

UNITED STATES DISTRICT COURT  
Northern District of Indiana  
South Bend Division

HEARTLAND RECREATIONAL )  
VEHICLES, LLC, )  
Plaintiff, )  
)  
)  
v. )  
)  
FOREST RIVER, INC., )  
Defendant. )

CASE NO.: 3:08-cv-490 TLS-CAN

**RESPONSE TO FOREST RIVER'S MOTION FOR  
EXTENSION OF TIME FOR FILING ITS EXPERT REPORT ON FINANCIAL ISSUES**

With its Motion for Extension, Forest River, Inc. ("Forest River") contends that it lacks information sufficient to allow its expert to calculate the amount of profits that Heartland Recreational Vehicles, LLC ("Heartland") obtained in connection with sales made during the time periods relevant to this action. Forest River makes this argument even though Heartland:

- (1) has produced a Microsoft Excel spreadsheet containing detailed information about the profits Heartland made from every individual sale from August 22, 2008 through December 2, 2008;
- (2) has provided its underlying financial statements—which Heartland creates and maintains in the regular course of its business in accordance with Generally Accepted Accounting Principles ("GAAP")—supporting the calculations contained in the spreadsheet; and
- (3) has allowed Forest River to depose Heartland's Chief Financial Officer about these documents and the methods he used in compiling them.

Heartland has produced documents providing the best estimate of the costs associated with the potentially relevant sales that can be achieved without performing an unreasonably

onerous, line-by-line scouring of Heartland's General Ledger, which this Court has already declined to compel Heartland to produce. Therefore, the Court should find that Forest River's expert needs no further information or time to complete her report and deny Forest River's Motion.

**I. In Intellectual Property Cases Where Only a Few Sales are Relevant, Defendants Cannot be Required to Calculate their Costs Exactly**

The ultimate question this Court must answer is whether Heartland should be permitted to estimate the amount of costs it expended in connection with the few recreational vehicles that are potentially relevant in this matter, or whether it must attempt to complete the virtually impossible task of calculating these costs *exactly*.

Two types of monetary relief are available in Lanham Act cases: (1) a plaintiff's monetary damages resulting from actual consumer reliance upon a defendant's unlawful conduct; and (2) an award of defendant's profits attributable to the unlawful conduct. *See* 15 U.S.C. § 1117. The second type is sought in this case. As Forest River notes in its Motion, its expert claims to need more documents in order to assess the amount of profits that Heartland earned as a result of its alleged conduct. 15 U.S.C. § 1117(a) provides that "[i]n assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed." *Id.* Forest River does not claim that it lacks sufficient information to prove the amount of revenue Heartland generated as a result of any potentially relevant sales. Instead, it claims to need more information to assist it in disputing the amount of cost deductions sought by Heartland.

In the typical Lanham Act case, it is not necessary to isolate the costs that went into the production and sale of any *individual* unit, because all of the defendant's units were affected by the infringement. That is because the defendant has usually affixed an infringing mark to all of

its products. Hence, it is reasonable to have the plaintiff simply prove the total amount of *all* of the defendant's sales. Likewise, because the defendant used the infringing mark on all or nearly all of its products, it is reasonable for the defendant to simply tally the total sum of all of its costs during the period of infringement.

This case, though, is very different from the typical Lanham Act claim. Here, only the profits Heartland made on a very small, isolated number of units are relevant. Indeed, the only potentially relevant sales are those which were made to dealers who received promotional materials as a result of Heartland's alleged conduct.<sup>1</sup> Therefore, the parties and the Court must determine the best way to determine the profits that Heartland made on *individual* units. As a matter of practicality, calculating the *exact* amount of costs that Heartland spent in connection with an individual unit is impossible. Manufacturers do not document, for example, the number of man-hours expended in producing a particular unit, or the price of a particular box of screws or sheet of fiberglass used in constructing a single unit. Even a company's General Ledger will not contain such a minute level of detail, for it does not indicate which screws eventually found their way into a particular product, or what employee hours were spent manufacturing a particular unit. Hence, how can a large RV manufacturer calculate the *exact* costs of materials, labor, etc. expended on a particular unit? The answer, of course, is that it cannot. Yet, that is precisely what Forest River apparently expects Heartland to do (or intends to try to do itself), stating that it wants to know the costs "Heartland incurred in manufacturing **only the extra RVs it sold as a result of using the Master List.**" (Mot. for Ext., DE# 125, p. 2) (emphasis added).

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939) (L.Hand, J.), the Second Circuit found that the use of averaged estimates is appropriate in instances where

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<sup>1</sup> Of course, even those sales are only relevant if the promotional materials were the "but-for" cause of those dealers' purchases, which Forest River will be unable to prove.

only one or a few of a defendant's products are relevant. The Second Circuit recently reaffirmed the prudence of *Sheldon* in *Hamil America Inc. v. GFI*, 193 F.3d 92, 104-05 (2d. Cir. 1999).<sup>2</sup> In *Sheldon*, the Court considered the proper calculation of costs associated with a defendant motion picture studio's production of a single infringing movie, one of forty produced by the studio during the relevant time period. *See Sheldon*, 106 F.2d at 54. In allowing the defendant to provide a reasonable *estimate* of its costs used in producing the single movie rather than an exact amount, the Second Circuit reasoned as follows:

[T]o make a perfect allocation one would have to examine what part of the time of all the employees whose pay went into the “overhead”, was given to each picture; and so of the other expenses. That was obviously impossible... **It was better ... to compute this item by assuming that the infringing picture used that proportion of the whole plant which its cost of production bore to the cost of production of all pictures made that year, than to attempt any allocation of buildings and other property according to their actual use for the picture. The second method would have been incredibly difficult in application, involving as it would a different proportional use of each bit of property concerned.**

*See id.* at 52-54 (emphasis added).

This case, like *Sheldon*, involves a situation where only a few of the defendant's many sales are relevant. As the Second Circuit has recognized, calculating a defendant's *exact* costs in producing a single unit is impossible. Accordingly, Heartland should be permitted to provide the best possible estimate of the costs it expended in producing and selling the relevant units by using its regularly-kept accounting records. As the next section discusses, that is precisely what Heartland has done, and Forest River needs no additional information.

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<sup>2</sup> Both *Sheldon* and *Hamil* involved an accounting of profits in the context of a copyright infringement case, which employs a framework that mirrors that of 17 U.S.C. § 1117(a). *See* 17 U.S.C. § 504(b) (“[i]n establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses...”).

## **II. Heartland Has Calculated its Best Estimate of Costs Using Regularly-Kept Accounting Records Maintained in Accordance with GAAP**

Heartland recognizes that its regularly-kept accounting records will not provide Forest River with the *exact* amount of costs associated with each individual unit. As discussed above and recognized by the Second Circuit in *Sheldon* and *Hamil*, providing the exact amount of costs for a particular unit is a practical impossibility. The documents produced by Heartland do, however, provide the best cost estimates available via reference to Heartland's financial statements for the relevant time periods. These financial statements were prepared in accordance with GAAP during the regular course of Heartland's business, and they are the same documents Heartland references in preparing its taxes, for example.

By querying a database of accounting information that Heartland maintains in the regular course of business, Heartland produced an electronic, Microsoft Excel spreadsheet that provided, *inter alia*, the following information *for every single sales order placed with Heartland from August 22, 2008 through December 2, 2008*,<sup>3</sup>

- (1) The date the order was placed in Heartland's computers (the "created date");
- (2) The sales order number;
- (3) The name of the dealer who purchased the product;
- (4) The invoice amount;
- (5) The estimated cost of materials used to produce the unit;
- (6) The estimated direct labor costs associated with the production of the unit;
- (7) The estimated manufacturing expenses associated with the production of the unit;
- (8) The estimated selling expenses associated with the sale of the unit; and

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<sup>3</sup>That is the time period prescribed by this Court's ruling on Forest River's Second Motion to Compel (Order, DE#112, pp. 3-4).

- (9) The estimated administrative expenses associated with the sale and production of the unit.

In addition to producing this spreadsheet, Heartland also provided Forest River copies of the actual financial statements from Heartland's database so that Forest River could examine the spreadsheet's underlying information.

Heartland believes that the financial statements and accompanying spreadsheet are more than sufficient to allow Heartland to satisfy its burden of proving its appropriate deductions with respect to any relevant sales. To the extent Forest River believes that the financial statements deviate from GAAP principles or questions the data in Heartland's comprehensive spreadsheet, it has had the opportunity to depose Heartland's Chief Financial Officer on those issues.

Unsatisfied, Forest River now apparently wants to obtain Heartland's entire General Ledger for the relevant time periods so that it can compile its own version of Heartland's financial statements according to its own preferred accounting methods. But this Court has already determined that Heartland should not be required to produce its General Ledger. (Order, DE#112, p. 6.) The Court's decision to deny Forest River access to Heartland's General Ledger is in direct agreement with the decision of the *Sheldon* court. *See Hamil*, 193 F.3d at 105 ("In adopting this pragmatic approach, the [*Sheldon*] court implicitly rejected the need for a detailed analysis of an infringer's ledgers.") Therefore, Heartland's calculations of its profits were reasonable under these unique circumstances, Forest River and its expert need no further information in order to prepare an expert report, and Forest River's Motion should be denied.

### **III. The Financial Statements Produced by Heartland Also Provide Sufficient Information for Forest River to Separate "Fixed" Costs from "Variable" Costs**

Forest River also contends that the documents produced by Heartland are insufficient to distinguish Heartland's "fixed" costs from its "variable" costs. Heartland does not dispute that the distinction between "fixed" and "variable" costs is relevant for Lanham Act purposes; indeed, in performing an accounting of a defendant's profits, courts may decline to allow the defendant to deduct those costs that the defendant would have incurred even if it had not obtained additional sales. *See, e.g., Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 941 (7th Cir.1989) (stating without further explanation that "[f]ixed costs are not deducted from the profit calculation"); *but see Hamil*, 193 F.3d 92, 106 (presuming that general overhead expenses, i.e. "fixed costs," were deductible and reviewing "only the sufficiency of the nexus between the expense and the infringing product and/or the adequacy of the adduced formula for allocating overhead costs to the production of the infringing product.")

However, the financial statements produced to Forest River provide enough detail to allow Forest River to separate those costs Forest River deems to be "fixed" from those that it concedes are "variable." For instance, the monthly financial statements provided to Forest River include, but are not limited to, the amounts Heartland spent in a particular month on the following cost categories: material cost, parts cost, direct labor, supervision costs, tools, factory supplies, equipment, fixtures, building rent, equipment rent, equipment repairs and maintenance, product repairs, tool repairs, utilities, property taxes, sales salaries and wages, sales commissions, advertising, literature, dealer spiffs, sales allowance, administrative wages, payroll taxes, health insurance costs, computer hardware and supplies, freight expense, etc. Forest River has the amounts that Heartland spent on each of these categories during the relevant time period,

and if it chooses, can argue that any or all of these are not properly deducted. In fact, Forest River may attempt to argue that only Heartland's material and direct labor costs should be deducted. If so, the information Heartland has provided states the amounts of these costs very clearly.

Because Forest River has sufficient information to allow it to identify the amounts Heartland spent on both "fixed" and "variable" costs, its expert needed no further information to finish her report, and Forest River's Motion should be denied.

### **CONCLUSION**

As outlined above, Forest River simply does not need additional information about Heartland's profits during the relevant time periods. The Court should not require Heartland to attempt to calculate the *exact* amount of costs associated with each individual unit, and Forest River is not entitled to discover Heartland's General Ledger. As Judge DeGuilio recently remarked with respect to this matter, "This case will soon enter its third year, and discovery is still ongoing. It is time to move the case forward on the only remaining claims: trademark infringement, criminal deception, and conduct warranting an award of attorney's fees." (Mem. Op & Order, DE #124, p. 14.) Forest River and its expert have the information they need to assess the merits of Heartland's planned arguments regarding appropriate cost deductions. Accordingly, Forest River's attempt to further extend these proceedings should be prevented, and its Motion for an Extension should be denied. However, should the Court decide to grant Forest River's Motion and extend the deadline for expert reports, Heartland requests that it be given the opportunity to depose Forest River's expert on the contents of her report, even though the deadline for discovery has now passed.



Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned counsel for plaintiff Heartland Recreational Vehicles, LLC, hereby certifies that a copy of the foregoing was served upon the following, this 18<sup>th</sup> day of October, 2010, by operation of the Court's electronic filing system:

Ryan M. Fountain  
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/s/ David P. Irmischer

David P. Irmischer