STATE OF CALIFORNIA

DECISION COVER SHEET

[X] ACTION BY: Public Members Only **[ ] ACTION BY**: All Members

To : BOARD MEMBERS **Date:** May 9, 2012

From : ADMINISTRATIVE LAW JUDGE MERILYN WONG

CASE: **LAIDLAW'S HARLEY-DAVIDSON SALES, INC. dba LAIDLAW'S HARLEY-DAVIDSON v. HARLEY DAVIDSON MOTOR COMPANY, a Corporation**
Protest No. PR-2299-11

TYPE: **Vehicle Code section 3060 Termination**
Proposed Decision

PROCEDURE SUMMARY:

- FILED ON CALENDAR: May 12, 2011
- MOTIONS FILED: None
- HEARING ON MERITS: November 30-December 14, 2011
- COUNSEL FOR PROTESTANT: Halbert B. Rasmussen, Esq.
  Franjo M. Dolenac, Esq.
  Manning, Leaver, Bruder & Berberich
- COUNSEL FOR RESPONDENT: Robert L. Ebe, Esq.
  Brett R. Waxdeck, Esq.
  Scott M. McLeod, Esq.
  Cooper, White & Cooper LLP

EFFECT OF PROPOSED DECISION: This Proposed Decision would **sustain** Protest No. PR-2299-11.

SUMMARY OF PROPOSED DECISION:

- Respondent contends that good cause exists to terminate Laidlaw's franchise because, over a two-year period, Laidlaw's sold 42 new motorcycles, and improperly sourced 17 new pleasure vehicles in violation of Respondent's Non-Retail Sales Policy (NRSP). Respondent further contends that Protestant's failure to perform Pre-Delivery Inspection and Protestant's filing of inaccurate or incorrect Sales Warranty Registration information were violations of the franchise as set forth in Respondent's General Conditions of Sales and Service.

- Protestant contends that its alleged violations of Respondent's Non-Retail Sales Policy and

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Fleet Sales Policy are the only basis for its termination. Protestant contends the Non-Retail Sales Policy does not amend or modify the Dealer Contract nor are its terms incorporated into the franchise. Protestant further contends that the Fleet Sales Policy, unlike the Non-Retail Sales Policy, is not addressed in the Dealer Agreement. Protestant asserts its actions were not intended to deceive Respondent, but were the result of a lack of understanding of the Non-Retail Sales Policy.

- The gravamen of this case is the good cause factor listed in Section 3061(g), which is the "extent of the franchisee's failure to comply with the terms of the franchise." It is significant that the language of subsection (g) requires the consideration of the extent of the failure to comply. It is equally important to note that the statute does not say ANY failure to comply or simply THE failure to comply, but it is the extent of the failure to comply that must be considered in evaluating whether or not there is good cause to terminate the franchise.

- In evaluating extent of the failure to comply the factors involving breach of contract under Restatement 2d of Contracts were as follows:

    - The Extent to which the Injured Party will be Deprived of the Benefit which he Reasonably Expected

      The "injured party" is Harley-Davidson Co. Harley-Davidson Co. has received and continues to receive the vast majority of the benefits of the contract with Laidlaw's over a period of 54 years, namely that of selling and servicing motorcycles, and promoting the Harley-Davidson lifestyle. As to whether Harley-Davidson Co. "will be deprived of the benefit" in the future, it is most likely that Laidlaw's will continue to be a successful dealer and it would be inconceivable that the personnel at Laidlaw's would engage in such conduct again.

    - The Extent to which the Injured Party can be Adequately Compensated for the Part of that Benefit of which he will be Deprived

      The Board is powerless to award damages should they be ascertainable, however Harley-Davidson Co. is not precluded from seeking relief in Superior Court for monetary damages as a result of Laidlaw's breach.

    - The Extent to which the Party Failing to Perform or to Offer to Perform will Suffer Forfeiture

      The issue of the policy of avoidance of forfeiture weighs heavily in favor of Laidlaw's. To permit a termination of the franchise would cause the Laidlaw family to "suffer forfeiture" of their family's investment and future livelihood.

    - The Likelihood that the Party Failing to Perform or to Offer to Perform will Cure his Failure, Taking Account of all the Circumstances Including Any Reasonable Assurances

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This factor too weighs in favor of Laidlaw's as it has already undertaken measures to ensure that its dealership will adhere to the policies mandated by Harley-Davidson Co. The demeanor of the family members who testified was sincerely remorseful. Protestant has made the following offer through its counsel: Protestant will agree to the imposition of conditions if the protest is sustained which include continuing with the Compliance Coach for a period of e.g. three years, Compliance Coach audits made available to Respondent, and full reimbursement of all costs, expenses or other losses caused by the export violations identified in the audit.

- The Extent to which the Behavior of the Party Failing to Perform or to Offer to Perform Comports with Standards of Good Faith and Fair Dealing

  There was nothing to indicate that what was done by any of Laidlaw's employees was done out of greed, corruption, collusion or any of the usual factors that might motivate a dealer to commit such acts.

  In applying the Section 241 of the Restatement of Contracts, 2d, although Laidlaw's did breach the NRSP and therefore the terms of the franchise, the breach is not found to be material under the analysis of Section 241. If only good cause factor (g) were to be considered in the termination, then factor (g) the "extent of the franchisee's failure to comply with the terms of the franchise" would have to be so egregious as to override the consideration of the remaining six good cause factors and the existing circumstances of this case.

RELATED MATTERS:

- Related Case Law: There are no published court decisions applicable to this case.
- Applicable Statutes and Regulations: Vehicle Code sections 3060, 3061, and 3066.
- Related Board Protest: *Riverside Motorcycles, Inc. dba Ski Fordyce Harley-Davidson v. Harley-Davidson Motor Company, a Corporation*, Protest No. Protest No. PR-2310-11, contains similar factual allegations. Judge Ryerson presided over the merits hearing; the Proposed Decision will be considered at the August 2012, Board meeting.

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