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January 30, 2001

Frederick K. Grittner
Supreme Court Administrator
Minnesota Supreme Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

OFFICE OF
APPELLATE COURTS

JAN 30 2001

FILED

Re: In Re: Twin Cities Harley-Davidson Litigation
Supreme Court File No.: C1-01-118

Dear Mr. Grittner:

Please find enclosed for filing the original and four (4) copies of the Reply Memorandum of Law in Support of Motion to Assign a Single Judge Pursuant to Minn. R. Gen. Prac. 113 and Affidavit of Service.

Yours truly,



TAMMY P. FRIEDERICHS

TPF:amf
Enclosures

cc: Michael W. Unger, Esq.

JAN 30 2001

STATE OF MINNESOTA
IN MINNESOTA SUPREME COURT

FILED

**In Re: Twin Cities Harley-Davidson
Litigation**

COURT FILE NO.: C1-01-118

**Reply Memorandum of Law in
Support of Motion to assign a
single judge pursuant to Minn. R.
Gen. Prac. 113**

To: Twin Cities Harley-Davidson, Inc., above-named and its attorney Michael W. Unger,
Rider Bennett Egan & Arundel, 333 South Seventh Street, Suite 2000, Minneapolis,
Minnesota 55402.

INTRODUCTION

It is obvious from Twin Cities Harley-Davidson's response to the Rule 113 motion that TCHD misunderstands the basis for this Motion. TCHD confuses the Rule 113 motion with a Minn. R. Civ. P. 42.02 motion for consolidation. TCHD's arguments in reliance on consolidation rules and cases and class action cases are inapplicable to this motion for assignment of all cases to a single judge pursuant to Minn. R. Gen. Prac. 113. Accordingly, TCHD's accusations that the multi-plaintiffs are doing an "end run around the appellate rules" are unfounded.¹ Rule 113 is specifically designed for a situation like the current litigation, i.e. to assign 23 cases to a single trial court judge.² The legal analysis should focus on the Rule 113 factors—not consolidation/class action arguments.

¹ Multi-plaintiffs have filed their notice of appeal of Judge Carolan's Order (judgment was entered on January 29, 2001), which TCHD quotes heavily in support of its "end run" accusation. The issues of whether the multi-plaintiff action will proceed as a consolidated action will be addressed in that appeal. The Supreme Court's determination to assign the cases to a single judge is based on the factors set forth in Rule 113, not consolidation/class action analysis.

² TCHD argues that "[n]early half [of the cases] are in Hennepin County and assigned to one judge already." TCHD's Mem. at 4. This argument actually supports this motion because it demonstrates the relative ease of granting the motion.

LEGAL ANALYSIS

Factor #1: the number of parties supports assigning the cases to a single judge.

TCHD argues the Court should not consider the number of parties as a factor because “every slip and fall claim against Wal-Mart does not require consolidated handling. There is nothing about the number of parties that makes each of these individual claims more manageable before a single judge.” TCHD’s Mem. at 10. With due respect to TCHD’s counsel, the authors of Rule 113 deemed this factor important enough to expressly state that it was one factor the Court should consider. Multi-plaintiffs request that the Court consider this factor.

In the case at bar, there are 26 parties involved. The multi-plaintiffs each allege the same claims against TCHD. *See discussion infra.* TCHD sued 23 multi-plaintiffs³ in declaratory judgment actions in seven different counties. Each multi-plaintiff needs to take the depositions of the four principals of TCHD and a number of salesmen; each multi-plaintiff is entitled to provide evidence (in the form of the principals’ testimony, advertising practices, statements of the salesmen, company practice of charging every customer over MSRP) in support of their claims that TCHD has a common sales practice of collecting deposits, waiting on a list, being promised MSRP, and not being sold the motorcycle at MSRP. The number of parties and corresponding number of declaratory judgments in seven different counties weigh heavily in favor of assignment of all cases to a single trial judge.

At the end of its memorandum, TCHD argues that discovery has been substantially completed without the need for assignment to a single judge. This argument is false.

³ After the moving parties’ counsel cited Mr. Smith as a named multi-plaintiff who was not sued in a declaratory judgment action, TCHD sued him on a declaratory judgment. This action demonstrates TCHD’s circuitous attempt to race to *res judicata*. (This issue will be addressed in multi-plaintiffs’ appeal.) Multi-plaintiffs request that the matter of *Twin Cities Harley-Davidson, Inc. v. Smith* (Hennepin County, file number is not yet available) also be assigned to the same judge. A copy of the complaint is filed herewith.

Although multi-plaintiffs cooperated with the scheduling and conducting of all the multi-plaintiffs' depositions (and two non-party witnesses), TCHD has failed to even provide multi-plaintiffs' counsel with dates for the depositions of any of the four principals or 15 salesmen. If motions to compel are needed, does each of the multi-plaintiffs bring his/her own motion in his/her own county, i.e. 23-24 motions to compel? Would a successful motion to compel in one case require the deponent to appear for depositions in the other cases or answer questions about other multi-plaintiffs? Which court's scheduling order applies to the discovery deadlines? What if trials in the declaratory judgment actions are scheduled for the same dates? Which cases will be tried first? Why? What if other trial judges dismiss TCHD's declaratory judgment actions? What if some trial judges find TCHD employed a common sales practice or a common sales scheme? The risk for inconsistent adjudications substantially supports assignment to a single judge.

Factor #2: The nature of the claims supports assignment to a single judge.

In the prior class action case (alleging the exact same claims and based on the same sales practice), TCHD made the same argument it makes here, i.e. that each claimant relies solely on alleged oral misrepresentations; thus, no common claims. TCHD's Mem. at 10-12. The trial court rejected that argument and the case proceeded as a putative class action and was settled. TCHD took advantage of that settlement to obtain dismissal of the claims of approximately 7,500 class members (with the exception of these 25 people who opted out or were not part of the class). Since TCHD settled a putative class action on the same issues, it cannot be heard now to complain that the cases do not present common facts and issues sufficient to justify assigning the cases to a single judge (arguably a far lower standard than class certification).

In responding to multi-plaintiffs' Rule 113 motion, TCHD cites a series of consolidation and class action claims attempting to argue some type of across-the-board prohibition against multi-plaintiff or class action fraud claims. TCHD's arguments are belied both by case law and the factual evidence of this case.

Minnesota case law recognizes that common claims are appropriately handled as a group when the complainants allege a common practice or common scheme. See *Fogie v. Rent-A-Center*, 867 F.Supp. 1398, 1402 (D. Minn. 1993) (common practice involving a form contract presented common issues); *Jenson v. Continental Financial Corp.*, 404 F.Supp. 806, 810 (D. Minn. 1975) (defendant's common practice of selling unregistered securities under the misrepresentation that they were registered presented common issues); see e.g. *State of Minnesota Dep't of Human Rights*, 482 N.W.2d 504, 506 (Minn. Ct. App. 1992) (common practice of testing applicants presented common issues despite the fact that each claimant's medical condition was different). In *Jenson*, the defendant made the same argument as TCHD makes here; i.e. its representations differed as to each customer. 404 F.Supp. at 810. The trial court found that those arguments were "without merit." *Id.* The *Jenson* court certified the class (a much higher standard) of customers damaged by the defendant's oral misrepresentations and omissions. *Id.* Likewise in this case, multi-plaintiffs allege that TCHD engaged in a common sales practice, which involved placing an order, making a down payment, and waiting on a list in order to purchase a motorcycle at MSRP.

The evidence demonstrates that TCHD engaged in a common sales practice; thus the claims are sufficiently common to satisfy this factor of Rule 113. Rather than focusing on a few statements taken out of context in 3 multi-plaintiffs' depositions⁴ (as TCHD does), the best source of information about the nature of the multi-plaintiffs' claims is their complaint.

⁴ Multi-plaintiffs have not yet even taken depositions of the TCHD personnel in this litigation.

As to TCHD's common sales practice, the multi-plaintiffs all make the same allegation of a common sales practice:

Defendant stated that it employed the following sales practice for the sale of new Harley Davidson motorcycles: Defendant required customers to place orders for new Harley Davidson motorcycles, put their names on a waiting list, and make down payments (or deposits) of \$500.00. Defendant stated that the down payment would reserve the customer's order of priority for taking delivery of the new motorcycle when it came in and could be applied to the purchase of the motorcycle.

Defendant further represented that when the customer's name came to the top of the list to take delivery of the motorcycle, Defendant would sell the motorcycle for the Harley Davidson "Manufacturer's Suggested Retail Price" (hereinafter "MSRP").⁵

Likewise in TCHD's own declaratory judgment pleadings, TCHD recognizes that multi-plaintiffs' allegations are exactly the same: "Defendant alleges that Twin Cities Harley-Davidson Inc., in taking the Defendant's waiting list deposit, promise through a salesman to offer the motorcycle at the manufacturer's suggested retail price."⁶ In addition, in its own pleadings, TCHD recognizes that each plaintiff is seeking the same damages, i.e. the difference between the price he/she paid for the motorcycle and the MSRP price.⁷ Lastly, in TCHD's pleadings it raises the same defense in each declaratory action, i.e. "It was the practice and policy of Twin Cities Harley-Davidson, Inc. to sell motorcycles to customers on the waiting list at a price it set each year based upon its perception of the retail market. . . . At no time did Twin Cities Harley-Davidson, Inc. ever commit or promise to sell its motorcycles

⁵ Complaint at Paras. 9, 11.

⁶ See para. 6 of TCHD's complaints against Berg, Bruggenthies, Bullis, Byrnes, Cady, Carter, Denzer, Dave and Tracy Gough, Jungwirth, Junkert, Kinney, Kohrt, Lindstrom, Lindwall, Lucken, Lund, Mascia, Rose, Schodde, (Smith), Sutherland, Thorman, White, Williams.

⁷ See para. 6 of TCHD's complaints against Berg, Bruggenthies, Bullis, Byrnes, Cady, Carter, Denzer, Dave and Tracy Gough, Jungwirth, Junkert, Kinney, Kohrt, Lindstrom, Lindwall, Lucken, Lund, Mascia, Rose, Schodde, (Smith), Sutherland, Thorman, White, Williams.

based upon the manufacturer's suggested retail price."⁸ All the cases hinge on this exact practice (multi-plaintiffs' claim for MSRP v. TCHD's defense against MSRP). The nature of the claims demonstrates the appropriateness of assigning all these cases to one judge.

Factor #3: The anticipated length of trial favors assignment to a single judge.

Multi-plaintiffs explained in their moving papers that each of the other multi-plaintiffs would testify in each of the 23 trials. TCHD argues that this is "absurd" and "[t]here is no basis for one to testify in the trial of another." TCHD's Mem. at 12. TCHD's argument is contrary to the Minnesota Rules of Evidence. Minn. R. Evid. 406 provides that evidence of a routine practice is relevant to prove the organization acted pursuant to its practice:

Evidence . . . of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the . . . routine practice.

Accordingly, multi-plaintiffs' position that the others will testify in each case is supported by the Rules of Evidence. Based upon the estimated length of trial (230 trial days), assignment to a single judge is appropriate.

CONCLUSION

Because the Rule 113 factors weigh in favor of assigning the case to a single judge, the multi-plaintiffs respectfully request that this Court grant their motion.

⁸ See para. 5 of TCHD's complaints against Berg, Bruggenthies, Bullis, Byrnes, Cady, Carter, Denzer, Dave and Tracy Gough, Jungwirth, Junkert, Kinney, Kohrt, Lindstrom, Lindwall, Lucken, Lund, Mascia, Rose, Schodde, (Smith), Sutherland, Thorman, White, Williams.

SISAM & WATJE, P.A.

Dated: 1/30/01



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Attorneys for Jeffrey S. Berg, Bradley P. Bruggenthies, Rocklyn Bullis, Robert J. Byrnes, Robert A. Cady, Terrance J. Carter, David Denzer, Tracy Gough, Dave Gough, Jeff Jungwirth, Tim Junkert, Jim Kinney, Connie L. Kohrt, Mark Lindstrom, Cris C. Lindwall, Alan L. Lucken, Daniel Lund, Anne Marie Mascia, Steven A. Rose, Dave Schodde, Craig Smith, Mark E. Sutherland, John Thorman, Lawrence White, and Terrell M. Williams

CASE TYPE: DECLARATORY JUDGMENT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Twin Cities Harley-Davidson, Inc.,

Plaintiff,

SUMMONS

vs.

Court File No. _____

Craig M. Smith,

Defendant.

THE STATE OF MINNESOTA TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon plaintiff's attorneys an answer to the Complaint which is herewith served upon you, within twenty (20) days after service of this Summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This case may be subject to Alternative Dispute Resolution (ADR) processes under Rule 114 of the General Rules of Practice for the District Courts. The Court Administrator or your attorney can provide you with information about ADR options and a list of neutrals available in your area. ADR does not affect your obligation to respond to the Summons and Complaint within twenty (20) days.

RIDER, BENNETT, EGAN & ARUNDEL, LLP

By


Michael W. Unger (131416)
Michael M. Lafeber (242871)

Attorneys for Plaintiff
333 South Seventh Street, Suite 2000
Minneapolis, Minnesota 55402
(612) 340-8953/8992

DATED: 1/22, 2001

CASE TYPE: DECLARATORY JUDGMENT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Twin Cities Harley-Davidson, Inc.,

Plaintiff,

COMPLAINT

vs.

Court File No. _____

Craig M. Smith,

Defendant.

Plaintiff, for its cause of action, states and alleges as follows:

1. Plaintiff is a Minnesota corporation in the business of sales and services of motorcycles with retail locations in Lakeville and Blaine, Minnesota.
2. Craig M. Smith is a resident of Hennepin County and was a customer of Plaintiff Twin Cities Harley-Davidson, Inc.
3. Defendant placed a refundable, noninterest-bearing deposit with Plaintiff in order to go on a waiting list to purchase a new Harley-Davidson motorcycle.
4. At the time of placing this deposit, Defendant specified the model type desired to be purchased at some unspecified time in the future.
5. It was the practice and policy of Twin Cities Harley-Davidson, Inc. to sell motorcycles to customers on the waiting list at a price it set each year based upon its perception of the retail market. Twin Cities Harley-Davidson, Inc.'s retail price was independent from the

manufacturer's suggested retail price. At no time did Twin Cities Harley-Davidson, Inc. ever commit or promise to sell its motorcycles based upon the manufacturer's suggested retail price.

6. Defendant alleges that Twin Cities Harley-Davidson, Inc., promised through a salesman to offer the motorcycle at the manufacturer's suggested retail price. Defendant claims to be entitled to receive the difference between the actual retail price offered by Twin Cities Harley-Davidson, Inc. and the manufacturer's suggested retail price.

7. Defendant is threatening to sue Plaintiff to recover an amount, less than \$3,000, which he alleges represents the difference between the manufacturer's suggested retail price and the actual retail price offered by Twin Cities Harley-Davidson, Inc. Defendant, through an attorney, is threatening to also seek recovery of attorneys' fees in an amount in excess of Defendant's alleged damages.

8. There being an adversity of interests between the parties and a justiciable controversy arising from this dispute, Plaintiff requests that the Court grant relief by declaring the rights of the parties pursuant to the Minnesota Declaratory Judgment Act, Minn. Stat. § 55.01 *et seq.*

WHEREFORE, Twin Cities Harley-Davidson, Inc. prays for a declaration and judgment against Defendant as follows:

1. That Defendant has no valid claim against Twin Cities Harley-Davidson, Inc. for damages related to making a deposit to get on a waiting list to purchase a motorcycle from Twin Cities Harley-Davidson, Inc.;

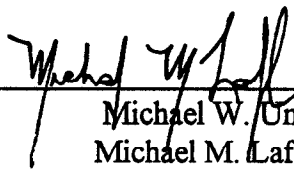
2. That any such claim, if brought, shall be dismissed with prejudice;

3. Plaintiff shall have its costs and disbursements herein; and
4. For such other relief as the Court deems just and equitable.

ACKNOWLEDGMENT

The party upon whose behalf this pleading is submitted, by and through the undersigned, hereby acknowledges that sanctions may be imposed for a violation of Minn. Stat. § 549.211.

RIDER, BENNETT, EGAN & ARUNDEL, LLP

By  _____
Michael W. Unger (131416)
Michael M. Lafeber (242871)

Attorneys for Plaintiff
333 South Seventh Street, Suite 2000
Minneapolis, Minnesota 55402
(612) 340-8953/8992

DATED: 1/22, 2001

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)

) S.S.

COUNTY OF HENNEPIN)

Re: In Re: Twin Cities Harley-Davidson Litigation
Supreme Court File No.: C1-01-118

Phillip Smith in the City of Edina, in the County of Hennepin, in the State of Minnesota, being first duly sworn, says that on the 30th day of January, 2001, he served the Reply Memorandum of Law in Support of Motion to Assign a Single Judge Pursuant to Minn. R. Gen. Prac. 113

upon:

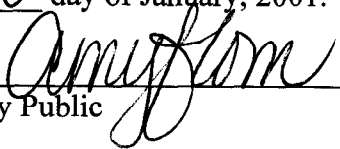
Michael W. Unger
Rider Bennett Egan & Arundel
333 South Seventh Street
Suite 2000
Minneapolis, Minnesota 55402

by handing to and leaving with DEB QUEST, true and accurate copies thereof.



Phillip Smith

Subscribed and sworn to before me,
this 30 day of January, 2001.



Notary Public

