

**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 TO COMPEL DEPOSITION OF HEARTLAND ON GAIN FROM USE OF THE MASTER LIST**

A key issue in this lawsuit is determination of the amount of unjust enrichment Heartland obtained from taking and using Forest River’s Master List. Forest River has sought evidence in that regard by several mechanisms, including a Rule 30(b)(6) deposition of Heartland on exactly that topic. While Heartland eventually produced a witness to testify at that deposition who professed to have no knowledge of any such gain, the witness admitted that he had done nothing to try to find out. Heartland has no valid reason for not conducting an investigation and preparing its witness with the full scope of its corporate knowledge. At the same time, Heartland makes an issue in its co-pending summary judgment motion that Forest River’s claims should be denied because Forest River cannot show the information which Heartland has withheld. Accordingly, Heartland should be compelled to comply with the deposition notice so that Forest River can fully and completely respond to the summary judgment motion.

A certification under Fed. R. Civ. P. 37 and 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 elsewhere with more detail in this and the related cases<sup>1</sup>, 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

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<sup>1</sup> See, e.g., factual backgrounds set forth in the Order of DE#112, the motion of DE#125, the Statement of Material Facts of DE#134-2 and the exhibits thereto from Forest River’s Motion for Partial Summary Judgment, 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).

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 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 thereto<sup>2</sup>.

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

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<sup>2</sup> 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 following a motion to compel. For purposes of the present motion, it should be noted that special and concerted efforts have been required to get such evidence from Heartland in this lawsuit, and those efforts have resulted in significant admissions and evidence of the gain that Heartland obtained from obtaining and using the Master List, far beyond the paltry two dealers which Heartland voluntarily disclosed.

parag. after salutation. 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.

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.<sup>3</sup>

**Discovery Efforts Using the Rule 30(b)(6) Deposition:**

Forest River is charging Heartland with various forms of unfair competition in connection with Heartland's obtaining and using the Master List. See, e.g., Memorandum, DE#134-1, pages 4-13. Forest River contends that it was damaged and that Heartland was unjustly enriched as a result of the accused actions. Accordingly, as part of its efforts to obtain evidence directly relevant to revealing the nature and extent of what Heartland gained from use of the Master List, on July 19,

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<sup>3</sup> Forest River has filed a "Motion for Enforcement of Court Order, DE#112" concurrently herewith which addresses the discovery disputes concerning this email in more detail. For purposes of the present motion, it should be noted that those emails were another source of unjust enrichment to Heartland about which the Rule 30(b)(6) witness was to be questioned.

2010,

Forest River served Heartland with a notice of deposition, confirming the previous requests for that deposition scheduling between counsel. Exhibit A hereto.

The second topic of that Notice was: “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, including the revenues derived from such sales, . . .”

That deposition was initially scheduled for August 2, 2010. However, Heartland asserted that it was unable to prepare for and attend that deposition until September 24, 2010. Presumably, this difficulty arose because Heartland was in the process of being sold to Thor Industries for \$209 Million, as announced publicly on September 17, 2010. Accordingly, the deposition was postponed until September 24, 2010, and Mr. Dennis Donat, Heartland’s Chief Financial Officer and a part owner of Heartland, was designated by Heartland as its witness.

Prior to the deposition, Heartland did not object to the topics of the deposition and did not seek any form of protective order against the topics as being vague or ambiguous.

However, when called to testify on Topic 2, Mr. Donat twice stated that he had no information and had done nothing to even try to find out information about that topic. Exhibit B hereto, page 201, line 25 - page 202, line 11 and page 203, lines 10-14. At the start of the deposition, Heartland’s counsel represented that Mr. Donat was the designated representative for “all seven categories that are included in the notice.” Exhibit B hereto, page 4, lines 17-22. However, when it became clear that Mr. Donat was not properly prepared with respect to Topic 2, Forest River specifically asked Mr. Donat if he was the person who was supposed to be testifying in that regard. Exhibit B hereto, page 202, lines 12-17. In response, Heartland’s counsel interjected and blocked

an answer to that question, asserting instead that he, Mr. Irmischer, was personally not aware of any sales Heartland got as a result of obtaining the Master List<sup>4</sup> and that Mr. Donat was not there to talk about that topic. Exhibit B hereto, page 202, lines 18-21. Thereupon, Forest River asked if Heartland had a witness to talk about that topic. Exhibit B hereto, page 202, lines 22-23. Rather than answer that question, Heartland's counsel repeated his earlier assertion that he personally was unaware of any sales in that category and contended that Forest River did not tell Heartland of any such sales. Exhibit B hereto, page 202, lines 24-25.

Despite previously reserving the "right to supplement" if there was some information which Mr. Donat could not provide, Exhibit B hereto, page 4, lines 22-24, Heartland did not provide any other witness to testify about Topic 2. Also, Heartland did not at any later date have Mr. Donat return, properly prepared to testify about that topic.

Forest River thereafter diligently made several good faith attempts to obtain this testimony from Heartland without the need for intervention by the Court. This is reflected in Exhibit D hereto, at Item C, as attached to email correspondence to Heartland's counsel on October 18, 2010 and referring to a lengthy (aprox. 57 minutes) telephonic conference between counsel for the parties on October 5, 2007, as well as through the efforts 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 testimony being

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<sup>4</sup> As to whether or not this interjection was blatant coaching of the witness, we can leave for a later resolution.

provided by Heartland.

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 circumstantial evidence of 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, the testimony expected from Topic 2 would allow Forest River to more narrowly focus its expert's analysis on the specific profits allowable under 15 U.S.C. §1117(a) and obtain direct evidence to demonstrate specific misdirected sales from specific RV dealers who were either misled or otherwise "stolen" by the various forms of interference with Forest River's business relations that Heartland stands accused of in this lawsuit. This was 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. For example, while the emails obtained as a result of this Court's order of March 13 indicate that Heartland met with 14 of Forest River's dealers on October 22-23, the Rule 30(b)(6) testimony is expected to indicate which of those dealers actually signed up with Heartland or made sales commitments after the trade show. As this Court has pointed out in connection with the related lawsuit between these parties of 3:09-cv-302, it is far more efficient to obtain this information from the parties involved than to issue subpoenas to the 14 RV dealers and drag them in as well. See, e.g., DE#35, Order quashing subpoenas to third party RV dealers for evidence relating to unfair competition impact. Heartland cannot have it both ways.

Nonetheless, as noted by this Court's Order of November 2, 2010, with respect to the damage analysis, "Forest River has been diligently seeking the information required to produce its expert's report." DE#133, page 2. Further, on November 2, 2010, Heartland filed its Motion for Partial Summary Judgment, DE#130. That motion itself demonstrates the relevance of the topic of the missing deposition testimony. 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 deposition testimony is reasonably calculated to lead to the discovery of, either by identifying specific RV dealer sales tied to use of the Master List and the misleading statements which are causally linked to that use or by identifying RV dealer witnesses who can testify directly as to their reliance on those statements and connection to Heartland's use of the Master List. Of course, by withholding the required testimony, 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.

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 two other damages discovery issues)<sup>5</sup>. Specifically, Forest River proposed

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<sup>5</sup> One of the other issues was the missing email evidence, as discussed in the concurrently filed "Motion for Enforcement of Court Order, DE#112." The other issue related to the missing financial detail documents required to be produced under Order of March 31 and Forest River's



that if Heartland were to amend its motion for summary judgment to delete reference to the lack of demonstrated damages, then the missing deposition testimony 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 deposition testimony.

**Analysis of the Present Motion:**

Fed. R. Civ. P. 26(b)(1) permits Forest River to seek discovery from Heartland as to "any nonprivileged matter that is relevant to" Forest River's claim and broadly defines "relevant information" as that discovery which "appears reasonably calculated to lead to the discovery of admissible evidence." There is no question here that the information sought by Topic 2 is "nonprivileged matter." Similarly, there is no question that the information sought is not relevant. Heartland does not and has not raised those questions as a defense or objection to providing testimony. Heartland has filed no motion for protective order blocking the testimony at all.

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's attorneys have informed Forest River

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Fifth and Sixth Requests for Production. These were also the subject of Forest River's "Motion for Extension of Time for Filing its Expert Report on Financial Issues," DE#125. To put these discovery resolution efforts in context, at the Hearing before this Court yesterday in connection with consolidation of discovery with the related '302 case, these three issues constituted three of the four motions which Forest River indicated it would be filing today and which may be available for an expedited resolution process. The fourth motion related to the Donat deposition designations, discussed briefly yesterday, by which Heartland has shifted litigation burden from itself to Forest River in violation of the Protective Order, DE#61. Upon consideration of the Court's case management concerns expressed yesterday, Forest River does not plan to file the Donat motion, and the motion with respect to the missing financial documents will be treated more comprehensively in a different motion format shortly.

that its grounds for refusal to comply were essentially two-fold: 1.) Heartland's attorneys do not know of any such sales, and 2.) Forest River has the burden of showing which dealers were confused, misled or otherwise "stolen" by Heartland's myriad uses of the Master List before Heartland should have to say how many sales it had with those dealers or to even undergo the burden of finding out how many it sold to the relevant dealers by internal inquiry.

The personal knowledge of Heartland's attorneys is, of course, irrelevant in this regard; it was Heartland that was being deposed, not the attorneys. That basis for objection strains credibility and smacks of the kind of "calculated indifference" complained of by Forest River elsewhere in this lawsuit.<sup>6</sup> Further, discovery under the federal rules is based upon notice pleading, not upon one party having to first prove its substantive case before the other party even participates in discovery. Heartland testified that it had all of its sales staff in town and "prepped" for that trade show, and those staff know exactly who of the 14 - 18 Forest River dealers they spoke to and signed up, who they got advance sales commitments from before the Forest River trade show, etc. Indeed, since Heartland's sales staff are paid on commission in large part and need to keep track of the payments Heartland owes to them for their own purposes, those sales persons often have their own sales logs showing exactly the information Forest River is seeking. It is far less difficult for Heartland to gather the information from its own employees than for Forest River to either subpoena and depose each of Heartland' sales staff personally or to survey its third party RV dealers for that information.

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<sup>6</sup> With respect to the "inequitable conduct" issues which are part of Forest River's "exception case" claim under 35 U.S.C. §285, Forest River argues that Heartland and its attorneys demonstrated "calculated indifference" toward compliance with the USPTO rules and regulations. *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").

Indeed, consolidation of multiple depositions of corporate employees into a single deposition of a designated witness was one of the primary purposes of Fed. R. Civ. P. 30(b)(6). Advisory Committee Notes to the 1970 Amendments to that Rule (“This provision should also assist organizations which find that an unnecessarily large number of their offices and agents are being deposed by a party uncertain of who in the organization has the knowledge”). Accordingly, as required by Rule 30(b)(6), a corporate entity must not merely designate a person to testify, it must also conduct an investigation to determine the full extent of the requested information that is reasonably available to it and then prepare its witness with that information. *Brazos River Authority v. GE Ionics, Inc.*, 469 F. 3d 416, 433 (5<sup>th</sup> Cir. 2006). If it becomes apparent that a designated witness cannot satisfy the deposition notice, the organization has a duty to substitute another witness who can. *Reilly v. Natwest Markets Group, Inc.*, 181 F. 3d 253, 268 (2d Cir. 1999). A party who produces a witness who can only answer a fraction of the topics in the deposition notice does not satisfy its obligations under Rule 30(b)(6). *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R. D. 338, 342-343 (N.D. Ill. 1995)( court will not “countenance self-selecting discovery” in this way).

Clearly, Heartland did not meet its obligations to Forest River under Rule 30(b)(6) since it provided no witness who was able to testify as to Topic 2 of the notice and it had conducted no investigation to prepare the designated witness.

**Nature of the Relief Sought:**

Fed. R. Civ. P. 37(a)(1) and (3)(B)(ii) and 37(d)(1)(A)(i) provide Forest River with remedies for Heartland’s misconduct via a motion to the Court. Accordingly, Forest River has done so by this motion. If a party fails to attend its own deposition, Rule 37(d)(3) permits the Court to issue any of

an number of sanctions, in addition to or instead of compelling the testimony. Included among those sanctions are “staying further proceedings” until the testimony is given, designating “established facts” in the case, or even prohibiting certain defenses from being raised, as enumerated in Rule 37(b)(2)(A)(i)-(vi) as examples of “just orders.”

It has been held that if a corporation designates a witness and that witness appears at the deposition, but is not knowledgeable about relevant facts, “then the appearance is, for all practical purposes, no appearance at all.” *Resolution Trust Corp. v. Southern Union Co., Inc.*, 985 F.2d 196, 197 (5<sup>th</sup> Cir. 1993). That court distinguished the situation of a corporate designee showing up without knowledge from the case of a natural person, where an order under Rule 37(a) should be used prior to imposing sanctions, and specifically held that with a corporate designee, Rule 37(d) sanctions may be appropriate without first obtaining an order compelling the testimony. However, in our judicial circuit, it has been held that no such distinction needs to be made; if the natural person’s refusal is wilful, dismissal sanctions can be appropriate even without a prior order under Rule 37(a). *Collins v. Illinois*, 554 F.3d 693, 696-697 (7<sup>th</sup> Cir. 2009)<sup>7</sup>.

In the present case, even if it were a natural person and in another judicial district, Heartland’s refusal does appear to be intentional and willful. The refusal to provide a properly prepared witness should be viewed in context with Heartland’s other efforts of record to stop discovery of the impact its use of the Master List had on RV dealers while at the same time pursuing a motion for summary judgment which faults Forest River from not demonstrating the very evidence Heartland is withholding. Further, the concurrently filed “Motion for Enforcement of Court Order,

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<sup>7</sup> At least one commentator has noted, however, that there appears to be a difference of opinion between courts as to whether Rule 37(d) should be applied literally or as applied by *Resolution Trust*. *Moore’s Federal Practice*, 3d, 2010, §37.91[1].

DE#112" does permit Forest River to seek sanctions under Rule 37(d) for withholding of related evidence, since a Court order compelling discovery was previously obtained in that situation, and Heartland is now in the position of contempt of that Order, DE#112.

Accordingly, as a "just order" in this situation, Heartland should both be required to produce a properly prepared witness to testify as to Topic 2, and sanctions should be imposed consistent with the procedural posture of the case and those sought in the related "Motion for Enforcement of Court Order, DE#112." Specifically, 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.<sup>8</sup> 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 other 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

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<sup>8</sup> In addition, the previously mentioned "Motion for Enforcement of Court Order, DE#112" 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.

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 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 order Heartland to designate and make available for deposition a properly prepared witness as to Topic 2 of the notice within 30days. Forest River shall have 30 days thereafter in which to prepare a report to this Court as to the results of that deposition. 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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ATTORNEY FOR FOREST RIVER, INC.

### **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. Irmscher     [david.irmscher@bakerd.com](mailto:david.irmscher@bakerd.com)

s/Ryan M. Fountain

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Ryan M. Fountain  
ATTORNEY FOR FOREST RIVER, INC.

**Index of Exhibits**

- Exhibit A     The notice of deposition in issue
- Exhibit B     Excerpts from Donat deposition transcript
- Exhibit C     Expert Report (contained in Confidential Supplement)
- Exhibit D     Fountain correspondence re October 5, 2010 conference