

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’ MOTION IN LIMINE NO. 7, TO PRECLUDE EVIDENCE,  
TESTIMONY, OR REFERENCE TO SUBSEQUENT LICENSING  
OF PLAINTIFFS’ ARCHITECTURAL WORK**

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 submit this Motion in Limine to Preclude Evidence, Testimony, or any Reference to the Subsequent Licensing of Plaintiffs’ Architectural Work. In support of its motion, Plaintiffs state the following:

1. Plaintiffs claim Defendants’ timberframe, as reflected in shop drawings and as erected, infringes Plaintiffs’ copyrighted architectural work. Defendants’ timberframe was designed and constructed for a Stanley J. Isbitski.

2. After Defendants erected the timberframe, Mr. Isbitski defaulted on his financing with Sugar River Savings Bank (“Sugar River”). Sugar River foreclosed on the Isbitski property and sold the property, including the incomplete house, at auction. As part of that process, a representative of Sugar River negotiated with Plaintiffs so that Sugar River could provide

Plaintiffs' plans to the high bidder. Plaintiffs and Sugar River came to an arrangement pursuant to which Plaintiffs licensed the plans to Sugar River or its designee in exchange for Sugar River's payment of \$4,000.

3. During discovery, Defendants subpoenaed records from Sugar River concerning the agreement between Sugar River and Plaintiffs and later deposed Plaintiffs' witnesses concerning the transaction. Plaintiffs now move in limine to exclude evidence concerning the Sugar River transaction.

### **Argument**

4. Rule 401 of the Federal Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Plaintiffs assume that Defendants may offer evidence of the Sugar River transaction by way of trying to convince the jury (1) Plaintiffs have been compensated for defendants' infringement of the copyrighted plans, (2) whatever Plaintiffs received from Sugar River should be offset against any amount the jury may award Plaintiffs, or (3) defendants' infringement could have caused Plaintiffs no damage greater than what Plaintiffs received from Sugar River to license the plans. None of these purposes can be said to make any fact that is of consequence to the determination of this action more or less probable than it would be without the evidence.

5. A copyright owner possesses unlimited rights with respect to the work to which the copyright is attached. This includes all rights to commercially exploit the copyrighted work. Whether Plaintiffs was able to exploit commercially the Plaintiffs plans, therefore, has no bearing on whether Plaintiffs was damaged by Defendants' infringement.

6. Plaintiffs, moreover, have elected to forego seeking their actual damages – lost profits – from the infringement and will seek either to disgorge Defendants’ profits or statutory damages. Whether the Sugar River transaction sheds any light on the commercial value of the plans, therefore, is irrelevant to any issue in the case. What matters is either Defendants’ profits or the jury’s determination of appropriate statutory damages.

7. Moreover, Rule 403 of the Federal Rules of Evidence allows otherwise relevant evidence to be excluded if its probative value is substantially outweighed by the danger of confusing the issues or misleading the jury. Even if evidence of the Sugar River transaction is remotely relevant to some issue in this action, that evidence will require a significant detour into the details and circumstances surrounding that transaction that will consume considerable trial time. In light of the absence of a claim by Plaintiffs for its lost profits, evidence of the Sugar River transaction may mislead the jury into making improper adjustments to the damages award, to the unnecessary prejudice of Plaintiffs.

8. For all of these reasons, Plaintiffs respectfully request that this Court preclude any evidence, testimony, or reference to the licensing of the Plaintiffs plans to Sugar River.

9. Given the dispositive nature of this motion, no concurrence is necessary. See LR 7.1.

10. Given the authorities and argument cited herein, no memorandum of law is necessary. See LR 7.1.

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Exclude evidence and argument concerning the licensing of the Plaintiffs architectural work to Sugar River; and

B. Grant such further and other relief as this Court deems just, proper, and equitable.

Respectfully submitted,

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

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: August 14, 2009

By: /s/ Jonathan M. Shirley  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was this day forwarded to W.E. Whittington, Esquire, by electronic transmission through the Court's Electronic Case Filing system.

Dated: August 14, 2009

/s/ Jonathan M. Shirley  
Jonathan M. Shirley