

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' OPPOSITION TO
MOTION TO EXTEND DISCOVERY PERIOD

Defendants, Vermont Timber Works, Inc. ("VTW") and Douglas Friant ("Friant"), object to Plaintiffs' Motion to Extend The Discovery Period, for the following reasons:

1. The January 15, 2005 discovery closing date has been set for nearly a year. All parties have relied on that date, and VTW has rejected plaintiffs' previous proposals to extend the case deadlines.

2. Plaintiffs in no way acted with diligence to obtain the information they now seek from Murus, the third-party. According to the explanation from Murus' counsel to defendants' counsel, after Murus provided documents to plaintiffs in May or June 2004, there was no further contact at all between plaintiffs and Murus until plaintiffs' counsel contacted Murus the week of Christmas 2004. At that late date, of course, it was too late for plaintiffs to properly subpoena Murus for a deposition within the discovery period.

3. Moreover, plaintiffs' request is supposedly based on the "additional series of documents" they received from Murus on January 11. Plaintiffs neither attach the documents nor articulate a single issue to which the new documents might possibly be relevant. Indeed, their January 13 letter concedes "we don't yet know whether these documents give rise to something

new.” Ex. 1. The fact is that these new documents are unremarkable, and entirely consistent with all the other evidence previously available in the case. Plaintiffs apparently want to extend the discovery period either to increase defendants’ cost in defending or to go on yet another fishing expedition in the hopes of finding some currently unknown theory of liability.

4. It also appears that plaintiffs obtained Murus’ “cooperation” by questionable use of the subpoena process. Back in March 2004 plaintiffs sent defendants a copy of a letter indicating that Murus had accepted service of their subpoena, Ex. 2, and they now advise the Court in their current motion that “Timberpeg received documents from Murus pursuant to a subpoena on May 18, 2004.” However, Murus’ counsel advised the undersigned last week that no subpoena was validly issued or accepted by Murus. Defendants have therefore been operating under the (incorrect) impression that information was flowing per the subpoena, while plaintiff was unilaterally obtaining information from Murus which was not available to defendants.

5. Plaintiffs have now divulged¹ information showing they obtained a secret agreement with Murus for plaintiffs to interview Murus’ principal without defendants being present or informed by giving Murus a release of plaintiffs’ claims. Ex. 1 & 4.

6. The plaintiff-Murus settlement documents are responsive to defendant’s initial production request and were required to be produced under the supplementation rule of FRCP 26(e). However, plaintiffs failed to produce, or even to mention the secret agreement at all, in their January 12 letter to defendants. Ex. 5. They only provided it after defendants demanded all Murus documents from plaintiffs and highlighted the supplementation obligation. Ex. 3, 6 & 7. Moreover, Murus’ counsel advised the undersigned that there were drafts of the

¹ In response to defendants January 13 e-mail directly demanding “any other documents relating to Murus,” Ex. 3, plaintiffs finally produced the Settlement Agreement And Release, now grudgingly stating that it “might remotely be responsive.” Ex. 1.

agreement communicated to Murus, and vice versa, which were rejected; plaintiffs have also refused to acknowledge or produce these. Ex. 7, second page. These documents are relevant and should be produced under the document supplementation provision (see related motion to compel being filed with this opposition).

7. Moreover, plaintiffs admit having notes of their one-hour interview of Murus' principal, which defendants do not have. Plaintiffs' non-control group employees who participated also likely have notes of Murus' statements. In light of the above, defendants should receive a copy of the notes of the statement (see separate motion to compel being filed with this opposition), and it would be unfair to reopen discovery for plaintiffs' unilateral benefit when defendants have been denied that information.

The discovery process should result in an even playing field. Plaintiffs should not be permitted to sit on their hands for the last seven months of the discovery process, use the apparent subpoena process and negotiation of claim releases to obtain information which defendants do not have, hide that information from defendants, and then exploit that unilateral information by obtaining new depositions after the discovery period has closed.

The motion should be denied.

Date: January 25, 2005

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

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2005, 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