

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'  
MOTION FOR JUDGMENT ON THE PLEADINGS  
AS TO DAMAGES REMEDY AND COUNTS V, VI AND VII

Defendant Vermont Timber Works, Inc. ("VTW") moves under FRCP 12(c) for judgment on the pleadings in its favor and against plaintiffs, (1) dismissing and striking plaintiffs' claims for damages under any counts, and (2) dismissing Counts V, VI and VII in their entirety.

This motion arises because plaintiffs, on September 29, 2004, abruptly changed their position – after seven months of resisting discovery relating to their “damages”<sup>1</sup> – to indicate that they “will not seek any damages arising out of [their] lost profits.” Ex. 1, attached.

Despite that apparently withdrawal of claims and remedies, plaintiffs have refused to withdraw those items from their complaint, and five days later, on October 4, 2004, sent a second letter contradicting the first letter (Ex. 2, attached), purporting to “reserve our right to seek our lost profits as damages” in the event the court requires production of the discovery which has been in dispute for seven months.

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<sup>1</sup> Simultaneously with this motion, VTW is filing its Second Motion to Compel And For Sanctions. This is being filed as a separate pleading.

Because of pending deadlines, including the November 1, 2004 deadline for VTW's expert disclosures<sup>2</sup> and also for summary judgment motions, VTW needs to clarify these issues now.

VTW submits its Memorandum In Support, below, and Exhibits 1-2, 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, by copying them when VTW erected a timber frame in Salisbury, New Hampshire. 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

As shown below, the Court should dismiss Counts VI and VII, and the damages portion of Count II, based on plaintiffs' claim they will not seek damages.

### THE UNFAIR COMPETITION CLAIM (COUNT VI) SHOULD BE DISMISSED

The sole harm alleged by plaintiffs under Count VI is that they "suffer[ed] damage. Cplt. ¶64.

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<sup>2</sup> The original deadline for VTW's expert disclosures was September 20, 2004, but plaintiff extended it to November 1 in exchange for VTW agreeing to delay its motion to compel which otherwise would have been filed in August 2004.

With the withdrawal of their claim to damages, the count cannot stand. It should be dismissed, with prejudice.

**THE CONSUMER PROTECTION ACT  
CLAIM (COUNT VII) SHOULD BE DISMISSED**

Under Count VII, plaintiffs state they are “entitled to damages, trebled . . . , as well as to an award of attorneys’ fees pursuant to RSA 358-A.” Cplt. ¶67.

With the withdrawal of their claim to damages, the count cannot stand. Nor can there be a CPA claim for the naked attorneys incurred in seeking “recovery” of nothing. As provided by RSA 358-A:10, standing is limited to “any person who has been injured.” By waiving damages, plaintiffs lose standing.

**THE UNJUST ENRICHMENT CLAIM  
(COUNT V) SHOULD BE DISMISSED**

Under Count V, plaintiffs state that VTW was “unjustly enriched to the detriment of Timberpeg. Cplt. ¶57.

With the withdrawal of their claim to damages, the allegation of “detriment,” and the count as a whole, cannot stand.

**THE DAMAGES PORTION OF THE COPYRIGHT  
INFRINGEMENT CLAIM (COUNT II) SHOULD BE DISMISSED**

Count II alleges that “Timberpeg has been damaged and continues to incur damage” because of the alleged copying. Cplt. ¶43.

With the withdrawal of plaintiffs claim to damages, this paragraph should be stricken.

WHEREFORE, VTW respectfully requests that the Court (1) dismiss Counts V, VI and VII and, to the extent not already stricken by such dismissal, (2) strike Paragraphs 36, 43, 46, 57, 64, 67, and Prayer for Relief 2.

CERTIFICATION

No consultation or certification is required under Rule 7.3 of this Court in that this is a dispositive motion as to certain counts.

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’ 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. 2 – VTW letter refusing to withdraw portions of complaint; “we reserve our right to seek our lost profits as damages” 10/4/04

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. E. Whittington  
W.E. Whittington

# DEVINE MILLIMET

ATTORNEYS AT LAW

September 29, 2004

**VIA FACSIMILE**

W.E. Whittington  
Whittington Law Associates, PLLC  
35 South Main Street  
Hanover, NH 03755

Re: **T-Peg, Inc. and Timberpeg East, Inc. v.  
Stanley J. Ishitski, and Vermont Timber Works, Inc.**

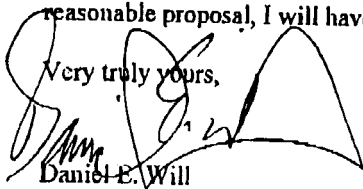
Dear Ned:

I continue to reject your assertions concerning our responses to discovery you have propounded. My client, however, does not desire to expend further resources fighting over this issue.

Accordingly, my client has instructed me to inform you that it will not seek any damages arising out of its lost profits, and will seek disgorgement of Vermont Timber Works' profits and statutory damages, along with interest and attorneys fees. In light of this position, further discussion as to my client's response to your damages discovery is unnecessary, and any effort on your part to obtain such information, including as outlined in your August 12 email, cannot be viewed as reasonably calculated to lead to the discovery of admissible evidence.

My client's election, however, makes discovery concerning Vermont Timber Works' profits directly relevant to this action, as it has been all along. I renew my request for the discovery we have long sought - the unredacted job profit sheet and tax returns, any confidentiality of which we believe you have waived. I would entertain any protective order you propose, but, barring any reasonable proposal, I will have no choice but to move to compel.

Very truly yours,



Daniel E. Will

DEW/ljm

cc: Stephen Woods

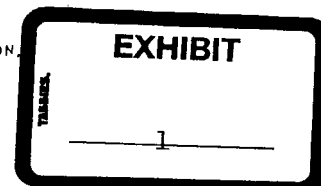
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# DEVINE MILLIMET

ATTORNEYS AT LAW

October 4, 2004

**VIA FACSIMILE**

W.E. Whittington  
Whittington Law Associates, PLLC  
35 South Main Street  
Hanover, NH 03755

**Re: T-Peg, Inc. and Timberpeg East, Inc. v.  
Stanley J. Ishitaki, and Vermont Timber Works, Inc.**

Dear Ned:

We take no position with respect to your desire to submit a reply memo in excess of ten pages.

My September 29 letter does not make either our motion to amend or our amended complaint inaccurate, except that we will not seek our own lost profits from Vermont Timber Works or Mr. Friant, unless you determine to continue to seek discovery concerning our lost profits. If you continue to seek that discovery, and 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.

We need not elect between statutory damages or disgorgement of profits under the copyright statute at this time, as the statute makes clear. Even if we elect statutory damages (which election we are not making at present), we can still pursue disgorgement under our state law claims against both defendants, assuming the court grants the motion to amend.

I gather from your silence that you continue to refuse to produce the discovery we have requested of your client concerning its profits. Please confirm that to be the case. Also, please respond to my request for documents concerning Kim Hentschel, which I made in a letter dated September 22. I suggest we speak on the phone and find a date among those you provided to me as possible dates for Kim Hentschel's deposition. I will wait to hear from you.

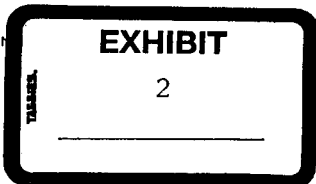
Finally, with respect to depositions, I have not checked with Jim Dreisch or Jonathan Vincent as to deposition availability. I am not available on October 15. I cannot produce Brian Pattison at all in October due to a series of medical procedures he will undergo this month. If possible, I will produce him in November.

DEVINE, MILLIMET  
& BRANCH  
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ASSOCIATION

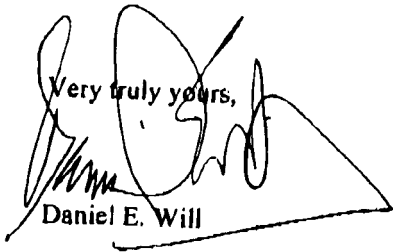
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W.E. Whittington  
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Page 2

Very truly yours,  
  
Daniel E. Will

DEW/ljm  
cc: Stephen Woods  
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