**UNITED STATES DISTRICT COURT**
Northern District of Indiana
South Bend Division

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

**HEARTLAND'S RESPONSE TO FOREST RIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

Forest River, Inc.'s ("Forest River") Motion for Partial Summary Judgment against Heartland Recreational Vehicles, LLC ("Heartland") is plagued by both legal and evidentiary pitfalls. The Motion fails for five independent reasons.

First, the purported claims at issue in the Motion are completely distinct from the counterclaims actually stated in Forest River's Amended Answer, Affirmative Defenses, and Counterclaims (DE # 25) (the "Amended Answer"). Forest River has filed this Motion for Partial Summary Judgment because it realizes that it has failed to amend the pleadings to include them and cannot point to any other filings confirming that they are part of this case. The Court should not tolerate this attempt to illegitimately and belatedly add new claims.[1]

[1] Heartland did not believe that Forest River intended to state these claims in this matter, and therefore did not include or address them in its own Motion for Summary Judgment (DE #130). However, as outlined throughout this Response, it is clear that Forest River's claims have no merit. Accordingly, if the Court decides to consider the merits of the claims stated in Forest River's Motion, the Court should consider this response as Heartland's brief in support of its concurrently-filed Cross-Motion for Summary Judgment on Forest River's claims and grant that motion. In the event that the Court decides that Forest River's claims should survive this cross-motion, however, Heartland requests that the Court provide it with an opportunity to file its own, fully-briefed motion for summary judgment, one supplemented by additional depositions and other discovery, before allowing this case to go to trial.

Second, because Forest River's unfair competition claims are based solely upon Heartland's acquisition and use of allegedly confidential information, they are preempted by the Indiana Uniform Trade Secrets Act.

Third, Forest River premises its unfair competition claims on an alleged agency relationship between Heartland and non-Heartland employee Rod Lung, but Forest River fails to designate any facts demonstrating that Heartland controlled Lung's conduct during the relevant time period, a prerequisite to the formation of an agency relationship. In fact, Lung's affidavit, Exh. E, conclusively establishes that he was not Heartland's agent. (SOF 15-17.)

Fourth, implicitly acknowledging that its evidence is insufficient to prove any recognized unfair competition cause of action under Indiana state law, Forest River invites the Court to adopt an entirely new and untenably amorphous cause of action, an invitation the Court should decline.

Fifth, Forest River's claim that Heartland tortiously interfered with its business relationships fails for several reasons. Forest River cannot show that Heartland acted illegally or that its conduct had the exclusive purpose of injuring Forest River, both of which are required in a claim for tortious interference with a business relationship. Forest River has also failed to specifically identify a single sale that Heartland gained as a result of obtaining the Master List, thereby demonstrating that it has no damages.

For each of these independent reasons, the Court should deny Forest River's Motion and enter summary judgment in favor of Heartland.

## I. Forest River Cannot Belatedly Add Claims to this Case Without Seeking Leave of the Court and Amending the Pleadings

In the Amended Answer, Forest River alleged three counterclaims, designating each under a separate heading: (1) "Declaratory Judgement of Invalidity, Non-infringement and

Unenforceability;" (2) "Infringement of Forest River's Trademark Rights under 15 U.S.C. §1125;" and (3) "Civil Action Under Criminal Deception." (DE#25, pp. 25, 29, & 34.) Forest River's claims under the Lanham Act and Indiana's criminal deception statute were rooted in the same, very specific factual allegations—those involving the Hotel Incident. (*See id.* at ¶86).

In short, Forest River accused Heartland employees of lying to hotel front desk employees, thereby persuading them to deliver envelopes containing Heartland promotional materials to recreational vehicle ("RV") dealers staying at the hotels. (*Id.* at ¶76.) Importantly, Forest River's counterclaims contained no allegations whatsoever that Heartland had acquired a Forest River Master List—improperly or otherwise—or that Heartland had used Forest River's Master List in any manner. Those claims *are* stated, however, in a Complaint filed by Forest River on September 29, 2010 in a separate action. (*See* Exh. L, Complaint in Cause No. 3:10-CV-409 JD.) Forest River apparently filed the September 29, 2010 Complaint as a last-ditch effort to save these belated claims in the event that the Court bars them as untimely in this case.

The Court should do just that. After a lengthy discovery period in this action, Heartland filed a Motion for Summary Judgment on December 21, 2009. (DE #78.) In arguing that it was entitled to summary judgment on Forest River's Lanham Act and criminal deception claims, Heartland informed the Court that Forest River had failed to provide any evidence that a Heartland employee had lied to a hotel employee. Heartland also argued that, because no lie had ever occurred, Forest River could not show that a lie had caused Forest River pecuniary harm or led Heartland to any pecuniary gain. Ultimately, rather than respond to Heartland's Motion, Forest River requested a stay in the summary judgment proceedings, arguing that it needed more discovery to respond to "both the patent issues and the unfair competition issues of **the Hotel Action**." (Mot. for Stay, DE#87, p. 7) (emphasis added).

However, after reviewing Heartland's arguments and evidence in support of its Motion for Summary Judgment, Forest River filed a Second Motion to Compel discovery on February 24, 2010. (Second Mot. to Compel, DE# 96). In that Motion, Forest River alleged for the first time that the real basis for its "unfair competition" claim was Heartland's "engage[ment] [of] a third party, Rodney Lung, to obtain a copy of the Forest River list of dealers who confirmed that they would be attending the private Forest River trade show." (*Id.* at pp. 2-3.) Forest River argued that, because the facts surrounding Heartland's acquisition of the list were discussed in the course of the parties' exceedingly broad discovery efforts, Heartland had implicitly or expressly consented to trying the new claim, citing Rule 15(b)(2). (*Id.*)

As an initial matter, Rule 15(b), by its express language, applies only to amendments sought "During and After Trial," and is thus inapplicable to periods of litigation prior to trial. *See* Fed. R. Civ. P. 15(b)(2); *Valley Entertainment, Inc. v. Friesen*, 691 F.Supp.2d 821, 826 (N.D.Ill. 2010) (stating that "Rule 15(b) applies to amendments proposed during and after a trial, and is thus not applicable to the instant motion" in excluding newly-asserted claims at summary judgment stage).

Regardless, Heartland unequivocally informed both Forest River and the Court of its refusal to consent to the addition of the claim in its response to Forest River's Second Motion to Compel, stating as follows:

> **Now, Forest River is apparently attempting to allege a *second* unfair competition claim, one based on Heartland's acquisition of a Forest River dealer list from a third party, Rod Lung. Nothing in Forest River's Amended Complaint hints that Heartland's acquisition of this list is the factual basis for any of Forest River's asserted claims. This "dealer list acquisition" unfair competition claim is actually an entirely separate claim from the "Hotel Action" unfair competition claim. Because Forest River declined to amend its Complaint to expressly allege this "dealer list" unfair competition claim, Heartland**

> **has had no opportunity to seek dismissal of the claim under Rule 12(b)(6). Furthermore, Forest River's failure to timely amend its complaint to include this second unfair competition claim lulled Heartland into a belief that Forest River did not plan to pursue it. As a result, Heartland declined to expend its full legal and financial resources conducting adequate discovery into the claim. To the extent Forest River wishes to pursue this claim, Heartland requests that the Court require Forest River to seek leave to amend its Complaint once again (a motion Heartland would then oppose), thus permitting Heartland an opportunity to seek its dismissal under Rule 12(b)(6), and, if necessary, conduct additional discovery into the purported claim's factual merits.**

(Resp. to Second Mot. to Compel, DE#102, pp. 11-12) (emphasis added.)

Months passed after Forest River's Second Motion to Compel, and Forest River did not amend its counterclaims to include allegations pertaining to Rod Lung or any use of the Master List. Accordingly, Heartland continued to object to certain discovery requests that would only be reasonable or relevant if Forest River's amorphous "dealer list acquisition" claims were part of the case. Heartland's belief that the claims were not part of the case was cemented on September 29, 2010, when Forest River filed the entirely new lawsuit containing claims based on Heartland's acquisition of the list. (*See* Exh. L, Complaint in Cause No. 3:10-CV-409 JD.) Accordingly, Heartland did not address the new claims when it re-filed its Motion for Summary Judgment in this action on November 2, 2010.

Forest River will likely ask in its reply brief for leave to add these new claims under Rule 15(a), but the Court should deny that leave. Under Rule 15(a), a court may refuse to give leave to amend based upon undue delay, bad faith, dilatory motive, prejudice, or futility, all of which are present here. *Winters v. Fru-Con Inc.*, 498 F.3d 734, 740 (7th Cir. 2007) (denying leave to amend complaint late in litigation where the amendment would affect defendant's discovery and trial strategy). Forest River had knowledge of Heartland's acquisition of the Master List at an

early point in this litigation, (*see* Exh. G, Hoffman Dep. pp. 270, ll. 3-25, taken in June of 2009), but failed to even informally assert a claim based on that acquisition until it reviewed Heartland's initial Motion for Summary Judgment and realized the claims it had pled could not survive summary judgment. That failure merits a denial of any request to amend the pleadings now. *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1298 (7th Cir. 1993) (affirming district court's denial of leave to amend and noting, "[t]hese facts could have been pled at any time after the filing of the initial complaint."); *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1304 (7th Cir. 1993) (noting that plaintiff only moved to amend after realizing that the claims she actually pled would lose on summary judgment, stating that "[t]here must be a point at which a plaintiff makes a commitment to the theory of its case," and denying leave to amend); *J.P. Morgan Chase Bank, N.A. v. Drywall Service & Supply Co., Inc.*, 265 F.R.D. 341, 351 (N.D. Ind. 2010) (denying leave to amend where court could not "fathom how [plaintiff] would not have had access to the facts underlying its proposed new legal theories until the summary judgment stage").[2]

At no point has Forest River sought leave to formally amend the pleadings. Instead, it has filed an entirely new lawsuit raising the list-acquisition claims, baiting Heartland into the continued assumption that they were not part of this action. That caused Heartland to decline to pursue focused, dedicated discovery on those claims, such as depositions of Brad Whitehead (who is now employed by a division of Forest River) and Rod Lung, the key actors at issue in this Motion. It also led Heartland to omit the claims from its own Motion for Summary Judgment. Now, instead of having an initial brief and a reply brief to affirmatively attack Forest River's belated claim at the summary judgment stage, it has this sole response brief. For all of the above reasons, the Court should deny Forest River's Motion for Summary Judgment and

[2] Furthermore, as noted by the court in *J.P. Morgan*, even though Heartland also knew of these facts, that does not mean that it knew Forest River intended to base additional claims on those facts. *See* 265 F.R.D. at 355.

instead dismiss its untimely claims with prejudice. That will preclude Forest River from pursuing the same claims in the *other* lawsuit in which they are alleged and prevent Heartland and this Court from expending further time and attorneys' fees reduplicating its litigation efforts related to the 2008 Forest River Trade Show. *See Ellis v. CCA of Tenn., LLC*, 2010 WL 2605870, at *4-5 (S.D. Ind. June 21, 2010) (barring claims in separate action under *res judicata*, finding that plaintiff could have amended complaint in previous action to include those claims).

However, should the Court decide to hear these claims in this action, it should allow the remainder of this Response to serve as the brief in support of Heartland's Cross-Motion for Summary Judgment, and then grant that motion in favor of Heartland. Furthermore, because Heartland has not had the opportunity for focused, adequate discovery, if the Court declines to award summary judgment to Heartland based on the current record, it should allow Heartland to take further depositions and then file its own, dedicated motion for summary judgment over the untimely claims before allowing them to go to trial. For the reasons stated below, however, that prolonged course of action is unnecessary, for Forest River's claims have no legal or evidentiary merit.

## II. Forest River's Unfair Competition Claims are Based Solely on Heartland's Acquisition and Use of Forest River's "Confidential" Information and are Therefore Preempted by the Uniform Trade Secrets Act

In 1982, Indiana became one of the first states to adopt the Uniform Trade Secrets Act. *AGS Capital Corp., Inc. v. Product Action Int'l., LLC*, 884 N.E.2d 294, 307 (Ind. Ct. App. 2008). The Indiana Uniform Trade Secrets Act ("IUTSA") contains a broad preemption provision. Specifically, the IUTSA "displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law." IND. CODE § 24-2-3-1(c). There exists very little Indiana state case law interpreting the scope of the IUTSA's

preemption provision. *See AGS Capital Corp., Inc.*, 884 N.E.2d at 306. However, case law from federal courts within the Seventh Circuit interpreting the Uniform Trade Secrets Act is highly instructive as to that scope.

The IUTSA defines "misappropriation of trade secrets" in part as follows: "(1) **acquisition of a trade secret** of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or (2) disclosure or **use of a trade secret** of another without express or implied consent by a person who…used improper means to acquire knowledge of the trade secret." IND. CODE § 24-2-3-2 (emphasis added). "Improper means" is defined as "theft, bribery, **misrepresentation**, **breach or inducement of a breach of a duty to maintain secrecy**, or espionage through electronic or other means." *Id.* (emphasis added). The language of the IUTSA directly mirrors Forest River's allegations, which claim that Heartland "**obtained** and **used** the [Forest River] list for its own advantage" and that "the list was obtained by **deception**." (Mem. Supp. Mot. for Part. Summ. J., DE #134-1, p. 9) (emphasis added.) To paraphrase Forest River's allegations, Heartland purportedly "acquired" and "use[d]" confidential information by the "improper means" of "misrepresentation." IND. CODE § 24-2-3-2. Forest River concedes that "[c]ommonly, such claims are considered under trade secret law."[3] (Mem. in Supp. Mot. for Part. Summ. J., DE #134-1, p. 9.) However, Forest River's admission fails to appreciate that claims "under trade secret law" are governed exclusively by the IUTSA, which preempts any and all common law claims with similar factual bases. IND. CODE § 24-2-3-1(c).

Forest River may attempt to argue that the IUTSA's preemption provisions should not apply because its Master List is not a "trade secret," but rather mere "confidential information." The Seventh Circuit Court of Appeals and district courts within the Seventh Circuit have

[3] For the reasons outlined in Section I, *supra*, the Court certainly should not allow Forest River to allege a trade secret claim based on the same facts after denying Forest River's motion; again, Forest River has never purported to be pursuing an IUTSA claim.

repeatedly refuted that argument. As Justice Posner eloquently reasoned in a case interpreting similar preemption provisions under Wisconsin and Minnesota law:

> In general, if information is not a trade secret and is not protected by patent, copyright, or some other body of law that creates a broader intellectual property right than trade secrecy does, anyone is free to use the information without liability. [Plaintiff] argues, however, that the common law of Minnesota imposes liability for such use if the defendant got hold of the information improperly. The argument is difficult to understand; if the information is not secret and not protected by any of the laws that create property rights in information, it is in the public domain and freely usable without need to commit a tort or a breach of contract to obtain it.

*ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 959 (7th Cir. 2006).

District court opinions deciding the same issue echo Judge Posner's reasoning and hold that any claims based on the misappropriation of confidential information are preempted by the Uniform Trade Secret Act, regardless of whether the information actually constitutes a statutory "trade secret." In *Learning Curve Toys, L.P. v. Playwood Toys, Inc.*, 1999 WL 529572, at *2-3 (N.D. Ill. July 20, 1999) (interpreting analogous Illinois Trade Secrets Act), the plaintiff alleged that its confidential information constituted a trade secret, but claimed that even if it did not, it could still pursue common law causes of action for "the theft of ideas." *Id.* The district court disagreed, finding that:

> The caselaw from the Seventh Circuit, and in this district, belies [Plaintiff's] argument. *See* Robert Unikel, *Bridging the "Trade Secret" Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets*, 29 Loy. U. Chi. L.J. 841, 886 n. 176 (1998) (collecting cases). The purpose of the ITSA was to codify all the various common law remedies for theft of ideas. *See Pepsico, Inc. v. Redmond*, 54 F.3d 1262, 1269 (7th Cir.1995). The ITSA did not establish a parallel statutory regime to complement the common law; rather, it "abolished common law theories of misuse of such [secret] information.... Unless defendants misappropriate[ ] a statutory trade secret, they d[o] no legal wrong." *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir.1992). Thus, plaintiffs who believe

> their ideas were pilfered may resort only to the ITSA; the alleged theft of ideas cannot support multiple claims under different theories of recovery. *See Powell Prods., Inc. v. Marks*, 948 F.Supp. 1469, 1474 (D.Colo.1996) (dicta) (preemption appropriate under the Uniform Trade Secrets Act where "'other claims are no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation"') (quoting Roger M. Milgrim, Milgrim on Trade Secrets, § 1.01[4], at 1-68.14 (1996)).

*Id.*; *accord Fox Controls, Inc. v. Honeywell Inc.*, 2002 WL 1949723, *2-3 (N.D. Ill. Aug. 22, 2002) (citing nine other cases within the Seventh Circuit and holding that a plaintiff's common law claims for the misappropriation of "confidential information" were "simply restatements of plaintiff's claim for misappropriation of trade secrets, and are thus preempted by the ITSA.")

Forest River's unfair competition allegations are based solely on Heartland's acquisition and use of the Master List. Acknowledging that it may not be able to prove that its information is a trade secret, (*see* Mem. Supp. Mot. Summ. J., DE# 134-1, p. 9), Forest River has forsaken any attempt to prove liability under the IUTSA, instead relying solely on identical claims under the common law.[4] Because, as explained above, the IUTSA expressly preempts those causes of action, Forest River has no remaining claim related to the acquisition and use of the Master List. Therefore, the Court should deny Forest River's Motion and enter judgment in favor of Heartland on these claims.

## III. Because Rod Lung Did Not Act as Heartland's Agent in Acquiring Forest River's Master List, Heartland Cannot be Held Liable for Lung's Conduct

Forest River premises the claims at issue in this motion on the bare assertion that a non-party to this lawsuit, Rod Lung, acted as Heartland's agent in acquiring the list, and that

[4] The evidence Forest River submits in support of its Motion confirms that the Master List was not a trade secret. According to the Declaration of Rod Lung offered by Forest River, "it is not uncommon for dealer lists to be traded among recreational vehicle manufacturers" and it is "common practice and courtesy" within the RV industry to use a competitor's dealer list to contact and arrange for meetings with customers. (*See* DE#134-4, ¶ 4;) (SOF 9.) If it is common practice to share such information with competitors, that information cannot be considered a statutory trade secret under the IUTSA. *See* IND. CODE § 24-2-3-2 (requiring that proponent of trade secret status must show that reasonable efforts are taken to ensure the information's secrecy).

Heartland can be held vicariously liable for Lung's conduct. Forest River essentially argues that Rod Lung lied to Forest River's Mike Tribble by telling him he would keep the Master List to himself, and that Lung's so-called deception entitles it to a finding that Heartland is vicariously liable for Lung's actions.

However, to establish Heartland's vicarious liability, Forest River must show that an agency relationship existed between Heartland and Lung. Under Indiana law, an agency relationship arises when the following three elements exist: (1) a manifestation of consent by the principal to the agent; (2) an acceptance of the authority by the agent; and (3) control exerted by the principal over the agent. *See Fioretti v. Aztar Ind. Gaming Co., LLC,* 790 N.E.2d 587, 591 (Ind. Ct. App. 2003). Importantly, "[i]t is necessary that the agent be subject to the control of the principal with respect to the details of the work." *Turner v. Bd. of Aviation Comm'rs,* 743 N.E.2d 1153, 1163 (Ind. Ct. App. 2001).

Forest River never even bothers to recite the elements of an agency relationship under Indiana law, relying instead on the unsupported allegation that Lung was Heartland's "third-party agent." (Mem. Supp. Mot. for Part. Summ. J., DE #134-1, p. 10.) Forest River apparently assumes that if a party completes an action that benefits another party, that is sufficient to create an agency relationship. However, an agency relationship is not created by the mere conferral of a benefit. Forest River must prove that when Rod Lung acquired the Master List, he was "subject to the control of [Heartland] with respect to the details of the work." *Id.* Here, Forest River designates no facts whatsoever demonstrating that Heartland controlled the conduct of Rod Lung. Forest River provides no evidence that Heartland instructed Lung on how to obtain the list, let alone that Heartland instructed him to use deception. Such evidence does not exist, **as**

**Lung himself affirms that at no point during the Fall of 2008 was he ever employed by Heartland or subject to Heartland's control**. (SOF 15-17.)

Forest River limply asserts that "Heartland knew or should have known that Mr. Lung would be using deception to obtain the list in the first place." (Mot. for Part. Summ. J., DE #134, p. 10.) Forest River cites no evidence in support of this assertion, but the testimony of Rod Lung included in Forest River's supporting materials refutes it anyway. Lung stated in his declaration that "it is not uncommon for dealer lists to be traded among recreational vehicle manufacturers." (SOF 9.) Lung also stated that he traded Tribble a list of Keystone dealers in exchange for the Master List. (SOF 10, 11.) Accordingly, Heartland could have assumed that Lung planned to merely trade information in order to obtain the list, and that no act of deception would be necessary.

Regardless, even if Heartland knew or "should have known" what Lung might do to obtain the list, knowledge does not equate to control, and, again, Forest River must show that Heartland controlled "the details" of Lung's work in order for Heartland to be held liable for his actions. *Turner*, 743 N.E.2d at 1163. In the absence of any evidence that Rod Lung was subject to Heartland's control, no issue of fact exists as to whether Lung was an agent of Heartland, and the Court should deny Forest River's Motion and enter summary judgment in Heartland's favor.

## IV. This Court Should Not Adopt a New Unfair Competition Cause of Action Based on an Amorphous "Against Public Policy" Standard

To date, Indiana law recognizes only four "unfair competition" causes of action: (1) "passing off;" (2) predatory pricing; (3) tortious interference with contractual relations; and (4) tortious interference with business relationships. *See Bartholomew Cty. Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 358 (Ind. Ct. App. 1988) (listing recognized causes of action); INDIANA MODEL CIVIL JURY INSTRUCTIONS, 2010 Edition, §§ 3123-3135 (relevant sections

attached as Exh. M) (recognizing only these four causes of action as "unfair competition"). Tacitly acknowledging that it cannot prove the elements of any of the unfair competition causes of action expressly recognized under Indiana law, Forest River asks this Federal Court to adopt an exceptionally vague new unfair competition cause of action, one it refers to as "unfair competition *per se*." Specifically, Forest River asks the Court to declare for the first time that a party can prove a claim of unfair competition by showing that: (1) a party took some act in furtherance of competition; (2) that act was "against public policy;" and (3) that act benefited the party or injured the plaintiff. (*See* Mem. Supp. Mot. for Part. Summ. J., DE # 134, p. 10.) The Court should decline Forest River's invitation to unilaterally adopt this cause of action for three simple reasons.

First, adopting such a cause of action would remain futile to Forest River's cause. Forest River contends that adopting this new standard is necessary to stretch the scope of "unfair competition" so that it encompasses "the situation where one competitor obtains by deception the customer list of its competitor and uses list that *(sic)* for unjust enrichment, without involving customer deception." (Mem. Supp. Mot. for Part. Summ. J., DE # 134-1, p. 9.) But Forest River also admits that "such claims are considered under trade secret law," and, indeed, any common law claims with a similar factual basis would be preempted by the IUTSA. *See* Section II *supra.* Hence, even if this Court adopted such a broad definition of unfair competition, because Forest River would still be relying on alleged acts that are contemplated by the IUTSA, its "unfair competition *per se*" claim would still be preempted. *See, e.g.*, *Fox Controls, Inc. v. Honeywell Inc.*, 2002 WL 1949723, *2-3 (N.D. Ill. Aug. 22, 2002) (holding that a plaintiff's common law claims for the misappropriation of "confidential information" were "simply restatements of

plaintiff's claim for misappropriation of trade secrets, and are thus preempted by the [Illinois Trade Secrets Act].")

Second, contrary to Forest River's assertion that adopting this broad cause of action would comport with "over 100 years of judicial experience with this area" (Mem. Supp. Mot. for Part. Summ. J., DE # 134-1, p. 10), Forest River's proposition would actually eviscerate the four unfair competition causes of action that have evolved from that experience. Instead of meticulously presenting evidence establishing each element of those respective causes of action, plaintiffs would reflexively relent to arguing that a defendant's actions were simply "against public policy." Hence, Forest River's proposed cause of action would actually **undo** a century's worth of judicial work aimed at carefully crafting workable, definite causes of action falling within the scope of "unfair competition." *See Bartholomew Cty. Beverage Co.*, 524 N.E.2d at 358 (Ind. Ct. App. 1988) (listing recognized causes of action); INDIANA MODEL CIVIL JURY INSTRUCTIONS, 2010 Edition, §§ 3123-3135.

Finally, the exceptionally vague nature of Forest River's proposed cause of action renders it untenable. Adopting the vague "against public policy" test would essentially mean that all Indiana unfair competition litigation would be governed by a wildly capricious "I know it when I see it" standard. The Seventh Circuit's opinion in *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263 (7th Cir.1992) is instructive on this point. In *Composite Marine Propellers*, the plaintiff, like Forest River here, accused the defendant of committing unfair competition by misappropriating its confidential information. The Court held that the Illinois Trade Secrets Act preempted that claim and explained that "[u]nless defendants misappropriated a (statutory) trade secret, they did no legal wrong." *Id.* at 1265. The Court then explained that while the defendants may have acted unfairly, unfairness should not equate to unlawfulness. As

the Court recognized, "most competition is 'unfair' in lay terms…Competition is ruthless, unprincipled, uncharitable, unforgiving—and a boon to society, Adam Smith reminds us, precisely because of these qualities that make it a bane to other producers." *Id.* at 1268. Quite simply, Forest River's exceptionally broad and vague new unfair competition cause of action would sweep within its ambit a vast array of conduct that, while seemingly "unfair" to a layperson, has never been deemed unlawful under Indiana statutory or common law. Mindful of the Seventh Circuit's reasoning in *Composite Marine Propellers*, the Court should decline Forest River's invitation to adopt an entirely new standard for unfair competition claims.

## V. Heartland Did Not Tortiously Interfere with Forest River's Business Relationships

Forest River does argue that Heartland's alleged conduct fits within one cognizable cause of action for unfair competition: tortious interference with a business relationship. In order to prove its claim, Forest River must prove each of the following six elements:

(1) A business relationship existed between Forest River and some third party;

(2) Heartland knew of the business relationship;

(3) Heartland intentionally interfered with the business relationship;

(4) No justification existed for Heartland's conduct;

(5) Heartland acted illegally in achieving its end; and

(6) Forest River was damaged as a result.

*See Levee v. Beeching*, 729 N.E.2d 215, 222-223 (Ind. Ct. App. 2000)

Forest River has not designated evidence sufficient to satisfy at least three of these elements. Specifically, Forest River cannot prove that: (1) Heartland acted illegally; (2) that Heartland acted without "justification," as that term has been defined under Indiana law; or (3) that it suffered any demonstrable injury as a result of Heartland's alleged conduct.

A. Heartland Committed No Illegal Acts in Obtaining or Using the List

To prove tortious interference with a business relationship, a plaintiff must show that the defendant acted illegally in achieving his end. *See id.* Indiana courts have not clearly defined the level of egregiousness necessary to satisfy this illegality requirement. However, it is clear that not every unlawful act is sufficiently "illegal" to sustain a cause of action. *See id.* (noting same and finding that defamation, i.e. a false statement about another person, did not constitute illegal conduct).

Forest River points to two acts that it claims were "illegal:" (1) Rod Lung's broken promise to Mike Tribble that he would keep the Master List to himself; and (2) Heartland employee Brad Whitehead's decision to share the list with his fellow sales managers even though he allegedly "knew or should have known that that it would be misleading Mr. Lung to disclose the list for general use within the company." (Mem Supp. Mot. for Part. Summ. J., DE #134-1, pp. 10, 12.) Neither of these acts rises to the level of illegality.

As a threshold matter, Rod Lung's broken promise to Mike Tribble is not determinative; as discussed above, Heartland had no control whatsoever over Lung's behavior, and Lung was not Heartland's agent, thereby relieving Heartland of any liability for his actions. *See* Section III, *supra*. But even if Lung were acting as Heartland's agent, a broken promise to a friend does not constitute illegal activity. Forest River argues that Lung's conduct constitutes "fraud" and a violation of Indiana's "criminal mischief" statute, which also prohibits acts sounding in fraud. *See* IND. CODE § 35-43-1-2(a)(2); (Mem Supp. Mot. for Part. Summ. J., DE #134-1 at p. 10.) However, Lung made a promise to Tribble to take a future action, i.e. to keep the list a secret. Fraud cannot be predicated upon representations of future conduct or broken promises. *Wallem v. CLS Indus., Inc.*, 725 N.E.2d 880, 889 (Ind. Ct. App. 2000). That is true even if the promisor

had no intention of fulfilling the promise when it was made. *Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88, 97 (Ind. Ct. App. 1987); *Balue v. Taylor,* 36 N.E. 269, 271 (Ind. 1894); *Ayres v. Blevins*, 62 N.E. 305 (Ind. Ct. App. 1901); Ind. Law Encycl. Contracts § 38. "An intention not to do that which the law does not require to be done, is not illegal, and such a negative intention cannot be the basis of an action for fraud unless there is also involved the breach of some other duty." *Sachs v. Blewett*, 185 N.E. 856, 859 (Ind. 1933). It is not alleged that Lung owed any fiduciary duty to Tribble, and no such duty is apparent from the operative facts. At most, Lung's conduct can be classified as a breach of an oral promise; however, a breach of contract is insufficient to constitute "illegal" conduct for purposes of a tortious interference claim. *Smith v. Biomet, Inc.*, 384 F.Supp.2d 1241, 1252-53 (N.D. Ind. 2005). Therefore, even if Lung had been acting as Heartland's agent, his conduct would not create a cause of action for tortious interference with a business relationship.

Heartland's claim that Brad Whitehead committed fraud against Rod Lung also fails to satisfy the illegality requirement. As an initial matter, Forest River has no standing to recover for a "fraud" committed against Rod Lung; once it failed to safeguard its confidential information from dissemination outside the company, that information became publicly usable information. Furthermore, Forest River has designated no evidence that any fraud actually occurred between Whitehead and Lung. Lung knew that Whitehead planned to contact dealers on the Master List, and Lung acknowledges that using the list to arrange to meet dealers is consistent with common practice and courtesy in the RV industry. (SOF 13-14.) While Lung requested that Whitehead keep the list to himself, there is no evidence that Whitehead affirmatively agreed to not share the list with other Heartland salespeople. (*See* SOF 12.) Instead, Lung simply stated that he "trusted Brad to do so." (*Id.*) Lung's assumption and hope

that Whitehead would honor his request does not make Whitehead guilty of fraud, and it certainly does not satisfy the requisite element of illegality.

Because the evidence demonstrates that Heartland committed no illegal acts in obtaining and using the Master List, Forest River's claim for tortious interference with a business relationship fails, and the Court should enter summary judgment in favor of Heartland.

B. Because Heartland Acted in Furtherance of its Own Business and Not Exclusively to Injure Forest River, Forest River cannot Prove a Lack of Justification

To succeed on its claim for tortious interference with a business relationship, Forest River must prove that no justification existed for Heartland's conduct. Forest River provides very little legal analysis for its argument that Heartland's conduct was unjustified, and it offers no clarity whatsoever as to what it means to act without justification under Indiana law. Instead, it merely asserts that "Heartland can justify competition, but cannot justify deception in aid of competition," and that "[t]here can be no justification for a crime, merely because Heartland was experiencing financial distress." (Mem. Supp. Mot. for Part. Summ. J., DE #134-1, p. 12.) Those statements erroneously conflate the justification requirement with the illegality requirement.

Under applicable Indiana law, the question of whether Heartland's actions were unjustified can be resolved very simply. "On the issue of whether there is an absence of justification, Indiana courts look to the Restatement of Torts which states that if a defendant's 'purpose is at least in part to advance his interest in competing with the other,' then there can be no 'absence of justification.'" *Smith v. Biomet, Inc.*, 384 F.Supp.2d 1241, 1249-1250 (quoting Restatement (Second) Torts, § 768(1)(d)). To be unjustified, Heartland's actions must be

"malicious and **exclusively** directed to the injury and damage of [Forest River]." *Morgan Asset Holding Corp. v. CoBank*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000) (emphasis added).

Heartland's conduct was primarily aimed at creating sales for itself, not to damage Forest River. Viewing the evidence in a light most favorable to Forest River, as Heartland's cross-motion necessitates, Heartland used the list to contact RV dealers and arrange to meet with them to discuss and hopefully sell Heartland's products. Again, that use is consistent with common practice and courtesy in the RV industry. (SOF 14.) Forest River claims, without any supporting evidence, that those dealers chose to purchase Heartland products as a result of Heartland's use of the list. If so, then those dealers apparently saw a product they preferred at a price they were willing to pay. While sales to Heartland may have had the collateral effect of taking sales from Forest River or some other competitor, Forest River cannot legitimately deny that Heartland's "purpose [was] at least in part to advance [its] interest in competing with [Forest River]" by making sales of its own products. *See Smith v. Biomet*, 384 F.Supp.2d at 1249-50 (quoting Restatement (Second) Torts, § 768(1)(d)).

Forest River provides no argument that Heartland's conduct was unjustified other than to state that its behavior was criminal. As discussed in Section V.A above, Heartland committed no illegal acts, and its goal was to make sales for itself, not exclusively to injure Forest River. Accordingly, Heartland is entitled to summary judgment.

### C. Having Failed to Identify a Single Sale Obtained by Heartland, Forest River Cannot Allege that it Suffered any Damages

As a necessary element of its claims of unfair competition, Forest River must prove that it suffered some pecuniary loss as a result of Heartland's alleged actions. Instead of providing concrete proof of resultant damage to itself or benefit to Heartland, Forest River asks this Court to presume damages from stray bits of circumstantial evidence. While it is true in unfair

competition cases that a plaintiff need not prove the **amount** of its damages with mathematical precision, Forest River must at least prove that **some** damage has in fact occurred as a result of the alleged unlawful conduct. *Hammons Mobile Homes, Inc. v. Laser Mobile Home Transport, Inc.*, 501 N.E.2d 458, 462 (Ind. Ct. App. 1986). An objective, careful analysis of the evidence designated by Forest River suggests that Heartland made sales around the time of the Forest River Trade show, but it does not show that those sales were proximately caused by Heartland's acquisition or use of the Master List.

Before discussing Forest River's lack of evidence, it is important to expose several of the myths about the Master List perpetuated by Forest River throughout this litigation. First, Forest River insinuates that the dealers on the list "belonged" to Forest River, and that Heartland could not have contacted those dealers without this crucial "confidential" information. In actuality, Forest River's own Vice President of Sales, Jeff Babcock, testified that 95-97 percent of the dealers attending the Forest River trade show were also dealers of other RV manufacturers. (SOF 5.) Furthermore, while Heartland did make sales during the relevant time period,[5] with the exception of one dealer, all of the dealers placing orders with Heartland were already Heartland dealers before Heartland obtained the Master List. (SOF 24.) The lone RV dealer who did sign with Heartland during the relevant time period was Loveall RV. (SOF 24.) But Heartland had been contacting and prospecting Loveall RV for six months prior to the Trade Show, and Forest River has not directed the Court to any evidence that Loveall RV was contacted by Heartland as

[5] In a previous Order regarding discovery, the Court determined that the relevant time period for evaluating Heartland's sales spanned from two months prior to Forest River's Trade Show through the date of the annual RV trade show in Louisville in early December, 2008. (Order, DE#112, pp. 3-4.)

a result of its acquisition of the Master List, or that Loveall RV's purchase of Heartland products resulted in any way from Heartland's acquisition of the Master List.[6] (SOF 19.)

The other myth perpetuated by Forest River is that dealers would not have visited Heartland at the time of the Trade Show if not for Heartland's acquisition of the Master List. Such an assertion belies common sense. If one RV manufacturer invites 260 RV dealers from all over the United States and Canada to visit its facilities in Elkhart, Indiana for a period of two days, some of those dealers, who have paid their own way to travel to Elkhart, will also likely take the opportunity to visit the *other* Elkhart, Indiana manufacturers with whom they do business. Indeed, Heartland has designated evidence demonstrating that at least two dealers planned to visit and did visit Heartland's facilities because they were already going to be in town. (SOF 20-23.) Furthermore, the two Heartland salespeople deposed by Forest River in this action (presumably because they were responsible for making a substantial number of sales for Heartland during the relevant time period) testified that they did not use the list at all. As one of those sales people explained in his deposition, "[I]f my dealers are coming into town, I would think that I have a good enough rapport that they're gonna call they tell me that, 'Hey, I'm gonna be there, you know, on such and such a date. You know, if I have time, I'm gonna come by and see you.'" (SOF 22.)

Forest River must designate some evidence showing that the sales Heartland made during the relevant time period resulted from **Heartland's use of the list**, and not the simple fact that Forest River invited 260 RV dealers to Elkhart, Indiana, i.e. a place just a few miles from its

[6] While Forest River designates an email from Coley Brady to other Heartland employees indicating that a Loveall representative met with Heartland while he was in Elkhart, Indiana for the Forest River Trade Show, that email does not establish that the Master List was used by Heartland to contact Loveall. (*See* Forest River's Sealed Appendix, DE #135.) After all, Heartland's evidence shows that it had been contacting Loveall for months prior to its acquisition of the Master List, and that dealers will often initiate meetings with Heartland themselves when they know that they are coming to town. (SOF 18-20, 22-23.)

competing manufacturers' doorsteps. There is no testimony from a single RV dealer stating that it decided to visit Heartland's facility as a result of such a communication. There is no testimony from an RV dealer stating that its receipt of materials or its visit to Heartland materially affected its purchasing decisions. Forest River is obviously acquainted with the dealers who are listed on its own Master List. Accordingly, Forest River could have easily looked at the list of sales provided by Heartland, determined whether any of those dealers were included on the Master List, and then contacted the dealers to determine their motivations for purchasing Heartland products. Yet, when asked in an interrogatory to identify the sales that it believes were caused by Heartland's conduct, Forest River **did not identify a single sale.** (SOF 28.) Accordingly, Forest River has either continued to refuse to contact any of these dealers to determine whether Heartland's alleged conduct affected their purchasing decisions, (*see* SOF 26), or it has contacted these dealers and learned that Heartland's alleged conduct did not affect their decisions.

In the absence of any competent, direct evidence, Forest River attempts to use circumstantial evidence to create the false appearance that Heartland's acquisition of the dealer list caused it to make sales. In doing so, however, Forest River misrepresents the evidence it has designated. In its brief, Forest River represents to this Court that "Heartland actually bragged to dealers about its success **in using the list** in order to obtain even more commercial benefit" and that it "publicly asserted that some new dealers and sales were **obtained from the use of Forest River's property, the Master List**." (Mem. Supp. Mot. Summ. J., DE# 134-1, pp. 11, 12.) In support of these representations, Forest River cites an email sent by Heartland President Brian Brady to its dealers. Contrary to Forest River's assertions, that email makes no mention of the list. Instead, it merely states that one of its competitors had hosted "an open house earlier this week" and that "[a] number of the dealers attending this function stopped by HEARTLAND."

(*See* DE #134-8.) Accordingly, all that Brady's email shows is that when Forest River invited 260 RV dealers to Elkhart, Indiana, some of those dealers decided to visit other manufacturers in the area, including Heartland. But as the evidence Heartland has designated demonstrates, those dealers would have visited Heartland regardless of whether Heartland obtained the Master List, and Forest River has failed to designate any specific evidence to the contrary.

This entire lawsuit demonstrates Forest River's frustration about one common sense truth: if an RV manufacturer invites 260 non-exclusive RV dealers to Elkhart, Indiana for a period of two days, then some of those dealers will likely make the practical decision to visit the other Elkhart-based manufacturers with whom they do business. While making those visits to other manufacturers, those dealers might see products they prefer over those offered by Forest River. If Forest River could have presented evidence that Heartland would not have been able to contact a particular dealer if not for the acquisition of its Master List, that Heartland then contacted that dealer, and that the dealer then decided to purchase a Heartland product as a proximate result of that conduct, then some question may have existed as to whether Heartland had made any gains or Forest River had suffered damages.[7] But Forest River has presented no specific evidence demonstrating these facts, and the evidence shows that every dealer purchasing products from Heartland during the relevant time period following the Trade Show was known to Heartland before it ever obtained a copy of the Master List.

There is no evidence that the sales Heartland made when Forest River invited its dealers to Elkhart, Indiana resulted from Heartland's use of the list, and not the simple fact that they decided to visit Heartland while they were in town for two days. Because proof of damages is

[7] Of course, Forest River would still be a long way from proving that any gains or damage were **proximately** caused by Heartland's alleged conduct. As its own Vice President of Sales, Jeff Babcock, noted during his deposition, sales are not made from the mere receipt of promotional materials, but from an RV dealer's thorough assessment of the merits of a product, its attractiveness to end users, and its price. (*See* SOF 25, 27.)

necessary to a claim of unfair competition, Forest River's claims fail as a matter of law, and the Court should enter summary judgment in Heartland's favor.

## CONCLUSION

With its Motion for Partial Summary Judgment, Forest River attempts to belatedly inject claims into this case that were not stated in the pleadings. Forest River's (1) failure to seek leave to amend the pleadings, and (2) filing of a second lawsuit alleging these claims caused Heartland to believe that Forest River did not plan to assert them in this litigation. As a result of Forest River's dilatory conduct and gamesmanship, Heartland did not have an opportunity to seek to dismiss these claims with a Rule 12(b)(6) motion, did not conduct focused discovery into the facts alleged in connection with the claims, and it did not address the claims in its own Motion for Summary Judgment. Forest River's conduct has damaged Heartland's litigation efforts, and the Court should deny Forest River's attempt to litigate these untimely claims and dismiss them with prejudice.

However, should the Court decide to consider the merits of the claims, they fail for several independent reasons. They are preempted by the IUTSA. They depend upon the presence of an agency relationship that never existed, due to Heartland's lack of control over Rod Lung. They require Forest River to show that Heartland committed an illegal act, which Forest River cannot do. They require Forest River to show that Heartland's exclusive purpose was to maliciously injure Forest River, which Forest River cannot do. And they require Forest River to provide some competent evidence that it suffered pecuniary loss as a result of unlawful conduct, which, again, Forest River has failed to do.

Forest River has failed to present viable legal theories, and it has failed to designate evidence sufficient to create an issue of material fact with respect to those theories. For all of

these reasons, the Court should deny Forest River's motion, acknowledge this response as Heartland's memorandum in support of its Cross-Motion for Summary Judgment on these claims, and then grant that motion in Heartland's favor.

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 8th day of December, 2010, by operation of the Court's electronic filing system:

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