

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

HEARTLAND RECREATIONAL)	
VEHICLES, LLC,)	
Plaintiff,)	
)	CASE NO.: <u>3:08-cv-490</u>
v.)	
)	
FOREST RIVER, INC.,)	JURY DEMAND
Defendant.		

FOREST RIVER’S MOTION FOR EXTENSION OF TIME FOR FILING ITS EXPERT REPORT ON FINANCIAL ISSUES

Forest River requests a two week extension of time in which to file its expert’s report on financial issues in this case. That report was due to be filed today and would be due on October 15, 2010 if this motion is granted. This motion is opposed by Heartland. A proposed form of Order is forwarded to chambers concurrently herewith.

Background Facts of the Case:

On October 22-23, 2008, Forest River held a private trade show for specially invited RV dealers next to Forest River’s corporate offices in Elkhart, IN. Forest River arranged for hotel accommodations, etc. for those RV dealers at its own expense in Mishawaka, IN while those RV dealers were at the show. Incident to preparations for this trade show, Forest River created and periodically updated a Master List having a compilation of information therein, such as the identity of which dealerships would be attending and which specific hotels each dealer representatives would be staying at.

Approximately two weeks before that trade show, Heartland obtained a copy of the Master List by deliberate and calculated deception.¹ Heartland used that list to contact RV dealers identified on the list to attempt to disrupt the trade show and to take RV sales away from Forest River. Heartland also used that list to engage in the “Hotel Action” previously referred to in this lawsuit. In addition to causing pecuniary loss to Forest River, Heartland was unjustly enriched by obtaining and using the Master List.

Forest River’s expert witness with respect to financial issues is Christine Lauber. The primary focus of Ms. Lauber’s report is measurement of the economic impact of Heartland’s use of the Master List. There are several different measures available for that purpose, but one that is presently the focus of discovery issues between the parties stems from 15 U.S.C. §1117(a). Briefly, Forest River asserts that the proper way to determine Heartland’s “profit” from using the Master List is to add up all of the RV sales Heartland obtained from using the list and then subtract all of the RV manufacturing expenses that Heartland incurred in manufacturing only the extra RVs it sold as a result of using the Master List (these are referred to as “marginal incremental costs” in accounting). Forest River would not allow Heartland to deduct those expenses which Heartland would have incurred anyway even if Heartland had not taken the list (these are referred to as “fixed costs” in accounting). Forest River would also not allow Heartland to deduct those “expenses” which are in reality “constructive dividends” to the shareholders of Heartland.² In contrast, Heartland asserts that

¹ More specific details of this deception are set forth in the Complaint of Case No: 3:10-cv-409 of this Court. That lawsuit was filed to encompass the issues raised by information discovered about the events of October, 2008 since the present lawsuit began, and it is Forest River’s intention to consolidate at least that case and this case into a single proceeding.

² A constructive dividend is a payment to a shareholder that is made in excess of fair market value as a way to disguise distribution of profits. For example, if shareholder “rents” the

it is entitled to deduct from the sales revenue what it considers to be its “normal” expenses amortized over all RV products - in effect making Forest River share the burden of Heartland’s manufacturing overhead. Heartland also denies that it has made any constructive dividend payments to its shareholders so that no allowance should be made for not deducting its hidden profits.

Background Fact of the Discovery Process:

Forest River has long sought the documents needed to determine Heartland’s marginal incremental costs for the extra RVs it sold via use of the Master List. For example, on July 1, 2009, Forest River served the following document request on Heartland:

Request No. 26: Forest River will be seeking damages under 15 USC. §1117(a) for the total of Heartland’s sales obtained as a result of the “hotel action” referred to in ¶79 of the Amended Answer in this case. Unless Heartland stipulates that it will not seek to reduce that damage amount by claiming any allowable costs or other deductions, provide all documents sufficient to:

- a. indicate the amount of the cost or deduction to be claimed by Heartland,
- b. indicate when that cost or deduction occurred, and
- c. describe in full the nature of the cost or deduction.

Heartland refused to provide the items requested at that time. Forest River was forced to then file a motion to compel (Doc. No. 96). That motion was granted and on March 31, 2010 this Court

land a business is using back to the business, but then charges an amount far greater than the normal rental fee to the business. Constructive dividends are, for example, used to avoid double taxation - the business would normally be taxed on its profits, and then the shareholder would be individually taxed on the dividends the business pays after taxes.

Ordered Heartland to produce the documents (Doc. No. 112). Heartland produced bits and pieces of documents related to what was ordered over July and late August 2010, but never the full amount of what was required. Further, and once again, some of what Heartland produced was mutually contradictory with other documents,³ which required Forest River to seek reconciliation documents as well.

In the meantime, Forest River served supplemental and more focused discovery requests, such as:

Request No. 45: To the extent not previously requested from Heartland, documents sufficient to show the nature and amount of the actual expenses incurred as “Manufacturing Expense,” “Selling Expense,” and “General & Administrative Expense” for each of the monthly periods of time referred to in document Heartland/FR 0005114 under tab “Mfg-Selling-Admin.”

Heartland’s response was due on August 2, 2010. In response, it provided none of the documents requested. Also, on August 20, 2010, Forest River served an additional and very focused set of discovery requests to get this marginal incremental vs. fixed cost information, including for example:

Request No. 47: Except to the extent previously produced in this form, the Cost of Goods Sold Statement for RV trailers sold between August 1, 2008 and February 1, 2009 (or, if that was not prepared by Heartland in the normal course of business, all of those regularly kept business records from which that Cost of Goods Sold Statement can be accurately and

³ For example, Heartland provided some, but not all, of the actual RV invoices for the time periods in question. Those invoices stated the actual amount of the discounts given to RV dealers for the RV sale on the invoice. However, the monthly and quarterly “income statements” Heartland provided which supposedly summarize those invoices show the invoice discounts that Heartland gave to RV sales at less than 10% of what the invoices show. Which is accurate?

completely derived according to normal accounting practices), including the specific details of material costs, overhead costs, and labor for the actual trailers sold between those dates.

Again, Heartland provide no documents in response.

Forest River did not limit itself to “paper discovery.” To get directly to the point on these accounting issues and get Ms. Lauber the information she needed, Forest River served a notice of deposition of Heartland under Fed. R. Civ. P. 30(b)(6) on July 19, 2010, asking for deposition on August 2, 2010 on the following topics:

1. The creation and content of the financial records of Heartland which have been provided to Forest River in this litigation.

2. Heartland’s sales of products as a result of obtaining the list of Forest River dealers who were planning to attend the private Forest River trade show in October 2008, including the revenues received from such sales, the actual costs of producing those products, and the marginal profits obtained by Heartland from such sales (“marginal profits” meaning profits without allowance for costs or services which would have been incurred regardless of those specific sales).

3. The financial condition of Heartland during the fourth calendar quarter of 2008 in comparison to its financial condition in the years immediately prior and following.

4. Heartland’s accounting and financial record keeping practices during the fourth calendar quarter of 2008, including its criteria for selecting the amounts listed in its general ledger and financial reports.

5. Heartland’s revenues received between August 1, 2008 and February 1, 2009, as well as actual cost of goods sold, actual fixed overhead expenses, actual inventory, actual

payments to related business entities having any common ownership interests, and actual marginal and net profits during that same time period.

6. Heartland's discounting practices during the fourth calendar quarter of 2008, including the criteria for and amount of discounts made to dealers at that time.

7. The amounts, if any, which Heartland is claiming as allowable deductions under 15 U.S.C. §1117(a) in this litigation incident to Forest River's Production Request No. 26, including the actual and specific basis for any such deductions and identification of all regularly kept business records which support any specific basis for such deductions.

However, would not attend the deposition on that date, and the earliest date Heartland would agree to produce a witness was Friday, September 24, 2010, only one week before Ms Lauber's report was due to be filed.

In an effort to move discovery forward as best it could, Forest River agreed to that late deposition date, conducted the deposition, discovered that Mr. Dennis Donet (Heartland's designated witness) was not prepared to discuss certain topics even after all that time to prepare. Of special disappointment was Mr. Donat's lack of information about the marginal profits. Nonetheless, Forest River paid for an expedited transcript of the deposition and attempted to resolve the discovery disputes as expeditiously as possible. For example, on Tuesday, September 28, 2010, the undersigned counsel sent the following email to David P. Imscher, Heartland's counsel:

Dave:

[items omitted which are not relevant to this motion]

3. I have just recently received the transcripts for last week's depositions and will be reviewing them this week. I assume you are doing the same. As a result of what was revealed last week, Forest River is planning to file:

a. A motion for contempt for Heartland's failure to comply with the Court's March 31 Order on discovery,

- b. A motion to compel other discovery served upon Heartland since but not complied with,
- c. A motion to compel a Rule 30b6 witness for the second topic listed in the notice,
- d. A motion to consolidate discovery at least as to financial matters between the first and second lawsuits, and
- e. A motion to amend the pleadings to conform to the evidence disclosed thus far based upon the analysis presented in the attached draft Complaint and upon the admissions made by Denis last Friday as to predatory pricing.

4. As soon as you have gone through those deposition transcripts sufficiently, I would like to have a Rule 37 conference to see if we can reach agreement as to some of these motions. Please let me know when you are available to do so. Given the number of issues, I suggest we set aside at least an hour.

5. To assist in preparation for the Rule 37 conference, I have attached a copy of Chris Lauber's memo about the documents still needed. If you have any technical questions about this we should probably include Dennis and Chris in our conference so that perhaps they can sort out directly what documents will do the job most efficiently.

[items omitted which are not relevant to this motion]

Ryan

No response has been received to this email and no dates have been offered by Heartland for the Rule 37 conference. The substance of the memo of Ms. Lauber referred to in the email above which sets forth the need for the missing documents is set forth below:

Reasons for needing additional information as requested

Given:

- **Monthly Income Statements for period 07/26/08 to 08/01/09**
- **Sales of Units by product line without names of customers 07/19/08 to 04/04/09**

These two items are not enough information to do a proper analysis for the following reasons:

- 1. To determine amount of sales that were stolen**
 - a. Requires that we have a sales ledger with customer names by product for the relevant period**
 - b. Requires historical sales by customer to distinguish regular customers sales volume from stolen sales**
- 2. To determine value of stolen sales**
 - a. Requires knowledge of financial condition of the company and this is reflected in the Balance Sheet**

- b. Requires knowledge of financial constraints under which the company operates, therefore need to know loan covenants, working capital requirements as reflected in the borrowing base certificates.
 - c. Requires knowledge of how cash was functioning in the operation and therefore the stresses from economic conditions, this is reflected in the Statement of Cash Flows.
 - d. Requires knowledge of other obligations of the company that could use cash and therefore put pressure on sales, these items are reflected in the Balance Sheet and the Statement of Cash Flows.
 - e. Requires knowledge of inventory levels, which is reflected in the Balance Sheet
3. To determine the value of marginal cost
- a. Requires clarity of manufacturing costs. Books are kept on the accrual basis and the income statement has revealed that some accruals were reversed, therefore need the Balance Sheets to apply the reversals retroactively to the correct time period.
 - b. Requires accrual work papers to understand the timing of the expense so as to apply to the correct time period.
 - c. Requires payroll records to determine difference between base pay and performance pay
4. To determine effect sales had on financial condition and valuation of the company
- a. Requires Balance Sheets
 - b. Requires copies of any valuation studies done before, during and after period

There has been no response back from Heartland with respect to Ms Lauber's memo either.

Granted, Heartland may be preoccupied with its recent and widely publicized sale to Thor Industries, announced on September 17, 2010. Indeed, Forest River is concerned that Heartland may not even have possession of or title to the documents Forest River had previously requested any more. Forest River's email to Heartland's counsel of last Friday, September 24, 2010 on exactly that issue also remains unanswered, so perhaps Heartland itself does not even know if it currently has the documents or if Forest River must seek them from Thor Industries.

The Merits of the Present Motion:

Discovery in this case has been unusually slow, but the delay is not due to any fault of Forest

River. The expert report of Chris Lauber was planned well in advance, and Forest River requested all of the discovery it would need for that purpose. Forest River served those discovery requests in good time for Ms. Lauber to complete her analysis and prepared the report by the October 1, 2010 deadline. However, Heartland withheld much of that discovery until late in the game and failed to produce much of the discovery at all even now.

The discovery disputes need to be resolved and the documents and testimony provided by Heartland in order for Ms. Lauber's report to be finished. At present, we do not even know when Heartland is willing to have a Rule 37 conference as to those disputes, but Forest River assumes that will be accomplished sometime early next week. Even though the undersigned counsel will be out of town all of next week, he stands ready to confer on those issue via telephone if Heartland is available. If that conference is successful and if the documents are provided to Ms Lauber next week, her report can be finished within the two week extension requested herein.

Accordingly, there is good cause to grant this motion.

Dated: October 1, 2010

Respectfully submitted,

s/Ryan M. Fountain

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ATTORNEY FOR DEFENDANT

Certificate of Service

I certify that on October 1, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system, which sent notification of such filing to all of the parties through at least the following counsel of record:

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s/Ryan M. Fountain

Ryan M. Fountain
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