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9

STATE OF CALIFORNIA

10

NEW MOTOR VEHICLE BOARD

11

12 In the Matter of the Protest of:

PROTEST NO.: PR-2299-11

13 LAIDLAW'S HARLEY-DAVIDSON
SALES, INC., dba LAIDLAW'S HARLEY-
14 DAVIDSON,

**RESPONDENT HARLEY-DAVIDSON
MOTOR COMPANY'S REPLY BRIEF**

15 Protestant,

16 vs.

17 HARLEY-DAVIDSON MOTOR
COMPANY, a Corporation,

18

Respondent.

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1 **I. Introduction**

2 Laidlaw's is one of the most egregious violators of critical contractual obligations,
3 including those set forth in Harley-Davidson's NRSP¹ that are designed to protect the public, the
4 Harley-Davidson brand, and fellow Harley-Davidson dealers. Harley-Davidson consistently
5 informs dealers of these obligations and monitors compliance. Since 2005, it has delivered
6 termination notices to 19 dealers discovered to have committed large-scale NRSP violations.
7 These 19 dealers include all dealers² who made more than twenty sales in violation of the NRSP,
8 and some dealers (depending on the circumstances) who made fewer than twenty sales in violation
9 of the NRSP. [Ex. 72] All of these 19 dealers, except in cases pending, have left the Harley-
10 Davidson system.

11 Laidlaw's has shown no reason why its Dealer Contract should not similarly be terminated.
12 It received ample notice of its obligations over many years, including a written "one time
13 exception" for its NRSP violations in 1999.³ Yet:

14 Laidlaw's made 59 sales violating the NRSP over two recent years (more than all
15 but two of the 19 terminated dealers) by selling to persons and entities that *told*
16 Laidlaw's they intended to ship motorcycles abroad,⁴ and by selling to persons and
17 entities that Laidlaw's either *knew* were resellers (e.g., Billy Ngo/UN Motors
18 Import/Export) or *should have known* were resellers (e.g., the multiple purchase
19 exporters that followed Ngo);⁵

18 It submitted false SWR information to Harley-Davidson— a violation of express
19 contractual obligations, the NRSP, and the explicit directives contained in the SWR
20 form;

21 It has failed to show it properly performed its Pre-Delivery Inspection obligations
22 for any of the motorcycles sold in violation of the NRSP – also violations of
23 express contractual obligations and the NRSP;⁶ and

24 It violated the NRSP fleet sales Sourcing Rule⁷ in order to pursue business with

23 ¹ Non-Retail Sales Policy—Pleasure Vehicles.

24 ² Except two in Florida, where a unique law did not permit it.

25 ³ Ex. 12 at HDMC428-9. *See also* Harley-Davidson Post-Trial Brief ("HPTB") 16:5-17:1.

26 ⁴ HPTB 4:16-5:9.

27 ⁵ HPTB 5:10-6:3 and, in greater detail, 35:22-47:3.

28 ⁶ HPTB 35:1-7.

⁷ The "Sourcing Rule" refers to the NRSP (and Fleet Sales Policy) requirement that motorcycles sold to rental
(footnote continued)

1 rental companies nationally.⁸

2 Despite the overwhelming evidence, Laidlaw's amazingly has attempted to maintain a
3 charade of innocence. Its Post-Trial Brief ("LPTB") says, for example, that Laidlaw's was
4 "surprise[d]" to receive Mr. Verdyun's letter in February 2011 identifying eighteen potential
5 NRSP violations. [LPTB 5:9] It characterizes the NRSP as a "highly detailed set of rules."
6 [LPTB 5:16] It asserts that there has been "no showing of intent to deceive, but rather there was a
7 lack of understanding." [LPTB 27:13-15]

8 The facts are, however, that Laidlaw's *knew months before* Mr. Verdyun's February 2011
9 letter that it had been violating the NRSP.⁹ Also, the dealership *was aware, all along*, of the
10 essence of the contractual obligations that it was violating (e.g., that the dealership was prohibited
11 from selling motorcycles to resellers and exporters and was prohibited from sourcing rental fleet
12 sales from pleasure unit allocation),¹⁰ even if no one at the dealership bothered to read the NRSP
13 until Fall 2010. These contractual obligations, moreover, are stated in a few sentences -- not a
14 "highly detailed" set of rules. They are easily understood, as admitted by both Laidlaw's' own
15 consultant, John Gisiger, and by Chris Tolman, Brent Laidlaw's nephew and Laidlaw's Sales
16 Manager, who orchestrated most of the illicit deals.¹¹

17 In truth, Laidlaw's' violations resulted not from a lack of "understanding" of "detailed
18 rules," but from the dealership's lack of interest in and disregard for the critical Harley-Davidson
19 contractual sales obligations at issue in this case.¹² Moreover, many of Laidlaw's' actions

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21 companies must be sourced from a dealer's fleet allocation, and not from a dealer's pleasure unit allocation. *See Ex.*
22 208 at HDMC6365. *See also* HPTB 10:7-9 and 11:15-17.

23 ⁸ HPTB 48:3-50:6, especially at 50:1-6.

24 ⁹ *See* CT. X:(morning session):60:17-61:8. *See also* HPTB 45:22-46:9.

25 ¹⁰ HPTB 24:2-26:12.

26 ¹¹ JG. X(morning session)21:25-22:4; CT. X(morning session):66:13-68:18. *See also* HPTB 14:7-15:8 (regarding
27 clarity of policy generally).

28 ¹² This attitude is illustrated particularly well by Laidlaw's' admissions about the 17 Rental Violations. Laidlaw's
knew the sales violated the NRSP Sourcing Rule; was repeatedly reminded of the Rule by Harley-Davidson; made the
sales anyway (purportedly on the advice of third party); chose not to ask Harley-Davidson whether the third party
advice was correct; and concealed the sales from Harley-Davidson. [*See* HPTB 48:3-49:16.] The same attitude, of
course, is reflected by the Laidlaw's claim that it never bothered to read the NRSP until the Fall of 2010, despite
(footnote continued)

1 involved outright *concealment and deception*.¹³

2 Laidlaw's' position, illustrated in its Post-Trial Brief, is that no dealer should *ever* be
3 terminated for violating the NRSP, failing to comply with PDI requirements, or submitting false
4 SWR information. This is reflected in the suggestion that the Board conditionally sustain its
5 Protest by, among other things, permitting Harley-Davidson to impose sanctions authorized by the
6 NRSP for its future violations, "short of termination."¹⁴ [LPTB 29:2] In Laidlaw's' world, its
7 Dealer Contract should never be terminated for NRSP violations -- not even following lengthy
8 litigation. But Laidlaw's is dead wrong. If the NRSP is not enforced through termination in this
9 precedent-setting case, which involves an extraordinarily large number of violations, Harley-
10 Davidson's ability to enforce the core obligations at issue will be gutted. The consequences will
11 be disastrous for Harley-Davidson, the public, and Harley-Davidson's hundreds of authorized
12 dealers around the world, that, unlike Laidlaw's, uphold their contractual commitments.

13 **II. Statutory Factors**

14 The evidentiary "factors" and other "existing circumstances" under Cal. Veh. Code. §3061
15 mandate termination.¹⁵

16 **A. Section 3061(a): Amount of Business Transacted by the Franchisee, as**
17 **Compared to the Business Available to the Franchisee**

18 This is not a case in which a manufacturer seeks to terminate a dealer contract for failing to
19 transact an adequate amount of business. But the volume of Laidlaw's' sales, and its local sales
20 performance, including within its own territory, is neither particularly remarkable nor a significant
21 factor weighing against termination.

22 **1. There are at least 100 dealers larger than Laidlaw's.**

23 Laidlaw's correctly states that it ranked it 101st out of Harley-Davidson's dealers nationally

24 numerous reminders that it should do so.

25 ¹³ See HPTB 73:24-74:5.

26 ¹⁴ Laidlaw's seems to be suggesting, incredibly, that it has already committed more violations, as yet undisclosed
and/or expects to commit future ones.

27 ¹⁵ Harley-Davidson, of course, does not need to "win" on each factor. It only needs to show that the balance of factors
and other "existing circumstances" under §3061 establishes "good cause" for termination.

28

1 in sales volume, according to a November 2011 Harley-Davidson year-to-date pleasure unit sales
2 ranking report.¹⁶ [LPTB. 8:3-5 (citing Ex. 315, first page)] This report actually overstates
3 Laidlaw's' sales performance, because it includes sales made in violation of the NRSP and Fleet
4 Sales Policy in late 2010 and early 2011, which Laidlaw's falsely reported to Harley-Davidson as
5 retail sales.

6 The bottom line, in all events, is that there are *at least* one hundred U.S. dealers whose
7 pleasure unit sales exceed Laidlaw's'. If dealers of this size are allowed to violate the NRSP,
8 particularly to the extent Laidlaw's did, it will be nearly impossible for Harley-Davidson to
9 enforce the NRSP, the Fleet Sales Policy, and the SWR and PDI obligations at issue in this case.
10 Harley-Davidson will have "chaos on [its] hands in terms of the number of violations" and its
11 distribution system, and the public will suffer from the magnitude of harm caused by such
12 violations. [MK. II:96:22-25] Moreover, any rule excusing violations by large volume dealers
13 would be unfair to smaller volume dealers.

14 **2. Most of Laidlaw's' sales are registered to customers outside its**
15 **territory.**

16 Laidlaw's says the amount of business it transacts relative to the business available is
17 "high" because the dealership's "registrations and sales, as compared to the national average in its
18 dealer-assigned territory, of Baldwin Park" were 158% in 2010 and 164.4% in 2011. [LPTB 8:26-
19 92 (citing Ex. 634, Tab 7)] Laidlaw's' language is misleading, and the statistics it quotes actually
20 show a far less flattering picture of Laidlaw's' sales performance than Laidlaw's suggests. What
21 Ex. 634, Tab 7, p. 1 really shows (taking 2010 as an example) is that Laidlaw's "sold" 304 units
22 nationally that year; Harley-Davidson's "registrations" (i.e., sales by any dealer) into Laidlaw's'
23 territory were 153 units; and the expected number of Harley-Davidson registrations in Laidlaw's'

24
25 ¹⁶ Laidlaw's also states that in December 2010 it ranked 62nd nationally in "net sales" [LPTB 9:3-4 (citing Ex. 120)]
26 and, in October 2011, ranked 55th nationally in "total retail units sold." [LPTB 9:19-24 (citing Ex. 540)] The citation
27 to Ex. 120 appears to be a typographical error, the correct cite perhaps being Ex. 102. Ex. 102, like Ex. 540, is a
28 Dealer Retail Excellence Report. As Ms. Stewart explained, these reports combine fleet sales, such as sales to the
LAPD and Eagle Rider corporate, with pleasure unit sales. [AS. XI:86:17-88:1] Fleet sales often are large and may
only occur now and then. A more relevant measure of Laidlaw's' sales performance, therefore, is reflected by Ex.
315, which only includes pleasure unit sales, and shows Laidlaw's ranking 101st. [AS. XI:88:2-17]

1 territory was 192 units, based on Harley-Davidson's national average. In other words, Laidlaw's'
2 "sales" nationwide (not its "registrations") were 158% of the expected Harley-Davidson
3 "registrations" (not "sales") for Laidlaw's' territory.¹⁷

4 Fundamentally, the data shows two things: First, a large number of Laidlaw's' sales were
5 registered to customers living outside its territory. This is confirmed by Exhibits 98 and 99, which
6 show that in 2010 and the first half of 2011, respectively, 72% and 74% of Laidlaw's' sales were
7 registered outside its territory. [See AS. IV:128:10-13:1.] Second, the data shows Harley-
8 Davidson is not particularly well represented in Laidlaw's' territory. In 2010, Harley-Davidson's
9 actual registrations in Laidlaw's' territory were 153 units compared to an expected registration of
10 192 units, a 79.7% performance, as Ex. 643, Tab 7 shows. Laidlaw's' data for 2011 reveal the
11 same patterns. [Ex. 643, Tab 7, p. 2] This means that, in fact, Laidlaw's is not serving its local
12 market customers particularly well but is instead making a substantial number of sales outside of
13 its territory.

14 **B. Section 3061(b): Investment Necessarily Made and Obligations Incurred by**
15 **the Franchisee to Perform its Part of the Franchise**

16 **1. Only franchisee investments are relevant.**

17 Laidlaw's' discussion under Veh. Code sections 3061(b) and (c) includes investments and
18 assets of both the franchisee, Laidlaw's, and the real estate holding companies that own the facility
19 Laidlaw's leases. [LPTB 10:1-12:15] Laidlaw's incorrectly states these investors are the same.
20 [LPTB 2-3]¹⁸ Because of the different ownership interests, and for the other reasons stated in
21 Harley-Davidson's January 6, 2012 Brief Regarding Relevance of Non-Franchisee Investments,
22

23 ¹⁷ 304/192 = 158.3%.

24 ¹⁸ The ownership of Laidlaw's and the real estate companies are not the same. Laidlaw's' stock is owned by Jarold R.
25 Laidlaw (34.38%); Brent S. Laidlaw (45.63%); Franceen Elizabeth Tolman (8.74%); and Laurie Grace LeDuc
26 (11.25%). [Ex. 137] Walter Laidlaw does not own any shares in Laidlaw's. *Id.* In contrast, Walter Laidlaw is the
27 sole owner of Laidlaw Realty, which owns 40% of the real property and improvements. [BL. 15:11-18:13] BP
28 Realty, which owns 60% of the real property, is owned by Brent Laidlaw, his brother and two sisters. Even if the
same four siblings that own Laidlaw's also own BP Realty, Laidlaw's has presented no evidence that the percentages
of ownership are the same or similar. One sibling could be primarily an owner of the real estate company, while
another might primarily be an owner of the franchisee.

1 only franchisee investments¹⁹ should be considered under section 3061. Alternatively, if the
2 investments of separate entities are to be considered at all, they should be given substantially less
3 weight.

4 **2. Laidlaw's has recouped its investments.**

5 Laidlaw's' expert, Mr. Woodward, testified that, depending respectively upon whether a
6 current book value, original cost, or current value basis is used, Laidlaw's has invested \$2.3
7 million, \$2.6 million, or \$6.37 million in its dealership operations. [CW. X(afternoon
8 session):15:9-17:5] Even if the most aggressive \$6.37 million figure is correct, Laidlaw's has
9 more than recouped its investments over its 52 years of existence.²⁰ In just the last ten years alone,
10 the dealership earned over \$8.2 million in profits, according to Mr. Woodward himself. [Ex.
11 150]²¹

12 Laidlaw's says: "nothing is permanent from a business perspective." [LPTB 12:22] That
13 undoubtedly is true. The fact that investments have been made does not entitle a business to
14 continue forever, particularly where there has been ample opportunity, successfully exercised over
15 decades, to recover those investments.

16 **C. Section 3061(c): Permanency of the Investment**

17 "Permanency" of investment relates fundamentally to whether Laidlaw's will suffer an
18 investment loss if it is terminated, due to factors such as illiquidity. Laidlaw's claims, in this
19 respect, that it will sustain a \$2 million diminution in the value of its real estate (the "Real Estate
20 Loss") plus a \$6 million loss in "goodwill" value (the "Goodwill Value Loss").²² [LPTB 14:2-4]

21 _____
22 ¹⁹ The New Motor Vehicle Board lacks jurisdiction over entities, such as the real estate holding companies, that are
23 neither franchisors nor franchisees. The "circumstances" the Board is to consider in protests are not those of entities
not licensed by the DMV. Cal. Veh. Code §3061.

24 ²⁰ If the investments of the real estate holding companies are to be considered, as Laidlaw's urges, the only loss
25 Laidlaw's claims as to these hard assets (which, of course may be sold), is the \$2 million "real estate loss" discussed
in the next section. Laidlaw's' \$8.2 million in profits since 2002 nearly equals the sum of this alleged \$2 million loss
plus the *largest* measure of the dealership's purported investments, i.e., the \$6.37 million mentioned in text.

26 ²¹ \$8.2 million is the sum of the entries shown on Mr. Woodward's Ex. 150 for "Earning (pre-tax, pre owners'
compensation)" for FYE 5/31/02 through FYE 5/31/11.

27 ²² To the extent Laidlaw's claims in its Post-Trial Brief that there are other portions of the total \$2.3 to \$6.37 million
28 purportedly invested by the franchisee (or the \$4,840,000 to \$16,611,000 purportedly invested by the franchisee and
(footnote continued)

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1. Laidlaw’s has not shown a real estate investment loss.

Laidlaw’s’ alleged \$2 million Real Estate Loss is neither relevant nor credible for the reasons stated in Harley-Davidson’s Post-Trial brief.²³ In sum, this is because: (1) the franchisee does not own the real estate; (2) it is based on the report of Mr. Woodward, who is not a real estate appraiser and has no expertise in appraising facilities; and (3) it is based on the assumption that the facility Laidlaw’s leases will remain unsold and vacant for three years, which in turn is based merely on the hearsay experiences of a few GM and Chrysler dealers in a different part of the country and other assumptions lacking evidentiary foundation. Mr. Woodward’s assumption of vacancy, moreover, ignores the real estate holding companies’ opportunity to sell or lease Laidlaw’s facility to the replacement dealer Harley-Davidson intends to appoint soon after termination. If the real estate holding companies choose not to exercise this opportunity, their loss (if any) will be self-inflicted.

2. Laidlaw’s has not shown a goodwill investment loss.

The claimed \$6 million Goodwill Value Loss, similarly, is neither relevant nor credible for reasons stated in Harley-Davidson’s Post-Trial Brief.²⁴ In sum, these are: (1) the alleged “value” is not an “investment made by the franchisee” (i.e., a sum, if any, paid by Laidlaw’s for “goodwill” when it purchased the dealership); (2) Laidlaw’s has not presented the data, weighting and calculations supporting it; and (3) Laidlaw’s concedes it is based on cash flow from distant years rather than recent years, contrary to the way businesses are properly valued. Moreover, any goodwill loss could have been avoided. Harley-Davidson offered to help Laidlaw’s sell its business prior to trial. Laidlaw’s ignored the offer.

D. Section 3061(d): Whether it is Injurious or Beneficial to the Public Welfare for the Franchise to be Modified or Replaced or the Business of the Franchisee Disrupted

real estate holding companies) that are relatively “permanent” in nature, and thus relevant under §3061(c), it remains true that Laidlaw’s has recouped these investments, as discussed in the previous subsection.

²³ HPTB 67:16-69:7.
²⁴ HPTB 69:8-70:12.

1 Enforcement of the NRSP by termination of Laidlaw’s’ Dealer Contract benefits the public
2 welfare.

3 **1. Continued NRSP enforcement, through termination in the most**
4 **egregious cases, benefits the public welfare.**

5 **a. The NRSP serves the public welfare.**

6 A principal reason for the contract obligations at issue in this case is the public welfare,
7 including that of Californians.²⁵ Consumer safety and satisfaction are enhanced as a result of the
8 proper set-up, testing, and inspection of motorcycles by qualified service technicians prior to
9 delivery at authorized Harley-Davidson dealerships. Consumer safety and satisfaction are also
10 enhanced as a result of the proper explanation of warranties, the Owner’s Manual, and safety and
11 operational features by qualified sales personnel at the point of sale. Consumer safety and
12 satisfaction are enhanced by accurate sales and warranty registration, which is critical to safety
13 recalls. Finally, the public benefits from the ban on export sales, which is designed to promote
14 compliance with laws and regulations. It is difficult to deny that compliance with public laws is in
15 the public interest. Moreover, the ban on export sales ensures that motorcycles specifically built
16 for a certain geographic region are available to consumers in that region.

17 Additionally, the public benefits from many other things that authorized dealers do -- in
18 addition to proper PDI and SWR. This includes things Laidlaw’s itself says it does: support
19 Harley Owner’s Group (H.O.G.) chapters, support charitable activities, and provide high quality
20 facilities and the “comforts and the amenities that come with use of the facility.” [LPTB 16:10-
21 11] But Laidlaw’s is not *unique* in doing these things. Most authorized Harley-Davidson dealers
22 perform these functions. Two fellow dealers, for example, Messrs. Guthrie in Thailand and Abry
23 in Jordan, testified in favor of enforcement of the NRSP. These dealers *also* have impressive

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25 ²⁵ The NRSP, of course, protects Californian consumers because it precludes grey market sales by non-authorized
26 resellers here. Thus it protects Californians from the types of harm discussed in detail in Harley-Davidson’s Pre-Trial
27 Brief, e.g., lack of proper PDI, failure by the grey market resellers to SWR motorcycles with Harley-Davidson (for
28 recall and other purposes), etc. Though the NRSP does not preclude individual end users from buying a motorcycle in
one state and taking the motorcycle to another state, the NRSP does prevent *grey market resellers* from purchasing
motorcycles in one state and selling them here. It thus facilitates compliance with California’s unique emissions laws.

1 facilities, they *also* have H.O.G. chapters, they *also* support the public welfare in a variety of
2 ways. The NRSP benefits the public welfare, in part, because is it designed to incentivize dealers,
3 such as Messrs. Guthrie and Abry, and the dozens of authorized California dealers, to make these
4 types of efforts by preventing brand damage and competition by low cost grey marketers. The
5 alternative to NRSP enforcement is a system where authorized dealers’ efforts are undermined by
6 non-authorized, free-riding resellers with little or no incentive to do the things described in this
7 section. This would be injurious to the brand *and* the public welfare.

8 **b. Harley-Davidson need not show a direct monetary loss to prove**
9 **that NRSP enforcement benefits the public welfare.**

10 Laidlaw’s suggests that Harley-Davidson has not proven the harm of NRSP violations
11 because it has not quantified the “monetary loss or damage” caused by Laidlaw’s’ violations, such
12 as “fines” imposed for violating public laws or “injury or monetary loss” caused by improper
13 motorcycle disassembly. [LPTB 20:21-21:2] This argument is unreasonable, particularly from a
14 public welfare perspective but also from a brand perspective. The NRSP benefits the public
15 welfare because it is designed to reduce the *risks* to consumer safety created by improper PDI,
16 grey market disassembly,²⁶ and consumer misinformation, among other things. Harley-Davidson
17 is justified in taking appropriate action to reduce these safety risks, including termination of the
18 Dealer Contracts of large-scale NRSP violators, regardless of whether a particular dealer’s
19 violations have resulted in an actual injury or penalty. A contrary rule would be absurd. One
20 dealer might commit fifty NRSP violations without being terminated because, fortuitously, none
21 of the motorcycles it sold were involved in an accident related to unperformed recall work or
22 improper assembly. Another dealer might be terminated after selling one such motorcycle. Under
23 this proposal, Harley-Davidson would not know whom to sanction until an accident or fine had

24 ²⁶ Laidlaw’s states, incorrectly, that Harley-Davidson “intimated, but did not prove motorcycles exported were
25 disassembled.” [LPTB 20:26-8] Laidlaw’s’ own witnesses admitted being told by its purchasers that many of the
26 Export Violation motorcycles would be disassembled and reassembled abroad by non-authorized persons. [See, e.g.,
27 CT. X(morning session):57:12-59:14.] Jarold Laidlaw, Laidlaw’s’ chief service technician, admitted, in this regard,
28 that there is a “risk” from having “pre-delivery inspection and assembly” done by non-authorized persons. [Ex. 308
(Jarold Laidlaw deposition) at 22:16-23:15)] He also admitted that disassembled bikes “may not be put back together
exactly per Harley-Davidson specifications. It’s pretty obvious.” [*Id.* at 17-22]

1 occurred. Laidlaw's would have the New Motor Vehicle Board play Russian roulette with public
2 safety.

3 **c. The availability of recall information on NHTSA is irrelevant.**

4 Laidlaw's suggests similarly, and incredibly, that since recall information is available from
5 NHTSA, the harm to public welfare from the submission of false SWR information is minimal.
6 [LPTB 21:12-20] This argument is preposterous. First, Harley-Davidson has legal obligations
7 under federal law to notify consumers of safety recalls;²⁷ it (and the Board) cannot simply *hope*
8 that consumers have some reason to visit the NHTSA webpage. Second, there is no evidence that
9 consumers do, in fact, periodically and regularly visit NHTSA's website (or that they even know
10 what NHTSA is), or that foreign governments translate and publish such information on websites
11 that foreign consumers can understand, or have any reason to visit.

12 **2. Terminating Laidlaw's' Dealer Contract will not injure the local**
13 **community.**

14 Terminating Laidlaw's' Dealer Contract will not injure the local community, as Laidlaw's
15 suggests. [LPTB 14:6-16:27] First, as noted, there is no evidence that the types of community-
16 related events that Laidlaw's does, such as sponsoring a H.O.G. chapter, are unique to it. Other
17 authorized Harley-Davidson dealers -- including neighboring ones and the replacement dealer
18 whom Harley-Davidson will appoint to Laidlaw's' territory after termination²⁸ -- do and will
19 perform similar functions. Second, Laidlaw's can continue its insurance business and its
20 independently franchised EagleRider rental operations following termination. As regards the latter
21 entity, there are EagleRider franchises throughout the United States that are not Harley-Davidson
22 dealers. [MK. II:19:19-20:1] Laidlaw's would not be unique in operating a stand-alone rental
23 business. Third, as to Laidlaw's' claim that the "most immediate injurious impact of termination
24 would be to [Laidlaw's] staff" [16:20-25], the reality is that many former Laidlaw's employees
25 presumably can be employed by the new dealer who fills Laidlaw's' point. The argument that

26 _____
27 ²⁷ 49 U.S.C. §30118.

28 ²⁸ See HPTB 70:15-71:5 (regarding Harley-Davidson's plans for the Baldwin Park point following termination).

1 termination may adversely affect employees moreover is a generic one that could apply to any
2 termination case. It is not a reason to keep dealers in the system who violate their contractual
3 obligations.

4 **E. Section 3061(e): Whether the Franchisee has Adequate Motor Vehicle Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service Personnel to Reasonably Provide for the Needs of the Consumers for the Motor Vehicles Handled by the Franchisee and has Been and is Rendering Adequate Services to the Public**

7 As noted in Harley-Davidson's Post-Trial Brief, Harley-Davidson has not offered evidence
8 that Laidlaw's lacks adequate sales and service facilities, equipment, parts, and qualified service
9 personnel, or that it has been rendering inadequate services to the public.²⁹ Laidlaw's' description
10 of its facility, staff and service operations [LPTB 17:1-19:13], however, are a good reminder of the
11 reasons for distribution of new motorcycles directly to local end users by, and only by, authorized
12 Harley-Davidson dealers, and not by chop shops, "shophouses"³⁰ and other unauthorized resellers
13 enabled by Laidlaw's' NRSP violations.

14 **F. Section 3061(f): Whether the Franchisee Fails to Fulfill the Warranty Obligations of the Franchisor to be Performed by the Franchisee**

16 Laidlaw's has significantly failed to fulfill its warranty obligations to Harley-Davidson by
17 submitting false and inaccurate SWR information. This violates paragraph F(3) of Laidlaw's'
18 Dealer Contract.³¹

19 **G. Section 3061(g): The Extent of Franchisee's Failure to Comply with the Terms of its Franchise.**

20 The extent of Laidlaw's' failure to comply with its franchise, i.e., its Dealer Contract
21 obligations, is massive.

22 **1. Laidlaw's has violated numerous contractual obligations.**

23 In a short paragraph that seems to represent a "contract argument" first suggested by
24

26 ²⁹ HPTB 72:19-73:5.

27 ³⁰ See HPTB 51:21-52:8 (describing Thai "shophouses").

28 ³¹ Ex. 2 at LLA10717. See also HPTB 73:6-15.

1 Laidlaw's in its Pre-Trial Brief,³² Laidlaw's' Post-Trial Brief begins by stating incorrectly that
2 "Respondent's only basis for termination is non-compliance with the Non-Retail Sales Policy and
3 Fleet Sales Policy, as set forth in the termination notice." [LPTB 19:22-3] Laidlaw's then states
4 that the "specific terms" of the NRSP and FSP are not "incorporated into the Dealer Agreement";
5 that the Dealer Agreement bans sales "for resale"; that Harley-Davidson "unilaterally revises" the
6 NRSP; and "dealers are not asked to sign the NRSP and FSP." [See LPTB 19:23-20:4]
7 Laidlaw's' argument seems to be that the only contract obligation it violated was selling to
8 resellers, but that none of its other violations breach its contract. Laidlaw's is wrong.

9 **a. Laidlaw's ignores several bases for its termination.**

10 First, it is not true that Harley-Davidson's "only basis" for termination is non-compliance
11 with the NRSP and FSP. The fact that Laidlaw's would so claim, at this juncture, shows
12 remarkably that the dealership *still* does not understand the importance of its contractually
13 mandated PDI and SWR related obligations. The Termination Notice [Ex. 237] in fact identifies
14 *all* of the following contractual provisions as bases for termination:

15 ¶1(A) which grants Laidlaw's the right to purchase and resell vehicles "at retail"
16 [Ex. 1 at 37203];

17 ¶B(6), which obligates Laidlaw's not to sell to non-retail customers and provides:
18 "Seller reserves the right to establish from time to time such policies and position
19 statements it believes are necessary or advisable to carry out the purpose or intent
20 of this part of this Contract and *Dealer shall comply with all such policies and
21 position statements.*" [Ex. 2 at LLA10713 (emphasis added)];

22 ¶F(2), which *obligates Laidlaw's to "uncrate, set up, inspect and test each new
23 Harley-Davidson motorcycle prior to delivery to Dealers' customer,* in accordance
24 with Seller's written instructions." [Id. at 10717 (emphasis added)] The
25 Termination Notice [Ex. 237 at 324] notes that the referenced "written instructions"
26 require, among other things, that the dealership and its customers sign a PDI
27 checklist to certify that proper PDI has occurred.

28 ¶F(3), which *obligates Laidlaw's to "explain Seller's customer warranty to its
customers prior to the consummation of any sale of Harley-Davidson Products";
deliver a copy of the warranty to the customer "at the time of delivery" of the
product;* and register all sales with Harley-Davidson "for purposes of establishing
warranty protection, providing essential information in the event of a recall of

³² Laidlaw's never suggested that it was not contractually bound by any part of the NRSP until its lawyers submitted its November 2011 Pre-Trial Brief. [See HPTB 31:16-23.]

1 Harley-Davidson Products and/or providing Seller with useful market information,
2 all in accordance with Seller's written procedures from time to time." [Ex. 2 at
LLA10717 (emphasis added)]

3 ¶F(7) which *obligates Laidlaw's to "complete and electronically file with Seller a*
4 *sales and warranty registration form for every new Harley-Davidson sold by*
5 *Dealer."* [Ex. 2 at LLA10719] The Termination Notice notes that the SWR Forms
6 require certification of important facts. [Ex. 327 324]

7 ¶M(4)(b), which permits termination for, among other things, the submission of
8 "claim, report, record or other information which is fraudulent or contains any
9 material misrepresentation by Dealer." [Ex.2 at 10727];

10 ¶M(6)(c), which permits termination for, among other things, conduct that may
11 impair the goodwill associated with the Harley-Davidson trademark; and

12 ¶M(6)(f), which permits termination for failure to fulfill any other responsibilities
13 under the Contract.

14 One basis for termination (in addition to non-compliance with the NRSP and FSP) is
15 Laidlaw's' chronic and massive failure to comply with critical PDI obligations in violation of
16 paragraphs F(2) and F(3) of its Dealer Contract.³³ Another is Laidlaw's' submission of false SWR
17 information in violation of paragraphs F(3) and F(7).³⁴ Significantly in this regard, all Harley-
18

19 ³³ None of the Export or Rental Violation sales jackets contain properly completed PDI Checklist Forms. Many
20 contain blank forms or no forms at all. None are signed by customers. None are signed by a dealer representative,
21 confirming inspection and communication with the end-user at the point of sale. Only half are signed by a service
22 technician. Most include unchecked boxes. The absence of properly completed forms suggests that proper set-up,
23 testing, sale and delivery (which includes completing the Checklist Form and obtaining a customer signature) did not
24 occur. It also suggests that proper point-of-sale communication with customers, e.g., explanation of safety features,
25 warranty, operational controls, etc., did not occur.

26 Laidlaw's' failure to properly PDI motorcycles and certify compliance also violates Dealer Contract ¶M(6)(c) and
27 (f). Among other things, such failure may expose Harley-Davidson to liability. [HPTB 55:22-56:2]

28 For further discussion of Laidlaw's' PDI obligations, see HPTB 11:25-13:1 (re obligations) and HPTB 35:1-7 and
49:20 (re Laidlaw's failure to fulfill obligations).

29 ³⁴ Laidlaw's submitted false SWR information in several respects. It reported to Harley-Davidson certain persons as
30 the purchasers of motorcycles that in fact were being purchased by export and trading *companies*. HPTB 34:6-13. It
31 reported certain persons as purchasers who were no more than "fronts" for other persons who were paying for and
32 taking possession of motorcycles, such as Mimi Lai, who had little involvement with motorcycles actually paid for by
33 Billy Ngo. [*Id.* at 34:13-17] It falsely reported that all the Export Violation sales and most of the Rental Violation
34 were "retail" sales even though they were not, thus obtaining various incentives and allocation from Harley-Davidson
35 that it did not deserve. Finally, by selling to persons it knew or should have know were not the intended end users of
36 the motorcycles, it violated one of the purposes of accurate SWR reporting, which is to allow Harley-Davidson to
37 provide critical recall and safety information to the end users. In May 2011, Brent Laidlaw admitted supplying
38 "incomplete and inaccurate" SWR information to Harley-Davidson, in six unspecified instances. [Ex. 124, p. 1 para
3.]

Laidlaw's' submission of false SWR information also violates Dealer Contract ¶M(4)(b), M(6)(c) and M(6)(f).

(footnote continued)

1 Davidson SWR forms -- including each that Laidlaw's signed for each Violation Sale -- require
2 the dealer to "acknowledge that any misrepresentation on this form will be considered a material
3 breach of my dealer contract and may constitute grounds for termination." Laidlaw's Dealer
4 Contract should be terminated for providing false SWR information alone. Laidlaw's Post-Trial
5 Brief simply ignores its PDI and SWR related violations.

6 **b. The NRSP, FSP and PDI and SWR obligations at issue are all**
7 **contractual requirements.**

8 Second, any suggestion that Laidlaw's' Export and Rental Violations are not contract
9 violations is wrong as well. The Dealer Contract includes the NRSP, FSP, and PDI and SWR
10 obligations. "A contract may validly include provisions of a document not physically part of the
11 basic contract." *Wolschlager v. Fidelity Nat. Title Ins. Co.*, 111 Cal.App.4th 784, 790 (2003)
12 (citing *Shaw v. Regents of University of California*, 58 Cal.App.4th 44, 54 (1997)). California law
13 allows parties to delegate choices over contract terms. *Facebook, Inc. v. Pacific Northwest*
14 *Software, Inc.*, 640 F. 3d 1034, 1038 (2011); *Automatic Vending Co. v. Bessie Jane Wisdom*, 182
15 Cal. App. 2d 354, 357-58 (1960) (same). Here, the NRSP and FSP -- as well as the "written
16 instructions" concerning PDI and SWR referenced by Dealer Contract paragraphs F(2) and F(3) --
17 are separate but contractually authorized and binding policies. Violation of contractually
18 authorized policies is a contract breach. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1309
19 (11th Cir. 1998) (violation of quality, safety and cleanliness standards established in contractually
20 authorized business manual breaches franchise agreement); *Dunkin' Donuts, Inc. v. Patel*, 174 F.
21 Supp 2d 202, 206, 210-12 (D.N.J. 2001) (violation of contractually authorized health standards
22 franchisor may establish "from time to time" breaches franchise agreement).

23 Specifically, all of the obligations of the NRSP (including the ban on export sales and the
24 Sourcing Rule) are incorporated by reference into Paragraph B(6) of the Dealer Contract, which is
25 entitled "NON-RETAIL SALES." That paragraph identifies two types of "non-retail sales" as

26 _____
27 For further discussion of Laidlaw's' SWR obligations, see HPTB 13:2-24 (re obligations) and HPTB 34:12-19 (re
28 Laidlaw's' failure to fulfill obligations).

1 illustrations: sales for resale and internet sales. Contrary to Laidlaw’s apparent suggestion, it
2 obviously does *not* limit non-retail sales to “sales for resale,” since internet sales do not
3 necessarily involve resale.

4 The paragraph also, and critically, expressly reserves to Harley-Davidson “the right to
5 establish from time to time such policies and position statements it believes are necessary or
6 advisable to carry out the purpose or intent of this part of this Contract” with which Laidlaw’s
7 “shall comply.”³⁵ [*Id.* 2 at 10713 (underline added)]

8 The NRSP (and FSP) are “policies” clearly authorized by this provision. Among other
9 things, they define “non-retail sales” to include sales for shipment abroad and certain fleet sales.
10 This carries out the “purpose and intent” both of Paragraph B(6) and of Part B (re “Sales
11 Efforts”).³⁶ As regards the latter, the “purpose or intent” of Part B is stated by its two introductory
12 paragraphs. They provide, respectively: “Dealer is responsible for effectively selling *at retail*”
13 and “Dealer shall devote its best efforts to promote aggressively the *sale at retail* of Harley-
14 Davidson Products.” (emphasis added) Part B, in other words, concerns both effective selling and,
15 like Paragraph B(6), selling “at retail.” Consistent with this framework, the NRSP and FSP
16 themselves reference their own contractual authorization.³⁷

17 The fact that Harley-Davidson may revise the NRSP does not somehow make the NRSP a
18 non-contractual obligation. To the contrary, Paragraph B(6) expressly authorizes Harley-
19 Davidson to establish policies “it deems necessary,” prospectively, “from time to time.”
20 Moreover, the facts are that when Laidlaw’s last signed its Dealer Contract in January 2005 [Ex. 1
21 at 37207], the MY 2004 NRSP existed and prohibited sales both to resellers *and to exporters*.
22 [Ex. 312 at 11896, para. 1] When Laidlaw’s signed the 2010 Addendum to its Dealer Contract in
23

24 ³⁵ Laidlaw’s materially misquotes this sentence. See LPTB 19:25-7.

25 ³⁶ See, e.g., paragraphs K(5 & 6), L(4), M(1) and O(1), all of which refer to the capital lettered sections of the
contract as “parts.”

26 ³⁷ Both state, prior to defining certain types of non-retail sales, that “as provided in the Dealer Contract, dealers are
27 prohibited from engaging in non-retail sales.” [See, e.g., Ex. 7 at 10694, third paragraph and Ex. 208 at 6365,
paragraph 1.] The NRSP expressly states: “This policy expands upon and interprets the non-retail sales provision in
the Dealer Contract (paragraph B-6).” [Ex. 208 at HDMC6365]

28

1 October 2009 [Ex. 3 at 37210], the Sourcing Rule, adopted in 2008, existed as well. [See Ex. 115
2 (re adoption of Sourcing Rule in MY 2008 NRSP).] There is no dispute that Laidlaw's received
3 the NRSP and FSP and numerous reminders about them, both before and after signing its latest
4 Dealer Contract.³⁸

5 The parties' course of performance³⁹ further confirms that the ban on sales for export is a
6 contractual obligation. Dealers, including Laidlaw's, have been told for years that their contracts
7 may be terminated for violating the NRSP. They have known that sales for export violate the
8 NRSP. They have been given copies of the NRSP and FSP, which, as noted, both reference their
9 own contractual authorization. Yet Mr. Kennedy testified that *no* dealer ever suggested that any
10 aspect of the NRSP (including the ban on export sales) is not a contractual obligation. [MK.
11 II:63:1-64:3] Indeed, it was a fellow dealer and D.A.C. representative, Ray Malzo, who
12 complained to Harley-Davidson about Laidlaw's' NRSP violations, and specifically about
13 Laidlaw's' sales for "export" (not for resale).⁴⁰

14 Not surprisingly, Laidlaw's itself never suggested that it was not contractually bound by
15 any part of the NRSP until its lawyers submitted its November 2011 Pre-Trial Brief – not even
16 when it was informed it was being terminated in April 2011, or when it filed its Protest.⁴¹ This too
17 constitutes course of performance evidence. Laidlaw's' failure to allege its "export" argument in
18 its Protest (and not until after discovery) bars it from making the argument now.⁴²

19 Finally, of course, Laidlaw's does not dispute that Dealer Contract Paragraph B(6) bans, at
20 a minimum, sales "for resale." Laidlaw's violated this obligation. It not only "sold for resale"; it
21

22 ³⁸ HPTB 7:1-6 and 15:9-20:20.

23 ³⁹ As regards the admissibility of evidence of "course of performance," see *Employers Reinsurance Co. v. Superior*
24 *Court of Los Angeles County*, 161 Cal. App. 4th 906, 920-22 (2008) ("The conduct of the parties after execution of
25 the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties'
26 intentions.") (quoting *Kennecott Corp. v. Union Oil Co.*, 196 Cal. App. 3d 1179, 1189 (1987)).

27 ⁴⁰ See Ex. 230 at HDMC11041-2. See also HPTB 28:3-10.

28 ⁴¹ HPTB 31:16-23.

⁴² Under 13 CCR 585(b) termination protests "shall be responsive to the specific grounds as set forth in the
[termination notice] and shall set forth in clear and concise language the factual allegations of the franchisee."
Laidlaw's failed to allege with *any* clarity or particularity that sales for export are not a contractual violation.

1 *knew* it was doing do in many cases, and should have known in most if not all others.⁴³

2 **2. The fact that the NRSP does not cover used vehicles is irrelevant to the**
3 **materiality of Laidlaw’s’ breaches.**

4 Laidlaw’s attempts to minimize both the materiality and the public welfare implications of
5 its breaches, by noting that the NRSP does not cover used vehicles. [LPTB 21:20-23:3] This
6 argument is a classic *non-sequitur*. First, as Professor Hanssens testified, the consumer
7 expectations that attach to the sale of new vehicles are “quite different” from those that attach to
8 the sale of used vehicles. [DH. 150:13-151:1] The damage to the brand resulting from vehicle
9 malfunctions, for example, is higher in the case of new vehicles. [*Id.* at 151:2-14] Second, the
10 fact that the Dealer Contract, not to mention the New Motor Vehicle Board itself, only regulates
11 the sale of new motorcycles, but not used, hardly means that Harley-Davidson must simply throw
12 up its hands and not enforce policies reasonably designed to promote public safety, consumer
13 satisfaction, compliance with laws, and the integrity of its dealer network. Yes, a rider could, for
14 example, be injured on an improperly reassembled used motorcycle. But that does not mean
15 Harley-Davidson should not try to prevent the harm from the grey market distribution of
16 improperly reassembled new motorcycles.

17 **3. Harley-Davidson’s audit methods do not make Harley-Davidson’s**
18 **claims of harm less “credible.”**

19 In another apparent attempt to minimize the materiality of its breaches, Laidlaw’s argues
20 that “Protestant’s (*sic*) contention as to the alleged potential harm to Respondent’s brand name as
21 a result of export violations would be far more credible if Respondent performed random
22 audits.....” [LPTB 24:26-7] It is unclear exactly what type of “random” process Laidlaw’s
23 suggests, or why such a process would make evidence of harm to Harley-Davidson’s “brand”
24 “more credible.” The statement, in all events, causes one to wonder whether Laidlaw’s was
25 paying attention at trial. The evidence presented by Harley-Davidson demonstrates that it makes a
26 huge effort to inform dealers of the NRSP and the possibility of audits and termination for non

27 ⁴³ HPTB 5:10-6:3 and, in greater detail, 35:22-47:3.

1 compliance.⁴⁴ That is where deterrence begins.

2 Harley-Davidson's actual monitoring and auditing process, moreover, is robust. Harley-
3 Davidson has variety of effective tools to catch NRSP violations. These include receiving
4 information from other dealers, various Harley-Davidson departments, and from district managers
5 and regional directors, as well as monitoring internet sources for evidence of violations and
6 reviewing National Insurance Crime Bureau (NICB) data.⁴⁵ Significantly, the NICB data shows,
7 on a calendar year basis, the Vehicle Identification Numbers ("VINs") for vehicles sold by all U.S.
8 dealers that are exported to foreign countries. It therefore should detect dealers involved in
9 substantial exported related NRSP violations. Harley-Davidson has, moreover, sent over 140
10 inquiry letters and conducted 30 on site audits just since 2005 -- hardly a token effort. Baseless
11 speculation by Laidlaw's' expert, Mr. Stockton, that some violator might have fallen through the
12 cracks, does not prove a need for more. Nor is there some rule of law that manufacturers may
13 only terminate dealers for contract violations if they "randomly audit" them for compliance,
14 whatever that means. Such a vague rule would be expensive and make a mockery of contractual
15 obligations.

16 **4. Laidlaw's' termination is not "motivated by independent reasons" and**
17 **will not result in a "windfall" for Harley-Davidson.**

18 Laidlaw's claims that "Respondent is motivated by independent reasons... in this case in
19 that it desires to reduce the number of dealers in the Los Angeles area" and that termination will
20 result in a "unwarranted windfall" to Harley-Davidson in that it will allow Harley-Davidson to
21 reduce its dealer network without having to rely on voluntary processes. [LPTB 25:14-20] The
22 evidence disproves these lawyer arguments.

23 It is true that Harley-Davidson believes -- particularly since the 2008 financial crisis -- that
24 the L.A. area, and some other U.S. metropolitan areas, have become "over-dealered" (meaning
25 that there are too few sales to allow the number of dealers in the area to each make adequate dealer

26 _____
27 ⁴⁴ HPBT 15:11-23:17.

28 ⁴⁵ See HPTB 21:20-22:11 (describing monitoring and enforcement methods).

1 profits), and that in 2011 Harley-Davidson met with its L.A. area dealers to present an “L.A.
2 Market Review” to discuss the issue. [Ex. 23; MK. II:103:24-107:20] Around the same time,
3 Harley-Davidson commissioned eight “L.A. Dealer Optimization Scenarios,” which evaluated the
4 likely impact of the voluntary departure of particular L.A. area dealers on the sales performance
5 and profitability of the remaining dealers. [Ex. 215-222; MK. II:117:5-118:21]

6 But there is no evidence that dealer consolidation motivated, in any way, Harley-
7 Davidson’s decision to terminate Laidlaw’s’ Dealer Contract. All of the evidence is instead to the
8 contrary. First, Brent Laidlaw himself testified that Harley-Davidson did not mention terminating
9 dealers at the L.A. meeting and that “nothing was said or done between the time of that meeting
10 [and] when you got the Notice of Termination to cause you to think they [Harley-Davidson] were
11 interested in having you be one of the dealers who might leave the system.” [BL. VIII:72:17-
12 73:19]⁴⁶ Second, as the L.A. Market Review presentation made clear, Harley-Davidson is
13 interested in achieving network consolidation only on a voluntary basis, by assisting dealers who
14 affirmatively want to leave the system. [See Ex. 23 at p. 21.] Third, Harley-Davidson has, in fact,
15 never considered closing Laidlaw’s’ Baldwin Park point to achieve consolidation. [MK.
16 II:118:18-21] None of the eight Optimization Scenarios, for example, involved eliminating
17 Laidlaw’s; they all assumed Laidlaw’s would remain, while other dealers might exit the system.
18 [Exs. 215-222; MK. II:118:7-17] Fourth, Harley-Davidson intends to fill Laidlaw’s’ dealer point
19 after termination.⁴⁷ Indeed, as Laidlaw’s notes, Harley-Davidson offered, prior to the hearing in
20 these proceedings, to help Laidlaw’s find a buyer or to lease its current facilities. [LPTB 29:27-
21 30:13] The bottom line is that Harley-Davidson has consistently sought to terminate the few
22 dealers with large number of NRSP violations. Laidlaw’s is one of them.

23 There will be no “unwarranted windfall,” whatever that means, to Harley-Davidson
24 because Harley-Davidson receives no money from dealer consolidation. The remaining dealers in

25
26 ⁴⁶ Laidlaw’s’ Pre-Trial Brief promised Laidlaw’s would present evidence that Harley-Davidson had discussed in the
27 meeting “termination” as a means of achieving network consolidation. [See Laidlaw’s Pre-Trial Brief at 7:27-8.] The
28 promised evidence failed to materialize at trial, and Protestant’s “consolidation theory” has fizzled.

⁴⁷ See MK. II:99:12-103:23. See also HPTB 70:15-71:5.

1 the area are the ones who receive the value, not Harley-Davidson. Moreover, Harley-Davidson
2 has never sought to close the Baldwin Park point, and will fill it after Laidlaw's termination. The
3 argument is a red herring.

4 **5. Less severe penalties would not be appropriate in this case.**

5 Finally, Laidlaw's suggests that Harley-Davidson should have imposed NRSP penalties
6 short of termination in this case, and by implication that the Board should do so now. [LPTB
7 20:5-21] First, Laidlaw's did receive a penalty short of termination for violating the NRSP in
8 1999. It sold four units in violation of the policy then. Laidlaw's was informed, in writing, that it
9 would receive a "one time exception" and that "[a]ny other 'non-retail' sales will be dealt with per
10 the, then current, policy." [Ex. 12 at 429] Remarkably, that warning did not even cause Laidlaw's
11 to read the NRSP, as Walter Laidlaw admitted. [WL. 28:16-19] And it obviously failed to
12 prevent the violations Laidlaw's has since committed.

13 More fundamentally, Laidlaw's argument reflects the dangerous view, noted in the
14 introduction to this brief, that no Dealer Contract should ever be terminated for violating the
15 NRSP. The logic suggests that the sixteen of the nineteen dealers terminated since 2005, who
16 committed *fewer* violations than Laidlaw's, should still be in Harley-Davidson's dealer network –
17 as well as the two dealers who committed more violations. This shows precisely why Laidlaw's is
18 wrong. If the Board sustains Laidlaw's Protest, the reality is that Harley-Davidson will lose the
19 most important tool it has, nationwide, for dealing with the small fraction of its hundreds of
20 dealers that commit violations of this critical policy.⁴⁸ Even if lesser penalties are of some effect,

21

22 ⁴⁸ *Re The laws of other states:* The termination statutes of many other states are similar to California's. Harley-
23 Davidson's ability to terminate dealers for NRSP violators under those laws, therefore, would be jeopardized if
24 Laidlaw's Protest is sustained. Laidlaw's December 14, 2011 "Supplemental Citations to its Opening Statement
25 ["LSC"] quotes the "good cause" provisions of seven states. New Mexico's provision (which Laidlaw's does not
26 fully and accurately quote) is nearly identical to California's. It allows termination only when there is a breach of the
27 dealer agreement that is "substantial and material" and there is "due cause." In sentences that Laidlaw's omits, "due
28 cause" requires consideration of seven factors similar to those of Cal. Veh. Code 3061. [See Ex. 5 to LSC, Part F.]

26 The provisions of the other six states require manufacturers to show breaches of contract provisions that are "both
27 reasonable *and* of material significance to the franchise relationship." [See LSC pp. 1-4. (emphasis added)] Though
28 these laws are simpler than California's or New Mexico's, the requirement that manufacturers show both
"reasonableness" and "materiality" suggests that factors in addition to materiality are relevant. This might include
factors similar to those expressly identified in Cal. Veh. Code §3061, e.g., the impact of termination on the
(footnote continued)

1 grey market selling can be expected to increase, with significant harm to the brand, the public, and
2 the other dealers who comply with their contractual obligations.

3 **III. The Protest Should be Overruled**

4 Laidlaw's' Protest should be overruled because good cause exists to terminate its Dealer
5 Contract under §3061, for the reasons stated above and in Harley-Davidson's Post Trial Brief.

6 **A. The Protest Should Not be Sustained Conditionally**

7 Laidlaw's proposes that if its Protest is not sustained unconditionally, it should be
8 sustained subject to four conditions: (1) that the Board order its compliance program to continue
9 in effect for a few years; (2) that audits conducted by the Compliance Coach be made available to
10 Harley-Davidson; (3) that Harley-Davidson be allowed to impose sanctions available under the
11 NRSP for violations "short of termination"; and (4) that Laidlaw's reimburse Harley-Davidson for
12 costs, expenses and losses caused by Laidlaw's NRSP violations as proposed in a May 2011 letter
13 [Ex. 124] from Brent Laidlaw to Mike Kennedy. [LPTB 28:12-29:13] This proposal must be
14 rejected for many reasons.

15 First, Laidlaw's' compliance program has hardly been a shining success. As the so-called
16 "compliance coach", Mr. Gisiger, testified, as of October 2011, his audits showed "consistent and
17 chronic failure" by Laidlaw's to comply with Harley-Davidson sales policies, including proper
18 PDI, after Harley-Davidson served its notice of termination. [JG. X(morning session):26:21-
19 28:18] One of the reasons, no doubt,⁴⁹ is because, remarkably, Laidlaw's did not train any of its
20 service personnel (responsible for the pre-point-of-sale PDI process) before November 2011. [JG.

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22 franchisee's investments and on public welfare. In other words, given the reasonableness requirements of these laws,
23 there is little reason to believe they are significantly more permissive of termination than California's.

24 Harley-Davidson's Response to Protestant's Supplemental Citations ["HSC"] quotes the "good cause" provisions of
25 another thirteen states, including all states bordering California, from which NRSP violation motorcycles might be
26 imported into California if the policy is not effectively enforced. Several of these states have provisions nearly
27 identical to California's (e.g., Nevada, Arizona, Oregon, Utah, Colorado, Montana, Nebraska, Texas, Iowa, Illinois,
28 West Virginia, and Massachusetts) in that they require consideration of seven similar factors. All require either
29 consideration of the public welfare and/or require that contract breaches be of provisions that are both material and
30 "reasonable." All require consideration of the dealer's investments. Again, there is little reason to believe these laws
31 are more permissive of termination than California's.

32 ⁴⁹ Another reason may be Mr. Gisiger and Compliance Coach's complete lack of experience in working with vehicle
33 dealers and/or manufacturer policies affecting dealers. [See JG X(morning session):17:6-20:20.]

1 X(morning session) 25:1-26]. This failure occurred notwithstanding Brent Laidlaw’s promise to
2 Harley-Davidson in May 2011 that the so-called “compliance program” would prevent any future
3 deviations from policy. [Ex. 124, p. 2] Similarly incredible is that, notwithstanding Mr. Laidlaw’s
4 promise, Laidlaw’s sold a new motorcycle to grey market facilitator Mimi Lai two months later, in
5 July 2011, in violation of the NRSP.⁵⁰ Mr. Gisiger’s audit never even detected this sale.

6 Second, the proposal that Compliance Coach’s audits be made available to Harley-
7 Davidson is meaningless. Harley-Davidson already has the right to audit its dealers whenever and
8 however it wants,⁵¹ and Harley-Davidson reasonably doubts the accuracy and reliability of Mr.
9 Gisiger’s audits, given the failures just discussed.

10 Third, the brazen offer to comply with sanctions for future violations “short of
11 termination,” is entirely unacceptable. As noted above, it is incredible and preposterous to suggest
12 that Harley-Davidson may never terminate a Dealer Contract for NRSP violations – not even one
13 with far more violations (including 59 NRSP/FSP violations, *plus* PDI and SWR related
14 violations) than many other dealers that *have been* terminated, not even after having been given a
15 “one-time exception,” and not even after a lengthy and expensive trial.

16 Fourth, the offer to reimburse Harley-Davidson for costs, expenses and losses caused by its
17 NRSP violations is disingenuous, given Laidlaw’s apparent position that since Harley-Davidson
18 cannot quantify precisely the losses caused by NRSP violations, such losses have no value at all.

19 Finally, as noted, sustaining Laidlaw’s’ Protest in any manner will erode Harley-
20 Davidson’s ability to enforce the NRSP against the rest of its U.S. dealer network, with negative
21 implications for Harley-Davidson, its dealers, and public safety.

22 **B. The Protest Should Not be Overruled Conditionally**

23 Laidlaw’s’ proposal that the Protest be “overruled conditionally,” by allowing Laidlaw’s
24 time to sell the dealership business [LPTB 29:16-30:13] also is unacceptable, for many reasons.
25 First, Laidlaw’s ignored Harley-Davidson’s pre-trial offer to help Laidlaw’s exit the dealer

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27 ⁵⁰ HPTB 36:9-14.

28 ⁵¹ See Ex. 2 (Dealer Contract) at 10721, paragraph J(6); Ex. 208 (NRSP) at 6366, paragraph 7.

1 network by selling to a qualified buyer. Since then, nearly half a year has passed and an expensive
2 trial has occurred. Laidlaw's took its chances on litigation. It should not be given a second
3 opportunity to accept an offer it effectively rejected. Harley-Davidson should be able to terminate
4 Laidlaw's now, and begin the process of finding a replacement dealer of its own choosing
5 immediately, without the additional unspecified delay necessitated by Laidlaw's' proposal.
6 Second, this is the first time the NRSP has been the subject of a trial, making this a high profile
7 case. Other dealers know that a California dealer has fought termination for violating the NRSP.
8 If dealers are led to believe the worst that can happen if they commit 59 NRSP violations, falsify
9 SWR information, violate PDI obligations, etc., and put Harley-Davidson through expensive
10 litigation is that they will have to sell out, Harley-Davidson's enforcement efforts will be
11 drastically eroded.

12 Third, Laidlaw's' proposal invites the Board to facilitate still more litigation between the
13 parties, which the Board likely could not control, should Harley-Davidson (as is its right) not
14 approve a buyer whom Laidlaw's proposed. It is not clear that the Board would have jurisdiction
15 over a claim by Laidlaw's that Harley-Davidson unreasonably refused to give that approval,⁵² a
16 claim which, in these circumstances, Laidlaw's should have no right to bring. Instead, such a
17 dispute could well end up in the courts. Fourth, much of Laidlaw's' claimed "investment loss"
18 can be mitigated if the real estate holding companies are willing to lease the Laidlaw's facility to
19 the replacement dealer whom Harley-Davidson itself selects after the Protest is overruled
20 unconditionally. Finally, of course, Laidlaw's has been told for years that it may be terminated for
21 non-compliance with the NRSP and for providing false SWR information. It cannot claim to be
22 surprised that it is facing termination now, without an opportunity to sell.

23 **IV. Conclusion**

24 As Mr. Veduyn testified, once a dealer has more than twenty NRSP violations, "It's gone
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26 ⁵² The Board has jurisdiction over protests under Cal. Veh. Code Sections 3060 *et. seq.* but not over claims for
27 refusals to approve a buy sell under Cal. Veh. Code section 11713.3. *Mazda Motor of America, Inc. v. California New*
28 *Motor Vehicle Board*, 110 Cal. App. 4th 1451, 1456-61 (2003). Such claims must be brought in court. Laidlaw's'
proposal creates a hybrid situation.

1 beyond the ability of the common person to think, 'Hey, you know, I got duped. I got fooled. I got
2 tricked. I didn't understand what was happening here.' And it usually gets to the point of a
3 conscious disregard of the policy itself." [SV. II:209:8-18]. As Mr. Kennedy wrote before
4 Harley-Davidson ever audited Laidlaw's, once a dealer exceeds this threshold, Harley-Davidson
5 does not, and "can't pick and chose" whose Dealer Contracts to terminate. [Ex. 90; MK. II:82:5-
6 83:22] Laidlaw's committed nearly three times as many violations. While it can continue its
7 rental and insurance operations and lease to its replacement, it cannot remain a Harley-Davidson
8 dealer. Harley-Davidson's ability to enforce critical contractual obligations that protect the public,
9 the brand, and hundreds of other authorized dealers -- including Mr. Abry, Mr. Guthrie, Mr. Malzo
10 and other authorized California dealers - is at stake. For these reasons and others stated in Harley-
11 Davidson's Pre-Trial Brief, good cause exists to terminate Laidlaw's' Dealer Contract. Laidlaw's'
12 Protest should be overruled, unconditionally.

13 DATED: April 9, 2012

Respectfully submitted,

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COOPER, WHITE & COOPER LLP

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By: 

Robert L. Ebe
Attorneys for Respondent

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1 **PROOF OF SERVICE**

2 **CASE NAME:** In the Matter of the Protest of
3 **LIDLAW'S HARLEY-DAVIDSON SALES, INC., dba**
4 **LIDLAW'S HARLEY-DAVIDSON**
5 **v.**
6 **HARLEY-DAVIDSON MOTOR COMPANY**
7 **COURT:** STATE OF CALIFORNIA, NEW MOTOR VEHICLE BOARD
8 **CASE NO.:** Protest No.: PR-2299-11

9 I am a resident of the State of California. I am over the age of eighteen years, and not a party
10 to this action. My business address is 201 California Street, Seventeenth Floor, San Francisco,
11 California 94111-5002.

12 On April 9, 2012, I served the following document(s): **RESPONDENT HARLEY-DAVIDSON**
13 **MOTOR COMPANY'S REPLY BRIEF and cited authorities** on each of the parties listed below at
14 the following addresses:

15 New Motor Vehicle Board 16 Attn: Legal 17 1507 21 st Street, Suite 330 18 Sacramento, California 95811	Telephone: (916) 445-1888 Facsimile: (916) 323-1632 Email: nmvp@nmvp.ca.gov
19 Halbert B. Rasmussen 20 Franjo M. Dolenac 21 Crystal Yagoobian 22 Manning, Leaver, Bruder & Berberich 23 5750 Wilshire Blvd., Suite 655 24 Los Angeles, California 90036	Attorneys for Protestant Laidlaw's Harley- Davidson Sales, Inc., dba Laidlaw's Harley- Davidson Telephone: (323) 937-4730 Facsimile: (323) 937-6727 Email: hasmussen@manningleaver.com fdolenac@manningleaver.com cyagoobian@manningleaver.com

25 **BY MAIL:** I am readily familiar with the business practice at my place of business for collection and
26 processing of correspondence for mailing with the United States Postal Service. Correspondence so collected
27 and processed is deposited with the United States Postal Service that same day in the ordinary course of
28 business. On the date specified above, as to each of the parties identified in the above service list, a true copy
of the above-referenced document(s) were placed for deposit in the United States Postal Service in a sealed
envelope, with postage fully prepaid; and on that same date that envelope was placed for collection in the firm's
daily mail processing center, located at San Francisco, California following ordinary business practices.

BY ELECTRONIC DELIVERY: On the date specified above, by or before 5:00 p.m., I transmitted from
electronic notification address mpace@cwclaw.com, a true copy of the above-referenced document(s) to the
notification address(es) identified in the above service list, each of which electronic notification address is the
last electronic notification address given on any document filed in the cause by the party served. The described
transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and
correct.

Executed on April 9, 2012, at San Francisco, California.



Martin Spence