



Excel Industries, Inc.

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March 13, 2018

VIA E-MAIL: mike.petersen@senate.ks.gov; dan.goddard@senate.ks.gov; pat.pettey@senate.ks.gov;
Carolyn.McGinn@senate.ks.gov; don.schroeder@house.ks.gov; Linda.Herrick@senate.ks.gov

Senator Mike Petersen
Chair, Committee on Transportation
Kansas State Capitol, 345-S
300 SW 10th Street
Topeka, KS 66612

Senator Dan Goddard
Vice-Chair, Committee on Transportation
Kansas State Capitol, 541-E
300 SW 10th Street
Topeka, KS 66612

Senator Pat Pettey
Ranking Minority Member, Committee on Transportation
Kansas State Capitol, 125-E
300 SW 10th Street
Topeka, KS 66612

Senator Carolyn McGinn
District 31
Kansas State Capitol, 545-S
300 SW 10th Street
Topeka, KS 66612

Representative Don Schroeder
District 74
Kansas State Capitol, 149-S
300 SW 10th Street
Topeka, KS 66612

Re: Opposition to SB 426 – AN ACT concerning contracts; relating to dealership agreements for farm equipment, outdoor power equipment and lawn and garden equipment; ...

Dear Senators Petersen, Goddard, Pettey, and McGinn:

Excel Industries, Inc. (“Excel”) writes in opposition to SB 426. It would significantly impair our existing business relationships with our Kansas dealers and would ultimately adversely affect Kansas consumers.

Headquartered in Hesston, Kansas, Excel is the proud manufacturer of Hustler® and BigDog® branded outdoor power equipment, including zero-turn mowers and utility vehicles. Founded in 1960, Excel has grown to be one of the largest manufacturers in the state. Excel, through its subsidiaries, distributes and sells its products in dozens of international markets and throughout the U.S., including Kansas. Excel has developed one of the largest and most effective independent dealer networks in its industry. SB 426 unnecessarily wades into long-standing relationships between Excel and its Kansas dealers and fails to appreciate certain complexities of the outdoor power industry.

The following is an overview of some of our rationale underlying our opposing this legislation. We would welcome the opportunity for a broader discussion.

Private Right to Contract: We support the private right to contract between two approving parties without legislative intervention. The proposed legislation interferes with that private right in several respects. Dealers are free to choose whether to carry our products, and there are numerous competitive market participants. We pride ourselves on building strong relationships with our network of independent dealers to deliver quality products to Kansas consumers. We are confident that our dealers choose to do business with us in part because of our collaborative approach and because dealers have certain financial incentives to work with us over our competitors. This bill has the effect of altering the incentives affecting the outdoor power equipment market, and takes the remarkable step of trying to determine certain profit margins for the parties in all circumstances instead of allowing the free market to do so. Ultimately, this bill hurts Kansas consumers by threatening to disrupt the delicate manufacturer-dealer balance developed over decades, resulting in increased prices, decreased warranty coverage, or both.

Manufacturers' Warranty Expenses: SB 426 increases the warranty expense for some products and manufacturers to include warranty reimbursement rates and processing requirements not currently included in mutually agreed upon contracts or business processes with authorized dealers. First, it should be noted that Excel already provides profit opportunities for our dealers performing warranty work. SB 426 is not providing an opportunity for a dealer to profit; rather, it is attempting to define the measure of profit appropriate for the market.

Second, the provisions attempting to define profit on warranty work fail to account for the broader relationship between manufacturer and dealer. SB 426 apparently assumes, without support, that dealers should profit identically for warranty and non-warranty work. Such an assumption disregards that both parties benefit from warranty provisions and that the parties bear different burdens in warranty and non-warranty transactions. A manufacturer's warranty is, among other things, a customer acquisition tool for the dealer. It both promotes sales of products on a dealer's floor subject to that warranty and also drives existing product owners to those dealers who deliver outstanding customer care and warranty repair. Excel, as a manufacturer, invests substantial resources in warranty support infrastructure and personnel, which justifies a different dealer profit margin for warranty and non-warranty work.

Third, SB 426 fails to account for several market realities of warranty work. For example, it would require manufacturers to pay a profit margin on warranty parts (and the same margin on every part) even if the dealers buy such parts from a third party, such as from manufacturer's upstream supplier. Further, it allows dealers to earn a windfall profit in certain situations. It assumes the dealer should earn profit equivalent to a non-warranty part sale, even though a manufacturer may provide the warranty part for free. And it provides no checks and balances on the dealer's "hourly retail labor rate for non-warranty work," which a dealer could set arbitrarily high for warranty reimbursement purposes.

Fourth, it requires Excel, as the OEM manufacturer who provided the OEM warranty, to pay profit on recalled or reworked parts even if such failed parts were not manufactured by Excel. Not only is the manufacturer being asked to furnish dealer profit for another's failure, but the manufacturer rarely can pass this cost along to the responsible party. The OEM manufacturer that provides the warranty simply does not have privity of contract with all such suppliers, and the very best it might get in some situations is a replacement part. For example, Excel may not be able to recover SB 426 dealer profit attributable to a carburetor defect because Excel did not purchase the carburetor; instead, Excel purchased the engine containing the carburetor. Exacerbating the inequity, under SB 426, Excel arguably would be required to pay a part profit on the *replacement engine* that included the failed carburetor. These are just a few ways in which SB 426 oversimplifies the market complexities of warranty work.

Retroactivity: SB 426 would apply retroactively to all current agreements, rendering “void and unenforceable” certain existing dealer relationships, which is fundamentally unfair. Conversely, manufacturers would remain bound by existing supply chain agreements, which were negotiated at a time before SB 426 existed, and had no opportunity to negotiate for reimbursement of SB 426 expenses caused by upstream suppliers.

Transfer of Ownership: SB 426 would significantly impair the manufacturers’ ability to choose who it contracts with and who represents its brand. Specifically, SB 426 precludes manufacturers from denying transfer of ownership within a dealer organization unless it results in a change in the controlling interest. Manufacturers believe they should decide who represents their brand(s). The ability to vet and accept or reject prospective owners is fundamental to manufacturers’ brand integrity and business models. There may be strong financial reasons supporting a manufacture’s oversight of a dealer’s ownership structure, such as when a proposed new minority interest holder in a dealer has certain felony convictions or would adversely affect floor plan financing, or when an existing minority interest holder in a dealer (a) is an investor that is necessary to the viability of a dealership; (b) is essential to a vital ongoing customer relationship at the dealer; or (c) is a financial guarantor for the dealership. And these are just a few potential reasons.

Creates Ambiguity: SB 426 includes confusing provisions and terms, increasing the likelihood of litigation.

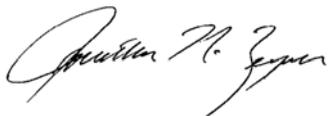
Provisions on accepting shipments: SB 426 would prevent manufacturer programs that require certain minimum parts orders or automatically fulfil warranty part shipments. That only hurts the Kansas consuming public, who must wait on parts that should be kept at the dealer for non-warranty or warranty work.

Pricing arrangements: Certain provisions could be read to prevent price incentive programs, such as volume discount programs, incentives to purchase one brand from a manufacturer as opposed to another brand from the same manufacturer, or incentives to promote branded products over private label products from the same manufacturer.

In summary, our company makes significant investments in the development of our products and the marketing of our brands, with the intent to drive business to our authorized dealer locations. We cannot thrive unless our dealers also thrive. We have a vested interest in seeing all of our committed dealers succeed. SB 426 threatens the balance between manufacturer, dealer, and consumer. It would significantly impair our existing relationships with Kansas-based dealers, creating unnecessary ambiguity and likely increasing manufacturing expenses that would only increase consumer’s costs or decrease the warranties we can offer. We oppose SB 426.

We appreciate the opportunity to provide comments on this legislation, and your consideration of our concerns.

Sincerely,



Jonathan N. Zerger
General Counsel, Excel Industries, Inc.

cc: Members of the Senate Committee on Transportation: Steve.fitzgerald@senate.ks.gov;
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