UNITED STATES DISTRICT COURT

Northern District of Indiana
South Bend Division

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

FOREST RIVER'S MOTION FOR ENFORCEMENT OF SCHEDULING ORDER AND FOR PROTECTIVE ORDER TO PREVENT ENFORCEMENT OF HEARTLAND'S POST-DISCOVERY SUBPOENA TO RV DAILY REPORT

Pursuant to Fed. R. Civ. P. 16(f)(1)(C) and 26(c)(1), Forest River requests that this Court enter an Order enjoining Heartland from enforcing the subpoena it issued on December 10, 2010 to a third party, RV Daily Report. A certification under Rule 26(c)(1) and L.R. 37.1 is attached hereto. A proposed form of Order is submitted to chambers concurrently herewith.

Summary of the Motion:

Per this Court's Order of July 29, 2010, DE#123, the time period for conducting discovery closed on October 15, 2010. Nonetheless, on December 10, 2010, Heartland issued a subpoena to a third party seeking additional discovery information. That information seeks to establish the identity of a person who posted anonymous comments critical of Heartland on the internet blog maintained by RV Daily Report, in response to a news article published by RV Daily Report about the fourth lawsuit between Heartland and Forest River. In issuing that subpoena, Heartland obtained

neither the consent of this Court nor of Forest River. Heartland asserts that the anonymous comments "will become a source of litigation because of its malicious nature" and "claims that RV Daily Report has a duty to prevent problem posters from posting information Heartland considers malicious and libelous." However, those issues have no relevance to any issues currently in this lawsuit.

The subpoena was issued out of the U.S. District Court for the District of Arizona. RV Daily Report has obtained legal representation by Matt Zimmerman of Electronic Frontier Foundation (whose offices are in San Francisco, CA) and has stated its intention to oppose the subpoena on various grounds in the Arizona Court, including First Amendment free speech and privacy.

There is no "good cause" under Rule 16(b)(4) for allowing this change to the Scheduling Order. Also, satellite litigation in Arizona over a totally unrelated claim of libel or malicious publication of anonymous internet comments imposes a significant and unwarranted burden upon Forest River which justifies a protective order under Rule 26(c)(1). Accordingly, enforcement of the subpoena should be enjoined.

Applicable Rules of Procedural Law:

Fed. R. Civ. P. 16(b)(4) provides, as to scheduling orders, that "a schedule may be modified only for a showing of good cause and with the judge's consent." While the Court is typically given considerable discretion in determining what suffices as "good cause," *Moore's Federal Practice, 3d,* 2010 §16.14[1][b], some justification is needed which is more compelling than would be sufficient under the lenient, "justice so requires" standard of Rule 15(a), *Teton Homes Europe v. Forks RV*, 2010 WL 3980254, at *3, (N.D. Ind. October 8, 2010). Further, it should be kept in mind that

scheduling orders are intended to be essential mechanisms for efficient and just resolution of litigation, *Moore's*, at 2010 §16.14[1][a]. In that regard, a party's diligence in seeking a modification of the scheduling order and in obtaining the discovery needed are factors to consider, as is the potential prejudice to the opposing party. *Hollis v. Defender Sec. Co.*, 2010 WL 1137485, at *2 (S.D. Ind. March 19, 2010).

Fed. R. Civ. P. 16(f)(1)(C) provides that, upon motion, a "court may issue any just orders" if a party fails to obey a scheduling order.

Fed. R. Civ. P. 26(c)(1) permits a party to seek a protective order to prevent "oppression or undue burden or expense" that would otherwise be imposed in the lawsuit. Usually, such motions are sought where the party is required to provide discovery to another person, and Rule 26 provides a list of orders which the Court may enter for that purpose. However, the court is not limited to those particular orders and, indeed, "a court is authorized to make *any* order that justice requires to protect a party or person from . . . oppression or undue burden or expense. Thus, courts have discretion to fashion a protective order to fit the facts and circumstances of the case." *Moore's Federal Practice, 3d*, 2010 §26.105[1][b].

With respect to any motion seeking to block discovery, it must be kept in mind that the scope and purpose of discovery is to obtain information "regarding any non-privileged matter that is relevant to any party's claim or defense" and relevance is defined as that which is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). It has long been the rule that when a party objects to discovery of confidential information, the court must weigh the interests of the parties and of the public policy to arrive at an appropriate discovery compromise. *Memorial Hospital for McHenry County v. Shadur*, 664 F. 2d 1058, 1061-72 (7th Cir. 1981)(per

curiam).

Also, as set forth by this Court in *Manufacturer Direct, LLC v. Directbuy, Inc.*, 207 WL 496382 (N.D. Ind. Feb. 12, 2007), at *2 -3, discovery by subpoenas may be precluded by a protective order under Fed. R. Civ. P. 26(c)(1), as distinct from a motion to quash under Rule 45, in order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." The Court explained that "subpoenas, like all discovery, are limited to relevant information," citing *Syposs v. United States*, 181 F.R.D. 224, 226, (W.D. N.Y. 1998), and that "relevancy includes information that may not be admissible, provided that 'discovery appears to be reasonably calculated to lead to the discovery of admissible evidence,'" also citing *Chavez v. Daimler Chrysler Corp*., 206 F.R.D. 615,619 (S.D. Ind. 2002).

Accordingly, facts to focus on in deciding the present motion under these rules are primarily those relating to:

1. diligence of Heartland in seeking this new discovery,
2. relevance of the information sought to the actual issues already in the case, and
3. burden this new discovery would impose upon Forest River.

Related Cases and Procedural Posture of the Case:

This lawsuit is the first of what so far has become four co-pending lawsuits in this Court between Heartland and Forest River. As discussed in more detail below, while this lawsuit began as a claim by Heartland against Forest River for infringement of the '650 patent, it now deals primarily with the "Exceptional Case" claims against Heartland by Forest River and with various types of unfair competition claims against Heartland based upon Heartland illegally obtaining and

using a Master List of dealers who were guests at a private Forest River trade show in October, 2008. As for the '650 patent, Heartland dropped its patent infringement claim after its president, Brian Brady, admitted under oath that patent was not valid in light of prior art evidence discovered by Forest River. DE#100-4, page 182. Heartland ultimately had to "unconditionally covenant[s] not to sue Forest River, Inc." or " any current or past supplier of parts" for infringement of that patent, DE#95-1, in order to avoid a having a Court judgment against the patent.

The second lawsuit, Case No. 3:09-cv-302, started off dealing with trademark infringement and unfair competition claims against Heartland. These arose primarily because of: 1.) deceptive comparative advertisements (the "24 Reasons" advertisement, in particular) which expressly targeted Forest River's Puma brand of products, but instead showed pictures of "flawed" features of other brands of travel trailers, and 2.) a confusingly similar model name, Cedar Ridge, which was initially used by Heartland to compete with Forest River's Cedar Creek brand of products and has since then apparently been discontinued by Heartland. That lawsuit was expanded last month to include related predatory pricing, antitrust law violations, and other unfair competition claims against Heartland, Brian Brady, Catterton Partners, and Thor Industries, because evidence of these offenses became more readily apparent after Thor purchased Heartland in September, 2010. See DE#45, Amended Complaint, in that case.

The third lawsuit, Case No. 3:10-cv-011, focuses on copyright infringement and unfair competition issues arising from Heartland's exact copying of a Forest River "r.Pod" floor plan, which was then re-labeled with a Heartland "MPG" model name designation in a comparative advertisement.

The fourth lawsuit, Case No. 3:10-cv-409, addresses more specifically the impact of evidence

discovered since the '490 case began, primarily concerning how Heartland actually obtained the Master List through multiple levels of deception and how Heartland then used that list for financial gain, beyond merely the "Hotel Action" described expressly in the first lawsuit. This new lawsuit was filed within the statute of limitations for the underlying claims being supplemented from the first lawsuit. It is expected that the '409 case will be consolidated into the '490 case in whole or part, although Heartland has thus far refused to consent to that consolidation, preferring instead a separate lawsuit be maintained.

Discovery closed in the present lawsuit on October 15, 2010, as per this Court's latest revision to the scheduling order, on July 29, 2010, DE#123. Some discovery was conducted after that date by agreement of the parties, such as completion on December 2, 2010 of the deposition of Gerard Gallagher, the Heartland attorney primarily responsible for obtaining the '650 patent and Heartland's conduct in negotiations with the U.S. Patent Office. The parties have each filed motions for summary judgment as to certain aspects of the case, but there are still motions currently pending and motions expected to be forthcoming on various open discovery issues, primarily as a result of Heartland's failure to comply with the March 31, 2010 Order of this Court, DE#112, which required Heartland to disclose certain documents and other evidence to Forest River, and Heartland's other related violations of the discovery rules. See, for example, DE#s144 and 145.

Discovery in the second and third lawsuits is underway. However, since Heartland also refused to comply with the discovery rules in the second case, it has already taken a Court Order requiring Heartland to show up and testify by January 31, 2010. DE#52 in '302 case. In the third case, Heartland also failed to attend and testify at its deposition, originally scheduled for December 10, 2010. At present, that issue is still within the Rule 37 process, where the attorneys try to work

out a solution among themselves, and has not yet been brought to the Court's attention.

Discovery has not yet begun in the fourth case and may not begin until the consolidation issue is resolved by the Court or until the 120 day "service of process" period forces case activity if, for example, consolidation in one form or another cannot be agreed upon by the parties.

The Substance and Timing of the Subpoena to RV Daily Report:

On October 15, 2010, RV Daily Report published a news article about the fourth lawsuit on its internet web site, www.rvdailyreport.com. At the end of the article, readers were permitted to post comments about the article via a "blog." Ex. A hereto. On October 17, 2010, one reader, posting anonymously under the *nom de plume* of "The Thinker," made comments critical of Heartland's litigation conduct, referencing Heartland's actions in the first lawsuit. Ex. A, page 3.

Immediately afterwards, on October 19, 2010, Heartland's attorneys contacted RV Daily, Report and reportedly stated:

1. "A comment posted by a person identified only as "the Thinker" will become a source of litigation because of its malicious nature."

2. "RV Daily Report has a duty to prevent problem posters from posting information Heartland considers malicious and libelous."

Heartland refused to identify what it thought was malicious and libelous about the comment. Heartland also failed to make any attempt to immediately mitigate the damage allegedly caused by the comment through a substantive response or rebuttal. Instead, Heartland publicly threatened to force the RV Daily Report to identify the name, email address and IP address of that anonymous poster by a subpoena which that law firm was then preparing to issue. Ex. B hereto.

On December 10, 2010, fifty two (52) days into "preparing" that subpoena, Heartland then served the subpoena and contacted RV Daily Report to announce that. Ex. D hereto. The subpoena specifies that RV Daily Report is to disclose to Heartland's attorneys in Phoenix, AZ all documents, electronically stored information, or objects relating to the following:

(1) the actual name and identity of "The Thinker," a commenter on the RV Dailey Report story "Forest River files Fourth Suit against Heartland RV," dated October 15, 2010;

(2) the e-mail address for "The Thinker;" and

(3) the IP address for "The Thinker."

Ex. C and Ex. E hereto.

Prior to Heartland's subpoena, "The Thinker" had also posted on the RV Daily Report blog that:

> "I am just a little guy. Just a consumer, and an RV'er, who used to work in the RV industry (on the retail sales and service side) MANY years ago. I no longer have any connection to the industry other than the fact that I use an RV, and still have a great interest in the industry that I loved in my youth. In that regard, I still subscribe to, and faithfully read, many trade publications and online trade sites.
>
> Litigation, some of it meaningful, necessary, and justified, and some of it (in my opinion) frivolous, has become such an issue in the industry that I voraciously follow that too, line by line, and word by word, through public records and services like Justica.com Dockets & Filings.
>
> I am not an attorney, and I don't profess to be one, but am just a layperson (and retired peace officer) with just a rudimentary understanding of the judicial system and court proceedings. . . [I] find it rather astounding that a big, powerful, law firm would seemingly threaten to sue me for expressing my understanding of, and opinion, regarding proceedings that are in the public record."

Ex. B, page 2.

On the next page in that same blog, Greg Gerber, editor of the RV Daily Report explained

that in order for RV Daily Report to comply with the subpoena:

> "[W]e'll kick the ball to the company hosting our website, which will require another round of subpoenas. But, in talking to them, they can't figure out where to get the information, so it would be kicked to another company, and possibly four or five others, reach requiring a different subpoena and service. . .
>
> From there, they have to subpoena the poster's Internet service provider to find out more identifying information in order to consider any type of legal action against a poster. And that just buys them the physical address. If it was sent from a company, then Heartland needs another subpoena to force the company to identify the specific computer used to post the comment.
>
> If it was sent from a common area, like Starbucks, or some place with a wireless connection, like a hotel room - - good luck Charlie!"

Therefore, if Heartland is to be taken at its word and if it really is seeking the identity of "The Thinker" in order to bring a lawsuit claim against that person because of the comment posted, then this subpoena appears to be the opening salvo in what may be a long process of tracking down identity through coercion under color of law.

The Results of the Process under Rule 26(c)(1) and Local Rule 37.1:

Even though the subpoena does not seek discovery from Forest River, since dealing with the issues created by the subpoena would likely impose a substantial burden upon Forest River (as explained further below), its undersigned attorney attempted to reach a mutually acceptable solution with Heartland prior to seeking relief from the Court through this motion, as required by Rule 26(c)(1) and Local Rule 37.1. See attached Certificate. That attempt was unsuccessful. In conferences and correspondence between opposing counsel under those rules of civil procedure, Heartland refused to explain why the subject matter of the subpoena was relevant to any issue in this lawsuit. At best, Heartland stated that the information was being sought in order to "mitigate against the claims" made against Heartland in this lawsuit. No explanation was provided as to how a claim

for malicious publication (assuming it even was malicious or otherwise actionable) of an anonymous internet comment could possibly offset any of the claims made by Forest River for Exception Case damages and unfair competition arising from the taking and using of Forest River's private property. Heartland's attorney did state, however, that Heartland was concerned Forest River would seek to make it "look bad" by using such press reports and apparently wanted to prevent that.

Heartland's counsel tried to find out, incident to this "meet and confer" process, if Forest River knew who The Thinker was. However, beyond expressly informing Heartland that they are "going down a blind alley," "meaning, that it will not do [Heartland] any good" to pursue this subpoena, and that Forest River's management is not believed to be responsible for the allegedly objectionable comment, Forest River would prefer not to wade into the fray over First Amendment rights to privacy on the internet and will not voluntarily deprive someone of his or her right to free speech or deprive the press of the right to report public comment. Those Constitutional issues have nothing to do with why Forest River is seeking to finally put an end to various illegal business tactics employed by Heartland in the RV market through this series of lawsuits.

One other item did come up in this process which is important to note here. Heartland expressly requested that Forest River inform it if "The Thinker" was actually one of Forest River's attorneys (despite the fact that "The Thinker" expressly reported that he or she is not an attorney). Forest River refused to comment one way or another on that matter since that inquiry is also extraneous to the issues of this lawsuit. Heartland has already filed at least one official grievance complaint, on November 6, 2009, against the undersigned attorney personally, primarily because he has dared to accused Heartland of improper conduct before the U.S. Patent Office in obtaining patents and because he represented two other clients in a dispute with Heartland involving

Heartland's third patent (not the '650 patent in this lawsuit) after Heartland had admitted the '650 patent was invalid and signed a covenant not to sue Forest River. Heartland lost that proceeding on September 29, 2010; "after a thorough and meticulous investigation" its grievance was found to be without "probable cause" that the violations complained of existed. Ex. F hereto. Heartland apparently believes that if the undersigned counsel is "The Thinker," then Heartland could file another grievance complaint against him personally. But again, how does that in any way mitigate against the claims against Heartland in this lawsuit or provide relevant information in defending against those claims?[1] Heartland would not say.

In addition to the efforts by Forest River's attorney, RV Daily Report's attorney also sought to resolve this dispute informally with Heartland's counsel by the "meet and confer" process. Even after trying for a week, that attempt was not successful, and Heartland also still refused to disclose what issues in this lawsuit were at all relevant to the subject matter of the subpoena. Ex. G and Ex. H hereto.

In summary, we have no information from Heartland directly or indirectly as to which of the issues in this lawsuit , if any, the subpoena may be relevant. Accordingly, a thorough analysis of those issues is forced upon us by this subpoena.

The Issues Remaining in this Lawsuit:

[1] Obviously, tying up Forest River's lead trial counsel in a concurrent legal proceeding against him personally would take up a significant amount of his time, as it in fact did previously during this lawsuit. In the sense that an attorney's time is his "stock in trade" and no one's time is unlimited, perhaps Heartland hopes to hurt Forest River's chances of success in these lawsuits by such attacks. That is not, however, a legally permissible way of "mitigating" against claims in a lawsuit. Instead, it smacks of another "abuse of process," when a subpoena is used even indirectly to get evidence for this purpose.

Exceptional Case:

Forest River asserts that this is an "Exceptional Case" entitling it to recovery of its reasonable attorneys fees and costs from Heartland. Normally, under the "American Rule" each party bears its own attorney fees in a lawsuit. However, since this case was brought by Heartland under the patent laws and since Forest River's unfair competition counterclaims involve Heartland's violations of the federal Lanham Act, both 35 U.S.C. §285 and 15 U.S.C. §1117(a) provide exceptions to the American Rule, and may allow recovery of whatever portion of the actual attorneys fees that the Court considers to be "reasonable."

The standards for an award of attorneys fees under either statue are similar, in that the conduct of the losing party in connection with the litigation is examined. In the case of §1117(a), the test would be if a party's actions were "oppressive," meaning they lacked merit, resembled abuse of process, and unreasonably increased the cost of litigation. *S. Indus., Inc. v. Centra 2000, Inc.*, 249 F. 3d. 625, 627 (7th Cir. 2001). Under Indiana law, "abuse of process" occurs where 1.) a party has an ulterior motive, and 2.) does a willful act in the use of legal process that is not proper in the regular conduct of the underlying legal proceeding or uses the legal process for an end other than that which it was designed to accomplish. *Kalwitz v. Kalwitz*, 934 N.E. 2d 741, 753 (Ind. App. 2010); *Miller v. Schrader*, 2010 WL 4363180, at *7 (N.D. Ind. October 27, 2010).

In the case of §285, the test is if, in the totality of circumstances, the losing party acted in bad faith or at least gross negligence in bringing and/or maintaining the lawsuit. *Intersprio USA v. Figgie Int'l Inc.*, 18 F. 3d 927, 933 (Fed. Cir. 1994); *RNA Corp. v. Proctor & Gamble Co.*, 2010 WL 4237838, at *6 (N.D. Ill. Oct. 21, 2010). Typically, that can be shown by evidence of fraud or inequitable conduct in procuring the patent, misconduct during the litigation, vexatious infractions

during litigation, or the like. *Brooks Furniture v. Dutailier Int'l*, 393 F. 3d 1378, 1381 (Fed. Cir. 2005); *RNA Corp., supra,* at *7.

Fraud or inequitable conduct in procuring a patent can arise where the conduct of a party and/or its counsel "cultivated ignorance" in order to avoid having actual knowledge of information or of prior art that would limit or deny patent protection for an alleged invention. *FMC Corp. v. Hennessy Indus., Inc.*, 836 F. Ed, 521, 526 at fn6 (Fed. Cir. 1986). A determination of inequitable conduit requires, for example, a two-step analysis: first, did the conduct rise to a threshold level of materiality, and second, does the evidence show a threshold level of intent to mislead the U.S. Patent office. *Brasseler U.S.A. I, L.P., v. Stryker Sales Corp.,* 267 F. 3d 1370, 1379 (Fed. Cir. 2001). Materiality can be established by evidence of withheld prior art information "that a reasonable [Patent] examiner would consider important in deciding whether to allow the application to issue as a patent," and any doubts concerning whether or not such information is material should be resolved in favor of disclosure. *Brasseler*, 276 F. 3d, at 1380. However, if the withheld information or misconduct violates a statutory requirement, such as under 35 U.S.C. §112, then that information is "inherently material" and automatically "reaches the minimum level of materiality necessary for a finding of inequitable conduct." *Consolidated Aluminum Corp. v. Foseco Int'l. Ltd.*, 910 F. 2d 804, 808 (Fed. Cir. 1990). The "cumulativeness" defense against materiality, for example, does not apply to "inexcusable" violations.[2]

[2] The "cummulativeness" defense was relied upon by Heartland in its motion for summary judgment, see DE#131 pages 17-19. In general, Heartland's defense against the charge of inequitable conduct in that motion is based upon a different line of case law, that dealing with the requirements of disclosure to the U.S. Patent Office of prior art which is actually known to the attorneys. In contrast, Forest River's claim is primarily based upon case law dealing with the penalties for conduct taken by attorneys to avoid obtaining actual knowledge of prior art and other statutory requirement information.

Direct evidence of a party's or an attorney's intent to mislead or deceive the U.S. Patent Office is not necessary. Instead, it is typically shown by inferences drawn from circumstantial evidence, by showing acts the natural consequences of which are presumed to be intended by the actor. *Lipman v. Dickinson*, 174 F. 3d 1363, 1370 (Fed. Cir. 1999). In that regard, it has long been the law that the more material the misrepresentation, the lower the burden of proving intent. *Brasseler*, 267 F. 3d, at 1381 ("when balanced against high materiality, the showing of intent can be proportionally less"); *KangaROOS U.S.A., Inc. v. Caldor, Inc.*, 778 F. 2d 1571, 1573 (Fed. Cir. 1985). In the end, the intent element of inequitable conduct is "in the main proven by inferences drawn from facts, with the collection of inferences permitting a confident judgment that deceit has occurred." *Larson Manufacturing Co. of South Dakota, Inc. v. Aluminart Products Ltd.*, 559 F. 3d 1317, 1327 (Fed. Cir. 2009), citing *Akron Polymer Container Corp. v. Exxel Container, Inc.*, 148 F. 3d 1380, 1385 (Fed. Cir. 1998).

However, a finding that inequitable conduct occurred before the U.S. Patent Office is not a requirement to finding that a case is "exceptional" under §285. "Litigation misconduct and unprofessional behavior are relevant to the award of attorney fees, and may suffice, by themselves, to make a case exceptional." *Brasseler*, 267 F. 3d at 1380.

Accordingly, facts relevant to the exceptional case issues include primarily those concerning:

1. The merit of Heartland's actions in bringing this lawsuit in the first place,
2. Heartland's use of this lawsuit to abuse of the legal process,
3. Heartland' vexatious conduct during the litigation to increase the expense of litigation to Forest River and delay resolution of the lawsuit, and
4. The conduct of Heartland's attorneys in proceedings before the U.S. Patent Office,

particularly as to the issue of intentional deception by avoidance of reasonable investigation about facts related to the "invention" of the '650 patent.

Unfair Competition:

Relevant case law on this issue is discussed in more detail in connection with Forest River's co-pending motion for partial summary judgement, DE#134. Briefly, unfair competition is a closely related field of law to trademark infringement. Indeed, traditional trademark law is actually a subset of the broader law of unfair competition,[3] which has its sources in English common law. *Moseley v. V Secret Catalogue, Inc.,* 537 U.S. 418, 428 (2003). Within the State of Indiana, courts have long recognized the common law tort of unfair competition and have noted that it was historically considered a subspecies of the class of torts known as tortious interference with business or contractual relations. *Felsher v. University of Evansville,* 755 N.E. 2d 589, 598 (Ind. 2001). While Indiana does not have an extensive body of case law defining unfair competition, certain important principles ring through over the past 100 years. Fraud is "the essence of unfair competition," focusing on deception of consumers and the ensuing injury to competitors; indeed "[t]he fertility of man's invention in devising new schemes of fraud is so great that the courts of equity have declined the hopeless attempt of embracing in formula all varieties of form and color . . . As new devices of fraud are invented, they will be dealt with by new correctives." *Computing Cheese Cutter Co. v.*

[3] This is the basis for Forest River's assertion that the Lanham Act claims in this lawsuit are of the nature of a "lessor included offense" and may be moot by the granting of Forest River's motion for partial summary judgment, DE#134.

Dunn, 88 N.E. 93, 95 (Ind. App. 1909).[4]

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

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

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

> "Although the law of unfair competition has been defined as the palming off of ones goods or services as that of some one else, and the attempt thereof, . . . the tort of unfair competition is much broader and also includes actions for the interference with a contract or business relationship, as well as for predatory price cutting."[5]

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

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

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

In regard to such illegal acts, it is a crime under Indiana law to "knowingly or intentionally cause another to suffer pecuniary loss by deception."[6] IC 35-43-1-2(a)(2). Moreover, the victim of such a crime has standing to seek recompense from the criminal in a civil action under IC 34-24-3-1 for three times the actual damages suffered, costs of the action, reasonable attorneys fees, etc.

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[5] Evidence of Heartland's predatory pricing during the Forest River trade show was just recently revealed when Heartland's chief financial officer, Dennis Donat, was finally brought to deposition on September 24, 2010.

[6] This criminal standard, "Criminal Mischief," appears to completely encompass the criminal deception statutes recited in the Amended Complaint.

Further, the court in *Felsher, supra,* articulated the scope of unfair competition law, by reference to *Prosser and Keeton on the Law of Torts,* 1015 (5th ed. 1984) and *Prosser, Law of Torts* 956 (4th ed. 1971), as:

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

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

Indeed, as between these same parties and in this same court, it has also been explained that the tort of unfair competition is much broader than mere palming off. *Heartland Recreational Vehicles, LLC v. Forest River, Inc.,* 2009 WL 418079, at *4-5 (N.D. Ind. Feb. 19, 2009)(citing *County Beverage, supra,* and *Felsher, supra,* as support for that understanding). As Judge Sharp put it, "[t]he Court will not condone Heartland's actions as simply healthy competition." *Id.,* at *5.

In summary, Forest River asserts in this lawsuit that actions which: 1.) are in furtherance of

competition, and 2.) are against public policy, and 3.) provide gain to the actor and/or loss to the competitor who is the object of that act, constitute "unfair competition" in violation of Indiana law. Therefore, in connection with Heartland's efforts to obtain and use the Master List, facts relevant to the unfair competition issues include primarily those concerning:

1. Various acts of deception used by Heartland to obtain the Master List from Forest River and to insulate Heartland from responsibility/liability for obtaining and using that list,

2. The nature and extent of Heartland's use of the Master List before, during, and after Forest River's private trade show in October, 2008,

3. The nature and extent of the financial gains obtained and/or facilitated by Heartland as a result of use the Master List,

4. Heartland's knowledge of the existence of dealer relationships reflected in the Master List, and

5. Heartland's motives or "justifications" for obtaining and using the Master List.

Further details of relevant facts in this regard are detailed in the co-pending motions for summary judgment.

Analysis of the Present Motion:

Lack of Diligence:

Heartland knew about the comments at least by the fourth day after discovery closed. Heartland also knew on that day, October 19, that a subpoena would be needed to obtain the information it sought and had already started to prepare it. Ex. B. Nonetheless, Heartland waited another 52 days before serving the subpoena upon RV Daily Report. Certainly, this lawsuit has been

going on a long time, more than two years[7], and there are still months more work to be done as a result of Heartland's previous discovery delays and to resolve admissibility issues with respect to certain evidence being proffered in connection with Heartland's motion for summary judgment. However, that does not mean Heartland has *carte blanche* to proceed once again at its leisure. We have already seen too much of that in these lawsuits, for example, waiting months at a time for Heartland to make itself available for each deposition ever sought by Forest River. [8] Such delays have repeatedly caused amendments to the prior versions of the Scheduling Orders. At least in those instances, Heartland sought permission in advance from the Court to amend the scheduling. Now, however, even at this late date, Heartland has not sought any permission from this Court to embark upon a new line of discovery. Such conduct is not evidence of good faith and reasonable diligence.

Burden Imposed by the New Discovery:

If Heartland is to be taken at its word, that it is pursuing a claim against "The Thinker" for malicious publication or libel, then we have several new issues interjected into this lawsuit which have not previously been addressed in this lawsuit, including:

[7] Indeed, the dispute between these parties has been going on for over five years, ever since Pete Liegl's letter of July 11, 2005 responded to Heartland's threat of patent infringement litigation against Forest River by notifying Heartland that the turning radius "invention" was similar to prior RV products which were already in use for a number of years. Ultimately, Mr. Liegl was proven correct. However, Heartland's motives for suing Forest River anyway, such as to support the corporate financial structure put in place around the '650 patent and its successor patents as bank loan collateral, and the impact of that on various issues in this lawsuit, have been and will be addressed in more detail elsewhere. See, e.g., DE#70.

[8] In contrast with the normal 15 day standard under L.R. 30.1

1. Libel , defamation, and malicious publication per se,[9]

2. First Amendments right of internet anonymity and free speech,

3. Liability of internet blog managers for policing postings.

Further, since RV Daily Report has objected to the subpoena, as per Ex. H, if Heartland seeks to enforce the subpoena, these issues will likely have to be litigated in the first instance in yet another federal court, this time in Arizona. From there, assuming Mr. Gerber's report about where the identification information is ultimately located is correct, there may be several other subpoenas and other courts involved in identity chasing before "The Thinker" is finally located.

If we take Heartland at its word that it is seeking to locate The Thinker in order to mitigate the claims against Heartland in this lawsuit, then once "The Thinker" is found, the pleadings in this case could be amended to allow Heartland to bring its claim against "The Thinker." It is probable, however, that an "anti-SLAPP" counterclaim would be then asserted against Heartland, as for example, under IC 34-7-7-5. The anti-SLAPP statute causes "all discovery proceedings" in the case to be stayed pending disposition of a motion to dismiss any claim that is against "an act or omission of that person in furtherance of the person's right of petition or free speech." IC 34-7-7-5 and 34-7-7-6. Thus, once again Forest River's efforts to get discovery completed against Heartland would be put on hold, and at the risk and expense of even more evidence becoming forgotten or even"lost," as with missing Heartland patent search report which has been the subject of several prior motions.

Thus, adding a new party and a new set of such claims to the lawsuit would create an undue

[9] Including, from the damages aspect, whether or not this is an instance of a "self-inflicted wound" by Heartland, given the nature of its reaction to "The Thinker" and the exacerbation of "damage" to its reputation by the subpoena itself and by Heartland making no effort to mitigate by rebuttal or response.

burden upon Forest River, by forcing upon it ancillary litigation expense in this and other courts and delay in resolution of its own claims, unless the new claims against "The Thinker" had some relevance or significant nexus to the claims already being brought against Heartland.

Lack of Relevance to Existing Issues:

The comments made by "The Thinker" expressly relate to that person's description of the conduct of Heartland during this lawsuit. Those comments do not refer to or provide evidence of Heartland's actions in connection with obtaining or using the Master List, or anything Heartland gained by such acts, or about Forest River's relationships with RV dealers. Ex. A, page 3. Accordingly, the identity of "The Thinker" has no relationship to those factual matters either.

If it was true that the comments posted by "The Thinker" were false and constituted malicious publication, that would provide no defense to the unfair competition claims made by Forest River against Heartland. Similarly, if RV Daily Report was somehow liable to Heartland for failing to prevent that malicious publication, that would also provide no defense to the unfair competition claims made by Forest River against Heartland.

In a general sense, the comments by The Thinker relate to actions taken by Heartland in the present lawsuit to insulate itself from liability by refusing to comply with discovery rules and the orders of this Court. However, since there is no evidence that those comments were made by a Heartland representative, they cannot be attributed to Heartland as an "admission against interest" or "statement by a party opponent" and, therefore, would remain inadmissible hearsay as to the truth of those facts.

Accordingly, neither the comments made by nor the identity of "The Thinker" are relevant

to the unfair competition issues in this lawsuit.

Similarly, the comments of "The Thinker" do not refer to or provide evidence of Heartland's conduct in proceedings before the U.S. Patent Office or the merit of Heartland's decision to bring this lawsuit in the first place. Accordingly, the identity of "The Thinker" has no relationship to those factual matters either.

If it was true that the comments posted by "The Thinker" were false and constituted malicious publication, that would provide no defense to the exceptional case claims made by Forest River against Heartland. Similarly, if RV Daily Report was somehow liable to Heartland for failing to prevent that malicious publication, that would also provide no defense to the exceptional claims made by Forest River against Heartland.

The comments by The Thinker do describe vexatious actions taken by Heartland during this lawsuit which have increased the litigation expense and have delayed resolution of the lawsuit. However, since there is no evidence that those comments were made by a Heartland representative, they cannot be attributed to Heartland as an "admission against interest" or a "statement by a party opponent." Therefore, they remain inadmissible hearsay as to the truth of those facts. Comments made by lay persons about the motions and filings of record before this Court are not admissible evidence as to the content of that record; the public record remains the "best evidence" of itself.

Ironically, however, while the comments of "The Thinker" do not provide evidence of Heartland's use of this lawsuit to abuse the legal process, Heartland's subsequent subpoena to RV Daily Report, coupled with Heartland's refusal to mitigate the supposedly libelous damage to its reputation by public rebuttal or response or to explain to RV Daily Report or Forest River the relevance of the malicious prosecution claim, and further coupled with Heartland's complete failure

to follow the rules of civil procedure for discovery after the deadline has passed, is evidence of another example of that abuse of process. Briefly, there is obviously no bone fide connection between the information sought by the subpoena and the claims presently pending in this lawsuit. There is obviously no mitigation available to Heartland by what "The Thinker" posted. The inescapable conclusion is that Heartland is primarily trying to use the subpoena process to stifle public criticism about Heartland's litigation tactics. That is clearly not a proper use of a subpoena in this lawsuit, even if the subpoena was timely issued.

As it turns out, this is the fourth instance of abuse of process in this lawsuit, and at least the third instance of Heartland using a subpoena in this lawsuit for an improper purpose. In the first place, Forest River asserts that the patent infringement claim under the '650 patent was an intentional shame, intended to draw out Forest River's evidence of the prior art, in favor of another Heartland patent, U.S. Patent No. 7,575,251, as evidenced by the "References Cited" section of the patent cover sheet and the Information Disclosure Statements within the file history of the application for the '251 patent. In short, Heartland was well aware that Forest River had prior art information, and Heartland wanted to use the "presumption of validity" status under 35 U.S.C. §282 to create a stronger case for the '251 patent, at the expense of the '650 patent. In part, this was what the "submarine patent" tactics were all about, as discussed in various motions in this case. While a "submarine patent" is not per se illegal, using a shame lawsuit to bolster one is, as an abuse of process under Indiana law.

Earlier instances of Heartland using subpoenas in this lawsuit for an improper purpose arose when Heartland threatened two third party witnesses with "contempt" litigation under subpoenas issued to them in July and August of 2009. Those subpoenas were originally issued to compel

evidence only with respect to the '650, and those witnesses duly complied with those subpoenas at that time. Then, on November 9, 2010, Heartland attempted to coerce those same witnesses into giving evidence to assist Heartland in obtaining a third patent, this time based upon the '894 patent application. That third patent is not part of this lawsuit, and indeed, Heartland has steadfastly refused all discovery as to that patent application incident to this lawsuit. Nonetheless, Heartland baldly used two subpoenas from this lawsuit for that purpose. Thus, it is unlikely that Heartland's use of the present subpoena against RV Daily Report was a accidental foray into impropriety.

Accordingly, neither the comments made by nor the identity of "The Thinker" are relevant to the exceptional case issues in this lawsuit. However, Heartland's subsequent use of the subpoena in issue does appear to be relevant, as another instance of abuse of process. Nonetheless, in order to mitigate the damage done by Heartland's misconduct, Forest River seeks to block enforcement of that subpoena by this motion.

Conclusions:

There is no good cause for modifying the Scheduling Order to allow Heartland's subpoena as timely. This subpoena would impose undue burden upon Forest River for purposes which not relevant to the present issues in this lawsuit. Accordingly, enforcement of this subpoena should be prohibited.

Dated: December 27, 2010

Respectfully submitted,

s/Ryan M. Fountain

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Certificate of Service

I certify that on December 27, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF system, which sent notification of such filing to all of the parties through at least the following counsel of record:

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s/Ryan M. Fountain
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INDEX OF EXHIBITS