

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.,	)
Defendant.	)

DEFENDANT’S MOTION TO STRIKE

Defendant moves, under Rule 7.2(c) of this Court, to strike the following with respect to Plaintiffs’ Objection To Summary Judgment:

- (1) The paragraph going from Page 4 to Page 5 of their Objection (this relates to the *December 1999* plans).
- (2) The first paragraph on Page 6 of their Objection (this relates to the *September 2001* plans).
- (3) The attachment “Tab 1” to Lynn Cole’s affidavit, Ex. D in plaintiff’s Appendix.

In support of this motion, defendant submits the following memorandum:

Memorandum

This case is based solely on the April 2001 “Registered Plans” filed with the U.S. Copyright Office as Certificate of Registration No. VAu 510-781. Cplt., ¶16-17.<sup>1</sup> Plaintiffs now concede that the “[April 2001 plans] form the basis of this action.” (Obj. at 5) This is not merely

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<sup>1</sup> Because plaintiffs refused initially to provide VTW a copy of the registered plans, or to attach it to the complaint, VTW was forced to submit a request to admit in order identify the plans which were actually registered. Plaintiffs now admit that the sole design they ever registered with the Copyright Office is the five-page design created in April 2001 and attached at Ex. 1 of VTW’s MSJ Appendix. See Req. to Admit Nos. 1 & 2, Ex. 10

a matter of plaintiffs' election; it is mandated by Section 411 of the Copyright Act, which requires registration of the applicable work prior to institution of an infringement suit.

Plaintiffs refer indiscriminately to preliminary Isbitski plans completed December 29, 1999 (Obj. at 4-5), and to September 2001 plans (Obj. at 6) as if they were all a part of the same case. These prior and subsequent plans were never registered, have not been referenced in the Complaint, and are not a part of this suit (except that the 1999 Plans are apparently what Isbitski showed VTW in December 2000 as the example of what he did not want). In addition, Cole directly concedes, concerning the December 1999 Plans:

[Isbitski] was not satisfied with the 12/29/99 design, but unfortunately he wasn't entirely clear about what he did want.

Cole Aff., Ex. D to Obj. Appendix. He clearly admits that the April 2001 plan (at issue in this case was a "new design." Id.

The prior and subsequent plans were never registered and are referenced merely in an improper attempt to mislead the court. The materials and argument should be stricken.

No concurrence was sought in the motion as it relates to the dispositive summary judgment motion.

Date: October 2, 2004

VERMONT TIMBER WORKS, INC.  
Defendant,

By: W. E. Whittington  
Its Attorney

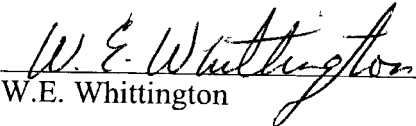
W. E. Whittington (Bar No. 6916)  
Whittington Law Associates, PLLC  
35 South Main Street  
Hanover, NH 03755  
(603) 643-2755

CERTIFICATION (CORRECTED) OF SERVICE

I hereby certify that an executed original of **Defendant's Motion to Strike** was sent via FedEx on October 2, 2004 to the New Hampshire District Court, and that a Certification (**corrected**) of Service was sent via mail on October 4, 2004 not October 2, 2004, to the New Hampshire District Court, and that one copy has this day, October 4, 2004, not October 2, 2004, been mailed, first-class mail, postage prepaid, to:

Daniel E. Will, Esq.  
Devine, Millimet & Branch, P.A.  
111 Amherst Street  
Manchester, NH 03105

Stephen S. Woods, Esq.  
Traditional Management Company  
68 Lyme Road  
Hanover, NH 03755

  
W.E. Whittington