

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

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

DEFENDANTS' REPLY MEMO
SUPPORTING THEIR
MOTION FOR ATTORNEYS FEES

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant") submit this reply memo supporting their motion for an award of its attorneys fees.

Lack Of "Objective Reasonableness"

Plaintiffs contend (Memo at 1-9) that their claims were "objectively reasonable," but their contention is at odds with virtually everything which occurred in the case.

- Their lead argument (at 1) is that the case could not have been unreasonable because it was "complex," and later (at 14) they state "this was a complex case, which contradicts any assertion that the claims were frivolous." There certainly is nothing preventing a complex case from being unreasonable or even frivolous. Indeed, a common method of keeping a bad claim alive longer is to cloak it in complication. That is undoubtedly what occurred here.

- They claim (at 3) that the case was reasonable because their "visits to the building site confirmed that the structure bore a striking similarity to Timberpeg's design." This is strikingly at odds with their deposition testimony. They admitted, and their photos showed, that the Isbitski

project was just a frame, open on one or more sides, with no windows in the house and no roof. Ex. 1 at 46047. Their Chief of Design said that “the framing [compared to the Timberpeg design] would be different, definitely.” Ex. 2 at 105-06. They certainly did see that there was no “house” at all, despite their allegations that VTW had utilized their plans “in the construction of a house.” Cplt. ¶32. Plaintiffs’ claim simply does not come from the land of reality.

- The Court itself found that VTW’s drawings “lacked probative similarity” to plaintiff’s plans. Feb. 9, 2005 Order at 17. Plaintiffs do not address this finding at all.
- The Court found that plaintiffs never even made frame drawings, at all. February 9, 2005 Order at 17. Plaintiffs do not address this finding at all, or how a claim based on supposed copied drawings can be sustained in the absence of such drawings.
- They urge (at 2) that unreasonableness be determined based on what they knew when they filed the case. Based on their own admissions, at that point they knew (1) that VTW’s frame was “different” than their design; (2) that the timberframe could be finished in a way unrelated to the Timberpeg plans; (3) that neither Isbitski nor anybody had built a “house;” (4) that their claim of \$75,000 in damages for jurisdictional purposes was wholly unsupportable; and (5) that they had no evidence of copying or similarity.
- They continue to rely (at 4) on the letters of VTW’s counsel to show their supposed reasonable belief in copying. This completely ignores this Court’s factual finding that “no reasonable fact-finder could conclude that the letters . . . constitute admissions of unlawful copying.” April 6, 2005 Order at 9. Even though no reasonable fact-finder could conclude that, plaintiffs say that they did.
- They argue (at 6) that the Court’s denial of VTW’s motion to dismiss, without memo or discussion, vindicates their claim as “reasonable.” This ignores this Court’s language in its

two subsequent opinions, of course. Moreover, virtually all of the grounds on which summary judgment was granted were first advanced in that initial motion to dismiss.¹

- They claim (at 13, 14) that this was a “close case,” but that would appear to be contradicted by the grant of summary judgment, which necessarily found no material issue on which they could even establish a genuine dispute.
- They claimed that their damages were in excess of \$116,000 but after six months of refusing to produce evidence and finally being forced to produce evidence of actual damages, they tried to make their damages claim irrelevant altogether by withdrawing the damages claim.
- VTW can only agree with plaintiffs’ own summary of their “objectively reasonableness” argument at Page 5 of their Memo:

Timberpeg pursued its claims even though Timberpeg was unable to uncover proof – direct evidence – of copying, beyond VTW’s counsels’ admissions.

In plain English, this openly concedes that the only evidence they had of copying consisted of the counsel letters, as to which this Court held that “no reasonable fact-finder could [draw the conclusion plaintiffs did].”

Abuse Of Discovery Process

Plaintiffs brag (at 11) that they “did not abuse the discovery process,” principally because they “produced well over 1,000 documents . . . compared to the 200 documents produced by VTW.” Of course, discovery abuse is not about what a party does produce but what it doesn’t. Plaintiffs produced a higher number of documents because they produced all their advertising

¹ This includes (1) VTW’s argument that plaintiffs admitted they did not design a timber frame (MTD at 4), (2) pre-emption of all three state claims (MTD at 5 ff.), (3) lack of substantial similarity (MTD at 8), (4) uncopyrightability of ideas as opposed to the expression thereof (MTD at 9), and (5) failure of each of the three state law claims to state a claim (MTD at 12 ff.).

literature over a number of years as well as documents from many other suits they brought and threats they made.

But on the documents that mattered, the documents related to the claimed profits and damages in the case, they refused, and on an ongoing basis for six months. Defendants had to make two motions to compel, both of which were granted. The second resulted in an order by the Magistrate Judge characterizing their 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

It is difficult to imagine how plaintiffs can assert that they “did not abuse the discovery process” while making no mention at all of this highly noteworthy discovery sanctions ruling.

No Windfall To Plaintiff

Plaintiffs argue (15-16) that the requested fees would result in a “windfall” to VTW, i.e., that “they would pay significantly lower attorneys’ fees than [they] seek as an award.” This is simply wrong.

Part way into the case, counsel agreed to make half of his ongoing fees contingent, because defendants simply could not afford normal fees. If those fees are awarded, they will go entirely to counsel, not to defendants. Defendants will not “earn” a penny in fees over and above what they pay.³

To be clear, plaintiffs’ statement (at 16) that “of the \$118,911.93 billed . . . , the defendants were only required to pay \$65,074” is completely misleading. Under the contingency

² The Magistrate Judge’s summary of the abusive conduct is quoted at length at page 8, note 2 in VTW’s principal memo.

³ Thus this case is easily distinguishable from Jewish Employment & Vocational Serv., Inc. v. Pleasant Edux. Supply Corp., 601 F. Supp. 224 (E.D. Pa. 1983), where the party sought to keep the additional fees awarded over what counsel received.

arrangement, each dollar awarded by the court will go first to counsel, until the rate again reaches the \$200/hour agreed at the beginning of the case, before VTW receives any reimbursement for what it has paid. Ex. 12, last attachments.

Nor will it be a windfall to counsel to receive \$200 per hour – the rate to which he initially agreed – which is still below his normal hourly rate. Do plaintiffs really think that “complex” copyright infringement counsel can be engaged for \$100 per hour?

In short, there is absolutely nothing wrong with contingency fees, and the lodestar method compensates for contingencies, as briefed in VTW’s principal memo at 13. Indeed, plaintiffs should be pleased that no risk premium is being sought for accepting the contingency risk.

The Billing Records Are Adequate

Plaintiffs contend (at 16-17) that the Court should reduce the requested fees by 10% “to account for inefficiencies in defense counsel’s representation,” but they do not identify any. Apparently plaintiffs’ reference is to Yankee Candle Company, Inc. v. Bridgewater Candle Company, 140 F. Supp. 2d 111 (D. Mass. 2001), where the court reduced the attorneys fees by 10% -- to \$828,714.40 – for “certain inefficiencies” which it identified as lead counsel “changing firms mid-stream” and “pursuing issues of dubious relevance such as [the opponent’s] environmental troubles.” 140 F. Supp. at 125. No such events occurred here.

The usual “inefficiencies” are for multiple counsel performing the same task, for excessive travel, or for switching firms in the course of a case. None of that occurred here, either. There was only one attorney working the case for defendants (unlike plaintiffs, who had two attorneys present for every single deposition).

Moreover, the contemporaneous records list all the tasks, and the Court is easily able to review them. If plaintiffs had found some true inefficiencies, they would be highlighting them, not asking for a general 10% reduction with no basis given.

No Reduction Appropriate For Motion To Dismiss

Plaintiffs contend (at 17) that no fees should be awarded for the motion to dismiss. However, there is no limitation of a fee award to only motions which were granted. Indeed, as noted in note 1 above, most of the issues denied in the motion to dismiss context were later granted in the summary judgment context. Certainly, the work on the motion directly contributed to the ultimate result in the case.

Summary Judgment Hours Appropriate.

Plaintiffs contend (at 18), without analysis, that 90 hours of work relating to the two motions for summary judgment were “facially excessive.” That is simply not the case. These were complex motions, involving a great deal of fact gathering and legal support, and fees of \$18,000 for briefing these two motions, with many counts and grounds, was more than appropriate, and probably a bargain. Plaintiffs were seeking damages at a level that may well have put VTW out of business, and VTW could certainly not be expected to defend on a shoestring. Moreover, the result justifies the work performed.

No Fees For Work Relating To Hentschel Deposition

Plaintiffs contend (at 18) that VTW should not be reimbursed for Kim Hentschel's fees, because she was not a VTW employee at the time of her deposition. But they wholly misconstrue the fees claimed, which were the fees of VTW, not of Hentschel.

There were no fees charged to Ms. Hentschel, and the e-mail engagement makes this abundantly clear. Ex. 13, attached. Based on her status as a former VTW employee, VTW was already obligated to cover Ms. Hentschel's exposure, and as is usual in the circumstance, representation of Ms. Hentschel in the deposition was in both her and VTW's interests and added not a penny to the cost.

The fees sought here relating to the defense of the deposition are solely those of VTW, and were billed to and paid by VTW.

December 29, 2004 Invoice (Expert Fee) and Other Expert Fee

Plaintiffs challenge (at 19) the December 29, 2004 expenses bill for \$2,250 and the \$1,350 expert fees of Phil Phillips.

First, an explanation of the December 29, 2004 charge. This was the bill (\$2,250) for VTW's CPA expert, Barry Potvin, who rendered formal expert opinions and was formally disclosed as VTW's expert on damages issues. See invoice, Ex. 14, attached.

Phil Phillips was VTW's timber framing expert, who also rendered formal expert opinion, was disclosed, and was deposed by plaintiffs. His bill was \$1,350.

VTW paid for both of these experts. Both of these experts were made necessary solely by plaintiffs improper case.

Moreover, plaintiffs' assertion (at 19) that expert witness fees are not recoverable is horribly out-dated and cites a civil rights case, not a copyright infringement case. In copyright

infringement cases, Section 505 grants “full costs” plus a reasonable attorney’s fee. The First Circuit has made clear, in a recent copyright infringement case, that any disbursements normally made by an attorney and ordinarily billed to the client “can properly be encompassed”:

[T]he Supreme Court has endorsed the view that disbursements made by an attorney and ordinarily billed directly to the client . . . can properly be encompassed within the phrase “attorney’s fee” . . .

Invessys, Inc. v. McGraw-Hill Companies, Ltd., 369 F. 3d 16, 22 (1st Cir. 2004).

Additional Fees For This Reply Memo

As noted in VTW’s principal memo,⁴ time spent litigating in order to recover fees is compensable as part of the fee award. Accordingly, VTW submits its supplemental fees of \$1,840.00 for reviewing plaintiff’s objection and preparing this reply, and seeks a total award of \$120,751.93.

CONCLUSION

One court stated, in a copyright infringement case, that “although attorney’s fees are awarded in the trial court’s discretion, they are the rule rather than the exception and should be awarded routinely.” Micromanipulator Co. v. Bough, 779 F. 2d 255, 259 (5th Cir. 1985). This case was anything but routine, with plaintiff proceeding in the face of many, many indications and warnings that their case was simply not reasonable. Despite their many counts, theories and allegation, not a single claim even survived summary judgment, and the Court had harsh words for plaintiffs, both in summary judgment rulings and also in discovery sanctions rulings (“six

⁴ Citations are given at p. 3 of the principal memo.

months of stonewalling”). If there were ever a case appropriate for a fees award, this would appear to be the case.

As the amount sought, all of the work was necessary and appropriate, and the level of fees is quite reasonable, both in relation to how far this case went (all trial materials were prepared at the time summary judgment was granted), and in comparison to other copyright infringement cases (for example, the award of over \$890,000 in Yankee Candle, supra). Every penny has been appropriately documented and supported.

If the Court awarded VTW only \$65,000 in fees, as suggested by plaintiffs (at 16), it would still peg VTW’s losses for “prevailing” in this suit at over \$55,000. That may be small change to plaintiffs, but it is extremely significant to VTW. (See Ex. 11 for VTW’s total revenues.) VTW’s principals, beyond the money they were forced to spend on fees and costs defending themselves, were forced to spend countless hours reviewing their counsel’s work on the case, offering insight, advice and direction, and fretting about the case and the financial health of their business when they should have been attending to business. One of VTW’s principals, Doug Friant, was even sued personally and forced to decide whether to risk his personal assets, including his house, or to simply cave in to T-Peg’s pressure, and pay T-Peg whatever moneys it demanded. That is surely not the result Congress intended, and not one deserved by defendants, who were totally innocent in this matter and who prevailed in the clearest of terms.

Defendants respectfully request that the Court award them \$120,751.93.

Date: May 20, 2005

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

By: W. E. Whittington
Their Attorney

W. E. Whittington (Bar No. 6916)
Whittington Law Associates, PLLC
35 South Main Street
Hanover, NH 03755
(603) 643-2755

Exhibits (in separate Attorneys Fees Appendix)

Ex. 13 – E-mail exchange with K. Hentschel	10/25/04
Ex. 14 – Stevens Wilcox Baker Potvin invoice	11/22/04
Ex. 15 – Supplemental fees	05/--/05

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

Daniel E. Will, Esq.
Devine, Millimet & Branch, P.A.
111 Amherst Street
Manchester, NH 03105

Stephen S. Woods, Esq.
Traditional Management Company
68 Lyme Road
Hanover, NH 03755

W. E. Whittington
W.E. Whittington