown by conduct vis-à-vis Sugar River Savings Bank. Plaintiffs' motivation to extract settlements is also shown by their threat letter, also signed by their in-house General Counsel, Woods, to the bank which foreclosed on the unfinished property in this case (Ex. 6).

5. "Six months of stonewalling." As determined by the Magistrate Judge in his November 19, 2004 Order sanctioning plaintiffs, plaintiffs ignored critical discovery requests for six months and, when it became clear the requested information was relevant, attempted to change their theory of damages so as to make the information irrelevant after the fact. The Court characterized plaintiffs' conduct as "failure to comply with Rule 26(a)(1), failure to comply with Rule 33 and six months of stonewalling." November 19, 2004 Order at 3.[2]

6. Bogus claim of damages. In their initial disclosures plaintiffs claimed "damages" of $116,007. This figure was absolutely absurd in light of the fact that plaintiffs had billed $4,503.75 for its plans, of which Isbitski paid $3,500. Moreover, plaintiffs initially suppressed their extracted settlement from Sugar River Savings

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[2] The Magistrate Judge summarized plaintiffs' discovery behavior thus:

"Plaintiff in its Rule 26 disclosure claimed damages for lost gross profit but did not produce documentary support [as required by the rule]. Defendant followed up with interrogatory no. 17 on April 2, 2004 for the omitted material. On May 2, 2004 [plaintiff] objected, asserting privileges that are unlikely to apply, and essentially providing a non-answer. No documents were supplied. Defense counsel again followed up on June 11th. On June 19th [plaintiffs'] counsel agreed to supplement. On July 13, 2004 [plaintiffs] provided the calculation derived from six jobs as its answer. No original documents to support the numbers were provided even though they were clearly required by the question. On August 12th defense counsel complained of the lack of original documents and also of the inability to determine whether the estimated gross lost profit calculation was taken from "cherry-picked jobs" or was representative of the average [plaintiff] job. The discovery request was thus expanded. After further delays plaintiff's counsel objected to the discovery, both the overdue documents and the new request. In an apparent effort to make the requested discovery irrelevant plaintiff then announced that it was no longer seeking damages based upon its lost profits." Order at 1-2.

Bank, but defendants learned of it directly from the Bank. The Bank paid an additional $4,000. So plaintiff received $7,500 against its bill of $4,500, a profit of around $3,000. After six months of "stonewalling" to hide their "calculation" of damages from VTW, plaintiffs ultimately withdrew their damages claim altogether.

Indeed, plaintiffs' General Counsel demonstrated in deposition that the "value of Timberpeg's plans" is a very fluid concept indeed, based solely on how great a threat he can bring to bear. He stated that in "his understanding of the word 'value,' . . . the value of the set of plans will be dependent upon the circumstances that are involved, [i.e.,] is there currently an infringement or is there simply a request to use a set of plans prior to an infringement." (Ex. 1 at 17).

7. Litigation decisions demonstrated lack of intent to prosecute. Plaintiffs' litigation decisions also demonstrate their lack of intent to prosecute the case to judgment. They delayed until the end of discovery in taking depositions, and only took the deposition of VTW's principal when VTW itself pushed it to get it over with. They engaged no outside experts at all, designating only their own employees as experts (as any serious defendant would in such a case, VTW engaged two outside experts, at significant expense). Even though they were plaintiffs, they obtained a lengthy extension of the deadlines, and repeatedly sought other extensions of the trial date (to all of which VTW objected). They sought exhaustive paper discovery from VTW – which they received – while "stonewalling" on their own production. Then they sued one of VTW's principals personally. The clear picture presented is of a litigant posturing a huge threat which it never intended to carry out.

C. Compensation and Deterrence.

As noted in Yankee Candle, "the final equitable factor noted in Fogarty is 'the need in particular circumstances to advance considerations of compensation and deterrence.' This factor is especially pertinent where, as here, a large industry leader brings unreasonable claims against a much small competitor. Denying attorneys' fees in such cases encourages dominant players to bury competitors in meritless lawsuits intended to lower profit margins." Yankee Candle Company, Inc. v. Bridgewater Candle Company, LLC, 140 F. Supp. 2d 111, 118 (D. Mass. 2001).

Here, plaintiffs are probably one of the dominant timber framers in the country[3], with four divisions covering the entire United States. They have 13 designers in their Services entity. They have an in-house General Counsel dedicated to handle their business. As trumpeted in their advertising literature (Ex. 7) and web site (Ex. 8,) Timberpeg is a "national company with four operating corporations covering the entire United States," "has Independent Representatives located around the nation and around the world," has "over 50 standard timberframe house models," and has "produced thousands of buildings since 1974."

By contrast, VTW is a small, local company whose co-owner, Friant, also serves as its sole designer. VTW's entire income for 2001 was $ on gross receipts of $ , and its income for 2002 was only $ on gross receipts of $ . Obviously, the relative size of the parties makes it easily feasible that, had plaintiffs prevailed here, they would have eliminated VTW as a competitor. (VTW believes this was one of plaintiffs' motivations in bringing this frivolous action.)

Significantly, in this region plaintiffs are a direct competitor of VTW, and this suit may well have been designed to force VTW out of business.

Figures redacted;
Unredacted version under seal.

## III. AMOUNT OF ATTORNEYS FEES AND EXPENSES

### A. "Lodestar" Approach

In the First Circuit, as elsewhere, the court

> must apply the "lodestar" approach to calculation of fee awards: a determination of the hours reasonably spent on this case, multiplied by a reasonable rate. To determine the hours reasonably expended, courts typically look at the actual hours spent by counsel as established by adequate contemporaneous billing

[3] Plaintiffs never did produce their financial statements, despite earlier orders that they do so. VTW's motion to compel was pending (and is now moot) when summary judgment was granted.

> records, then subtract from that figure hours which were duplicative, unproductive, excessive or otherwise unnecessary. A reasonable rate is "that prevailing in the community for similar work."

Yankee Candle Company, Inc. v. Bridgewater Candle Company, Inc., 140 F. Supp. 2d 111 (D. Mass. 2001), citing Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F. 3d 331, 227 (1st Cir. 1997) and Grendel's Den v. Larken, 749 F. 2d 945, 950 (1st Cir. 1994). See also, Marshall & Swift v. BS & A Software, 871 F.Supp. 952 (W.D. Mich. 1994); Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc., 656 F.Supp. 826 (M.D.Fla. 1987); Lamphere v. Brown University, 610 F. 2d 46, 47 (1st Cir. 1979) (civil rights action); Coutin v. Young, 124 F. 3d 331 (1st Cir. 1997) (in discrimination case, reversal for failure to use lodestar approach).

B. The Work Performed

This was a complex case which progressed all the way to the verge of trial, summary judgment having issued literally eight days before the Final Pre-Trial Conference, after all the pretrial filings were in and defendant was prepared for trial. After answering, defendants took nine depositions in the case; answered multiple sets of exhaustive paper discovery; reviewed extensive document productions from seven separate persons; produced its own extensive documents; filed two successful motions to compel (the second of which resulted in sanctions against plaintiffs for "six months of stonewalling"); consulted various expert witnesses (and formally disclosed two of them); reviewed and objected to the expert opinions of plaintiffs; filed two summary judgment motions and a motion for judgment on the pleadings; objected to plaintiffs' summary judgment motion; prepared all pre-trial documents and exhibits; prepared trial testimony; and responded to plaintiffs' motion to reconsider. (Ex. 12)

The undersigned counsel states that the services were reasonable and necessary in connection with obtaining the discovery order and in responding to plaintiffs' motion to reconsider it. (Whittington Affidavit, Ex. 12.)

Defendants' legal services – after the initial letter responses to plaintiffs' counsel – were all performed by a single attorney at a single firm, with some research being handled by a research paralegal. The total hours expended were:

| | |
|---|---|
| Whittington | 553.3 hours @ $200/hour |
| Jones (paralegal) | 56.11 hours @ $85/hour |

None of the usual reasons for reducing hours exists here: There never was more than a single attorney handling the case. No time at all was spent in conferences among lawyers. No time was spent for travel. No part of plaintiffs' case was successful in even reaching trial.

See generally, Whittington Affidavit and attached time records, Ex. 12

C. Reasonable Rate

In his award of attorneys fees for plaintiffs' "six months of stonewalling" in discovery, the Magistrate Judge already found that "$200.00 per hour is a reasonable hourly rate." March 29, 2005 Order at 3.

To further support that finding, VTW provides the following additional information. Its counsel, Whittington, is a 1976 graduate of Duke Law School and Editorial Board Member of the *Duke Law Review;* has been in law practice since 1976; was an Army prosecutor for approximately 3 years and an associate and then partner with a large Chicago firm before moving to New Hampshire in 1989; has been lead counsel in over 75 trials; and has been lead counsel (and argued orally) at the U.S. Supreme Court, the First, Second and Seventh U.S.

Circuit Courts of Appeal and in the Supreme Courts of New Hampshire, Vermont and Illinois. (Whittington Affidavit, Ex. 12)

The paralegal, Ross Jones, is a 2000 graduate of Vermont Law School, with honors, and has performed legal research for Whittington since 1999. (Whittington Affidavit, Ex. 12) His standard rate is $85 per hour.

The rate agreed to by VTW and charged in the matter was also $200 per hour, with half of the first $25,000 and half of fees from June 2004 on contingent upon award of fees by the court.[4] (Whittington Affidavit, Ex. 12)

D. Amounts Billed, And Deductions

Per affidavits (Ex. 11 & 12), the time and expenses charged, are as follows:

| Firm | Rates | Fees | Expenses | Total |
|---|---|---|---|---|
| Dakin & Benelli | 125/hr | | | 597.50 |
| John J. Welch, Ltd | | | | 175.00 |
| Whittington Law Associates<br>- Whittington<br>- Jones | <br>200/hr<br>85/hr | 115,429.42 | 7,430.01 | 122,859.43 |
| Total | | | | 123,631.93 |

From that total, VTW agrees that the following amounts should be deducted:

$3,700 paid by plaintiffs in sanctions ordered by the Court.
$1,020 counterclaim time, voluntarily dismissed without prejudice.

Thus, VTW respectfully requests an award of attorneys fees and expenses of $118,911.93.

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[4] The June 2004 conversion of half the ongoing rate to contingency occurred, after receipt of most significant discovery from plaintiffs when counsel could evaluate the weakness of plaintiffs' case, because VTW could not afford the ongoing standard fees to which it had agreed. Without the fee concession, plaintiffs' apparent scheme of outspending VTW into submission might have succeeded.

Contingency does prevent the collectibility of fees, and many courts award a premium over the standard rate to compensate for the risk undertaken by counsel. E.g., Form Builders v. Dan Chase Taxidermy Supply Co., Inc., 881 F. Supp. 1021 (E.D. Va. 1994), aff'd, 74 F. 3d 488, cert. Denied, 519 U.S. 809.

Date: April 14, 2005

VERMONT TIMBER WORKS, INC.
and DOUGLAS FRIANT, Defendants,

By: W. E. Whittington
Their Attorney

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Exhibits (in separate Attorneys Fees Appendix)

| | | |
|---|---|---|
| Ex. 1 | – Woods (Plaintiffs' General Counsel) deposition, pp. 46-47, 54 | 10/22/04 |
| Ex. 2 | – Vincent (Plaintiff's Chief of Design) deposition, pp. 1, 105-106 | 03/31/04 |
| Ex. 3 | – Woods threat letter | 06/23/03 |
| Ex. 4 | – Plaintiffs' documents on other threats | misc. |
| Ex. 5 | – PACER print out (U.S. Party/Case Index) | 04/07/05 |
| Ex. 6 | – Woods Letter to Sugar River Savings Bank | 10/09/03 |
| Ex. 7 | – Welch letter | 09/22/03 |
| Ex. 8 | – Whittington letter | 11/17/03 |
| Ex. 9 | – Timberpeg sales magazine "Artisan" | no date |
| Ex.10 | – Timberpeg web site excerpts | no date |
| Ex.11 | – Friant Affidavit (including financial statements and invoices of Dakin & Benelli and Welch) | 04/12/05 |
| Ex.12 | – Whittington Affidavit (including fee agreement and invoices) | 04/13/05 |

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

Daniel E. Will, Esq.
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W. E. Whittington
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Daniel E. Will, Esq.
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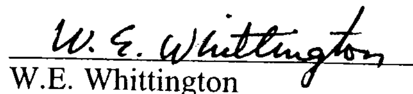

W.E. Whittington