

UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

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

**REPLY IN SUPPORT OF HEARTLAND'S
CROSS-MOTION FOR SUMMARY JUDGMENT**

In its Response to Forest River's Motion for Partial Summary Judgment and Memorandum in Support of Cross-Motion for Summary Judgment (DE# 142) (the "Memorandum in Support of Cross-Motion"), Heartland Recreational Vehicles, LLC ("Heartland") outlined several independent reasons why the unfair competition claim of Forest River, Inc. ("Forest River") cannot succeed. In its responsive briefing, Forest River fails to refute a single one of those reasons. Accordingly, the Court can now award Heartland summary judgment under any of the following six arguments:

- (1) Forest River never stated a claim for unfair competition based on Heartland's acquisition and use of the "Master List," and it cannot amend the pleadings now to include that claim;¹
- (2) Because Forest River bases its civil law unfair competition claim exclusively on Heartland's acquisition and use of allegedly confidential information, the claim is preempted by the Indiana Uniform Trade Secrets Act ("IUTSA"), IND. CODE § 24-2-3-1;

¹ For a discussion of Forest River's attempt to improperly and belatedly inject its claim into this litigation, Heartland refers the Court to its Memorandum in Support of its Cross-Motion. (See DE #142, pp. 2-7.)

(3) Heartland cannot be held liable for the conduct of Rod Lung because Lung was not an agent of Heartland;

(4) Even if Lung had been Heartland's agent, Forest River's claim of tortious interference with business relationships² fails because neither Lung nor Heartland committed an illegal act;

(5) Forest River's tortious interference claim also fails because Heartland was not acting with the malicious and exclusive intent to injure Forest River; and

(6) Forest River cannot provide competent evidence that it lost a single sale as a result of Heartland's alleged conduct.

As outlined more fully below, Forest River's attempts to refute these arguments are without legal and factual merit, and the Court should award summary judgment to Heartland.

I. Because Forest River's Unfair Competition Claim Arises Under Indiana Civil Common Law and is Based Solely on the Acquisition and Use of Confidential Information, it is Preempted by the IUTSA

In support of its Cross-Motion, Heartland cited extensive statutory and case law providing that the IUTSA preempts all unfair competition causes of action based on the acquisition or use of another party's confidential information. (*See* Mem. Supp. Cross-Motion, DE #142, pp. 7-10). In response, Forest River cites *AGS Capital Corp., Inc. v. Product Action Intern., LLC*, 884 N.E.2d 294, 308-9 (Ind. Ct. App. 2008), which notes that the IUTSA does not preempt causes of action provided by a criminal statute. This argument is irrelevant. Forest River's claim is for unfair competition, a cause of action provided by civil common law. While Forest River has argued that Heartland's conduct was "against public policy" or "illegal" by

² Forest River also persists in its argument that Heartland committed "unfair competition *per se*," a cause of action that fits within no species of unfair competition ever recognized under Indiana law. Rather than reiterate why that cause of action has not and should not be recognized in Indiana, Heartland commends the Court to its discussion of this issue in the Memorandum in Support of its Cross-Motion. (DE #142, pp. 12-15.)

trying to show that Rod Lung's conduct constitutes statutory criminal mischief, it has not actually pled an independent claim of criminal mischief. Hence, this case is distinguishable from *AGS Capital Corp.*, where the plaintiff alleged a cause of action provided solely by a criminal statute, the Racketeer Influenced and Corrupt Organizations statute. Because Forest River's claim is for unfair competition under civil common law, it is squarely preempted by the IUTSA.

Forest River next argues that its unfair competition claim is not preempted because it is based on conduct beyond mere "misappropriation." Specifically, Forest River argues that its claim is based on the "deceptions involved" in acquiring the "Master List" and Heartland's subsequent use of that list "to interfere with Forest River's efforts to sell to its dealers at the private trade show." (DE #160, p. 4.) With these arguments, Forest River demonstrates its fundamental misunderstanding as to what "misappropriation" means under the IUTSA. The IUTSA's definition of "misappropriation" specifically includes "acquisition" of protected information by "improper means," including "misrepresentation." IND. CODE § 24-2-3-2. "Misrepresentation" is synonymous with deception. The statutory definition of misappropriation also expressly includes "disclosure or use" of the protected information. *Id.* Hence, Forest River's allegations that Heartland acquired the "Master List" and then used it are completely encompassed by the IUTSA's definition of "misappropriation." Forest River has not alleged any conduct on the part of Heartland that does not fit within the categories of acquisition or use. Accordingly, Forest River's claims are entirely preempted by the IUTSA.

Finally, Forest River attempts to distinguish the cases demonstrating that its unfair competition claim is preempted by saying that the information in those cases was not confidential, but that the "Master List" was. With this argument, Forest River demonstrates its misunderstanding of the holding of Heartland's cited cases: **if information does not rise to the**

level of a trade secret, then the misappropriation of that information can never be unlawful, regardless of whether a company unilaterally deems the information to be "confidential." *ConFold Pacific, Inc. v. Polaris Industries, Inc.*, 433 F.3d 952, 959 (7th Cir. 2006) ("In general, if information is not a trade secret and is not protected by patent, copyright, or some other body of law that creates a broader intellectual property right than trade secrecy does, anyone is free to use the information without liability."); *Composite Marine Propellers, Inc. v. Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir.1992) ("Unless defendants misappropriate[] a statutory trade secret, they d[o] no legal wrong."); *Learning Curve Toys, L.P. v. Playwood Toys, Inc.*, 1999 WL 529572, at *2-3 (N.D. Ill. July 20, 1999) ("Thus, plaintiffs who believe their ideas were pilfered may resort only to the ITSA; the alleged theft of ideas cannot support multiple claims under different theories of recovery."); *Fox Controls, Inc. v. Honeywell Inc.*, 2002 WL 1949723, *2-3 (N.D. Ill. Aug. 22, 2002) (holding that a plaintiff's common law claims for the misappropriation of "confidential information" were "simply restatements of plaintiff's claim for misappropriation of trade secrets, and are thus preempted by the ITSA.")

Forest River has declined to assert a trade secret claim in this action, presumably because it realizes that the "Master List" is not a trade secret. Because of the IUTSA's preemption provision, no other claim for the misappropriation of "confidential information" exists under Indiana common law, and Heartland is entitled to summary judgment.

II. Heartland Cannot be Held Liable for the Alleged Conduct of Rod Lung

A. Forest River's Response Fails to Designate any Facts Showing that Heartland Controlled the Details of Rod Lung's Acquisition of the "Master List"

In its initial memorandum supporting its Motion for Partial Summary Judgment, Forest River premised its argument that Heartland had acted unlawfully on a contention that a non-

Heartland employee, Rod Lung, was Heartland's "third party agent." To prove the existence of an agency relationship, Forest River must show that Heartland controlled the "details" of Lung's work. *Turner v. Bd. of Aviation Comm'rs*, 743 N.E.2d 1153, 1163 (Ind. Ct. App. 2001); *Hope Lutheran Church v. Chellew*, 460 N.E.2d 1244, 1247-48 (Ind. Ct. App. 1984)(interpreting *Mooney-Mueller-Ward, Inc. v. Woods*, 371 N.E.2d 400, 403-4 (1978) and noting that "while the facts may have revealed an agreement the lessee would act on behalf of the lessor, there was no evidence indicative of the lessor exerting control over the lessee's operations"). As Heartland explained in its Memorandum in Support of its Cross-Motion, Forest River has designated no evidence that Heartland controlled Lung. Heartland has also presented an affidavit signed by Lung confirming that he was not Heartland's employee, that Heartland gave him no compensation during the Fall of 2008, and that Heartland did not control Lung at any time during the Fall of 2008. (See Heartland's Statement of Genuine Issues, DE #143, ¶¶ 15-17.)

In response to Heartland's arguments, Forest River contends that Heartland employee Brad Whitehead's mere request that Lung discover what dealers would be attending the 2008 Forest River Trade Show renders Heartland vicariously liable for his actions. As a matter of established law, Mr. Whitehead's request that Lung perform a task does not constitute the level of control necessary to create an agency relationship. A principal must exercise control over the details and methods by which that task is completed. *Turner*, 743 N.E.2d at 1163; *Hope Lutheran Church*, 460 N.E.2d at 1247-48. Forest River fails to provide any evidence whatsoever that Heartland sought to control the details as to how Lung acquired that information, or that Heartland had any right to control how Lung acquired that information. Furthermore, there is no designated evidence showing that Whitehead or any other Heartland employee knew what

method Lung would use to acquire the list.³ Whitehead simply asked Lung if he could complete the task and Lung, a longtime acquaintance of Whitehead, agreed to try.

Were the courts to accept Forest River's theory of vicarious liability, the "control" element of the test for agency would be eradicated. For example, all Indiana companies would become liable for the acts of any independent contractors they asked to complete a specific task, even though the companies had no control over the "details" of how the task was to be completed. From the legion of cases distinguishing independent contractors from employees, it is clear that this is not the law. *See, e.g. Guillaume v. Hall Farms, Inc.*, 914 N.E.2d 784, 791 (Ind. Ct. App. 2009) (finding no vicarious liability where defendant specified task of which fields would be picked by putative agents, but did not control the methods by which the fields were picked); *Walker v. Martin*, 887 N.E.2d 125, 131-32 (Ind. Ct. App. 2008) (finding no vicarious liability where defendant specified task of where deliveries were to be made by truck driver, but did not control the method by which the delivery was accomplished). The requirement that a party control the "details" of a person's work also exists in cases, like this one, that do not involve an alleged employer-employee relationship, but are instead based on the doctrine of gratuitous servitude. *See Gilbert v. Loogootee Realty, LLC*, 928 N.E.2d 625, 630-31 (Ind. Ct. App. 2010) (finding no vicarious liability because defendant had no "right to control" purported agent). Here, Lung was not Heartland's employee, Heartland did not pay Lung any compensation, Heartland had no right to control Lung's behavior, and Heartland made no effort to control Lung's behavior. Under clear Indiana precedent, these facts necessitate a finding that Lung was not Heartland's agent.

³ Indeed, Whitehead may have believed that Lung would have obtained the "Master List" via the method he actually did employ – by trading another valuable dealer list for it, a common practice within the industry. (Heartland's Statement of Genuine Issues, DE #143, ¶¶ 10-11.)

B. Forest River's Additional Arguments for Vicarious Liability Also Fail as a Matter of Law

In an attempt to find some way that Heartland can be held liable for Lung's conduct, Forest River offers a flurry of additional arguments, each of which can be easily dismissed. First, Forest River claims Heartland is liable under the antiquated doctrine of *qui facit per alium facit per se*, or "he who acts through another, acts himself." The Indiana cases Forest River cites in support of this argument were decided over a century ago. Regardless, the only cited case invoking this doctrine in a civil matter clarifies that the doctrine simply means that a principal is liable for the actions of his agent. In *Bowles v. Trapp*, 139 Ind. 55, 38 N.E. 406 (Ind. 1894), the Court noted that the plaintiff "invokes the legal maxim 'qui facit per alium facit per se,' – 'he who acts through another acts himself;' **i.e. the acts of the agent are the acts of the principal.**" See *id.* at 407 (emphasis added to quote). Hence, Forest River's argument of *qui facit per alium facit per se* is indistinguishable from its claim that an actual agency relationship existed, and it fails for the same reasons.

Forest River also argues that Heartland is vicariously liable because Lung had Heartland's authority to acquire the "Master List." But authority is only one element of agency. See *Fioretti v. Aztar Ind. Gaming Co., LLC*, 790 N.E.2d 587, 591 (Ind. Ct. App. 2003) (explaining elements of agency and referring to authority element as "manifestation of consent"). Forest River must still designate facts establishing Heartland's right to control the details of Lung's conduct. *Id.* Because Forest River has not designated evidence sufficient to establish the requisite level of control, this argument is irrelevant.

Forest River then argues that a party can be legally responsible for the acts of another because of the party's relationship to a wrongdoer. But Forest River does not identify any special relationship that Lung had with Whitehead or Heartland that would render Heartland liable, and

it designates no facts to support the existence of that phantom relationship. This argument is both factually unsupported and legally irrelevant.

Finally, Forest River argues that Heartland is liable under the doctrine of "agency by estoppel." However, Forest River does not explain what it must prove to establish agency by estoppel. The non-development of that argument notwithstanding, the case Forest River cites in support of that argument provides that Heartland itself would have had to have made a misrepresentation to Forest River. *See Hope Lutheran Church v. Chellew*, 460 N.E.2d 1244, 1251 (Ind. Ct. App. 1984). Here, as in *Hope*, the facts only support an argument that the putative agent, Rod Lung, made a misrepresentation to the defendant. *See id.* ("If false representations were made, they were the product of Central's conduct and not that of the [defendant] churches.") Hence, as the Court held in *Hope*, no agency by estoppel can exist. *Id.*

In sum, none of Forest River's additional, perfunctory arguments has legal merit, and Heartland cannot be held vicariously liable for any acts of Rod Lung.

C. Forest River Fails to Designate Any Evidence Showing that a Heartland Employee Committed a Tortious Act

Forest River also argues that if Heartland cannot be held liable for Lung's actions, then Heartland *can* be held liable for the acts of its employees, Brad Whitehead and Tim Hoffman. However, it fails to cite any conduct by these two men that is independently unlawful.⁴ There is nothing independently tortious about sliding truthful information under customers' hotel doors. There is nothing tortious about calling customers and offering them products. There is nothing tortious about faxing information to prospective customers. Forest River argues that this conduct drew attention away from and interfered with its trade show. That may be true, but such conduct is the hallmark of ordinary, legitimate competition, not unlawful activity. Because Forest River

⁴ Again, the best argument Forest River can muster is a vague allegation that Brad Whitehead "knew" that Lung would use deception to obtain the list. Forest River cites no evidence whatsoever to support that statement.

cannot cite any evidence that a Heartland employee independently engaged in tortious conduct, Heartland is entitled to summary judgment.

III. Because Criminal Deception Cannot Exist Absent a Showing of Fraud, Forest River Cannot Show that Heartland or Lung Acted Illegally

To prove its claim of tortious interference with a business relationship, Forest River must show that Heartland acted "illegally," as that term has been interpreted under Indiana common law. *See Levee v. Beeching*, 729 N.E.2d 215, 222-223 (Ind. Ct. App. 2000). In an attempt to satisfy the illegality requirement, Forest River has alleged that Rod Lung's behavior also constitutes "criminal mischief" in violation of IND. CODE § 35-43-1-2(a)(2). While Heartland cannot be held liable for Lung's actions, *see* Section II above, it is clear that Lung's conduct does not amount to criminal mischief.

In the Memorandum Supporting its Cross-Motion, Heartland noted that a claim of criminal mischief requires a showing of fraud. (*See* Mem. Supp. Cross-Motion, DE #142, pp. 16-18.) Heartland then cited case law holding that allegations of fraud cannot be based upon representations of future conduct or broken promises. *Wallem v. CLS Indus., Inc.*, 725 N.E.2d 880, 889 (Ind. Ct. App. 2000). This is true even if the promisor had no intention of fulfilling the promise when it was made. *F. McConnell & Sons, Inc. v. Target Data Sys., Inc.*, 84 F.Supp.2d 980, 985 (N.D. Ind. 2000); *Captain & Co., Inc. v. Stenberg*, 505 N.E.2d 88, 97 (Ind. Ct. App. 1987); *Balue v. Taylor*, 36 N.E. 269, 271 (Ind. 1894); *Ayres v. Blevins*, 62 N.E. 305 (Ind. Ct. App. 1901); Ind. Law Encycl. Contracts § 38.

To avoid this law, Forest River argues that it need not prove that Lung committed fraud to satisfy the requirements of the criminal mischief statute. In support of its argument, Forest River cites *Jackson v. Russell*, 498 N.E.2d 22, 39 (Ind. Ct. App. 1986). However, the *Jackson* Court did not closely analyze whether a claim of criminal mischief requires a showing of actual

fraud. Instead, it held that the appellant had failed to timely object to the court's instruction on the criminal mischief claim, and that "even if erroneous," that instruction had become "the law of the case." *Id.*

Contrary to Forest River's claim that a showing of fraud is not necessary to succeed on a claim of criminal mischief, courts hold that Indiana's "criminal mischief" and "criminal deception" statutes cannot be used to circumvent a party's failure to prove a claim of common law fraud. When claims under Indiana's criminal deception and criminal mischief statutes cannot meet the standards for common law fraud, courts dismiss them. *See SMC Corp. v. Peoplesoft USA, Inc.*, 2004 WL 2538641, at *6 (S.D. Ind. Oct. 12, 2004) (dismissing deception claims under the Indiana Crime Victim's Relief Act because they were based on same "future promises" that were insufficient for claim of fraud); *F. McConnell & Sons, Inc. v. Target Data Sys., Inc.*, 84 F.Supp.2d 980, 987 (N.D. Ind. 2000) (noting that "'actionable fraud cannot be predicated upon a promise to do a thing in the future, although there may be no intention of fulfilling the promise'" and dismissing concurrent claims of criminal deception and criminal mischief).

To show that Heartland's conduct was illegal under Indiana's criminal mischief statute, Forest River must demonstrate that Rod Lung or Heartland committed fraud. Forest River cannot show this. Accordingly, Forest River's claim for tortious interference with a business relationship fails as a matter of law.

IV. All of Heartland's Alleged Conduct was Justified Under Indiana Common Law

To prove its claim for tortious interference with a business relationship, Forest River must also show that Heartland acted without justification. In its Memorandum in Support of its Cross-Motion, Heartland quoted case law from this Court interpreting the Restatement (Second) of Torts, § 768(d)(1). That case law provides that "'On the issue of whether there is an absence

of justification, Indiana courts look to the Restatement of Torts which states that if a defendant's 'purpose is at least in part to advance his interest in competing with the other,' then there can be no 'absence of justification.'" (Mem. in Supp. Cross-Motion, DE #142, p. 18)(quoting *Smith v. Biomet, Inc.*, 384 F.Supp.2d 1241, 1249-50)); *see also Morgan Asset Holding Corp. v. CoBank*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000) (holding that to be unjustified, conduct must be "malicious and exclusively directed to the injury and damage of [Forest River].") Forest River quarrels with the interpretation of the *Smith* Court, arguing that Heartland must also show that it did not engage in any "wrongful" activity.

While the court's application of the Restatement in *Smith* is clear and correct, Forest River's arguments are futile anyway. Forest River bases its argument that Heartland's actions were wrongful on Lung's alleged commission of criminal mischief. As discussed above, neither Lung nor Heartland committed criminal mischief. Hence, Heartland's conduct was not "wrongful," and even under Forest River's proffered standard, Heartland did not act without justification.

V. Forest River Still Cannot Show that it Suffered any Damages

In attempting to prove that it suffered recoverable damages, Forest River admits that it cannot identify a single sale that it lost as a result of Heartland's alleged conduct.⁵ Instead, Forest River argues that a trier of fact could simply infer the existence of damages from a "spike" in Heartland's sales near the time of Forest River's Trade Show.

⁵ On January 25, 2011, the Magistrate Judge entered an order permitting Forest River to hire a forensic expert to search Heartland's electronic information for any replies to an email sent by Brian Brady around the time of Forest River's 2008 Trade Show. (*See* Order, DE #165.) Forest River believes that any such replies could provide it with evidence of damages. Heartland has filed this Reply in order to complete the briefing on Forest River's purported claim of unfair competition. However, Heartland recognizes that Forest River may seek to supplement the record on damages with respect to these claims after completing its additional discovery. Nonetheless, Heartland anticipates that the Court will award it with summary judgment based on one or more of the other five arguments outlined in its briefing. All of those arguments are currently ripe for adjudication, and the Court can award Heartland summary judgment based on any of them without waiting for resolution of Forest River's additional discovery with respect to damages.

However, such an inference would be specious and impermissibly speculative. As noted in Heartland's Memorandum, if an RV manufacturer invites 260 non-exclusive RV dealers to Elkhart, Indiana for a period of two days, then some of those dealers will likely make the practical decision to visit the other Elkhart-based manufacturers with whom they do business. While making those visits to other manufacturers, those dealers might see products they prefer over those offered by Forest River. In other words, absent any additional evidence specifically linking Heartland's sales to some illicit conduct, it is more likely that Heartland gained an inordinate amount of sales due to a huge influx of dealers visiting the city where its headquarters are located.

Forest River fails to offer any additional, linking evidence. Conspicuously absent from Forest River's evidence is any showing that an RV dealer received a communication from Heartland as a result of Heartland's acquisition or use of the "Master List" and then purchased Heartland products as a result of that communication. The only testimony Forest River offers from an RV dealer is contained in the "Supplemental Declaration of Brad Campkin." In that Supplemental Declaration, Mr. Campkin, owner of Campkin's RV, testifies that his receipt of Heartland materials under his hotel door "sticks in his mind."⁶ (*See* Suppl. Decl. of B. Campkin, DE #160-1, ¶7). However, Heartland has already submitted an affidavit from Mr. Campkin in which he testifies that neither his decision to visit Heartland while he was in Elkhart nor his decision to purchase Heartland products were affected by receiving Heartland promotional materials. (*See* Heartland's Statement of Genuine Disputes, DE # 143, ¶ 20.) The event may "stick in his mind," but it did not result in any lost sales to Forest River.

⁶ The Supplemental Declaration of Brad Campkin submitted by Forest River is unsigned and should be stricken. That said, nothing in the Supplemental Declaration hurts Heartland's cause on any issue.

Forest River must prove that it suffered damages in order to sustain its claim of tortious interference with a business relationship. It cannot do so. Accordingly, Heartland is entitled to summary judgment.

CONCLUSION

To award Heartland summary judgment on Forest River's claim of unfair competition with respect to the acquisition and use of the "Master List," the Court must agree with only one of the following six arguments outlined by Heartland:

- (1) Forest River never stated a claim for unfair competition based on Heartland's acquisition and use of the "Master List," and it cannot amend the pleadings now to include that claim;
- (2) Because Forest River bases its civil law unfair competition claim exclusively on Heartland's acquisition and use of allegedly confidential information, the claim is preempted by the IUTSA;
- (3) Heartland cannot be held liable for the conduct of Rod Lung because Lung was not an agent of Heartland;
- (4) Even if Lung had been Heartland's agent, Forest River's tortious interference claim fails because neither Lung nor Heartland committed an illegal act;
- (5) Forest River's tortious interference claim also fails because Heartland was not acting with the malicious and exclusive intent to injure Forest River; and
- (6) Forest River cannot provide competent evidence that it lost a single sale as a result of Heartland's alleged conduct.

All of these arguments are legally correct, and the Court need only choose one of them to award summary judgment to Heartland. For any and all of the reasons outlined above, Forest

River's unfair competition claim fails as a matter of law, and the Court should GRANT Heartland's Cross-Motion for Summary Judgment.

Respectfully submitted,

BAKER & DANIELS LLP

By: /s/ David P. Irmischer

David P. Irmischer (#15026-02)

Abigail M. Butler (#22295-02)

Peter A. Meyer (#27968-53)

111 East Wayne, Suite 800

Fort Wayne, Indiana 46802

Tel: 260.424.8000

Fax: 260.460.1700

david.irmscher@bakerd.com

abigail.butler@bakerd.com

peter.meyer@bakerd.com

ATTORNEYS FOR PLAINTIFF,
HEARTLAND RECREATIONAL
VEHICLES, LLC

CERTIFICATE OF SERVICE

The undersigned counsel for plaintiff Heartland Recreational Vehicles, LLC, hereby certifies that a copy of the foregoing was served upon the following, this 31st day of January, 2011, by operation of the Court's electronic filing system:

Ryan M. Fountain
420 Lincoln Way West
Mishawaka, Indiana 46544-1902

/s/ David P. Irmischer

David P. Irmischer