Heartland Recreational Vehicles LLC v. Forest River Inc Doc. 163

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

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

FOREST RIVER'S REPLY TO HEARTLAND'S RESPONSE (DE#150) TO FOREST RIVER'S MOTION FOR ENFORCEMENT OF COURT ORDER, DE#112

Summary of Respone:

Heartland argues that it "has been preserving relevant documents by ensuring that its employees do not delete them from Heartland's servers." And yet, its own President admits to failing to follow any such plan to preserve documents. As incredible as it seems, Heartland asserts that there were no responses at all to the Brady email, despite the large mailing list, yet it is silent about where the emails were sent in the first place. Heartland asserts that its back-up tapes "would" have no records of the emails, but it has not looked to see if they actually do. Accordingly, since Heartland has done its search to the best of its ability (or at least had the opportunity to), it is time to allow Forest River to search for itself, using forensic recovery techniques.

The Existence of the Emails, Going out and Coming back:

Contrary to the argument of Heartland's attorneys, Mr. Brady never said he did not have

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copies of the email correspondence from his dealers responding to the email of October 28. Instead, Mr. Brady testified: "Most dealer letters I keep a copy of. Not all." He expressly stated that he did not recall if he got any responses to the email in question or not. Similarly, he keeps copies of some emails he sends to dealers, but not all. He simply cannot "generalize" about what he does with email correspondence. Exhibit F hereto. In fact, **Mr. Brady's testimony shows expressly that on June 15, 2009, he was not following any email preservation policy** - contrary to the representations of Heartland's attorneys that they were "ensuring" preservation of relevant documents!

If the person responsible for protecting the email does not know to protect it, there is no protection. Now Heartland testifies that it cannot find any responding email from the dealers on the Heartland server. Fine. However, Heartland did not state that it made any forensic recovery attempt for the deleted emails.

Heartland asserts that Forest River has shown no evidence that any responses to the email ever existed. DE#151, page 8. That is true (so far), and yet it strains credibility to believe no responses ever existed. Heartland admits the email was distributed to "a large list of recipients." DE#151, page 9, fn 4. How likely is it that any corporation would send out a mass mailing, even electronically, and get *no response whatsoever*, but instead its primary competitor gets a response immediately! Mr. Brady has no recollection one way or another as to if there were any responses. Heartland has no effective practices in place to preserve any such responses to Mr. Brady. How convenient.

One could try to track down responses from the dealers, if one knew which dealers were sent the Brady email. However, at the same time it asserts having no responses, Heartland also refuses to disclose to whom it send those emails. Instead, Heartland argues who the emails went to is not

relevant. Exhibit G hereto, highlighted portion. The underlying motion explains the relevancy of those emails, and the testimony of Mr. Plummer as to new sales arising a week after the Forest River trade show, and a few days after the Brady email, lends support for the concern that the Brady email may have contributed to lost sales. See Exhibit H hereto.

In this process, Heartland is also attempting two sleights of hand. First, it asserts that the Brady email was actually disclosed to Forest River a year early than it was actually given, by reference to DE#150-4. DE#1509, page 9. However, DE#150-4 makes no disclosure of an email, being merely a form letter text with no addressee and no date. Thus, there is nothing to suggest that form letter was ever sent, much less to whom. In conjunction with the letter of Ex. G, it appears that Heartland is intentionally trying to conceal the recipients. Heartland's dealer list is not at all confidential, being freely available on Heartland's internet web site, www.heartlandrvs.com under the tool bar heading "Customer Service" leading to "Dealer Locator," with the dealer email addresses shown. Exhibit I hereto. Why is Heartland trying to hide the recipients, unless there were responses?

Secondly, Heartland complains that it has "explained many times" that Mr. Brady did not send the Brady email, so disclosing that email in a text format was somehow ok. DE#150, page 9, fn 4. However, the underlying document request was as follows:

> Request No. 24: To the extent not previously requested, all records of any type which contain reference to Forest River's sales event (or "open house" as Mr. Brady's email of 10/28/08, 7:36 PM described it) of October 22-23, 2008, including, without limitation, all correspondence to any recreational vehicle dealer referring to that event and/or referring to any sales event of Heartland's between October 22-25,

2008.

Thus, it is not the "Word format" document which matters, but instead the "correspondence to any recreational vehicle dealer," i.e., the emails which were actually sent. If the text was distributed "via emails to a large list of recipients" at least a copy of those emails exists or should exist, kept in the "ensuring" hands of "Heartland's IT professionals." Heartland does not deny that it has those even today. Instead, it denies they are relevant. However, that battle was over by March 31, 2010.

The Back-up Tapes:

For the first time, we are hearing that Heartland does not use back-up tapes to preserve the documents relevant to this lawsuit. The warnings that were given to Heartland to do so are of record already and the spoilation of evidence issues need not be dealt with herein. However, it is important to note that Heartland has not asserted that the back-up tapes will not contain forensically recoverable information. Instead, Heartland asserts only by attorney argument that "any such information would have been wiped from the back-up tapes."

It is well known that information merely deleted from a computer can often be recovered forensically. Heartland did not represent to this Court that it actually examined the back-up tapes, as it was required to do in the March 31 Order, DE#112. Now, it is time for Forest River to take a look. It may be too late, as Heartland suggests, since no action really was taken to preserve this evidence, but better late than never.

As to Timeliness:

Forest River has already explained in detail on more than one occasion the extent of effort

it has gone through to obtain this kind of discovery from Heartland about its use of the Master List taken by deception from Forest River, and this Court determined that the discovery was both necessary and diligently pursued. E.g., DE#112 and DE#133. Further, Forest River has had to file a Motion to Compel Heartland to participate in a Rule 37 conference involving this very issue, DE#129 (see the Exhibits thereto, DE#129-7, at ¶3a, and DE#129-10, at ¶6).

Briefly, the documents were originally requested on July 1, 2009 (Request Nos. 24 and 25), but Heartland refused to comply, and a motion to compel was filed which resulted in this Court's Order of March 31, 2010, DE#112. Heartland continued to refuse production even thereafter, claiming that it did not have responsive emails, and that the original emails were not relevant (an issue which should have been moot by the Order of March 31). Ex. G, dated September 1, 2010. The deposition of Dennis Donat on September 24, which was delayed to that date upon Heartland's request, revealed that Forest River could not obtain testimony about sales resulting from Heartland's use of the Master List in any context (even via deposition testimony) apart the anonymous screening down to the Loveall and Racetrack RV dealerships, including as to the effect of the Brady email. Accordingly, on September 28, Forest River Forest River sought to resolve the present issue via a Rule 37 conference (DE#129-7, at ¶3a). However, the rule 37 conference did not take place until November 8, 2010, and only then as a result of Forest River's motion to compel Heartland to attend that conference. DE#137. Given the intervening holiday and the other filings concurrently involved in this lawsuit and the related cases between these parties, filing the subject motion to compel on December 8, 2010 should be considered a very prompt response. If there is delay here, it is only because of the efforts of Heartland.

Fed. R. Civ. P. 37 imposes no deadline on filing motions to compel, nor does any local rule

or order of this court. In fact, prior to filing a motion to compel, a party is required to engage in a diligent effort to confer and resolve the dispute without court intervention. See, e.g., L. R. 37.1. Accordingly, in the exercise of its broad discretion in discovery matters, the court should grant a reasonable time in which to file motions to compel. *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999).

In the present case, in addition to substantively conferring about this dispute on November 8, the parties explored the option of amending Heartland's motion for summary judgment on December 1, 2010, so as to make this motion unnecessary at this time. However, no agreement could be reached, and one week later the present motion was filed.

Forest River agrees that normally, a motion to compel should be filed before the summary judgment briefs are filed. However, in this case, Heartland delayed in document production after the March 31 Order, re-raised the issue of relevance on September 1, 2010, did not permit the information to be obtained by deposition, and then refused to participate in a Rule 37 conference from September 28 until a week after the motions for summary judgment were filed. In contrast, Forest River has made good faith efforts to resolve this matter expeditiously every step of the way.

In summary, the delay here has been short, there is no significant prejudice to Heartland by complying at this time (especially given the complex and on-going litigation between these parties regardless of the present motions for summary judgment), the delay appears to have been tactically inspired by Heartland despite Forest River's efforts at prompt resolution and indeed, the delay has been totally outside of Forest River's control and in no sense waived by Forest River. Considering then all of the various factors courts have used in analyzing such motions, *e.g., Moore's Federal Practice,* 3d, 2010, Vol. 7, §37.05[2], there can be no doubt that it is entirely reasonable and proper

to grant this motion at this time.

As to the New Claims Argument:

Heartland is asserting in its Response, pages 4-8, essentially the same "new claim" argument presented in its opposition to Forest River's motion for partial summary judgment (DE#134). See DE#142, pages 1-6. In its Reply, DE#154, Forest River explained that the claim was not "new" under Rule 15 since, for example, the issue had been pre-tried by implied consent of the parties. That issue is also expected to be addressed by a co-pending motion to conform the pleadings to the evidence. Rather than repeat the content of the DE#154 Reply herein, reference to that other filing and the extensive exhibits thereto is respectfully requested.

As to Giving Forest River All it Needs:

On pages 11-13 of its Response, Heartland repeats the argument made in its Response, DE#151, to the co-pending motion to compel, DE#145, as to the extent of information it has already provided. Those arguments are considered to be illusory and misleading for the reasons stated at length in Forest River's Reply thereto, DE#162, pages 1- 8. Rather than repeat the content of that Reply herein, reference to that other filing and the extensive exhibits thereto is respectfully requested.

Conclusions:

Heartland was warned to keep copies of these documents. Heartland professes to have "ensured" that preservation, but it failed. That failure should not be allowed to impinge upon

uncovering the facts in this case as to the extent of Heartland's use of the Master List.

It may be true that now the primary evidence which Forest River seeks, dealer responses, is destroyed. However, we will not know for sure until we look. The information is relevant and worth the effort. If that information is truly gone, at the very least Heartland does not contest that it still has the list of who the email was sent to in the first place. From that, Forest River may be able to track down copies of the responses. Heartland's objections are without merit, and the present motion should be granted.

Dated: January 13, 2011

Respectfully submitted,

s/Ryan M. Fountain

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ATTORNEY FOR FOREST RIVER, INC.

Certificate of Service

I certify that on January 13, 2011, I electronically filed the foregoing document and all attachments thereto 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.

EXHIBITS

Exhibit F	Excerpt of Brady Dep.
Exhibit G	Heartland letter of Sept. 1, 2010
Exhibit H	Excerpt of Plummer Dep.
Exhibit I	Sample Heartland Dealer Listing