

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’ OBJECTION TO  
PLAINTIFFS’ MOTION FOR LEAVE TO FILE “REPLY” (Document 156)

Defendants object to plaintiffs’ Motion For Leave To File “Reply” [sic] (Document 156).

While plaintiffs call their proposed pleading a “reply,” it is not a reply because it does not fit the allowed “pleadings” or “motions” under FRCP 7, nor does it fit Local Rule 7.1, which only relates to replies to objections to motions, not to briefs.

Here, the Court directed the parties to enter a briefing schedule (Document 147, at 17); the parties set the schedule by plaintiffs’ own motion, which was assented by defendants (Document 150); and the Court granted that motion (Endorsed Order dated 04/16/08). The schedule did not call for a “reply,” and since there is no “motion,” Rule 7.1(e) does not authorize plaintiffs to seek leave to file it.

Defendants would not ordinarily object to an additional brief but do so here in the context of plaintiffs’ already-shifting theories in the case. As noted by the Court in its Order requesting these briefs,

defendants justifiably complain about what seems to be a constantly moving target, given plaintiffs’ serial reliance on alternate theories of authorship . . . .

[note 3] Those theories are: (1) the registration form’s now-disclaimed identification of T-Peg as author; (2) the apparent portrayal of Timberpeg

Services as author in interrogatory answers, which attributed all of Timberpeg's design time to Downey; and (3) plaintiff's current theory that Timberpeg East was the author, due to Cole's creation of the work.

Document 147 at 11.

The yet-another-brief proposed by plaintiffs would do nothing but attempt to justify a theory of authorship and standing (a) which was not contained in the complaint or amended complaint; (b) which is wholly inconsistent with the rights asserted in the copyright registration; (c) which was not subjected to the rigors and safeguards of discovery in the case; (d) which are wholly at odds with the facts of this Court's original rulings and the First Circuit's rulings, which rulings have become "law of the case; and (e) which are entirely unsupportable based on the facts.

Moreover, if the Court indeed permits this complete revision of the claims and alleged facts on which they are based - not at the "eleventh hour" but at the thirteenth - the only way to protect defendants' due process rights would be to require plaintiffs to completely re-plead their case, allow defendants to take discovery on the new claims, and allow defendants their full complement of rights under the Federal Rules with respect to the restated claims. That, of course, would result in a monumental waste of the litigants' and the Court's time and resources over the past five years, and would only be remotely appropriate if defendants were awarded their defense costs and expenses to date.

Plaintiffs' ability to constantly allege new theories in response to defendants' pleadings proving the current theory untenable should come to an end. The Court should not permit a further "reply."

Date: July 2, 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 July 2, 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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