

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' MOTION FOR RECONSIDERATION
OF PORTION OF MARCH 28, 2008 ORDER (Document 147)

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), respectfully move the Court to reconsider that portion of its March 28, 2008 Order which denies their motion for summary judgment (Document 44, Heading I) on the stated ground it "has been foreclosed by the court of appeals, see T-Peg, 459 F. 3d at 110." (Document 147 at 13-14)

Defendants believe this is truly a situation where "the order was based on a manifest error of fact or law" in accordance with L.R. 7.2(e). More particularly, defendants respectfully suggest that the Court may have confused the "no separability test for architectural works" concept referred to by the First Circuit – referring to the separation of the work from its utilitarian function – with the requirement that the court "separate" protectible design elements from non-protectible design elements.

While the concepts use the confusingly similar terms "separability" and "separate," they are distinct.

The First Circuit did nothing in T-Peg to waiver from, and even repeated, 459 F. 3d at 108, the established principle that a plaintiff must "prove[] . . . copying of constituent elements of the work that are original." 459 F. 3d at 108. Indeed, under settled "law of the case

principles,” the First Circuit could not have ruled on the issues in Document 44 because those issues had not been not determined by this Court and were not part of the appeal at all.

In support of this motion, defendants submit their Memorandum In Support.

Defendants have not conferred with plaintiffs’ counsel as the motion is dispositive.

Date: April 8, 2008

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 April 8, 2008, 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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