

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.,	)	
Defendants.	)	

DEFENDANT VERMONT TIMBER WORKS'  
SECOND MOTION TO COMPEL, AND FOR SANCTIONS

Defendant, Vermont Timber Works, Inc. ("VTW"), moves (1) to compel production of discovery withheld by plaintiffs Timberpeg East, Inc. and T-Peg, Inc. ("Timberpeg"), concerning damages, and (2) for sanctions under FRCP 26(g) and 37(a)(4).

VTW submits its Memorandum In Support, below, and Exhibits 1-19, attached.

MEMORANDUM IN SUPPORT

PRELIMINARY STATEMENT

This is plaintiffs' action against VTW alleging that VTW infringed plaintiffs' copyrighted plans dated 4/20/01 and registered with the Copyright Office on May 8, 2001. Plaintiffs also assert three common law claims against VTW. The complete claims against VTW are the following:

<u>Count</u>	<u>Legal Theory</u>	<u>Defendant</u>
II	Copyright Infringement	VTW
V	Unjust Enrichment	VTW
VI	Unfair Competition	VTW
VII	N.H. Consumer Protection Act	VTW

This motion addresses discovery relating to plaintiffs' alleged damages and accounting for plaintiffs' job costs, all of which is relevant to each of the four counts against VTW.

#### PLAINTIFFS' FRCP 26 OBLIGATION

FRCP 26(a)(1) requires a plaintiff to provide

a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

#### PLAINTIFFS' DEFECTIVE DAMAGES DISCLOSURE

Plaintiff's initial disclosure contained a surprisingly large damage figure, but otherwise was wholly inadequate in fulfilling the Rule 26 obligation. It provided:

Timberpeg's lost gross profit on the Isbitski project is presently computed at \$116,007.41 {Timberpeg's Package Price \$228,410 x gross profit margin of 50.76%}, not including prejudgment and post-judgment interest.

Ex. 1, attached. No indication was given as to how plaintiffs computed the 50.76% "gross profit margin," and no documents were provided relating to the computation, all in violation of Rule 26.

#### PLAINTIFFS' REPEATED REFUSALS TO PROVIDE DAMAGES, JOB COST INFORMATION

VTW followed up plaintiffs' damages disclosure on April 2, 2004 with Interrogatory 17, which requested plaintiffs to

describe in detail how you computed Timberpeg's gross profit margin of 50.78%, and identify and produce all documents relating to the computation.

Ex 2 (emphasis added).

Plaintiffs' initial response to Interrogatory 17, dated May 12, 2004, was a near complete refusal, except for the useless conceptual statement that it "compared the gross profit margin of several other delivered projects in the same time period." (Ex. 3) This methodology, of course, was obvious; what was called for and not produced was the identification of the particular jobs used and the documents relating to them.

On June 11, 2004, VTW sent plaintiffs' counsel a draft motion to compel (Ex. 4) and invited a conference to address the deficiencies. A telephonic conference ensued on June 19, with plaintiffs agreeing to "supplement to explain how they computed gross profit margin of 50.78%." (Ex. 5)

A month later no supplementation had been received, and VTW sent a follow up e-mail "checking in on the status of several outstanding items," specifically referring to Interrogatory 17. (Ex. 6)

Later that day (July 13) plaintiffs mailed their "supplementation" (Ex. 7). This now showed plaintiffs' mathematical computation, which demonstrated a huge flaw in methodology strongly suggesting the reason that plaintiffs were withholding the information sought: it appeared that plaintiffs had purposely skewed the computation by cherry-picking six particular jobs over a 13-month period to compute gross profit margin. These jobs were neither consecutive, nor necessarily contemporary with the job in question here.

However, plaintiffs still prevented VTW from filing its motion to compel by also sending an e-mail that same day indicating that a further response was still to come "as soon as we can." (Ex. 8) Plaintiffs knew that VTW's counsel was going away for an extended vacation, and that this would effectively delay the reckoning for a month.

A month later plaintiff had still not sent their “as soon as we can” response, and on August 12 VTW sent an e-mail (Ex. 9) indicating it would file a motion to compel unless it received the requested information by August 27. The e-mail stated:

In light of the above history and our approaching deadline, I'm requesting that you commit by the end of the week (actually Monday morning would be fine) to providing us, by August 27, the following:

1 All calculations of profit, by job, and showing the operating company, for all jobs during calendar year 2002. If plaintiffs are on a fiscal year other than 12/31, please add the same information for the entire fiscal year(s) including Feb-June 2002.

2 All backup documentation relating to those jobs. Presumably plaintiff(s) have pre-existing job cost sheets relating to each job, and there is no reason these have not been produced, particularly in light of the way they compute their "damages."

3 All plaintiffs' documents showing overhead for 2002 (or the fiscal years including Feb - June 2002), and, if there is a year-end reconciliation by job or analogous document (which we certainly assume already exist), copies.

4 If any of the six jobs listed in your supplemented response to Int. 17 include companies other than TEI, the same information for all four T-Peg subsidiaries.

5 The break out of claimed damages between the timber frame component and other components, and all documents showing or relating to the components.

I'd appreciate your prompt response. We are now late in the discovery process, this is all information I should have had since the "mandatory disclosure" phase, and I have been continually seeking it since March.

Ex. 9 (emphasis added).

Later on August 12, plaintiffs responded, claiming “I thought you were satisfied” (!), and indicating they would be unavailable to deal with this for at least ten more days, but simultaneously refusing to extend VTW’s deadlines for expert witnesses, which was itself dependent of obtaining the damages discovery. (Ex. 10)

On August 24, plaintiffs delayed the issue still further by now agreeing to extend VTW’s expert disclosure date by 35 days from the date they responded. (Ex. 11)

Still, VTW's reasonable understanding was that the information would be forthcoming shortly. Thus, when the information was not received by September 16, VTW sent a letter stating:

I'm noting that I will need your damages and expert information that I have listed previously soon. Although your agreement to extend my expert disclosure date solved the immediate issue at the time, I never expected you to take this amount of time. Because of other deadlines in the schedule, I cannot afford to wait any longer. I request the information by Wednesday, September 22, or I will be forced to proceed with motions to compel.

Ex. 12 (emphasis added).

Plaintiffs continued to refuse to provide the information, while giving the appearance of cooperation, to force VTW to postpone its motion to compel. They responded:

I am not prepared to provide you with the information you seek in your letter by September 23, nor, likely will I be in a position to respond to your August 12 email by that date, though I expect to respond in the near future.

Ex. 13 (emphasis added).

VTW responded in good faith that "your statement that you will respond . . . 'in the near future' is not in good faith if you expect me to delay a motion to compel based on it. Please let me know by what date you will respond." Ex. 14 Plaintiffs declined to do so and now proposed a many-month delay in damages discovery, Ex. 15, which VTW declined, Ex. 16.

Finally, with the motion to compel about to be filed and no further delay possible, plaintiffs attempted to withdraw the issue. On September 29, 2004, they stated:

[M]y client has instructed me to inform you that it will not seek any damages arising out of its lost profits . . . In light of this position, further discussion as to my client's response to your damages discovery is unnecessary . . . .

Ex. 17. However, even that withdrawal was equivocal, both because (1) plaintiffs refused to withdraw that portion of the complaint, Ex. 18 & 19, and because (2) they continue to claim a “reserve[d] right to seek our lost profits as damages.” Ex.19.

### PLAINTIFFS’ ALLEGED DAMAGES DISCOVERY IS RELEVANT

Plaintiffs’ contention that at the eleventh hour they have made damages discovery irrelevant is simply not true. The information is still relevant and discoverable for at least the following reasons:

1. Plaintiffs still seek to recover VTW’s profits, and there are disputes as to how profits are calculated in the timber framing industry. For example, plaintiffs have contended that a component for overhead is not properly deductible. Since plaintiffs apparently keep job cost information, their own materials will demonstrate the propriety of an overhead deduction (as well as other deductions).

2. Even if VTW is deemed to have infringed plaintiffs’ design and its profits are disgorgable, VTW will be entitled to take deductions for profit components such as materials, non-timber frame materials, erection of the frame, non-design related profit, etc. Since these particular categories are likely to be broken out in the same fashion by plaintiffs as by VTW, plaintiffs’ profits computation is relevant to show what is done in the industry.

3. Based on preliminary information obtained from plaintiffs and third parties, it appears that plaintiffs’ allegation that it had any damages at all, let alone damages in the six figures, is in bad faith. VTW believes the true calculations will show that even if their “copyrighted” design was infringed, plaintiffs did not suffer any damages but made a profit on the infringement by making multiple demands from various third parties for purported “license” payments. Indeed, it appears that by an aggressive policy of accusing third parties of

infringement and taking settlement payments, plaintiffs have created an independent profit center. This profit, netted against plaintiffs' true "damages," is a proper offset to any profits of VTW.

4. Plaintiffs apparently continue to seek damages, either as a contingency, or in other counts besides the copyright infringement count. Thus, their October 4, 2004 letter continues to assert that "if any efforts on your part require us to produce that discovery, then, of course, we reserve our right to seek our lost profits as damages." Ex. 19

5. In addition, plaintiffs have refused to amend their complaint to remove the counts which are inconsistent with waiver of lost profits. For example, Count VI (alleged unfair competition) seeks only damages (Cplt. ¶64), and Count VII (alleged violation of New Hampshire Consumer Protection Act) is available only to "any person who has been injured . . ." RSA 358-A:10.<sup>1</sup>

6. In addition, the quantum meruit claim (Count V) would require plaintiff to establish the "fair market value of the materials or labor" unjustly retained, and plaintiffs' damages are, or may be, directly relevant to this computation.

7. Based on what VTW has already learned, it is also likely the production of the information will demonstrate that plaintiffs never had a good-faith claim of damages.

The request for this information has been postponed repeatedly, VTW has sought it continually and repeatedly from the very beginning of the discovery process, and VTW now needs it promptly because it faces a November 1, 2004 for its own expert disclosure.

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<sup>1</sup> VTW is separately filing its motion for judgment on the pleadings on (1) the requested damages remedy and (2) Counts VI and VII.

SANCTIONS ARE APPROPRIATE UNDER FRCP 26(g) AND 37(b)

Plaintiffs apparently hope to avoid a motion for sanctions by attempted to make damages discovery irrelevant. However, in light of their protracted delay and gamesmanship from the very beginning of discovery to now, sanctions would be appropriate even if the discovery were no longer relevant.

Plaintiffs' conduct has caused immense burden and expense to VTW, a small company which cannot afford major litigation, and apparently for the purpose of forcing VTW to concede the litigation. There is no other explanation for the pattern of avoidance, delay, refusal and attempt to head off motion practice documented in Exhibits 1-19.

FRCP 26(g)(2)(B) provides that the signature on the initial disclosures constitutes a certification that the response is

not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation

Subsection (g)(3) provides that

if without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

FRCP 37(a)(4)(A) provides that if a party fails to make disclosures or cooperate in discovery, and a motion to compel is granted,

If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion, or the party or attorney advising such conductor both of them to pay to the moving party the reasonable expenses incurred in making the motion, including

attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's [action] was substantially justified . . . .

Emphasis added.

After seven months and 19 exhibits of VTW attempted to obtain the discovery and plaintiffs avoiding it, sanctions are appropriate.

VTW respectfully requests that the court award it the reasonable expenses, including attorneys fees, in taking the actions set forth above to obtain the discovery to which it is entitled.

WHEREFORE, VTW requests that the Court compel the above discovery and award it its reasonable attorneys fees and costs incurred in making this motion and making the numerous unsuccessful requests to obtain this information without motion practice.

#### CERTIFICATION

Counsel certifies, under FRCP 37(a)(2) and Rule 7.1 of this Court, that he has conferred in good faith with plaintiffs' counsel in an effort to secure the disclosures without court action, as set forth above and documented in Exhibits 1-19 attached.

Date: October 9, 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

Attachments

Ex. 1 – Plaintiffs’ Mandatory Disclosures	3/02/04
Ex. 2 – VTW’s First Interrogatories To Plaintiffs	4/02/04
Ex. 3 – Plaintiffs’ Responses To First Interrogatories	5/12/04
Ex. 4 – Letter of VTW’s counsel	6/11/04
Ex. 5 – Notes of “meet and confer,” sent to plaintiffs’ counsel	6/19/04
Ex. 6 – VTW’s e-mail to plaintiffs’ counsel	7/13/04
Ex. 7 – Plaintiffs’ “Supplemental Answers”	7/13/04
Ex. 8 – Plaintiffs’ e-mail: “will get that information to you as soon as we can”	7/13/04
Ex. 9 – VTW’s follow up requesting outstanding discovery	8/12/04
Ex. 10 – Plaintiffs’ response: “cannot respond . . . until the week of 8/23. . . . we will talk after next week”	8/12/04
Ex. 11 – E-mail from plaintiffs’ counsel, extending further	8/24/04
Ex. 12 – VTW’s letter requested info “soon,” by September 22	9/16/04
Ex. 13 - Plaintiffs’ letter – “not prepared to provide you with information by September 23	9/20/04
Ex. 14 – VTW letter – “‘in the near future’ not in good faith . . .let me know by what date	9/21/04
Ex. 15 – Plaintiffs’ letter – “please consider this Timberpeg’s substantive response.” Still refuses to produce; requests “bifurcated trial”	9/27/04
Ex. 16 – VTW response – will not agree to bifurcate; “will proceed with motion to compel	9/29/04
Ex. 17 – Plaintiffs’ letter – “continue to reject your assertions concerning our responses to discovery. . . . my client will not seek damages arising out of its lost profits.”	9/29/04
Ex. 18 – VTW letter refusing to withdraw portions of complaint; “we reserve our right to seek our lost profits as damages”	10/4/04
Ex. 19 – Plaintiffs’ letter – “we reserve our right to seek our lost profits as damages”	10/04/04

CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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. G. Worthington