

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' FOURTH 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 - 4, attached.

MEMORANDUM IN SUPPORT

Preliminary Statement

This is plaintiffs' action against VTW alleging infringement of copyrighted architectural plans. Trial is set for March 1, 2005, making it necessary to obtain a prompt ruling on this motion.

The Court has largely granted defendants' two prior motions to compel, and sanctioned plaintiffs in connection with the second of those. A third motion to compel is still pending.

The Outstanding Discovery

This motion concerns defendants' Second Interrogatories And Requests To Produce, dated August 13, 2004, consisting of one interrogatory (No. 25) and two requests to produce (RTP 9 & 10), attached as Ex. 1.

Responses were due September 14, 2004. Plaintiffs made no responses or objections at all. The discovery is as follows:

Requests to Produce 9 & 10:

9. All monthly and yearly financial statements, including balance sheets and profit/loss statements, for any periods and year- or month- ends from January 2000 to present.
10. All federal tax returns, including schedules, for or including either plaintiff, for any years from 2000 to present.

These requests call for production of plaintiffs' financial statement and federal tax returns, for periods or as of dates in 2000 to present. This information is directly relevant to plaintiffs' claims for damages, whether actual or statutory.¹

¹ It is at present unclear whether plaintiffs will be permitted to assert their actual damages under Section 504(b), or statutory damages under Section 504(c) of the Copyright Act. The discovery is relevant, however, under either statutory remedy.

Under this Court's November 19, 2004 Order granting defendants' Second Motion To Compel and sanctioning plaintiffs, the Court ruled that plaintiffs' claims for actual damages are out of the case, and order plaintiffs to amend their complaint to reflect that ruling. However, plaintiffs have moved for reconsideration of that order, which reconsideration motion is still pending. Defendants are entitled to have the information in case that remedy is in the case so that it can effectively challenge those asserted damages should they be in the case.

Even if plaintiffs' actual damages remain out of the case, the information is still relevant to the issue of statutory damages under 11 U.S.C. §504(c). Statutory damages, under Section 504(c), are not a specific figure, but a discretionary range, from \$750 to \$30,000. According to Nimmer, "the determination of statutory damages within the applicable limits may turn upon such factors as . . . the revenues lost by the plaintiffs as a result of the defendant's infringements." Nimmer On Copyright §14.04[B][1][a] at page 14-48. Other information in plaintiffs' financial statements and tax returns will also be relevant to the jury's computation of statutory damages, if liability is found.

Based on discovery to date, it has become apparent that the actual damages discovery will demonstrate that plaintiffs had no lost revenues based on the alleged infringement (indeed, plaintiffs must agree as shown by their motion in limine seeking to exclude evidence of their lack of damages). Thus defendants still need the damages discovery in support of its argument that any statutory damages should be de minimus.

Interrogatory 25:

25. For each of the years 2001 and 2002, and for each of T-Peg, TEI, and T-Peg's other subsidiaries, state (a) the number of contracts "Deposit Agreement For Timberpeg Preliminary Plans And Drawings" entered during each year and, (b) of those contracts entered, the number which to date has resulted in the purchase of a "Timberpeg package" by the customers entering the contracts. (c) Please provide all documents relating to the information in your responses.

This request seeks information on the proportion of plaintiffs' prospects entering a preliminary plans contract whom plaintiffs successfully "converted" to a sold package. This is relevant because plaintiffs have claimed that Isbitski, their prospect here who signed a preliminary plans contract, would definitely have been "converted" to a full-blown purchase customer but for defendants' alleged infringement.

Attempts to obtain compliance. The undersigned certifies that he has conferred with plaintiffs in an attempt to obtain compliance, and plaintiffs do not assent to the motion. Those attempts include the following:

- On January 25, 2005, defendants e-mailed plaintiffs a letter seeking compliance. Plaintiffs did not respond. (Ex. 2)
- On January 28, 2005, plaintiffs sent a letter indicating they would not comply. (Ex. 3)
- On February 1, 2005, defendants sent a follow up e-mail. (Ex. 4)
- As of this date, plaintiffs have not responded.

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

This is defendants' fourth motion to compel. Basically, plaintiffs do not produce anything in this case which they deem hurtful to them without forcing long "confer" periods followed by motion practice.

In light of plaintiffs' continuing refusal to provide discovery to which defendants are clearly entitled, sanctions are again appropriate.²

WHEREFORE, VTW requests that the Court compel the above discovery and sanction plaintiffs by awarding defendants their costs in obtaining compliance.

² 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.

Date: February 2, 2005

VERMONT TIMBER WORKS, INC.
and DOUGLAS FRIANT,
Defendants,

By: W. E. Whittington
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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2005, I served the foregoing pleading on the following counsel of record, by first class mail:

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