

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE**

T-Peg, Inc. and Timberpeg East, Inc.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. C-03-462-M
	)	
Vermont Timber Works, Inc. and Douglas Friant	)	
	)	
Defendants.	)	
	)	

**OBJECTION TO DEFENDANTS’ RENEWED MOTION TO REOPEN DISCOVERY  
ON STANDING AND COPYRIGHT OWNERSHIP ISSUES, AND FOR EXPEDITED  
DISCOVERY RESPONSES**

NOW COME Plaintiffs, T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEI”), by and through their attorneys, Devine, Millimet, & Branch, Professional Association, and respectfully object to Defendants’ Renewed Motion to Reopen Discovery on Standing and Copyright Ownership Issues, and for Expedited Discovery Responses and state as follows:

**A. Preliminary Statement**

Defendants move to reopen and expedite discovery (proposing a 14 day whirlwind schedule) so they can explore a broad swath of topics ostensibly concerning Plaintiffs’ “corporate status,” company agreements, and employees and their responsibilities. Defendants assert this discovery is necessary because they have “*never* been afforded an opportunity to take discovery” on the issue of Plaintiffs’ standing and copyright ownership. Document 171-2 at 1 (emphasis in original). The question of copyright ownership has already been resolved in Plaintiffs’ favor, making discovery on the issue irrelevant. What is more, Defendants have already conducted extensive discovery on this issue. Defendants’ motion should be denied and

this Court should confirm its Order of March 27, 2009 that Plaintiffs' standing to sue is "uncontested" and conclusively established. Order of 3/27/2009 at 4.

**B. Plaintiffs' "Shifting Theory Of Copyright Ownership"**

Defendants' motion attempts to capitalize on the Court's assessment that Plaintiffs have a "shifting theory of copyright ownership" and have engaged in a misleading pleading practice of collectively referring to themselves as "Timberpeg." Document 171-2 at 2. Defendants believe this conduct alone justifies taxing Plaintiffs with additional discovery, though Defendants fail to identify exactly what discovery they are missing or what additional discovery would add to their defense. The "shifting theory" assessment is not accurate nor does it merit additional discovery. Plaintiffs have never obfuscated, but instead have always maintained the same "theory" that Plaintiffs co-own the copyright at issue in this action (a theory which is, in fact, reality). This theory is why Plaintiffs viewed "Timberpeg" as nothing more than an efficient way to identify themselves in pleadings.<sup>1</sup> It is the Defendants whose theories to defeat Plaintiffs' standing have shifted. Plaintiffs have merely met each of Defendants' new attacks head-on.

Defendants first mounted a challenge to Plaintiffs standing in August 2004, when they argued that TEI did not own the copyright because its name was not on the registration. Document 23. Plaintiffs objected because TEI's name was not required to be on the registration in order to own the copyright or sue for infringement. Document 24. Defendants "revived" their standing argument in 2007, but this time on a wholly different theory: that Timberpeg Services, Inc. authored the work, not Plaintiffs. Document 126. Defendants based this theory on Plaintiffs' answer to an ambiguous interrogatory in which Defendants sought to know the

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<sup>1</sup> Though Defendants complain that "Timberpeg" is meaningless word, they too used it as shorthand to identify Plaintiffs during this litigation. As an example, an affidavit drafted by defense counsel and signed by Kimberly Hentschel, a Vermont Timber Works Inc. employee, identified Plaintiffs throughout as "Timberpeg." Affidavit of Hentschel, attached as Exhibit A.

“design time” spent on the Isbitski home. Id. at 3. Plaintiffs answered that question by first noting that it did not track design time for TEI, but that Timberpeg Services, Inc. spent 108 hours on the project. Defendants mischaracterized this answer as an admission that Timberpeg Services, Inc. “authored” the work. But authorship was not the question posed to Plaintiffs and, in any event, not tracking design time for TEI was not the same as admitting TEI devoted no design time to the project. TEI’s employee Lynn Cole authored the architectural work because the Isbitski home was the result of his creative efforts. See Document 135 at 5-7. By contrast, Timberpeg Services, Inc. merely converted Cole’s hand-drawn plans into scaled architectural plans using a computer program. Id. This was more a mechanical process and not a creative one that would give rise to “authorship” as understood under the Copyright Act. Id. Though Defendants complained Plaintiffs changed their theory of ownership by this explanation, it was Defendants that misunderstood the process by which a concept gets reduced to architectural plans, propounded an ambiguous interrogatory, and then misunderstood the answer and claimed it meant something far different than it did. Through all of this, Plaintiffs’ theory of ownership never shifted, nor did Plaintiffs obfuscate anything.

In the end, the only mistake Plaintiffs made was in identifying T-Peg’s ownership in the registration certificate as stemming from a work for hire, when it should have indicated that it was by transfer from TEI. This mistake was innocent and, as the Court has already determined, neither Defendants nor the U.S. Copyright Office suffered prejudice by it. Order of 3/27/09 at 7. As much as Defendants want to attribute malicious intentions to Plaintiffs in this litigation, the record simply does not support that conclusion nor does it justify additional discovery.

**C. The Issue Of Standing Is Already Resolved In Plaintiffs' Favor**

Defendants' motion should be denied because the question of standing and copyright ownership is settled, having already been decided by the Court in Plaintiffs' favor. In its Order of March 28, 2008, the Court determined that, as between the two Plaintiffs, the determinative issue was T-Peg's ownership of the copyright in the architectural work. Order of 3/28/08 at 11. In order to address this question fully, and recognizing the importance of resolving standing before trial, the Court instructed the parties to submit briefs containing a comprehensive statement of disputed and undisputed facts and argument as to T-Peg's copyright ownership. Id. at 12. The Court further instructed that the parties confer separately and develop a schedule for submitting the briefs to the Court. Id. at 17.

The parties conferred as directed by the Court and Defendants agreed to a schedule for briefing that required Plaintiffs to submit their brief first, with Defendants' brief to be submitted three weeks later. At no time before or during the conference did Defendants' counsel indicate any need or desire to undertake additional discovery from Plaintiffs on the issue of standing and copyright ownership. Defendants also did not raise the issue during the three week period after it received Plaintiff's brief. Finally, nowhere in Defendants' brief did they raise any qualm with the amount of discovery they had been provided nor did they assert that additional discovery was required to properly join the standing and ownership arguments. See Document 153.

By Order dated March 27, 2009, the Court held that "T-Peg owned the copyright it registered." Order of 3/27/09 at 4. In reaching this decision, the Court observed that Defendants' brief failed to address the issues raised by the Court or even challenge the facts presented by Plaintiffs. Id. at 2. Rather, Defendants focused their brief on an extraneous service agreement involving TEI that had no bearing on T-Peg's standing or copyright ownership. Id.

This Court found the Plaintiffs' position "uncontested" and ruled in Plaintiffs' favor on standing and copyright ownership. Id. at 4. The Court's ruling resolved standing and copyright ownership in Plaintiffs' favor, the issue is now closed, Defendants need no additional discovery, and the parties need not consume trial time on this issue.

**D. Defendants' Due Process Rights Are Not At Stake**

The notion that Defendants' "due process rights" require additional discovery also lacks merit. This case was filed in 2003 and the Court approved a discovery plan in which the parties agreed to a discovery period lasting almost a year and that closed January 14, 2005. See Order of 2/16/04. Defendants pursued discovery rigorously, propounding interrogatories and document requests that fully probed, among other things, Plaintiffs' corporate status, their "affiliates," and their employees, just like Defendants' propose to do now. See Defendants' First Interrogatories and Requests to Produce to Plaintiffs, attached hereto as Exhibit B.

Defendants' interrogatories specifically sought detailed information about officers, directors, and shareholders for T-Peg and its subsidiaries, the identities of anyone involved in the "design work" for Isbitski, and the "design time" spent on the Isbitski project. Id. at Interrogatories 1, 8 & 10. Defendants' also requested all documents concerning these topics as well as any documents, "including contracts," between Plaintiffs and Timberpeg Services, Inc. and/or Timberpeg Design Services. Id. at Document Request 7.

Plaintiffs answered Defendants' discovery requests and produced responsive documents, including the agreement that conveyed co-ownership rights in all copyrights to T-Peg and TEI and the service agreement between TEI and Timberpeg Services, Inc. Plaintiff also made available for deposition a host of employees who had knowledge of Plaintiffs' "corporate status," the inter-company agreements, as well as the preparation of Plaintiffs' architectural work.

For their part, Defendants pointedly pressed the issue of Plaintiffs' "corporate status" from early on in the discovery period, even objecting at depositions to the use of the word "Timberpeg" to collectively describe Plaintiffs:

**Mr. Will:** And what do you understand to be the business of Timberpeg?

**Mr. Friant (Deponent):** They do post and beam frames.

**Mr. Whittington:** Before you answer, I object to the use of the term Timberpeg unless you tell us who Timberpeg is.

**Mr. Will:** Noted. Are you instructing him not to continue answering the question?

**Mr. Whittington:** Oh, he can answer, but I think its a meaningless question. And if you want to use this at some point, I'll object to it because you haven't defined who Timberpeg is, and in light of the pleadings in the case, it ain't obvious.

Deposition Transcript of Douglas Friant, August 10, 2004 at 47-48.<sup>2</sup> The issue of what "Timberpeg" was and which entity owned the copyright was front and center in Defendants' litigation strategy and the focus of their discovery efforts.

More than four months before the close of discovery, in August 2004, Defendants moved for summary judgment on the issue of standing and used Plaintiffs' separate corporate identities to challenge copyright ownership. Document 23. Plaintiffs objected and pointed to the agreement between T-Peg and TEI as evidence of their co-ownership in the copyright – the very same document Plaintiffs' produced to Defendants in the first round of discovery in the case, and on which Plaintiffs relied in their standing brief submitted in 2008.<sup>3</sup> Document 24. Defendants

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<sup>2</sup> Defense counsel's objection was itself meaningless because, as noted already, Defendants were themselves identifying Plaintiffs as "Timbepeg" in their documents. See Exhibit A.

<sup>3</sup> Later, when Plaintiffs again cited the agreement between T-Peg and TEI in its standing brief in 2008, Defendants claimed Plaintiffs somehow "changed" their theory of copyright ownership even though Plaintiffs relied on the same agreement in its objection to Defendants' 2004 motion for summary judgment on standing.

did not challenge the agreement nor did they pursue the matter further in the remaining four months of discovery. In fact, Defendants noticed depositions for the fall of 2004 to depose a number of Plaintiffs' executives, including Plaintiffs' owner who had authenticated by affidavit the agreement between T-Peg and TEI granting co-ownership rights in the copyright and Plaintiffs' corporate counsel. Defendants did not pursue the issue of the agreement between T-Peg and TEI in any of their depositions, not even with Plaintiffs' corporate counsel.

In short, Defendants thoroughly explored Plaintiffs' "corporate status" and its employees during the discovery period in this litigation. They were also aware well before the January 2005 close of discovery that Plaintiffs were relying on the agreement between T-Peg and TEI to establish ownership and standing. Plaintiffs should not now be burdened to respond to additional "expedited" discovery when trial is little more than a month away, Defendants have already exhausted all the subjects of discovery they falsely claim they "never" had an opportunity to explore, and this Court has conclusively determined the standing issue in T-Peg's favor. This is all the more the case given that Defendants neither specify what additional information they seek, nor how it will bear on the standing inquiry, nor why they have not sought it to date.

#### **E. Defendants Are The Ones Without Standing**

Finally, the Defendants' pursuit of the standing issue - their last shot at keeping the jury from seeing how similar their frame drawings are to the Plaintiffs' architectural work - itself is misplaced. This is because Defendants do not have standing to challenge the agreements between T-Peg, TEI and Timberpeg Services, Inc., which are the agreements that create Plaintiffs' standing. Billy-Bob Teeth, Inc. v. Novelty, Inc., 329 F.3d 586, 591 (7th Cir. 2003). Billy-Bob involved an owner's transfer of his copyright in a work to a company he founded after the work had been created. Billy Bob Teeth, 329 F.3d at 589. The company registered the

copyright as a work made for hire and, later, sued the defendant for infringement of the copyright. Id. at 589-90. The defendant challenged the company's standing to bring the infringement action because a writing did not exist memorializing the copyright transfer.<sup>4</sup> Id. To rectify this oversight, the owner executed an agreement on the eve of trial that memorialized his prior transfer of the copyright to his company. Id. The United States Court of Appeals for the Seventh Circuit held that the writing, even though executed on the eve of trial, ratified the earlier "oral" transfer.<sup>5</sup> Id. Thus, the company was vested with standing to prosecute the infringement action, thereby mooting the defendant's motion. See id.

The Court also noted that the issue was irrelevant anyway since the defendant itself did not have standing under the Copyright Act to challenge the copyright transfer in the first instance. Id. at 592. The Court observed that the writing requirement under the Copyright Act is in the nature of a statute of frauds and is designed to resolve disputes among copyright owners. Id. Thus, where there is no dispute between the copyright owner and the transferee about the status of the copyright ownership, "it would be unusual and unwarranted to permit a third-party infringer to invoke section 204(a) to avoid suit for copyright infringement." Id. at 592-93 (quoting Imperial Residential Design, Inc. v. Palms Development Group, Inc., 70 F.3d 96, 99 (11th Cir. 1995) (internal quotations omitted)).

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<sup>4</sup> The defendant also challenged the copyright registration on the grounds that the work was not a work made for hire, as indicated on the application, since the work was created *before* the company existed or had employees. The Court brushed aside the significance of this registration defect, noting "case law is overwhelming that inadvertent mistakes on registration certificates do not . . . bar infringement actions, unless the claimant intended to defraud the Copyright Office by making the misstatement." Billy-Bob Teeth, 329 F.3d at 591 (internal quotations omitted).

<sup>5</sup> The Court construed the prior "oral" transfer requirement loosely, noting that corporations cannot literally discuss anything with anyone. Instead, it was sufficient for purposes of establishing a prior oral transfer that the owner acknowledged the intention to transfer the copyright to his company when he incorporated it. Billy-Bob Teeth, 329 F.3d at 592.

Here, the only conceivable purpose of Defendants' expedited discovery is so that they can take a third bite at the apple to challenge T-Peg's standing as owner of the copyright in the architectural work. Neither T-Peg, TEI nor any other Timberpeg company has ever disputed that T-Peg is a rightful co-owner of the copyright in this action. Defendants have no legitimate reason for the expedited discovery they seek because they do not have standing to challenge the agreement that creates T-Peg's copyright ownership.

**F. Conclusion**

For all the foregoing reasons, Defendants' motion for expedited discovery should be denied.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court:

- A. Deny Defendants' Renewed Motion To Reopen Discovery On Standing And Copyright Ownership Issues, And For Expedited Discovery Responses;
- B. Confirm that standing is not an issue appropriate to be pursued at trial; and
- C. Grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,

T-PEG, INC. AND  
TIMBERPEG EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: August 5, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, August 5, 2009, a copy of the foregoing Objection to Defendants' Renewed Motion To Reopen Discovery On Standing And Copyright Ownership Issues, And For Expedited Discovery was transmitted to W.E. Whittington, Esquire in accordance with the Court's Administrative Procedures of Electronic Filing.

/s/ Jonathan M. Shirley  
Jonathan M. Shirley