

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

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

Plaintiff,

v.

Stanley J. Isbitski and Vermont Timber Works, Inc.

Defendants.

No. C-03-462-M

**OBJECTION TO DEFENDANT VERMONT TIMBER WORKS' MOTION TO DISMISS**

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully object to the defendant Vermont Timber Works' Motion to Dismiss. In support of this objection, Timberpeg states as follows:

1. Vermont Timber Works moves to dismiss every count of Timberpeg's Complaint against Vermont Timber Works for failure to state a claim upon which relief may be granted. Timberpeg objects to Vermont Timber Works' motion.

2. Timberpeg incorporates herein and respectfully refers this Court to the accompanying Memorandum of Law in Support of its Objection to the Motion to Dismiss.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Deny defendant Vermont Timberworks' Motion to Dismiss; and
- B. Grant such other and further relief as this Court deems just, equitable and proper.

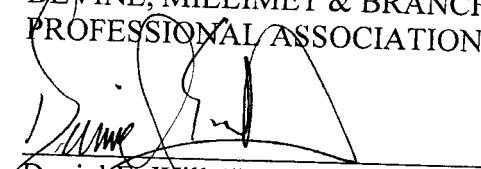
Respectfully submitted,

T-PEG, INC. AND TIMBERPEG EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Dated: January 7, 2004

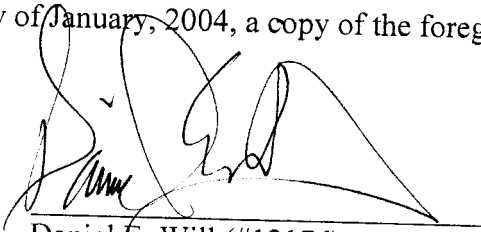
  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of January, 2004, a copy of the foregoing was forwarded to W.E. Whittington, Esquire.

  
\_\_\_\_\_  
Daniel E. Will (#12176)

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

T-PEG, INC. and TIMBERPEG EAST, INC. )

Plaintiffs )

V. )

STANLEY J. ISBITSKI, and )  
VERMONT TIMBER WORKS, INC. )

Defendants )

No. C-03-462-M

**MEMORANDUM OF LAW IN SUPPORT OF  
OBJECTION TO DEFENDANT VERMONT TIMBERWORKS' MOTION TO DISMISS**

The plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. ("Timberpeg"), respectfully submit this memorandum of law in support of their objection to the motion to dismiss of the defendant Vermont Timber Works, Inc. ("VTW").

**Preliminary Statement**

This action involves a claim of copyright infringement and other claims by Timberpeg against VTW and co-defendant Stanley Isbitski ("Isbitski"), arising out of the defendants' use of Timberpeg's copyrighted design plans to design and construct a timber frame structure for Isbitski. On the basis of a combination of mischaracterizations of the facts alleged, or, simply, bold assertions of facts not alleged, VTW moves to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. VTW goes as far as to suggest a Rule 11 violation, perhaps in the hope this Court will overlook the actual allegations in the Complaint and the reasonable

inferences the allegations support. As set forth below, VTW states no basis upon which any of the claims asserted should be dismissed. To the contrary, VTW's motion is ill argued and unfounded, and should not have been filed at all.

### **Standard of Review**

For the purposes of a motion to dismiss, the allegations in the Complaint are construed liberally in favor of a plaintiff. See Drolet v. Healthsource, Inc., 968 F. Supp. 757, 759 (D.N.H. 1997) (analyzing Rule 12(b)(6)); Santiago de Castro v. Morales Medina, 943 F.2d 129, 130 (1st Cir. 1991) (analyzing Rule 12(c)). All facts are assumed true, and all reasonable inferences from those facts are drawn in favor of the plaintiff. To withstand a Motion to Dismiss, the plaintiff must only set forth in the Complaint "factual allegations, either direct or inferential regarding each numbered element necessary to sustain recovery under some actionable legal theory." Id. (emphasis added).

### **Statement of Facts**

The following sets forth the facts, as alleged in the Complaint, which must be assumed as true for purposes of a motion to dismiss.

Timberpeg designs, manufactures and sells TIMBERPEG® brand packages of post and beam materials used for the construction of a home's timber frame and exterior building envelope. See Complaint, ¶9. A timber frame consists of vertical posts and horizontal beams, the combination of which create the structural skeleton of the home and define the home's size, shape, look, and architectural spaces (i.e. the overall design of the home). See id. A Timberpeg package generally consists of the timber frame, windows, exterior doors, insulation, siding, exterior trim, and cedar roof shakes. See id. A purchaser of a Timberpeg package hires a builder to assemble the package and complete construction of the home. See id.

In November 1999, Isbitski entered into an agreement (the “Design Agreement”) with Timberpeg, pursuant to which he paid a \$2500 deposit in exchange for Timberpeg’s agreement to create plans and drawings for a post and beam home Isbitski intended to construct from a Timberpeg package in Salisbury, New Hampshire. See Complaint, ¶10. The Design Agreement between Timberpeg and Isbitski provided that should Isbitski decide not to purchase a Timberpeg package, Timberpeg would return the deposit to Isbitski, less the cost of design time. See id. Pertinent to the pending motion, the Design Agreement unequivocally provided that Timberpeg would own the copyright to any plans it produced, regardless of whether Isbitski purchased a Timberpeg package. See id. at ¶13.

Pursuant to the Design Agreement, Timberpeg created an original set of architectural plans and provided the plans to Isbitski. See Complaint, ¶14 (emphasis added). The plans contained a copyright notice confirming that Timberpeg held the copyright in the plans. Isbitski reviewed the plans and requested design changes. Timberpeg accommodated the changes in revised plans, (“the Plans”) which also contained a copyright notice. See id. at ¶15. Timberpeg registered the Plans with the United States Copyright Office as an architectural work. See Complaint ¶16.

Isbitski ultimately decided not to purchase a Timberpeg package. See Complaint, ¶19. Isbitski, nonetheless, had filed a copy of Timberpeg’s copyrighted Plans with the Salisbury Building Department, on the basis of which the Building Department issued a building permit (Permit No. 01-37) to Isbitski. See id. at ¶18. Isbitski also delivered the Plans to VTW. See Complaint ¶19. VTW used the Timberpeg Plans to create a timber frame that would fit the Plans and follow and define the architectural spaces embodied in the Plans. See id. at ¶20. VTW then erected on Isbitski’s property a timber frame that physically embodies the size, shape,

architectural spaces, floor plan, and overall design of Timberpeg's Plans so as to make VTW's timber frame (that portion of a post and beam house which creates the overall shape of the house and defines the interior spaces) virtually identical to the architectural work embodied in Timberpeg's Plans. See id. at ¶23. Timberpeg did not consent to either Isbitski or VTW copying or using Timberpeg's copyrighted Plans in this manner. See id. at ¶¶24-5.

### **Argument**

On the strength of the allegations in the Complaint, as well as the documents attached to the Complaint and incorporated by reference therein, Timberpeg seeks relief against VTW for copyright infringement, unjust enrichment, unfair competition, and violation of the New Hampshire Consumer Protection Act, RSA 358-A.

VTW bases its motion to dismiss principally upon a recitation of facts that is a combination of (1) misstatements or mischaracterizations; (2) allegations not contained in the Complaint; and (3) attenuated inferences impermissibly drawn in VTW's favor. VTW further interjects a fair amount of invective (e.g., Timberpeg's true business strategy is to take customers' ideas, produce nothing of value, and extort sales, see Motion To Dismiss at 2; Timberpeg's Complaint violates Rule 11, see id. at 4) that has no bearing on any substantive issue.

As set forth below, on the basis of the facts actually alleged in the Complaint and the reasonable inferences in Timberpeg's favor that can be drawn from those facts, Timberpeg states claims upon which relief may be granted for copyright infringement, unjust enrichment, unfair competition, and the New Hampshire Consumer Protection Act. Accordingly, VTW's motion should be denied.

**I. VTW's Purported Statement Of The Facts Is Inaccurate, Draws Inferences Adverse To Timberpeg, And Asserts Factual Allegations Not Found In The Complaint**

VTW's factual recitation resembles argument more than fact and contains a series of assertions which find no basis in the Complaint itself (the governing document on a motion to dismiss), or consist of attenuated inferences in VTW's favor, not Timberpeg's favor as per the standard of review. See Drolet, 968 F.Supp. at 759. Many of VTW's "factual" allegations are irrelevant to the substantive issues VTW raises and can only have a purpose of attempting to bias this Court against Timberpeg. Some of the "factual" allegations are not within the Complaint at all. Each of these assertions is an improper basis for a Rule 12 motion and should be disregarded.

In commenting on the Design Agreement between Timberpeg and Isbitski, VTW states:

More realistically, anyone reading Timberpeg's fine print, standard contract for 'preliminary plans and drawings' (Cplt., Ex. A) will conclude that one of Timberpeg's true business strategies employed here was to appropriate its customers' ideas, to copyright those ideas in Timberpeg's own name while providing nothing of utility for the customer, and then to extort sales of packages by preventing the customer from using his own ideas.

Motion at 2. VTW does not draw that statement from an express allegation in the Complaint itself, but rather infers that allegation from the Design Agreement between Isbitski and Timberpeg. To the extent that inference has any relevance to VTW's motion, the inference is drawn in favor of VTW, the moving party, and against Timberpeg, the nonmoving party, and, therefore, is improper. See Drolet, 968 F.Supp. at 759.

VTW boldly asserts that "[p]laintiffs admit that they provided only preliminary plans to Isbitski...." Motion at 2 (emphasis in original). VTW draws this inference, which at least in VTW's view is adverse to Timberpeg, from the language of the Design Agreement between Isbitski and Timberpeg. Not only is any inference adverse to Timberpeg improper on a motion

to dismiss, but VTW overlooks altogether the allegations in paragraphs 14 and 15 of the Complaint in which Timberpeg expressly asserts that Timberpeg created an original set of architectural plans and provided them to Isbitski. VTW also overlooks the allegations in paragraph 18, that Isbitski had the Plans he received from Timberpeg filed at the Salisbury Building Department and received a building permit on the basis of the Plans. Even without paragraphs 14-15, paragraph 18 supports a reasonable inference, in Timberpeg's favor, that the Plans Isbitski received were architectural plans, which were sufficiently "final" for purposes of the Salisbury Building Department to issue a building permit and for construction to commence.

Next, VTW claims:

Since it is clear from the complaint that Isbitski never received 'Construction Plans,' 'specifications,' 'Frame Design,' or other materials necessary to make a decision, the process never reached the point where transfer of copyright was triggered.

Motion at 2-3. This, too, finds no basis within the Complaint's allegations. See Complaint ¶13, ("Company and/or its assigns own and will continue to own the copyright in the Plans."); ¶14 (stating that Timberpeg provided Isbitski with a set of architectural plans); and ¶16 (referencing Timberpeg's copyright Certificate of Registration, Exhibit B). At best this constitutes an inference VTW seeks to draw in its own favor, contrary to Rule 12's standard.

Finally, VTW states:

Isbitski was unhappy with the Timberpeg package, and withdrew without having ever approved even the Preliminary Plans, so far as the Complaint explains.

Motion at 3. This allegation finds no basis anywhere in the Complaint, though VTW contends that the Complaint explains it. Drawing all inferences in Timberpeg's favor, the fact that Isbitski drew a building permit on the strength of Timberpeg's Plans and paid VTW to manufacture and

construct a timber frame based on the Timberpeg Plans, suggests that Ibitski was quite happy with the Plans.

In short, VTW bases its motion largely on a combination of inferences drawn in its favor and “facts” the Complaint does not allege. In light of the Rule 12 standard, which VTW recites at pages 4-5 of its motion, VTW must know its tactics are improper. This Court should disregard those inferences and facts, such as they are. On the facts actually asserted in the Complaint, which must be taken as true, and the reasonable inferences in Timberpeg’s favor, the Complaint states claims upon which relief may be granted.

## **II. T-Peg, Inc. States A Claim Against VTW**

At the outset, VTW requests dismissal of plaintiff T-Peg, Inc. based upon VTW’s contention no claim is asserted on T-Peg’s behalf. VTW’s argument lacks any substantive merit and is largely a function of a careless or inattentive review of the Complaint.

Paragraph 1 of the Complaint identifies T-Peg, Inc. as a New Hampshire corporation and as the parent corporation of co-Plaintiff Timberpeg East, Inc. Paragraph 2 of the Complaint identifies Timberpeg East, Inc. as a New Hampshire corporation based in Claremont. Paragraph 2 further states: “T-Peg, Inc. and Timberpeg East, Inc. shall hereafter collectively and individually be referred to as ‘Timberpeg.’” Contrary to VTW’s argument, every allegation of the Complaint is made on behalf of both T-Peg, Inc. and Timberpeg East, Inc. More specifically, as referenced in Complaint paragraph 16, T-Peg, Inc. is the owner of the Certificate of Registration attached to the Complaint as Exhibit B. As a result, accepting Timberpeg’s well-pleaded factual averments as true, T-Peg, Inc. is the legal owner of the Certificate of Registration and is a proper party to this litigation.

### **III. VTW's Claim Of Preemption Is Unfounded**

In addition, VTW, without any significant citation or analysis, argues that the United States Constitution and the Copyright Act of 1976 preempt Timberpeg's State law claims. VTW fails to cite a single case in which a court has determined that unjust enrichment, unfair competition, and the New Hampshire Consumer Protection Act claims are preempted by the Federal Copyright Act. Ironically, VTW's argument is premised on the assumption that Timberpeg's copyright claims against VTW are valid. Defendant VTW's argument appears to be that, given valid copyright claims against VTW, Timberpeg cannot assert other "equivalent" State law claims against VTW.

VTW's argument fails because none of Timberpeg's State law claims requires proof of copyright ownership as an essential element to recover under those claims. Under claims of unjust enrichment, unfair competition, and violation of the New Hampshire Consumer Protection Act, copyright registration of the Plans is irrelevant. Under both Timberpeg's unjust enrichment and unfair competition claims against VTW, Timberpeg need only prove VTW used Timberpeg's Plans, even if not copyrighted, in such a way as to provide a benefit to which VTW was not entitled to or so as to have permitted VTW to compete with Timberpeg in a way that was unfair. Under Timberpeg's Consumer Protection Act claim, Timberpeg need only prove that VTW's construction of a timber frame for Isbitski pursuant to a Building Permit based on Timberpeg Plans constitutes passing off goods as those of another. Thus, copyright ownership is not an essential nor a relevant element for any of the State law claims.

Even assuming Timberpeg's State law claims were subsumed within federal copyright law, a proposition for which, as mentioned, VTW supplies no legal support, Timberpeg has a well recognized right to assert alternative pleadings in its Complaint. See Fed.R.Civ.P. 8(e)(2)

“A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.”). Courts have long recognized that a plaintiff may assert what appear to be facially contradictory allegations with the understanding that the discovery process is the appropriate procedure for the plaintiff to determine which of its alternative theories is supported by the evidence. Therefore, a motion to dismiss is not appropriate for purposes of alternative theories of recovery when by definition the motion to dismiss must assume the truth of all factual averments.

#### **IV. Timberpeg States A Claim Against VTW For Copyright Infringement**

The thrust of VTW’s motion is that Timberpeg fails to state a claim against VTW for copyright infringement. VTW’s argument is based on erroneous legal contentions, oversight of clearly pleaded factual allegations, invention of facts not in the complaint, and the drawing of inferences adverse to Timberpeg. Timberpeg will first demonstrate that its Complaint contains allegations sufficient to plead each element of a copyright claim. For the sake of thoroughness, Timberpeg will then respond to each of VTW’s various arguments.

##### **A. The Complaint Adequately Alleges Copyright Infringement**

The elements of a copyright infringement claim are well settled. “To establish copyright infringement, a plaintiff must prove (i) ownership of a valid copyright, and (ii) copying of the constituent elements of the work that are original.” CCM Cable Rep. Inc. v. Ocean Coast Properties, Inc., 97 F.3d 1504, 1513 (1<sup>st</sup> Cir. 1996). Accepting the factual averments of the Complaint as true, Timberpeg pleads each element necessary to establish copyright infringement against VTW.

With respect to the first element, paragraph 16 of the Complaint states: “On May 18, 2001, Timberpeg registered the Plans with the United States Copyright Office as an architectural

work, Certificate of Registration No. VAu 510-781. A true and correct copy of the Certificate of Registration is attached hereto as Exhibit B.” The First Circuit has confirmed that “once the Plaintiff produces a certificate of copyright, which constitutes prima facie evidence of copyrightability in judicial proceedings, the burden shifts to the defendant to demonstrate why the claim of copyright is invalid.” CCM Cable, 97 F.3d at 1513. Timberpeg has produced a valid Certificate of Registration. Therefore, Timberpeg has averred and established the first prong of the copyright test: ownership of a valid copyright.

The second element of a copyright infringement claim (“copying”) is established through two separate but similar proofs: (1) proof of “copying” as a factual matter and; (2) proof of “copying” that is so extensive as to render the infringing work substantially similar to the copyrighted work.

With respect to the first,

“To show actionable copying and thereby satisfy Feist’s second prong, ‘a plaintiff must first prove that the alleged infringer copied plaintiff’s copyrighted work as a factual matter; to do this, he or she may either present direct evidence of factual copying or, if that is unavailable, evidence that the alleged infringer had access to the copyrighted work and the offending and copyrighted works are so similar that the court may infer that there was factual copying (i.e., probative similarity).’”

CCM Cable, 97 F.3d at 1513. Timberpeg has alleged factual “copying” (i.e., use) in Paragraph 21 of the Complaint: “Upon information and belief, Vermont Timber used the Plans for the purpose of designing and manufacturing a timber frame pursuant to the Plans’ ‘requirements and parameters.’” As detailed below, the fact that Timberpeg alleges copying or use “upon information and belief” in no way undermines the sufficiency of its allegation. In addition, even absent Timberpeg’s factual averment of actual copying, Timberpeg has alternatively alleged access to the Timberpeg Plans and that the infringing work is “substantially similar to, if not

virtually identical to, the architectural work embodied in the Plans.” See Complaint ¶¶ 20 and 23.

With respect to the second component of copying, Paragraph 23 of the Complaint also sufficiently alleges substantial similarity: “The Vermont Timber timber frame as manufactured and constructed by Vermont Timber physically embodies the size, shape, architectural spaces, floor plan, and overall design of the Plans in a manner that is substantially similar to, if not virtually identical to, the architectural work embodied in the Plans.” Accepted as true, as Rule 12 requires, Timberpeg’s factual averments properly allege each of the constituent elements of a copyright infringement claim.

**B. VTW’s Arguments Concerning Copyright Infringement**

VTW’s chief argument in support of its contention that Timberpeg fails to state a claim for copyright infringement appears to be based on a fundamental misunderstanding of copyright law as it relates to architectural works. VTW argues that because VTW did not allegedly copy the Timberpeg Plans or erect the actual Timberpeg frame, VTW could not have “copied” as a matter of law. VTW misreads the Architectural Works Copyright Protection Act of 1990, which added “architectural work” to copyright law. The statute defines an architectural work as:

the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

17 U.S.C. § 101, Definitions. Copyright protection for architectural works applies to a set of plans even if the embodied design is unconstructed. See Hunt v. Pasternack, 179 F.3d 683, 683-84 (9<sup>th</sup> Cir. 1999) (“ . . . an unconstructed work, embodied only in plans or drawings, can be infringed by a structure that embodies the copied design. (emphasis added).

Infringement need not occur through the copying (ie, duplication) of architectural plans; it is well established that infringement can occur through the construction of a structure substantially similar to the embodied design.<sup>1</sup> See Arthur Rutenberg Homes, Inc. v. Maloney, 891 F. Supp. 1560, 1568 (N.D. Fla. 1995) (“MALONEY is liable as a direct infringer because of his involvement in the creation of the architectural plans and the construction of the architectural work. (emphasis added)”); Richmond Homes Management, Inc. v. Raintree Inc. 862 F. Supp. 1517, 1525 (W.D. Va. 1994) (“The defendants’ argument that . . . the defendants therefore did not infringe on any of plaintiffs’ copyrights by building substantially similar homes, contradicts the shift in treatment of architectural works brought about by the 1990 amendments to the Copyright Act. (emphasis added)”). Thus, “copying” for purpose of infringement of an architectural work may be established by the mere construction of a substantially similar structure.

Proof of “copying” via construction or other fabrication of the infringing work is well acknowledged in copyright law. In Segrets, Inc. v. Gillman Knitwear Company, Inc., 207 F.3d 56, 61-2 (1<sup>st</sup> Cir. 2000), for example, the First Circuit found direct evidence that defendants “copied” the plaintiff’s copyrighted sweater based upon the defendants’ use of the sweater as a model for the creation of a substantially similar (and infringing) sweater. The act of manufacturing the sweater itself constituted the “copying” for purposes of copyright infringement. See id. In this case, similarly, Timberpeg alleges that VTW manufactured and constructed a timber frame that “physically embodied the size, shape, architectural spaces, floor plan, and overall design of the Plans in a manner that is substantially similar to, if not virtually

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<sup>1</sup> The legislative history clarifies the purpose of the Architectural Works Copyright Protection Act. The House Report relating to the Act specifically found that an amendment to the copyright law to protect architectural works was necessary because “there was concern that a defendant with access to the plans or drawings could construct an

identical to, the architectural work embodied in the Plans.” Complaint, ¶23. Taken as true, Timberpeg has alleged sufficient facts to establish copyright infringement of Timberpeg’s unconstructed architectural work as embodied in Timberpeg’s copyrighted Plans.

VTW’s remaining arguments are less substantive, but equally without merit:

1. VTW argues that Timberpeg does not hold a valid copyright. Motion at 7. As discussed above, Exhibit B to the Complaint is prima facie evidence of Timberpeg’s valid copyright ownership.

2. VTW argues that Timberpeg’s copyright does not extend to VTW’s manufacture of the timber frame because Timberpeg allegedly did not design the timber frame. Motion at 8. As discussed above, Timberpeg’s copyright is on the architectural work as embodied in its copyrighted Plans. Defendant VTW, at the very least, infringed Timberpeg’s copyrighted Plans by manufacturing and constructing a timber frame that is substantially similar to the architectural work embodied in Timberpeg’s Plans.

3. VTW contends that the Plans were not copyrightable because the Plans only covered non-protectible ideas.” Motion at 9. VTW misstates the facts and inserts argument in place of facts. Timberpeg’s Complaint does not admit that the Plans were not copyrightable. To the contrary, the Certificate of Registration is prima facie evidence of valid copyright registration. VTW’s argument overlooks Paragraphs 14 and 15 of the Complaint, which alleges that Timberpeg provided Isbitski with architectural Plans. More telling of the frivolous nature of VTW’s motion to dismiss, VTW claims the Plans were not sufficiently detailed to obtain a building permit. Motion at 9. VTW makes this assertion despite the fact that Isbitski was issued

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identical building but escape liability so long as the plans or drawings were not copied.” H.R. Rep. No.101-735 at 19 (1990).

a building permit based on the Plans (Complaint ¶18) and VTW erected the Isbitski frame based on that very building permit.

As a matter of law, VTW's argument fares no better. VTW relies on the decision of the Second Circuit in Attia v. Society of the New York Hospital, 201 F.3d 50 (2d Cir. 1999), but that reliance is misplaced. In Attia, New York Hospital hired the plaintiff to create a proposal for the modernization of the Hospital's facilities, namely the expansion of the Hospital. See 201 F.3d at 52. The plaintiff developed a concept, which included drawings and sketches, to expand the Hospital on a platform over FDR Drive. See id.

The plaintiff in Attia described his own plans as "demonstrating a concept," "an idea," and as "a first attempt to stimulate thinking," and, upon that basis, the Court, drawing a distinction between mere ideas and protected expression, concluded that the plaintiff's generalized ideas and concepts did not rise to the level of copyrightable architectural works. See id. at 56-7. Notably, the Court contrasted the plaintiff's concepts against cases which supported infringement claims based on architectural plans sufficiently detailed to support construction. See id. at 56.

Unlike the generalized, conceptual drawings in Attia, which were insufficient for purposes of construction, Timberpeg alleges that it provided Isbitski with architectural Plans, and that its Plans were not only placed on file with the Salisbury Building Department but were sufficient for the Salisbury Building Department to issue a Building Permit. See Complaint Paragraphs 14, 15, and 18. Timberpeg alleges the very level of detail or specification which the Attia court recognizes as supporting a valid copyright, namely that VTW used copyrighted plans that would have supported construction.

In that regard, Timberpeg's claim more closely resembles that of the plaintiff in Sparaco v. Lawler, Matusky, Skelly Engineers, LLP, 303 F.3d 460, 465 (2d Cir. 2002), in which the plaintiff, a land surveyor, appealed a summary judgment order dismissing his copyright infringement claim for a site development plan he created. The lower court, relying on Attia, determined that the site plan contained only generalized conceptual ideas and not protected expression. In reversing the lower court, the Second Circuit noted that the plaintiff's site plan was a fully realized plan capable of being used to guide actual construction and that the plan was acceptable to the local town and "could have been built as approved." 303 F.3d at 468. Similarly, Timberpeg's Plans go far beyond mere idea and are protectable expression as an architectural work as evidenced by the Town of Salisbury's issuance of a Building Permit based upon the Timberpeg Plans.

4. VTW argues that "Timberpeg specifically authorized the copying." Motion at 6. VTW's unsubstantiated allegation, which finds no basis in the Complaint and which fails to recognize the standard of review on a motion to dismiss, should be ignored.

5. Finally, VTW contends that Timberpeg's allegations are insufficient because the allegations are made upon information and belief. Motion at 10-11. To a large extent, this is the most baseless of VTW's arguments, but also the most serious and disturbing, as VTW strongly implies, if not expressly states, that Timberpeg and its counsel have violated Rule 11. See Motion at 4. Timberpeg and its counsel take very seriously any suggestion they have advanced pleadings which do not meet Rule 11 standards. Timberpeg assumes counsel for VTW would not launch such charges off the cuff in passing; yet any level of analysis reveals VTW's suggestion to be wholly unfounded.

Rule 8 of the Federal Rules of Civil Procedure requires of complaints only a short, plain statement of the allegations upon which the request for relief is premised. See Fed.R.Civ.P. 8. The Rule requires no particular form, and, while Rule 9 sets forth heightened pleading requirements for some types of claims such as fraud, Rule 9 does not apply to copyright infringement or any of the other claims Timberpeg asserts. See Fed. R. Civ. P. 8 & 9. Rule 11 supplies, in essence, the pleading backstop by imposing a requirement upon counsel to have a good faith basis for the assertions in any pleading. Given the gravity of the implications of a Rule 11 violation, courts have made clear that the Rule 11 inquiry is searching and stringent. Thus, a court will find a Rule 11 violation only if the allegations at issue are “utterly lacking in support.” O’Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996). Germane to this action, pleadings based upon evidence reasonably anticipated to be discovered during the litigation do not violate Rule 11. See Rotella v. Wood, 528 U.S. 549 (2000); O’Brien, 101 F.3d at 1489.

Viewing Timberpeg’s Complaint through the clear lens of applicable law, VTW has no basis to even suggest that Timberpeg and its counsel have violated Rule 11; any such suggestion should not be countenanced. The allegations of which VTW complains, paragraphs 19 – 22, and 54, flow inferentially from the specific allegations in the Complaint. In that regard, the Complaint alleges that Timberpeg provided architectural plans to Isbitski, that Isbitski had the Plans placed on file at the Salisbury Building Department, that Isbitski was issued a building permit, and that VTW erected a timber frame virtually identical to the design embodied in Timberpeg’s Plans. See Complaint, ¶¶14, 15, 18, and 23. The direct inference from those allegations is that Isbitski gave the Plans to VTW and that VTW used the Plans to design Isbitski’s timber frame. Stated alternatively, the Complaint alone makes clear that Timberpeg reasonably anticipates evidence to be discovered during the litigation to prove those allegations.

Notably, VTW does not suggest that the allegations are utterly lacking in support. See O'Brien, 101 F.3d at 1489. This is likely because the allegations in paragraphs 19 – 22, and 54 stem from admissions made by VTW’s own counsel, and, after disposition of this motion, VTW will have to admit them in its answer. While cognizant that neither a motion to dismiss nor an objection thereto should normally contain any admission of facts outside the pleadings, Timberpeg feels further compelled to respond to VTW’s insinuation of a Rule 11 violation. Attached as Exhibits A and B to this Memorandum are two letters from VTW’s counsel in which VTW’s counsel admits that Isbitski gave the Timberpeg Plans to VTW, that VTW performed its design work based upon the information conveyed by Isbitski, and that VTW erected the VTW timber frame. Timberpeg has redacted the last paragraph of the September 22, 2003 letter (Exhibit B) due to its reference to settlement negotiations. Timberpeg made its allegations upon information and belief because it has not yet deposed VTW’s principals. The basis for those allegations, however, as the attached correspondence demonstrates, is strong.

VTW’s not so subtle reference to a Rule 11 violation is without merit given the allegations in the Complaint, backed by the correspondence of VTW’s own counsel. This Court should not approve of VTW’s unfounded claim of unethical conduct on the part of Timberpeg and its counsel.

**V. Timberpeg States a Claim for Unjust Enrichment**

VTW contends that Timberpeg fails to state a claim for unjust enrichment, arguing that the claim is too vague, that Timberpeg fails to allege that VTW received a benefit, and that the claim is preempted. Stated most broadly, “[a] trial court may require an individual to make restitution for unjust enrichment if he has received a benefit which would be unconscionable for him to retain.” R. Zoppo v. City of Manchester, 122 N.H. 1109, 1132 (1982). A plaintiff must

prove (or allege at this stage of the proceedings) that the defendant was unjustly enriched “either through wrongful acts or passive acceptance of a benefit that would be unconscionable to permit the defendant to retain.” Id.

Timberpeg alleges each constituent element of an unjust enrichment claim against VTW. Paragraph 56 of the Complaint specifically states: “The copying or utilization of the Plans provided a benefit to Vermont Timber to which Vermont Timber was not entitled.” Paragraph 54 of the Complaint alleges by way of benefit that “Vermont Timber saved considerable cost in its manufacture of construction materials for the Isbitski house.” Even accepting the propositions VTW cites in its motion as correct statements of law, Timberpeg has alleged that VTW received a financial benefit in the form of architectural plans it did not have to prepare. The claim is neither too vaguely pleaded nor insufficient as a matter of law.

As discussed above, federal preemption does not apply because unjust enrichment does not require proof of copyright ownership and, additionally, Timberpeg has a well recognized right to plead alternative causes of action. See section III supra.

#### **VI. Timberpeg States A Claim for Unfair Competition**

Timberpeg’s factual allegations in Paragraphs 58 through 64 of the Complaint contain sufficient allegations, when accepted as true, to establish a cause of action for unfair competition. Specifically, VTW through its conduct (e.g., manufacturing and erecting the VTW timber frame based on a building permit issued upon Timberpeg’s Plans), is representing to the public that Timberpeg’s design is VTW’s design. In that fashion, Timberpeg satisfies the very requirement VTW contends (Motion at 12) the Complaint fails to meet: Timberpeg alleges that VTW is deceiving the general buying public.

Defendant VTW's reliance on this Court's decision in Mueller is misplaced. The plaintiff's claim in Mueller was specifically for misappropriation of trademark as a form of unfair competition. The holding in Mueller does not apply to copyright law but rather trademark law. Unlike copyright law, trademark law retains certain state common law protection that was the focus of the decision in Mueller. More fundamentally, Timberpeg's unfair competition claim rests on the fact that VTW is deceiving the public by claiming that Timberpeg's design is VTW's own.

**VII. Timberpeg States A Claim For Violation Of The New Hampshire Consumer Protection Act**

Finally, VTW contends that Timberpeg fails to state a claim for violation of the New Hampshire Consumer Protection Act, RSA 358-A. VTW contends, ostensibly, that none of Timberpeg's allegations describe conduct enumerated as proscribed in the act. See RSA 358-A:2. The Consumer Protection Act enumerates thirteen different categories of conduct, proof of which will result in a violation. The categories of proscribed conduct include passing off goods and services as those of another, and causing likelihood of confusion or of misunderstanding as to the source of goods or services. See RSA 258-A:2, I, II, III.

The allegations in Paragraphs 65 through 67 of the Complaint allege sufficient facts to state a claim for a violation of the New Hampshire Consumer Protection Act. In that regard, the Complaint alleges that the Salisbury Building Department issued a Building Permit based upon the Timberpeg Plans. The Complaint also alleges that VTW manufactured and constructed a substantially similar structure without revising the Building Permit. Those allegations combined could sustain a finding of passing off goods as those of another (i.e. suggesting to the public that the timber frame is a Timberpeg timber frame rather than a VTW timber frame), or similarly

causing likelihood of confusion or of misunderstanding as to the source of the goods or the affiliation of the goods. As a result, Timberpeg states a claim for which relief may be granted.

With respect to VTW's preemption contention, Timberpeg refers to Section III supra, and adds only that its Consumer Protection Act claim does not derive from its copyright claim, but rests on the independent basis that VTW is passing off Timberpeg's goods or services as VTW's goods or services.

### **VIII. Timberpeg Establishes Independent Jurisdiction Over Counts Five, Six and Seven**

Timberpeg has alleged damages in excess of \$75,000. Complaint ¶6. VTW's contention to the contrary is based on nothing more than VTW's opinion that Timberpeg's damage allegations are "fanciful and proven untrue by the allegations of the Complaint." Motion at 14-15. The allegations of the Complaint must be accepted as true. Timberpeg is prepared to prove damages in excess of \$75,000. As a result, this Court has separate and independent federal jurisdiction over Counts five, six and seven due to the diversity of the parties and the sum in controversy exceeding \$75,000.

### **Conclusion**

For the reasons set forth above, each of VTW's arguments lacks merit, and Timberpeg respectfully requests that this Court deny VTW's Motion to Dismiss.

Respectfully submitted,

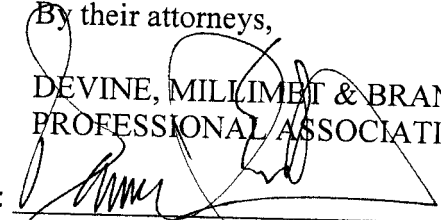
T-PEG, INC. AND TIMBERPEG EAST, INC.

By their attorneys,

DEVINE, MILLIMET & BRANCH,  
PROFESSIONAL ASSOCIATION

Date: January 7, 2004

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**CERTIFICATE**

I hereby certify that on this 7th day of January, 2004, a copy of the foregoing was mailed to W.E. Whittington, Esquire.

  
Daniel E. Will