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U.S. DISTRICT COURT  
DISTRICT OF N.H.  
FILED

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UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF NEW HAMPSHIRE

T-Peg, Inc. and  
Timberpeg East, Inc.

v.

Civil No. 03-462-M

Vermont Timber Works, Inc.

O R D E R

Defendant moves to compel production of documents from which  
Timberpeg's lost gross profit may be calculated. Plaintiff  
objects.

Background

Plaintiff in its Rule 26 disclosure claimed damages for lost  
gross profit but did not produce documentary support.<sup>1</sup> Defendant  
followed up with interrogatory no. 17 on April 2, 2004 for the  
omitted material. Exhibit 2. On May 2, 2004 <sup>plaintiff</sup> defendant objected,  
asserting privileges that are unlikely to apply, and essentially

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<sup>1</sup>In its Rule 26(a)(1) disclosure plaintiff claimed a gross  
profit margin of 50.78% but failed to comply with that part of  
the rule requiring production of the documents on which the  
computation was based.

providing a non-answer. Exhibit 3. No documents were supplied. Defense counsel again followed up on June 11th. Exhibit 4. On June 19th <sup>plaintiff's</sup> defense counsel agreed to supplement. Exhibit 5. On July 13, 2004 <sup>pl</sup> defendant provided the calculation derived from six jobs as its answer. Exhibit 7. 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 <sup>pl</sup> defendant job. Exhibit 9. The discovery request was thus expanded. After further delays plaintiff's counsel objected to the discovery, both the overdue documents and the new request. Exhibit 13. 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. Exhibit 17.

#### Discussion

Plaintiff certainly has a right to seek

- (1) the copyright owners actual damages and any additional profits of the infringer, as provided by subsection (b); or

(2) statutory damages, as provided by subsection (c).

28 U.S.C. § 504(a). In order to make the broadened discovery irrelevant plaintiff has committed itself to statutory damages and has made an election under 28 U.S.C. § 504(c). Plaintiff is ordered to amend its complaint to conform with this election. It will not be permitted to seek actual damages and any additional profits. The broader discovery - i.e., the jobs other than the six compromising the 50.78% calculations are irrelevant and as to the broader range the motion is denied.

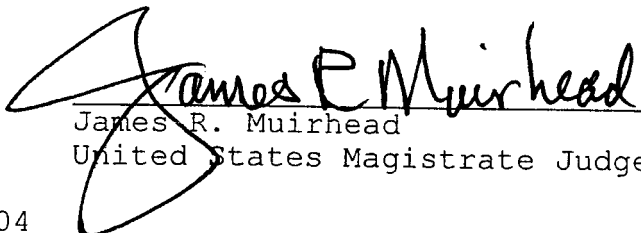
However, all of the documents underlying the computation from the six (6) jobs are discoverable since any objection based on relevance was not asserted within the thirty (30) days required under Fed. R. Civ. P. 33(b)(3). The motion is granted as to those six jobs and is to be complied with within ten (10) days.

Given plaintiffs' failure to comply with Rule 26(a)(1), its failure to comply with Rule 33 and the six months of "stonewalling", it is to show cause within twenty (20) days why it should not be required to pay defendant's costs in obtaining the

ordered discovery.<sup>2</sup> See Fed. R. Civ. P. 37(a)(4).

The motion (document no. 32) is granted in part and denied in part as set forth above.

**SO ORDERED.**

  
James R. Muirhead  
United States Magistrate Judge

Date: November 19, 2004

cc: W. E. Whittington, Esq.  
Daniel E. Will, Esq.

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<sup>2</sup>Defense counsel should within ten (10) days submit its statement for fees and costs to plaintiffs' counsel.