

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

T-PEG, INC and)	
TIMBERPEG EAST, INC.,)	
Plaintiffs,)	
)	
vs.)	No. 03-CV-462-M
)	
STANLEY J. ISBITSKI and)	
VERMONT TIMBER WORKS, INC.,)	
Defendants.)	

DEFENDANT VERMONT TIMBER WORKS'
REPLY MEMORANDUM
SUPPORTING MOTION TO COMPEL

Defendant Vermont Timber Works, Inc. ("VTW") submits this reply memo supporting its motion to compel.

Work-Product and Attorney-Client Privilege *Not* At Issue

Timberpeg now raises issues – work-product and attorney-client privilege – which have never been at issue, and omits from its attachments earlier correspondence showing that VTW was always prepared to honor the work-product and attorney client privileges:

- As early as March 5, 2004, VTW indicated it would honor the work-product doctrine and attorney-client privilege. Thus VTW stated "[VTW is] not willing to withdraw the deposition notice as to Steve Woods. While it may be true that many of his communications with Timberpeg officers may be privileged (which I assume you will assert), there are plenty of other issues on which he has discoverable information, such as his letters and phone calls to VTW and its [prior counsel] and Timberpeg's suits against others." Ex. 7, attached.
- On March 8, Timberpeg showed it understood there was no dispute on privileged material: "Regarding Steve Woods, I continue to doubt that he has anything to offer that is relevant and not privileged. I reiterate my request for a better understanding from you as to what it is factually that you think Steve has to offer that is also non-privileged." Ex. 7.

- Timberpeg's March 31 formal objection it raised overbreadth, burden and relevance, *period*. There was no mention of work-product or privilege at all, since the parties had already clarified that Timberpeg had also shown it would respect these. (Ex. 2 to Mot. To Compel, Item 13).
- In VTW's April 2 letter trying to obtain compliance, it again clarified that it was only seeking non-privileged material: "We believe he has non-privileged information which may be admissible or lead to admissible evidence . . . [listing several categories]." (Ex. 3 to MTC)
- In Timberpeg's April 13 later response, it again never mentioned work-product or privilege at all, since the parties had already resolved it. (Ex. D to Objection, 3d para.)

So, to be clear, VTW has never sought work-product or privileged material. It does not seek it now.

The Pleadings And Non-Privileged Information On Other Copyright Suits Is Discoverable

VTW's quest for non-privileged information on other Timberpeg suits is highly likely to lead to relevant evidence and is discoverable. Based on the cases discovered through PACER, plaintiffs have brought at least eight copyright infringement suits. See Ex. 8, attached. In the two cases where VTW has been able to obtain complaints, those complaints have had virtual cookie-cutter identical claims and defenses similar to this one. Presumably there are other cases which are not reported in PACER, and threats to others which were resolved before suit was ever filed.

While VTW does not seek the work product and privileged materials relating to those suits, there is a great deal of other information – publicly filed pleadings, communications to adversaries, rulings, settlement agreements, etc. – which are likely to have direct relevance in this case. Some of those documents may even be res judicata against Timberpeg or bind it based on positions it has taken elsewhere.

By way of illustration, information concerning a similar, concluded case involving the same party is precisely the type of information found discoverable from that party's counsel in Pamida, Inc. v. E. S. Originals, Inc., 281 F. 3d 726, 730-31 (8th Cir. 2002) (information from concluded, prior patent case deemed discoverable).

The "Border" of the Copyrighted Drawings.

Timberpeg has apparently conceded the discoverability of these and produced them. This point is moot.

Stephen Woods' Deposition

Timberpeg cites (Objection at 10,11) two cases – Dunkin Donuts from the District of Puerto Rico and Shelton,¹ a 1986 Eighth Circuit case, which supposedly make it difficult to depose opposing counsel. A short perusal of the cases indicates that both are cases where the deposing party was seeking attorney work product material – which is not the case here. Thus, both cases analyzed the issue under the work product framework of FRCP 26(b)(3), which allows discovery of work product material only if there is no other way to get it.

That is not what VTW seeks, or has ever sought. The two cases are wholly irrelevant.

It cannot be seriously disputed that an in-house general counsel may be deposed regarding non-privileged, non-work-product material. E.g., Harding v. Dana Transport, Inc., 914 F. Supp. 1084 (D.N.J. 1996) (no general prohibition against deposing adverse counsel regarding

¹ In addition, the Shelton case was later limited by the Eighth Circuit in Pamida, Inc. v. E. S. Originals, Inc., 281 F. 3d 726, 730-31 (8th Cir. 2002), where it was clarified not to apply to counsel's knowledge of information from prior, completed cases involving the same client. "Shelton was not intended to provide heightened protection to attorneys who represented a client in a completed case and then also happened to represent that same client in a pending case Dynasty need not satisfy Shelton to depose the LHDL attorneys regarding information involving the concluded patent infringement case." Id.

relevant, nonprivileged information); Rainbow Investors Group, Inc. v. Fuji Tricolor Missouri, Inc., 168 F.R.D. 34 (D. La. 1996) (deposition of opposing counsel permitted where attorney may be fact witness, such as actor or viewer); Rock v. UNUM Life Ins. Co., 167 F.R.D. 88 (C.D. Colo. 1996) (insurer's general counsel not entitled to protective order); Cascone v. Niles Home for Children, 897 F. Supp. 1263 (D.C. Mo. 1995) (employer's attorney could be deposed with regard to actions taken by the attorney); United Phosphorus, Ltd. V. Midland Fumigant, Inc. 164 F.R.D. 245 (D. Kan. 1995) (attorneys with discoverable facts, not protected by attorney-client privilege or work product, are not exempt from being a source for discovery).

Here, Stephen Woods was active in operations, and negotiated and concluded agreements with third parties relating to the alleged copyrighted plans at issue here, before this case even began:

- (1) By obtaining documents from Sugar River Bank – a subsequent owner of the property on which the timber frame was erected – VTW learned that Mr. Woods demanded and obtained payment from the bank which far exceeded the amount it claims was unpaid here. See Ex. 9, consisting of 12 pages of correspondence between Woods and the bank, and a license agreement between Timberpeg and the bank, regarding the alleged copyrighted plans.
- (2) In addition, Woods repeatedly communicated with VTW itself, co-plaintiff Isbitski, and VTW's prior counsel. Ex. 7.
- (3) In addition, Woods is knowledgeable about Timberpeg's prior suits against others, as he bragged to VTW. Even if he were not, he could lead VTW to those who have information.

There simply is no reasonable basis on which VTW is not entitled to question Woods on the above, and other relevant, non-privileged information.

Efforts To Obtain Compliance

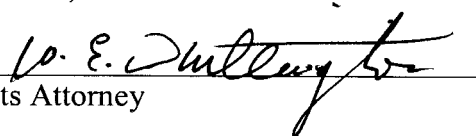
As shown above at pages 1-2, VTW has been trying to “consult” with Timberpeg since March 5, and Timberpeg keeps demanding more time to “consider” and reconsider its position, while using that as an excuse to delay production. VTW has undertaken reasonable consultation. It is not obligated to wait forever, particularly when Timberpeg has indicated it will not produce the information.

As demonstrated by Timberpeg’s objection, the matters here are truly disputed.

The Court should order production of the requested documents relating to other litigation, and should order Stephen Woods deposed, with the same rights to protect work product and privilege as with any other witness.

Date: April 27, 2004

VERMONT TIMBER WORKS, INC.
Defendant,

By: 
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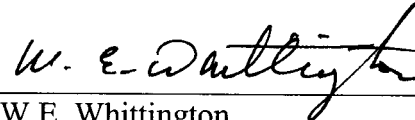
- Ex. 7 – Woods letters to VTW, Isbitski and VTW prior counsel
- Ex. 8 – Print-out from PACER showing certain Timberpeg suits
- Ex. 9 – Woods correspondence with Sugar River Bank, and license agreement with Bank

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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