

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’ MEMO IN SUPPORT OF
THEIR MOTION TO AWARD ATTORNEYS FEES

Defendants, Vermont Timber Works, Inc. and Douglas Friant (jointly “VTW”) have moved the Court, under 17 U.S.C. §505, for an award of their attorneys fees and expenses as prevailing parties in the case.

The undersigned conferred with plaintiffs’ counsel. Plaintiffs did not offer to pay any amount at all and do not assent to the relief sought in the motion.

In support of this motion, VTW states as follows:

Preliminary Statement

This case is six years old, and the Court is now intimately familiar with it.

Defendants made a conscious decision not to settle for releases but to go through the expense, burden and risk of trial because that was the only method by which they could “prevail” and thereby recoup litigation expenses which were, of course, were involuntarily incurred. Without an award of fees, the case will have been a monumental financial disaster for them. They believe a fee award is appropriate because –

- Plaintiffs knew from the start that the VTW frame did not “accommodate” the Timberpeg design (accommodation being the linchpin of their case), that 24 of the 26 posts were “different,” and that the Timberpeg windows and doors did not physically fit into the VTW design. Yet they continued to prosecute this case for six years, causing enormous financial and emotional consequences to both the corporate and individual defendant.

- Defendants were involuntarily involved in major litigation for six years despite having done nothing wrong.

- The Copyright Act and case law permit fee awards in situations such as this, and the First Circuit has held that fees *must* be awarded where the plaintiff makes “misleading misrepresentations” and/or made a “shift in its theory of the case to avoid summary judgment,” as shown below.

From the start, and several times during mediation, VTW offered to settle if its legal fees were paid by plaintiffs. Each time, plaintiffs refused and instead chose to continue a losing case to avoid paying VTW anything. Friant, and VTW’s other principal, Kelleher, spent hundreds of hours of company time on this baseless suit when they could have been earning a living. Those costs can never be recovered. VTW’s view, at the start and now, has not changed: the least Timberpeg should do is pay for the cost of the litigation, particularly after intentionally misleading the First Circuit (see p. 8 below) and doing everything in their power to prolong the case.

I. GOVERNING LEGAL STANDARDS

Congress has provided that in any case under the Copyright Act, the court “may allow the recovery of full costs . . . and may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. §505. The term “attorneys fees” includes all traditional

“expense” or “cost” items advanced by counsel in connection with the case. Invessys, Inc. v. McGraw-Hill Companies, Ltd., 369 F. 3d 16 (1st Cir. 2004).

The Supreme Court in 1994 clarified that under Section 505 “[p]revailing plaintiffs and prevailing defendants are to be treated alike.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994).

A. Factors To Be Considered.

The Supreme Court approved a “non-exclusive” list of factors to be considered, including “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” Fogarty v. Fantasy, *id.* at 534, note 19. See also, Mag Jewelry Co., Inc. v. Cherokee, Inc., 496 F. 3d 108, 122 (1st Cir. 2007).

The First Circuit has announced additional principles. “Dishonesty is not required for an award; even a case that is merely objectively weak can warrant such an award.” Invessys, Inc. v. McGraw-Hill Companies, Ltd., 369 F. 3d 16, 20-21 (1st Cir. 2004); Matthews v. Freedman, 157 F. 3d 25, 29 (1st Cir. 1998) (“[d]epending on other circumstances, a district court could conclude that the losing party should pay even if all of the arguments made were reasonable”). See also Yankee Candle Company, Inc. v. Bridgewater Candle Company, 140 F. Supp. 2d 111, 115-16 (D. Mass. 2001) (“An unreasonable claim need not be frivolous to be compensable Had Congress intended to condition the award of fees on the presence of bad faith, the statutory provision would have been surplusage. Indeed, unreasonableness is not even a requirement of a fee award.”) This Court quoted and relied on the above authorities in its ruling in Ferraris Medical, Inc. v. Azimuth Corporation, No. 2002 DNH 140, at 8.

Moreover, significantly for this case, the First Circuit’s most recent Section 505 pronouncement found the District Court’s refusal to award fees to the prevailing defendant to be

an abuse of discretion, and ordered that fees had to be awarded, where the plaintiff had made “misleading representations” and/or had made a “shift in its theory of the case to avoid summary judgment.” Mag Jewelry Co., Inc. v. Cherokee, Inc., 496 F. 3d 108, 122-23 (1st Cir. 2007). As noted below, these factors are also present here.

Finally, the court must articulate its rationale for awarding or declining to award fees. *Nimmer On Copyright* §14.10[D][2][b] at p. 14-168; Susan Wakeen Doll Co. v. Ashton Drake Galleries, 272 F. 3d 441, 457 (7th Cir. 2001).

B. Computation Of Fees

The Court is not required to make any reduction for fees having application to defense of state claims in the case, particularly where the state claims are based on identical fact allegations as the copyright claim, as here (and did not do so in its initial awarding of fees dated November 8, 2005). Invessys, Inc. v. McGraw Hill Companies, Ltd., 369 F. 3d. 16, 19-20 (1st Cir. 2004); Yankee Candle Company, Inc. v. Bridgewater Candle Company, LLC, 140 F. Supp. 2d 111, 122-23 (D. Mass. 2001) (state law claims rested on violations of copyright law, making claims sufficiently interwoven to make segregation impossible). Here, defendant prevailed on three state claims which the court found to be preempted because they were exactly coextensive with the copyright infringement claims. As to each, the Court made an express finding that the claim “alleges no conduct other than copying, and [plaintiff] suggests no additional element necessary.” February 9, 2005 Order at 24, 26-27. Thus the factual predicates for these counts were identical to those in the copyright allegations, and the legal work to prevail on these counts was based on the preemption clause contained in the Copyright Act itself, 17 §301(a). The Court should not reduce the legal fee award for defense of the state claims.

Additionally, time spent litigating in order to recover fees is compensable as part of the fee award. Harris v. McCarthy, 790 F. 2d 753 (9th Cir. 1986); Lund v. Affleck, 587 F. 2d 75, 77 (1st Cir. 1978); Souza v. Southworth, 564 F. 2d 609, 614 (1st Cir. 1977) (“to hold otherwise would permit a deep pocket losing party to dissipate the incentive provided by an award”).

Other legal principles will be cited in connection with the appropriate sections of the argument, below.

II. APPLICATION OF THE FOGARTY AND MAG JEWELRY FACTORS

As shown below, each of the Fogarty and Mag Jewelry factors strongly favors a fee award here.

A. Objective Unreasonableness; Frivolousness.

Objective unreasonableness of the action is strongly indicated by the evidence, as it finally came in at trial from plaintiffs’ own witnesses, as well as other actions of plaintiffs, as follows:

(1) Unreasonable assertion of “substantial similarity.” When the case finally came to trial, the evidence showed overwhelming that the VTW frame was not “substantially similar” to plaintiffs’ “form and spaces.” Or, to articulate this in the manner pursued doggedly by plaintiffs for six years, that the VTW frame was not designed in a manner to accommodate the Timberpeg work, including doors, windows, millwork, etc.

In this regard, the most dramatic exhibits and testimony were those created by plaintiffs themselves: (1) their “demonstrative exhibits,” DX 61 (Ex. 13 to this pleading), which depicted the VTW drawings superimposed on the Timberpeg work, and (2) PX “N” (Ex. 14 to this pleading) the exhibit summarizing the testimony of plaintiffs’ own expert and Chief of Design,

Jon Vincent, showing that “24 or 26 posts were different” in location, orientation, dimension and/or notching. In addition, the super-imposition of the Timberpeg and VTW designs on the same document, DX “W” (Ex. 15 to this pleading), also conclusively make this point.

In sum, that evidence – all from the mouths and CAD drawings of plaintiffs themselves – showed the following:

- Out of 11 window and door openings on the first floor, 9 do not physically fit into the VTW design.¹
- Out of 6 window and door openings on the 2d floor, all 6 do not fit into the VTW design.
- Out of 6 openings on the upper gable, all 6 do not fit into the VTW design.
- The sky lights don’t match, and would result in a VTW timber tie going right through the Timberpeg skylight.
- The kitchen bump-out doesn’t match.
- The Timberpeg French doors would be blocked by a VTW brace.
- Other Timberpeg windows would be blocked by VTW braces.
- Of 26 posts on the 1st floor foundation, 24 do not match.
- Timberpeg’s expert and Chief of Design, Vincent, admitted that the frames were “definitely different.”

The interfering windows, doors and millwork are all highly significant; in each case the Timberpeg elements would not even fit within the VTW frame, and the Timberpeg witnesses admitted over and over that in order to fit the design would have had to be changed or altered or that the specified elements would have to be changed altogether in order to co-exist.

¹ When asked at trial, Driesch (plaintiffs’ current Chief of Design) said that “it would be easier to move the [T-Peg] windows” than to cut out the [VTW] beams with a chainsaw.

Vincent (plaintiffs’ former Chief of Design) said that “the windows did not fit and would have to be changed.”

The deception is demonstrated by what plaintiffs omitted from their demonstratives just as much as what they included. Their PX 61 willfully omitted windows and skylights where VTW's beams ran right through the middle (at the kitchen bump-out and at the sky light locations). Plaintiffs did not even show the elevation of the kitchen wall on these demonstratives – clearly because VTW's posts would have run right through the T-Peg windows and a VTW purlin would have run right through the T-Peg skylights. Also, they could not have missed that a T-Peg bay-tie (referred to at trial as a “clothesline”) would have run at 11 feet right through the middle of the great room space on the VTW plan.

Timberpeg has a sophisticated design department and should have known, or was willfully blind to the fact, that the windows, doors and millwork did not fit, that the posts were substantially different, and that the timber frame itself was “definitely different.” As noted in their Doc. 61, pp 1-2, they disclosed two in-house employees as experts. Jonathan Vincent, T-Peg's Chief of Design, is a Harvard, Princeton and University of Chicago educated, licensed architect with extensive professional experience and accreditations. James Driesch, T-Peg's Chief Designer, has an Associates Degree in architecture and building engineering, and has been involved in architectural design at T-Peg since 1975. See Doc. 61 at pp 1-2 and Tabs A and C thereto. It is inconceivable that these two experts and, through them, plaintiffs, were unaware of these overwhelming differences from the beginning.

Despite that assumed awareness, plaintiffs purposely misled the Court as to substantial similarity so as to create false “disputed issues” to overcome summary judgment based on lack of substantial similarity. In their Objection to defendants' initial Motion For Summary Judgment, plaintiffs stated:

In addition, the post locations for the VTW frame posts are in the same location as shown on the Timberpeg plans with a few minor exceptions,

and the VTW frame accommodates the exact locations for the windows and doors as shown on the Timberpeg plans. See Vincent Report.

* * *

With respect to the “composition of spaces” element, VTW’s timberframe and drawings reflect the same interior room dimensions [in actuality, VTW’s frame reflects *no* room dimensions] [The VTW] frame itself (as opposed to the shop drawings) precisely accommodates the windows and doors in the same locations as the Timberpeg copyrighted plans. See Vincent Report.

Doc. 24, at 7 & 13 (emphasis added). They repeated these untrue factual allegations in Document 56, at 2. These fact representations were manifestly incorrect, and were designed to prevent, and did prevent, defendants from obtaining summary judgment on this substantial similarity point in 2004, before the case went through an additional 200 pleadings over the next five years.

They even went so far as to continue this deception at the First Circuit. As noted in the First Circuit opinion:

VTW asserts that its frame was able to support any number of designs, depending on how the panel and walls were applied to the frame, while the Timberpeg design showed a particular internal floor plan and external features. Timberpeg acknowledges that the frame was not determinative, but points out that VTW’s fame could accommodate Timberpeg’s whole house design (if one chose to do so).

459 F. 3d at 113 (emphasis added). That claim that VTW’s frame could accommodate is untrue today and was untrue at the time. It resulted in extended, expensive, and needless litigation for VTW.

(2) Allegations at odds with site visit. Plaintiffs visited the site but made allegations clearly at odds with what they saw on the ground. Plaintiffs could not have been confused about the dissimilarity. They (including their in-house General Counsel) visited the site and took photos of the frame erected by VTW, which clearly indicated it was an entirely

independent work. (Woods Deposition, Ex. 1 at 46-47, 54) And Vincent, plaintiffs' Chief of Design and expert witness, admitted that "the framing would be different, definitely." (Vincent Deposition, Ex. 2, at 105-106.)

Plaintiffs' witnesses, Vincent, Driesch and Cole, all testified – incredibly – that customers who purchase timber frames don't really pay attention to the look of the frame, but principally look at the posts on the first floor. The disingenuousness of this testimony is demonstrated by Vincent's deposition admission (which he grudgingly repeated in his cross examination at trial):

- Q. Once the work is completed, to a homeowner standing inside the timber frame depicted in [the T-Peg frame] as opposed to the same homeowner standing inside [the VTW frame], the two systems would look aesthetically quite different, would they not?
- T-Peg counsel: [series of objections from T-Peg counsel omitted]
- Q. Coming back to my question about the homeowner standing inside the frame depicted in [the T-Peg frame] versus [the VTW frame] where you indicated that you don't think the homeowner pays that much attention to the timber frame, as an architect, if you were standing inside work depicted by those two drawings, would you see a visual and aesthetic difference?
- A. And where do you have me standing?
- Q. Anywhere inside.
- A. Certainly in the open space, this large room here I would see that the framing system was a bent here and common rafters.
- Q. They're aesthetically quite different, right?
- T-Peg counsel: Object to the form, you can answer.
- A. I was taught in design to never use the word, aesthetic, so I try not to, it means different things to different people.
- Q. What about the word, artistic?
- A. Another form of the same word.
- Q. Doesn't have meaning to you?
- A. The framing would be different, definitely.

Ex. 2 (emphasis added).

In addition, Woods wrote in his threat letter that “Isbitski and Vermont Timber Works, Inc. have built a home (provided a timber frame) . . . that is substantially similar, if not virtually identical, to the home designed for Mr. Isbitski by Timberpeg” (Ex. 3), and plaintiffs alleged in their complaint that their plans had been “utilized in the construction of a house [on the Isbitski property]” (Cplt. ¶32). These statements were simply in bad faith; if plaintiffs had reacted properly after visiting the site, they would never have filed suit here.

(3) No state law facts other than copying. In each of the state law claims, plaintiff never alleged any wrongful conduct other than “copying,” Cplt ¶¶ 53-67, which would have been necessary to support the various state law claims which were dismissed early by the Court..

(4) Ridiculous characterization of counsel letters. Concerning plaintiffs’ claim that defendants “admitted” copying, the Court found that “No reasonable fact-finder could conclude that the letters . . . constitute admissions of unlawful copying.” April 6, 2005 Order at 9. While the First Circuit found otherwise, the First Circuit’s never would have reached that conclusion had it been aware of the now undisputed testimony (not available to the First Circuit) that the only plans seen by defendants were the 1999 preliminary drawings and that they never saw the 2001 registered drawings at all.²

(5) Failure to heed repeated warnings. VTW repeatedly warned plaintiffs that their case was frivolous, and advised plaintiffs in plain English that VTW would seek fees at the end of the case.

- In response to Woods’ initial threat letter, VTW’s pre-litigation attorney stated “The drawings that Mr. Isbitski gave my client had no specific frame details, drawings or specifications. . . . Timberpeg does not have a case against my client, my client did not copy their drawings or their frame design. Should Timberpeg continue against my client, my client

² Plaintiffs essentially succeeded, for a time, by having the First Circuit apply facts relating to the 1999 unregistered plans to the 2001 registered plans.

will defend itself and take action to recover its damages and legal costs Timberpeg, against an allegation that we view as groundless. (Ex. 7)

- VTW's litigation counsel, before filing a single pleading, met with Woods at Woods' office to (unsuccessfully) try to dissuade plaintiffs from continuing the suit, and gave Woods a copy of this Court's ruling in the Ferraris case (in which fees were awarded against a copyright infringement plaintiff). After the meeting, he confirmed in writing to Woods that "I want it clearly expressed, now, that VTW will seek . . . legal fees for the case you have brought. Concerning fees, I gave Steve this morning a copy of Judge McAuliffe's recent *Ferraris Medical* ruling Steve gave it back, saying he already had it. So you have notice. . . . It may be that you are still considering your position and will dismiss the suit If you continue, I want no doubt as to the course VTW will employ, and no doubt that you have been duly warned." (Ex. 8)

In short, this case was not merely an "objectively weak" case, it was a frivolous case which never had a chance of succeeding. As shown below, its only real purpose was to attempt to extract an unjust settlement out of a defendant unwilling to incur legal fees in defense.

B. Motivation

The second Fogarty factor is motivation. "Should it appear that plaintiff's motivation was not a good faith intent to protect a valid interest, but rather a desire to discourage and financially damage a competitor by forcing it into costly litigation, an award of fees is more likely." Yankee Candle Company, Inc., v. Bridgewater Candle Company, LLC, 140 F. Supp. 2d 111, 116 (2001).

Numerous points demonstrate that plaintiffs' motivation here was to extract quick payment, not to prosecute a meritorious claim:

1. Threat letter designed to terrorize, not inform. The threat letter (Ex. 3) to VTW, signed by plaintiffs' in-house General Counsel, contained grossly overstated fact claims and dubious legal principles, listed large damages figures, and was designed to scare VTW without providing any useful information. The strategy, and the subsequent addition of Friant in his personal capacity, had its intended effect: for six years defendants were terrorized by the thought that if they lost the case the business would be destroyed, and both the business and Mr. Friant would be forced into bankruptcy.

2. Hiding of identity of copyrighted plans. Plaintiffs deliberately prevented VTW from seeing the allegedly infringed plans for as long as they could. Plaintiffs did not include a set of their plans in their threat letter (Ex. 3), they did not attach them or even identify them in their complaint, and they refused VTW's many requests for them until the discovery process forced production. If VTW had seen the plans early, it would have been obvious that the plans were not "substantially similar" and the case would have ended sooner. Even after VTW obtained the copyrighted plans in discovery, plaintiffs purposely tried to confuse the Court by relying on early or later plans – which were never copyrighted – as if they were the plans at issue.

3. History of using copyright infringement threats/litigation to extract settlements. Plaintiffs have a strong history (Ex. 1, esp. pp. 59-66) of accusing others of copyright infringement and collecting settlement payments. In the period 1999-2003, plaintiffs collected total settlement payments aggregating at least \$126,000 from at least 14 targets,³ in most cases receiving payment merely upon sending of threat letters. Indeed, the initial threat letter to VTW here (Ex. 3) contains near

³ Plaintiffs' document production on these threats is attached as Exhibit 4. A summary of the threats and the amounts netted (as of 2004, and the discovery has not been updated) is as follows:

<u>Bates numbers</u>	<u>Target</u>	<u>Year</u>	<u>Amount Paid</u>	<u>Extent of Legal Action</u>
1032 ff	Pinsak Mill Creek	2003	\$13,000 For both	Threat letter, no cplt filed
1010 ff	Jones Corey	2001	17,500 For both	Cplt, no answer filed
1000 ff	Lorence Timberpike Contractors	2001	4,000 For both	Threat letter
970 ff	McAfee Lentz Lentz Construction	2002	25,000 All 3 All 3	Cplt, no answer filed
944 ff	Anderson Schmitt Bldg Contractors	2003	12,500 12,500	Cplt, no answer filed
938 ff	Tobin Construction	1999	5,000	Threat letter, no cplt filed
902 ff	Micley Oak Post & Beam Robert Smith Constr Co	2000	17,500 5,000 10,000	Cplt, settled during discovery
3136 ff	Sugar River Sav Bank	2003	4,000	Threat letter, no cplt filed
TOTAL			\$126,000	

verbatim sections of the letter plaintiffs used with nearly all the others. All threat letters were handled by plaintiffs' in-house counsel, apparently in the hope that actual litigation would not follow. In accepting settlements ranging between \$5,000 and \$25,000 – amounts which wouldn't cover even the attorneys fees necessary to prosecute a legitimate case – plaintiffs' actions suggest that they never intended to prosecute any of these cases to judgment.

In addition, as shown by a 2005 PACER search (Ex. 5), there were apparently other such suits for which plaintiffs did not produce documents.

Plaintiffs' in-house General Counsel, Steve Woods, conceded that as to each of the persons from whom he demanded money, (1) “none of those individuals or entities ever admitted copyright infringement,” (2) “there's no court language that [he was] aware of anywhere finding that anyone ever infringed a Timberpeg design,” and (3) “of all those claims that we just went through in that file, [only one, Micley, ever] went beyond the initial complaint being filed.” (Ex. 1 at 65-66.)

Apparently plaintiffs engaged in a long-term, strategic gamble to create a profit center out of defendants who would pay quickly rather than defend legitimate claims; their gamble backfired in this case when VTW stood on principle.

4. Settlement extraction policy also shown by conduct vis-à-vis Sugar River Savings Bank. Plaintiffs' motivation to extract settlements is also shown by their threat letter, also signed by their in-house General Counsel, Woods, to the bank which foreclosed on the unfinished property in this case (Ex. 6).
5. “Six months of stonewalling.” As determined by the Magistrate Judge in his November 19, 2004 Order sanctioning plaintiffs, plaintiffs ignored critical discovery requests for six months and, when it became clear the requested information was relevant, attempted to change their theory of damages so as to make the information irrelevant after the fact. The Court characterized plaintiffs' conduct as “failure to comply with Rule 26(a)(1), failure to comply with Rule 33 and six months of stonewalling.” November 19, 2004 Order at 3.⁴

⁴ The Magistrate Judge summarized plaintiffs' discovery behavior thus:

“Plaintiff in its Rule 26 disclosure claimed damages for lost gross profit but did not produce documentary support [as required by the rule]. Defendant followed up with interrogatory no. 17 on April 2, 2004 for the omitted material. On May 2, 2004 [plaintiff] objected, asserting privileges that are unlikely to apply, and essentially providing a non-answer. No documents were supplied. Defense counsel again followed up on June 11th. On June 19th [plaintiffs'] counsel agreed to supplement. On July 13, 2004 [plaintiffs] provided the calculation derived from six jobs as its answer. No original documents to support the numbers were provided even though they were clearly required by the question. On August 12th defense counsel complained of the lack of original documents and also of the inability to determine whether the estimated gross lost profit calculation was taken from “cherry-picked jobs” or was representative of the average [plaintiff] job. The discovery request was thus expanded. After further delays plaintiff's counsel objected to the discovery, both the overdue documents and the new request. In an apparent effort to make the requested discovery irrelevant plaintiff then announced that it was no longer seeking damages based upon its lost profits.” Order at 1-2.

6. Bogus claim of damages. In their initial disclosures plaintiffs claimed “damages” of \$116,007. This figure was absolutely absurd in light of the fact that plaintiffs had billed \$4,503.75 for its plans, of which Isbitski paid \$3,500. Moreover, plaintiffs initially suppressed their extracted settlement from Sugar River Savings Bank, but defendants learned of it directly from the Bank. The Bank paid an additional \$4,000. So plaintiff received \$7,500 against its bill of \$4,500, a profit of around \$3,000. After six months of “stonewalling” to hide their “calculation” of damages from VTW, plaintiffs ultimately withdrew their damages claim altogether.

Indeed, plaintiffs’ General Counsel demonstrated in deposition that the “value of Timberpeg’s plans” is a very fluid concept indeed, based solely on how great a threat he can bring to bear. He stated that in “his understanding of the word ‘value,’ . . . the value of the set of plans will be dependent upon the circumstances that are involved, [i.e.,] is there currently an infringement or is there simply a request to use a set of plans prior to an infringement.” (Ex. 1 at 17).

7. Litigation decisions demonstrated lack of intent to prosecute. Plaintiffs’ litigation decisions also demonstrate their lack of intent to prosecute the case to judgment. They delayed until the end of discovery in taking depositions, and only took the deposition of VTW’s principal when VTW itself pushed it to get it over with. They engaged no outside experts at all, designating only their own employees as experts (as any serious defendant would in such a case, VTW engaged two outside experts, at significant expense). Even though they were plaintiffs, they obtained a lengthy extension of the deadlines, and repeatedly sought other extensions of the trial date (to all of which VTW objected). They sought exhaustive paper discovery from VTW – which they received – while “stonewalling” on their own production. Then they sued one of VTW’s principals personally. The clear picture presented is of a litigant posturing a huge threat which it never intended to carry out.

C. Compensation and Deterrence.

As noted in Yankee Candle, “the final equitable factor noted in Fogarty is ‘the need in particular circumstances to advance considerations of compensation and deterrence.’ This factor is especially pertinent where, as here, a large industry leader brings unreasonable claims against a much small competitor. Denying attorneys’ fees in such cases encourages dominant players to bury competitors in meritless lawsuits intended to lower profit margins.” Yankee Candle Company, Inc. v. Bridgewater Candle Company, LLC, 140 F. Supp. 2d 111, 118 (D. Mass. 2001).

Here, plaintiffs are probably one of the dominant timber framers in the country⁵, with four divisions covering the entire United States. They have 13 designers in their Services entity. They have an in-house General Counsel dedicated to handle their business. As trumpeted in their advertising literature (Ex. 9) and web site (Ex. 10,) Timberpeg is a “national company with four operating corporations covering the entire United States,” “has Independent Representatives located around the nation and around the world,” has “over 50 standard timberframe house models,” and has “produced thousands of buildings since 1974.”

By contrast, VTW is a small, local company whose co-owner, Friant, also serves as its sole designer. VTW’s entire income for 2001 was \$84,711 on gross receipts of \$1,154,000, and its income for 2002 was only \$182,859 on gross receipts of \$1,160,00. Obviously, the relative size of the parties makes it easily feasible that, had plaintiffs prevailed here, they would have eliminated VTW as a competitor. (VTW believes this was one of plaintiffs’ motivations in bringing this frivolous action.)

Significantly, in this region plaintiffs are a direct competitor of VTW, and this suit may well have been designed to force VTW out of business.

D. “Misrepresentations” And “Shifts In Theory” To Avoid Summary Judgment

Under the First Circuit case Mag Jewelry, *supra*, 496 F. 3d 108 at 122-23, “misrepresentations . . . at the summary judgment hearing” and a “shift in [] theory of the case to avoid summary judgment” are factors which may *require* the Court to exercise its discretion in favor of awarding fees. Here, there are multiple situations which appear to qualify.

First, as noted above (at pp. 7-8) Timberpeg introduced affidavits and asserted facts articulating that the VTW frame “accommodates the exact locations” (and “precisely

⁵ Plaintiffs never did produce their financial statements, despite earlier orders that they do so. VTW’s motion to compel was pending (and is now moot) when summary judgment was granted.

accommodates”) for windows, doors, millwork, etc., and that the posts in the two designs were “nearly identical.” This was designed to create a false material dispute on the substantial similarity issue so plaintiffs could defeat summary judgment, and it succeeded.

Second, plaintiffs repeatedly interchanged and confused, on purpose, the various iterations of drawings, including the 1999 drawings which it finally conceded at trial – when it suited their new (2008) theory that Lynn Cole “authored” the copyright work in April 2001 – were entirely different from the 1999 drawings. From the beginning of this case in 2003 until their shift in authorship position in 2008 the plaintiffs sought to establish copying by claiming that defendants had reviewed and copied the 1999 drawings which, they asserted, were merely a prior generation of the 2001 registered drawings.

Third, plaintiffs completely changed their theory of authorship and ownership to avoid summary judgment based on standing and lack of registration. The Court expressly noted plaintiffs “constantly moving” theories of authorship and ownership:

[D]efendants justifiably complain about what seems to be a constantly moving target, given plaintiffs’ serial reliance on alternate theories of authorship

[FN3: 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.]

March 28, 2008 Order, Doc. 147, at 11 and fn 3. Plaintiffs’ ultimate (third) authorship and ownership theory was not reached until after discovery was closed, and was based on a new (third !) version of Lynn Cole’s affidavit as well as purported assignment agreements which no one could authenticate, which were unsigned and undated, and which were not produced in discovery until plaintiffs decided settled on their new authorship and ownership theory.

III. AMOUNT OF ATTORNEYS FEES AND EXPENSES

A. “Lodestar” Approach

In the First Circuit, as elsewhere, the court

must apply the “lodestar” approach to calculation of fee awards: a determination of the hours reasonably spent on this case, multiplied by a reasonable rate. To determine the hours reasonably expended, courts typically look at the actual hours spent by counsel as established by adequate contemporaneous billing records, then subtract from that figure hours which were duplicative, unproductive, excessive or otherwise unnecessary. A reasonable rate is “that prevailing in the community for similar work.”

Yankee Candle Company, Inc. v. Bridgewater Candle Company, Inc., 140 F. Supp. 2d 111 (D. Mass. 2001), citing Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F. 3d 331, 227 (1st Cir. 1997) and Grendel’s Den v. Larken, 749 F. 2d 945, 950 (1st Cir. 1994). See also, Marshall & Swift v. BS & A Software, 871 F.Supp. 952 (W.D. Mich. 1994); Nick-O-Val Music Co., Inc. v. P.O.S. Radio, Inc., 656 F.Supp. 826 (M.D.Fla. 1987); Lamphere v. Brown University, 610 F. 2d 46, 47 (1st Cir. 1979) (civil rights action); Coutin v. Young, 124 F. 3d 331 (1st Cir. 1997) (in discrimination case, reversal for failure to use lodestar approach).

B. The Work Performed

This was a complex case which initially progressed all the way to the verge of trial, only to have summary judgment issued literally eight days before the Final Pre-Trial Conference, after all the pretrial filings were in and defendant was prepared for trial. After answering, defendants took nine depositions in the case; answered multiple sets of exhaustive paper discovery; reviewed extensive document productions from seven separate persons; produced its own extensive documents; filed two successful motions to compel (the second of which resulted in

sanctions against plaintiffs for “six months of stonewalling”); consulted various expert witnesses (and formally disclosed two of them); reviewed and objected to the expert opinions of plaintiffs; filed two summary judgment motions and a motion for judgment on the pleadings; objected to plaintiffs’ summary judgment motion; prepared all pre-trial documents and exhibits; prepared trial testimony; and responded to plaintiffs’ motion to reconsider. (Ex. 12)

Thereafter, the case went through a full appeal at the First Circuit. Although plaintiffs won a reversal based on the sole ground on which summary judgment had been granted, they did so through assertions of similarity which they knew to be false and which the jury later determined to be false (see p. 8 above).

On remand, the case went through another three and a half years of litigation, resulting in a total of 223 formal court “documents” to date.

The undersigned counsel states that the services were reasonable and necessary in connection with obtaining the discovery order and in responding to plaintiffs’ motion to reconsider it. (Whittington Affidavit, Ex. 12.)

Defendants’ legal services – after the initial letter responses to plaintiffs’ counsel – were all performed by a single attorney at a single firm, with some research being handled by a research paralegal and with assistance at trial by a paralegal. The total hours expended were:

Whittington	1106.6 hours @ \$200/hour
Jones (paralegal)	57.41 hours @ \$85/hour
Williamson (paralegal)	41.5 hours @ \$85/hour

None of the usual reasons for reducing hours exists here: There never was more than a single attorney handling the case. No time at all was spent in conferences among lawyers. No time was spent for travel except for travel to the Court for trial. No part of plaintiffs’ case was successful.

See generally, Whittington Affidavit and attached time records, Ex. 12

C. Reasonable Rate

In his award of attorneys fees for plaintiffs' "six months of stonewalling" in discovery, the Magistrate Judge already found that "\$200.00 per hour is a reasonable hourly rate."

March 29, 2005 Order at 3.

Moreover, since the hourly rate was established some six years ago, in 2003, it has remained at the rate despite a general increase in counsel's rate to \$250 - \$275 per hour.

In case the court needs further support for the reasonable of counsel's rate, VTW provides the following additional information. Its counsel, Whittington, is a 1976 graduate of Duke Law School and Editorial Board Member of the *Duke Law Review*; has been in law practice since 1976; was an Army prosecutor for approximately 3 years and an associate and then partner with a large Chicago firm before moving to New Hampshire in 1989; has been lead counsel in over 100 trials; and has been lead counsel (and argued orally) at the U.S. Supreme Court, the First, Second and Seventh U.S. Circuit Courts of Appeal and in the Supreme Courts of New Hampshire, Vermont and Illinois. (Whittington Affidavit, Ex. 12)

The paralegal, Ross Jones, is a 2000 graduate of Vermont Law School, with honors, and has performed legal research for Whittington since 1999. (Whittington Affidavit, Ex. 12) His standard rate is \$85 per hour.

The paralegal, Fadia Williamson, has worked in the offices of Bryan Cave, LLP (an international firm which today has over 1,100 attorneys) for approximately 25 years in its Riyadh, Saudi Arabia, office, and has worked as a paralegal at Whittington Law Associates since 2003. Her standard rate is \$85 per hour.

The rate agreed to by VTW and charged in the matter was also \$200 per hour, with half

of the first \$25,000 and half of fees from June 2004 on contingent upon award of fees by the court.⁶ (Whittington Affidavit, Ex. 12)

The Court granted (Doc. 108) VTW's motion for attorneys fees made in 2005 and in doing so determined that all of the rates charged were reasonable, and that virtually all of the time spent was reasonable and necessary.⁷

E. Amounts Billed, And Deductions

Per affidavits (Ex. 11 & 12), the time and expenses charged, are as follows:

Firm	Rates	Hours	Fees	Expenses	Total
Dakin & Benelli	125/hr		597.50		597.50
John J. Welch, Ltd			175.00		175.00
Whittington Law Asso.			229,727.42	10,954.65	240,682.07
- Whittington	200/hr	1,106.60	221,320.00		
- Jones	85/hr	57.41	4,879.92		
- Williamson	85/hr	41.50	3,527.50		
Total			230,499.92	10,954.65	241,454.57

From that total, VTW agrees that the following amounts should be deducted:

- \$3,700.00 already paid by plaintiffs in sanctions ordered by the Court.
- 1,020.00 counterclaim time, voluntarily dismissed without prejudice.
- 3,600.00 in expert fees which the Court found unreimbursable per its 2005 Order.
- 229.50 which the Court found unreimbursable per its 2005 Order.

⁶ The June 2004 conversion of half the ongoing rate to contingency occurred, after receipt of most significant discovery from plaintiffs when counsel could evaluate the weakness of plaintiffs' case, because VTW could not afford the ongoing standard fees to which it had agreed. Without the fee concession, plaintiffs' apparent scheme of outspending VTW into submission might have succeeded.

Contingency does prevent the collectibility of fees, and many courts award a premium over the standard rate to compensate for the risk undertaken by counsel. E.g., Form Builders v. Dan Chase Taxidermy Supply Co., Inc., 881 F. Supp. 1021 (E.D. Va. 1994), aff'd, 74 F. 3d 488, cert. Denied, 519 U.S. 809. This Court awarded the contingency fees in its November 2005 Order.

⁷ The only amounts not awarded in the 2005 Order were:

- \$3,600.00 for expert witness fees
- \$ 229.50 for research into remedies for VTW's inadvertent disclosure of information to Timberpeg.

See Doc. 108 at p. 16.

Thus, VTW respectfully requests an award of attorneys fees and expenses of \$232,905.07.

Date: October 29, 2009

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

By: /s/ W. E. Whittington
W. E. Whittington

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Exhibits

Ex. 1 – Woods (Plaintiffs’ General Counsel) deposition, pp. 46-47, 54	10/22/04
Ex. 2 – Vincent (Plaintiff’s Chief of Design) deposition, pp. 1, 105-106	03/31/04
Ex. 3 – Woods threat letter	06/23/03
Ex. 4 – Plaintiffs’ documents on other threats	misc.
Ex. 5 – PACER print out (U.S. Party/Case Index)	04/07/05
Ex. 6 – Woods Letter to Sugar River Savings Bank	10/09/03
Ex. 7 – Welch letter	09/22/03
Ex. 8 – Whittington letter	11/17/03
Ex. 9 – Timberpeg sales magazine “Artisan”	no date
Ex.10 – Timberpeg web site excerpts	no date
Ex.11 – Friant Affidavit (including financial statements and invoices of Dakin & Benelli and Welch)	04/12/09
Ex.12 – Whittington Affidavit (including fee agreement and invoices)	10/30/09
Ex.13 – Plaintiffs’ Trial Exhibit 61, “Demonstrative Exhibits” (intending to show that the two plans “fit” but actually showing that they do not	from trial
Ex.14 – Defendants’ Trial Exhibit “N,” summarizing Vincent testimony that 24 of 26 posts “do not match”	from trial
Ex.15 – Defendants’ Trial Exhibit “W,” super-imposing Timberpeg and VTW designs on same document	from trial

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 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.

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