IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

EISENCORP, INC.,

Plaintiff,

v.

ROCKY MOUNTAIN RADAR, INC.
and MICHAEL CHURCHMAN,

Defendants.

OPINION AND
ORDER

03-C-0157-C

- -

In this civil action for monetary and declaratory relief, plaintiff Eisencorp, Inc. contends that defendants Rocky Mountain Radar, Inc. and Michael Churchman terminated the parties' dealership agreement in violation of the Wisconsin Fair Dealership Law. Wis. Stat. § 135.03. In addition, plaintiff contends that defendants are liable under breach of contract, conversion and civil theft theories for failure to make certain commission payments. The case arises out of a failed relationship under which plaintiff had the right to sell defendant Rocky Mountain's products and to hold itself out as a dealer. In 2001, plaintiff had an opportunity to sell defendant Rocky Mountain's products to a new customer on a large scale that plaintiff could not accommodate financially. The parties agreed that

until plaintiff could obtain the necessary financing, defendant Rocky Mountain would invoice the new customer directly for all sales solicited by plaintiff. In 2003, defendants cancelled this arrangement, which plaintiff characterizes as a dealership and defendants call a sales representative agreement. Presently before the court is defendants' motion for summary judgment. Jurisdiction is present. 28 U.S.C. § 1332.

Defendants' motion for summary judgment will be granted with respect to plaintiff's claim under the Wisconsin Fair Dealership Law. Plaintiff argues that all transactions between the parties formed part of the original dealer agreement, but this is unpersuasive; the parties developed the sales representative arrangement in response to plaintiff's inability to secure the financing needed to accommodate a large new client under the terms of the dealer agreement. Further, the facts show that defendants terminated only the sales representative agreement and left the dealer agreement intact. Because plaintiff does not argue that the sales representative agreement qualifies as a "dealership" under the Act, I conclude that plaintiff has failed to show that it is entitled to the Act's protections.

Defendants' motion for summary judgment will be denied with respect to plaintiff's contract, conversion and civil theft claims. Defendants argue that they have fully satisfied their obligation to pay the commissions by paying plaintiff's president Ryan Eisenhut. However, because this payment was made to Eisenhut, it does not satisfy whatever liability defendants might have to plaintiff. Were it clear that the commission payments were owed

to Eisenhut and not plaintiff, the claim would be dismissed for lack of standing. However, I am unable to determine from the record or the parties' submissions who is entitled to the payments.

(As a preliminary note, it is largely unclear from the evidence which acts plaintiff's president, Ryan Eisenhut, performed in his individual or official capacity. For purposes of laying out the facts, I have indicated plaintiff as the actor where it is clear and in all other instances, used Eisenhut as the relevant actor. By indicating that certain acts were performed by "Eisenhut," I am not deciding whether they were performed in his individual or official capacity.)

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

Plaintiff Eisencorp, Inc. sells a variety of goods, including radar detectors, anti-photo-radar plates, bird houses, pepper spray, barbecue tools and Elvis memorabilia, through its internet site, www.eisencorp.com. It is incorporated and has its principal place of business in Wisconsin. Plaintiff's sole owner and president is Ryan Eisenhut. Eisenhut founded plaintiff as a sole proprietorship in 1999 and incorporated the business in 2001. Defendant Rocky Mountain Radar, Inc. sells radar detectors, laser detectors and scramblers for use in

automobiles and commercial trucks and it is the only manufacturer of legal, passive radar scramblers. It is incorporated and has its principal place of business in Colorado. Defendant Michael Churchman, a citizen of Texas, has been the president of defendant Rocky Mountain since 1990. Including defendant Churchman, defendant Rocky Mountain has eleven employees and thirteen stockholders. Defendant Churchman was the sole stockholder until 1998 and currently owns 80% of the stock and is the only sitting member of the board of directors.

Defendant Rocky Mountain sells its products through dealers, distributors and sales representatives. Its sales representatives solicit orders from dealers and distributors. They do not have authority to negotiate prices, but instead must charge the prices listed in defendant Rocky Mountain's pricing scheme. These prices vary depending on quantity sold and type of customer. For example, in May 2001, defendant Rocky Mountain sold one of its products to dealers for $225-$180 for each unit depending on the quantity ordered and to distributors who purchased by the case for $153 for each unit. Ordinarily, defendant Rocky Mountain puts its sales representative agreements into writing and provide a 6% commission on all sales solicited. Defendant Rocky Mountain has approximately nine sales representatives. None of these sales representatives have dealer agreements.

A. Structure of Parties' Relationship

1. Original arrangement

Eisenhut approached defendant Rocky Mountain in 1999, seeking the right to market defendant Rocky Mountain's products on behalf of plaintiff. On September 23, 1999, plaintiff and defendant Rocky Mountain entered a dealer agreement. Under the agreement, plaintiff was granted the right to purchase and resell defendant Rocky Mountain's products, to hold itself out as an authorized dealer of these products and to use defendant Rocky Mountain's name and logos in marketing. The agreement provides that defendant Rocky Mountain "does not offer refunds for product(s) sold to its dealers for resale." Shortly thereafter, plaintiff offered defendant Rocky Mountain's products for sale on its internet site. Plaintiff did not maintain an inventory of these products but instead ordered them as internet sales were made. Defendant Rocky Mountain would then ship orders to plaintiff with payment due upon delivery.

In July 2001, plaintiff paid a marketing firm $5,450 to develop a marketing campaign. The campaign included television commercials, print advertisements in a number of catalogs and a number of press releases. Some of the print advertisements used the names and pictures of some of defendant Rocky Mountain's products. In early February 2003, plaintiff spent approximately $1,000 to place an advertisement for one of defendant Rocky Mountain's radio scramblers in a trucking magazine. Plaintiff sold $18,000-$20,000 worth of defendant Rocky Mountain's products to individuals and also made other efforts targeted

at retailers.

2. Special arrangement for Barjan orders

In 2001, Eisenhut spoke with defendant Churchman, defendant Rocky Mountain's president, about a potential new client, Barjan, LLC. Barjan is in the business of distributing products for commercial truck drivers to retail outlets and wanted to place a large order of defendant Rocky Mountain's equipment from plaintiff. Eisenhut contacted defendant Churchman for advice on negotiating and securing a contract with Barjan. Defendant Churchman told Eisenhut that he would need to secure financing to make the purchases necessary to accommodate Barjan's resale orders. Although defendant Churchman indicated that he might be able to help plaintiff in this matter, plaintiff was unable to secure enough financing to allow it to handle the Barjan sales.

Defendant Rocky Mountain proposed a temporary solution under which it agreed to take payment directly from Barjan until plaintiff could obtain the necessary financing to permit a resale arrangement. Eisenhut would solicit sales from and negotiate prices with Barjan and submit the orders to defendant Rocky Mountain. Upon receipt of a purchase order, defendant Rocky Mountain would send the ordered products and invoices to Barjan directly. However, it reserved the right to reject purchase orders from Barjan. This arrangement was never committed to writing.

At the time Eisenhut first started soliciting orders from Barjan, which was sometime in the middle of 2001, his commission was computed as the difference between the price he had negotiated with Barjan ($188 for each unit) and the standard distributor price ($153 for each unit), less any returns and their associated shipping costs. Commission checks were made out to plaintiff at Eisenhut's request.

B. Trade Show

In early January 2002, defendant Rocky Mountain displayed its products at an electronics trade show in Las Vegas, Nevada. One of Barjan's representatives who attended the trade show brought a representative from Petro truck stops over to defendant Rocky Mountain's booth. At the time, Barjan was trying to enlist Petro as a customer. Both the Barjan and Petro representatives picked up a price sheet showing the standard unit cost for orders of twenty units or more as $180, $8 less than the price plaintiff was charging Barjan.

After the show, Petro's representative indicated that Petro wished to carry defendant Rocky Mountain's product, but only through a distributor. The representative proposed two potential distributors to defendant Rocky Mountain, one of which was Barjan. Defendant Churchman contacted Eisenhut and proposed three options: (1) sales to Petro could be made through the second proposed distributor; (2) plaintiff could obtain the financing it would need to purchase enough units so that it could resell to Barjan, which would then resell to

Petro for $180 a unit; or (3) Eisenhut could continue to solicit sales from Barjan as he had been doing, but commission payments would be reduced to 6% of the standard $153 unit price for distributors. Eventually, both parties agreed on the third option. (The parties dispute how they came to agree on the third option. According to plaintiff, defendant Churchman told Eisenhut that Eisenhut had to arrange financing within one week if he wanted to choose the second option. When Eisenhut called Churchman back to let him know that he was close to arranging financing, Churchman told him to forget about it and that the third option would be adopted. Eisenhut Aff., dkt. #21, at 82-83. According to defendants, Eisenhut chose the third option. Churchman Aff., dkt. #20, at 46.). As a result of the new arrangement, Eisenhut's commission rate dropped $9.18 for each unit and defendant Rocky Mountain received $8.18 less for each unit sold to Barjan.

Shortly after the new arrangement was made, defendant Churchman contacted Eisenhut, stating that he wanted to draw up a sales representation agreement with a termination clause. Eisenhut refused.

C. Product Returns

Defendant Rocky Mountain required any distributor wishing to return products to fax it a request for returned goods authorization identifying the product to be returned. Upon receipt of a return request, it would issue an authorization number that the distributor

was to submit with the returned product. Each year, defendant Rocky Mountain introduced approximately two to three new products to replace models that had become obsolete because of rapid developments in technology and the legal regulatory environment. Defendant Rocky Mountain did not always allow return of obsolete products.

Barjan had agreed to take back unsold product from its customers and in turn, wanted to be able to return these products to defendant Rocky Mountain. It pressured Eisenhut to make arrangements for the return of obsolete equipment. Eisenhut believed that defendant Rocky Mountain would be reluctant to make such arrangements. Nonetheless, Barjan and Eisenhut agreed that Barjan would send both its return requests and products to be returned to Eisenhut, who would send them to defendant Rocky Mountain. Normally, a distributor would send the request to a sales representative and if the request were approved, the distributor would send the product to defendant Rocky Mountain directly. Defendant Rocky Mountain did not object to the return arrangement Eisenhut had made with Barjan, but did ask Eisenhut whether he was aware of the additional risk he was incurring because he would be responsible for any lost shipments.

Defendant Churchman had agreed to accept some but not all returns of an obsolete model called the "Phantom II." On several occasions, Eisenhut returned obsolete products but attached return slips indicating incorrectly that he was shipping back current models. In January 2003, one of defendant Rocky Mountain's employees, Doug Jones, complained

to Eisenhut about these errors. Shortly thereafter, Eisenhut made another return shipment with inconsistencies in the return form, which showed all the units being returned as current, when nine of the nineteen units were obsolete Phantom II's.

D. Termination

On February 5, 2003, Doug Jones, who at the time had the authority to terminate a dealer or sales agreement, left a message for Eisenhut in which he stated, "I will terminate you if I see another Phantom II hit my docks." In a conversation later that day, Jones said to Eisenhut, "I'm just going to get rid of you now." Jones sent Eisenhut a letter dated February 5, 2003, in which he wrote "Pursuant to the Rocky Mountain Sales Representative Agreement, this letter will serve as your official 30-day notification for termination." After receiving the letter, Eisenhut compared its language to plaintiff's dealer agreement and realized that the "sales representative agreement" was not the same as the "dealer agreement." He wrote "This is not a sales rep. agreement" on the dealer agreement and "There is no sales rep. agreement" on the letter. Defendant Rocky Mountain had no established procedures for terminating a dealer agreement.

Neither plaintiff nor Eisenhut did business with defendant Rocky Mountain after receiving the termination letter. Eisenhut made two phone calls to defendant Churchman, one on February 5, 2003, and the other on February 6, 2003. Defendant Churchman did

not respond to either call. Eisenhut has made no attempts to contact defendant Rocky Mountain since February 7, 2003. Eisenhut never received written notice from defendant Rocky Mountain that the dealer agreement was terminated. In a letter dated April 7, 2003, sent to plaintiff's attorney, defendant Churchman stated that the termination of Eisenhut's role as a sales representative did not affect plaintiff's rights under the dealer agreement. All of defendant Rocky Mountain's terminated sales representatives receive a final commission payment within sixty days of termination. The "bulk" of plaintiff's gross income in 2001 and 2002 had been derived from its relationship with Barjan.

OPINION

The Wisconsin Fair Dealership Law provides that "[n]o grantor, directly or through any officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause." Wis. Stat. § 135.03. Even when there is good cause, the grantor of a dealership must give ninety day written notice of the termination. Wis. Stat. § 135.04. The notice must state the reason for the termination and provide a sixty-day cure period. Id. The Act provides dealers with a civil cause of action for damages caused by a grantor's violation. Wis. Stat. § 135.06

A. Scope of the Agreement

At the heart of the parties' dispute is whether the special arrangement the parties made to accommodate Barjan sales was part of the dealer agreement between plaintiff and defendant Rocky Mountain or whether it created a separate sales representative agreement. "[A] dealership must be cohesive. Not every interaction between the parties is part of a single dealership." Dynamic Movers, Inc. v. Paul Arpin Van Lines, Inc., 956 F. Supp. 836, 839 (E.D. Wis. 1997). Useful factors in determining the scope of an agreement are:

> (1) the language and history of the agreements;
> (2) the extent of distinction between the activities;
> (3) the extent to which the activities identified in the contracts are treated distinctly by the defendant in the operation of the plaintiff's businesses; and
> (4) whether there are third parties performing the activities separately.

Team Electronics of Janesville, Inc. v. Apple Computer, Inc., 773 F. Supp. 153, 155 (W.D. Wis. 1991). Because both parties have organized their arguments around these four elements, I will do the same. However, I note that the second and third considerations, deal with whether the parties have institutionally separated the performance of their obligations under the agreements and are not particularly useful in a case such as this where both parties are so small that institutional separateness is impracticable. However, the language and history alone reveal that the agreements are separate.

1. Language and history

Defendants note that the language of the agreements differs in that one was written and the other was oral. See, e.g., Dynamic Movers, 956 F. Supp. at 839 (defendant "used a written agreement for hauling household goods but not logistics, suggesting that the markets were distinct"). Plaintiff suggests that the non-existence of a second written contract cuts in their favor; it says that no writing was necessary because the dealer agreement was broad enough to encompass the new Barjan arrangement. Plaintiff notes that the agreement "placed no true restrictions on the marketing, pricing, or customer base." Plt. Br., dkt. #22, at 20. Although the dealer agreement may have been broad in these respects, it did not entitle plaintiff to the right to commissions for sales it had solicited. The heart of the dealer agreement was the conveyance of the right to purchase and resell; the essential change worked under the Barjan arrangement was the elimination of this step.

With respect to the history of the agreements, plaintiff argues that the Barjan arrangement was not a "clear change" in the parties' interactions like the one in Team Electronics, 773 F. Supp. at 155. Plaintiff notes that under the Barjan arrangement, plaintiff continued to set prices, at least initially, solicit orders and handle customer returns, as it had done with respect to other customers in the past. In Team Electronics, 773 F. Supp. at 155, the court characterized a "clear change" as one in which "the pricing decisions, the burden of maintaining inventory, the risk of nonpayment and the burden of processing billing and collections" are shifted from the plaintiff to the defendant. Except for pricing decisions, all

of these burdens shifted from plaintiff to defendant Rocky Mountain under the Barjan arrangement. Plaintiff attempts to explain away the "slight difference[]" in treatment of Barjan versus its other customers; it notes that defendant Rocky Mountain was better situated to finance the Barjan orders, but this shift in financing large transactions is no "slight change." See Secretary of Labor, U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529, 1540 (7th Cir. 1987) (Easterbrook, J., concurring) ("[T]he opportunity to obtain profit from efficient management is not the same as exposing a stock of capital to a risk of loss.") Moreover, the very reason the alternative arrangement was made was plaintiff's inability to take advantage of the opportunity with Barjan under the terms of the dealer agreement.

2. Extent defendants treated activities distinctly

As noted in Team Electronics, 773 F. Supp. at 156, "[i]f a manufacturer or supplier organizes and divides its own operations around the activities which are the subject of separate agreements, this is strong evidence that the agreements should be viewed separately." Plaintiff argues that defendant Rocky Mountain treated the dealership agreement and the Barjan sales agreement similarly. All affairs for both were handled by the same three employees: defendant Churchman, Jones and Maria Alfaro. In addition, plaintiff notes that defendant Rocky Mountain has no dedicated staff working solely with sales representatives or distributors. These facts might have more weight if defendant Rocky

Mountain had more than eleven employees; in this case, three employees represent over one-quarter of the total staff. Where division of operations is impracticable or impossible given a company's size and resources, its absence should not weigh heavily in determining whether the agreements are separate or not.

3. Extent plaintiffs treated activities distinctly

"If the plaintiff uses the same inventory, facilities, employees and business plan for both activities, this strongly evidences a single 'agreement' and 'business' for [the Wisconsin Fair Dealer Law] purposes." Team Electronics, 773 F. Supp. at 156. Plaintiff notes that Eisenhut performed all the work, using the same marketing plan of catalogs, television ads and direct solicitation for both plaintiff's internet customers and Barjan. Plt.'s Br., dkt. #16, at 21. Again, it is not probative that Eisenhut performed all the work for both Barjan and its other clients. Because Eisenhut was plaintiff's sole employee, no other division of responsibility was possible. Moreover, it makes little sense for plaintiff to assert that it used television and catalog advertisements to solicit sales both from Barjan and other customers alike; plaintiff does not explain why it would have used such broad forms of media to solicit sales from a company with which it had regular contact.

In Dynamic Movers, 956 F. Supp. at 839, the court found activities to be different when one involved dealing with customers on a one-time basis, in which case advertising and

trademarks are important, and the other involved the development of long-term relationships, in which customer service and flexibility are essential. These characteristics distinguish plaintiff's relationship with its internet customers from the relationship with Barjan. Moreover, as defendants point out, the Barjan agreement did not include one of the major activities under the dealer agreement, purchasing goods for resale.

4. Third parties performing tasks separately

In Team Electronics, 773 F. Supp. at 156-57, the court found the fact that other entities performed one of two relevant activities exclusively tended to establish a real and substantive difference between the two. The parties agree that defendant Rocky Mountain's dealers are not sales representatives but each believes that this fact cuts in their favor. Defendants argue that they always treat dealers and sales representatives differently and therefore, the sales representative agreement and the dealer agreement must be separate. Plaintiff contends that because sales representative agreements and dealer agreements are always performed by separate entities and defendant Rocky Mountain "does not allow dealers to also be sales reps," plaintiff would not have been operating under both types of arrangements. Plt.'s Br., dkt. #22, at 23. Plaintiff's argument is not supported by the evidence; plaintiff has not proposed any facts or adduced any evidence that defendant Rocky Mountain would never allow the same entity to act both as a dealer and sales representative.

The parties' proposed findings of fact show only that none of defendant Rocky Mountain's nine sales representatives currently serves as a dealer. It is illogical to argue that receiving commissions for solicited sales is somehow tantamount to a purchase and resale for profit, simply because a single party performs both acts. Earning a commission payment is not the same thing as profiting through a purchase and resale arrangement.

After considering the four factors, I conclude that the Barjan arrangement was separate and distinct from the existing dealer agreement. It falls outside the scope of the contractual language governing the dealer agreement; it was developed because plaintiff could not handle Barjan's orders under that agreement; and it shifted the burden of financing and risk of loss from plaintiff to defendant. Finally, the long-term relationship-building activities involved in carrying out the sales representative agreement are significantly different from the tasks needed to attract new customers under the dealer agreement. Accordingly, these two agreements will be evaluated separately under the Wisconsin Fair Dealer Law.

B. Termination

I turn next to the question whether defendants terminated either or both of the agreements. Because I conclude that only the sales representative agreement was terminated, it will be unnecessary to determine whether the dealer agreement qualifies as a "dealership."

"Termination" is an "act [by] the grantor which ends the relationship between the parties." Meyer v. Kero-Sun, Inc., 570 F. Supp. 402, 406 (W.D. Wis. 1983). Plaintiff argues three acts of termination: the February 5 phone conversation with Jones, the February 5 letter and defendants' failure to return two phone calls.

First, plaintiff argues that the dealer agreement was terminated by virtue of the February 5 phone conversation between Jones and Eisenhut in which Jones said, "I'm just going to get rid of you now." Defendants challenge the portion of Eisenhut's affidavit in which he states that Jones had said that *"Eisencorp* was terminated," Eisenhut Aff., dkt. #25, ¶ 10 (emphasis added) under the sham affidavit rule in light of the following portion of Eisenhut's prior deposition testimony:

> Q. Okay. Have you been told orally by Rocky Mountain Radar that the dealership agreement is terminated?
>
> A. February 5th.
>
> Q. Okay. Who — who told you that?
>
> A. Doug Jones.
>
> Q. And he told you what?
>
> A. The Conversation I had with Doug Jones was, number one, again, the mentality that every conversation was with him, that there were more Phantoms on my dock — and I won't use the profanity that was used in this conversation — were for — more Phantom II's on my dock. I'm just gonna — I'm gonna terminate you right now. That was the conversation we had.
>
> Q. That's all of it?
>
> A. That — I do have —
>
> Q. Have you told me all of it, I mean on the termination? That's what it is?

> A. The — the termination — so I'm just gonna terminate your contract, is what he said.
>
> Q. Okay. Do you know if he said, I'm gonna terminate you right now or I'm gonna terminate your contract?
>
> A. He said, I'm gonna terminate your contract right now.

Eisenhut Dep., dkt. #21, at 104-05. According to defendants, when Eisenhut swore in his affidavit that Jones had told him that *Eisencorp* was terminated, he contradicted his deposition testimony that Jones had told him that *he* was terminated. The sham affidavit rule applies when "a subsequent statement so squarely contradicts an earlier one as to create only a sham issue of fact." Bank of Illinois v. Allied Signal Safety Restraint, 75 F.3d 1162, 1170 (7th Cir. 1996) (invalidating later testimony that child was wearing seatbelt because of earlier unequivocal testimony that he was not). "'A definite distinction must be made between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence.'" Id. at 1169-70 (quoting Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986)).

Eisenhut's deposition testimony does not present the kind of square contradiction that would warrant striking the challenged portion of the affidavit; Eisenhut did not testify that Jones never said that plaintiff was fired. Moreover, it is not clear whether "you" refers to Eisenhut as an individual or in his capacity as plaintiff's president. Accordingly, I decline to strike this portion of the affidavit.

However, even accepting Eisenhut's sworn statement that Jones told him that *plaintiff* was terminated, the context of his statements clarifies their meaning. Eisenhut concedes that Jones did not refer to any specific agreement or status during this conversation. Jones complained of obsolete Phantom II's that Eisenhut had returned on behalf of Barjan; there is no indication that Jones mentioned anything regarding plaintiff's performance under the dealer agreement. Moreover, Jones wrote a letter that same day, which Eisenhut received the following day, saying that the letter served as notice of the termination of the "Rocky Mountain Sales Representative Agreement." It is undisputed that plaintiff noticed that the letter specified a sales representative agreement; Eisenhut wrote, "There is no sales rep. agreement" on the letter. Plaintiff made only two phone calls to try to clarify this discrepancy. It argues that defendant Rocky Mountain's failure to return these calls made it clear that the relationship was over.

I am unprepared to hold that an ambiguous statement, the meaning of which was clarified the following day, and two unreturned telephone calls amount to a termination. Plaintiff argues that it understood the termination to be an end of the dealer agreement because that was the only contract it believed existed between the parties. The Wisconsin Fair Dealership Law protects dealers against unfair treatment by grantors, Wis. Stat. § 135.025(2)(b), but not from their mistaken impressions about the legal status of their contractual relations. If there were any lingering confusion, defendant Churchman resolved

it in the April 7, 2003 letter he sent to plaintiff's attorney, stating that the termination of Eisenhut's role as a sales representative did not affect plaintiff's rights under the dealer agreement.

C. Dealership

Although the evidence does show that defendants terminated the sales representative agreement, plaintiff does not contend that this agreement standing alone qualifies as a "dealership." An agreement is a "dealership" if the grantor conveys "the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol." Wis. Stat. § 135.02(3)(a). Plaintiff notes that these rights are conveyed under the dealer agreement but it does not argue that the same is true under the Barjan arrangement. There also must be a "community of interest" or a "continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods and services." Wis. Stat. §§ 135.02(1) and (3)(a). The continuing financial interest must be something "more significant than in the typical vendor-vendee relationship." Ziegler Co., Inc. v. Rexnord, Inc., 139 Wis. 2d 593, 604, 407 N.W.2d 873, 879 (1987). The only investments plaintiff has made in the promotion of defendant Rocky Mountain's products are the advertising expenses it incurred. Plaintiff has not indicated how its advertising efforts were related to developing and

maintaining its on going relationship with Barjan. By failing to develop these arguments, plaintiff has waived them. Huck Store Fixture Co. v. NLRB, 327 F.3d 528, 537 (7th Cir. 2003). Accordingly, defendants' motion for summary judgment will be granted with respect to plaintiff's claim under the Wisconsin Fair Dealership Law.

D. Commission Payments

Finally, plaintiff asserts claims for breach of contract, conversion and civil theft for certain unpaid commissions. The parties dispute both the amount owed and whether a check was ever issued and received. According to plaintiff, defendant Rocky Mountain has failed to pay it $3,024 that is owed; defendants contend that defendant Rocky Mountain has paid Eisenhut the $1,964.53 it owed him at the conclusion of the sales representative agreement. Plaintiff has submitted the sworn testimony of Eisenhut that no check has been received, Eisenhut Aff., dkt. #25, at ¶ 2, while defendants submit testimony from defendant Churchman that a check has been issued. Defendants supplement this testimony with a copy of their internal records, indicating payment in the amount of $1,964.53. Churchman Dep., dkt. #29, at 86-88 and ex. 33.

Even if there were no dispute whether the amount owed were ever paid, defendants' argument is without merit. According to defendants' proposed fact, they paid Eisenhut the $1,964.53. Dfts.' PFOF, dkt. #17, ¶ 103. Although the check was made payable to

plaintiff, defendants insist that the money was owed Eisenhut and was made payable to plaintiff at his request. Churchman Dep., dkt. # 20, at 84-85. Defendants now seek an entry of summary judgment against *plaintiff* on the ground that they paid *Eisenhut* money they owed him. If defendants were liable to plaintiff, this payment would not satisfy that obligation.

Defendants assert that plaintiff lacks standing to pursue recovery under the sales representative agreement because that agreement is between defendant Rocky Mountain and Eisenhut. Dfts. Br., dkt. #16, at 15. However, this argument is not developed and it is unclear from the evidence whether Eisenhut was acting in his capacity as an individual or as plaintiff's president when he agreed to the Barjan agreement. Because defendants have failed to show that its sales representative agreement was with Eisenhut and not plaintiff, their motion for summary judgment will be denied with respect to these claims.

ORDER

IT IS ORDERED that defendants Rocky Mountain Radar. Inc.'s and Michael Churchmans' motion for summary judgment is GRANTED with respect to plaintiff Eisencorp, Inc.'s claim under the Wisconsin Fair Dealership Law and DENIED with respect

to plaintiff's contract, conversion and civil theft claims.

Entered this 15th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge