

**UNITED STATES DISTRICT COURT**  
Northern District of Indiana  
South Bend Division

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

**FOREST RIVER’S RESPONSE IN OPPOSITION TO  
HEARTLAND’S CROSS-MOTION FOR SUMMARY JUDGMENT, (DE#141)**

**Procedural Status of this Response:**

On December 8, 2010, Heartland filed a combined Memorandum in response to Forest River’s motion for partial summary judgment and in support of its cross-motion for summary Judgment. DE#142. The Response issues were parsed out of the Memorandum, and Forest River submitted its Reply thereto on December 29, 2010. DE#154. The remaining cross-motion issues are addressed herein.

**Summary of Response:**

1. The unfair competition claims are not pre-empted by the Uniform Trade Secrets Act because the unfair competition claims are not based solely upon Heartland’s misappropriation and use of confidential information/trade secrets. Instead, the unfair competition claims in Forest River’s motion for summary judgment are based in part upon Heartland’s use of deception to obtain the Master List in violation of IC 35-43-1-2(a)(2) and upon Heartland’s interference with Forest River’s

business relations.

2. Heartland's effort to show that no vicarious liability attaches to itself fails because it focuses only on the wrong person, Mr. Lung. While Mr. Lung was not an employee, Mr. Whitehead, the person who caused Mr. Lung to deceive Mr. Tribble, and the person who obtained the Master List for Heartland, was an employee and manager of Heartland. Further, Mr. Hoffman, knowing the Master List was obtained from Heartland and being an owner and officer of Heartland, ratified that acquisition and made use of the list to interfere with Forest River's attempts to sell products to its dealers at the private trade show. Heartland's argument also fails because liability is direct, not vicarious, Heartland caused the events to happen under a "but for" standard.

3. Forest River is not advocating a new cause of action, merely articulating the existing unfair competition cause of action in a more comprehensive manner.

4. Under IC 35-43-1-2(a)(2) the standard of liability is deception, not fraud.

5. Heartland is not "justified" because of its wrongful acts in obtaining the Master List.

6. Showing a single dealer sale is not needed when you can show many.

7. There are numerous genuine and material issues of fact, as detailed herein, upon which Heartland's motion depends.

**1. As to the Preemption Arguments:**

IC 24-2-3-1(c), the Indiana Uniform Trade Secrets Act ("IUTSA"), expressly states that "the [IUTSA] displaces all conflicting law of this state pertaining to the misappropriation of trade secrets, except contract law and criminal law." However, where other laws of this state pertaining to misappropriation of trade secrets provide a private action which is derived from the criminal law,

the IUTSA does not pre-empt those other laws. *AGS Capital Corp., Inc. v. Product Action Intern., LLC*, 884 N.E. 2d 294, 308-309 (Ind. App. 2008)(RICO claim for theft of trade secrets not pre-empted). Further, this very Court has previously instructed Forest River that where more than mere misappropriation of trade secrets is involved, the IUTSA does not pre-empt the claims. *Patriot Homes, Inc. v. Forest River Housing, Inc.*, 489 F. Supp. 2d 865, 870-871 (N.D. Ind. 2007).

In the present case, Forest River expressly bases its unfair competition claims on Heartland's "act[s] in furtherance of competition which [are] against public policy," specifically criminal deception in violation of IC 35-43-1-2(a)(2). That criminal deception forms the basis for unfair competition *per se* and well as the "lack of justification" element of unfair competition by interference with contractual relations. DE#134-1, pages 10-11 and 12. Thus, these unfair competition claims are derived from criminal law and are not pre-empted by the IUTSA. Further, there is no question but that the claim of unfair competition by interference with contractual relations is not based upon misappropriation of trade secrets. As explained in DE#134-1, at page 7, this common law tort focuses upon the relationship between the parties and acts without justification. A misappropriation of any sort, trade secret or not, is not a requirement of that cause of action.

As to Heartland's arguments, *ConFold Pacific, Inc. v. Polaris Indus., Inc.*, 433 F. 952 (7<sup>th</sup> Cir. 2006) is distinguishable from the very quote Heartland refers to at page 959 therein. Specifically, the Master List *was* secret and *was* protected by the laws that create property rights and *was not* in the public domain. The physical copy of that list was the private property of Forest River, protected against conversion, the employee seduced by Heartland for that list was bound by fiduciary duty laws to preserve that property from disclosure to others. Unlike a mere dealer list, which is often posted on the internet by RV manufacturers, this was a specific list for a specific

event. If it was in the public domain, Heartland would not have had to obtain it from a third party, such as Mr. Lung, and Mr. Lung would not have had to obtain it by lying to a Forest River employee, Mr. Tribble.

Similarly, the present case is distinguishable from that of *Learning Curve Toys, L.P. v. Playwood Toys, Inc.*, 199 WL 529572 (N.D. Ill. July 20, 1999) from the very quote Heartland offers at pages \*2-3 therein, since Forest River's claims are "more than a restatement of the same operative facts which would plainly *and exclusively spell out only trade secret misappropriation.*" [emphasis added]. The operative facts set forth by Forest River spell out a claim for interference with contractual relations, as well as a crime victim claim under IC 34-24-3-1 because of the violation of IC 35-43-1-2(a)(2). Thus, preemption is not applicable here.

In short, it is not *solely* the acquisition itself of the Master list which forms the basis for Forest River's claims. Instead, it is precisely how that Master List was acquired, the deceptions involved, that is the crux of the claim for unfair competition. Misappropriation of trade secrets does not necessarily pertain to that deception and or to the use of that deception to interfere with Forest River's efforts to sell to its dealers at the private trade show.

## **2. As to Vicarious Liability:**

It is undisputed by Heartland that Mr. Whitehead asked Mr. Lung to obtain the Forest River Master List. Heartland Exhibit B, ¶3. It is undisputed that Mr. Whitehead was at the time a Heartland manager. Heartland Exhibit G, at page 271, lines 3-5. It is undisputed that upon finding out that Heartland had obtained the Master List, Mr. Hoffman, an officer of Heartland, instructed his brand managers to use that list to contact the Forest River dealers on that list and invite them to

Heartland. (DE#134-3, page 15, lines 10-15 and page 274, line 17 - page 275, line 8).

Heartland's vicarious liability argument appears to be an attempt to insulate the corporate entity from the actions taken by the individuals. Heartland asserts that because Mr. Lung was not its employee, the corporation is not responsible for what he did. However, clearly Mr. Whitehead and Mr. Hoffman were employees of Heartland, and meet all of the vicarious liability criteria in their respective capacities as manager and officer. Further, since Mr. Whitehead did ask Mr. Lung to obtain the Master List, he exercised control to that degree - but for his request, the Master List would not have been given to Heartland. Further, Mr. Hoffman exercised control over his brand managers in telling them to use the list to call the Forest River dealers.

However, the doctrine of vicarious liability applies where a party is legally responsible for the acts of another not because the party did anything wrong, but rather merely because of a party's relationship to the wrongdoer. *Hunt Const. Group, Inc. v. Garrett*, \_\_\_ N.E. 2d \_\_\_, \_\_\_, 2010 WL 5087843, at \*2 (December 14, 2010 Ind. App.). In the present case, Heartland did something wrong. First, knowing that the Master List was not in the public domain, it sought to obtain the list indirectly through deception it must have known Mr. Lung would use, or else Mr. Whitehead would have asked directly for the Master List from Forest River. Then Heartland misled Mr. Lung, taking the Master List under conditions of confidentiality that Mr. Whitehead knew he would breach.

Further, Heartland gave Mr. Lung an express "agency" based upon the actual authority to obtain the Master List expressly for Heartland. As the agent in fact under actual authority, Mr. Lung's deception of Mr. Tribble is directly attributed to Heartland. Also, Heartland is bound by Mr. Lung's actions by the doctrine of "agency by estoppel." Heartland concealed material facts from Mr. Lung about its intended use of the Master List, did so intentionally so as to induce Mr. Lung to get

the list for Heartland, and Mr. Lung did so in reliance upon the omission of that information. *See, Hope Lutheran Church v. Chellev*, 460 N.E. 2d 1244, 1251 (Ind. App. 1984).

More to the point, Forest River's unfair competition claims are brought under Indiana common law. A long standing principle of common law is represented by the Latin phrase, "qui facit per alium facit per se," he who acts through another, acts himself. 1 *W. Blackstone, Commentaries* at \*429-430; *See, e.g., City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835-838 at fn 6 (1985). Indiana courts have expressly recognized that principle of common law for over 100 years, in the context of both criminal matters, *e.g., Seifert v. State*, 160 Ind. 464, 67 N.E. 100 (Ind. 1903), and civil claims, *e.g., Bowles v. Trapp*, 138 Ind. 55, 38 N.E. 406 (Ind. 1894).

Forest River's claim is not strictly speaking based only upon vicarious liability to Heartland from Mr. Lung, but rather from simple causation. Heartland's manager employee, Mr. Whitehead, acting on behalf of Heartland, caused a chain of events which lead to the deception of Mr. Tribble. But for that request, the Master List would not have been obtained by any means, including deception. In that regard, it should be noted that as to the penal nature of IC 35-43-1-2(a)(2), under Indiana law, a person who intentionally causes another to commit an offense is himself considered to commit that offense. IC 35-41-2-4.

Mr. Whitehead himself then obtained that list knowing that he was going to use that list in a way which Mr. Lung expected him not to, thus deceiving Mr. Lung. Next, Mr. Hoffman, undoubtedly knowing the Master List belonged to Forest River, directly caused Heartland's employees to use that list to interfere with Forest River's attempts to sell to its dealers, thus compounding the injury to Forest River. Accordingly, Mr. Hoffman, an officer of the corporation, ratified the actions of both Mr. Whitehead and Mr. Lung even if their actions were outside of the

scope of agency or employment, and confirmed Heartland's corporate liability under longstanding Indiana law. *Indianapolis, P. & C. Ry. Co. v. Anthony*, 43 Ind. 183, 188 (Ind. 1873).

### **3. As to a "New" Unfair Competition Cause of Action:**

Heartland argues the "Indiana law recognizes only four "unfair competition" causes of action. DE#142 at page 12. That is false. For over 100 years, since *Computing Cheese Cutter Co. v. Dunn*, 88, N.E. 93, 95 (Ind. App. 1909), Indiana courts have expressly recognized that it would be a "hopeless attempt" to create a fixed formula of all types of unfair competition. More recently, in *Hann Crafts Corp. v. Craft Masters, Inc.*, 683 F. Supp, 1234, 1245 (N.D. Ind. 1988), this Court noted that "unfair competition" could be defined satisfactorily as "people playing dirty tricks" and that "one can feel the unfairness better than one can express it." All that Forest River has done with its three part test, is attempt to articulate that same definition more precisely.

As to the first part, an act in furtherance of competition, if it was a non-competitive act, there would, inherently be no competitive injury and, if anything, some other form of tort would be involved. As for the third part, we have the same old damage analysis of any tort - the act either hurt someone or helped someone. If there was no damage/gain causation, there would be nothing to recover in any tort. The crux of the issue then seems to be the second part, an act which is against public policy. However, this is nothing new. If a defendant violates the law in order to aid its competition, its action is inherently unfair because common law or the legislature has already made it so as a matter of public policy.

Heartland's citation to *Composite Marine Propellers, Inc., v. Van Der Woude*, 962 F. 2d 1263 (7<sup>th</sup> Cir. 1992), is distinguishable on this very point at page 1265 therein, since it focuses on

the existence of a “legal wrong.” In the present case, we have two legal wrongs: deception under IC 35-43-1-2(a)(2) and intentional interference with business relations. It is not merely that confidential information has been taken - the method of taking through deception and the use of that information to interfere with Forest River’s dealer sales at the time of the private trade show are both legal wrongs. In contrast with the reasoning of that case, we do not here have a situation where the defendant may have acted unfairly, and that unfairness is being equated to unlawfulness. Instead, we have a situation where the defendant acted unlawfully, and that unlawfulness is the basis for a legal remedy.

**As to Interference with Business Relations:**

**4. Illegal Acts by Heartland:**

Heartland asserts that there was no illegal act because there was no “fraud,” taking off on Forest River’s statement about Mr. Tribble being “in simple terms” a “victim of fraud.” DE#142, page 16. That characterization of Mr. Tribble is not relevant to the determinative issue, however. No claim is being made herein on behalf of Mr. Tribble, and Heartland is not being accused of fraud against Forest River. In contrast, Forest River’s claim is based upon Heartland’s “deception” under IC 35-43-1-2(a)(2).

This statute provides that “a person who knowingly or intentionally causes another to suffer pecuniary loss by deception or by an expression of intention to injure another person or to damage the property or to impair the rights of another person commits criminal mischief.” There is no known statutory definition of “deception” which is applicable here. Indiana courts interpreting this statute have held that “fraud” and “deception” do not mean the same thing. *Jackson v. Russell*, 498



N.E. 2d 22, 39 (Ind. App. 1986). Further, that statute itself shows that the offense can be committed by an act of “intention” about future conduct (injury, specifically), rather than merely a misrepresentation of pre-existing or present fact.

In the present case, there is no question but that Mr. Lung told something to Mr. Tribble that was knowingly false. The fact that Mr. Tribble specifically asked Mr. Lung to keep the list confidential shows that the representation was material to the decision to give the list. The fact that Mr. Lung then asked Mr. Whitehead to keep it to himself shows that confidentiality was material to Mr. Lung’s decision as well. Having been expressly told the conditions of the transfer, Mr. Whitehead was obligated to speak up if he did not intend to honor the “in confidence” condition. To remain silent under those circumstances was deception as well.

Heartland argues that “a broken promise to a friend does not constitute illegal activity.” However, it does constitute deception when the promise was intended to be broken all along, and when that deception is used to injure another person, it becomes illegal.

### **5. Heartland was not Justified**

Heartland cites to the Restatement (Second) of Torts, §768(1)(d) as to whether there was an absence of justification for the interference. DE#142, pages 18-19. However, that is only one part of the test, taken out of context. More completely, §768(1) provides:

“One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other’s relation if

(a) the relation concerns a matter involved in the competition between the

actor and the other **and**

**(b) the actor does not employ wrongful means and**

(c) his action does not create or continue an unlawful restraint on trade **and**

(d) his purpose is at least in part to advance his interest in competing with the other.

[emphasis added] Each and every element must be met in order for the action to be “justified.” *Id.*; *Techcom, Inc. v. Telematrix, LLC*, 903 N. E. 2d 187, 2009 WL 485182 at \*8 (Feb. 25, 2009)(unpublished disposition). In particular, the defendant may not employ any wrongful means to solicit the customers of the plaintiff if the solicitation is to be “justified.” *Rice v. Hulsey*, 829 N.E. 2d 87, 92 (Ind. App. 2005).

In the present case, however, Heartland has used wrongful means. Since deception, wrongful means in violation of IC 35-43-1-2(a)(2), was used to obtain the Master List, Heartland’s use of that list was not “justified” within the meaning of the elements of Tortious Interference with Business Relations when soliciting Forest River’s dealers.

#### **6. Forest River Need Not Point to One Sale when Many Sales Took Place**

At the outset, it should be noted that there are still currently pending several discovery disputes surrounding Heartland’s refusal to provide documents and testimony on the issue of damages, even in violation of this Court’s Order of March 31, 2010, DE#112, granting Forest River’s motion to compel. See, e.g., DE#144 and DE#145. Heartland’s argument now that Forest River lacks damages evidence is, seen in that light, as an attempt by Heartland to capitalize on its willful refusal to comply with discovery.

However, it is not disputed that Heartland is a direct competitor of Forest River and used the Master List to send out fax flyers to Forest River dealers. DE#134-2, ¶s 2 and 14. It is not disputed that Heartland used the Master List to contact the Forest River dealers to try to arrange meetings while they came to see Forest River. DE#134-2, ¶14. It is not disputed that Heartland used the Master List to try to get sales from those dealers. DE#134-2, ¶s12-16. It is not disputed that sales and sales commitments to Heartland prior to the Forest River trade show would decrease available sales at that trade show for Forest River because of limited dealer financial resources. DE#134-2, ¶20. It is not disputed that a huge spike in Heartland's sales took place immediately after Heartland obtained the Master List in mid-October, 2008 and engaged in this usage of the Maser List. DE#147, Exhibit 4 therein (sealed document containing Forest River's Expert Report based upon the information provided thus far by Heartland - that report being an interim document pending discovery completion).

Thus, we have circumstantial evidence that:

1. Heartland used the list to attempt to get sales form Forest River's dealers before the Forest River trade show.
2. Sales to Heartland before the show would hurt Forest River's chances of sales at the trade show.
3. Heartland had a huge increase in sales immediately prior or during Forest River's trade show.

From that, the trier of fact could reasonably "connect the dots" and conclude that Heartland did succeed in its attempts and did get sales at the expense of Forest River. The extent of those sales need not be determined with precision at this time, but some damage from those sales certainly did

exist, especially since in the context of summary judgment, the record as a whole must be viewed in a light most favorable to Forest River (the non-moving party in this context). *DirectTV, Inc. v. Fergusson*, 328 F. Supp 2d 904, 909 (N.D. Ind. 2004). Further, it is well established that where there are difficulties in determining damages which arise in large part from the defendant's conduct, a reasonable approximation will suffice. *National Merchandising Corp., v. Leyden*, 348 N.E. 2d 771, 774 (D. Mass. 1976).

The case citation relied upon by Heartland in this regard, *Hammons Mobile Homes, Inc. v. Laser Mobile Home Transport, Inc.*, 501 N.E. 2d 458 (Ind. App. 1986) actually supports Forest River's contentions in several respects. For example, that Court acknowledged that "in alleging unfair competition, the plaintiff is not required to show actual deception, but only that deception is the natural and probable consequence of the tortfeasor's actions." *Id.*, at 461. In the present case, the factual situation is not completely analogous, but when considering what Mr. Whitehead asked Mr. Lung to do, and considering the context of the private trade show, which was not a usual event in the RV industry (Response Exhibit 1, ¶3), the trier of fact could conclude that Heartland fully intended for the deception to occur as a "natural consequence." Thus, Heartland should be held accountable for that which it intended, including the damages resulting from the use of the Master List would be from a willful and intentional tort. As *Hammons* further points out, on page 462 therein, damages are appropriate where the defendant's conduct was deliberate and willful.

Further, and more to the point Heartland was addressing in this context of its Memorandum, *Hammons* points out on that same page that "[b]ecause of the amorphous nature of unfair competition, we will not impose upon the plaintiff the burden of proving specifically the damages to the business. . . Although the plaintiff must show damages have in fact occurred, mathematical

certainty as to the amount in not necessary.” Thus, in the present case, it is not necessary for Forest River to show specifically which sales it lost from which dealer. It is sufficient instead that Heartland had an unusual increase in sales at a time when it was actively trying to take sales from Forest River by use of Forest River’s Master List of dealers coming to an unusual event. Given the close competition between the parties, the timing of the private trade show and the limited resources of the dealers with which to purchase new products, it is reasonable to assume that the extra sales Heartland obtained at this time came as a result of sales diverted from Forest River.

#### **7. Statement of Genuine Issues:**

The following objections and issues are contested with respect to Heartland’s Statement of Material Facts, the numbering below corresponding to the number used by Heartland for such “facts.”

Re ¶2. “Since that time, it has grown steadily and become an established manufacturer of RV products.” Rule 56(c) requires Heartland to support this contention. Heartland provided no support. In fact, Forest River contends that Heartland has not grown steadily and faced a severe economic crisis just prior to taking the Master List in the fall of 2008. DE#134-2, ¶18. That severe economic difficulty was a motivating factor in Heartland’s willful misconduct in this case.

Re ¶5. Even though 95-97% of the dealers attending did sell non-Forest River products as well, the fact that those dealers were coming to the private trade show indicate that many of them were at least interested in buying from Forest River at that time. Forest River contends that those dealers were not necessarily all interested in purchasing from Heartland at that time. See, for example, Response Exhibit 1, at ¶3. Further, there is no evidence that all of those dealers also sold

Heartland products, so many of them would be new prospects to Heartland.

Re ¶7. Open Range sells RVs, that much is not disputed. It is disputed that they are a close competitor or a competitor whose sales activities could have any significant impact on Forest River's sales. See, for example, Response Exhibit 2; even a year after the private Forest River trade show, Open Range was only 1/5 the size of Heartland. Also, the price point of their products and their dealer network may not overlap significantly. Thus, the issue here goes to Mr. Tribble's actions in disclosing the Master List to Mr. Lung, that he was not expecting a serious problem by that disclosure and that he would never have made the disclosure to Heartland.

Re ¶9. Trading dealer lists *per se* is one thing, since many are public knowledge. Heartland, for example, posts their dealer list on the internet at [www.heartlandrvs.com](http://www.heartlandrvs.com). However, the Forest River trade show as not just a usual event in the RV industry at that time. Response Exhibit 1, at ¶3. The Master List included not just dealer names, but also the hotels they would be staying at during the visit to Forest River. DE#21-2, ¶75. Forest River disputes that trading lists like the Master List is a common practice.

Re ¶11. "Tribble believed that providing the list to a competitor was simply common practice." The evidence given shows that Mr. Lung believed dealer lists were commonly given for a limited use, but that this dealer list should be given in confidence. Heartland Ex. B, ¶s 4, 6-7. There is no evidence by Mr. Tribble of what he thought or believed, despite the fact that he is a Heartland employee. Forest River disputes that Mr. Tribble thought giving the Master List was a common practice, or he would not have required it to be kept in confidence, as per Heartland Ex. B, ¶6.

Re ¶17. Forest River disputes that Heartland did not control Mr. Lung's behavior in any way.

Heartland Ex. B, ¶4 shows that but for Mr. Whitehead's call, Mr. Lung would not have obtained the Master List, and ¶7 shows that he would not have given Heartland the Master List but for his belief that it would be kept confidential. To the extent that these actions by Heartland had such impact, Mr. Lung was influenced or "controlled" to a relevant degree by Heartland's actions.

Re ¶18. Forest River disputes the attempt to herein to suggest that the private Forest River trade show in October 2008 was a generic "event to which RV dealers are invited." The Forest River show was different in kind from other "open house" events in this industry. Response Exhibit 1, at ¶3.

Re ¶20. Forest River disputes that the Hotel Action had no effect on the purchasing decisions of Mr. Campkin. The event "sticks in his mind," Response Exhibit 1, ¶7, even two years later. It is reasonable to assume that a dealer will be more likely to purchase products from someone who sticks in their mind.

Re ¶21. Forest River disputes that the Master List was not used by these persons. First off, Mr. Leonard's credibility on this issue is in serious doubt in light of his recanting testimony during his deposition. Response Exhibit 3. Secondly, it is obvious from various emails produced by Heartland that the dealer list was circulated to a number of Heartland's sales persons. Response Exhibit 4.

Re ¶22. Forest River disputes this, especially after Mr. Leonard recanted his testimony about calling Forest River dealers prior to the show. Response Exhibit 3. There was obvious value in calling the dealers or he would not have done it.

Re ¶24. Forest River disputes this for several reasons. First, the relevant time period starts from when the Master List was obtained, a couple weeks before the trade show. There was an

abnormal spike in Heartland's sales, as per Exhibit 4 of DE#147, immediately after this point in time. Second, Heartland's failure to disclose certain new dealers obtained during this time period makes it impossible to verify that Loveall was the only new dealer. Forest River has pointed out to the Court in a motion to compel that there are several dealer numbers which were assigned in this time period for which no documentation has been given by Heartland. DE#96, at page 5. No documentation has still been given in that regard. Third, regardless of if these persons were already Heartland dealers for some products, their interest in Forest River products was diverted by Heartland's efforts to market to them when they were in town for the private trade show, and that effort was facilitated by Heartland's acquisition of the Master List. DE#134-2, ¶s 12-16.

Re ¶25. Forest River disputes this if taken out of context. Mr. Babcock's testimony was given more than a year before all the evidence was in about "face time" and other evidence of Heartland use of the Master List. As a result of Forest River's motion to compel, DE#96, and this Court's Order, DE#112, considerably more information was given about the Loveall sales and about Heartland's use of the Master List in that regard. Mr. Leonard, for example, specifically testified that it is important for dealers to meet face to face with the sales persons whenever possible in order to get the sale. DE#134-2, ¶19.

Re ¶26. Forest River disputes this. The evidence provided by Heartland in support of this contention shows only that Forest River did not talk to dealers within a two week window in October 2009, Heartland Exhibit A, page 399, lines 6-13, and that Mr. Babcock had not personally talked to Loveall, but that others at Forest River had, Heartland Ex. A, page 399, line 24 - page 400, line 5. Further, Mr. Babcock stated that he had not talked to Forest River's dealers about the 2008 trade show incident while at the 2009 trade show which "we had just had." Heartland Exhibit A, page 448



12 - page 449, line 5. It should be kept in mind that the private Forest River trade show took place just prior to Mr. Babcock's second day of deposition.

Re ¶28. Forest River disputes this. The evidence provided by Heartland to support this contention provides a different answer than the "summary" Heartland listed. The interrogatory answer should be stated in its entirety to be accurate. Forest River did not state that it deserves the indefinite amount of revenue Heartland gained or merely an amount equal to the present value of Heartland itself.

**Conclusions:**

There are genuine issues of material facts upon which Heartland relies for support of its motion. Also, Heartland is not entitled to judgment as a matter of law upon the bases it has given. Accordingly, Heartland's motion for summary judgment should be denied.

Dated: January 10, 2011

Respectfully submitted,

s/Ryan M. Fountain

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ATTORNEY FOR FOREST RIVER, INC.

**Certificate of Service**

I certify that on January 11, 2011, 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. Irmischer [david.irmscher@bakerd.com](mailto:david.irmscher@bakerd.com)

s/Ryan M. Fountain

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Ryan M. Fountain  
ATTORNEY FOR FOREST RIVER, INC

## **INDEX OF RESPONSE EXHIBITS**

- Exhibit 1 Supplemental Decl. of Brad Campkin
- Exhibit 2 Excerpt of Statistical Surveys Report
- Exhibit 3 Excerpt of Leonard Dep. Transcript
- Exhibit 4 Brad Whitehead email of October 20, 2008