

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

With its untimely Motion to Compel Deposition on Gain From Use of Master List ("Motion to Compel"), Forest River, Inc. ("Forest River") claims that Heartland Recreational Vehicles, LLC ("Heartland") has failed to provide it with adequate information to assess whether it has suffered any damages as a result of Heartland's alleged conduct in this matter. That is simply incorrect. Heartland has provided Forest River with detailed information about every sale it made during the time period from August 22, 2008 through December 2, 2008. It has even identified those sales that were made to dealers on Forest River's "Master List," thereby pinpointing the sales that are most likely to be relevant to Forest River's claims. Heartland has also produced for deposition two Heartland salespeople of Forest River's choosing. Both of these salespeople informed Forest River that they did not use the "Master List" to make any sales. Finally, Heartland has produced its Chief Financial Officer, Dennis Donat, to testify in a Rule 30(b)(6) deposition. Contrary to Forest River's allegations in this Motion to Compel that Mr. Donat did not prepare for his deposition, Mr. Donat was prepared to talk in great detail about all of the sales that were potentially relevant in this matter.

Forest River's Motion to Compel reflects Forest River's frustration that Heartland continues to contend that that none of its allegedly unlawful conduct proximately caused Heartland to gain sales. Despite having more than enough information to attempt to prove Heartland wrong, Forest River has failed to identify a single sale that Heartland made as a result of the conduct at issue in this litigation. That failure stems not from a lack of discovery, but from the simple reality that RV dealers do not buy products as a proximate result of receiving a brochure under their hotel room doors. If Forest River wishes to compel Heartland to offer its legal conclusion as to what sales Heartland made as a proximate result of the alleged events of the Hotel Action, the answer Heartland will continue to provide is "none." For the reasons outlined more fully below, the Court should deny Forest River's untimely Motion to Compel and require it to promptly respond to Heartland's Motion for Summary Judgment.

**I. Forest River Does Not Need an Additional Deposition to Assess the Gain that Heartland Obtained From Its Allegedly Unlawful Conduct**

Forest River claims that it needs another deposition in order to prove the damages element of its claims. However, Heartland has provided more than sufficient information for Forest River to assess what sales Heartland made as a result of its alleged conduct, and no additional deposition testimony is necessary.

On June 17, 2010, Heartland produced a comprehensive financial spreadsheet to Forest River. That spreadsheet contained a list of every sale Heartland made to RV dealers from August 22, 2008 (a date two months before the first day of the Forest River Trade Show) until December 2, 2008 (the first day of the annual Louisville national RV show).<sup>1</sup> 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; (3) the brand name

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<sup>1</sup> That was the time period deemed relevant by the Court in its Order on Forest River's Second Motion to Compel (DE#112).

and model of the trailer ordered; (4) the purchase order number for the order; (5) the invoice price of the order; (6) the costs of producing the trailer ordered; and, most importantly, (7) **whether the dealer was listed in Forest River's "Master List" that Heartland allegedly used to complete the so-called "Hotel Action."** If a dealer making orders after the Hotel Action was included on Forest River's "Master List," then Heartland noted that the dealer was: (1) already an existing Heartland dealer; (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 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.

Forest River argues that because Heartland resisted Forest River's attempts to contact end user customers in another case (No. 3:09-cv-302), Heartland cannot claim that Forest River

should contact its own RV dealers to gain evidence in this matter. (Mot. to Compel, DE #145, p. 7.) A quick comparison of the two situations demonstrates the invalidity of Forest River's argument. In the other matter, Forest River would have been contacting hundreds of end user customers, while in this instance, it would be contacting only a handful of RV dealers. RV dealers are typically more informed than end users and less likely to be affected by Forest River's allegations. Furthermore, unlike in the other matter, Forest River did not have to subpoena Heartland's non-party dealers to obtain the information necessary to contacting the relevant RV dealers; instead, Forest River would be contacting its **own** dealers, something its salespeople do every day. In light of Forest River's eagerness to call hundreds of end user customers in the other matter, its resistance to contacting a handful of its own dealers in this matter seems odd, and it likely indicates one of two things: (1) that Forest River has already contacted its dealers and received less than desirable responses to its questions; or (2) that Forest River has willingly buried its head in the sand for fear of obtaining discoverable, negative information from them.

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. Its request that Heartland designate a 30(b)(6) witness to form a legal conclusion as to what sales were proximately caused by its alleged conduct would be a waste of time. As outlined above, Heartland signed only one new dealer during the relevant time period, Loveall RV. As Heartland explained in its Memorandum in Support of its Motion for Summary Judgment, (DE #131), Heartland had been contacting Loveall RV for six months prior to the Forest River Trade Show. Therefore, Heartland's position is that none of the sales occurring during the relevant time period resulted from its allegedly unlawful conduct. Heartland's counsel has repeatedly informed Forest River's counsel of Heartland's position on this matter. A desire to

ask Heartland to produce a witness to relay that position would be a waste of the parties' resources, and it does not justify Forest River's continued refusal to respond to Heartland's Motion for Summary Judgment.

Because Forest River has the information it needs to form an independent legal theory as to what Heartland gained as a result of its allegedly unlawful conduct, the Court should deny Forest River's Motion to Compel and require Forest River to promptly respond to Heartland's Motion for Summary Judgment.

## **II. The Court Should Also Deny Forest River's Motion to Compel as Untimely**

Because Forest River waited until after the close of discovery and after the filing of Heartland's Motion for Summary Judgment to file its Motion to Compel, the Court should deny it as untimely. "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, an opposing party has filed a motion for summary judgment prior to the other party's filing of the motion seeking additional discovery. *See Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7<sup>th</sup> 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. The 30(b)(6) deposition of Dennis Donat concluded on September 24, 2010. If Forest River deemed Mr. Donat's testimony insufficient, it had more than three weeks before the close of discovery to file a motion to compel further testimony. Instead, it waited roughly two-and-a-half months, until the deadline for its response to Heartland's Motion for Summary Judgment, to ask the Court to compel further

deposition testimony from Heartland. 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. This is the second time that Forest River has waited until the due date for its response to a dispositive motion from Heartland to request additional discovery. The Court should not permit Forest River to repeatedly wait until Heartland has filed its Motion for Summary Judgment to formally assert its complaints about the discovery process. In accordance with Seventh Circuit precedent governing discovery motions filed after the close of discovery, Forest River's Motion to Compel should be denied as untimely.

**III. Because Heartland's Financial Representative was Prepared to Discuss the Financial Implications of All Sales of Potential Relevance in this Matter, Heartland Complied With its Duties under Rule 30(b)(6)**

On July 19, 2010, Forest River issued its Confirmation of Forest River's Notice of Deposition of Heartland's Financial Representative (the "Notice of Deposition"). (*See* Notice of Deposition, Exh. A.) The Notice of Deposition requested Heartland to produce a witness to testify on seven separate topics, each of which pertained to Heartland's accounting records and financial condition. (*See generally* Exh. A.) The nature of these topics, as well as Forest River's explicit request to depose Heartland's "financial representative," led Heartland to believe that the subject matter of the deposition would be focused entirely on accounting issues. Based on that belief, Heartland provided its Chief Financial Officer, Dennis Donat, to testify on all seven of the topics, and it prepared him accordingly.

Forest River contends that Heartland failed to provide a witness who could adequately testify as to topic number 2 in the Notice of Deposition. That topic requested that Heartland's

financial representative be prepared to discuss: "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 received from such sales, the actual costs of producing those products, and the marginal profits obtained by Heartland from such sales ('marginal profits' meaning profits without allowance for costs or services which would have been incurred regardless of those specific sales).**" (See Exh. A, Notice of Deposition, topic #2) (emphasis added.)

Because Heartland had previously produced detailed information about the 250 sales that Heartland made between October 22, 2008 to December 2, 2008, including notations indicating which of the sales were made to dealers on Forest River's "Master List," Heartland assumed that Forest River had used this information, along with the other discovery Heartland had provided, to identify the specific sales that it believed to have been caused by Heartland's allegedly unlawful conduct in this matter. Heartland also assumed that Forest River planned to identify specific sales to Mr. Donat, and that Mr. Donat would then discuss the accounting information associated with those specific sales, i.e. "the revenues received from such sales, the actual costs of producing those products, and the marginal profits obtained by Heartland from such sales." (See Notice of Deposition, Exh. A, topic #2, requesting a witness to discuss this information.)

However, Forest River apparently failed to conduct any independent analysis to determine which sales it believes were proximately caused by Heartland's allegedly unlawful conduct, even though it is Forest River's burden to prove that it suffered pecuniary loss or that Heartland received pecuniary gain from that conduct. Instead, Forest River's counsel repeatedly asked Heartland's Chief Financial Officer to draw a legal conclusion as to what sales were proximately caused by Heartland's conduct and to essentially concede that element of Forest

River's claims. For example, Forest River asked the following questions: (1) "As a result of Heartland contacting Forest River dealers using that dealer list, did Heartland obtain any particular gain?" and (2) "Do you know how many sales Heartland got as a result of anything that happened on October 22<sup>nd</sup> and 23<sup>rd</sup>?" (See Donat Dep., Exh. B, p. 201, l. 25, p. 202, ll. 1-2, p. 203, ll. 10-12.)

Mr. Donat was prepared to talk about the accounting information related to any of the 250 sales that took place between October 22, 2008 and December 2, 2008, including the 51 sales that were specifically made to dealers who were included on Forest River's "Master List." Hence, it properly prepared a witness to testify on the second topic in Forest River's Notice of Deposition. Forest River might be frustrated that Mr. Donat did not admit that any of those sales were proximately caused by Heartland's alleged wrongful conduct. However, Forest River is well-aware of Heartland's position that it did not make any sales as a proximate result of the conduct at issue in this lawsuit, and stalling these proceedings further to compel Heartland to produce a witness to reiterate that position once more is not warranted. The Court should stop Forest River's repeated refusal to respond to Heartland's Motion for Summary Judgment and deny its Motion to Compel.

### **CONCLUSION**

Motions to compel that are filed after the close of discovery are considered untimely, especially when they are not filed until after the opposition has filed its motion for summary judgment. See *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 647 (7<sup>th</sup> Cir. 2001). For that reason alone, the Court should deny Forest River's Motion to Compel. Regardless, Forest River has all of the information it needs to determine what sales, if any, Heartland made as a result of its allegedly unlawful conduct. It is Heartland's legal opinion that no sales were obtained as a



result of that alleged conduct. Requiring additional deposition testimony repeating that legal conclusion is unwarranted. For all of these reasons, the Court should deny Forest River's Motion to Compel and require that it 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