UNITED STATES DISTRICT COURT

Northern District of Indiana
South Bend Division

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

FOREST RIVER'S REPLY TO HEARTLAND'S RESPONSE TO (MOTION FOR REVIEW OF) FOREST RIVER'S OBJECTIONS TO MAGISTRATE'S ORDER (DE#164) REGARDING FOREST RIVER'S MOTION TO COMPEL DEPOSITION OF HEARTLAND ON GAIN FROM USE OF THE MASTER LIST (DE#145)

Analysis of Heartland's Response:

Both Heartland's arguments and assertions of fact in its Response are disingenuous and misleading. For example:

1. "No" Justification is not the same as "Unconvincing" Justification: Contrary to Heartland's argument on page 3 of the Response, the Magistrate did not find that Forest River failed "to give a reasonable justification for the delay." Instead, the Magistrate expressly found that "Forest River offers no excuse for the late filing." Further, the Magistrate expressly found that "Forest River seeks to compel further discovery without any justification." DE#164, page 3 (emphasis added). Either those findings of fact are clearly erroneous, because the record shows that Forest River actually did present facts which could excuse the late filing (under the express heading of

"Timeliness of this Motion" on pages 8-10 of the Reply (DE#162)), or, and as is most likely, the Reply was inadvertently not read, which would be a clear error of procedural law and due process. It is, therefore, not a question of "the Court's refusal to accept that justification," but rather of the Court's unawareness of that justification.

Further, and contrary to Heartland's argument that the Magistrate refused to accept Forest River's justification, is the facial inconsistency between the Magistrate's Orders of DE#164 and of DE#165. On December 8, 2010, Forest River filed two motions which impacted the timing of Forest River's response to Heartland's summary judgment motion, the subject motion to compel a deposition of Heartland, DE#145, and a Motion for Sanctions, DE#144.[1] In each case, the issue of timeliness was contested, and virtually the same facts and argument in that regard were presented to the Court. Compare DE#144 at pages 8-10 and DE#163 at pages 4-7 with DE#145 at pages 4-9 and DE#162 at pages 8-10. In the Order of DE#165, granting the Motion for Sanctions in part, the Magistrate expressly rejected Heartland's assertion that the motion was "untimely because it was filed two months after the close of discovery," and instead held that "the motion is timely" under these circumstances. The only significant procedural difference between the two motions is that one Reply was filed under seal and one Reply was not. It is reasonable to assume, therefore, that had the Reply of DE#162 not been inadvertently overlooked because it was filed under seal, the subject motion would also have been found to be timely.[2]

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[1] See DE#146, Notice by Forest River, Inc., regarding the specific impact on timing of the summary judgment response with respect to DE#130 by the remedies sought in each motion.

[2] Regarding Heartland's argument at page 4 of the Response as to the so-called tactical "prejudice" upon Heartland, it should be noted that on page 3 of the Order of DE#165, the Magistrate indicated that he was not convinced of the "adequacy of Heartland's search efforts" to locate the email required under the Court's Order of March 31, 2010, and, therefore that Order

2. Attending a Rule 37 Conference and Refusing to Discuss the Issues: Heartland's factual representation to this Court on page 4 of the Response about the "lengthy Rule 37 conference on October 5, 2010" is not accurate. Heartland asserts that "Forest River had an opportunity to seek Heartland's agreement to additional deposition" at that conference. However, the conference of October 5, 2010 was described in detail in "Forest River's Motion for Protective Order Compelling Heartland to Participate in the Discovery," DE#129, at pages 2-3, along with exhibits and additional discussion putting that conference in perspective and analyzing its effect. There was, in fact, no *bona fide* Rule 37 conference on that date because of Heartland's refusal to participate in any meaningful way in the conference.

Briefly, on March 31, 2010, this Court ordered Heartland to produce certain financial records and other documents (DE#112). However, Heartland delayed producing any of those documents for over two months (see Exhibit A of DE#129, the first production under the Order) and even by the fourth month had produced only a portion of the documents which it had been ordered to produce (see Exhibit B of DE#129, September 1 production of only income statements in response to July 22 list of deficiencies noted by Forest River). Also, Heartland completely refused to produce documents in response to two further Production Requests by Forest River (Exhibits C and D of

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expressly "delays any response to any dispositive motion that relates to damages until thirty days following the results of the data recovery expert search." Heartland's present motion for summary judgment, DE#130, "relates to damages" in that Heartland, through its supportive Memorandum, has expressly asserted that it has no liability to Forest River since Forest River has proven no damages, see DE#131 at pages 32-37. Although that Order was issued on January 25, 2011, Heartland has made no effort to expedite that expert search and has even to this day not turned over its computer data to the designated expert for analysis, or even contacted that expert, Mr. Steve Keilman, to arrange the disclosure. Accordingly, the so-called tactical prejudice of the subject motion to compel is non-existent, since Forest River's summary judgment response is delayed anyway for as long has Heartland drags its feet in that discovery as well.

DE#129). In addition, as pointed out in the September 14 status conference with this Court, Heartland refused to provide a witness to testify about certain relevant topics in connection with this lawsuit for over two months, despite being properly noticed for that deposition under Fed. R. Civ. P. 30(b)(6)(see Exhibit E of DE#129). Forest River attempted on multiple occasions to resolve these issues as the problems came up. However, it was not until the deposition of Dennis Donat was finally permitted by Heartland on September 24, 2010 that the full significance of the missing documentation was brought to light.

Promptly thereafter, on multiple occasions Forest River attempted to conduct a Rule 37 conference with Heartland so as to minimize the need for one or more Motions to Compel or a Motion for Contempt of Court against Heartland (Exhibit F, items 3 - 5, of DE#129). At first, Heartland agreed to participate in such a Rule 37 conference on October 5(Exhibit G of DE#129). However, when that day came Heartland did so with complete lack of preparation, asserting continuously through the discussion that the issues were "too complicated" for it to discuss the matter at that time and that it needed to see the issues in writing in order to respond. This excuse was given even though prior to that conference, Forest River had provided Heartland with a written summary of the primary financial issues and reasons for relevance of certain documents, as prepared by its expert witness, Ms. Lauber (Exhibit H of DE#129).

It strains credibility past the breaking point to believe that Heartland, a very large and financially sophisticated company with about $400 Million in annual sales, which was sold to Thor Industries last year for $209 Million, could honestly assert that the lawsuit it started had become too complicated for it to understand. Heartland's attorneys, a law firm founded in 1863 which now touts 370 attorneys and legal professionals, was also stumped, or so we are expected to believe. No, what

Heartland really did by throwing up its hands and declaring that this discovery analysis is just "too complicated" is to attempt to dump the entire problem on the Court by forcing yet another motion to compel, but without the benefit of the proper context which would normally result from a *bona fide* Rule 37 conference. This is as if to say "if we make this too complicated for the Court and Forest River, maybe we will not have to produce anything, or at least not as much as if we had really made an effort in discovery."

Nonetheless, after that conference, Forest River summarized the primary discovery issues in writing and forwarded that summary to Heartland as well, along with several requests via telephone and email for Heartland to resume and complete the Rule 37 conference (Exhibits I, J, and K of DE#129). Ultimately, however, all attempts at obtaining a Rule 37 conference where Heartland's counsel would actually discuss the issued failed prior to November 8, 2010. Even then, the only way to get that conference on November 8 was for Forest River to actually file a Motion with the Court, DE#129.

In the meantime, Heartland's refusal to participate in discovery also required Forest River to file a "Motion for Extension of Time for Filing its Expert Report on Financial Issues," DE#125. That motion discussed in detail the financial information which Heartland was withholding both in document production and in response to Topic #2 of the Rule 36(b)(6) deposition of Mr. Donat (see, for example, Page 7 of DE#125 and pages 7-8 of DE#127). That motion was contested and fully briefed by the parties. The Court granted that motion in Forest River's favor (DE#133). In the process, and considering the same sequence of events surrounding the October 5 conference, the Court expressly found that "Forest River has been diligently seeking the information required to produce its expert report," DE#133 at page 2. Further, the Court expressly rejected Heartland's

argument that "Forest River has all the information it needs," finding instead that "Forest River has shown that the documents produced by Heartland were insufficient for its expert report. Forest River has detailed in its motion the necessity for a sales ledger, balance sheets, and valuation studies." DE#133 at page 2.

The subject motion to compel supplements Forest River's efforts to offset the Heartland document production deficiencies found by the Order of DE#133. As detailed in the Reply (DE#162) at pages 6-8, the testimony of Mr. Donat should have included the results of a Rule 30(b)(6) investigation into which sales Heartland obtained as a result of using the Master List, including by at least:

a. examination of the list of cancelled sales orders, email documents,[3]

b. inquiry of the relatively few Heartland sales persons face to face,

c. examination of the "prospect call logs," and

d. examination of Purchase Orders and dealer files.

While Heartland had been required to turn over these documents in discovery, since it did not, deposition under Rule 30(b)(6) is a reasonable response by Forest River to obtain the information therein.

3. The Second Time for Whom?: Heartland's assertion that "for the second time in this litigation, Heartland has filed its Motion for Summary Judgment . . . only to have Forest River . . .

[3] Also, contrary to Heartland's assertion on page 1 of the Response that "Forest River already has all the information it needs to assess its damages," in the Order of DE#165 the Magistrate found that the missing "email and its responses are [still] relevant" to the damages issues surrounding Heartland's use of the Master List, and ordered that even at this point in time Forest River was entitled to have an expert search conducted for those emails.

[file] tardy motions to compel" is clearly false. In response to Heartland's prior summary judgment motion, DE#78, Forest River filed a "Motion for Stay Pending Decision on Fully Briefed Motions and Scheduling Conference to Resolve Discovery Disputes," DE#87. Pages 2-3 of that motion set forth the grounds for the stay in summary form. There are no motions to compel listed, tardy or not. There were discovery disputes existent at that time which were referred to in that motion and which subsequently became the topic of two motions to compel, one of which was granted, DE#112. However, the primary grounds listed in the motion of DE#87 were four pending motions which were fully briefed and which may have been dispositive of the summary judgment issues or would have impacted the rights of an indispensable party.

What is a common thread in connection with Heartland's motions for summary judgment is the refusal of Heartland to permit Forest River to conduct or complete discovery until at or after the summary judgment filing deadlines. However, that "short sheeting" of discovery, as it were, is a prejudice to Forest River, not to Heartland.

4. Heartland Bundled its own Arguments, Not Forest River: Heartland complains in footnote 1 of the Response that the damages issues relate only to the Lanham Act claims against Heartland, but not to the "inequitable conduct" counterclaim against Heartland. First off, there is no separate "inequitable conduct" claim left in this case. All defenses against the patent infringement claims, including unenforceability based upon inequitable conduct by Heartland, were dismissed by this Court's Order of April 29, 2010 (DE#115) due to Heartland's concession of a second Covenant Not to Sue. What is left in this lawsuit in that regard are the "exceptional case" claims under 35 U.S.C. §285 and 15 U.S.C. §1117. See DE#25 at ¶61 and at page 36, Item H.

Heartland's fraud and "inequitable conduct" in connection with proceedings before the United States Patent and Trademark Office ("USPTO")are one aspect of the "exception case" claim. However, as explained more fully in "Forest River's Motion for Enforcement of Scheduling Order . . ", DE#149, at pages 11-15, the exceptional case claim herein encompasses much more of Heartland's conduct that just that, especially as to the abuse of process-type events.[4] In that regard, there are damages aspects of the analysis as well, but the further deposition testimony sought under the subject motion is not expected to address those damages directly.

However, Heartland, by its own volition, bundled all of its arguments with respect to both counterclaims into a single, oversized motion for summary judgment, DE#130. Heartland's lament now, that Forest River has not filed a response to Heartland's arguments which are relevant to only the exceptional case claim, is of no consequence. Forest River is not permitted to segregate out of Heartland's motion the issues for which a response is and has been ready.

5. Arguing the Merits of the Summary Judgment Motion: Heartland uses footnote 1 of the Response as a platform to argue the merits of its summary judgment motion, asserting that Forest River's claim falls "entirely outside of the Lanham Act's purview." That is true enough to some extent and with respect to certain sets of facts, but that is why claims were also brought under Indiana statutory law and the common law of unfair competition. See the Amended Complaint, DE#25, at ¶s 88 and 89; this Court's Order of February 18, 2009 (denying Heartland's motion to dismiss) at page 8 (Forest River "plausibly alleges a claim for unfair competition"); and Forest

[4] That motion, at pages 4-7 summarizes the interrelationships of the four pending lawsuits between Forest River and Heartland in this Court, and at pages 15-19 summarizes the unfair competition/Lanham Act claims remaining in this case.

River's Motion for Partial Summary Judgment (for unfair competition), DE#134.

More directly to the point, Heartland emphasizes in its footnote that "Forest River has failed to provide any evidence that a Heartland employee made any misrepresentations to hotel employees." However, at least as of September 28, 2010, Heartland knew that was an untrue assertion. On that date, Forest River provided Heartland with a copy of the declaration of Todd A. Mowers (a copy of which is Exhibit A hereto), an employee of one of the hotels involved in the "Hotel Action." Mr. Mowers had reviewed the declaration of Heartland's employee, Bryan Walczak, concerning statements made or not made by Mr. Walczak to hotel employees, including statements which would have been directed to Mr. Mowers. Mr. Mowers expressly disagreed with Mr. Walczak and stated that "if Mr. Walczak did get the guest room numbers from me and personally slide the envelopes under the guests' doors, I would only have allowed him to do that if he had indicated to me that he was authorized by Forest River to do so." Exhibit A at page 2. Such an indication of authorization would have been a misrepresentation by Mr. Walcazk. The significance of this contradiction must have been apparent to Heartland from the transmission letter sent to Heartland's counsel, designating Mr. Mowers as a trial witness in this lawsuit. See Exhibit B hereto, at ¶1. Other evidence of the misrepresentations of Heartland's employees which form the bases for Forest River's counterclaims have been provided to Heartland both in discovery and in various motions filed with this Court. However, this example suffices to demonstrate both the lack of merit in Heartland's Response contention and that there are genuine issues of fact which are likely to lead to the denial of Heartland's motion for summary judgment.

6. The Necessity of Further Deposition Testimony: On page 5 of the Response, Heartland

asserts that it has given "extensive, detailed information . . on the issue of damages." As to the language thereafter quoted from the Order, DE#164, the last sentence is the key to the present motion for review: it was "difficult for this Court to see how the information provided by Heartland does not serve that purpose." As explained in the subject motion, DE#169, at pages 4 and 7, since the Reply, DE#162, did provide such an explanation at pages1-6 and 8-10 concerning the inadequacy of what Heartland had given so far, the Magistrate's "difficulty" likely arose because the Reply was inadvertently not considered at all. This conclusion was all the more likely given that on past and concurrent occasions the Magistrate did find that Heartland's so-called "extensive, detailed information" was not enough (see discussion above at Section 2 with respect to the Orders of DE#112, DE#133, and DE#165, for example). For the Magistrate not to consider the Reply in that regard, was thus, a clear error of procedural law, just as noted above in Section 1 with respect to timeliness.

As for Heartland's representation on page 6 of the Response that "Forest River incredibly refused to provide a single document," without going into extensive detail herein, Heartland's own Exhibit A, DE#171-1, itself belies the assertion. As stated therein with respect to the documents supporting the Interrogatory answers concerning damages analysis, Request No. 13 was expressly objected to because at least some of the requested documents had "already been provided or which Forest River has itself received from Heartland " or which Forest River had "already [been] made available to Heartland." Also, with respect to Request No. 14, the answer also expressly objected since documents had "been previously produced or made available for copying to Heartland." To summarize in general the nature of the discovery dispute which was discussed at length between the parties, Heartland wanted Forest River to base its damage claims on an express recitation of actual

sales Forest River lost, but Forest River was instead basing its claim upon sales and other enrichment unjustly obtained by Heartland. Further, the issue is not as to "every sale [Heartland] made from the day of the so-called 'Hotel Incident' until December 3, 2008," Response at page 5. Rather, it is sales made and revenue generated by Heartland as a result of obtaining and using the Master List, starting at the time that list was obtained (several weeks prior to the Hotel Action) and extending until the List was no longer used.

Incidently, on page 6 of the Response, Heartland also asserts that it "has provided its internal and external email communications with and about these dealers during the relevant time periods." As noted above, that representation is expressly in dispute, and the Magistrate's Order of DE#165 requires further discovery as to those emails from Heartland.

7. The Scope of the Deposition is Exactly as Stated, Starting at the First Words: On pages 7-9 of the Response, Heartland asserts that the testimony sought from Mr. Donat was outside the scope of the deposition. However, in doing so, Heartland emphasizes only the last portion of the sentence of Topic #2, starting with "including the revenues . . ." The scope of Topic #2 starts, however, with the first words of the sentence:

> **Heartland's sales of products as a result of obtaining the list of Forest River's dealers who were planning to attend the private Forest River trade show in October 2008 . . .**

The inclusive material following is important, to be sure, but the threshold question, which the designated witness under Rule 30(b)(6) was required to investigate and provide the "corporate knowledge of" is as to the "sales of products as a result of obtaining the list." As demonstrated by

Exhibit D to Heartland's Response, DE#171-4, Mr. Donat did nothing to find out what those sales were. See DE#171-4, at page 201, line 5 to page 202, line 11; at page 203, lines 10-14.

Heartland asserts at page 9 that "Forest River is well aware of Heartland's position that it did not make any sales . ." That is not, however, relevant to the issue of the responsibility of a Rule 30(b)(6) witness to investigate and report at the deposition. That Heartland may "take a position" does not mean there are no facts known to the company which are contrary to that position. Stated differently, a position taken in ignorance or obstinance does not excuse a failure to investigate once the Rule 30(b)(6) notice is served. It is well established as a matter of federal procedural law that the notice under Rule 30(b)(6) carries with it an affirmative duty to investigate. *E.g., Moore's Federal Practice,* 3d ed. 2010, Vol 7, §30.25[3] (describing the four duties which the deposed entity must comply with). This is not a situation where Mr. Donat testified that he conducted an investigation and found nothing. Instead, all we have is Heartland's attorney repeatedly making a representation, apparently to coach a witness. DE#171-4, page 202, lines 18-25.

Put differently, and as explained in the Reply of DE#162 at page 10, Forest River is entitled to discover the evidentiary basis for Heartland's position that there were no such sales. If the witness did no investigation at all in that regard, then he cannot state the basis for the denial. Further, in order to explain the revenues received, costs, etc., as listed in the "including" portion of Topic #2, Mr. Donat would have had to investigate to determine which sales actually took place. As is shown on its internet web site, www.heartlandrvs.com, Heartland sells many different sizes and types of travel trailers. The bill of materials, sales pricing, discounts, and profits margins are not the same for each. Both of these explanations would have made the Magistrate more cognizant of the actual scope of the deposition notice, had the Reply been considered.

Accordingly, it was a clear error of law to hold that only the back portion of Topic #2 was within the scope of that deposition topic and it was clearly erroneous to find that Mr. Donat was prepared to discuss the full scope of Topic #2. Most likely, these errors arose because the Reply was not considered.

Conclusions:

The arguments made by Heartland in opposition to this motion are without merit. The present motion should be granted.

Dated: March 7, 2011

Respectfully submitted,

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Certificate of Service

I certify that on March 7, 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:

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s/Ryan M. Fountain

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