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

MEMORANDUM IN SUPPORT OF FOREST RIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST HEARTLAND FOR UNFAIR COMPETITION

Summary of the Motion: Heartland obtained Forest River's proprietary Master List by the intentional deception of one of its managers and by the non-employee agent of that manager. Heartland used that list in order to gain for itself commercial advantage in competition with Forest River during the time of Forest River's private trade show on October 22-23, 2008. The full extent of the monetary value of that gain is still a matter for discovery resolution, but Heartland's liability for that gain is clear from the material facts of which there is no genuine issue. Forest River is entitled to judgment as a matter of law.

Jurisdiction:

This Court has original jurisdiction over the Lanham Action claim (which is based on 15 U.S.C. §1125 (a)(1)(B)) pursuant to 15 U.S.C. §1121 and 28 U.S.C. §1338(a). This Court has original jurisdiction over the unfair competition claim pursuant to 28 U.S.C. §1338(b).

Applicable Rules of Law:

As to Summary Judgment -

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986); *Lawrence v. Kenosha County*, 391 F. 3d 837, 841 (7th Cir. 2004); *Malibu, Inc. v. Reasonover*, 246 F. Supp. 2d 1008, 1011 (N.D. Ind. 2003). An issue is "genuine" only if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). A fact is "material" if the fact may affect the outcome of the case under applicable law, and irrelevant or unnecessary facts do not preclude summary judgement even when they are in dispute. *Id.*, at 248.

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323. Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir.1995)) (stating that it is not a district court's task "to scour the record in search of a genuine issue of triable fact"). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-

323.

No genuine issue of material fact exists when a rational trier of fact could not find for the non-moving party even when the record as a whole is viewed in a light most favorable to the non-moving party. *Ritchie v. Glidden Company*, 242 F. 3d 713, 720 (7th Cir. 2001); *Custom Vehicles, Inc., v. Forest River, Inc.*, 2005 WL 3299499, *1 (N.D. Ind. 2005). "The mere existence of an alleged factual dispute will not defeat a summary judgment motion; instead the non-movant must present definite, competent evidence in rebuttal." *Butts v. Aurora Health Care, Inc.*, 387 F. 3d 921, 924 (7th Cir. 2004). At the same time, the party with the burden of proof on an issue must show that there is enough evidence to support a jury verdict in his favor. *Lawrence*, 391 F. 3d at 842.

"Summary judgement is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Harney v. Speedway SuperAmerica, LLC,* 526 F. 3d 1099, 1103 (7th Cir. 2008). "Summary judgment 'is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events," *Johnson v. Cambridge Indus., Inc.,* 325 F. 3d 892, 901 (7th Cir. 2003), *reh'g denied*, quoting *Schacht v. Wisconsin Dep't of Corr.,* 175 F. 3d 497, 504 (7th Cir. 1999). "It is gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained," and in such cases summary judgment should be granted. *Mason v. Continental Illinois Nat'l Bank*, 704 F. 2d. 361, 367 (7th Cir. 1983).

As to partial summary judgement, Rule 56(d) provides that "[i]f summary judgement is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue," and "[a]n interlocutory summary judgement may be rendered on

liability alone, even if there is a genuine issue on the amount of damages." Partial summary judgment is particularly appropriate for shaping and speeding up the litigation by narrowing the scope of what must be decided at trial. *11 Moore's Federal Practice 3d*, §56.40[2] (2009 LexisNexis); *See, e.g., Deimer v. Cincinnati Sub-Zero Prods.,* 990 F. 2d 342, 345-46 (7th Cir. 1993).

As to Unfair Competition under Indiana common law -

Unfair competition is a closely related field of law to trademark infringement. Indeed, traditional trademark law is actually a subset of the broader law of unfair competition,[1] which has its sources in English common law. *Moseley v. V Secret Catalogue, Inc.,* 537 U.S. 418, 428 (2003). Within the State of Indiana, courts have long recognized the common law tort of unfair competition and have noted that it was historically considered a subspecies of the class of torts known as tortious interference with business or contractual relations. *Felsher v. University of Evansville,* 755 N.E. 2d 589, 598 (Ind. 2001).

"Unfair competition" has long been considered elusive of complete definition, necessarily evolving as competition itself evolves. The reasons for allowing this evolution are and have been clear and widely understood. "[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited . . . since unfair and fraudulent business practices may run the gamut of human ingenuity and chicanery . . . the essential test being whether the public is likely to be deceived." *People ex rel. Mosk v. National Research Co. of Cal.,* 201 Ca. App. 2d 765, 772, 133 U.S.P.Q. 413 (Cal. App. 3d Dist. 1962). Indeed, even in a nationwide

[1] Indeed, this is the basis for Forest River's assertion that the Lanham Act claims in this lawsuit are of the nature of a lessor included offense and may be moot by the granting of this motion.

context, when Congress created the Federal Trade Commission Act of 1914, it expressly rejected the notion of an express definition of "unfair methods of competition, stating that:

> "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would at once be necessary to begin all over again. If Congress were to adopt the method of definition, it would be an endless task."

as quoted in *F.T.C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 240, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972), where that Court went on to articulate that prohibited unfair methods of competition were historically characterized by "deception, bad faith, fraud or oppression, or as against public policy." *Id.*, at 241; *see also, 1 McCarthy on Trademarks and Unfair Competition,* §1.8 (4th ed. 2009)(Copy attached as Appendix 2).[2]

Within the state of Indiana, we do not have an extensive body of case law defining unfair competition, but certain important principles ring through over the past 100 years. Fraud is "the essence of unfair competition," focusing on deception of consumers and the ensuing injury to competitors; indeed "[t]he fertility of man's invention in devising new schemes of fraud is so great that the courts of equity have declined the hopeless attempt of embracing in formula all varieties of form and color . . . As new devices of fraud are invented, they will be dealt with by new correctives." *Computing Cheese Cutter Co. v. Dunn*, 88 N.E. 93, 95 (Ind. App. 1909).[3]

Three basic principles can be derived from the early Indiana cases as well as from the

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[2] This treatise has been relied upon by this court previously in defining what acts constitute "unfair competition" under Indiana law. *E.g., Hann Crafts Corp. v. Craft Masters, Inc.,* 683 F. Supp. 1234, 1244-5 (N.D. Ind. 1988)(unfair competition found when defendants were "playing dirty tricks').

[3] This is believed to be the first reported Indiana case which deals with the question of unfair business competition *per se*, although some older trademark cases do exist.

experiences in other jurisdictions: protecting potential consumers against deception (passing off being a common example of such deception), maintaining flexible and comprehensive scope against new variants of unfair "creative marketing," and protection of a competitor's property rights in reputation. These principles have been followed since then by Indiana courts, *see, e.g., Jones v. Roshenberger,* 144 N.E. 858, 859 (Ind. App. 1924); *Wasmuth-Endicott Co. v. Richmond Cabinet Co.*, 159 N.E. 697, 698-9 (Ind. App. 1928); *Hammons Mobile Homes, Inc. v. Laser Mobile Home Transport, Inc.,* 501 N.E. 2d 458, 460-1 (Ind. App. 1986). Although through the years the definition of "unfair competition"as articulated by Indiana courts has sometimes centered more simply on the deception of potential consumers by defendant's acts, *see, e.g., L'il Red Barn, Inc. v. Red Barn System, Inc.,* 322 F. Supp. 98, 111 (D.C. Ind. 1970); *Durakool, Inc. v. Mercury Displacements Industries, Inc.*, 422 N.E. 2d 680, 682 FN3 (Ind. App. 1981); *DirectTV, Inc. v. Ferguson*, 328 F. Supp. 2d 904, 915 (N.D. Ind. 2004), protecting fundamental property rights of a business under the *Hartzler* doctrines is also recognized, *Barlow v. Sipes*, 744 N.E. 2d 1, 8 (Ind. App. 2001).

Unfair competition has often arisen in the context of the defendant trying to pass his goods/services or himself off as the plaintiff's goods/services or as the plaintiff. However, in recent cases, Indiana courts have exercised the flexibility of the scope of this body of law to prohibit other forms of unfair competition as well. In *Bartholomew County Beverage Co., Inc. v. Barco Beverage Corp.,* 524 N.E. 2d 353, 358 (Ind. App. 1988) the court explained:

> "Although the law of unfair competition has been defined as the palming off of ones goods or services as that of some one else, and the attempt thereof, . . . the tort of unfair competition is much broader and also includes actions for the interference with a contract or business relationship, as well as for predatory price cutting."[4]

[4] Evidence of Heartland's predatory pricing during the Forest River trade show was just recently revealed when Heartland's chief financial officer, Dennis Donat, was finally brought to

Indiana recognizes the tort of interference with business relationship either as a subset of unfair competition or a free standing tort in its own right. The elements of a claim for interference with a business relationship under Indiana law are:

1. The existence of a valid relationship,
2. Defendant's knowledge of the existence of the relationship,
3. Defendant's intentional interference with that relationship,
4. Absence of justification, and
5. Damages resulting from defendant's wrongful interference with the relationship.

Felsher, 755 N.E. 2d at 598, fn 21(citing *Levee v. Beeching*, 729 N.E. 2d 215, 222 (Ind. Ct. App. 2000). In addition, it appears that the defendant's conduct complained of must be illegal, either as a matter of criminal or non-criminal law. *The Osler Institute, Inc. v. Forde*, 333 F. 3d 832, 838 (7th Cir. 2003); *Syndicate Sales, Inc. v. Hampshire Paper Corp.,* 192 F. 3d 633, 641-42 (7th Cir. 1999).

In regard to such illegal acts, it is a crime under Indiana law to "knowingly or intentionally cause another to suffer pecuniary loss by deception."[5] IC 35-43-1-2(a)(2). Moreover, the victim of such a crime has standing to seek recompense from the criminal in a civil action under IC 34-24-3-1 for three times the actual damages suffered, costs of the action, reasonable attorneys fees, etc.

Further, the court in *Felsher, supra,* articulated the scope of unfair competition law, by

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deposition on September 24, 2010. There are several currently pending discovery disputes in need of resolution in order to flesh out that evidence, long sought by Forest River. See DE#125 and DE#129. Accordingly, that aspect of the case is not relied upon herein, and is reserved for trial, to the extent that the issue is not rendered moot by granting of this motion.

[5] This criminal standard, "Criminal Mischief," appears to completely encompass the criminal deception statutes recited in the Amended Complaint, and form the basis for Forest River's assertion that those claims as well may be rendered moot by granting of this motion.

reference to *Prosser and Keeton on the Law of Torts,* 1015 (5th ed. 1984) and *Prosser, Law of Torts* 956 (4th ed. 1971), as:

> "Unfair competition . . . does not describe a single course of conduct or a tort with a specific number of elements; it instead describes a general category into which a number of new torts may be placed when recognized by the courts. The category is open-ended, and nameless forms of unfair competition may be recognized at any time for the protection of commercial values. . . .
>
> Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. The trader is not a free lance. Fight he may, but as a soldier, not a guerilla."

755 N.E. 2d, at 598-9. Further elaboration of the scope of unfair competition is found in *Keaton and Keaton v. Keaton*, 842 N.E. 2d 816, 819-21 (Ind. 2006), where it was explained that trade name infringement is also considered to be unfair competition even apart from the passing off "species of unfair competition." At the same time, that court noted that "'[p]assing off' is nothing more than a subspecies of fraud." *Id.,* at 819. Further, in *Keaton* the court explained that while evidence of an intent to deceive is not always required for a finding of unfair competition, if such evidence does exist it can create a rebuttable inference of a likelihood of consumer confusion. *Id.,* at 820.

Indeed, as between these same parties and in this same court, it has also been explained that the tort of unfair competition is much broader than mere palming off. *Heartland Recreational Vehicles, LLC v. Forest River, Inc.,* 2009 WL 418079, *4-5 (N.D. Ind. 2009)(citing *County Beverage, supra,* and *Felsher, supra,* as support for that understanding). As Judge Sharp put it, "[t]he Court will not condone Heartland's actions as simply healthy competition." *Id.,* at *5.

Analysis of the Present Motion:

Unfair Competition *Per Se* -

There are many, many facts in dispute in this lawsuit. There are still several significant discovery disputes that have not yet even been briefed despite the spurt of recent filings, since they await decision of the pending motions to become ripe. Most of those issues encircle the concepts of precisely measuring the harm done and/or gain procured by Heartland as a result of obtaining and using the Master List.

However, there is no dispute that Heartland obtained and used the list for its own advantage. There is no dispute that the list was the exclusive property of Forest River. There is no dispute that the list was obtained by deception. There is some dispute as to whether the deception extended to certain uses of that list, particularly as to the so-called Hotel Action. For purposes of this motion, however, there is no dispute that some form of Hotel Action, deceptive or not, took place to evidence another use of the list.

Forest River has found no prior Indiana case explicitly describing as "mere unfair competition" the situation where one competitor obtains by deception the customer list of its competitor and uses list that for unjust enrichment, without involving customer deception. Commonly, such claims are considered under trade secret law. However, in the present case, it is believed there is a disputed issue of fact as to whether Forest River's efforts to keep the contents of that Master List a secret were "reasonable." Accordingly, to proceed along that precedent would encumber this court with another jury trial to resolve what is otherwise a straightforward claim.

Accordingly, Forest River asserts herein that its claim may be resolved via summary judgment as a matter of unfair competition *per se* and credits Heartland with nothing less than achieving what Indiana courts from *Computing Cheese* to *Felscher* have been wary of: another form of chicanery by a guerilla competitor stepping outside of the bounds of healthy competition. In that

regard, Forest River submits that with the benefit of over 100 years of judicial experience with this area law since *Computing Cheese*, Indiana courts could now articulate a complete definition of "unfair competition," namely: any act in furtherance of competition which is against public policy and with provides gain to the actor or loss to the competitor who is the object of that act.

In the present case, Heartland clearly acted in furtherance of competition. Heartland professes to be nothing less than a "bitter competitor" of Forest River. Established Fact 1. Prior to obtaining the Master List, Heartland was in serious financial trouble. Established Fact 18. Once it obtained the Master List, Heartland used the list to contact dealers on the telephone, via fax flyers, via personal meetings, and via the Hotel Stuffing (Established Facts 12 - 15), all for the purpose of taking business away from Forest River (Established Fact 12, last sentence).

In order to implement that competition, Heartland committed an act which was against public policy: obtaining the Master List by deception. That deception was actually two-fold. First, Heartland's third party agent, Mr. Lung, lied to Mr. Tribble to get a copy of the list in the first place. Established Fact 9. In simple terms, Mr. Tribble was the victim of fraud. Second, Heartland then deceived its own agent when that agent turned the list over to Heartland. Established Fact 10. Heartland knew or should have known that Mr. Lung would be using deception to obtain the list in the first place; there is no other reason why Heartland would seek that list through a third party rather than have one of its own employees try directly. Heartland certainly knew Forest River would not voluntarily give up that list when it contacted Mr. Lung. Further, when Mr. Lung conditioned delivery of the list upon Mr. Whitehead keeping that list to himself, Heartland knew or should have known that it would be misleading Mr. Lung to disclose the list for general use within the company. Heartland cannot credibly claim that it came by the list "accidentally" through the actions of one

rogue manager, since its Vice President was told how the list was obtained, but nonetheless immediately jumped to use that list and since another manager was tasked to obtain an update to the list.[6] Established Facts 12 and 14.

Use of the Master List certainly provided some gain to Heartland, even if it cannot as yet be quantified precisely. Heartland's own actions confirm that there was value obtained since it would not have gone through the expense of the Hotel Stuffing and fax flyers if it did not expect some sales. Were it not for having put the dealers' names on the envelopes, something Heartland could not have done without the list, the Hotel Stuffing may well have been futile. Established Fact 16. Further, Heartland actually bragged to dealers about its success in using the list in order to obtain even more commercial benefit. Established Fact 17. At the very least, Heartland used the Master List to obtain valuable "face time" with prospective customers, without having to incur the normal travel expenses associated with sending a sales person on the road to visit the dealers. Even if no sales immediately resulted from that, long term sales were certainly expected, and Heartland's travel savings existed in some pecuniary form.

Using the Master List certainly was intended to inflict some loss upon Forest River, even if that loss cannot yet be quantified precisely. Heartland knew that by signing up dealers in advance of the Forest River show, it was depriving Forest River of even the opportunity to sell more products to those dealers, since the dealers have limited financing. Established Fact 20.

Accordingly, Heartland's actions should be considered unfair competition *per se.*

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[6] It has been alleged elsewhere that another fraud or deception occurred in the manner in which Mr. Creech used his "relationship" with the female office worker at Forest River. We do not need to address that herein. The mere fact that Heartland sought the update shows its intent to possess the Master List.

Unfair Competition by Interference with Business Relations -

There is no question but that both a valid relationship existed between Forest River and the dealers and that Heartland knew of the relationship between Forest River and the dealers. The Master List itself defined that relationship expressly: those dealers were Forest River's guests at the hotels marked on the list and they were planning to attend a private trade show with Forest River. Further, it was the fact of that relationship that made the Master List desirable to Heartland.

Obtaining and using the Master List to attempt to get dealer sales away from Forest River at the time of the private trade show clearly evidences Heartland's intent to interfere with that relationship. Pursuing an update to the list shows a further intent to tap into that relationship to the last minute.

Heartland can justify competition, but cannot justify deception in aid of competition. That deception is a crime in Indiana under IC 35-43-1-2(a)(2). There can be no justification for a crime, merely because Heartland was experiencing financial distress. A starving child may steal food with some justification. A business which dissipated millions and saved nothing for the proverbial "rainy day" cannot.[7]

Damages, including pecuniary loss, certainly were suffered by Forest River to some degree. Even if a single specific, near term lost sale cannot be identified precisely yet, Heartland publicly asserted that some new dealers and sales were obtained from the use of Forest River's property, the Master List. Heartland cannot now be heard to deny the representations it has made to its own

[7] The $7 Million referred to in DE#73, page 4, is one example of this. Heartland has restricted public disclosure of additional evidence in this regard at the present time. In the event that Heartland attempts to argue in Response that it was justified in this deception because of economic distress, Forest River will submit this evidence under seal. For now, however, it is considered patently silly for Heartland to argue that.

dealers without admitting another fraud. At a minimum, Heartland's use of the list damaged Forest River to the extent that it inherently diminished the value of that list because of lost exclusivity of dealer contact during that private trade show. Alternatively, Heartland's use by deception denied Forest River some fair "royalty" from the use of that list, if Forest River had been inclined to "rent" or share the list with other RV manufacturers. This motion is only for purposes of establishing liability, the actual extent of damages can be adjudicated later.

Accordingly, Heartland has committed unfair competition by its interference with Forest River's business relations via deceptions which constitute a crime under Indiana law.

Conclusions:

Forest River has met its burden of proof for partial summary judgment on this issue. Each and every element of the claim under two alternative forms of analysis have been shown by facts which are not in dispute. The Court should thus conclude the issue of liability and allow the parties to move forward as to adjudication of the remaining issues in this case.

Dated: November 2, 2010

Respectfully submitted,

s/Ryan M. Fountain

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Certificate of Service

I certify that on November 2, 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
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INDEX OF EXHIBITS