

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 MOTION TO CONTINUE TRIAL [ASSENTED]

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant") respectfully move to continue trial for three months (or for any other period) to enable the Court to rule on outstanding dispositive or issue-narrowing motions so that the parties can submit more meaningful pre-trial materials.

In support of this motion, defendants state as follows:

1. Currently this case is set for trial on October 10, 2007, for final pre-trial conference on September 28, 2007, and for Pre-Trial Statements and documents on September 10, 2007.
2. Defendants believe 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. These pending (and in one case, expected to be submitted in the next ten days) motions, and in one case an appeal of a magistrate ruling, are as follows:

- a. 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 by defendants on June 22, 2007.

There are still some issues being addressed, and the undersigned has sent an e-mail to plaintiffs' counsel addressing them.

- b. Defendants' MSJ I, Headings I (D) & (E) (Document 23, fully briefed but never determined).
- c. Defendants' MJOP I as to Damages, Profits Remedies (Document 33, fully briefed but never determined). After the 1<sup>st</sup> Circuit ruling on other grounds, this Court reopened this motion (Order dated 3/9/07). This motion is ready for ruling.
- d. Defendants' MSJ II on (1) Non-Copyrightability and (2) VTW's Lack Of Profits (Document 44, fully briefed but never determined). After the 1<sup>st</sup> Circuit ruling on other grounds, this Court reopened this motion (Order dated 3/9/07).
- e. 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.
- f. 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.
- g. 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, 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.

3. Accordingly, defendants are filing this motion to continue the trial and pre-trial dates until the above significant motions have been addressed. Plaintiffs proposed a similar phasing of the case in their portion of the Updated Joint Discovery Plan date 11/01/06 (Document 118), and in the March 9, 2007 status conference, the Court indicated it was not averse to 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.

4. In accordance with Rule 7.2(d) of this Court, the undersigned certifies that defendants have been notified of this request and concur in it

5. In accordance with Rule 7.1(c) of this Court, the undersigned certifies that he has conferred with opposing counsel, Dan Will, in a good-faith effort to obtain assent to this motion, and plaintiffs assent to the relief requested.

July 3, 2007

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

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

W. E. Whittington (Bar No. 6916)  
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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 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  
W.E. Whittington