

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 TO REOPEN DISCOVERY
ON STANDING AND COPYRIGHT OWNERSHIP ISSUES

Defendants respectfully move that the Court reopen discovery on standing and copyright ownership issues, for a period of 90 days, including but not limited to

- The corporate status of plaintiffs and their affiliates.
- Inter- and intra-company agreements between and among plaintiffs and their affiliates.
- Employees, officers and agents of plaintiffs and their affiliates and their duties, authority and responsibilities.

This discovery is appropriate, and without it defendants will have been deprived of their due process rights to take meaningful discovery under the rules, because the case has completely changed after the close of discovery and defendants have *never* been afforded the opportunity to take discovery on these issues, which are central to the case.¹

In support of this motion, defendants state:

This is a case in which plaintiffs completely changed their theory of standing and copyright ownership, at least twice, long after discovery closed and even after an appeal

¹ The Court noted that “the record raises more question than it answers, and they are questions that matter.” Document 147 at 10.

to the First Circuit based on the original theory. Moreover, they did so without ever even amending their original and amended complaints to reflect the complete change of theory.

While not granting any relief, the Court has at least twice validated defendants' complaints about the unfairness of this theory-changing practice. In its March 28, 2008 ruling it stated:

[D]efendants justifiably complain about what seems to be a constantly moving target, given plaintiffs' serial reliance on alternate theories of authorship [Court's footnote: 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 and fn 3.

In its March 27, 2009 ruling it stated:

The court appreciates defendants' unhappiness with plaintiffs' shifting theories of copyright ownership, as well as plaintiffs decidedly unhelpful, if not obfuscatory, practice of referring to the Timberpeg entities collectively rather than individually in various pleadings. . . .

[P]laintiffs' misleading practice of referring to T-Peg and Timberpeg collectively in court filings could be viewed as contributing to "a complicated pleading history replete with evasions and artful omissions."

Document 164 at 2, 6-7.

In the latter ruling the Court notes that "defendants have, arguably, suffered some prejudice. They have had to use the discovery process to learn what should have been reported on the certificate of registration." Document 164 at 6. In actuality it was not the discovery process but the motion briefing process which unmasked the complaint as unviable and led plaintiffs to completely change their theory, twice. Defendants never

took discovery on the new issues because they were simply not raised in the case while discovery was ongoing. They have only been brought into the case through the Court's recent ruling.

Moreover, the result of the plaintiffs' changing theory and the defendants' lack of meaningful discovery is that the Court has accepted plaintiffs' position while acknowledging that it is "shaky" because defendants are unable to adequately contest it. Document 164 at 3. Indeed, the Court has noted that "it is difficult to determine . . . just what Timberpeg East conveyed, or meant to convey, to T-Peg" in the critical sentence in the (unsigned and undated) "agreement." Document 147 at 9.²

LR 7.1 Certifications

Per Local Rule 7.1 counsel certifies that he sought assent from opposing counsel (by e-mail on April 26, 2009) and that he has not obtained such assent.

Per Local Rule 7.1 counsel states that no separate memorandum in support is being submitted as the motion is straightforward and does not require complex briefing.

WHEREFORE, defendants respectfully move that

- A. The Court reopen discovery on standing and copyright ownership issues, for a period of 90 days.

² Defendants' counsel apologizes for not addressing the question identified by the Court. Counsel can only assure the Court that the shortcoming was the result of misunderstanding, not any willful evasion of the subject which clearly was most on the Court's mind. As the goal is to arrive at the correct result (and as plaintiffs have already had the dispensations of completely changing their theories of ownership and standing twice), counsel can only request the Court's indulgence as he attempts to obtain information now which may properly address the issue.

B. The Court allow defendants, if appropriate, to file further pleadings relating to the standing and copyright ownership issues, based on discovery they obtain.

Date: April 27, 2009

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2009, 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:

Daniel E. Will, Esq.
Jonathan Shirley, Esq.
Devine, Millimet & Branch, P.A.
111 Amherst Street
Manchester, NH 03105
dwill@devinemillimet.com
jshirley@devinemillimet.com

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