

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' THIRD MOTION TO COMPEL

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

VTW submits its Memorandum In Support, below, and Exhibits 1 - 10, attached.

MEMORANDUM IN SUPPORT

Preliminary Statement

This is plaintiffs' action against VTW alleging that VTW infringed plaintiffs' copyrighted architectural plans dated April 21, 2001, and registered with the Copyright Office on May 8, 2001. Defendants categorically reject the claim; they made their timber frame design completely independently of plaintiffs' design.

The Court has largely granted defendant VTW's two prior motions to compel, and sanctioned plaintiffs in connection with the second of those.

Plaintiffs' recent Motion To Extend The Discovery Deadline has raised a concern that plaintiffs have used the subpoena process<sup>1</sup> and/or settlement and release of their claims against a non-party to obtain unilateral information to which defendants should have been entitled on the same terms, and that they continue to withhold other producible documents.

### Murus

After VTW erected the raw timber frame for a portion of Isbitski's house, the Murus Company contracted separately with Isbitski to apply panels to the frame. Apparently plaintiffs hope to establish that their own drawings had been provided to Murus by defendants. However, not one shred of evidence developed to date – including depositions of all the VTW personnel and complete document production from both the defendants and Murus – has surfaced to support that theory.

Not satisfied with the state of evidence, on the eve of discovery cut-off plaintiffs apparently re-contacted Murus and, by negotiating a release of plaintiffs' claims against Murus, obtained a secret agreement with Murus for plaintiffs to interview Murus without defendants being present, or even being informed. Ex. 2. They secretly conducted the interview on January 11, 2005.

Then, on January 12, 2005 plaintiffs advised defendants that Murus had - presumably out of the blue – produced some additional documents. Ex. 3. However, this announcement failed to divulge the Murus settlement, or the secret interview, at all. Ex. 3 Plaintiffs produced the settlement document only after defendants demanded all Murus documents and highlighted the

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<sup>1</sup> It appears that plaintiffs may have obtained Murus' "cooperation" by questionable use of the subpoena process. Plaintiffs advised defendants that Murus had accepted service of its subpoena, Ex. 1, and in their current motion to reopen the discovery deadline state that "Timberpeg received documents from Murus pursuant to a subpoena." But Murus' counsel advised the undersigned last week that this was not the case. Defendants have therefore been operating under the (incorrect) impression that information was flowing per the subpoena, while plaintiff was unilaterally, and secretly, obtaining information from Murus which was not available to defendants.



## **Childbirth**

*I want to have children, but my friends scare me. One of them told me she was in labor for thirty-six hours. I don't even want to do anything that feels good for thirty-six hours.*

**Rita Rudner**

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supplementation obligation of FRCP 26. Ex. 4 & 5. Defendants now know both from Murus and plaintiffs that there were other drafts of the agreement, and possible correspondence or e-mails, relating to it. Murus has informed defendants that plaintiffs proposed terms which Murus rejected. Plaintiffs refuse to produce these, and defendants have been unsuccessful in obtaining them from Murus.

Since the Murus personnel are possible witnesses in the case, the negotiation of the settlement, including the rejected terms, are relevant. Moreover, the documents are responsive to defendants' discovery, Ex. 6 & 7, and producible under the supplementation rule of FRCP 26(e)(2). The Court should order production.

#### Notes Of Murus Interview

Defendants have learned that plaintiffs interviewed Murus' principal, Jamie Jenkins, for approximately one hour on January 11, 2005. This was conducted by Daniel Will (plaintiffs' outside litigation counsel in this case), Stephen Woods (plaintiffs' in house general counsel), and apparently<sup>2</sup> Jonathan Vincent and James Driesch.

Plaintiffs' counsel has confirmed that there are counsel notes of the interview but has not confirmed or denied whether there are also notes from Vincent and Driesch. Ex. 8.

As to the notes by counsel, these might constitute attorney work product under FRCP 26(b)(3), but they most likely consist of the lowest level of work product, that is, the mere recording of fact statements by non-party Murus, not attorney impressions. If there are also indications of counsel's mental impressions, conclusions, opinion, or legal theories, that could easily be redacted. Defendants have substantial need of it so that they have the same access as plaintiffs have accorded to themselves through, apparently, the threat of suit or the suggestion of

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<sup>2</sup> Murus advised defendants' counsel that in addition to Will and Woods, plaintiffs had a "chief of design" and a "more junior designer" on the phone; defendants assume these to be Vincent and Driesch.

subpoena. FRCP 26(b)(3); See Klonoski v. Mahlab, 953 F. Supp. 425 (D.N.H. 1996); Klonoski v. Mahlab, No. 95-153-M slip op. (July 16, 1996). In addition, they need it so that they can appropriately prepare for the testimony of plaintiffs' two expert witnesses who also participated in the unilateral discussion (see next paragraph).

As to the notes (probably) made by Vincent and Driesch, the grounds for production are even stronger. First, these notes are not attorney work product, nor are Vincent and Driesch part of the control group to which attorney-client privilege might apply. New Hampshire adopts the "control group" test of whether a person is entitled to be treated as management. Klonoski v. Mahlab, No. 95-153-M slip op, supra. Here, Vincent testified at deposition that he had no "authority to take actions on behalf of Timberpeg East [or] T-Peg," and that the "only place I have anything to do with T-Peg, Inc., is in filling out copyright apps." Ex. 9 at P. 10. Driesch is junior to Vincent.

Second, both Vincent and Driesch have been disclosed by plaintiffs as expert witnesses in the case. As such, everything they have considered, participated in, or written relating to the case should be open book for defendants.

Documents TIM 493, 494, 495

Plaintiffs have withheld from production three documents, labeled TIM 493, 494 and 495, solely on the basis of purported "attorney-client privilege." Ex. 10. In each case the document was communicated solely between Stephen Woods, plaintiffs in-house counsel, and Jonathan Vincent, as shown by the privilege log.

As shown in the prior section, Vincent made clear at deposition that he is not involved in the decision-making process at either plaintiff, is not directing this case, and is not a part of plaintiffs' "control groups." Ex. 9 at 10. Therefore, attorney-client privilege cannot apply, under the cases cited above.

Moreover, independently of the control group issue, the documents are discoverable because of Vincent's and Driesch's designations as expert witnesses in the case, also as discussed above.

#### Sanctions Are Appropriate Under FRCP 26(g) and 37(b)

This is not the first problem with discovery from plaintiffs, the Court having already sanctioned plaintiffs in its November 19, 2004 Order on the Second Motion To Compel. In light of plaintiffs' continuing refusal to provide discovery to which defendants are clearly entitled, sanctions are again appropriate.

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 continuing pattern of avoidance, delay, refusal and attempt to hide the ball.

FRCP 26(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 conduct, or 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.

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.

Conclusion

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, as follows:

1. That it compel production of all documents relating to Murus, including all settlement drafts and communications between plaintiffs or their counsel and The Murus Company or its counsel.
2. That it compel production of the statements of plaintiffs' counsel recording information provided by Murus in the interview of approximately January 11, 2005 (permitting redaction of counsel's comments on such information, subject to in camera review by the court of redacted passages).
3. That it compel production, unredacted, of statements of others who listened or participated in the Murus interview (including particularly Vincent and Driesch).
4. That it compel production of plaintiffs' documents labeled TIM 493, 494 and 495.
5. That it award appropriate sanctions, including attorneys fees and expenses, to defendants incurred in obtaining the above information.

Date: January 25, 2005

VERMONT TIMBER WORKS, INC.  
Defendant,

By: W. E. Whittington  
Its Attorney

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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:

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