

**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 REPLY TO HEARTLAND’S RESPONSE TO “FOREST RIVER’S MOTION FOR EXTENSION OF TIME FOR FILING ITS EXPERT REPORT ON FINANCIAL ISSUES” AND AMENDMENT TO UNDERLYING MOTION**

**Summary:** We are back to pulling teeth again. Forest River had requested a two week extension of time in which to complete the discovery process through a Rule 37 conference and then provide its expert report. However, as it turned out Heartland refused to complete the Rule 37 process, stalled the case for that two weeks, and ended up in effect rearguing some of the same issues already decided by the Court in the Order of March 31, 2010 (DE#112). Forest River is filing concurrently herewith a “Motion for Protective Order Compelling Heartland to Participate in the Discovery Process” to compel Heartland to complete the Rule 37 process. If that motion is granted and the discovery issues are resolved, then Forest River could complete its Expert report within two weeks or deal with the remaining issues via a motion for contempt and/or to compel.

**Background Case Claims and Issues:** There are two basic claims left in this case: 1.) Is this an “Exceptional Case”, and 2.) Did Heartland violate Forest River’s rights by taking the Master List and

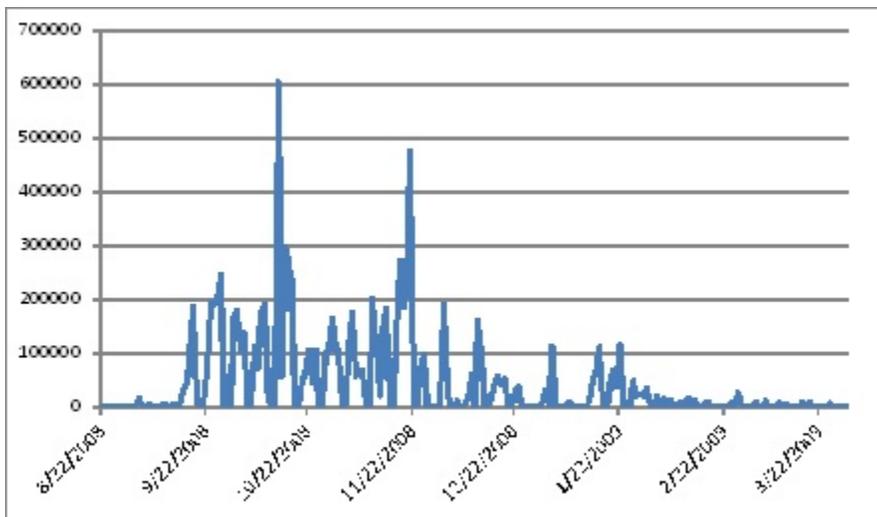
using it against Forest River in connection with the October 22-23, 2010 private trade show? The expert report of Chris Lauber on behalf of Forest River relates to the second claim. Forest River contends that it is entitled to strip away whatever Heartland gained from using the Master List, either under 15 U.S.C. §1117(a) or as a measure of unjust enrichment under Indiana unfair competition laws. The present motion deals primarily with the §1117(a) issues concerning measurement of Heartland's actual "profit" from the sales it obtained using the Master List. There are two specific issues in measuring that profit that are focused on by this motion: the number of units sold and the costs of manufacturing those units.

**The Rule 37 Conference:** As originally filed, this motion focused on the need for a Rule 37 conference. Why? This Court's Order of March 31, 2010 determined that:

1. An expanded time period for examining Heartland's sales records is appropriate in this circumstance since analyzing Heartland's sales records for any unusual increases in new sales before and after Forest River's trade show is helpful in gathering relevant information that is useful in creating the inference of causation. DE#112 at pages 3-4.
2. Forest River is entitled to the actual business records which support Heartland's discovery summaries. DE#112 at page 5.
3. Any similar documents, reflecting all sales and communications with new dealers that occurred within Forest River's expanded time period must also be disclosed. DE#112 at page 5.

Further, this Court stated that "Heartland may not unilaterally conclude which evidence is relevant to causation." DE#112 at pages 5-6.

As it turned out, this Court was completely correct regarding Item 1. Even from the documents given thus far by Heartland, Forest River was able to derive two trend analysis charts that demonstrate dramatic increases in particular sales-related activity/events about the time of Forest River's 2008 trade show. These charts were used as exhibits in the September 24, 2010 deposition of Dennis Donat where their meanings were discussed specifically and the activity/events involved were revealed. For ease of discussion herein, one of those charts is reproduced below with a generic vertical scaling (i.e., in order to preserve at this point what Heartland contends is confidential information, the vertical scale indicia on the side of the graph has been rendered generic and is not to be given literal cognizance). Dates and relative scale of activity/events, however, are preserved.



The RVIA National Trade Show in Louisville, KY, normally the biggest sales event of the year for the RV industry, took place on December 2, 2008. The spike in sales-related activity shown on this chart in the last week of November corresponds to that trade show. However, this chart evidences that, by comparison, for Heartland the biggest sales event of the year was instead the Forest River dealer show on October 22, 2008. The spike in sales-related activity for that show is also just prior.

This chart reveals that we are on the right track and that, contrary to Heartland's assertions in its Response, we are not dealing with just a "few recreational vehicles" or a "very small, isolated number of units." Indeed, because this chart was only based upon the invoices which Heartland actually produced so far, the number of affected sales is inevitably higher.<sup>1</sup>

As to Item 2 ordered by this Court, contrary to Heartland's assertions in its Response, it did not produce "its underlying financial statements." Instead, it only produced some of its monthly "income statements." First off, "financial statements" are normally understood to include the balance sheets and cash flow statements, and each component is necessary to obtain an accurate understanding of the actual "profits" involved. Exhibit A, ¶2-3. Secondly, Mr. Donat testified that these income statements Forest River was given are only based on accrued expenses, not actual expenses, and that the accrued expenses are not "trued up" in certain respects for the months in question, such as on Mr. Donat's spreadsheet.<sup>2</sup> Third, and contrary to Heartland's assertions in its Response, Mr. Donat testified that the income statements were not kept according to GAAP. For example, when they were audited by Heartland's CPA's at year end, at least one major change

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<sup>1</sup> As shown by Item A, the testimony of Dennis Donat in the Confidential Appendix filed as a supplement hereto, the invoices which Heartland turned over to Forest River did not, contrary to this Court's Order, include all sales orders actually received, but only included those actual sales for units produced by Heartland within a given time frame. Sales orders placed as a result of Heartland's use of the Master List, but then, for example, cancelled by the dealer when Forest River "re-acquired" the sale in its efforts to mitigate the damage caused by Heartland, were not included, nor were sales included where the dealer signed up with Heartland but could not immediately obtain the financing for that purchase. These invoices are still withheld.

<sup>2</sup> For example, Mr. Donat testified that for sales in the months of October and November 2008 the income statements did not show the actual material costs incurred. Those expenses were not "trued up" in the income statements by month, but would be shown in the monthly balance sheets. Confidential Appendix, Item B and B1.

needed to be made<sup>3</sup>, but the audited financial statements with the notes by the CPAs as to errors/corrections were not given to Forest River. Fourth, as explained by Chris Lauber, the income statement alone cannot be relied upon to show “profit” where a company has various amortizations and write offs (such as the large number of Buy-Backs which Heartland encountered in the fall of 2008) and where the company is engaged in predatory pricing. Exhibit A, ¶3. Forest River specifically requested the full financial statements as well as the balance sheets and cash flow statements from Heartland, Exhibit B and C, Request Nos. 42-4, 50, and 51. Forest River also specifically requested documentation as to the extent of the Buy-Backs and their impact on sales.<sup>4</sup> Exhibit B, Request Nos. 38-41. Fifth, and rather importantly, the unaudited income statements which Heartland produced do not allow us to see actual expenses for the time period involved where certain temporary price concessions have been obtained from suppliers as a result of the difficult market at the time, such as for rent<sup>5</sup> and certain unusually large and unexplained interest charges.<sup>6</sup> Heartland has other documents for that which were withheld from Forest River.

Accordingly, not only are the income statements themselves flawed, use of those alone to determine the gain Heartland obtained from using the Master List is inappropriate. Moving forward, Forest River provided Heartland with Ms. Lauber’s list of explanations (attached to Exhibit A and

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<sup>3</sup> Confidential Appendix, Item C.

<sup>4</sup> Buy-Backs refer to travel trailers which Heartland was required to take back from dealers and resell because the dealers were in financial difficulties at that time. As testified to by Mr. Donat, a relatively large number of Buy-Backs occurred in the fall of 2008 and that affected the “cost of goods” calculations on the income statements Heartland gave to Forest River. Confidential Appendix, Item C1.

<sup>5</sup> Confidential Appendix, Item D.

<sup>6</sup> Confidential Appendix, Item D1.

reprinted on page 7-8 of the present motion), and a summary of the missing documents still needed in that regard and as to Item 3 of the Court's Order, Exhibit D, as part of the Rule 37 process. Heartland never responded. We have no clear idea of what Heartland's contentions are with respect to those specific items, hence the Motion for Protective Order referred to above. Even if Heartland's participation in the Rule 37 process does not result in production of the withheld documents immediately, at least we will have a more focused set of issues for the Court to resolve.

### **The Real Story Behind Heartland's Response - the "HA-HA" Defense:**

Cutting to the chase, there are many ways to measure damages sustained in an unfair competition case. Forest River is embarking on its preferred methods, Heartland seeks to force Forest River to adopt a different method of analysis. Why? Why would Heartland prefer that Forest River accept its so called approximation of profits rather than an exact calculation? Very simple, Heartland has apparently adopted the HA-HA Defense.

Simply stated, Heartland has never contested that it did not get the Master List and use it. Heartland has instead argued that only few sales came as a result and has produced business records that show, for the sales it admits are relevant, Heartland made *no profit on those sales*.<sup>7</sup> As noted above, Forest River has pierced the "few sales" argument. However, even so, Heartland would argue that since it had no "profit," there is no damage under ¶1117(a). In effect, that defense is: HA-HA, so what if we lose, you recover nothing for all you have spent on litigation.

However, Heartland's measure of "profit" is deceptive and inappropriate here. Mr. Donat's testimony shows, for example, that even ignoring discounts, Heartland was engaged in predatory

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<sup>7</sup> Confidential Appendix, Item E (previously marked Trial Exhibit 55).

pricing for its products at this point in time - selling its travel trailers, even the ones it admits were a result of using the Master List, at a loss in order to gain market share.<sup>8</sup> Obviously, there is a “profit” to be gained by predatory pricing, even if it is not reflected in the monthly income statements for the period of time in question, since gaining market share provides more long term profits, such as an enhanced ability to sell a business for \$209 Million less than two years later when the RV market is still in a slump. These market share benefits are measurable, although doing so could require a fair amount of work and force discovery on a much wider time frame of Heartland’s financial picture. Viewed in that light, Forest River’s decision to pursue an actual cost analysis for the time period in question is much more reasonable.

**Additional Comments on Heartland’s Response:**

1. Heartland asserts that its spreadsheet contained information about “every individual sale.” Word smithing again. Heartland was ordered and required to produce records about every purchase order, sales written, and dealer correspondence in this time. Heartland gave only a summary of information about what it defined as a “sale.” Missing were the orders placed but cancelled when Forest River got the sale back,<sup>9</sup> for example, or orders not completed right away. See Confidential Appendix, Item A.

2. Heartland asserts that is has allowed its chief financial officer to testify about the

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<sup>8</sup>Confidential Appendix, Item F and F1.

<sup>9</sup> Comparing the cancelled orders with the Forest River orders would show direct losses incurred by Forest River, as measured by the extra discounts listed on the Forest River invoices. Since, however, some dealers only “claim” to have placed orders with competitors when negotiating to get a better deal with Forest River, having the actual Heartland order information would allow confirmation of actual effect.

documents he prepared. And he did. However, he was required to testify about much more, including the “marginal profit” analysis and the sales Heartland obtained as a result of using the Master List. Exhibit E, Item 2. Mr. Donat did admit he knew what a marginal incremental cost analysis was and that it was appropriate in some circumstances, such as where there was an increasing market share.<sup>10</sup> However, Mr. Donat refused to testify about what Heartland’s marginal profit was on the affected sales and his spreadsheet would not allow that calculation.

3. Heartland asserts that it should not be required to engage in the “onerous, line-by-line scouring of Heartland’s General Ledger” needed for a actual cost analysis. Forest River does not require that. However, Forest River’s expert believes that she can get that information from the documents we requested. Exhibit A, ¶5. Once the documents are given, the burden is on Forest River, not Heartland. All Heartland has to do is turn over the documents it has which it was already required to produce.

4. Heartland spends much time pointing to case law about calculating exact costs on individual units. That is not in dispute. Forest River is not looking for the exact costs associated with any individual unit. We are looking for the actual costs associated with producing a large number of units, as shown by the chart above and as confirmed by Mr. Leonard’s testimony in this lawsuit about 18 dealers meeting with Heartland as a result of the Master List<sup>11</sup> (some of those dealers have been identified by name,<sup>12</sup> some have not as yet). Even assuming each dealer bought only three travel trailers as a result in even the first of many orders, with an average trailer price of

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<sup>10</sup> Confidential Appendix, Item G.

<sup>11</sup> Confidential Appendix, Item H.

<sup>12</sup> Confidential Appendix, Item I.

\$35,000, the total sales could be nearly \$2 Million for the initial orders.

5. Heartland also spends a great deal of time arguing that it cannot be done, actual costs are indeterminable. That is not the issue here. The documents are relevant and discoverable. Most were ordered to be produced, the rest are required to be produced. Production is not unduly burdensome. If Heartland contends that the methodology Forest River proposes to use is flawed, the time to raise that is at the deposition of Ms. Lauber or in a motion to exclude her report once it is prepared.

6. Heartland requests that it be allowed to depose Ms. Lauber when her report is done. That has never been an issue. Forest River had previously informed Heartland's counsel that it had no objection to such a deposition even after the close of discovery. Forest River has never held Heartland to literal compliance with discovery deadlines where there has been a reasonable excuse. For example, Forest River has agreed to complete the deposition of Mr. Gallagher on November 18, 2010, even though it has been requesting that deposition since March and discovery formally closed on October 15. Exhibit F.

**A Word about Delay:**

As Heartland acknowledges in its Response, this case is entering its third year. What delay has there been in the last six months? On March 31 Heartland was ordered to produce its documents. It did nothing at all to comply with that Order until June 7 and June 18, Exhibit G. Forest River examined those documents and provided a detailed identification of the discrepancies with the requirements of the Court's Order on July 22. Heartland did not respond to that correspondence until the income statements were finally mailed to Forest River on September 1, 2010, Exhibit H, Item 4 on page 2.

In the meantime, Forest River served its supplemental Production Requests of Exhibits B and C on or about June 30 and August 20. No documents were provided at all in response.

On July 19 Forest River also gave notice of the deposition of Mr. Donat on the financial issues, etc. on August 2. Heartland did not allow that deposition to take place until September 24. It was not until Mr. Donat's deposition that Forest River discovered that the income statements were only accrual records, not actual expense records, and that Heartland had been engaged in predatory pricing, intentionally forgoing any immediately measurable "profit" according to what Heartland claims is its normal method of accounting. It is late in the case for that key fact to be uncovered, but at least it was uncovered!

Clearly, if Heartland had provided this information on time, and allowed Mr. Donat to be deposed on time, we would probably not be here today, with an expert report still unfinished. Still, Forest River is not asking to re-open discovery. Forest River is only asking for the opportunity to complete the discovery already outstanding and then bring this case to trial.

**Conclusions:**

The delay in completion of Forest River's expert report is due to Heartland's delay in complying with discovery. The missing discovery issues need to be resolved before that report can be completed. Forest River's plan to require Heartland to comply with Rule 37 is reasonable. Submission of Forest River's report should be held in abeyance until these discovery issues are resolved. At that time, Heartland will be permitted to depose the expert providing that report.

A revised proposed form of Order is being submitted to Chambers herewith.

Dated: October 28, 2010

Respectfully submitted,

s/Ryan M. Fountain

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ATTORNEY FOR DEFENDANT

### **Certificate of Service**

I certify that on October 28, 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:

David P. Irscher     [david.irmscher@bakerd.com](mailto:david.irmscher@bakerd.com)

s/Ryan M. Fountain

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Ryan M. Fountain  
ATTORNEY FOR DEFENDANT

## INDEX TO EXHIBITS AND CONFIDENTIAL APPENDIX

**Confidential Appendix:** (filed separately under the ECF/CM system)

Items A - D1, F and G are excerpts from the transcript of the deposition of Denis Donat - dated September 24, 2010.

Item E is Trial Exhibit 55, a document prepared by Heartland for this lawsuit.

Item H is a copy of the November 10, 2008 email of John Leonard, a Heartland employee,

Item I is a copy of the October 21, 2008 email of Coley Brady, one of Heartland's former owners.

### **Exhibits:**

- Exhibit A Declaration of Christine Lauber
- Exhibit B Heartland's Response to Forest River's Fifth Production Request
- Exhibit C Heartland's Response to Forest River's Sixth Production Request
- Exhibit D Fountain memo to Irscher re discovery issues
- Exhibit E Forest River's Notice for deposition of Heartland
- Exhibit F Fountain email concerning Gallagher deposition
- Exhibit G Meyer letters of June 7 and June 18
- Exhibit H Irscher letter of September 1.