

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

HEARTLAND RECREATIONAL)	
VEHICLES, LLC,)	
Plaintiff,)	
)	CASE NO.: <u>3:08-cv-490 AS- CAN</u>
v.)	
)	
FOREST RIVER, INC.,)	JURY DEMAND
Defendant.)	

**FOREST RIVER’S RESPONSE TO HEARTLAND’S
FIRST INTERROGATORIES TO FOREST RIVER, INC.**

Interrogatory No. 1: Identify any basis that you contend supports your defense that the Patent is Suit is invalid pursuant to the provisions of 35 U.S.C. §§ 102 and 103, including all prior art upon which you rely.

Response: Pursuant to agreement of counsel, this Interrogatory was withdrawn because Heartland’s covenant not to sue is intended to eliminate the charge of patent infringement made directly against Forest River; there is probably no longer any “defense” which is relevant in this case at the present time, although a decision of the Court on Heartland’s third motion to dismiss is still pending in that regard. However, the substance of several of the deficiencies in the Patent in Suit under 35 U.S.C. §§102 and 103 which also form part of the bases for the unenforceability claims are incorporated in the response below.

Interrogatory No. 2: State any basis that you contend supports your defense that the Patent in Suit is invalid pursuant to the provisions of 35 U.S.C. §§101 and 112.

Response: Pursuant to agreement of counsel, this Request was withdrawn because Heartland's covenant not to sue is intended to eliminate the charge of patent infringement made directly against Forest River; there is probably no longer any "defense" which is relevant in this case at the present time, although a decision of the Court on Heartland's third motion to dismiss is still pending in that regard. However, the substance of several of the deficiencies in the Patent in Suit under 35 U.S.C. §§102 and 103 which also form part of the bases for the unenforceability claims are incorporated in the response below.

Interrogatory No. 3: State any basis that you contend supports your defense that the Patent in Suit is unenforceable as a result of inequitable conduct.

Response: The Interrogatory is objected to as ambiguous and indefinite. Specifically, the phrase "any basis" could refer to facts, legal case citations, statutory authority, documentary evidence, credibility evidence, etc. Strictly speaking then, Forest River could respond by simply stating that the deposition transcript of Brian Brady is a basis which supports the claim of inequitable conduct which renders that patent unenforceable since Mr. Brady admitted therein to facts which show his false execution of the Declaration of inventorship. However, Forest River has other several bases in that regard and does not wish to suggest to Heartland that the inequitable conduct issue is that simple. Accordingly, Forest River will provide herein a brief summary of the primary factual bases for the inequitable conduct claim, as those bases are presently known to Forest River. Obviously, a great deal of supplementation is possible, but given that Heartland has not as yet set forth its contentions by answering the pleadings, it is not known how much more detail is really relevant at this time. Accordingly, excess supplementation is objected to as unduly burdensome and

oppressive. The listing is as follows:

1. At least three of the named inventors executed the Declaration of inventorship, Trial Exhibit 2, under false pretenses - having not read the application sufficiently to understand its content and claims, having falsely asserted inventorship, and having not disclosed to the USPTO the information required under 37 CFR 1.56. That falsity was known or should have been known by the primary patent attorney they appointed to represent them before the USPTO, Gregory S. Cooper. Mr. Cooper was personally bound both under 37 CFR 10 et seq., and 37 CFR 1.56 to prevent the patent application from being prosecuted under those circumstances.

2. Mr. Cooper and the succeeding patent attorneys who were directly involved in prosecuting the patent application, Gerald Gallagher and Thomas Mauoh, either failed to communicate with the inventors sufficiently to gather the information known to the inventors or failed to pass on to the USPTO information obtained from the inventors with respect to:

a. the nature of the invention itself - the invention, in the minds of the inventors at least, lay in the spaced apart, mating curvatures of the trailer lower corner to the truck cap upper corner, rather than in any one or two particular frame designs to accomplish that invention. Frame design was instead recognized by the inventors as a mere matter of design choice, to be selected and dimensioned in the normal course of events from a wide variety of potential formats, as was well known in the industry.

b. the known scope and content of the prior art, including the fact that travel trailers, horse trailers, cargo trailers, park model homes, modular homes, and some boat trailers are all made by many of the same manufacturers and are structurally related to a high degree, especially as to chassis design and construction; also, that many of those trailers have

common functions and are sold through the same channels of trade, including at common trade shows such that persons familiar with travel trailers and fifth wheels are likely to also be familiar with horse trailers and cargo trailers which have living quarters formed within; also, that trailer chassis designs have been made with a wide range of variation and structural equivalence such that locating any particular side beam, end beam, or cross beam at any particular location according to a particular use or fit was widely known as a matter of design choice; also, that adapting fifth wheel trailer chassis to include as interchangeable features notched or angled front corners to support a particular cap configuration was well known, such as shown by Trial Exhibits 40 and 41, especially so as to maximize “floor plan to footprint” ratios of larger trailers; also, that as pointed out in the Amended Answer, Defenses, and Counterclaims, one or more of the inventors were aware of the specific prior art illustrated therein and/or of prior art having a similar structures and/or purposes to those illustrated examples; also, that the RVIA and other trade organizations to which Heartland and/or the inventors belong cover a range of closely related products using similar trailer chassis; and also, that there was additional relevant and material prior art in existence and known to the inventors in the United States and foreign RV markets, such as the travel trailers of Trial Exhibit 30, having angled front corners, various V nose trailers, and cargo trailers with forward ramp doors or fifth wheel formats supported on trailer chassis.

c. the known level of ordinary skill of those persons who were involved in the design of some or all portions of travel trailers and fifth wheels, including the average years of experience and education of those persons, as well as the fact that many of the employees involved in the design and construction of such trailers will change jobs within that general

industry, making travel trailers at one time, cargo trailers at another, modular homes at another, etc., such that they become familiar with the construction of a wide range of such products; also, that persons of ordinary skill in the design of some or all portions of travel trailers and fifth wheels would have been exposed to and aware of many of the features of such products from trade shows, dealer servicing, and living in RV oriented communities like Elkhart County, IN; and also, that travel trailers and fifth wheels are typically designed in whole or part by a team of persons, such that “a person of ordinary skill in the art” within the meaning of the patent laws would actually have attributed to him or her that collective level of skill and experience.

d. the differences and similarities between the claimed invention of the patent application and the prior art cited by the USPTO.

As a result, these patent attorneys obtained the issuance of a patent which was not directed to and did not claim the real “invention” of the named inventors. Further, the final, fully amended application for that patent was defective under 35 U.S.C. §112 for not “particularly pointing out and distinctly claiming the subject matter which the [named inventors] regards as [their] invention” and for not “enabling” one of ordinary skill in the art to make and use that invention. Thus, the failings of these persons were relevant and material to the invalidity of the patent in this lawsuit.

3. Neither Heartland, who was also bound by 37 CFR 1.56, nor any of the named inventors corrected those mistakes of the patent attorneys even though they were, according to the fully executed Declaration of inventorship, knowingly bound to do so, upon pain of patent invalidity.

4. Heartland’s patent attorneys intentionally and repeatedly mislead the USPTO as to the scope and content of the prior art by refusing to admit in Information Disclosure Statements (“IDSs”)

filed with the USPTO that certain “prior art” was in fact “prior art.” Those attorneys knew or should have known that the documents submitted with the IDSs really did disclose prior art.

5. Heartland’s attorneys failed to bring to the attention of the USPTO prior art which was disclosed to them by Forest River during the pendency of the patent application even when they were aware that Forest River considered that prior art to be so relevant and material that it created a defense to the patent infringement charge being made by Heartland against Forest River. Instead, Heartland waited until after the patent issued and this lawsuit was filed and brought that prior art to the USPTO in a “submarine” patent application, but still doing so in a manner which misled the USPTO as to the significance of that prior art. Further, even when required by the USPTO to provide a fuller disclosure in the record of the submarine patent application of the arguments about the prior art which were made in a non-public hearing on December 4, 2008 with the USPTO, Heartland failed to do so, intentionally keeping secret those arguments so as to not reveal their own failure to comply with 37 CFR 1.56 in the parent patent and/or to keep secret admissions against interest which could be used under the Doctrine of File Wrapper Estoppel to interpret the patent claims more narrowly than Heartland was asserting against Forest River. Further, immediately after June 15 - 17, 2009, when the deposition testimony of Heartland’s own employees under oath asserted that there was false inventorship in the parent patent application (which is also attributed to the submarine patent application as a matter of law) Heartland’s attorneys rushed to pay the issue fee in the submarine patent application on June 24, 2009 so as to close down prosecution of the submarine patent application before the transcript of those depositions was created. This was done to deceive the USPTO into issuing the submarine patent quickly so that it could be used by Heartland to argue a “purge” of the inequitable conduct in not bringing the Forest River prior art to light in the

parent patent. Specifically, Heartland thought to argue that the Forest River prior art was not relevant and material because the USPTO somehow issued the second patent anyway. However, in doing so, Heartland's attorneys compounded the fraud on the USPTO.

6. Heartland was motivated to commit inequitable conduct in these ways by the direct financial benefit it was obtaining from an inflated valuation of the patent which was used in a particular corporate financial structuring of the company. Invalidation of the patent or denial of issuance by the USPTO would probably have directly brought about a financial collapse of Heartland. Forest River has not been permitted to see the actual documentation of this situation, but has been informed by its attorney that substantial evidence exists to support this conclusion as a result of information received in part under and "Attorneys Eyes Only" restriction.

Interrogatory No. 4: Identify and describe all information that you allege should have been, but was not, disclosed to the U.S.P.T.O. during the prosecution of the Patent in Suit.

Response: See the Response to Interrogatory No. 3 for the general "description" of that information and for specific "identification" of much of the information. Identification of "all information" is objected to at this time due to Heartland's failure to answer the pleadings and refusal to provide a witness to testify as to patent prosecution of the meaning of the claims terms. Without that participation by Heartland, the range of what is relevant and material information cannot be established. As a result it, would be unduly oppressive and burdensome on Forest River to list all possible information in this regard.

Interrogatory No. 5: Identify and describe all information relating or referring to any offer for sale,

sale, public use (whether experimental or non-experimental), disclosure (whether confidential or not confidential), or publication of information by anyone relating to the alleged invention described and/or claimed in the Patent in Suit that occurred on or before the filing date of the application that led to the Patent in Suit.

Response: This Interrogatory is objected to as being either a breach of the covenant not to sue or irrelevant since the subject matter appears to be directed to “defenses” against a charge of patent infringement which Heartland claims it is no longer asserting against Forest River. To the extent that Forest River has such information which is being used as a basis for the unenforceability claims, see the Responses above to Interrogatory Nos. 3 and 4.

Interrogatory No. 6: State whether you have requested any opinions of counsel that refer or relate to the issues of validity and/or unenforceability of the subject matter of the Patent in Suit.

Response: Yes.

Interrogatory No. 7: State any basis you contend supports your allegations that the Patent in suit is unenforceable.

Response: See Response to Interrogatory Nos. 3 and 4. In addition, there are a number of “documents” which have been produced and/or made available for inspection by Forest River to Heartland incident to Forest River’s Response to “Heartland’s First Set of Requests for Production of Documents to Forest River.”

Interrogatory No. 8: Identify all information or documents that support Forest River’s contention that

the Hotel Action resulted in lost sales to Forest River.

Response: This Interrogatory is objected to as being unduly burdensome and oppressive, especially in light of Heartland's failure to answer the pleadings, thus preventing a more restricted scope of relevance to be used in answering this interrogatory. "All information" could, by its nature reach to minutia of detail of facts, witnesses, corroborating witnesses, credibility evidence, etc. which are not truly in issue here, but we have no way of knowing the need for that until Heartland actually participates in the case. Still, Forest River will set forth the general type of information and sufficient specific examples which provide sufficient understanding of the nature of the contentions. In addition to the information set forth in the Amended Answer, Defenses, and Counterclaims, beginning at ¶73 therein, there are a number of "documents" which have been produced and/or made available for inspection by Forest River to Heartland incident to Forest River's Response to "Heartland's First Set of Requests for Production of Documents to Forest River." Further, the transcripts of the depositions of Mr. Brady, Mr. Rhymer, and Mr. Hoffman, and, in particular Trial Exhibit 14 therein provide support for this contention.

Briefly, Exhibit 14 and Mr. Brady's deposition testimony demonstrate that six to ten dealers were drawn to visit Heartland from the Forest River trade show as a result of the Hotel Action. Mr. Hoffman's testimony and the "Attorneys Eyes Only" documents provided by Heartland concede that at least one of those visiting dealers made purchases of a line Heartland products which it was not previously buying. Forest River and Heartland are in direct competition over Heartland's entire product line. Thus, any such purchases by a Forest River dealer under these circumstances is most likely to be at the expense of buying similar products from Forest River. Further, it is likely that additional dealers also made purchases as a result of the Hotel Action, especially because of

Heartland's deliberate attempt to conceal those dealers from Forest River incident to document production. In particular, documents relating to Heartland dealers #10751, 10753, 10754, 10755, 10757, or 10758 have been withheld from Forest River even though Heartland's summary records show these dealers to have signed up with Heartland at or shortly after the Forest River trade show. Further, Trial Exhibit 14's boast of the success of the Hotel Action supports the conclusion that more than one dealer made such purchases. In addition, the content of the packages themselves contained comparative advertising against Forest River products, thus suggesting that the dealer was to choose between Forest River and Heartland for such purchases.

Interrogatory No. 9: Identify all misrepresentations or untruthful statements alleged to have been made by Heartland in connection with the Hotel Action, including but not limited to, any misrepresentations or untruthful statements alleged to have been made by Heartland in an effort to obtain Forest River's customer list in connection with the Hotel Action.

Response: Based upon current information:

1. Rod Long misrepresented himself while an employee of Open Road and his interest in the Forest River dealer list to Mike Tribble, the Forest River employee he ultimately obtained the initial list from. In particular, Rod was given that list in confidence and expressly represented to Mike that it would go no further than him. However, at the time, Rod knew that he had been asked by Heartland to obtain the list for Heartland and that he intended to pass the list on to Heartland.

2. Mike Creech misrepresented himself while an employee of Heartland in re-establishing a relationship with Dawn Splawski, an employee in Forest River's corporate offices, shortly before the Forest River trade show began. Mike's real purpose was not friendship with Dawn, but rather

to obtain the updated dealer list, having several new entries since the list was obtained from Mr. Tribble. See Trial Exhibit 43, a copy of which is attached hereto, showing emails between Mike and Dawn the day before the trade show. Immediately after the Hotel Action, Mike misrepresented himself and his intentions to Dawn with respect to his knowledge of the Hotel Action and the source of the list Heartland did obtain. Mike then abruptly and without explanation ceased his relationship with Dawn.

3. Heartland concealed both the emails and text messages of Mike Creech to Dawn and the Trial Exhibit 14 emails of Mr. Brady to dealers from Forest River during discovery in this lawsuit, asserting that those documents did not exist, even though Heartland's lead trial counsel asserted that no such records had been destroyed.

4. As testified to by Mr. Rhymer in his deposition, Tim Hoffman lied to Mr. Rhymer when describing the Hotel Action after the event, in an attempt to conceal the facts even from one of Heartland's owners.

5. Heartland told at least the receptionist at the Hyatt Place hotel that the packages were from Forest River and needed to be delivered right away to the dealers since they were important and were needed for a dealer meeting the next day. The Heartland employee was photographed doing so, and copies of those photos were previously provided to Heartland.

6. Heartland misled the receptionist at Country Inn & Suites into thinking the packages were to go along with the Forest River party in part by his mannerisms and in part by having the specific dealer's name on the cover and asking for a call back to pick up the undeliverable packages.

7. Heartland misled and made false statements to the receptionist at Residence Inn by asking for the room number of the named guests to be looked up and marked on the packages, then evading

inquiry about his identity and who the packages were from and if the guests were expecting the packages, and then expressly denying that he knew what the packages were for.

Interrogatory No. 10: Identify all information or documents that support your contention that the Hotel Action caused any disruption or confusion (including initial interest confusion) among the guests of Forest River's trade show on or about October 22, 2008.

Response: This Interrogatory is objected to as being unduly burdensome and oppressive, especially in light of Heartland's failure to answer the pleadings, thus preventing a more restricted scope of relevance to be used in answering this interrogatory. "All information" could, by its nature reach to minutia of detail of facts, witnesses, corroborating witnesses, credibility evidence, etc. which are not truly in issue here, but we have no way of knowing the need for that until Heartland actually participates in the case. Still, Forest River will set forth the general type of information and sufficient specific examples which provide sufficient understanding of the nature of the contentions. In addition to the information set forth in the Amended Answer, Defenses, and Counterclaims, beginning at ¶73 therein, there are a number of "documents" which have been produced and/or made available for inspection by Forest River to Heartland incident to Forest River's Response to "Heartland's First Set of Requests for Production of Documents to Forest River." Further, the transcripts of the depositions of Mr. Brady, Mr. Rhymer, and Mr. Hoffman, and, in particular Trial Exhibit 14 therein provide support for this contention.

Briefly, David Richgurber, one of the guests at Country Inn & Suites who received a Heartland package as a result of the Hotel Action complained to the hotel receptionist about the event so much so that the receptionist attempted to get back many of the packages she had delivered

by entering the guests rooms, and then contacted hotel management about the incident and called to warn another hotel involved in the Forest River trade show. See also Trial Exhibit 42. Also, various Forest River employees were told stories and comments about the Hotel Action while the Forest River trade show was in progress. Further, as noted above, Mr. Brady testified that six to ten dealers were drawn from the Forest River event to Heartland as a result of the Hotel Action. That only one (as far as Heartland will admit) such dealer ended up buying products still means that the remaining five to nine dealers were at least also distracted from the Forest River trade show in progress

Interrogatory No. 11: Identify all information or documents that support Forest River's counterclaim against Heartland for Criminal Deception.

Response: See the responses to Interrogatory Nos. 8 - 10. Beyond that, no calculation has been made as yet for the special damages permitted by this claim, although it is inherent that such damages will exist in terms of the Forest River employee time involvement. Accordingly, further detail is objected to at this time.

I, Jeff Babcock, Vice President of Forest River, Inc., hereby declare that the facts set forth in the foregoing Responses are true and correct based upon my knowledge, information, and belief.

Dated: _____

Dated: August 10, 2009

Respectfully submitted as to objections,

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Certificate of Service:

I certify that a copy of the foregoing document was served upon the Plaintiff in this case by depositing that copy with the United States Postal Service for delivery via First Class mail, postage pre-paid, on August 10, 2009, addressed for delivery to the following counsel for that party:

David P. Irscher
Baker & Daniels
111 East Wayne, Suite 800
Fort Wayne, IN 46802

A courtesy copy was sent via fax as well on that date.

Ryan M. Fountain