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 REPLY TO HEARTLAND'S RESPONSE TO FOREST RIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST HEARTLAND FOR UNFAIR COMPETITION

Summary of Reply:

Contrary to Heartland's assertions, Forest River is not litigating an entirely new claim by its summary judgment motion. Instead, it is litigating the same basic unfair competition-type complaint about Heartland's actions in connection with October 22-23, 2008 trade show. The difference is that since the lawsuit was filed, the scope of events which gave rise to that claim has been broadened as Heartland has revealed more about how it was able to accomplish the Hotel Action mentioned in the pleadings - by taking Forest River's private property, the Master List, through deception, and then using the Master List in various ways to interfere with Forest River's efforts in that trade show.

The issues surrounding Heartland's acquisition and use of the Master List have been litigated by the parties expressly and impliedly since shortly after this lawsuit began. Now, despite having conducted discovery itself on that issue and having had in its employ all but one of the people actually involved in that acquisition, Heartland claims it is somehow prejudiced by having to address

this issue as part of Forest River's motion for summary judgment on the unfair competition issues. No evidence is provided as to specifically what that prejudice actually is or what material facts Heartland expects to disagree with concerning the acts of acquisition if its is given the additional discovery it seeks.

As part of allowing the pleadings to now be amended to conform to the evidence presented in the case, Rule 15(b)(2) and applicable case law of this judicial circuit allow this Court to constructively amend the pleadings to include those facts as part of the basis for Forest River's claim of unfair competition against Heartland. Alternatively, Rule 15(a) is applicable to accomplish the same purpose if the Court prefers an express amendment. Accordingly, Forest River will file a Motion to Amend the Pleadings to Conform to the Evidence Presented to be co-pending herewith.

Procedural Posture of this Reply:

The deadline for filing summary judgment motions in this case was November 2, 2010. (DE#123). Accordingly, on November 2, 2010, Forest River filed its Motion for partial summary judgment. (DE#134). On December 8, 2010, Heartland filed a combined Response to that Motion and "Cross-Motion for Summary Judgment." (DE#141). Obviously, this was not a "cross motion" in the usual context. Instead, Heartland presented first its Response, that Forest River's basis for summary judgment was untimely, and then asked the Court to consider Heartland's newly filed motion for summary judgment on issues of the Master List acquisition and use only if the Response was not successful in defeating Forest River's Motion, DE#141 at page 2 and DE#142 at page 7 ("allow the remainder of this Response to serve as the brief in support of Heartland's Cross-Motion"). Further, Heartland asked this Court to allow it to reopen discovery on this issue if the

Cross-Motion was not successful, and to then allow Heartland to file yet another motion for summary judgment after that discovery. DE#142 at page 7.

Apparently, Heartland believes this procedural approach is appropriate so that Heartland can have more opportunities to argue its case than "this sole response brief," DE#142 at page 6. However, no specific prejudice has been shown from proceeding the same way a party normally would in defending against a motion for summary judgment under the Federal Rules of Civil Procedure. Similarly, no explanation was present by Heartland for not instead merely requesting oral argument or a hearing under L.R. 56.1(c) to clarify and fully present the arguments. Rather, this appears to be just an insistence that Heartland be allowed to "have the last word" and, if that fails to win its case, two more bites at the apple.[1]

Nonetheless, Forest River is not going to file a motion to strike Heartland's combined Response/Cross-Motion and start another procedural contest. Instead, Forest River has parsed the Response out of the combined filing, as requested by Heartland of the Court. Forest River now submits its Reply to that Response. Forest River will hereafter separately submit its Response to the Cross-Motion, currently due on January 10, 2011. Substantively, this means Forest River will address the issue of timeliness herein, and later address the other arguments Heartland made in DE#142 through Forest River's Response to the Cross-Motion.

Forest River will also address herein what it perceives to be the only "Genuine Issues" presented by Heartland. Unfortunately and contrary to Local Rule 56.1, Heartland did not designate

[1] In a conference call on December 27, 2010, starting at 2:00 pm between the undersigned counsel and two of Heartland's counsel, David Irmscher and Peter Meyer, Forest River offered to resolve the current summary judgment debate by consenting to deposition of the two persons Heartland wanted to depose as well as of Mike Tribble, the third person directly involved in Heartland's acquisition of the Master List. Heartland declined that offer.

any "Genuine Issues" as such in its Response. Instead, Heartland submitted a combined "Statement of Genuine Issues and Material Facts in Support," DE#143-1. Within that filing, the only numbered paragraphs which appear to function as "Genuine Issues" are ¶s29-31. Forest River will treat them accordingly herein even though they are designated instead as "Objections ."

Analysis of the Timeliness Issue:

The Pleadings:

In the Amended Answer (DE#25, at ¶75, Forest River directed Heartland's attention to the Master List, "identifying each guest who would be attending the private trade show and which hotel that guest would be staying at." Further in that pleading, Forest River directed Heartland's attention to improper acts by Heartland in connection with those guests which took place in the hotels the guests were staying at. DE#25 at ¶s 76-78. In that pleading, Forest River generally accused Heartland of unfair competition because of the Hotel Action and other related actions. DE#25 at ¶81. Also in that pleading, Forest River indicated that even apart from the Lanham Act claims, Heartland had engaged in "unfair competition, including the 'hotel action.'" DE#25 at ¶82.

Rule 8(a)(2 requires that a pleading for a claim "must contain . . . a short and plan statement of the claim showing that the pleader is entitled to relief." Also, even as between these same two litigants it has been held by this Court that a claim in the pleading "is facially plausible if a court can reasonably infer from the factual content in the pleading that the defendant is liable for the alleged wrongdoing." *Forest River, Inc. v. Heartland Recreational Vehicles, LLC,* Case No.: 3:09-cv-302, DE#19 in that case, at pages 1- 2 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009)). Further, when Heartland has previously objected to Forest River's counterclaim pleadings, the Court in this

lawsuit has twice pointed out to Heartland that "[a] complaint need not set forth all the relevant facts or recite the law; all that is required is a short plain statement . . . Under the federal pleading rules, a plaintiff is not limited to or bound by the legal characterizations of his claims contained in the complaint. *Forseth v. Village of Sussex*, 199 F. 3d 363, 368 (7th Cir. 2000)." DE#32 at page 3; DE#38 at page 4. The federal rules still envision "notice pleading."

Clearly, from the Amended Complaint it is clear that Heartland is being accused of unfair competition. It can be reasonably inferred from the Amended Complaint that the Master List, showing the guests and identifying each guest's hotel, had something to do with Heartland's attempt to contact each guest at that hotel. Thus, Heartland had fair notice that this was an issue for discovery. Accordingly, the argument Heartland makes in its Response, that Forest River did not expressly recite in the pleadings that Heartland "acquired a Forest River Master List" and "used Forest River Master List in any manner," DE#142 at page 3, does not justify ignoring the clear inference that those events were part of the "unfair competition" being claimed.

The Actual Litigation of Master List Acquisition and Use:

In fact, that inference was not lost upon Heartland. The events surrounding Heartland's acquisition and use of the Master List were actually litigated expressly and impliedly by the parties throughout this lawsuit. In reviewing the following time-line of these events, it is important to note that how Heartland obtained a copy of the Master List and its admission of thereafter using that list were first disclosed to Forest River by Mr. Tim Hoffman, one of the owners of Heartland and its

Rule 30(b)(6) designee in this regard, at his deposition on June 17, 2009. Ex A[2] as highlighted at pages 269-270, 274-275, and 278.

	1. October 22-23, 2008	The Forest River trade show in issue
	2. October 24, 2008	The Complaint in this lawsuit is filed by Heartland
	3. November 17, 2008	Forest River serves its Answer (patent issues only) - DE#6
	4. December 12, 2008	Forest River Notices Tim Hoffman deposition for 1/9/2009 - Ex. M hereto
	5. January 9, 2009	Heartland fails to attend Hoffman deposition or to provide other acceptable scheduling of that and related depositions of Heartland employees.
**	6. January 12, 2009	Motion for Amended Complaint filed alerting Heartland to unfair competition issues and inference of Master List involvement - DE#21.
	7. January 23, 2009	Forest River serves its Initial Disclosures, listing Mike Creech, a Heartland employee, as a witness re Master List ("list of dealers and the hotels they were staying at") acquisition and use issues. Ex. N at ¶1b.

[2] Forest River used an alphabetical numbering system for its exhibits in this motion. Heartland's Response uses the same alphabetic numbering system for its exhibits, resulting in an overlap and duplication of in exhibit numbers. In this Reply, Forest River will continue the original alphabetic system it started with, picking up with the next available indicia and incorporating a summary index at the end of this document. So as to avoid confusion between the two systems, Forest River will not herein make reference to any of Heartland's exhibits. All exhibits mentioned herein are referenced by only the Forest River designation.

8. February 11, 2009	Hearing on Heartland's Motion to Dismiss where **Forest River expressly states on the record that it is changing the legal theory upon which relief should be granted.** See DE#32 at footnote 1 in that regard as well as the Court's admonition that the parties re-evaluate their claims.
9. February 18, 2009	Court issues Order in which it denies Heartland's first motion to dismiss and expressly indicates that while it doubts whether Forest River has adequately pled a Lanham Act violation, Forest River "plausibly alleges a claim for unfair competition." DE#32 at pages 7-8. (This marks a shift in the discovery efforts as well, since Forest River is not oblivious to judicial comment.)
10. May 4, 2009	Forest River serves a Rule 30(b)(6) Notice of deposition of Heartland, expressly specifying discovery on acquisition and use of the Master List ("the list of Forest River dealers and the hotels those dealers would be staying at on or about October 22 and 23, 2008, as referred to in the Amended Answer"). Ex O hereto at ¶17.
11. June 17, 2009	Deposition of Tim Hoffman where Heartland reveals how it obtained and used the Master List. Ex A as highlighted at pages 269-270, 274-275, and 278.
12. July 1, 2009	Forest River serves its Second Production Requests, ¶18

dealing with Heartland's use of the Master List given to Brad Whitehead by Rod Lung. Ex. P hereto.

13. August 10, 2009 — Forest River serves its Responses to Heartland's interrogatories, wherein ¶9 expressly recites that Rod Lung's deception of Mike Tribble was attributed to Heartland as a misrepresentation in connection with the Hotel Action and ¶11 expressly indicates that action supports at least one of Forest River's counterclaims against Heartland. Ex. Q hereto.

14. November 9, 2002 — Forest River serves its Supplemental Initial Disclosures wherein ¶1d expressly lists Rod Lung and Mike Tribble as witnesses it intends to use "as to events involving and leading up to the Hotel Action." Ex. R hereto.

**At this time and until Aug. 2010, Mr. Tribble and Mr. Whitehead were both Heartland employees.

15. January 21, 2010 — Forest River files a motion, DE#87, where it expressly recites on page 3 that its unfair competition claim is "**related to** the Hotel Action," indicating that there is more to the matter than just what happened at the hotels.

16. February 26, 2010 — Forest River files a motion to compel, DE#96, wherein it expressly states that the unfair competition claim is based upon Heartland obtaining and using the Master List through the actions of Rod Lung (and that this issue has been litigated at least by express or implied consent since Feb. 18, 2009.

	DE#96 at pages 2-3) and that the sought after discovery is needed to support that claim.
17. March 15, 2010	Responding to that motion to compel, tries to assert that basing unfair competition upon the acquisition and use of the Master List is a "second unfair competition claim." DE#102 at pages 11-12.
18. March 26, 2010	Forest River files its Reply to Heartland's Response, expressly refuting Heartland's contention that a second unfair competition claim was being raised. DE#111 at page 6, footnote 2.
19. March 31, 2010	The Court grants Forest River's motion to compel and orders the discovery sought in all respects relevant to the unfair competition liability issues. DE#112.
20. July 19, 2010	Forest River serves a Rule 30(b)(6) Notice of deposition of Heartland, expressly specifying discovery on sales "as a result of obtaining the Master List ("the list of Forest River dealers who were planning . . ."). Ex S hereto at ¶2.
21. August 12, 2010	**Heartland's Interrogatories to Forest River seeking discovery on "Heartland's allegedly unlawful conduct" and "for each counterclaim . . . the specific conduct of Heartland that caused the damages..."** Ex. T hereto, ¶s 12 and 14.

22.	September 14, 2010	**Forest River's responses to those interrogatories, setting forth the events of Heartland's acquisition and use of the Master List ("the Forest River dealer list for the private dealer show") as a basis for the counterclaims and damages**. Ex. T hereto, ¶s 12 and 14.
23.	October 1, 2010	Forest River files a motion based upon the need for discovery as to events and documents which "determine Heartland's "profits's" from using the Master List." DE#125 at page 2.
24.	November 2, 2010	The Court grants that motion, noting that Forest River has made a proper showing of need for that information. DE#133 at page 2.

In addition, Heartland and Forest River each questioned several witnesses about Heartland's acquisition and use of the Master List in several depositions, including that of Brian Brady, John Rhymer, Jeff Babcock, John Leonard, Jack Plummer, and Dennis Donat.

Clearly, it is not true (as Heartland argues in DE#142 at page 1) that the unfair competition claim based upon Heartland's acquisition and use of the Master List is "completely distinct" from the counterclaims stated in the pleadings. The Hotel Action *per se* was only one way Heartland used the Master List. As soon as the facts began to come out as to how else Heartland used the Master List and how it obtained that list, they were litigated throughout discovery. Further, it is not true (as Heartland argues in DE#142 at page 1) that Forest River "cannot point to any other filings confirming that they [the Master List acquisition and use issues] are part of this case." Also, it is not true (as Heartland argues in DE#142 at page 4) that Heartland did not know (or had no reason to

know in the exercise of due diligence) until February 24, 2010 that Forest River's unfair competition claim was based upon the actions of Heartland in obtaining and using the Master List. Even if that was the first time such realization struck Heartland, it was expressly informed on March 26, 2010 that it was dealing with only a single, overall unfair competition claim based upon the events in connection with the October 2008 trade show (not a second, distinct claim) and on March 31, 2010 that the issues around that claim are proper discovery in this lawsuit. The most important witnesses as to the deception in acquiring the Master List, Rod Lung, Brad Whitehead, and Mike Tribble, were known to Heartland, and Heartland knew that at least two of these persons would be relied upon as witnesses by Forest River. Further, Heartland had two of those persons in its employ and fully available to it for information at least until August, 2010. Heartland itself actually conducted discovery on the Master List acquisition and use issues and was fully informed by September 14, 2010 that Forest River was relying upon those events as the basis for its unfair competition counterclaim. If Heartland did nothing to obtain full discovery in this regard, that was a self-inflicted wound.

Further, Heartland has submitted no explanation as to what discovery it would have conducted relevant to Forest River's Motion if it had been "fully awake" to the claim basis. There is, for example, no declaration of counsel submitted under Rule 56(d). Further, if the facts are contested as to the deception of Mike Tribble, why is there even to this day no declaration from Mr. Tribble describing his side of the story filed by Heartland? He is even now at Heartland's beck and call to do so. On December 27, Heartland was expressly offered the chance for discovery even now on those key witnesses. Instead, Heartland demonstrates its belief that it has the evidence it needs to oppose the motion through the arguments made in its "Cross-Motion." Heartland's objections

based upon some "prejudice" which Forest River has caused are not convincing. [3]

Applicable Rules of Law and Analysis of Legal Argument:

It has long been the rule that "[t]he Federal Rules of Civil Procedure create [a system] in which the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence." *Matter of Prescott*, 805 F. 2d 719, 724 (7th Cir. 1986). "The procedure for amending the pleadings to conform to the evidence is established by Federal Rule of Civil Procedure 15(b)." *Id.*

Fed. R. Civ. P. 15(b)(2) provides:

> "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move -- at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue."

Contrary to Heartland's assertion in DE#142 at page 5, this rule does not apply only "During and After Trial." The leading case in our judicial circuit which is directly on this point is *Torry v. Northrop Grumman Corp.*, 399 F. 876 (7th Cir. 2005)(exploring at length the doctrine of "constructive amendment" and the realities of Rule 15(b)). That case expressly applied Rule 15(b)(2) in the context of a summary judgment motion. Further, that court noted "the question is simply whether the issue [of the case] was (pre)tried by implied consent of the parties." *Id.*, at 879. District courts in this circuit have expressly relied upon *Torry* in applying Rule 15(b) to summary

[3] Heartland's so-called reliance upon the Complaint in the fourth lawsuit is not convincing. That Complaint expressly states at the outset that it is expected to be consolidated with this case. Heartland was expressly informed that it was filed to prevent any statute of limitations issues from arising, and that it has not yet been served.

judgment motions. *E.g., Bannon v. University of Chicago,* 2006 WL 1722374, at *6 (N.D. Ill. June 16, 2006).[4]

It is well established that amendments to the pleadings under Rule 15(b)(2) are designed to facilitate decisions on the merits and are subject to the generally liberal amendment policy of Rule 15. *E.g., First Nat'l Bank of Louisville v. Continental Ill. Nat'l Bank and Trust Co. of Chicago*, 933 F. 2d 466, 468-469 (7th Cir. 1991). The test of whether or not there has been express or implied consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Prescott*, 805 F. 2d at 725, quoting from *Hardin v. Manitowoc-Forsythe Corp.*, 691, F. 2d 449, 456 (10th Cir. 1982).

In the present case, at the very least Heartland knew the basis of Forest River's unfair competition claim by the Responses given to the Second Set of Interrogatories on September 14, 2010. The reality, however, is that any reasonable party would have known much, much sooner, at least by the August 10, 2009 Interrogatory responses, and certainly by the March 26, 2010 motion Reply. Realistically, it is neither credible nor creditable that Heartland did not know the jig was up

---

[4] It should be noted that there appears to be a split of authority between the various judicial circuits on the applicability of Rule 15(b)(2) to summary judgment motions. *Ahmad v. Furlong*, 435 F. 3d 1196, 1203 at fn 1 (10th Cir. 2006) notes this and collects representative cases. The case cited by Heartland, *Valley Entertainment, Inc. v. Friesen*, 691 F. Supp. 2d, 821 (N.D. Ill. 2010) actually cites *Bannon* and notes *Torry,* but cannot be in accordance therewith outside of the specific facts of that case, wherein a second copyright registration, which had been refused identification in discovery, was sought to be added in summary judgment and there had been no showing of implied consent. As for Heartland's "leap" to a draconian dismissal with prejudice, citing *Ellis v. CCA of Tenn, LLC,* 2010 WL 2605870 (S.D. Ind. June 21, 2010), that case is highly distinguishable from this lawsuit on the facts. In *Ellis*, the previous claims had been subject to a judgment against them. Thus, res judicata applied from the prior judgment, not to a denial of amendment to still pending claims, such as we have here.

when Tim Hoffm and admitted what Heartland had done in his deposition of June 17, 2009.

In all that time, Heartland could have done any number of things to obtain and present additional evidence. Heartland did nothing, preferring instead to wait it out. That decision to "roll the die" was an intentional strategy of Heartland, not an unexpected prejudice.

Analysis of Heartland's Geniune Issues:

In ¶29 of DE#143-1, Heartland complains that the pleadings did not expressly recite the acquisition and use of the Master List as a basis for the unfair competition claim. However, as explained above, the pleadings did not need to do that. Thus, while this may be an "issue," it is not a "material" issue, since it does not affect the outcome of the case under applicable law. Such irrelevant facts do not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986).

In ¶30 of DE#143-1, Heartland asserts that Mr. Lung's declaration demonstrates that he obtained the Master List by an exchange. That is certainly true. However, an express condition of that exchange was the promise of confidentiality, as shown in that same declaration. Thus, there is no genuine issue of material fact raised, just a disagreement of the extent of emphasis to be placed upon known and agreed to facts.

In ¶31 of DE#143-1, Heartland asserts that the "email from Heartland employee Coley Brady, contains no indication whatsoever that the Master List was used to arrange those meetings." That email must be read in context, however. In this case, the context is the express testimony of Tim Hoffman that the Master List was used for exactly that purpose, as shown by Ex. A in the highlighted portions at pages 269-270, 274-275, and 278. Thus, the email was evidence of the result of Mr.

Hoffman's instructions to his employees. Again, this creates no genuine issue of material fact.

Conclusions:

The timeliness objection of Heartland to the present Motion for summary judgment has no merit since Heartland had amble notice of and consented to litigation of the Master List acquisition and use basis for Forest River's unfair competition claim throughout this case. Heartland has raised no genuine issues of material fact in opposition to the present Motion.

Dated: December 29, 2010

Respectfully submitted,

s/Ryan M. Fountain

Ryan M. Fountain (8544-71)
RyanFountain@aol.com
420 Lincoln Way West
Mishawaka, Indiana 46544
Telephone: (574) 258-9296
Telecopy: (574) 256-5137

ATTORNEY FOR FOREST RIVER, INC.

Certificate of Service

I certify that on December 29, 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:

David P. Irmscher david.irmscher@bakerd.com

s/Ryan M. Fountain

Ryan M. Fountain
ATTORNEY FOR FOREST RIVER, INC.

COMBINED INDEX OF EXHIBITS

Exhibit A	Excerpts of Hoffman deposition transcript
Exhibit B	Declaration of Mr. Lung
Exhibit C	Creech email
Exhibit D	C. Brady email (Filed under Seal in Appendix)
Exhibit E	Leonard email (Filed under Seal in Appendix)
Exhibit F	Walczak email (Filed under Seal in Appendix)
Exhibit G	Heartland email re Hotel Stuffing
Exhibit H	Excerpts of Gearhart deposition transcript
Exhibit I	B. Brady email
Exhibit J	Excerpts of B. Brady deposition transcript
Exhibit K	Excerpts of Donat deposition transcript
Exhibit L	Excerpts of Leonard deposition transcript
Exhibit M	Notice of Deposition - Tim Hoffman
Exhibit N	Forest River's Initial Disclosures
Exhibit O	Notice of Deposition - Heartland Rule 30(b)(6)
Exhibit P	Forest River's 2d Requests for Production
Exhibit Q	Forest River's Response to Heartland's 1st Interrog.
Exhibit R	Forest River's Supplemental Initial Disclosures
Exhibit S	Confirmation Notice of Deposition of Heartland
Exhibit T	Fores River's Responses to Heartland's 2d Interrog.