

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

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

FOREST RIVER’S MOTION FOR ENFORCEMENT OF COURT ORDER, DE#112

Pursuant to Fed. R. Civ. P. 37(b)(2)(A)(iv), Forest River seeks to enforce compliance with this Court’s Order of March 31, 2010 (DE#112). That Order resulted from Forest River’s Sealed Motion to Compel, DE#96, and required Heartland to “conduct its own search of its computer files for all communications that are responsive to Forest River’s request,” DE#112, page 7. Specifically, Heartland was required to conduct that search and turn over all documents showing to whom Mr. Brady’s email of October 28, 2008, 7:36 pm, was sent and all responses which any dealer sent back to Heartland. (See DE#96, at page 8, referring to Production Requests No. 24 and 25). Heartland did not do so. When confronted with its non-compliance with the Order by Forest River, Heartland does not dispute that it has backup media with those emails preserved. Instead, Heartland argues that those emails are not relevant to this case and, accordingly, it should not be required to comply with the Order in that regard. Heartland’s argument is without merit.

A certification under L.R. 37.1 is attached hereto, and a proposed form of order is submitted to chambers herewith.

Factual Background of the Motion:

As noted in the March 31 Order and elsewhere with more detail in this and related cases¹, Forest River and Heartland are direct competitors in the recreational vehicle (“RV”) industry. On October 22-23, 2008 Forest River held a private trade show, inviting and hosting (at its own expense) several RV dealers from around the country, at Forest River’s principal place of business, Elkhart, Indiana. Incident to preparing for this trade show, Forest River created and periodically updated a Master List having a compilation of information therein, such as the identity of which dealerships would be attending the trade show and specifying which hotels each dealer representative would be staying at. This list was the exclusive property of Forest River.

Approximately two weeks before that trade show, Heartland obtained a copy of the Master List by deliberate and calculated deception. Specifically, Heartland arranged for a third party, Rod Lung, to contact a Forest River employee and obtain a copy of that list for Heartland by deceiving the Forest River employee as to what the copy would be used for. In the process, Heartland even misled Mr. Lung as to what Heartland would do with the list, once Mr. Lung turned it over to Heartland. DE#96, Exhibit A thereto.

After Heartland obtained the Master List, it made use of that to target Forest River dealers and disrupt Forest River’s business efforts at the trade show in several ways. For example, knowing that RV dealers have limited floor planning dollars available to spend at any given time, Heartland sought to pre-empt the amount of money Forest River’s dealers could spend at the trade show via

¹ See, e.g., factual backgrounds set forth in the motion of DE#125, the Statement of Material Facts of DE#134-2 and the exhibits thereto, and the Complaint, ¶s 6-25, of related case 3:10-cv-409 before this Court (the ‘409 case was filed based upon a more complete understanding of the events of October, 2008 which emerged from discovery in the ‘490 case, and Forest River intends to seek consolidation of the two lawsuits).

a “fax flyer” advertisement on October 20, 2008 to selected Forest River dealers. DE#96, Exhibit D thereto. Similarly, Heartland placed telephone calls to the dealers on the Master List just before the Forest River trade show to solicit immediate sales commitments and invite the dealers to also visit Heartland while in Elkhart to see Forest River. DE#134-2, ¶12. Also, by October 21, 2008, Heartland had made arrangements to meet personally with 14 of the dealers on the Master List. DE#134-2, ¶13, Exhibit D thereto. Still further, the Master List was used to commit what Heartland referred to in its emails at the time as the “Hotel Stuffing,” DE#96, Exhibit C thereto, and what Forest River in the pleadings referred to as the “Hotel Action,” DE#21-2, ¶79. These actions and others ultimately resulted in “about 18 dealers” from the Forest River Master List coming to see Heartland during the time of the Forest River trade show. DE#134-2, ¶13, Exhibit E thereto².

After the Forest River trade show, Heartland also sought to further reap benefits from its misappropriation of the Master List, by sending out advertising emails to RV dealers stating that “a number of dealers” attending Forest River’s trade show (which Mr. Brady referred to as an “open house”) “stopped by” Heartland and, as a result, “we signed some new dealers and we wrote a pleasantly surprising and quite frankly, unexpected number of orders.” DE#96, Exhibit F, first parag. after salutation; also seen in Exhibit A to the present motion. In that email, Heartland did not mention that it had taken Forest River’s Master List by deception and made a substantial, concerted effort to ensure that a number of Forest River’s dealers would “stop by.” Given all the work Heartland put into the misappropriation, it cannot be true that the number of orders was “unexpected.” In fact, it was deliberately planned and actively worked for by Heartland.

² Despite the fact that this lawsuit has been pending since October, 2008, the email of that Exhibit E was initially concealed by Heartland during discovery and only turned over to Forest River in June, 2010 as a result of the Order of March 31, 2010.

Viewed in the light of day, Mr. Brady's email was a deliberate attempt to mislead dealers into thinking that Heartland's products were so much an acceptable alternative to Forest River's products, that Forest River's specially invited dealers, on their own initiative, would have naturally 'stopped by' Heartland when shopping for Forest River products and buy some Heartland travel trailers instead. That email did not go unnoticed by the dealers who Mr. Brady corresponded with. In fact, one of them, Brad Poche of Berryland Campers, thought enough of that email to immediately notify Forest River of what was going on. Exhibit A hereto.

Prior Discovery Efforts and the Order of March 31, 2010:

During discovery, Forest River requested copies of all the emails of that type which Mr. Brady had sent out, and specifically referenced the October 28, 2008, 7:36 pm email of Mr. Brady. Further, since some dealers do correspond with Heartland via email, Forest River specifically requested copies of "all responses to the correspondence" of Mr. Brady (as detailed in DE#96, page 8, re production requests No. 24 and 25). Heartland refused to provide those records. Forest River included that deficiency in its motion to compel of DE#96. The issue of those withheld emails to and from Heartland was specifically argued in the motion. E.g., DE#111, pages 8 and 9.³ That motion was granted by the Order of March 31, 2010, DE#112. Therein, as an alternative to having Forest River itself search through Heartland's computer records for the missing emails, including specifically "all of its backup computer files," Heartland was ordered to "conduct its own search of its computer files for all communications that are responsive to Forest River's request," DE#112,

³ Unlike with respect to certain other discovery disputes in this case, Heartland has made no argument that the backup computer files do not exist. Indeed, Heartland has been on notice since the start of this case that those email records must be retained. Exhibit B hereto.

pages 6- 7. As has been detailed in other motions filed in this case (e.g. DE#125, pages 3-4), Heartland produced no documents at all in response to the Order of March 31 until June 7, and by September, Heartland informed Forest River that it had completed all of the production under that Order that it was willing to do.

Analysis of the Present Motion:

The present motion to enforce the Order of DE#112 is brought because Heartland did not conduct that mandatory search. Further, Heartland has provided Forest River with no formal supplemental Response to production Requests Nos. 24 and 25 (such as indicating perhaps the reason that it was unable to comply with the Court Order, because it was technologically unable to search its backup computer files). Thus, we have no official corporate explanation for non-compliance. However, we do know the withheld emails existed, Exhibit A hereto. We also know that Heartland was aware that the existence of those emails must continue, Exhibit B hereto. Also, we do know, as shown by Exhibit A hereto, that the emails which Mr. Brady sent out “braggin”⁴ about what Heartland had done were specifically addressed to particular RV dealers, brad@berrylandcampers.com in the example of that exhibit. However, Forest River does not know the identity of all the other dealers the email was sent to. Thus, Forest River has no way to track any change in sales activity after October 23, 2008 to those dealers which may be attributed to Mr. Brady’s email. Such a change in sales activity may be circumstantial evidence of damage/unjust enrichment caused by the email. The amount of that change cannot be determined until the identity of the RV dealers involved is known.

⁴ This description is taken from another email of Mr. Brady, dated October 21, 2008.

Further, since responding emails by the RV dealers would likely indicate the impact of Mr. Brady's email and identify potential misunderstandings of the dealers that were caused thereby, it is important to know what those responding emails stated. Certainly, the persons so responding may well be important witnesses as to the damage done by this misleading email. The mere fact of a response itself is indicia of some impact. Whether or not that impact caused injury to Forest River or unjust enrichment to Heartland cannot be known until the response itself is known.

At present, because of Heartland's non-compliance with discovery requests, Forest River's analysis of the damages/unjust enrichment caused by Heartland's misappropriation of the Master List has been limited primarily to the "spike" in sales Heartland obtained immediately before and at the October 22-23 Forest River trade show. See Exhibits 1 and 4 of the report of Forest River's financial expert in Exhibit C hereto, filed in a confidential supplement. This spike is believed to have been caused by Heartland's use of the Master List to obtain pre-emptive sale commitments from the Forest River dealers it contacted using the Master List.

However, Mr. Brady's email represents a supplemental use of the Master List - for misleading or "braggin'" emails sent after the trade show which falsely attribute or misleadingly describe the misappropriated sales activity on October 22-23 in an attempt to encourage even more sales to Heartland. Thus, Forest River may have suffered secondary damage which is causally linked directly to Heartland's taking and use of the Master List in the first place.

While Heartland itself has provided no information about why it did not comply with the Court's Order, over the course of several discussions with Heartland's attorneys in attempts to resolve this matter without judicial intervention, Heartland informed Forest River that it looked through its present computer files, as by having its sales persons check their records for such emails,

but found nothing other than the basic “form” for the Brady email. However, Exhibit A shows that specifically addressed emails did exist. Also, Heartland suggested that the basic “form” was simply mass emailed to dealers. However, Heartland has refused to provide any information as to whom this basic “form” was sent, such as by providing a copy of such the email mailing list. Also, and more importantly, Heartland has specifically refused to examine the computer backup files for the actual missing emails as sent or as responses were received. Heartland’s excuses for non-compliance by not searching the backup files have only been that the emails are “not relevant” and if Forest River wants to know what impact the email had on dealers, then Forest River can do a survey of the dealers it already knows.

First off, for Heartland to argue irrelevancy is “swinging after the bell.” The appropriateness and relevance of the originating production requests was argued with the initial Motion to Compel. Heartland lost that issue. The Court specifically noted in the Order of March 31, that “this Court agrees with Forest River in almost every respect of its motion to compel.” DE#112, page 3. “That said, however, this Court does not believe that Forest River is entitled to *carte blanche* access to Heartland’s business records.” DE#112, page 6. For that reason, the Court required Heartland to review “its General Ledger and all of its backup computer files,” as an alternative to allowing Forest River to do that directly at that time.

Secondly, this missing evidence is even more relevant now than it was at the time of the Motion to Compel. On November 2, 2010, Heartland filed its Motion for Partial Summary Judgment, DE#130. Heartland devoted two entire sections of its Memorandum, DE#131, in support of that motion to Forest River’s lack of evidence of any damage caused by the accused conduct of Heartland, sections IV.B.4 (on pages 32-37) and V.3 (on page 40). For example, on page 33 of

DE#131, Heartland emphasizes that Forest River must show “actual consumer reliance on the misleading statements.” That is precisely the sort of evidence which the missing emails are reasonably calculated to lead to the discovery of, either by showing responding emails demonstrating that reliance or by identifying witnesses who can testify directly as to their reliance. Of course, by withholding the evidence required to be produced by the Order of DE#112, Heartland helps to conceal the very same evidence Heartland now faults Forest River for not showing. However, that kind of self-help is not permitted under the Federal Rules of Civil Procedure.

Forest River has been diligent in pursuing this information from Heartland. In addition to obtaining the Order of March 31, there have been multiple conferences between counsel, and emails since August on this specific topic (among several other discovery disputes). For example, a substantial discovery conference (approximately 53 minutes in length) between counsel took place on October 5, 2010, in which the missing emails were specifically discussed. Exhibit D hereto. Subsequently, Forest River sought further discussion on the various open discovery issues, including this one, which ultimately led to the “Motion for Protective Order Compelling Heartland to Participate in the Discovery Process,” DE#129 (in which Exhibit D hereto was submitted as Exhibit I thereto). That motion was later withdrawn when Heartland finally consented to and did participate in the requested Rule 37 conference on all issues on November 8, 2010, as per DE#137. Unfortunately, that conference did not result in any additional information being provided by Heartland.

At the same time, Forest River sought to obtain this information alternatively from Heartland via deposition. Specifically, on July 19, 2010, Forest River issued a notice of deposition under Fed. R. Civ. P. 30(b)(6) requiring Heartland to produce a witness to testify about various topics, including

“Heartland’s sales of products as a result of obtaining the list of Forest River dealers who were planning to attend the private Forest River trade show in October 2008.” As explained further in Forest River’s “Motion for Extension of Time for Filing its Expert Report on Financial Issues,” DE#125, at pages 5-6, such information (inherently including the sales impact of the Brady email), was considered important to Forest River’s analysis of the damages/unjust enrichment issues. Unfortunately, Heartland’s designated witness, Mr. Dennis Donat, was unavailable for deposition prior to September 24, 2010. Even then, Heartland refused to provide any information about the sales it gained in any way from using the Master List and refused to conduct any internal investigation to try to find out.⁵ Exhibit E hereto. Nonetheless, as noted by this Court’s Order of November 2, 2010, “Forest River has been diligently seeking the information required to produce its expert’s report.” DE#133, page 2. The missing emails are part of that required information, relating to secondary sales and gains.

Further, rather than slow down the summary judgment resolution process, on December 1, 2010, the undersigned counsel conferred via telephone with David Irscher and Peter Meyer, Heartland’s trial counsel, starting at 10:00 am and extending for about 17 minutes, to attempt to resolve this dispute (and other damages discovery issues). Specifically, Forest River proposed that if Heartland were to amend its motion for summary judgment to delete reference to the lack of demonstrated damages, then the missing emails would not be an issue with respect to Forest River’s response to that motion. Heartland declined that offer and continued to refuse to provide the missing

⁵ Heartland’s non-compliance with this notice of deposition is being addressed specifically by a “Motion to Compel Deposition of Heartland on Gain from Use of the Master List” filed concurrently herewith. Part of the relief sought by that motion and the present motion are, however, interrelated, as is addressed by a Notice as to Response, also filed concurrently herewith.

emails or to conduct the search of the backup computer records.

Nature of the Relief Sought:

Fed. R. Civ. P. 37(b)(2)(A) provides, in pertinent part, that “if a party . . . fails to obey an order to provide or permit discovery . . . , the court where the action is pending may issue further just orders. They may include the following . . . (iv) staying further proceedings until the order is obeyed.”

In this case, a “just order” is one which would accomplish the goals of the Order of March 31, 2010, in an efficient and prompt manner. Specifically, Heartland was ordered to examine the backup computer files for the missing emails. Those missing emails (both outgoing and responding) would not appear to be hard to locate with a word search of the backup computer files, especially given the “Re:” line of the Brady email message. Nonetheless, Heartland had its chance to do so and squandered it by intentionally not looking (and then, in the context of the deposition topics, doing nothing to find out if it gained anything from using the Master List).⁶ Now Forest River should be given a opportunity to conduct the search itself.

Accordingly, Heartland should be ordered to turn over the backup computer files containing Heartland’s emails for Forest River to have examined by an outside computer expert to find those missing records. Keilman & Associates of South Bend, IN have already been retained as outside

⁶ Indeed, Heartland’s calculated indifference to the Order of March 31 in this regard is consistent with the “calculated indifference” it also exhibited toward compliance with the USPTO rules and regulations, which forms part of Forest River’s evidence of inequitable conduct supporting one of the two “exceptional case” claims in this lawsuit (one under 35 U.S.C. §285 and the other incident to the Lanham Act claims). *See, FMC Corp. v. Hennessy Inds., Inc.*, 836 F. 2d 521, 526 fn.6 (Fed. Cir. 1987)(“one should not be able to cultivate ignorance . . . merely to avoid actual knowledge of that information or prior art”).

computer experts in this case for purposes of preserving access to old computer files related to prior art Damon frame drawings, and that firm is believed to have the capacity to conduct the present email investigation as well.

Further, since Heartland has made the lack of this knowledge of the impact on RV dealers an issue in its summary judgment motion, Forest River should not be required to respond substantively to that motion until this discovery issue is resolved.⁷ Responding prior to resolution of this issue would be a piecemeal motion practice, requiring Response supplementation (and probably Reply supplementation) while the summary judgment remains pending anyway. It is clearly more efficient for both the Court and the parties to have only one Response and one Reply. However, it is not necessary or advisable to stay all further proceedings in this case. Specifically, there are discovery issues still in need of resolution which can efficiently and justly proceed regardless of the outcome of this motion.

Further, on November 2, 2010, Forest River filed a Motion for Partial Summary Judgment, DE#134, which is expected to be fully briefed shortly and ripe for decision. Consideration of that motion is not expected to depend upon the results of the present discovery dispute, since it deals only with the liability of Heartland for taking and using the Master List, rather than calculating a specific measure of damages at this stage. Further, since the unfair competition liability under that motion fully encompasses the liability Heartland seeks to avoid for the Hotel Action under its motion for summary judgement (the Hotel Action being in the nature of a “lesser included offense”), a decision

⁷ In addition, the previously mentioned “Motion to Compel Deposition of Heartland on Gain from Use of the Master List,” filed concurrently herewith, impacts the timing of responding to that summary judgment motion, as noted in the Notice as to Response, also filed concurrently herewith.

on Forest River's motion for partial summary judgment may render moot one half of the issues in Heartland's motion for summary judgment.

Accordingly, Forest River requests that this Court find Heartland to be in contempt of the Order of March 31 and require Heartland to immediately turn over the backup computer files to Forest River's counsel, under an Attorneys Eyes Only designation if Heartland prefers, so that those files can be examined by an outside expert, such as Keilman & Associates, to find the missing emails. Forest River shall have 30 days thereafter in which to have the files so examined and to prepare a report to this Court as to the results of that examination. In the meantime, further proceedings as to Heartland's Motion for Summary Judgment, DE#130 should be stayed.

Dated: December 8, 2010

Respectfully submitted,

s/Ryan M. Fountain

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Certificate of Service

I certify that on December 8, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system, which sent notification of such filing to all of the parties through at least the following counsel of record:

David P. Irscher david.irmscher@bakerd.com

s/Ryan M. Fountain

Ryan M. Fountain
ATTORNEY FOR FOREST RIVER, INC.

Index of Exhibits

- Exhibit A Poche email of October 29, 2010 containing Brady email of October 28, 2010
- Exhibit B Fountain email of November 17, 2008
- Exhibit C Expert Report (contained in Confidential Supplement)
- Exhibit D Fountain correspondence re October 5, 2010 conference
- Exhibit E Excerpts from Donat deposition transcript