

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

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

**NOTICE AS TO RESPONSE
CONCERNING HEARTLAND’S MOTION FOR SUMMARY JUDGEMENT, DE#130**

Concurrently with filing of this Notice, Forest River filed two related motions: 1.) “Motion for Enforcement of Court Order, DE#112,” and 2.) “Motion to Compel Deposition of Heartland on Gain from Use of the Master List.” These motions sought sanctions against Heartland for failing to comply with this Court’s Order of March 31, 2010 and for failing to attend its own deposition, both under Fed. R. Civ. P. 37(d). Since the discovery sought was important to Forest River’s presentment of evidence in opposition to Heartland’s Motion for Summary Judgment, DE#130, as well as for other proceedings in this lawsuit, part of the requested sanctions included a stay of the Response due by Forest River to Heartland’s Motion for Summary Judgment. The due date of that Response would otherwise have been today. Under the requested sanctions, the due date of that Response would be determined by Heartland’s compliance with the requested discovery.

These sanctions motions by Forest River are not considered to affect the timing of response and reply to the pending Motion for Partial Summary Judgment, DE#134, which was filed by Forest River and which is expected to be joined by Heartland as a Cross Motion for Summary Judgment.

Rule 37(d) (through application of Rule 37(b)(2)(A)(iv)) permits as a sanction, that any or all proceedings in a case may be stayed, as may be considered “just.” Such a stay was part of the relief sought by Forest River in those motions. At the same time, Rule 56(f) provides that summary judgment proceedings may be continued pending undertaking discovery if circumstances require it. It appears to the undersigned counsel that these rules are not mutually exclusive and that either may be employed as an alternative when appropriate. In this case, since the violation of this Court’s Order, DE#112 and the discovery disputes surrounding the deposition were already familiar to the Magistrate judge who issued the Order in the first place, judicial economy seemed to be best served by proceeding under Rule 37(d).

However, in the event that this Court considers the Rule 56(f) procedure to have been required in any event, the undersigned counsel requests that the two concurrently filed motions be considered substantial compliance with the affidavit requirement of Rule 56(f), demonstrating that Forest River cannot as yet present all of the facts essential to justify its opposition to Heartland’s Motion for Summary Judgment, DE#130.

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:

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s/Ryan M. Fountain

Ryan M. Fountain

ATTORNEY FOR FOREST RIVER, INC.