

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

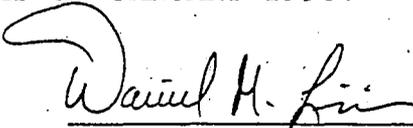
In the Matter of the Petition of)
)
HARLEY-DAVIDSON MOTOR COMPANY,) Petition No. P-405-97
)
Petitioner,)
)
vs.)
)
J.S. STOREY, JR., individually)
and doing business as HARLEY-)
DAVIDSON OF MERCED,)
)
Respondent.)
_____)

DECISION

At its regularly scheduled meeting of January 22, 1998, the Public members of the Board met and considered the administrative record and proposed decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 22nd DAY OF JANUARY 1998.



DANIEL M. LIVINGSTON
President
New Motor Vehicle Board

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11 In the Matter of the Petition of)
12 HARLEY-DAVIDSON MOTOR COMPANY,) Petition No. P-405-97
13 Petitioner,)
14 vs.) PROPOSED DECISION
15 J.S. STOREY, JR., individually)
16 and doing business as HARLEY-)
DAVIDSON OF MERCED,)
17 Respondent.)
18

19 PROCEDURAL BACKGROUND
20

21 1. Harley Davidson Motor Company ("Harley") is a licensed
22 manufacturer of new motor vehicles in California.

23 2. J.S. Storey, Jr., dba Harley-Davidson of Merced
24 ("Storey") was a licensed new motor vehicle dealer. J.S. Storey,
25 Jr., an individual, was the dealer principal of Harley-Davidson
26 of Merced.

27 3. On June 27, 1997, Harley filed a petition with the New
28 Motor Vehicle Board ("Board") to resolve a dispute between itself

1 and Storey.

2 4. A one-day hearing was held on January 7, 1998 before
3 Michael M. Sieving, Administrative Law Judge and Assistant
4 Executive Secretary of the Board.

5 5. Petitioner was represented by Robert L. Ebe, Esq., of
6 McCutchen, Doyle, Brown & Enersen, Three Embarcadero Center, San
7 Francisco, California.

8 6. Respondent was represented by Jack Kenealy, Esq., of
9 the Law Offices of Jack Kenealy, 1905 Park Marina Drive, Redding,
10 California.

11 ISSUES PRESENTED

12 7. Which party, Harley or Storey, has the burden of
13 establishing the facts necessary to support the allegations of
14 the petition?

15 8. Did Harley violate its Dealer Agreement with Storey?

16 9. Did Harley violate any obligation to Storey under
17 Vehicle Code § 11713.3¹?

18 10. Did Harley violate the terms of the Proposed Stipulated
19 Decision and Order?

20 11. Did Harley violate any other obligation to Storey?

21 12. Is Storey entitled to damages caused by the wrongful
22 conduct of Harley?

23 13. Is Harley entitled to an award of attorney's fees?

24 FINDINGS OF FACT

25 14. Storey has the burden of proving his allegations that
26 Harley acted wrongly. The burden of proof does not necessarily

27 _____
28 ¹ All statutory references are to the Vehicle Code unless noted
otherwise.

1 lie with the person who files an action for declaratory relief.
2 State Farm Mutual Auto Insurance Co. v. Spann (1973) 31
3 Cal.App.3d. 97, 100-101. Instead, that burden lies with the
4 person who is asserting the claims that are in issue. Evid. Code
5 § 500; American Home Assurance Co. v. Essy (1960) 179 Cal.App.2d
6 19, 22-23; 1 Witkin, Cal. Evid. § 132 (3d ed. 1986).

7 15. Storey was convicted of petty theft in 1972 and was
8 punished by 30 days of confinement. Storey admitted that he pled
9 guilty to further violations of the law around 1985, Harley
10 noticed termination of their agreement, Storey protested under
11 Vehicle Code § 3060, and the parties entered into a settlement
12 agreement to avoid termination for this reason. Storey agreed in
13 this settlement that his dealership would be terminated
14 automatically if he violated the terms of the settlement, which
15 included the standard provision in the Dealer Contract regarding
16 violation of law.

17 16. Storey also admitted that he pled nolo contendere in
18 1993 to stealing tools from a local business, Sears, and was
19 placed on probation. Storey admits that, in 1996, he pled nolo
20 contendere to the felony of stealing tools again from the local
21 Sears business. He was sentenced to eight months in jail for the
22 second of these offenses.

23 17. By letter dated May 3, 1996, Harley gave notice to
24 Storey of Harley's intention to terminate the franchise of
25 Storey. On June 12, 1996, Storey filed a protest against
26 termination with the Board under § 3060 (Protest No. PR-1526-96).

27 18. As a result of a Mandatory Settlement Conference in the
28 protest proceeding which was held on November 13, 1996, the

1 parties entered into a settlement agreement entitled Proposed
2 Stipulated Decision and Order ("Stipulated Decision"). The Board
3 adopted the Stipulated Decision pursuant to § 3050.7 by an order
4 dated December 2, 1996.

5 19. Storey admitted in the Stipulated Decision that good
6 cause existed to terminate his franchise. The Stipulated
7 Decision gave Storey the conditional opportunity to attempt to
8 sell his business. The Stipulated Decision imposed upon Storey
9 certain obligations with respect to such a sale. Storey had
10 seventy-five (75) days from the execution of the Stipulated
11 Decision within which to submit to Harley an executed buy/sell
12 agreement and related documents. The Stipulated Decision also
13 required that any such buy/sell close escrow within thirty (30)
14 days of the date that Harley provided written approval of the
15 buy/sell agreement. The failure of Storey to comply with these
16 (or other) provisions of the Stipulated Decision would, under its
17 terms, result in a termination of Storey's franchise.

18 20. Kris Hinrichs ("Hinrichs") was the Harley employee
19 principally responsible for Harley's contacts in connection with
20 Storey's attempts to sell his business. On or around November
21 15, 1996, Hinrichs wrote and sent Storey a letter sending him
22 forms to complete and return in order to obtain Harley's
23 assistance of being placed on its official sellout list.
24 Hinrichs also sent Storey application packages for him to give
25 prospective buyers. Storey responded by sending Hinrichs a form
26 Summary of Inventory For Sale.

27 21. Hinrichs reviewed Harley's database of people who had
28 expressed interest in becoming Harley dealers in California. She

1 found approximately 27 such people. On and around November 27,
2 1996, she mailed to each of them a form of letter advising them
3 that the existing dealer in Merced had decided to sell his
4 business and was looking for qualified buyers. On December 5,
5 1996, she faxed Storey a letter with the names of these people.

6 22. Hinrichs received responses from approximately 11 of
7 these people. On and around December 11, 1996, she mailed them a
8 form letter telling them some information that Mr. Storey had
9 given Harley about his asking price and also enclosing
10 information about Harley's approval requirements for dealerships
11 of the size of Mr. Storey's. Hinrichs suggested that they
12 contact Mr. Storey for additional information and details. At
13 the same time, she telephoned and faxed Mr. Storey a memo giving
14 him the names and other information about these people.

15 23. In December, 1996, Harley drafted a classified ad to
16 run in the *San Jose News* and the *Sacramento Bee* advertising Mr.
17 Storey's interest in selling his dealership. These were the
18 papers in which Storey told Hinrichs he wanted to run the ad. On
19 December 17, 1996, Hinrichs faxed Storey a memo showing him the
20 text of this ad before Harley ran it. Storey told Hinrichs that
21 he liked the text and was surprised at the cost, which was nearly
22 \$3,000. Harley paid that cost instead of asking Mr. Storey to do
23 so.

24 24. In addition, Hinrichs mailed Mr. Storey 24 application
25 packages for him to give or mail to people who responded to his
26 ad.

27 25. Richard Tapia was one of the people to whom Hinrichs
28 sent the letters discussed above. In mid-January 1997, Messrs.

1 Tapia and Storey entered into an Agreement of Purchase and Sale
2 of Assets for \$600,000, which Mr. Storey gave to Harley
3 requesting Harley to approve Mr. Tapia as the new dealer in
4 Merced. Mr. Tapia and his partner, Leonard Tavera, each updated
5 their applications to Harley.

6 26. Harley reviewed these and the proposal that the
7 applicants submitted. On February 24, 1997, Hinrichs
8 communicated Harley's approval to Mr. Storey and his buyers.

9 27. The Board's Stipulated Decision provided that Storey
10 had 30 days within which to close the transaction.

11 28. Storey and his buyers later told Hinrichs that they
12 needed to wait until April 25, 1997 to resolve outstanding issues
13 and close their deal. Harley agreed to extend the deadline until
14 then.

15 29. Beginning on April 11, 1997, the buyers performed an
16 inventory of Storey's parts. A dispute arose regarding the value
17 of the inventory. The buyers claimed that many of Storey's parts
18 were not in good condition, were not usable, were not saleable,
19 were used, broken, scratched, promotional, demonstration, "take
20 offs" and warranty returns.

21 30. As a result of this, the buyers and Storey signed
22 another agreement for a reduced purchase price of approximately
23 \$370,000 that did not include parts that the buyers did not want.

24 31. In addition, on or around April 15, 1997, police
25 conducted a search of Storey's home and business. He was
26 arrested and charged with, among other things, possessing firearm
27 ammunition in violation of his parole (to which Mr. Story later
28 pled no contest). Police found residue of drugs left on a scale

1 in the dealership, which was taken into custody as evidence.
2 Newspaper articles were published locally. One of them was
3 headlined "Police Nab businessman on drug charges." The article
4 identified Storey as the owner of the local Harley-Davidson
5 dealership. Another article was headlined "Harley shop owner
6 gets arraignment date."

7 32. On April 17, 1997, Storey's buyers wrote him claiming
8 that his arrest had irreparably harmed his business's goodwill
9 and that this was a material breach of their buy/sell agreement.
10 The buyers offered to pay Storey \$175,000.

11 33. On April 22, 1997, Storey told Hinrichs that he and his
12 buyers might not be able to close their deal as scheduled.
13 Harley agreed in an April 23, 1997 letter to extend the Board's
14 deadline a second time, until May 23, 1997, for Storey and his
15 buyers to close their buy/sell transaction. Harley communicated
16 to Mr. Storey the fact that, if he did not meet this final
17 deadline, Harley would exercise its right to terminate the
18 dealership under the Board's Stipulated Decision.

19 34. On April 23, 1997, Storey rejected the buyers' offer of
20 \$175,000. According to Storey, he and his proposed buyers
21 continued to have "extensive negotiations" over a period of
22 several weeks. For example, the buyers increased their offer to
23 \$200,000 on April 23, 1997, on April 25, 1997, Storey offered to
24 sell for \$300,000, and on April 27, 1997, the buyers offered to
25 buy for \$270,000. Storey did not accept this counter-offer.

26 35. The proposed buy/sell transaction did not close by the
27 May 23, 1997 deadline. (Storey so stipulated during a July 11,
28 1997 hearing at the Board.)

1 36. By notice dated May 24, 1997, Harley invoked the
2 procedure set forth in the Board's Stipulated Decision by
3 asserting that Storey had failed to comply with a specified
4 provision of the Decision.

5 37. On June 3, 1997, Storey filed a Notice of Dispute Re:
6 Termination ("Notice").

7 38. The Notice of Dispute hearing took place on July 11,
8 1997. On July 28, 1997, the Administrative Law Judge issued an
9 Order of Termination Pursuant to Stipulated Decision and Order
10 finding that Storey failed to establish that none of the
11 circumstances justifying termination under the Stipulated
12 Decision had occurred. Accordingly, the franchise was terminated
13 effective on that date.

14 39. Storey's counsel J. Scott Dorius ("Dorius") repeatedly
15 threatened in May 1997 to sue on behalf of Storey if the buy/sell
16 did not close, and he specifically threatened to sue Harley. The
17 allegations of wrongdoing included the following:

18 (a) Storey's Notice and declaration alleged that
19 Harley breached the covenant of good faith and fair dealing that
20 was implied in the Stipulated Decision because Harley's District
21 Manager, Fred Lear, suggested to Storey that two former
22 disgruntled employees of Storey perform the inventory of Storey's
23 parts, and that these ex-employees misrepresented the value and
24 condition of Storey's parts to the buyers.

25 (b) Dorius also alleged in his May 30, 1997,
26 declaration that by not allowing Storey to negotiate with more
27 than one buyer, Harley put Storey "in an impossible situation to
28 negotiate a fair purchase price for the sale of his business."

1 (c) Dorius claimed that Harley's April 23, 1997,
2 letter agreeing to another extension placed "even more pressure"
3 on Storey to close the buy/sell transaction.

4 (d) Dorius also claimed that Hinrichs' April 23, 1997,
5 letter put "constraints" on Storey.

6 40. On June 26, 1997, Harley filed with the Board a
7 petition under Vehicle Code section 3050(c) to mediate, arbitrate
8 or otherwise resolve, through the Board's settlement and/or
9 adjudicatory powers, the disputes between the parties and thus to
10 find and declare: (1) whether Harley violated its dealer
11 agreement with Storey; (2) whether Harley violated any obligation
12 to Storey under Vehicle Code section 11713.3; (3) whether Harley
13 violated the Board's Order; and (4) whether Harley violated any
14 other obligation to Storey arising from the allegations in the
15 attached papers. Harley further petitioned this Board to find
16 and declare that Harley has no liability to Storey and that
17 Storey is not entitled to any relief from Harley, monetary or
18 otherwise, based on the allegations in the attached papers.
19 However, should Harley be found liable to Storey, Harley further
20 petitioned this Board to find and declare the amount of any
21 damages.

22 41. Storey admits that a current dispute, controversy and
23 honest difference of opinion or viewpoint exists between Harley,
24 on the one hand, and Storey, on the other hand, in the foregoing
25 regards. No lawsuit is pending between these parties. No one
26 has challenged the Board's jurisdiction to act. All parties
27 received adequate notice and opportunity to request discovery, to
28 subpoena witnesses and documents for hearing, and to appear with

1 evidence and to argue at hearing.

2 42. The evidence presented at the hearing on this matter
3 did not establish that Harley violated any express or implied
4 terms of its Dealer Contract with Storey at any time after the
5 parties entered into the Stipulated Decision adopted by the
6 Board.

7 43. The evidence did not establish that Harley violated any
8 obligation to Storey under Vehicle Code section 11713.3.

9 44. The evidence did not establish that Harley violated the
10 express or implied terms of the Board's Stipulated Decision.

11 45. The evidence did not establish that Harley acted
12 wrongly or violated any other obligation to Storey arising from
13 the circumstances described above.

14 46. To the contrary, the evidence demonstrates that Harley
15 went to great lengths to assist Storey in the buy/sell process.
16 Harley had no obligation to extend the May 23 deadline. Indeed,
17 it generously extended the original March deadline to April and
18 then to May in an effort to assist Mr. Storey.

19 47. The failure of Storey's buy/sell transaction to close
20 on or before the May 23 deadline was due to a number of factors.
21 The evidence did not establish that Harley caused or contributed
22 to any of them, including the search by authorities of Storey's
23 home and business.

24 48. Storey alleged prior to the hearing in this proceeding
25 that one reason the buy/sell transaction did not close by the
26 deadline was that Harley improperly suggested to his buyers that
27 they rely on Storey's two ex-employees (Rogers and Lenz) in
28 connection with an inventory conducted at the dealership in April

1 1997. Storey has admitted in this proceeding, however, that this
2 allegation was merely a "suspicion" "which proved to be
3 unfounded." The evidence established that Harley had nothing to
4 do with the selection of these individuals to conduct the
5 dealership inventory.

6 49. The evidence does not establish that Harley acted
7 wrongly in any respect by, as Storey's counsel Mr. Dorius
8 alleged, putting Storey in an impossible situation by not
9 allowing Storey to negotiate with more than one buyer. Storey's
10 situation was agreed by him and approved by the Board in its
11 Stipulated Decision pursuant to the Vehicle Code. Harley put
12 Storey in no different situation. Nor did that situation prevent
13 Storey from negotiating with more than one proposed buyer. The
14 evidence establishes that Harley himself gave Storey the names of
15 numerous potential buyers with whom he could have negotiated, and
16 the Stipulated Decision gave Mr. Storey an opportunity to submit
17 a second buyer to Harley under certain circumstances.

18 50. The evidence did not establish either that, as Storey's
19 lawyer also alleged, Harley placed undue pressure and constraints
20 on Storey to close the buy/sell transaction. To the contrary,
21 Harley extended the closing deadline twice in circumstances where
22 it did not have to. Harley acted fairly in advising Storey on
23 April 23 that the extension granted on that date would be the
24 last.

25 51. The Stipulated Decision entered into in the protest

26 / /

27 / /

28 / /

1 action provides as follows:

2 "In the event of any action or proceeding regarding
3 this stipulated Decision, the prevailing party, in
4 addition to all other remedies possessed, shall be
5 entitled to be reimbursed for all costs and expenses,
6 including actual attorneys' fees, incurred by reason of
7 such action or proceeding" (emphasis added).

8 52. Harley's petition for declaratory relief is not an
9 "action or proceeding regarding this stipulated decision", nor is
10 it an action which was in any way contemplated by the terms of
11 the Stipulated Decision. It is instead an action which requests
12 that the Board determine the rights of Storey as they relate to
13 conduct of Harley which has never been alleged in any action
14 initiated by Storey. To the contrary, Storey, in its response to
15 the petition, admits that the premise upon which the threat to
16 sue was based proved to be unfounded. Accordingly, this petition
17 is not sufficiently related to the Stipulated Decision entered in
18 the protest proceeding.

19 DETERMINATION OF ISSUES

20 53. Storey has the burden of establishing that Harley's
21 conduct was actionable by Storey.

22 54. The evidence did not establish that Harley violated any
23 express or implied terms of its Dealer Contract with Storey at
24 any time after the parties entered into the Stipulated Decision
25 adopted by the Board.

26 55. The evidence did not establish that Harley violated any
27 obligation to Storey under Vehicle Code § 11713.3.

28 56. The evidence did not establish that Harley violated the
29 express or implied terms of the Board's Stipulated Decision.

30 57. The evidence did not establish that Harley acted

1 wrongly or violated any other obligation to Storey arising from
2 the circumstances described above.

3 58. The evidence did not establish that Harley violated any
4 contract, Board order, statute or other duty of any type owed to
5 Storey. Therefore, the issue of damages need not be addressed by
6 this decision.

7 59. Harley is not entitled to an award of attorney's fees
8 regarding this petition.

9
10 PROPOSED DECISION

11 1. The request in the petition for declaratory relief is
12 granted to the extent as set forth above. The request for
13 attorney's fees is denied.

14
15 I hereby submit the foregoing
16 which constitutes my proposed
17 decision in the above-entitled
18 matter, as a result of a hearing
19 before me on the above dates,
20 and recommend the adoption of
21 this proposed decision as the
22 decision of the New Motor
23 Vehicle Board.

24 DATED: 1-21-98

25 By Michael M. Sieving
26 MICHAEL M. SIEVING
27 Administrative Law Judge/
28 Assistant Executive Secretary