



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Kutter Harley-Davidson, Inc., Complainant

Case No.: TR-11-0048

v.

Harley-Davidson Motor Company, Inc.,
Respondent

FINAL DECISION

On December 29, 2011, Kutter Harley-Davidson, Inc. (Kutter), filed a complaint against Harley-Davidson Motor Company (Harley-Davidson), pursuant to Wis. Stat. § 218.0114(7)(d). The complaint alleges that Harley-Davidson has terminated the franchise agreement of Kutter in violation of Wis. Stat. § 218.0116(1)(i). By letter dated January 10, 2012, Attorney Steven T. Caya, on behalf of Kutter, advised the Division of Hearings and Appeals that the parties had completed mediation pursuant to Wis. Stat. § 218.0136(1), without resolution.

The administrative law judge assigned to this matter (ALJ) conducted telephone prehearing conferences in this matter on February 2 and 13, 2012. During the telephone conference, the attorney for Kutter indicated that he intended to file a Motion for Summary Judgment. Pursuant to the briefing schedule established during the telephone conference, Kutter filed its Motion for Summary Judgment and brief and affidavits in support of the motion on March 1, 2012; Harley-Davidson filed a response brief and supporting affidavits opposing the motion on March 15, 2012. Kutter filed a reply brief on March 23, 2012.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Kutter Harley-Davidson, Inc., by:

Attorney Steven T. Caya
Nowlan & Mouat LLP
Post Office Box 8100
Janesville, WI 53547-8100

Harley-Davidson Motor Company, Inc., d/b/a Harley-Davidson Motor Company,
Respondent, by:

Attorney Roberta F. Howell
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Post Office Box 1497
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The ALJ issued a Proposed Decision granting the Motion for Summary Judgment on May 9, 2012. The Respondent filed objections to the Proposed Decision on May 24, 2012. No other comments on the Proposed Decision were received. The Respondent raises two objections to the Proposed Decision. The Respondent's first objection is that the Proposed Decision erroneously found that Harley-Davidson did not provide Kutter with a written notice of the breach. Harley-Davidson argues that the notice of termination satisfied the statutory requirements that a manufacturer must provide a dealer with a notice of the breach. As discussed in the Proposed decision, just provocation requires notice to the dealer of the alleged breach and an opportunity to cure the breach.

The Respondent's second objections reiterated arguments it raised in its brief opposing the Motion for Summary Judgment. The first argument is that the alleged breach is not curable; therefore, it was not necessary for Harley-Davidson to give the complainant an opportunity to cure breach. As support for the contention, Harley-Davidson cites various decisions applying the Wisconsin Fair Dealership Law and decisions from other jurisdictions applying similar laws. It is unnecessary to consider these cases when one, *Volvo Trucks North America v. Dep't of Transportation*, 2010 WI 15, 323 Wis. 2d 294, 779 N.W.2d 423, directly on point and interpreting the specific statute at issue exists. The cases cited by the respondent are not persuasive.

Alternatively, the respondent argues that Kutter had an opportunity to cure the alleged breach during the time that has passed since it received the notice of termination. There is nothing in the notice of termination informing the complainant that the notice of termination will be rescinded if the breach is cured. Part of the determination that would have had to have been made if an evidentiary hearing had been conducted in this matter is whether Harley-Davidson had given Kutter a reasonable opportunity to cure the alleged breach. Without a separate notice of breach, one cannot determine whether Kutter was given a reasonable opportunity to cure the alleged breach. It is disingenuous for the respondent to contend that the complainant has failed to cure the breach. The Proposed Decision is adopted as the final decision in this matter.

Issue to be decided

Whether Harley-Davidson Motor Company, Inc., d/b/a Harley-Davidson Motor Company, has cancelled the Dealer Agreement it entered into with Kutter Harley-Davidson, Inc., unfairly, without due regard to the equities, and without just provocation in violation of Wis. Stat. § 218.0116(1)(i).

Applicable law

Wis. Stat. § 218.0114(7)(d) provides:

Any dealer or distributor discontinued or canceled may, on or before the date on which the discontinuation or cancellation becomes effective, file with the department of transportation and division of hearings and appeals and serve upon the respondent manufacturer, distributor or importer a complaint for a determination of unfair discontinuation or cancellation under s. 218.0116(1)(i). Allowing opportunity for an answer, the division

of hearings and appeals shall schedule a hearing on and decide the matter. The burden of proof at the hearing shall be on the manufacturer, distributor, or importer to show that the discontinuation or cancellation was fair, for just provocation, and with due regard to the equities. Agreements and certificates of appointment shall continue in effect until final determination of the issues raised in the complaint. If the complainant prevails the complainant shall have a cause of action against the respondent for reasonable expenses and attorney fees incurred by the complainant in the matter.

Wis. Stat. §§ 218.0116(1)(i)1 a and b define the phrases "Due regard to the equities" and "Just provocation" for purposes of Wis. Stat. § 218.0114(7)(d). Wis. Stat. §§ 218.0116(1)(i)1 a and b provide:

a. "Due regard to the equities" means treatment in enforcing an agreement that is fair and equitable to a motor vehicle dealer or distributor and that is not discriminatory compared to similarly situated dealers or distributors.

b. "Just provocation" means a material breach by a motor vehicle dealer or distributor, due to matters within the dealer's or distributor's control, of a reasonable and necessary provision of an agreement and the breach is not cured within a reasonable time after written notice of the breach has been received from the manufacturer, importer or distributor.

Discussion

Pursuant to Wis. Admin Code § HA 1.10(2), the Division of Hearings and Appeals follows the procedure set forth at Wis. Stat. § 802.08 in ruling on motions for summary judgment. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts. *Tomlin v. State Farm Mut. Auto Liability Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

The methodology for summary judgment is that the court first examines the pleadings to determine whether claims have been stated and a material fact issue is presented. If the complaint states a claim and the pleading show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party has made a *prima facie* case, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether genuine issues exist as to any material fact, or reasonable conflicting inferences may be drawn from undisputed facts, and therefore trial is necessary. *In re Cherokee Park Plat*, 113 Wis. 2d 112, 334 N.W.2d 580 (App. 1983).

The material facts on which Kutter's Summary Judgment motion is based are not in dispute. Kutter is a Harley-Davidson dealer located in Janesville, Wisconsin. The relationship between Kutter and Harley-Davidson is governed by the Harley-Davidson Motor Company Motorcycle Dealer Contract (Dealer Agreement) (exh. "A" attached to the affidavit of Michael Kennedy). The Dealer Agreement incorporates the General Conditions of Sales and Service. Section "B," ¶ 6 of the General Conditions of Sales and Service expressly provides that the Kutter "shall not sell Harley-Davidson Products for resale to non-retail customer." During the time period from January, 2010 to August, 2011, Kutter sold thirty new motorcycles to an individual named John Grotjan (Grotjan).

Harley-Davidson was informed of the high volume of new motorcycle sales by Kutter to Grotjan in August of 2011. Harley-Davidson then conducted an audit of Kutter's sales documents relating to the sales to Grotjan on September 9, 2011 (affidavit of Steve Verduyn). As a result of the audit, Harley-Davidson concluded that the sales to Grotjan were non-retail sales. Kutter disputes that it should have known that these were non-retail sales. However, for purposes of considering a motion for Summary Judgment any benefit of doubt must be given to the non-moving party. Accordingly, for purposes of this ruling, it is assumed that the sales to Grotjan were non-retail sales made in violation of the Dealer Agreement.

By letter dated November 3, 2011, Harley-Davidson notified Kutter that it was terminating its Dealer Agreement (exh. "C" attached to complaint). The grounds for the termination were that Kutter made non-retail sales of new motorcycles in violation of Section "B," ¶ 6 of the General Conditions of Sales and Service and other provisions of the Dealer Agreement and also made material misrepresentations to Harley-Davidson regarding those sales in violation of Section "M" ¶ 4(b) of the General Conditions of Sales and Service. In response to the notice of termination, Kutter requested mediation pursuant to Wis. Stat. § 218.0136(1) and filed a complaint with the Division of Hearings and Appeals pursuant to Wis. Stat. § 218.0114(d). In the complaint Kutter alleged that the termination was unfair, without just provocation and without due regard to the equities in violation of Wis. Stat. § 218.0116(1)(i).

The issue to be decided for the Summary Judgment motion is whether Harley-Davidson's termination of the Dealer Agreement it entered into with Kutter was unfair, without due regard to the equities, or without just provocation. Although Harley-Davidson has the burden to prove that the termination was not unfair, without due regard to the equities, or without just provocation, for purposes of deciding the Summary Judgment motion the benefit of the doubt and any inferences must be given to Harley-Davidson as the non-moving party. The term "unfair" is not defined for purposes of Wis. Stat. § 218.0116(1)(i); however, "due regard to the equities" and "just provocation" are defined. Due regard to the equities" includes treatment by the manufacturer in enforcing a Dealer Agreement that is unfair and equitable and "is not discriminatory compared to similarly situated dealers." There is no basis in the materials filed by Kutter in support of its motion to conclude that the termination was either unfair or without due regard to the equities.

The only statutory element that can seriously be contested at this point is whether "just provocation" existed for Harley-Davidson's termination of Kutter's Harley-Davidson franchise. Pursuant to Wis. Stats. § 218.0116(1)(i)1.b., there are four elements to "Just provocation." The elements are:

- 1) Conduct by a dealer that constitutes a material breach by the dealer;

- 2) The breach is of a matter within the dealer's control;
- 3) The breach is of a reasonable and necessary provision of the Dealer Agreement; and,
- 4) The breach is not cured within a reasonable time after written notice of the breach has been received from the manufacturer.

For purposes of this motion, it is assumed that Harley-Davidson will be able to prove that Kutter's sales to Grotjan were non-retail sales made in violation of the Dealer Agreement and that this breach of the Dealer Agreement is a matter within Kutter's control. Additionally, it must be assumed that the violation is a material breach. This leaves only the fourth element of "just provocation," did Kutter cure the breach within a reasonable period of time after it was notified of the alleged breach, to be decided.

Harley-Davidson concedes that it did not serve a written notice of breach on Kutter. Thus, there was no specific time period that Kutter was given to cure the breach. Harley-Davidson's primary contention is that in this case the breach committed by Kutter is not curable; therefore, no purpose would have been served by providing Kutter with notice of the breach or an opportunity to cure the breach. "Cure" for purposes of Wis. Stat. § 218.218.0116(1)(i)1.b. is not defined in the statute. The Wisconsin Supreme Court discussed the meaning of "cure" for purposes of Wis. Stat. § 218.218.0116(1)(i)1.b. in its decision in *Volvo Trucks North America v. Dep't of Transportation*, 2010 WI 15, 323 Wis. 2d 294, 779 N.W.2d 423. The Court held:

We are informed about the meaning of "cured" by a contract case cited by Wausau Truck, *Anacapa Technology, Inc. v. ADC Telecommunications, Inc.*, 241 F.Supp.2d 1016 (D.Minn.2002). In *Anacapa*, arbitrators found a material breach of a licensing agreement. The breaching party was given 30 days to cure the breach or the agreement would be terminated. The parties disputed the definition of "cure," and whether the culpable party had cured the breach.

This meaning of "cured" focuses in the present case on the performance of the breaching party, rather than on matters beyond the control of the breaching party, such as the conduct of third parties or on the effects of an economic recession. The *Anacapa* court rejected the argument, similar to the one Volvo makes in the instant case, that to cure a material breach, the breaching party must not only stop the offending conduct but must also "repair the harm done by the breach." *Anacapa*, 241 F.Supp.2d at 1020.

In the present case, the Division [of Hearings and Appeals] did not explicitly define "cured," but the meaning of "cured" is implicit in its decision. The Division did not apply Volvo's dictionary definition of the statutory word "cured." The Division's statement that Wausau Truck had "recommitted" itself to the dealer agreement and was using its best efforts to promote Volvo products demonstrates that the Division was interpreting the statutory word "cured" to encompass the meaning of "cured" in contract law: the breaching party had to stop the offending conduct and to substantially perform the contract. (footnote omitted)

We reject Volvo's argument that "cured" requires restoration to the *status quo ante* or repair of all harm done by the breach. (footnote omitted) This is not a reasonable interpretation of the statute. A reasonable interpretation of the statutory word "cured" means the breaching party is to stop the offending conduct and to substantially perform the contract. No other interpretation of the word "cured" is more reasonable.

Volvo, 323 Wis. 2d 294, ¶¶ 45-48.

Harley-Davidson makes two arguments in support of its contention that it has "just provocation" for terminating Kutter's Dealer agreement without providing Kutter an opportunity to cure the breach. The first is that Kutter's conduct was so egregious that it "destroy[ed] the trust on which the parties' relationship is based." This contention is contrary to the definition of "cure" the Wisconsin Supreme Court adopted for purposes of Wis. Stat. § 2182.0116(1)(i)1.b. in *Volvo*. The definition adopted by Court the does not require the dealer to undo the breach, but to stop the offending conduct and to substantially perform the provisions of the Dealer Agreement going forward.

The Court clearly interpreted the right to cure for purposes of determining whether "just provocation" exists as requiring the manufacturer to give a dealer a second chance. This is consistent with the principle that the Wisconsin Auto Dealership Law, of which Wis. Stats. § 218.0114(7)(d) is part, should be interpreted liberally in favor of protecting the investment of dealers and to balance out the disparate power of dealers *vis-à-vis* manufacturers. *Forest Home Dodge, Inc., v. Karns*, 29 Wis. 2d 78, at 85, 138 N.W.2d 214 (1966). In this matter, Harley-Davidson is required to give Kutter an opportunity to cure the breach before it can terminate Kutter's Dealer Agreement.

Alternatively, Harley-Davidson argues that if the breach was curable, then the issue becomes whether Kutter cured the breach. Accordingly, a factual dispute would exist and this matter may not be decided by summary judgment. Harley-Davidson attempts to demonstrate in its brief that Kutter has not cured the breach other than to promise not to violate the non-retail sales provision of the Dealer Agreement anymore. This argument is premature because no notice of the breach was ever provided to Kutter. Wis. Stat. § 2182.0116(1)(i)1.b. clearly requires a manufacturer to provide written notice of a breach and an opportunity for the dealer to cure the breach prior to the manufacturer having "just provocation" for the termination of a dealer agreement.

In summary, "just provocation" to terminate a Dealer Agreement requires that a manufacturer give a dealer written notice of the breach and a reasonable opportunity cure the breach. Curing the breach for purposes of Wis. Stat. § 2182.0116(1)(i)1.b. means stopping the conduct that constitutes the breach and resume substantially performing the terms of the contract. Harley-Davidson concedes that it provided no written notice to Kutter of the breach and no opportunity to cure the breach. Accordingly, no factual dispute exists and this matter may be decided by Summary Judgment. As a matter of law "just provocation" for the termination of Kutter's Dealer Agreement does not exist.

Conclusions of Law

1. Wisconsin Stat. § 218.0116(1)(i) prohibits motor vehicle manufacturers from terminating the franchises of motor vehicle dealers without “just provocation.” For purposes of Wis. Stat. § 218.0116(1)(i)1.b., “just provocation” requires that the dealer engaged in conduct that is a material breach of the Dealer Agreement and the dealer continues to engage in the conduct after receiving written notice of the breach and a reasonable opportunity to cure the breach. Harley-Davidson failed to provide written notice of the breach to Kutter prior to issuing the Notice of Termination. Accordingly, the Notice of Termination issued by Harley-Davidson to Kutter is without just provocation and, therefore, in violation of Wis. Stat. § 218.0116(1)(i).

2. Pursuant to Wis. Stat. §§ 218.0114(7)(d) and 227.43(1)(bg), the Division of Hearings and Appeals has the authority to issue the following order.

Order

Harley-Davidson Motor Company, Inc., is hereby ordered to rescind the Notice of Termination issued to Kutter Harley-Davidson, Inc., and the evidentiary hearing now scheduled to commence on July 23, 2012, is cancelled.

Dated at Madison, Wisconsin on June 21, 2012.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
David H. Schwarz
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.