

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.)

DEFENDANT'S STATUS REPORT

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant") respectfully submit this status report to assist in cataloguing the pending matters, and for reference in connection with their Motion For Continuance expected to be filed later this week.

This updates the prior status report (Document 118), dated November 1, 2006 as follows:

Mediation Unsuccessful

In the March 29, 2007 telephone conference, the Court strongly encouraged the parties to mediate the case. The parties did so, on May 8, 2007, with mediator David Plant, and unfortunately did not settle the case.

Outstanding Discovery Issues

1. Defendants' 3d Motion To Compel (Document 72), has been apparently resolved,¹ with production of documents received from plaintiffs on June 22, 2007.

¹ Defendants have made one follow up request which is not expected to require Court involvement.

2. Defendants' 4th Motion To Compel (Document 87), has been resolved, with production of documents received from plaintiffs on May 14, 2007.

3. Concerning the Court's November 19, 2004 Order granting Defendants' 2d Motion To Compel (Document 52, reconsideration denied in Document 97), plaintiffs have produced six 1-page responsive documents which were received on June 22, 2007. There are still some issues being addressed, and the undersigned has sent an e-mail to plaintiffs' counsel addressing them. Defendants are hopeful this can be resolved without the Court's involvement.

Pending/Anticipated Motions

1. Defendants' MSJ I, Headings I (D) & (E) (Document 23, fully briefed but never determined). After the 1st Circuit ruling on other grounds, this Court reopened the motion (Order dated 3/9/07). Upon further consideration, defendants are willing to withdraw Heading I(D), and based on a discussion with the calendar clerk have re-briefed and expanded Heading I(E) in their new Motion For Summary Judgment For Lack Of Standing filed this date (Document 126) as opposed to seeking leave to file a supplemental memo. Accordingly, defendants suggest that the remaining portion of Document 23 (Heading I(E)) be withdrawn without prejudice in favor of Document 126.

2. Defendants' MJOP I as to Damages, Profits Remedies (Document 33, fully briefed but never determined). After the 1st Circuit ruling on other grounds, this Court reopened this motion (Order dated 3/9/07). This motion is ready for ruling.

3. Defendants' MSJ II on (1) Non-Copyrightability and (2) VTW's Lack Of Profits (Document 44, fully briefed but never determined). After the 1st Circuit ruling on other grounds, this Court reopened this motion (Order dated 3/9/07). However, defendants are currently drafting

a motion for summary judgment (Item 5 below) which includes, but is broader than, the non-copyrightability issue. The motion being drafted has been awaiting plaintiffs' production of discovery as noted above, and defendants expect to file it by July 15. Based on a discussion with the calendar clerk, defendants suggest the Court consider the non-copyrightability issue withdrawn without prejudice in favor of the motion (Item 5 below) to be filed shortly. The second portion of the pending motion, to dismiss the remedy of disgorgement of profits, is moot unless the Magistrate Judge's Orders of November 19, 2004 and March 29, 2005 are reversed. Accordingly, there is no need to address it at present.

4. Plaintiffs' MSJ (Partial), filed June 3, 2007 (Document 124). Defendants' objection is not due until July 6, 2007, so this is obviously not yet ripe for decision.

5. Defendants' Anticipated MSJ III For Lack Of Protectible Copyright Interests, expected to be filed by July 15, 2007. This Motion is based, in part, on discovery which has only been recently received, and/or which is still to be received, and therefore is expected to be filed in the next three weeks.

Appeal Of Magistrate Judge's Order

Plaintiffs have appealed the Magistrate Judge's Order dated November 19, 2004 (Document 52), and reaffirmed by him on March 31, 2005 (Document 97). Defendants oppose the appeal. It has been fully briefed (Documents 120 & 121) and is ripe for decision.

In the event that the Magistrate Judge's ruling is reversed – which defendants strongly believe should not be the case – the reversal would require defendants to follow up with additional discovery which they have not done to date in reliance on the ruling of November 19, 2004.

Pre-Trial And Trial Schedule; Anticipated Motion To Continue

Currently this case is set for trial on October 10, 2007 and for final pre-trial conference on September 28, 2007, and for Pre-Trial Statements and documents on September 10, 2007.

However, that schedule is unrealistic, or extremely difficult and inefficient, in that so many important matters bearing on the pre-trial documents, exhibits, witnesses, and jury instructions, depend on very significant rulings which are still pending, and many of which could not be made until now because of outstanding discovery relating to them. Accordingly, defendants anticipate filing a motion to continue the trial and pre-trial dates until the above significant motions have been addressed. Defendants anticipate that plaintiffs may likely concur with this concept (of course, defendants will formally seek assent before filing the motion), since they proposed a similar phasing of the case in their portion of the Updated Joint Discovery Plan date 11/01/06 (Document 118). Moreover, in the conference on March 9, 2007, the Court indicated it was not averse to such a phasing concept in principle, but that for procedural reasons hard dates needed to be scheduled so that dates would be triggered by the ECF docketing system. With discovery now (nearly) complete and dispositive motions on file, or about to be, that consideration has now been fulfilled and defendants believe judicial and legal economy would be greatly furthered by delaying the trial and pre-trial until determinations on the motions have been made.

Defendants anticipate filing the motion to continue later this week, as soon as they have discussed it with plaintiffs' counsel.

June 26, 2007

Respectfully submitted,

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

/s/ W. E. Whittington
W.E. Whittington

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2007, I served the foregoing pleading on the following counsel of record, by causing it to be filed electronically via the CM/ECF filing system or mailed by first-class United States Mail, postage pre-paid, or in such other manner as may be indicated:

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/s/ W. E. Whittington
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