UNITED STATES DISTRICT COURT

Northern District of Indiana
South Bend Division

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

FOREST RIVER'S MOTION FOR PROTECTIVE ORDER COMPELLING HEARTLAND TO PARTICIPATE IN THE DISCOVERY PROCESS

Pursuant to Fed. R. Civ. P. 26(c)(1), Forest River requests that this Court enter a Protective Order to protect Forest River from "undue burden or expense" in the present lawsuit as a result of Heartland's refusal to participate in the discovery process, particularly as to resolution of discovery disputes under Rule 37. A certification under Rule 26(c)(1) and L.R. 37.1 is attached hereto. A proposed form of Order is submitted to chambers concurrently herewith.

Summary of the Motion:

This Motion is about the effects of one party simply ignoring discovery communications from the other. On March 31, this Court stated that "Heartland may not unilaterally conclude which evidence is relevant to causation" DE#112 at pages 5-6, and thereafter ordered Heartland to produce certain documents. Heartland has not produced all of those documents, and has totally refused other discovery. Instead, Heartland appears to be once again arguing that it has the unilateral right to

conclude which evidence is relevant to damages. Moreover, this time Heartland has refused to properly participate in a Rule 37 conference to resolve the discovery disputes it has caused by ignoring correspondence and telephone messages from opposing counsel. Failing to so participate dumps a substantial burden on Forest River and this Court to sort out a myriad of issues in a vacuum.

Relevant Background Facts:

On March 31, 2010, this Court ordered Heartland to produce certain financial records and other documents. However, Heartland delayed producing any of those documents for over two months (see Exhibit A, the first production under the Order) and even by the fourth month had produced only a portion of the documents which it had been ordered to produce (see Exhibit B, September 1 production of only income statements in response to July 22 list of deficiencies noted by Forest River). Also, Heartland completely refused to produce documents in response to two further Production Requests by Forest River (Exhibits C and D). In addition, as pointed out in the September 14 status conference with this Court, Heartland refused to provide a witness to testify about certain relevant topics in connection with this lawsuit for over two months, despite being properly noticed for that deposition under Fed. R. Civ. P. 30(b)(6)(see Exhibit E). Forest River has attempted on multiple occasions to resolve these issues as the problems came up. However, it was not until the deposition of Dennis Donat was finally permitted by Heartland on September 24, 2010 that the full significance of the missing documentation was brought to light.

Promptly thereafter, on multiple occasions Forest River attempted to conduct a Rule 37 conference with Heartland so as to minimize the need for one or more Motions to Compel or a Motion for Contempt of Court against Heartland (Exhibit F, items 3 - 5). At first, Heartland agreed

to participate in such a Rule 37 conference on October 5(Exhibit G). However, when that day came Heartland did so with complete lack of preparation, asserting continuously through the discussion that the issues were "too complicated" for it to discuss the matter at that time and that it needed to see the issues in writing in order to respond. This excuse was given even though prior to that conference, Forest River had provided Heartland with a written summary of the primary financial issues and reasons for relevance of certain documents, as prepared by its expert witness, Ms. Lauber (Exhibit H). Nonetheless, after that conference, Forest River summarized the primary discovery issues in writing and forwarded that to Heartland as well, along with several requests via telephone and email for Heartland to resume and complete the Rule 37 conference (Exhibits I, J, and K). Heartland has never responded.

Heartland's failure to respond is especially disappointing and wasteful of judicial resources since Heartland was expressly informed that completion of the Rule 37 conference was critical to completion of Forest River's expert report by Ms. Lauber. In fact, Forest River's Motion for Extension, DE#125, was specifically focused on completing the Rule 37 process and wrapping up the discovery issues expeditiously.

In fact, apparently as an alternative to calling Forest River's counsel for the meet and confer on October 18 as requested, Heartland merely filed its Response, DE#126, to the Forest River's Motion for Extension. Even then, rather than address all or even most of the outstanding discovery issues in that Response, Heartland blithely asserted a defense which was, in effect, that no further financial information was needed by Forest River if only Forest River would accept Heartland's own financial analysis at face value (i.e., that Heartland gained no profit at all taking and using the Master List - see Item E in the Confidential Appendix, DE#128).

Such a tactic cannot be condoned. First, even if Heartland's form of financial analysis had any merit, that would only deal with some of the outstanding discovery issues which Forest River wanted to discuss in the Rule 37 conference; it does not deal with all of them, as discussed below. Second, once again, Heartland is attempting to unilaterally conclude what is relevant and then withhold discovery on that basis. This Court has already decided that is not Heartland's choice.

Moreover, this is not the first time that Heartland has simply turned its back on any good faith attempt to resolve discovery disputes. It is the third time in less than two months, and Forest River needs to end this tactic of Heartland. For example, on September 17, 2010 when Thor Industries purchased Heartland, Forest River became concerned about the impact of that event on this lawsuit and thereafter made inquiries of Heartland for an explanation relevant to discovery in this case. Exhibit L. After initially assuring Forest River that it would engage in a dialog for that purpose, Heartland went silent and refused to respond at all. Exhibit M. Secondly, at the outset of the deposition of Dennis Donat on September 24, 2010, Heartland sealed the entire transcript of that deposition *regardless of what questions were asked!* Exhibit N (the portion of the transcript containing the announcement by Heartland is proffered as this Exhibit but not included herewith as yet, since even that portion of the transcript is sealed against public disclosure). Afterwards and in compliance with the procedure set forth by this Court's Protective Order of October 19, 2009 (DE#61), Forest River requested that Heartland release non-confidential portions of the transcript. Exhibit O. Heartland did not respond in any way. Accordingly, Forest River then attempted to engage Heartland in a Rule 37 conference in an effort to avoid the need for judicial intervention. Exhibit P. Heartland did not respond in any way.

However, ignoring problems do not make them simply go way.

Applicable Rules of Law:

Fed. R. Civ. P. 26(c)(1) permits a party to seek a protective order to prevent "oppression or undue burden or expense" that would otherwise be imposed in the lawsuit. Usually, such motions are sought where the party is required to provide discovery to another person, and Rule 26 provides a list of orders which the Court may enter for that purpose. However, the court is not limited to those particular orders and, indeed, "a court is authorized to make *any* order that justice requires to protect a party or person from . . . oppression or undue burden or expense. Thus, courts have discretion to fashion a protective order to fit the facts and circumstances of the case." *Moore's Federal Practice, 3d*, 2010 §26.105[1][b].

Forest River and Heartland face a long list of disputed discovery matters. Exhibits F, H and I. Prior to filing any motion for contempt or to compel, Forest River must certify that it "has in good faith conferred or attempted to confer with the person or party in an effort to resolve the matter without court action." N.D. Ind. L. R. 37.1(b). "A good faith effort to resolve a discovery dispute requires that counsel converse, confer, *compare views*, consult and deliberate." *Imbody v. C & R Plating Corp.,* 2010 WL 3184392, at *1 (N.D. Ind. Aug. 10, 2010) (emphasis added). "The requirement to meet and confer must be taken seriously, because 'before the Court can rule on a motion, the parties must demonstrate they acted in good faith to resolve the issue among themselves.'" *Id.* "Discovery is meant to be a cooperative endeavor, requiring minimal judicial intervention." *Ellis v. CCA of Tennessee, LLC*, 2010 W.L. 234514, at*2 (S.D. Ind. 2009). As Forest River itself has learned, "it is not this Court's duty to become a third party to discovery disputes between litigants." *Forest River Housing, Inc. v. Patriot Homes, Inc.*, 2007 W.L. 1376289, at *1 (N.D. Ind. 2007).

One obvious purpose of the Rule 37 certification is to avoid squandering judicial resources. However, in addition, Rule 37 certification affords a party the opportunity to save substantial resources as well. Certainly, if the dispute can be resolved by the "meet and confer" without the expense of a motion to the Court, that is one of the benefits of the Rule 37 process. Perhaps more importantly, though, is the opportunity to obtain an articulation of the opposing party's views on each specific issue. Armed with that information, a movant can focus its arguments to the court in seeking to compel discovery with a minimum of waste, rather than argue in a vacuum. The alternative, waiting for the Response opposing a motion to compel, has the effect of turning the Reply brief into the movant's first substantive brief on the real merits. Apart from the wasted cost to the movant (and the court) of the primary brief, reply briefs are substantially limited in length compared to the primary brief. Thus, the movant, hearing for the first time what the real opposition is, may not be able to fairly answer without seeking leave of the court for a longer brief. This results in more wasted effort for all involved.

Analysis of the Present Motion:

Obviously, Forest River could file the motions to compel and for contempt without any further participation by Heartland since Forest River itself has made good faith attempts to meet and confer, as required by Rule 37. Just as obviously, however, that would require Forest River's primary brief to argue in a vacuum, likely wasting both Forest River and the Court's resources. Forest River does not know what Heartland's actual position is with respect to each one of the specific issues in dispute, especially after the revelations of Mr. Donat's testimony. There are a relatively large number of specifically listed issues remaining unresolved. To brief each of those

would be tedious and expensive, especially where Forest River believes a reasonable response by Heartland would end the dispute. At the very least, if Heartland would set forth its specific rationale with respect to each of the issues at the meet and confer, Forest River could more clearly focus the Court's attention on the crux of the disputes in any motion that may still be needed thereafter.

Unfortunately, Heartland, a company with about $400 Million in annual sales and which was sold to Thor Industries last month for $209 Million, is apparently asserting that the lawsuit it started is now too complicated for it to understand. Heartland's attorneys, a law firm founded in 1863 which now touts 370 attorneys and legal professionals, is also stumped, or so we are expected to believe. No, what Heartland has really done by throwing up its hands and declaring that this discovery analysis is just "too complicated" is to attempt to dump the entire problem on the Court without the benefit of the proper context. It also smacks of disingenuousness on the part of Heartland, as if to say "if we make this too complicated for the Court and Forest River, maybe we will not have to produce anything, or at least not as much as if we had really made an effort in discovery." That kind of gamesmanship should not be permitted under the federal rules.

Heartland may attempt to assert in Response to this motion that a Rule 37 conference would be pointless because it has already made clear its position with respect to discovery of its financial records: it will only produce "accrual based income statements" and not balance sheets and cash flow statements. However, even Exhibit I demonstrates that there are many more issues to be involved in the Rule 37 conference. For example, while the issue about the financial statements goes to measuring the per unit "profit" on the travel trailers sold, identification of the new dealers who signed up and the invoices/orders they placed (see Exhibit I, items A: 2, 3, and 6 - 8) goes to measuring the number of units which were sold using the Master List. Moreover, the constructive

dividend evidence of Exhibit I, item A:5 goes to the validity of using accrual income statements in the first place, since constructive dividends are disguised profits which typically do not show up on income statements. Similarly, Mr. Donat's testimony evidencing Heartland intentional predatory pricing practices in the fall of 2008 requires reassessment of the value of any accrual income statement in the first place. On a different note, Exhibit I, item A:9 goes to a logistics issue; the actual invoice copies which Heartland gave Forest River were completely shuffled up and in no apparent order that either Forest River or Heartland's witnesses, Mr. Leonard and Mr. Donat, could discern in their depositions. A classic discovery "game," but perhaps 30 years too late to be even cute. It is axiomatic that business records are to be produced as they are kept in the usual course of business. *E.g.*, Fed. Riv. Civ. P. 34(b)(2)(E)(i).

Conclusions:

Heartland's failure to participate in the Rule 37 process is inappropriate and would impose an undue burden upon both Forest River and the Court. Heartland should be required to meet and confer in good faith to attempt to resolve each of the outstanding discovery disputes.

Dated: October 28, 2010

Respectfully submitted,

s/Ryan M. Fountain

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Certificate of Service

I certify that on October 29, 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. Irmscher david.irmscher@bakerd.com

s/Ryan M. Fountain
_____
Ryan M. Fountain
ATTORNEY FOR DEFENDANT

INDEX TO EXHIBITS

Exhibit A	Meyer letters of June 7 and June 18, 2010
Exhibit B	Irmscher letter of September 1, 2010
Exhibit C	Heartland's Response to Forest River's Fifth Production Request
Exhibit D	Heartland's Response to Forest River's Sixth Production Request
Exhibit E	Forest River's Notice for deposition of Heartland
Exhibit F	Fountain email of Sept. 28, 2010 to Heartland's counsel
Exhibit G	Email correspondence of October 1 - 4, 2010
Exhibit H	Lauber Memo
Exhibit I	Fountain memo to Irmscher re discovery issues
Exhibit J	Fountain Email of October 14, 2010 to Heartland's counsel
Exhibit K	Email exchange of October 18, 2010
Exhibit L	Fountain email of September 16, 2010
Exhibit M	Fountain email of September 24, 2010 re Thor Sale
Exhibit N	Excerpt of Donat Deposition - Proffered
Exhibit O	Fountain email of September 24, 2010 re Donat Transcript
Exhibit P	Fountain Email of October 14, 2010 to Heartland's counsel (Ex. J w/ diff. emp.)