



**Electronic Frontier Foundation**

Protecting Rights and Promoting Freedom on the Electronic Frontier

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**December 23, 2010**

By US Mail and e-mail

Re: Objections to subpoena *duces tecum* seeking identity information for  
*Heartland Recreational Vehicles, LLC v. Forest River, Inc.*, Case No.  
3:08-cv-490 (N.D. Ind.)

Dear Mr. Brotherson,

This letter is to inform you that Greg Gerber and RV Daily Report (hereafter collectively referred to as "Greg Gerber" or "Mr. Gerber") hereby object to the subpoena, dated December 10, 2010, issued by your client Heartland Recreational Vehicles, LLC, (hereafter referred to as "Heartland") seeking information related to *Heartland Recreational Vehicles, LLC v. Forest River, Inc.*, Case No. 3:08-cv-490 (N.D. Ind.). The subpoena was issued pursuant to the authority of the federal district court for the District of Arizona. The subpoena seeks all documents, electronically stored information, or objects relating to the following:

- (1) the actual name and identity of "The Thinker," a commentator on the RV Daily 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."

Mr. Gerber first objects that Heartland's subpoena was issued after the close of discovery. As per the Indiana district court's order of July 29, 2010, (Docket No. 123) fact discovery closed on October 15, 2010, nearly two months prior to the issuance of Heartland's subpoena. *See, e.g., Integra Lifesciences I, Ltd. v. Merck KGaA*, 190 F.R.D. 556, 561 (S.D. Cal. 1999) ("Case law establishes that subpoenas under Rule 45 are discovery, and must be utilized within the time period permitted for discovery in a case."); *Rice v. United States*, 164 F.R.D. 556, 558 (N.D. Okl. 1995) (subpoenas *duces tecum* for particular records, issued to third parties after close of discovery for purposes of discovering impeachment material, were quashed as improper attempt to engage in discovery after designated time period).

**Mr. Gerber also objects on the grounds that the discovery sought is not relevant to the above-captioned action. Indeed, despite repeated requests, Heartland has to date been**

unwilling to identify which claim or defense about which it seeks this discovery. *See* Federal Rule of Civil Procedure 26(b)(1) (limiting the scope of permitted discovery to material and information “regarding any nonprivileged matter that is relevant to any party’s claim or defense”).

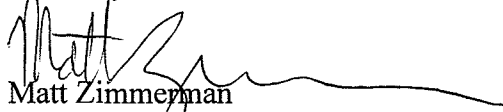
Mr. Gerber additionally objects on the grounds that Heartland’s subpoena seeks privileged material protected by the First Amendment and accordingly that compliance with the subpoena would subject the anonymous speaker whose information is sought to an undue burden. *See* Federal Rule of Civil Procedure 45(c). Specifically, contrary to the heightened discovery test imposed by the First Amendment, Heartland has apparently not made reasonable attempts to notify the speaker whose identity is being sought about the pending subpoena, has not identified the specific claim or defense the identity of the anonymous speaker in question is relevant to, has not provided *prima facie* evidence in support of each element of such (unidentified) claim or defense, has not explained why unmasking the anonymous speaker is necessary for Heartland’s litigation to proceed, and has not explained why that purported need should outweigh the speaker’s right to anonymous expression. *See, e.g., Dendrite Int’l v. Doe No. 3*, 776 A.2d 756 (N.J. App. 2001); *Doe v. 2themark.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Mobilisa, Inc. v. Doe*, 170 P.3d 712 (Ariz. Ct. App. 2007); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010).

Please note that as Heartland has been unwilling to identify the specific claim or defense the identity of the anonymous speaker in question is relevant to, Mr. Gerber is unable to completely identify and document all of the bases on which he may be able to object to the subpoena and therefore expressly reserves his right to raise additional objections in the future.

As we strongly believe that Heartland’s subpoena of December 10, 2010, is unenforceable as a matter of law, I request that you promptly withdraw it. Alternatively, if you do not intend to withdraw it, I request that you promptly identify the legal basis upon which Heartland issued the subpoena.

If you have any questions about Mr. Gerber’s position, or would otherwise like to discuss this matter, please feel free to contact me.

Sincerely,



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