

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

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

**RESPONSE TO FOREST RIVER'S MOTION
FOR ENFORCEMENT OF COURT ORDER, DE #112**

With its Motion for Enforcement of Court Order (the "Motion"), Forest River, Inc. ("Forest River") continues its ongoing pattern of refusing to respond to the Motion for Summary Judgment of Heartland Recreational Vehicles, LLC ("Heartland"). On December 8, 2010, Forest River was required to respond to Heartland's latest Motion for Summary Judgment, DE #130. Instead, Forest River filed this untimely motion to compel further document production, even though discovery had been closed already for nearly two months, and over three months had passed since Heartland had informed Forest River by letter that it did not have the documents that Forest River seeks. This is the second time that Forest River has filed a motion seeking additional discovery on the due date for its response to Heartland's Motion for Summary Judgment.¹

¹ On pages 9-10 of its Motion, Forest River states that "if Heartland were to amend its motion for summary judgment to delete reference to the lack of demonstrated damages, then the emails would not be an issue with respect to Forest River's response to [Heartland's Motion for Summary Judgment]." (Motion, DE #144, pp 9-10.) In its other discovery motion filed in lieu of a response to Heartland's Motion for Summary Judgment, its Motion to Compel Deposition of Heartland on Gain From Use of Master List, Forest River repeats this assertion. (Motion to Compel, DE #145, pp. 8-9.) With these statements, Forest River implicitly admits that the only discovery issues remaining pertain to the issue of Forest River's damages. Hence, once these issues are resolved, the Court should require Forest River to promptly respond to Heartland's Motion for Summary Judgment.

The Court should deny Forest River's Motion for each of the following reasons:

- (1) Forest River's Motion is untimely;
- (2) Even if the emails sought by Forest River existed, they would have no relevance to the claims Forest River has actually stated in this action; and
- (3) As Heartland explained to Forest River in a letter dated September 1, 2010, it has been unable to locate any responsive emails in its electronic records. (*See* September 1, 2010 letter, Exh. A, p. 2.)

For each of these three reasons, the Court should deny Forest River's Motion, thereby compelling Forest River to finally answer Heartland's Motion for Summary Judgment.

I. The Court Should Deny Forest River's Motion Because it Did Not File it Until After Discovery Had Closed and Heartland Had Filed its Second Motion for Summary Judgment

"The Federal Rules of Civil Procedure place no time limit on the outside date for the filing of a motion to compel discovery, **although motions to compel after the close of discovery generally are deemed untimely.**" *Vision Center Northwest, Inc. v. Vision Value, LLC*, 2008 WL 5191456, at *3 (N.D. Ind. Dec. 10, 2008) (emphasis added). That general rule is particularly applicable where, as here, a party has filed a motion for summary judgment prior to the filing of the motion seeking additional discovery. *See Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7th Cir. 2001) (motion to compel filed after discovery closed and summary judgment motion filed deemed untimely).

Forest River has no excuse for its untimely filing of this Motion. On June 7, 2010, Heartland forwarded copies of the additional dealer correspondence the Court ordered Heartland to produce in connection with Forest River's second motion to compel, DE # 96. On July 22, 2010, Forest River sent an email to Heartland's counsel noting the absence of any emails from

dealers in response to an October 28, 2008 email from Brian Brady. On September 1, 2010, Heartland's counsel wrote Forest River's counsel a letter informing him that "Heartland's search of its records did not locate any documents responsive to this particular request." (*See* September 1, 2010 letter, Exh. A, p. 2.) Hence, as of that date, Forest River knew that Heartland had not found any responses to Brady's October 28, 2008 email to produce to Forest River.

A month and a half later, discovery in this matter closed. Two months later, the deadline for dispositive motions passed, and Heartland filed its Motion for Summary Judgment. Finally, three months later, on the due date for its response to Heartland's Motion for Summary Judgment, Forest River decided to bring this Motion to compel production of the putative email responses. Hence, rather than allowing the Court to resolve this issue in a timely fashion, Forest River waited for Heartland to file its Motion for Summary Judgment. Now, Forest River has the benefit of months of extra time to formulate its responsive arguments to Heartland's Motion for Summary Judgment, thereby further prolonging this already lengthy litigation.

Based on its untimeliness alone, the Court should deny Forest River's Motion and compel it to promptly respond to Heartland's Motion for Summary Judgment. However, as outlined below, there are two further reasons for denying the Motion: (1) the emails sought by the Motion are irrelevant to the claims actually stated by Forest River in this action; and (2) as Heartland informed Forest River on September 1, 2010, Heartland does not have any emails responsive to the request.

II. In Arguing That the Emails are Relevant, Forest River Attempts to Once Again Belatedly Add New Claims to this Case

Before discussing Forest River's arguments that the emails it seeks are relevant, it is important to chronicle Forest River's repeated attempts to illegitimately inject new claims into this action without amending the pleadings.²

In the Amended Answer, Forest River alleged three counterclaims, designating each under a separate heading: (1) "Declaratory Judgment of Invalidity, Non-infringement and Unenforceability;" (2) "Infringement of Forest River's Trademark Rights under 15 U.S.C. §1125;" and (3) "Civil Action Under Criminal Deception." (DE#25, pp. 25, 29, & 34.) Forest River's claims under the Lanham Act and Indiana's criminal deception statute were rooted in the same, very specific factual allegations—those involving the Hotel Incident. (*See id.* at ¶86).

In short, Forest River accused Heartland employees of lying to hotel front desk employees, thereby persuading them to deliver envelopes containing Heartland promotional materials to recreational vehicle ("RV") dealers staying at the hotels. (*Id.* at ¶76.) Importantly, **Forest River's counterclaims contained no allegations whatsoever that Heartland had acquired a Forest River Master List—improperly or otherwise—or that Heartland had used Forest River's Master List in any manner.** Those claims **are** stated, however, in a Complaint filed by Forest River on September 29, 2010 in a separate action. (*See* Exh. B, Complaint in Cause No. 3:10-CV-409 JD.) Forest River apparently filed the September 29, 2010 Complaint as a last-ditch effort to save these belated claims after realizing that the Court would likely bar them as untimely in this case.

² The following discussion is largely repetitive of one of the arguments in Heartland's Response to Forest River's Motion for Partial Summary Judgment (DE #142). Because Heartland is uncertain whether the district court judge or the magistrate judge will be considering Forest River's Motion, it includes the discussion again in this response.

After a lengthy discovery period in this action, Heartland filed a Motion for Summary Judgment on December 21, 2009. (DE #78.) In arguing that it was entitled to summary judgment on Forest River's Lanham Act and criminal deception claims, Heartland informed the Court that Forest River had failed to provide any evidence that a Heartland employee had lied to a hotel employee. Heartland also argued that, because no lie had ever occurred, Forest River could not show that a lie had caused Forest River pecuniary harm or led Heartland to any pecuniary gain. Ultimately, rather than respond to Heartland's Motion, Forest River requested a stay in the summary judgment proceedings, arguing that it needed more discovery to respond to "both the patent issues and the unfair competition issues of **the Hotel Action.**" (Mot. for Stay, DE #87, p. 7) (emphasis added).

However, after reviewing Heartland's arguments and evidence in support of its Motion for Summary Judgment, Forest River filed a Second Motion to Compel discovery on February 24, 2010. (Second Mot. to Compel, DE# 96). In that Motion, Forest River alleged for the first time that the real basis for its "unfair competition" claim was Heartland's "engage[ment] [of] a third party, Rodney Lung, to obtain a copy of the Forest River list of dealers who confirmed that they would be attending the private Forest River trade show." (*Id.* at pp. 2-3.) Forest River argued that, because the facts surrounding Heartland's acquisition of the list were discussed in the course of the parties' exceedingly broad discovery efforts, Heartland had implicitly or expressly consented to trying the new claim, citing Rule 15(b)(2). (*Id.*)

As an initial matter, Rule 15(b), by its express language, applies only to amendments sought "During and After Trial," and is thus inapplicable to periods of litigation prior to trial. *See* Fed. R. Civ. P. 15(b)(2); *Valley Entertainment, Inc. v. Friesen*, 691 F.Supp.2d 821, 826 (N.D.Ill. 2010) (stating that "Rule 15(b) applies to amendments proposed during and after a trial,

and is thus not applicable to the instant motion" in excluding newly-asserted claims at summary judgment stage).

Regardless, Heartland unequivocally informed both Forest River and the Court of its refusal to consent to the addition of the claim in its response to Forest River's Second Motion to Compel, stating as follows:

Now, Forest River is apparently attempting to allege a *second* unfair competition claim, one based on Heartland's acquisition of a Forest River dealer list from a third party, Rod Lung. Nothing in Forest River's Amended Complaint hints that Heartland's acquisition of this list is the factual basis for any of Forest River's asserted claims. This "dealer list acquisition" unfair competition claim is actually an entirely separate claim from the "Hotel Action" unfair competition claim. Because Forest River declined to amend its Complaint to expressly allege this "dealer list" unfair competition claim, Heartland has had no opportunity to seek dismissal of the claim under Rule 12(b)(6). Furthermore, Forest River's failure to timely amend its complaint to include this second unfair competition claim lulled Heartland into a belief that Forest River did not plan to pursue it. As a result, Heartland declined to expend its full legal and financial resources conducting adequate discovery into the claim. To the extent Forest River wishes to pursue this claim, Heartland requests that the Court require Forest River to seek leave to amend its Complaint once again (a motion Heartland would then oppose), thus permitting Heartland an opportunity to seek its dismissal under Rule 12(b)(6), and, if necessary, conduct additional discovery into the purported claim's factual merits.

(Resp. to Second Mot. to Compel, DE#102, pp. 11-12) (emphasis added.)

Months passed after Forest River's Second Motion to Compel, and Forest River did not amend its counterclaims to include allegations pertaining to Rod Lung or any use of the Master List. Accordingly, Heartland continued to object to certain discovery requests that would only be reasonable or relevant if Forest River's amorphous "dealer list acquisition" claims were part of the case. Heartland's belief that the claims were not part of the case was cemented on September

29, 2010, when Forest River filed the entirely new lawsuit containing claims based on Heartland's acquisition of the list. (*See* Exh. B, Complaint in Cause No. 3:10-CV-409 JD.) Accordingly, Heartland did not address the new claims when it re-filed its Motion for Summary Judgment in this action on November 2, 2010.

Now, Forest River argues that Brady's email "represent[s] a supplemental use of the Master List" which may have caused Forest River to suffer "secondary damage which is causally linked directly to Heartland's taking and use of the Master List in the first place." (Motion, DE# 144, p. 6.) In doing so, it argues that the emails are relevant to its untimely list-acquisition claim, one that is not in this case, and which fails as a matter of law for the multiple independent reasons outlined in Heartland's Response to Forest River's Motion for Partial Summary Judgment.³ (*See generally* Resp. to Mot. Part. S. Judg., DE #142.) As the Seventh Circuit has held, "[t]here must be a point at which a plaintiff makes a commitment to the theory of its case." *Johnson v. Methodist Med. Ctr. of Ill.*, 10 F.3d 1300, 1304 (7th Cir. 1993) (noting that plaintiff only moved to amend after realizing that the claims she actually pled would lose on summary judgment). A party cannot simply assert claims in discovery motions and decline to amend the pleadings to formally state them. *See* FED. R. CIV. P. 15.

Based on its mistaken belief that it has properly amended the pleadings to add a claim based on Heartland's acquisition and use of Forest River's "Master List," Forest River argues that the email responses it seeks "would likely indicate the impact of Mr. Brady's email and identify potential misunderstandings of the dealers that were caused thereby...[c]ertainly, the persons so responding may well be important witnesses as to the damage done by this misleading email."

³ Forest River also argues that the list of recipients of Brady's email is relevant. As Heartland informed Forest River in its September 1, 2010 letter, "[b]ecause Mr. Brady's emails are not the basis of Forest River's claims, the list of recipients does not seem reasonably calculated to lead to the discovery of admissible evidence." (*See* September 1, 2010 letter, Exh. A, p. 2.)

(Motion, DE #144, p. 6.) Again, Forest River based its specific claims entirely on Heartland's alleged conduct with respect to the so-called Hotel Incident. Because it realizes that those claims are doomed to fail, it is now attempting to state entirely new claims and to use them to support discovery requests that otherwise have no relevance or significance to the claims it has stated. Because Forest River's claims based on Heartland's acquisition and use of the "Master List" are not part of this case, the emails sought by Forest River are not relevant, and the Court should deny Forest River's present Motion.

III. Heartland Has Not Found Any Emails Responsive to Forest River's Requests

Throughout its Motion, Forest River simply assumes, without any competent evidence, that Heartland and Brian Brady received responses to Mr. Brady's October 28, 2008 email. Forest River asserts that "we do know the withheld emails existed." (Motion, DE #144, p. 5.) In support of this assertion, Forest River cites Exhibit A to its Motion. However, contrary to Forest River's misleading insinuation, Exhibit A is not an email response sent to Brian Brady by an RV dealer. Instead, it is an email from an RV dealer forwarding Brian Brady's email to **Forest River**. The fact that an RV dealer sent a response about Mr. Brady's email to Forest River does not mean that any RV dealers sent replies to Heartland. Importantly, Forest River has failed to identify any evidence suggesting that Heartland ever received any email replies to Brian Brady's emails. In other words, Forest River has failed to supply the Court with any reason to believe that the emails it seeks ever existed.

In fact, as Brian Brady's deposition testimony indicates, it is unlikely that Heartland ever received any email responses to Brady's October 28, 2008 mass email, and even if Heartland did receive an email response, it is likely that Brady deleted it immediately after reading it. During his deposition in June 15, 2009, Mr. Brady testified that he receives very few responses to the

mass emails Heartland employees send on his behalf, and that he does not keep the responses that he does receive. (Brady Dep., Exh. C, p. 197, ll. 5-23.) Hence, even in the unlikely event that a dealer would have decided to respond directly by email to one of Mr. Brady's mass-emails, it is probable that Mr. Brady deleted it after reading it back in October of 2008.

On three separate instances, Heartland has searched its records for correspondence relevant to the Hotel Incident. In June of 2009, Heartland produced an initial batch of emails relevant to the Hotel Incident. No response to Mr. Brady's email was located in connection with the gathering of those emails. In August of 2009, Heartland produced a second batch of email records. Contrary to Forest River's assertions that Heartland did not produce Brady's October 28, 2008 email until after this Court's order on Forest River's Second Motion to Compel, that communication was included in the batch of documents that Heartland sent to Forest River on August 25, 2009.⁴ (See August 25, 2009 letter and attached document containing text of October 28, 2008 email, Exh. D.) However, no responses to Mr. Brady's email were located at that time.

Additionally, after the Court's Order on Forest River's Second Motion to Compel, DE #112, Heartland was ordered to once again search its records for additional emails. The search for these additional emails occurred in May and June of 2010. In gathering these emails, Heartland broadened the scope of its search considerably. The gathering of those emails occurred by searching Heartland's computer servers for correspondence containing very broad search terms, including, among others, "Forest River," "Hotel," "Trade Show," "Open House,"

⁴ Forest River complains that Heartland never produced the actual email that Mr. Brady sent, instead producing a Word document containing the text of the email. However, as Heartland has explained many times throughout this litigation, Mr. Brady does not send these emails on his own. Instead, he types the content of the email into a Word document and forwards that document to Heartland's IT professionals, who then use a computer program to distribute it via emails to a large list of recipients. Accordingly, when Heartland produced the communication, it did so in the Word format in which Mr. Brady created it.

etc. Despite this exceedingly broad search, Heartland again located no relevant replies to Brian Brady's October 22, 2008 email.

Forest River argues that Heartland should search its backup records for any email responses to Mr. Brady's emails. However, Forest River incorrectly assumes that Heartland has been using its backup tapes to preserve those documents that are relevant to Forest River's claims. Heartland's backup tapes only hold onto information for two weeks after it is deleted; in other words, Heartland only uses backup tapes as a method of recovering information that was very recently deleted. Hence, throughout this litigation, Heartland has been preserving relevant documents by ensuring that its employees do not delete them from Heartland's servers in the first place. Accordingly, if the information sought by Forest River was not located on Heartland's servers during its searches for emails related to the Hotel Incident in June and August of 2009, or its even more comprehensive sweep of its correspondence in May and June of 2010, then the information will not exist on Heartland's backup tapes now. After Forest River complained that Heartland's supplemental production did not include any responses to Brian Brady's October 28, 2008 email, Heartland's counsel again asked Heartland whether it was possible that those emails could still be present on Heartland's backup tapes. Heartland's IT personnel confirmed that any such information would have been wiped from the backup tapes two weeks after its deletion from the servers. Heartland's IT personnel also confirmed that if the information had not been found on the servers during Heartland's previous searches, then it could not be on the backup tapes now, because more than two weeks had passed since those searches had occurred.

As Brian Brady's deposition testimony indicates, it is unlikely that he ever received any responses to his October 28, 2008 email, and it is even more unlikely that he would have kept that email after receiving it. Even in the unlikely event that any responsive emails ever existed,

if Mr. Brady deleted the reply email shortly after he received it (on or about October 31, 2008), as he testified was his normal practice, it would have been erased from Heartland's backup tapes two weeks later (on or about November 14, 2008). Hence, Heartland would have had no record of that potential response on the date that it received the November 17, 2008 litigation hold notice attached as Exhibit B to Forest River's Motion. Throughout this litigation, Heartland has searched its servers multiple times for the putative email responses and has not located any. A search of Heartland's backup tapes would be futile, because those tapes only preserve the emails for two weeks after they are deleted from the servers. Therefore, as Heartland notified Forest River in writing on September 1, 2010, it does not possess any email responses to Brian Brady's October 28, 2010 email. In sum, Forest River's untimely Motion seeks documents that Heartland simply has not been able to find, assuming that they ever existed.

IV. Heartland Has Provided Forest River With All the Information it Needs to Identify What Sales, if Any, Heartland Made As a Result of its Allegedly Unlawful Conduct

Forest River exaggerates the relevance of the email responses it seeks, arguing that "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." (Motion, DE #144, p. 5.) That is not true. In reality, Heartland has provided Forest River with more than enough information for it to assess any effect that Heartland's allegedly unlawful conduct had on its sales efforts.

In June, Heartland produced a comprehensive financial spreadsheet to Forest River. That spreadsheet contained a tab with a list of every sale Heartland made to RV dealers from October 22, 2008 (the first day of the Forest River Trade Show) until December 2, 2008 (the first day of the annual Louisville national trade show). That list contained 250 sales orders. With each sales order, Heartland included, among other details: (1) the date that the sales order occurred; (2) the

name of the RV dealer placing the order; and (3) whether the dealer was listed in Forest River's "Master List." If a dealer making orders during that time period was a dealer that was included on Forest River's "Master List," then Heartland denoted that the dealer was: (1) already an existing Heartland dealer for the trailer model the dealer had ordered; (2) an entirely new dealer to Heartland; or (3) an existing Heartland dealer who was purchasing a new model of trailer for the first time. If a dealer was not on Forest River's "Master List," Heartland noted that by stating that the dealer placing the order was "Not a Mutual Dealer."

That information should have been more than sufficient for Forest River to identify which of Heartland's sales may have been affected by Heartland's allegedly unlawful conduct. By Heartland's count, of the 250 sales Heartland obtained from October 22, 2008 to December 2, 2008, **199 of those sales came from dealers who were not even on the "Master List."** Of the 51 sales made to dealers who were on the "Master List," **47 of those sales were made to RV dealers who were already Heartland dealers**, and with whom Heartland already had regular contact prior to its acquisition of the "Master List." The remaining 4 sales were all made to the same dealer, Loveall RV. Loveall RV was the only new dealer to sign with Heartland during the relevant time period. All of this information is readily apparent from the information that Heartland provided to Forest River six months ago. Hence, Forest River could have easily used this information to contact the handful of potentially relevant dealers and ask them directly whether any of Heartland's allegedly unlawful conduct affected their purchasing decisions.

Heartland has already provided Forest River with all of the information it needs to investigate what effect, if any, Heartland's alleged conduct had on RV dealers during the relevant time period. Forest River has either refused to perform this investigation, or it has performed the investigation and learned that the relevant dealers did not purchase Heartland products as a result

of Heartland's allegedly unlawful conduct. Forest River's representation to this Court that it cannot track Heartland's sales activity is simply false. Forest River has the information it needs, and its continued request for irrelevant emails that Heartland does not have does not justify its refusal to respond to Heartland's Motion for Summary Judgment. The Court should deny Forest River's Motion and require it to promptly respond to Heartland's Motion for Summary Judgment.

CONCLUSION

Forest River's Motion is an untimely attempt to obtain evidence that has no relevance to the claims actually at issue in this litigation. Heartland has already told Forest River in writing that it has not been able to find the documents that it seeks. (*See* Exh. A, p. 2.) The Court should not permit Forest River to stall this litigation any longer with its unreasonable and tardy requests for additional, irrelevant evidence, particularly when Heartland has provided Forest River with information that is more than sufficient to allow it to assess whether Heartland made any sales as a result of its allegedly unlawful conduct. For all of the reasons stated in this Response, Heartland respectfully requests that the Court deny Forest River's Motion, thereby requiring Forest River to finally respond to Heartland's Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

The undersigned counsel for plaintiff Heartland Recreational Vehicles, LLC, hereby certifies that a copy of the foregoing was served upon the following, this 27th day of December, 2010, by operation of the Court's electronic filing system:

Ryan M. Fountain
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/s/ David P. Irmischer

David P. Irmischer