

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

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

PLAINTIFFS’ FINAL PRETRIAL STATEMENT

NOW COME Plaintiffs T-Peg, Inc. (“T-Peg”) and Timberpeg East, Inc. (“TEI”) by and through their attorneys, Devine, Millimet & Branch, Professional Association, and submit the following Pretrial Statement pursuant to L.R. 16.2.

I. BRIEF STATEMENT OF THE CASE

Plaintiffs claim Defendants’ timberframe, as reflected in shop drawings and as erected, infringes Plaintiffs’ copyrighted architectural work. Timberframing is a method of creating a structure that will support the walls and roof of a building and define the layout, in this case, a house. Defendants deny Plaintiffs’ allegations and deny that they used, or even possessed, plans that embody Plaintiffs’ copyrighted architectural work when they designed, manufactured, and erected the timberframe.

II. STATEMENT OF UNCONTESTED AND CONTESTED FACTS

A. Statement of Uncontested Facts

Plaintiffs believe the following facts to be undisputed:

1. TIMBERPEG[®] is a federally registered trademark used by a family of companies to promote, design, manufacture, and sell TIMBERPEG[®] brand post and beam home packages.
2. T-Peg owns the TIMBERPEG[®] trademark and licenses the mark to a group of related companies, all owned by T-Peg, which includes TEI. The related companies use the trade name “Timberpeg” to promote their common business.
3. TEI, a wholly-owned subsidiary of T-Peg, is responsible for sales of TIMBERPEG[®] product in the Northeast. Timberpeg Services, Inc. (“Timberpeg Services”) also a wholly-owned subsidiary of T-Peg, provides drafting and manufacturing services to TEI, as well as other related Timberpeg companies operating in other regions. Timberpeg Services operates solely for the benefit of the Timberpeg companies and does not independently provide services to the public or any unrelated companies.
4. The common goal of T-Peg, TEI and Timberpeg Services is to promote and sell TIMBERPEG[®] brand product. Consequently, T-Peg, TEI, and Timberpeg Services have contractual agreements whereby copyright interests are transferred and drafting services are provided by Timberpeg Services and paid for by TEI. T-Peg registers copyright interests, but TEI maintains co-ownership in the copyright arising from TEI projects.
5. Vermont Timber Works, Inc. (“VTW”) is a company located in Vermont, which specializes in timber framing. VTW has no architects on staff. VTW utilizes architectural plans or sketches to fit frames to the houses those plans or sketches reflect.

6. VTW needs some significant information – footprint dimensions, wall height and roof pitch at a minimum – in order to design a frame. If a customer comes to VTW without that information, VTW will generally refer that customer to an architect, because architectural elements will drive the location of the timberframe components.

7. VTW was founded by Douglas Friant and Dan Kelleher. Mr. Friant is the only person at VTW who does any drafting of timber frame drawings.

8. Timberframing is a method of framing a building utilizing posts and beams, which, generally, remain visible inside of the building.

9. The timberframe provides, in essence, the skeleton of a house, to which are affixed external siding and roofing, again, typically with the frame itself visible on the interior.

10. Timberframed buildings are unusual in that the timber frame itself – the structural component of the building – also defines the spaces within the building. A timber frame, therefore, can define the size, shape and intended layout of the building.

11. Architectural works – in this case the design of a house – are reflected, among other ways, in so-called architectural plans. Architectural plans typically consist of floor drawings, elevations, sections, roof plans, and, sometimes, perspectives, which show the overall scope of a building. Architectural plans reflect a building's size, shape, layout or floor plan, and dimension.

12. In the context of a timberframed building, the design of any particular timberframe may be reflected in so-called shop drawings. Shop drawings reflect the

components of the timberframe, meaning their location and their connections. VTW makes shop drawings for the timberframes they manufacture and erect.

13. It is typical to utilize architectural plans in the design process of a timberframe, and architectural plans will often include designations for the locations of the frame components. The Timberpeg plans at issue in this litigation include such designations.

14. On November 1, 1999, an individual named Stanley J. Isbitski entered into an agreement with Timberpeg called “Deposit Agreement For Timberpeg Preliminary Plans And Drawings,” (“Design Agreement”).

15. The Design Agreement provided that Timberpeg would prepare so-called preliminary plans, which would include the basement plan, floorplans, four elevations, and a cross section.

16. The Design Agreement also provided that Timberpeg East, Inc. and/or its assigns, would own the copyright in the plans created and, had Mr. Isbitski provided materials by way of sketches or other materials (which he did not), those materials would have become the property of TEI.

17. On or about December 29, 1999, Timberpeg completed the first set of preliminary plans, and supplied those plans to Mr. Isbitski.

18. The plans reflected the design of a house, the main portion of which was to be timberframed, and a master bedroom wing of which was to be “stick built,” meaning standard framing with two inch lumber, and not posts and beams.

19. In early December 2000, Mr. Isbitski first met with representatives of VTW.

20. Among other documents, Mr. Isbitski brought a set of Timberpeg architectural plans with him, and showed them to VTW representatives.

21. According to VTW, Mr. Isbitski wanted a different frame style, known as a “bent” frame and different frame component joinery

22. In early 2001, Mr. Isbitski met with Lynn Cole of TEI, and Lynn Cole prepared a new floorplan for Mr. Isbitski. Mr. Cole noted “Copyright Timberpeg” on the right-hand side of the floorplan.

23. On or about April 20, 2001, Timberpeg completed a second set of architectural plans for Mr. Isbitski, which reflected the earlier meeting between Mr. Isbitski and Mr. Cole.

24. Timberpeg registered those plans as an architectural work with the Copyright Office, and that set of plans, and the architectural work they reflect, form the basis of this action. The copyright became effective on May 18, 2001. Timberpeg delivered the plans to Mr. Isbitski for his further review and comment.

25. Mr. Isbitski made no further substantive revisions to the overall design of the house. He did, however, ask Timberpeg to frame his house design in a bent style.

26. In September 2001, at Mr. Isbitski’s request, Timberpeg prepared construction drawings for Mr. Isbitski’s residence intending to frame the house with a so-

called bent timberframe system.

27. Except for providing for a bent frame, the construction plans duplicate the design embodied in the copyrighted plans.

28. Timberpeg sent the construction plans to Mr. Isbitski on or about September 19, 2001.

29. On or about February 20, 2002, VTW revised shop drawings of a timberframe for the portion of Mr. Isbitski's residence which the Timberpeg plans show to be timberframed.

30. Mr. Friant, who drew the shop drawings, testified that he had prepared between 10 and 20 revisions prior to February 20, 2002, but that VTW did not keep any of the prior revisions.

31. The last revision to VTW's shop drawings occurred in May 2002.

32. VTW went on to cut and erect the timberframe for the Isbitski residence.

33. The footprint of the timberframed portion of the Isbitski house is nearly identical in both sets of plans. The sole difference is two feet of width in the kitchen "bump out."

34. The overall dimensions of Timberpeg's design and VTW's timberframe are the same.

35. The stair is the same design (switchback stairs) and in the same exact location in both the Timberpeg design and VTW timberframe.

36. The area shown as the loft is the same size and in the same location in both designs.

37. The height of the walls is the same in both designs.

38. The pitch of the roof is the same in both designs.

39. The isometric (three dimensional) renderings in the VTW shop drawings show rooms (living room, dining room, kitchen) in the same location as in the Timberpeg architectural plans.

40. The VTW frame accommodates the exact locations for the windows and doors as shown on the Timberpeg plans. The VTW frame also accommodates connection to the stick framed portion of the house embodied in the Timberpeg plans.

41. On behalf of VTW, in response to correspondence from Timberpeg counsel, VTW's attorney, Molly Sinclair, confirmed VTW contracted with Mr. Isbitski to design a frame "to accommodate floor plans of his house."

42. On behalf of VTW, in response to correspondence from Timberpeg counsel, another VTW attorney, John T. Welch, reiterated that Mr. Isbitski asked VTW to design a frame to fit a portion of the floorplans of his house.

43. Attorney Welch also confirmed that Mr. Isbitski provided a set of Timberpeg plans to VTW.

44. Attorney Welch confirmed that VTW "provided to Mr. Isbitski with [sic] an acceptable timber frame cut to [Mr. Isbitski's] drawings."

45. Douglas Friant is one of two owners of VTW.

46. Douglas Friant did all of the drafting and design of the VTW timberframe for the Isbitski house.

47. Douglas Friant oversaw the erection of the VTW timberframe for the Isbitski house.

48. Mr. Isbitski paid VTW \$66,350 for the VTW timberframe.

B. Statement of Facts Which Defendants Contest

Plaintiffs believe that Defendants contest the following facts asserted by Plaintiffs. Plaintiffs list the following facts as contested only to comply with LR 16.2. By listing these facts as contested, Plaintiffs do not in any way mean to suggest or imply that the dispute over these facts raises any genuine issue of material fact or that any evidence supports any such dispute.

1. VTW possessed and used Timberpeg's copyrighted architectural plans during the design, manufacture, and erection of the VTW timberframe for the Isbitski home.

C. Statement of Facts Which Plaintiffs Contest

Plaintiffs contest the following facts asserted by Defendants. Plaintiffs list the following facts as contested only to comply with LR 16.2. By listing these facts as contested, Plaintiffs do not in any way mean to suggest or imply that the dispute over these facts raises any genuine issue of material fact or that any evidence supports any such dispute.

1. Neither VTW nor Mr. Friant used Plaintiffs' architectural plans embodying Plaintiffs' copyrighted architectural work in the manufacture and erection of

the Isbitski timberframe.

III. **STATEMENT OF APPLICABLE LAW AND DISPUTED ISSUES OF LAW**

This action is governed by the federal copyright statute, 17 U.S.C. § 501-5.

Presently, several disputed issues of law are before this Court. These issues include (i) whether the question of Plaintiffs' standing is already fully settled by the Court and Defendants should be barred from raising issues of Plaintiffs' standing at trial, and (ii) whether Defendants should be precluded at trial from presenting the "severability" or "dissection" test for the jury to evaluate substantial between Plaintiffs' architectural work and Defendants' infringing work.

The plaintiffs reserve the right to supplement this statement of applicable law and disputed issues of law up to the time of trial.

IV. **WITNESS LIST**

A. **Witnesses Whom the Plaintiffs Expect to Call**

For the purpose of complying with LR 16.2(a), Plaintiffs identify the following witnesses whom they expect to call at trial:

1. James Driesch
Timberpeg Services, Inc.
Main Street
West Lebanon, NH 03784
2. Lynn Cole
PO Box 5023
Hanover NH 03755
603-863-6519
3. Richard Neroni
Timberpeg Services, Inc.
Main Street
West Lebanon, NH 03784
4. Robert Britton
Timberpeg East, Inc.

101 Twistback Road
Claremont, NH 03743

5. Jonathan Vincent
PO Box 220
Norwich, VT 05055
802-649-1807
6. Douglas Friant
Vermont Timber Works, Inc.
120 Bridge Street
Springfield, VT 05156
7. Kim Hentschel
Claremont, NH (?)

B. Witnesses Whom the Plaintiffs May Call If the Need Arises.

Plaintiffs may call the following witnesses if certain other witnesses are not available, or if needed to rebut testimony of any of Defendants' witnesses, or if the need otherwise arises:

1. Stephen Woods
T-Peg, Inc.
68 Lyme Road
Hanover, NH 03755
2. A representative of Murus Corp.
3. A VTW witness to be designated on VTW's profits from the Isbitski project.
4. The Building Inspector for the Town of Salisbury, NH.
5. James Ward.
6. Matt Dupee.
7. Any witness listed in Defendants' Pretrial Statement.
7. Any witness who is necessary to lay a proper foundation for the admission of any exhibit listed in this pretrial statement or any fact discovered prior to or during the trial.

8. Plaintiffs reserve the right to amend the foregoing lists of witnesses at any time upon reasonable notice to Defendants.

V. **WRITTEN WAIVER OF CLAIMS OR DEFENSES**

Plaintiffs do not waive any claims or defenses.

VI. **LIST OF DEPOSITIONS WHICH MAY BE READ INTO EVIDENCE**

Plaintiffs reserve the right to read into evidence any depositions which have been or may be taken, consistent with the Federal Rules of Evidence, including (but not limited to) the depositions of a Murus Corp. representative and Douglas Friant. Plaintiffs reserve the right to take additional trial testimony by deposition for witnesses who are unavailable for attendance at trial.

VII. **EXHIBITS**

For the purpose of complying with LR 16.2(a), Plaintiffs identify the following exhibits that they expect to introduce at trial. Plaintiffs reserve the right to supplement or amend this list of exhibits as case preparation continues. Some of the listed exhibits are generically described. Plaintiffs do not represent that they will necessarily introduce each of these exhibits into evidence. Rather, Plaintiffs reserve the right to do so. Plaintiffs also reserve the right offer as an exhibit any document or item marked during any deposition taken in this case, any document produced by any party in discovery, any exhibit listed by the defendants, and any exhibit necessary or appropriate for cross-examination, impeachment, foundation, rebuttal, or corroboration.

NUMBER/ LETTER	DESCRIPTION
1 (id)	Photograph of hardware at support beams (Bates No. TIM000046)
2 (id)	Photograph of hardware at support beam (Bates No. TIM000047)
3 (id)	Photograph of hardware at support beams (Bates No. TIM000048)
4 (id)	Photograph of hardware at support beam (Bates No. TIM000049)
5 (id)	Photograph of hardware at support beam (Bates No. TIM000050)
6 (id)	Photograph of hardware at support beam (Bates No. TIM000051)
7 (id)	Photograph of hardware at support beam (Bates No. TIM000053)

NUMBER/ LETTER	DESCRIPTION
8 (id)	Photograph of hardware at support beam (Bates No. TIM000054)
9 (id)	Photograph of hardware at support beam (Bates No. TIM000055)
10 (id)	Timberpeg blueprints (Bates No. TIM000396 to TIM000403)
11 (id)	Timberpeg plans with September revisions (Bates No. TIM000476 to TIM000485)
12 (id)	Timberpeg blueprints (Bates No. TIM000404 to TIM000411)
13 (id)	Timberpeg blueprints (Bates No. TIM000421 to TIM000430)
14 (id)	Timberpeg blueprints (Bates No. TIM000440 to TIM000453)
15 (id)	Timberpeg's "Registered Plans" dated 4/20/01 and registered with the Copyright Office on 5/8/01 (Bates No. TIM000454 to TIM000459)
16 (id)	Vermont Timber Works's shop drawings (Bates No. VTW000001 to VTW000007)
17 (id)	Vermont Timber Works' revised shop drawings (Bates No. VTW000175 to VTW000187)
18 (id)	Vermont Timber's shop drawings used by Murus (Bates No. MUR000001 to MUR000010)
19 (id)	Vermont Timber Works' shop drawings, 7 sheets [Exhibit 1 from Phillips' deposition]
20 (id)	Murus' panel layouts (Bates No. MUR000011 to MUR000013)
21 (id)	Timberpeg's elevation sheets used by Murus (Bates No. MUR000014 to MUR000022)
22 (id)	Certificate of Registration for T-Peg, Inc., application received date 5/18/04 (Bates No. TIM000001 to TIM000002)
23 (id)	Deposit Agreement for Timberpeg and Stanley Isbitski dated 11/1/99 [Exhibit 6 from Doug Friant's deposition] (Bates No. TIM000104)
24 (id)	Timberpeg's Preliminary Plan Request (Bates No. TIM000081)
25 (id)	Original sketches from Old Hampshire Designs (Bates No. TIM000108 to TIM000113)
26 (id)	Timberpeg's Fax to Stanley Isbitski from Lynn Cole re: revised sketches dated 2/5/01 (Bates No. TIM000215 to TIM000219)
27 (id)	Timberpeg's Design Information Form for customer Stanley Isbitski dated 3/26/01 (Bates No. TIM000058 to TIM000069)
28 (id)	Correspondence to Stanley Isbitski from Lynn Cole at Timberpeg re: copies of sketches dated 3/30/01 (Bates No. TIM000211 to TIM000214)
29 (id)	Timberpeg's Fax to Kathy Kanter and Joe Downey re: revisions for Isbitski Plan dated 4/16/01 (Bates No. TIM000071 to TIM000073)
30 (id)	Timberpeg's Fax to Kathy Kanter re: revisions for Isbitski Plan dated 4/30/01 (Bates No. TIM000074 to TIM000076)
31 (id)	Timberpeg's Fax to Joe Downey and Jesse Kendall from Lynn Cole re: change timberframe to bent type frame date 5/2/01 Bates No. TIM000197 to TIM000199
32 (id)	Hearthstone Timber Frame Photo [Exhibit 3 from Doug Friant's deposition]

NUMBER/ LETTER	DESCRIPTION
33 (id)	Timberpeg's Contact Note of 8/1/01 (Bates No. TIM000077)
34 (id)	Timberpeg's Construction Plan Request (Bates No. TIM000080)
35 (id)	Timberpeg's internal Fax to Jay Tucker from Lynn Cole re: phone conversation with Stanley Isbitski dated 8/6/01 (Bates No. TIM000180)
36 (id)	Timberpeg's Fax to Kathy Kanter re: picture of bent style timberframe dated 8/9/01 (Bates No. TIM000083)
37 (id)	Photocopy of photograph re: post and beam interior (Bates No. TIM000087)
38 (id)	Timberpeg's Fax to Lynn Cole from Chad Rivet dated 8/31/01 (Bates No. TIM000084 to TIM000086)
39 (id)	Correspondence to Stanley Isbitski from Pam Joslin at Timberpeg re: amount due on account dated 9/20/01 (Bates No. TIM000126 to TIM000127)
40 (id)	Correspondence to Stanley Isbitski from Lynn Cole at Timberpeg re: status of manufacturing and amount due on account dated 8/14/02 and the undelivered envelope (Bates No. TIM000142 and TIM000143)
41 (id)	Correspondence to Stanley Isbitski from Lynn Cole at Timberpeg re: amount due on account and close out of Isbitski's Timberpeg Design Agreement dated 9/25/02 and invoice dated 7/23/02 (Bates No. TIM000149 and TIM000150)
42 (id)	Correspondence to Stanley Isbitski and Vermont Timber Works from Attorney Stephen Woods for Timberpeg re: notification of copyright infringement dated 6/23/03 [Exhibit 28 from Doug Friant's deposition] (Bates No. TIM000370 to TIM000372)
43 (id)	Correspondence to Attorney Stephen Woods for Timberpeg from Attorney Molly Sinclair for Vermont Timber Works re: rejection of copyright infringement claim dated 7/14/03 [Exhibit 29 from Doug Friant's deposition] (Bates No. TIM000392 to TIM000393)
44 (id)	Correspondence to Attorney Stephen Woods for Timberpeg from Attorney John Welch for Vermont Timber Works re: denial of copyright infringement dated 9/22/03 [Exhibit 30 from Doug Friant's deposition] (Bates No. TIM000390 to TIM000391)
45 (id)	Copyright Contract between T-Peg and TEI (Bates No. TIM000888)
46 (id)	Service Agreement between T-Peg and TEI (Bates No. TIM000889 to TIM000890)
47 (id)	Service Agreement between Timberpeg Design and TEI (Bates No. TIM000891 to TIM000892)
48 (id)	Design charges from Timberpeg Design to TEI (Bates No. TIM000894 to TIM000901)
49 (id)	"New post & beam" (Bates No. TIM001063)
50 (id)	"New Timberpeg" (Bates No. TIM001064)
51 (id)	Real estate listing for completed Isbitski residence (Bates No. TIM001063 to TIM001076)
52 (id)	Expert Report of Jonathan Vincent including attached photographs

NUMBER/ LETTER	DESCRIPTION
53 (id)	Jonathan Vincent's handwritten notes of his site visit
54 (id)	Correspondence to Stanley Isbitski from Kim Hentschel at Vermont Timber Works re: budgetary proposal dated 12/8/00 [Exhibit 2 from Doug Friant's deposition]
55 (id)	Handwritten note re: eliminating rafters to match Hearthside's photos (Bates No. VTW000110)
56 (id)	Vermont Timber Works' Isbitski estimate dated 12/6/00 [Exhibit 5 from Doug Friant's deposition]
57 (id)	Vermont Timber Works's December 6 budget pricing (Bates No. VTW000126)
58 (id)	Handwritten Notes dated 12/14/00 [Exhibit 7 from Doug Friant's deposition]
59 (id)	Vermont Timber Works' Isbitski estimate dated 1/0/00 [Exhibit 4 from Doug Friant's deposition] (Bates No. 00032-00036)
60 (id)	Handwritten Notes dated 1/4/01 [Exhibit 8 from Doug Friant's deposition]
61 (id)	Handwritten Notes undated [Exhibit 9 from Doug Friant's deposition]
62 (id)	Vermont Timber Works' Isbitski estimate dated 5/30/01 [Exhibit 10 from Doug Friant's deposition]
63 (id)	Vermont Timber Works' Isbitski proposal dated 6/4/01 [Exhibit 11 from Doug Friant's deposition] (Bates No. 000117)
64 (id)	Vermont Timber Works' Isbitski revised proposal dated 6/11/01 [Exhibit 12 from Doug Friant's deposition] (Bates No. 000124)
65 (id)	Handwritten Notes dated 12/6/01 [Exhibit 13 from Doug Friant's deposition] (Bates No. 000105)
66 (id)	Vermont Timber Works' Isbitski revised proposal dated 12/10/01 [Exhibit 14 from Doug Friant's deposition]
67 (id)	3/7/02 Bid on frame (Bates No. VTW000029)
68 (id)	12/10/01 Bid on frame (Bates No. VTW000030)
69 (id)	Vermont Timber Works' Isbitski estimate dated 12/10/01 [Exhibit 15 from Doug Friant's deposition]
70 (id)	Handwritten Notes dated 2/12/02 [Exhibit 16 from Doug Friant's deposition]
71 (id)	Correspondence to Stanley Isbitski from Kimberly Hentschel at Vermont Timber Works re: contract and deposit dated 3/8/02 [Exhibit 17 from Doug Friant's deposition] (Bates No. 000102)
72 (id)	Vermont Timber Works' Isbitski contract price dated 3/7/02 [Exhibit 18 from Doug Friant's deposition] (Bates No. 000037)
73 (id)	Correspondence to Stanley Isbitski from Kimberly Hentschel at Vermont Timber Works re: price to erect timber frame dated 6/17/02 [Exhibit 26 from Doug Friant's deposition] (Bates No. VTW000081-000082)
74 (id)	Bid on master bedroom (Bates No. VTW000072)
75 (id)	Vermont Timber Works' letter to Isbitski re: master bedroom (Bates No. VTW000075)

NUMBER/ LETTER	DESCRIPTION
76 (id)	Job specs on master bedroom (Bates No. VTW000076 to VTW000078)
77 (id)	Rick's Welding (metal connectors) (Bates No. VTW000170)
78 (id)	Invoice to Stanley Isbitski from Vermont Timber Works re: deposit and drawings dated 3/7/02 [Exhibit 19 from Doug Friant's deposition]
79 (id)	Invoice to Stanley Isbitski from Vermont Timber Works re: materials dated 3/27/02 [Exhibit 20 from Doug Friant's deposition]
80 (id)	Invoice to Stanley Isbitski from Vermont Timber Works re: shop fabrication dated 5/15/02 [Exhibit 24 from Doug Friant's deposition]
81 (id)	Invoice to Stanley Isbitski from Vermont Timber Works re: delivery, assembly, erection and final payment dated 6/4/02 [Exhibit 25 from Doug Friant's deposition]
82 (id)	E-Mail to Kimberly Hentschel from Doug Friant dated 8/12/04 [Exhibit 3 from Hentschel's deposition]
83 (id)	Sworn Statement of Kimberly Hentschel dated 6/16/04 [Exhibit 5 from Hentschel's deposition]
84 (id)	Draft/Revised Kim Hentschel Info [Exhibit 16 from Hentschel's deposition]
85 (id)	Defendant's Motion for Summary Judgment (Bates No. VTW005019 to VTW005045)
86 (id)	Timberpeg's Objection to Motion for Summary Judgment (Bates No. VTW005046 to VTW005074)
87 (id)	E-mail communications between Murus and Vermont Timber Works (Bates No. MUR000025 to MUR000031)
88 (id)	VTW Redacted Job Cost Master
89 (id)	Lynn Cole's Hand Drawn Floorplan (TIM 220-221)
90 (id)	Certified Copy of Town of Salisbury Building Department file showing Timberpeg plans on file
91 (id)	Timberpeg demonstrative trial exhibits
	VTW Unredacted Job Cost Master
	All Vermont Timber Works blueprints

VIII. ITEMIZED STATEMENT OF SPECIAL DAMAGES

Plaintiffs seek to disgorge Defendants of their gross profits from the infringement, or, alternatively, an award of statutory damages under the Copyright Act. Under the Copyright Act, Plaintiffs need only advance proof of the gross revenues Defendants received due to the infringing conduct. In this action, it is undisputed that Defendants earned \$66,350 in gross revenue from the Isbitski project.

IX. **DEMAND AND OFFER; ALTERNATIVE DISPUTE RESOLUTION**

Parties have participated in numerous mediation sessions, the most recent of which was before Magistrate Judge Muirhead on July 23, 2009. All mediation efforts have failed.

X. **CLAIM FOR ATTORNEYS' FEES**

The Copyright Act allows for an award of attorneys fees. See 17 U.S.C. § 505. Plaintiffs reserve the right to submit a claim for attorneys fees after the jury renders a verdict.

XI. **REQUEST FOR VIEW**

Plaintiffs do not request a view.

XII. **ESTIMATE OF LENGTH OF TRIAL**

Plaintiffs estimate that the trial will take four to five days

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: August 14, 2009

/s/ Jonathan M. Shirley
Daniel E. Will (#12176)
Jonathan M. Shirley (#16494)
111 Amherst Street
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(603) 669-1000

Of Counsel:

Stephen S. Woods, Esquire (#8240)
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(603) 643-6200

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing was electronically transmitted to W.E. Whittington, Esquire through the Court's Electronic Case Filing system.

Dated: August 14, 2009

/s/ Jonathan M. Shirley
Jonathan M. Shirley

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