

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

3
4
5
6
7
8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

10
11 In the Matter of the Protest of

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

14 Protestant,

15 v.

16 HARLEY-DAVIDSON MOTOR COMPANY, a
Corporation,

17 Respondent.

Protest No. PR-2299-11

PROPOSED DECISION

18
19 **PROCEDURAL BACKGROUND**

20 **Statement of the Case**

21 1. By letter dated April 14, 2011, Harley-Davidson Motor Company, a Corporation ("Harley-
22 Davidson Co." or "Respondent"), gave notice to Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's
23 Harley-Davidson ("Laidlaw's" or "Protestant") pursuant to California Vehicle Code section 3060¹ of its
24 intention to terminate Laidlaw's Harley-Davidson Motorcycle Dealer Contract. The New Motor Vehicle
25 Board ("Board") received the notice on April 18, 2011.

26 2. The notice states in part the following reasons for termination:
27 _____

28 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

1 [Harley-Davidson's] audit revealed approximately forty-two (42) violations of [its]
2 non-retail policy since December 27, 2008, a period of approximately two years spanning
3 four model years...The violations include generally sales to resellers such as non-
authorized dealers and/or exporters, and/or providing false SWR [sales and warranty
4 registration] information regarding customers, among other things.

5 ... [T]he violations include many false reports on SWR forms of customer
6 addresses, as well as inadequate completion. Other required documentation was missing
7 for many transactions, such as PDI [Pre-Delivery Inspection] forms, few of which were
8 completed and/or signed properly by dealership personnel and the purchaser. There are
9 many false reports of vehicles which [Laidlaw's] documents indicate were intended to be
10 shipped to locations outside the United States such as Vietnam, Thailand, Cambodia, and
11 Jordan. These vehicles were not delivered directly to end user consumers at [Laidlaw's].

12 ...
13 In addition, [Harley-Davidson] discovered seventeen (17) sales of pleasure vehicles
14 to rental sales and/or operations that were not sourced from the Rentals Fleet Pool and/or
15 did not have authorization from Riders Services for conversion from pleasure allocation to
16 rentals/fleet allocation...

17 Thus there are a total of at least fifty-nine (59) violations of Harley-Davidson
18 policies and procedures, and [Laidlaw's] contract. [Ex 237]

19 3. On May 12, 2011, Laidlaw's filed a timely protest.

20 4. An 11-day hearing on the merits of Protest No. PR-2299-11 was held November 30
21 through December 2, 2011, December 5-9, 2011, and December 12-14, 2011, before Administrative
22 Law Judge Marilyn Wong.

23 Pre-Hearing Motions and Orders

24 5. The following are the rulings that were made on the pre-hearing motions:

25 (a) Respondent's Motion to Exclude [Protestant's] Expert Witness Carl Woodward was
26 denied.

27 (b) Respondent's Notice of Intent to Use Declarations as Evidence of Robert Guthrie, Claude
28 Abry, and Nick Colledge in lieu of live testimony and Protestant's Motion to Cross-Examine Declarants
Robert Guthrie, Claude Abry, and Nick Colledge telephonically, were granted.

(c) Respondent's Motion to Exclude Protestant's Exhibits for failure to comply with discovery
deadlines resulted in the following rulings:

(i) Protestant is required to renumber its exhibits in compliance with the previous discovery
order. Its failure to do so will result in the exclusion from evidence of improperly numbered exhibits.

(ii) With respect to Protestant's failure to provide Respondent with its updated compliance
program reports, Respondent will be allowed additional time for discovery relating to the reports.

1 (iii) Respondent's motion to exclude Dealer Retail Excellence Reports created by Harley-
2 Davidson Co. is denied.

3 6. The matter was submitted on April 9, 2012.

4 **Parties and Counsel**

5 7. Protestant Laidlaw's is an authorized Harley-Davidson dealership located at 1919 Puente
6 Avenue, Baldwin Park, California. [Ex 1] It is owned by the Laidlaw family which includes, Walter
7 and Frances Laidlaw, trustees of the Laidlaw Family Trust, and their children Brent Laidlaw, Jarold
8 "Jerry" Laidlaw and Laurie Laidlaw-Le Duc. [Ex 1] Protestant is a "franchisee" within the meaning of
9 Sections 331.1 and 3060(a)(1).

10 8. Protestant is represented by Halbert B. Rasmussen and Franjo M. Dolenac of Manning,
11 Leaver, Bruder & Berberich, 5750 Wilshire Blvd., Suite 655, Los Angeles, California.

12 9. Respondent Harley-Davidson Co. is a "franchisor" within the meaning of Sections 331.2
13 and 3060(a)(1).

14 10. Respondent is represented by Robert L. Ebe and Brett R. Waxdeck of Cooper, White &
15 Cooper LLP, 201 California Street., 17th Floor, San Francisco, California.

16 **Summary of Witnesses' Testimony and Exhibits Introduced at Hearing²**

17 **Protestant's Witnesses' Testimony and Exhibits**

18 11. Protestant called the following witnesses: Walter Laidlaw, founder of Laidlaw's and
19 former President of Laidlaw's; Brent Laidlaw, current President and Dealer Operator of Laidlaw's and
20 Walter's son; Richard Litchfield, General Manager of Laidlaw's; Matthew Laidlaw, Insurance
21 Associate/DMV Clerk at Laidlaw's and Walter's grandson; Christopher Tolman, General Sales Manager
22 of Laidlaw's and Walter's grandson; John Gisiger, FIS Compliance Coach retained as a consultant to
23 Laidlaw's; and expert witnesses: Carl Woodward, CPA, and Edward Stockton from the Fontana Group.

24 ///

25 _____
26 ² More than 250 Exhibits offered by the parties were received into evidence. Most if not all of the exhibits were pre-marked
27 for identification. Exhibits numbered 1-176 were offered jointly by the parties. Exhibits numbered 1-176 also numerically
28 correspond to exhibits previously used at depositions. Exhibits numbered 200 through 499 were offered by Respondent, and
Exhibits numbered 500 and above are offered by Protestant. The numbers marked on the exhibits do not reflect either the
numerical or chronological order in which they were offered or admitted into evidence at this hearing. The individually
numbered exhibits may also contain several different but related documents.

1 or replaced or the business of the franchisee disrupted.

2 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
3 vehicle parts, and qualified service personnel to reasonably provide for the needs of the
4 consumers for the motor vehicles handled by the franchisee and has been and is rendering
5 adequate services to the public;

6 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be
7 performed by the franchisee; and

8 (g) Extent of the franchisee's failure to comply with the terms of the franchise.

9 **RESPONDENT'S CONTENTIONS**

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

16 **PROTESTANT'S CONTENTIONS**

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

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **FINDINGS OF FACT**³

2 **Preliminary Findings Relating to Protestant**

3 18. In 1958 at age 27, Walter Laidlaw became a Harley-Davidson dealer. For the past 54 years
4 he has remained active selling Harley-Davidson motorcycles. [VII 6]⁴

5 19. For over 50 years Walter has been the President of the corporation that owns the Laidlaw
6 dealership. It is called Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's Harley-Davidson and is the
7 named franchisee. In 2009 Walter Laidlaw's son Brent became the President. [VII 20-21, Ex 1, 3]

8 20. The corporation's stockholders are all Laidlaw family members,⁵ including Walter's
9 children who will eventually receive most of the corporation's stock. Since its inception there have been
10 no other shareholders outside of the immediate Laidlaw family. [VII 20-21, Ex 1]

11 21. In late 2008 Walter turned over the sales operations to his sons, Brent and Jerry. In
12 addition to his two sons who run the business, four of Walter's grandsons are also employed at the
13 dealership. [VII 10, 12-13, 19] Brent and Jerry Laidlaw are listed as the dealer principals on Laidlaw's
14 organizational chart. [Ex 5]

15 22. Although the day-to-day operations of the dealership are in the hands of his sons, Walter
16 frequently works the sales floor meeting and greeting customers, and offering them assurances that if they
17 purchase a motorcycle from his store they will be well taken care of. [VII 19-20]

18 23. Like his father, Brent testified that growing up "The dealership was our life and our
19 identity." Brent started riding motorcycles before he was big enough to start them. [VII 30-31]

20 24. During high school Brent worked in all aspects of the dealership. To pay college expenses,
21 Brent worked at Motorcycle Goodies, a subsidiary of Laidlaw's that was located upstairs from the
22 dealership. The company sold wholesale accessories nationwide. [VII 30-32]

23
24
25 ³ References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding
and are not intended to be all-inclusive.

26 Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the
particular topic under which they appear, but rather may apply to any of the "existing circumstances" or "good cause" factors
of Section 3061.

27 ⁴ The Reporter's Transcript is identified by volume ("I" for the first day of hearing, and "II" for the second day and so on).

28 ⁵ For clarity, persons with the Laidlaw family surname, Walter, Brent, Jarold (Jerry), and Matt will be referred to by their first
name.

1 34. Harley-Davidson motorcycles are sold in 100 countries. [V 86] There are 1,300 Harley-
2 Davidson dealers worldwide with 697 dealers throughout the United States, including 50 in California.
3 [I 126]

4 35. Approximately 65% of Harley-Davidson Co.'s production or 155,000 motorcycles
5 annually are distributed in the United States and 35% or 60,000 motorcycles annually are distributed
6 internationally.⁶ [I 122, II 12-13, Ex 206] Harley-Davidson Co.'s annual domestic fleet sales are
7 approximately 4,000 units. [II 17]

8 36. Harley-Davidson Co.'s annual sales dollar volume is approximately \$5 billion with 75% of
9 revenues attributed to vehicle sales, 20% to parts and accessories, and 5% to general merchandise. [I 118]

10 **Findings Relating to the Amount of Business Transacted by the Franchisee,**
11 **as Compared to the Business Available to the Franchisee [§ 3061(a)]**

12 37. In 2005, 2006, and 2007, Laidlaw's received Harley-Davidson Co.'s Gold Bar and Shield
13 award. It is one of the top awards for dealer excellence and is given to only the top 25 dealers in the
14 country. [VII 137-38, Ex 124] In 2008 Laidlaw's received the Bronze Bar and Shield award. [IV 71, Ex
15 157, 158] Walter received Harley-Davidson Co.'s 50-Year Achievement Award. [VII 138, Ex 124]

16 38. Despite the economic downturn, the net sales figures for the dealership were up 3.6 percent
17 in October 2011 compared with last year. [VII 151-52, Ex 540] In October 2011 net profit before taxes
18 for the dealership was up by 3.1 % as compared to 2% for the same time last year. [VII 153, Ex 540] As
19 of October 2011, Laidlaw's had sold 383 motorcycles, for a 23% improvement over the previous year's
20 sales. [VII 155-56, Ex 540]

21 39. In December 2010, Laidlaw's was ranked first in sales out of 16 district dealers, and in
22 May 2011 Laidlaw's ranked second in district sales. [IV 72-73, Ex 159, 160]

23 40. Laidlaw's nationwide dealership ranking for retail sales units in November 2011 was 55th
24 out of 703 dealerships. [VII 156, Ex 540]

25 41. In September 2011, Laidlaw's dollar volume year-to-date was \$12 million ranking
26 Laidlaw's 95th in the country in gross dollar volume sales. [VII 160, Ex 539]

27 _____
28 ⁶ Numbers represent 2009 sales figures.

1 42. Protestant's expert witness Edward Stockton testified that Laidlaw's sales effectiveness is
2 158% of the national average. [XI 28-29, Ex 634]

3 43. Mr. Stockton also found data showing that Laidlaw's numbers are quite high when looking
4 at absolute sales volume. These numbers confirm that Laidlaw's sales are high relative to the amount of
5 business available. [XI 34]

6 44. The sale of new vehicles was the most significant factor considered by Mr. Stockton as
7 new vehicle sales generate service and parts revenues. The second most important factor is the volume of
8 service, as this amount will have the largest impact on the consuming public. [XI 34-35]

9 45. Service figures for September 2011 year-to-date show a decrease of 3.5% over last year,
10 however the \$1,140,540 net sales puts Laidlaw's at 10th in the nation out of 693 dealerships for service
11 sales. Service proficiency calculated at 92.9% placed Laidlaw's ranking at 110 out of 697 dealerships. At
12 79.8% customer retention for service, Laidlaw's ranks 257 out of 633 dealerships. [VIII 5, 9, Ex 539]

13 46. Based on Customer Satisfaction Index (CSI) data, Mr. Stockton found that customers
14 responded more positively to Laidlaw's than to comparable dealerships. [XI 32]

15 47. Data from Harley-Davidson Co.'s Dealer Retail Excellence Reports compares Laidlaw's to
16 other Harley-Davidson dealerships. For 2010, Laidlaw's was ranked 62 out of 706 dealers nationwide in
17 net sales of new vehicles and ranked 7 out of 701 dealers nationwide in service net sales. [XI 33, Ex 634]

18 **Findings Relating to the Investment Necessarily Made and Obligations Incurred**
19 **by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]**

20 48. At the original Rosemead location the Laidlaw family expanded the facility twice, nearly
21 doubling it in size. The renovations and expansions were done with the encouragement of Harley-
22 Davidson Co. [VII 6-8]

23 49. In 1999, Laidlaw's received permission from Harley-Davidson Co. to relocate its
24 Rosemead dealership to an open point in Baldwin Park. [VII 41-41, Ex 500] The 2-acre parcel of land,
25 with an existing building on it, was purchased for \$2.1 million, paid for in part from the proceeds of the
26 Rosemead sale. Protestant expanded and renovated the building that is now 46,000 square feet at a cost of
27 approximately \$4.8 million. The total finished costs for the current dealership facility was between \$6.5 -
28 \$7 million. [VII 24-25, 42]

1 50. Recently more than \$10,000 was expended to upgrade lighting in the store to comply with
2 Harley-Davidson Co.'s new lighting requirements. Additional improvements, not required by the Harley-
3 Davidson Co., were made that included installing solar panels, painting the buildings, and repaving the
4 parking lot. These were done to increase energy efficiency and improve the appearance of the dealership.
5 [VII 44, 61-62, VIII 10-11, 20-21, 23-25]

6 51. According to Brent, Laidlaw's is one of the preeminent Harley-Davidson dealerships in the
7 state. In his opinion, the large visible signage of the Harley-Davidson Bar and Shield offers tremendous
8 brand presence rivaling the Walmart sign on the other side of the freeway. [VII 45, 47] The present
9 location enjoys high-visibility on a well-traveled section of the 10 freeway. [VII 7]

10 52. For more than 50 years that Laidlaw's has been in existence, members of the Laidlaw
11 family have been the sole owners of the real estate, the facilities, and the dealership business entity.

12 **Findings Relating to Permanency of the Investment [§ 3061(c)]**

13 53. Ownership of the real property and improvements of the dealership are owned by two
14 Laidlaw family controlled Limited Liability Corporations (LLC). An entity called Laidlaw Realty
15 Associates, LLC, controlled by Walter has a 40% ownership interest in the land and facilities. Laidlaw
16 B.P. (Baldwin Park) Realty Associates, LLC, controlled by Walter's children owns the remaining 60%
17 interest. [VII 20-21, VIII 5-18, Ex 146A, B, C, 147, 148] The current Laidlaw's facility, as was the
18 former, is dedicated exclusively to Harley-Davidson. Laidlaw's has been a single line-make, Harley-
19 Davison-only dealership throughout its 54 years of operation.

20 54. The cost of the real property upon which the dealership is located was \$2.1 million. [VIII
21 25] The expansion and renovation of the 46,000 square foot dealership facility cost approximately \$4.8
22 million. The finished costs include interior finishes, and other assets of the dealership such as 50
23 computer stations, 35 surveillance cameras, merchandising fixtures, boutique lighting, shop equipment,
24 lifts, workbenches, signage, and solar panels which totaled about \$6.5 to \$7 million. [VIII 10-11, 20-21,
25 23-25]

26 55. Laidlaw's is one of the larger Harley-Davidson dealerships in the area. Its nearest
27 competitor is a non-Harley-Davidson dealership located three miles away. The nearest Harley-Davidson
28 dealerships are smaller than Laidlaw's, with the nearest one about 15.5 miles away. [IV 39-40, VIII 27-

1 28]

2 56. Because the building was designed exclusively for a Harley-Davidson dealership it would
3 be difficult to use it for other purposes. The exterior design, colors, and signage were required by the
4 Harley-Davidson Co. and are specific to the Harley-Davidson brand. [VIII 40-41] Even the interior
5 includes computer wiring specific to the motorcycle dealership. [VIII 21-22]

6 57. Dealerships such as Laidlaw's that are housed in single-purpose buildings are not easily
7 convertible to other uses. When dealerships are so specifically branded, the inability to convert them to
8 other uses makes them more permanent than a less branded facility. [XI 28, Ex 634] Upon termination a
9 heavily branded facility would be more difficult to liquidate. [XI 35-36]

10 58. Protestant's expert Carl Woodward estimates that termination of this dealership operating
11 from a single-purpose facility reduces its value by 30%. [X pm 24-26] The cost value of the facility and
12 the real estate is estimated at \$7 million. [X pm 28-30, Ex 135]

13 59. The goodwill valuation of the Laidlaw's dealership would be significant based on its
14 longevity of over 50 years, its success and profitability, and its recognition as the oldest Harley-Davidson
15 dealership in the Los Angeles area. [VIII p 33] Mr. Woodward has valued the range of goodwill from \$4
16 to \$8 million, with a mid-point of \$6 million. [X pm 7-14, 59, Ex 135]

17 60. Respondent contends that Laidlaw's is the "franchisee" as set forth in the Vehicle Code,
18 and that Laidlaw's does not own the real property or improvements of the dealership operations.
19 Respondent further asserts that because separate legal entities own the real estate, their investments are
20 not relevant to Section 3061(b) or 3061(c), because they are not the investments of the "franchisee."

21 61. One of the obligations of the Dealer as set forth in the General Conditions of Sales and
22 Service is to maintain satisfactory facilities as required by the franchise. The person who maintained and
23 provided facilities in the early years was Walter and now it is Walter and his children. [Ex 2] There is no
24 dispute that Walter made certain that Laidlaw's facilities met or exceeded the requirements of the
25 franchise. Whether he chose to do so by having the realty purchased by Laidlaw's or to use his personal
26 assets to buy and then lease back the facilities to Laidlaw's, Walter's actions were dictated by the Dealer
27 Contract. Most likely Walter was the Owner and Dealer Operator under the earlier forms of the Dealer
28 Contract, and the structuring of the ownership of the realty was done in the "most effective manner," for

1 the operation of the dealership, which is the current requirement as stated in Section 4.A of the Dealer
2 Contract. [Ex 1]

3 62. The fact that Walter and his children chose to acquire the current facilities for Laidlaw's
4 through their wholly-owned realty companies formed for that specific purpose would not lessen the
5 impact of a termination upon those individuals who are the owners of, not only the dealership, but also
6 owners of the realty.

7 63. To disregard the investments made and their permanency as not being relevant would be
8 putting form over substance. The same family members made investments in both the realty and in the
9 dealership for the sole purpose of selling and servicing Harley-Davidson motorcycles and no other brand.

10 64. For the Respondent to assert that the Board should look only to the actual investments of
11 the "fictional franchisee" to evaluate the impact of the intended termination cannot be reconciled with the
12 language of the very contract it seeks to terminate. The Dealer Contract that the franchisor is relying
13 upon is based on the "personal qualifications, experience, skill and commitment" of the person identified
14 as the "Dealer Operator and Owner(s)." The Dealer Contract then identifies "Brent S. Laidlaw" as
15 "Dealer Operator;" and it lists as owners: Jarold R. Laidlaw, Brent S. Laidlaw, and Laurie G. Laidlaw-
16 LeDuc, as well as Walter Laidlaw and Frances E. Laidlaw as Trustees of the Laidlaw Family Trust.

17 65. It is common for family-owned dealerships operated in California to have similar
18 arrangements in regards to ownership and leasing of the realty needed for compliance with the dealer
19 contract and operation of the business. To conclude that any time a Dealer Operator/Owner of the
20 franchisee chose to operate under such a "family" or "personal" arrangement would mean that the
21 "franchisee" would have no permanent investment that could be considered under Section 3061. This
22 would effectively remove Sections 3061(b) and 3061(c) from the statutory good cause factors and could
23 not be what was intended by the legislature.

24 **Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare**
25 **For the Franchise to be Modified or Replaced or the**
26 **Business of the Franchisee Disrupted [§ 3061(d)]**

27 66. Laidlaw's database indicates that over 90,000 individuals have had contact with the
28 dealership in sales and service over the years. Laidlaw's active mailing list has over 12,000 customers
who have made purchases or had some other contact with the dealership within the past 24 months. [VII

1 129-30]

2 67. Laidlaw's has 50 employees who would lose their jobs, health benefits and 401(k) plans, if
3 Laidlaw's is terminated. [VIII 57-58]

4 68. Unlike some dealers who eschew police business out of concern for their image, Walter
5 has been involved in police vehicle sales throughout his career. Over the years he has provided Harley-
6 Davidson motorcycles to law enforcement officers in 11 municipalities in southern California, including
7 the Los Angeles Police Department. [VII 10-11] Out of their relationship with law enforcement
8 Laidlaw's has sponsored benefit rides from their store for police events, including those for fallen
9 officers. [VII 12]

10 69. Over the years Laidlaw's has been involved in numerous charitable events and community
11 causes including fundraising rides sponsored by the dealership. [VII 20] Walter testified that his entire
12 life has been dedicated to his Harley-Davidson store, and the termination proceeding has been the most
13 devastating event of his life. [VII 21-22]

14 70. Other dealerships do not undertake collision work because it is time-consuming and
15 sometimes difficult to work with insurance companies. Laidlaw's service department has a collision
16 center that handles insurance repair work. Brent sees insurance work as a commitment to his customers
17 and a service to the consuming public. [VII 64-65]

18 71. Laidlaw's operations also include an insurance sales center. In 2006 Laidlaw's added a
19 motorcycle rental franchise called EagleRider, which has 20 Harley-Davidson motorcycles in its fleet.
20 [VII 53-54, 57]

21 72. The EagleRider rental business is an adjunct to the motorcycle sales business. The rentals
22 allow prospective buyers of Harley-Davidsons to test ride motorcycles before they make a purchase.
23 Smaller motorcycles are available for buyers use to allow them to more easily pass the DMV motorcycle
24 license driving test. [VII 55] Rentals are also available to customers while their motorcycles are being
25 serviced or repaired. [VII 57]

26 73. A variety of insurance company policies are offered as a service to Laidlaw's customers.
27 Laidlaw's has found that many of their customers are underinsured or have inadequate insurance
28 coverage. The insurance center is designed to assist customers with their insurance needs, and their sales

1 can exceed 600 policies annually. [VII 54]

2 74. Matt has worked at Laidlaw's for the past 2 ½ years. He is a licensed insurance salesman
3 and now manages the insurance center where he works with his brother Scott. Matt had been in sales but
4 was moved to insurance shortly after Laidlaw's received the termination letter. [IX 117-18]

5 75. Laidlaw's has maintained a Harley Owners Group or H.O.G. chapter for 20 years. The
6 chapter has more than 177 members. It organizes rides and events for other Harley-Davidson enthusiasts.
7 [VII 130-31, IV 111, Ex 124]

8 76. Laidlaw's operates a Motorcycle Value Program or MVP, a fee based membership loyalty
9 program offering its members discounts and event access. The MVP is exclusive to only 24 dealers in the
10 U.S., and Laidlaw's is the only participating MVP dealer in California. The MVP encourages
11 participation in the brand and promotes sales at the dealership; nearly 50% of Laidlaw's sales are from
12 MVP members. [VII 132-35, Ex 124]

13 77. Another service provided by Laidlaw's is a 3-year pre-paid service maintenance contract
14 called Priority Maintenance Service Plan. More than 600 maintenance plans are in effect with the
15 customers who have enrolled in the plan. In addition to the customers losing a service facility, Laidlaw's
16 would have to provide refunds to the plan holders if it is terminated. [VII 56, 136, Ex 134]

17 78. The harm to the public caused by the loss of Laidlaw's dealership would be greater than
18 just the loss of motorcycle sales. Loss to the consuming public would include the lack of the facility for
19 service, loss of the motorcycle rental business, loss of the insurance services, loss of the insurance
20 collision center, loss of participation in the local H.O.G. chapter and other community events, loss of a
21 dealership that welcomes law enforcement business, loss of a facility to service its Priority Maintenance
22 customers, and the loss of jobs for nearly 50 employees, as well as the loss of tax revenues for the
23 community. The loss would significantly impact Laidlaw's customers, the Laidlaw family, and Laidlaw's
24 employees. [VIII 54-59] Significantly customers would lose the comfort and confidence associated with
25 doing business with a 50-year old institution. [VIII 54-56]

26 79. Neither the insurance nor the EagleRider rental businesses would be viable upon a
27 termination. [IX 87-88] The insurance business is a by-product of the sale of motorcycles and is
28 marketed exclusively to Laidlaw's Harley-Davidson customers, and the rental business is primarily

1 offered as a convenience to its customers. [IX 87]

2 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle**
3 **Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service**
4 **Personnel to Reasonably Provide for the Needs of the Consumers**
5 **for the Motor Vehicles Handled by the Franchisee and has been and**
6 **is Rendering Adequate Services to the Public [§ 3061(e)]**

7 80. Respondent does not dispute the adequacy of Protestant's facilities, adequacy of staff size
8 or their capacity to handle customer service. [II 133-35] Protestant has satisfied Harley-Davidson Co.'s
9 facility standards. [IV 75]

10 81. The service area is large and spacious. The service department has 24 lifts, 18 of which
11 are in-ground lifts. [VII 63, Ex 124] The service department has a dynamometer room dedicated to
12 specialized machinery for mechanical diagnostics. [VII 64-67]

13 82. The service department employs nine technicians and has a good volume of business.
14 Laidlaw's has a high degree of repeat service customers, with 70-80% returning. [VII 63-64, VIII 6; Ex
15 502]

16 83. Harley-Davidson Co.'s Dealer Retail Excellence Report dated June 2011 shows that
17 Laidlaw's percentage of service retention of sales customer for the year-to-date is 75%. [IV 139-40, Ex
18 155]

19 84. In 2010 Laidlaw's with eight technicians at that time, generated a total 4,745 work orders
20 amounting to \$1,364,288 in labor sold which is above district, regional, and national averages at an 87%
21 proficiency. Proficiency is an important measure of service department productivity and efficiency. In
22 2009, the service department generated 5,495 work orders amounting to \$1,626,240 in labor sold, which
23 is an 80% proficiency level. [Ex 124, VII 135-36]

24 85. In 2010 the collision repair center completed 160 work orders amounting to \$467,272 in
25 parts and labor; and in 2009 completed 186 work orders amounting to \$734,062 in parts and labor. [Ex
26 124]

27 86. The Baldwin Park store has a large parts and accessories department as well as other
28 amenities to enhance the customer's experience with the Harley-Davidson lifestyle, including a
MotorClothes department, which is currently carrying inventory worth \$400,000. [VII 57] The
dealership has a photo wall of motorcycle purchasers along with their bikes. [VII 48, 49-52, 58, Ex 502]

1 87. The retail accessories department is a huge draw for the customers and for the brand.
2 Products with the Harley-Davidson logo reinforce the brand and can be found on a wide array of products
3 in the store from tee shirts to pet toys. [VII 58]

4 **Findings Relating to Whether the Franchisee Fails to Fulfill the Warranty Obligations**
5 **of the Franchisor to be Performed by the Franchisee [§ 3061(f)]**

6 88. Respondent contends that Laidlaw's has significantly failed to fulfill its warranty
7 obligations to Harley-Davidson Co. by submitting false and inaccurate Sales Warranty Registration
8 information in violation of paragraph F.3 of Laidlaw's Dealer Contract. However, Section 3060(f) refers
9 to the failure of the franchisee to perform "warranty obligations of the franchisor" that are to be
10 performed by the franchisee. Submitting the SWR information to Harley-Davidson Co. is an obligation
11 of the franchisee pursuant to Section F. Service 3. Product Warranty of the General Conditions of Sales
12 and Service discussed below, but is not a "warranty obligation of the franchisor." There is no allegation
13 that Protestant has failed to provide proper warranty services and vehicle repairs. [II-33-35]

14 **Findings Relating to the Extent of the Franchisee's Failure to Comply with**
15 **the Terms of the Franchise [§ 3061(g)]**

16 **Respondent's Non-Retail Sales Policy (NRSP)**

17 89. Michael Kennedy is the Vice President for Sales, North America, for Harley-Davidson Co.
18 and is responsible for product sales, sales planning, dealer development, and fleet sales, within the United
19 States and Canada. [I 104] He is the highest-ranking executive at Harley-Davidson Co. to testify about
20 its policies and procedures.

21 90. The parties executed a document entitled "Harley-Davidson Motor Company Motorcycle
22 Dealer Contract" (Dealer Contract), on or about January 5, 2005, for a term expiring on December 31,
23 2009. [I 128, Ex 1] A document executed by the parties on October 26, 2009 entitled "2010 Addendum
24 to the Harley-Davidson Motorcycle Dealer Contract" extended the Dealer Contract until December 31,
25 2014. [Ex 3]

26 ///

27 ///

28 ///

1 91. The Dealer Contract provides in part:

2 2. GENERAL CONDITIONS. The Harley-Davidson Motor Company General Conditions
3 of Sales and Service (January 2005) (referred to in this Contract as the "General
4 Conditions"), a copy of which has been provided to Dealer and has been read and agreed to
5 by Seller and Dealer, and such General Conditions and any duly executed and delivered
6 supplement or amendment thereto are hereby expressly made a part of this Contract and
7 incorporated herein. Unless the context otherwise requires, any term defined in any part of
8 this Contract shall have the same meaning in all parts of this Contract. [Ex 1]

9 92. A document dated January 2005 (as amended) (sic) entitled "Harley-Davidson Motor
10 Company General Conditions of Sales and Service" contains the following provision: [I 128-30, Ex 2]

11 B.6. NON-RETAIL SALES. Dealer shall not sell Harley-Davidson Products for resale to
12 non-retail customers, except to other United States authorized Harley-Davidson dealers in
13 accordance with Seller's written policies. Dealer shall not sell new Harley-Davidson
14 Motorcycles through any Internet web site or otherwise in e-commerce. Seller reserves the
15 right to establish from time to time such policies and position statements it believes are
16 necessary or advisable to carry out the purpose or intent of this part of this Contract and
17 Dealer shall comply with all such policies and position statements. [I 134, Ex 2]

18 93. Harley-Davidson Co. issued Non-Retail Sales Policy-Pleasure Vehicles for the model
19 years in question of 2008, 2009, 2010 and 2011. [Ex. 6, 25, 208, 209] The NRSP is issued in the summer
20 of the preceding year for the up-coming model year. The relevant portions of the NRSP are the same for
21 the four model years.

22 94. The first sale at issue by Protestant occurred on December 27, 2008, and the last sale was
23 on January 20, 2011. [Ex 200]

24 95. The "Non-Retail Sales Policy" for the 2010 Model year on Pleasure Vehicles states in part:
25 Harley-Davidson is concerned about the sale of new motorcycles to non-retail purchasers,
26 including sales outside the United States by domestic dealers and sales in e-commerce. In
27 light of that concern, Harley-Davidson has created a Non-Retail Sales Policy to ensure
28 customer satisfaction and safety, facilitate compliance with federal and state law and laws
in various foreign countries, and protect the integrity of Harley-Davidson's worldwide
distribution network. ...

1. As provided in the Dealer Contract, dealers are prohibited from engaging in non-
retail sales of motorcycles. A sale by a U.S. dealer of a new or previously unregistered
motorcycle (an unregistered motorcycle is one that has not been registered with the
state and with Harley-Davidson) will be considered a "non-retail sale" for purposes of
the Dealer Contract and this policy if the motorcycle is not properly set up, inspected,
tested, sold and delivered at the dealership facility, directly to the ultimate consumer.
An "ultimate consumer" is the retail end user who purchases, as indicated on the
Certificate of Origin, a new or previously unregistered motorcycle for his or her own
use, without the intent to resell, pays all applicable taxes and registration fees, and titles
the vehicle in his or her name. Please note that although payment of taxes and
registration fees and titling in the customer's name will normally be sufficient evidence
of a retail sale, the sale to a customer who the dealer knows, or should know, intends to

1 resell the motorcycle may still be deemed a non-retail sale. A sale by a U.S. dealer of a
2 new or previously unregistered motorcycle will also be considered a non-retail sale if it
3 is sold to a customer who resides outside of the United States or for shipment or use
4 outside of the United States, or if it is sold on an Internet web site or otherwise in e-
5 commerce. ...

6 ...
7
8 7. To ensure compliance with this policy, Harley-Davidson reserves the right to audit
9 dealer records as appropriate. ...

10 8. Harley-Davidson will strictly enforce the terms of this policy using all available
11 means. If a dealer sells a motorcycle in an unapproved non-retail sale, records a non-
12 retail sale as a retail sale on the SWR form, submits false SWR information or falsifies
13 any documentation with respect to a sale or otherwise violates this policy, Harley-
14 Davidson reserves the right to take any action it deems appropriate depending upon the
15 circumstances around the violations. Such actions may include, but are not limited to:
16 (1) place limitations on future product allocations or shipments, and/or (2) charge back
17 to the dealer any incentives or allowances credited or paid with respect to such sale,
18 and/or (3) placement of dealer in Not in Good Standing status, and/or (4) charge back
19 any internal and external audit and legal expenses to the dealer, and/or (5) terminate the
20 dealer's contract. [Ex 208]

21 96. The Non-Retail Sales Policy is only applicable to the sale of new motorcycles and is not
22 applicable to used motorcycles. Harley-Davidson Co. has had a version of the NRSP in effect since July
23 1990. [I 141, II 37] The NRSP policy along with other policies is sometimes updated for the upcoming
24 model year and is available on H-D Net, a dealer accessible website. [II 34-36, 49-52, Ex 13, 115, 116,
25 118, 119, 213]

26 97. Mr. Kennedy testified that Harley-Davidson Co. communicated the NRSP to its dealers at
27 meetings and through written communications. The NRSP appeared on three out of 108 slides given at a
28 PowerPoint presentation during the 2006 Town Hall meetings for dealers, and on one slide out of 56 at
the 2007 Town Hall meetings. [II 45-48, 62-65, Ex 112, 113]

98. Both presentations contained the following statement: "Company continues to monitor
and act on violations of non-retail sales policy." Neither presentation warned dealers that termination
could result from violations of the NRSP. [Ex 112, 113]

99. Mr. Kennedy testified that he told the Dealer Advisory Counsel (DAC) that Harley-
Davidson Co. had terminated dealers who had violated the NRSP. The DAC is a 12 dealer representative
body that meets quarterly with Harley-Davidson Co. management. [II 64] However there was no
evidence to show that DAC ever conveyed the warnings about dealer terminations to any of its dealer
members including Laidlaw's. [II 155]

1 100. Nine years before the Laidlaw's violations occurred, in November 2000, Harley-Davidson
2 Co. sent a memo to dealers stating among other things that dealers had been terminated for violating the
3 NRSP.⁷ [II 167-70, II 34-36, 45, Ex 1, 13]

4 101. The next Harley-Davidson Co. memo about the NRSP in March 2004 is entitled Sales of
5 New Motorcycles in E-Commerce. As its title suggests, the primary concern was directed at Internet
6 sales. While the memo includes an attachment of the revised NRSP, the memo itself does not warn of
7 termination for NRSP violations. [II 42-45, 169, Ex 14] No other Harley-Davidson Co. communications
8 were produced between 2000 and 2004 relating to NRSP. [II 169-70]

9 102. In May 2006 another memo from Harley-Davidson Co. warns of termination for violation
10 of the NRSP and further explains other prohibited practices. Under a section entitled Dealer Action
11 Required only one "red flag" warning is listed: "Question multiple sales to one individual in a short
12 period of time." [Ex 118]

13 103. In July 2010 another memo from Harley-Davidson Co. provides clarifications of the NRSP
14 but does not contain a termination warning for policy violations. [Ex 119]

15 104. None of the Harley-Davidson Co. communications about the NRSP including the 2007,
16 2010, and 2011 policy updates require the dealers to acknowledge receipt of the document. [Ex 207, 208,
17 209]

18 105. Although Brent does not recall reading the memos, he does not deny that Laidlaw's
19 received them. [VIII 99-103] He also admits that there were no internal checks or audits to prevent non-
20 retail sales. [VIII 105-06]

21 106. In contrast to the NRSP, the Minimum Advertised Price (MAP) policy and the Parts,
22 Accessories, and MotorClothes (PAM) policy contains a form, requiring the dealer's signature, which
23 acknowledges that the dealer has received, read and understands the updated PAM MAP Policies. The
24 Dealer Acknowledgment Form must be returned to Harley-Davidson Co. The PAM MAP policies carry

25
26
27
28

⁷ "If we determine that a dealer has breached the non-retail sales policy, we will take appropriate action. This could include, depending on the facts and circumstances, chargebacks of retail incentives and allowances, reimbursement of audit and legal fees, and, in situations involving repeated or substantial non-retail sales or submission of false SWR information, termination of your dealer contract. Please understand that documented non-retail sales are a serious issue and a breach of the dealer contract. Past violations have resulted in dealer termination in several cases." [Ex 13]

1 graduated penalties for violations but the penalties do not include termination. See discussion *infra*. [Ex
2 132, 620]

3 107. The stated reasons for the Non-Retail Sales Policy are as follows:

4 Harley-Davidson is concerned about the sale of new motorcycles to non-retail purchasers,
5 including sales outside the United States by domestic dealers and sales in e-commerce. In
6 light of that concern, Harley-Davidson has created a Non-Retail Sales Policy to ensure
7 customer satisfaction and safety, facilitate compliance with federal and state law and laws
8 in various foreign countries, and protect the integrity of Harley-Davidson's worldwide
9 distribution network.... [II 89-92, Ex 208, 237]

10 108. Both the Pre-Delivery Inspection (PDI) form and the Sales Warranty Registration (SWR)
11 form relate to customer satisfaction and safety. Before a new Harley-Davidson motorcycle is delivered to
12 the customer, it undergoes a Pre-Delivery Inspection (PDI) process, where the motorcycle is prepared for
13 the customer's use. Upon completion of the PDI process the dealer completes the PDI form, which is
14 retained in the deal jacket.⁸ [I 144-50]

15 109. After a customer takes delivery of the new motorcycle, the Sales Warranty Registration
16 (SWR) form signed by both the dealer and the customer is sent to Harley-Davidson Co. The submission
17 of the SWR to Harley-Davidson Co. begins the motorcycle's 2-year warranty period; customer
18 information is entered into the Harley-Davidson Co. database in the event of a recall, and it initiates the
19 customer's Harley Owners Group membership.

20 110. The Harley-Davidson Co. document entitled General Conditions of Sales and Service
21 obligates the dealer to complete the SWR form. [I 160-61, Ex 2] Like the NRSP above and the Fleet
22 Sales Policy ("FSP") below, the language of the SWR form allows Harley-Davidson Co. to terminate a
23 dealer if there are any misrepresentations on the SWR form.

24 111. The SWR form signed and submitted to Harley-Davidson Co. bears the following
25 certification:

26 "DEALER: I certify that I am the delivering dealer and that the sale of this vehicle meets
27 all requirements of all Harley-Davidson sales policies; this vehicle has been prepared for
28 delivery according to all applicable Pre-Delivery and Set-Up instructions; the warranty has
29 been explained to purchaser; the Owners Manual has been delivered to the purchaser; and

⁸ A deal jacket contains all relevant documents relating to the sale of a motor vehicle. Most of Laidlaw's deal jackets contained, among other things, the SWR form, Motorcycle Bill of Sale, Motorcycle Dealer Set-Up and Pre-Delivery Check List (PDI), DMV New Vehicle Registration, and some contained bills of lading. [Ex 63]

1 that the information on this form is true, correct and complete to the best of my
2 knowledge. I also certify that this vehicle was ordered with the intention for Retail Sale in
3 the country of United States of America and make no representation that it meets
4 specifications in any other country. I acknowledge that any misrepresentation on this
5 form will be considered a material breach of my dealer contract and may constitute
6 grounds for termination. ..." [II 33-34, Ex 33, III 64, Ex 64]

7 112. The SWR form only provides for three types of sales: Retail (Direct to Ultimate
8 Consumer), Police/Shrine, and Other. The "Other" designation can be used for fleet or rental sales. By
9 its nature checking the retail box for any non-retail sales is a misrepresentation that could result in
10 termination of the franchise. [III 65 Ex 64]

11 113. A retail sales designation on the SWR form allows the dealer to receive eligible factory
12 incentives, and affects the dealer's vehicle allocation. [I 160-65, II 52-53, Ex 63, V 90-91] Only retail
13 sales are eligible for Vehicle Incentive Payments (VIP). [III 8-9, Ex 116]

14 114. The SWR form provides owner information that allows Harley-Davidson Co. to contact
15 the customer in the event of a recall. Harley-Davidson Co. conducts safety, regulatory, and voluntary
16 recalls. Most vehicle recalls are related to safety and are reported to the National Highway Traffic Safety
17 Administration (NHTSA). Since 1970 Harley-Davidson Co. has conducted 145 safety recall campaigns.
18 [V 74-75, 77-79, 147-48]

19 115. Information about vehicle safety recalls are available on the NHTSA website. Safety recall
20 campaigns are also reported in every country where Harley-Davidson Co. markets its products. [V 74-75,
21 77-79, 147-48]

22 116. Regulatory recalls result from lack of compliance with primarily federal regulations,
23 although there are a few states such as California that also have additional regulatory requirements. [V 74-
24 75, 147, 163]

25 117. Voluntary recalls can result if a potentially high failure rate on a mechanical issue is
26 indicated or if there is significant customer dissatisfaction concerning a product feature. [V 74-75]

27 118. For Harley-Davidson Co. a 60% customer response rate to recalls is considered acceptable.
28 Recall work that has not yet been performed on a vehicle is considered an open recall. [V137, 151]

119. The owners of the exported vehicles sold by Laidlaw's will not receive recall notices
through conventional mail. In this case, 25 of the exported vehicles are subject to one or more open

1 recalls. [V 91-92, 137]

2 120. Although incorrect or incomplete information on the SWR means that owners of the
3 vehicles sold by Laidlaw's will not receive recall notices, recall information can be gleaned from the
4 NHTSA website. A 60% compliance rate of recall repairs means conversely that 40% of the recalled
5 vehicles are either not repaired or not tracked by Harley-Davidson Co. [V 151]

6 121. Vehicles imported into a foreign country through authorized channels are required to
7 comply with foreign, regional, or local rules and regulations. Homologation refers to the design or
8 modification of vehicles to comply with these rules and regulations. For example, motorcycles sold in
9 California are designed to meet California Air Resources Board certification. Motorcycles sold in Europe
10 are designed with speedometers calibrated in kilometers instead of miles. Harley-Davidson Co. has not
11 received any complaints from any foreign governments about non-compliant Harley-Davidson
12 motorcycles. [I 124, V 81]

13 122. The General Conditions of Sales and Service set forth Dealer obligations with respect to
14 Pre-Delivery Obligations (F.2) and Product Warranty (F.3). Section M.6.(f) allows Respondent to
15 terminate the franchise for "(f) Breach, violation or failure to fulfill any of Dealers other responsibilities
16 under this Contract."

17 123. While Respondent asserts that with respect to the 59 total vehicles that were sold in
18 violation of the NRSP, almost all of them were not PDI'd and all of the sales were reported as retail sales
19 on the SWR forms. As stated earlier there are only three boxes to check on the SWR form, one for retail
20 sale, one for Police/Shrine, and one for other sales. By definition any exported vehicle is a non-retail sale
21 and therefore reporting it as such is automatically a violation of the General Conditions of Sales and
22 Service.

23 124. The violations of the PDI and SWR obligations are ancillary to the primary reason for
24 Respondent's efforts to terminate the franchise, which are the 59 alleged NRSP violations. The fact that
25 Respondent has either ignored or failed to enforce violations of both the PDI and SWR obligations are
26 indications that Respondent does not consider these breaches material.

27 **Protestant's Violations of the NRSP**

28 125. The following documents: General Conditions of Sales and Service, the Non-Retail Sales

1 Policy, and the Fleet Sales Policy, authorize Harley-Davidson Co. to conduct audits of its dealers. [II 30-
2 31, Ex 2, 7, 208]

3 126. Steven Verduyn is the Manager of Dealer Credit and Compliance for Harley-Davidson Co.
4 [II 188-89] His responsibilities include monitoring and enforcement of Harley-Davidson Co.'s Non-
5 Retail Sales Policy. As part of his duties, Mr. Verduyn conducted the on-site audit at Laidlaw's. [II 191-
6 92]

7 127. Most investigations relating to the NRSP are initiated after Harley-Davidson Co. receives a
8 tip about improper sales. In this case, Mr. Verduyn began investigating Laidlaw's after Ray Malzo, a
9 California dealer, claimed Laidlaw's was making improper sales. [II 74-75, 193, 206, 227-29, Ex 220,
10 230] In contrast, the terms of the PAM MAP policies, *infra*, specifically discourage dealers from
11 reporting alleged violations of the policies and expressly state: "Dealer-specific complaints will not be
12 used to enforce the Policy against such Dealers." [Ex 620]

13 128. Discovering violations of the NRSP is at best random. In contrast, independent third
14 parties monitor violations of the MAP and PAM policies. E-commerce sales are a violation of the NRSP,
15 so eBay and other Internet sites are monitored for unauthorized sales. To date most Internet sites selling
16 new Harley-Davidson motorcycles have been shut down. [II 193-96, III-225-26, Ex 620]

17 129. Harley-Davidson Co. has no systematic way of detecting non-retail sales among its
18 dealers. Most non-retail sales come to the attention of Harley-Davidson Co. through tips from other
19 dealers or sometimes from H.O.G. members. [III 224, 227-28]

20 130. About one-half of the motorcycles sold in violation of the NRSP are exported, the other
21 half stay in the U.S. Resellers in the U.S. will often sell the motorcycles to "chop shops" or other
22 aftermarket venues such as, unauthorized shops, car dealerships, Polaris dealerships, or on eBay. [II 213-
23 14]

24 131. Sometimes district managers will pay visits to aftermarket shops or to their competitors
25 looking for new Harley-Davidson motorcycles. [II 64-66] Harley-Davidson Co. does not maintain a list
26 of known resellers or exporters. [III 227-28]

27 132. Mr. Verduyn began the investigation by examining the SWR database and reviewing the
28 ///

1 National Insurance Crime Bureau (NICB)⁹ reports for 2009 and 2010. [II 95, III-10] In late 2010 or early
2 2011 Harley-Davidson Co. began to use the NICB as a tool to monitor compliance with the NRSP. [II
3 127]

4 133. In March 2011 Mr. Verduyn conducted an on-site audit of 70 sales that he had identified as
5 questionable. He was able to confirm that 36 new motorcycles sold by Laidlaw's had been shipped
6 overseas. [II 74-75, 193-96, 206, Ex 220, Ex 235]

7 134. Over approximately two years from December 2008 through November 2010, Mr.
8 Verduyn found that Laidlaw's sold 36 new motorcycles¹⁰ that were ultimately shipped overseas. The
9 motorcycles were sent to Jordan (12), Thailand (11) and Vietnam (9), Hong Kong (2), Taiwan (1), and
10 Cambodia (1). [II 85-89, Ex 200, 235, 236]

11 Jordan

12 135. Matt began working as a full-time salesperson at Laidlaw's in August 2008. [IX 117-18,
13 Ex 309] As a result of the audit Matt was moved out of the sales department and the business manager
14 position. He is now in charge of the insurance department and is the DMV clerk. He has attended the
15 compliance training sessions that began after the audit. [IX 131-33, Ex 63]

16 136. Matt received staff level training in 2008 and business manager training in 2010 from
17 Harley-Davidson University. [IX 119] He also took a live class called Back To Basics, Sales Training.
18 None of the courses he took provided any information or instruction on the Non-Retail Sales Policy. Nor
19 did any of the classes provide information on how a salesperson could identify resellers or brokers, or
20 how to spot "red flag" indicators of a non-retail sale. [IX 120]

21 137. Harley-Davidson Co. offers a variety of training sessions at Harley-Davidson University in
22 sales, sales technique, product information and management processes and techniques. None of the
23 training involves reading, understanding or interpreting the Non-Retail Sales Policy. [II 174-75]

24
25 ⁹ The NICB collects data, including vehicle identification numbers of exported vehicles, the exit and destination ports for the
26 vehicles, and sales and exportation dates. [III-18-23, Ex 224, 225]

27 ¹⁰ An additional six vehicles were sold to two buyers connected with Ahkuputra who are alleged to have exported the
28 motorcycles to Thailand, however there are no bills of lading or NICB data to verify the shipments. Combining these six to the
36 known exports brings the total to 42 exports, which is the number of exports referred to in the Notice of Termination. [III
200, Ex 236] NICB Reports show that in 2010 there were 38 exported vehicles combined with 14 in 2009 for 52 vehicles. [III
22, Ex 224, 225, 235]

1 138. Matt first learned the details of the NRSP, after the Verduyn inquiry. [IX 120] Before
2 actually reading the policy he had heard that selling to a reseller was not allowed, but was unaware of the
3 severity of the consequences. [Ex 309]

4 139. Matt's first sale to Muneer Al Sharif was in April 2009. Muneer came to the store and
5 bought a used Road King motorcycle. He told Matt he was going to ship it to Jordan to ride when he
6 visited his home country. He also told Matt that although he was now living in the U.S. he was from a
7 wealthy family in Jordan with many family members still living there. A used motorcycle is not subject
8 to the NRSP. [IX 121-26, Ex 309]

9 140. A month later, Muneer returned to the store and purchased another motorcycle that he
10 wanted shipped to Jordan. He told Matt that the motorcycle was for his brother, but this time it was a new
11 motorcycle. [IX 121-26, Ex 309 p 30]

12 141. Matt was unaware of the fact that Muneer's brother Alaa was a reseller in Jordan. [Ex
13 309] Matt assumed that the motorcycles sold to Alaa were for his personal use because he had overheard
14 a phone conversation between Muneer and Alaa where they discussed what type of motorcycle Alaa
15 wanted and what accessories to order. [Ex 309] Matt never had any reason to ask Muneer if the
16 motorcycles were for resale, because it seemed obvious to him that they were for Alaa's personal use.
17 [Ex 309]

18 142. In addition to motorcycles Muneer also bought parts and accessories from Matt. Muneer
19 visited the dealership multiple times introducing Matt to his wife, brother and friends. He told Matt that
20 even though he, Muneer, was paying for all the motorcycles; he wanted the motorcycles in his wife's,
21 brother's, and friends' names so they would be able to have the warranty registration and H.O.G.
22 membership in their own names. [IX 121-26] He even brought pictures to show Matt of himself riding
23 motorcycles in Jordan with family and friends. [IX 121-26]

24 143. From February through October 2010, eight more motorcycles were sold to Muneer and
25 two of the eight were the same color and model. [III 127-40, Ex 50-61, 200] All of the sales were paid
26 for by cashier's check showing Muneer as the remitter, but four of the sales list the buyers as Muneer's
27 relatives: Fatima Elshiyab (2), Mohammad Tamary (1) and Alaa Alsharif (1). [III 136-40, Ex 54, 57, 60,
28 61]

1 144. Over a 16-month period of time from 2009-2010, Matt sold a dozen new motorcycles, of
2 which 11 were resold in Jordan.¹¹ [II 239, III 127-40, Ex 50-61]

3 145. In Matt's final conversation with Muneer in November 2010, Matt told him that they
4 would have to charge sales tax and Muneer has not been heard from again. [IX 121-126]

5 146. It appears that Muneer intentionally cultivated a relationship with Matt, first by purchasing
6 a used motorcycle for export then graduating to new motorcycles for his "family and friends" back in
7 Jordan, all the while maintaining the relationship by occasionally purchasing parts and accessories from
8 Matt. When sales of new vehicles were cut off to Muneer, that ended the relationship and he was never
9 seen again.

10 147. According to Mr. Verduyn all the sales to Muneer bore similar hallmarks or "red flags" of
11 a non-retail sale. The "red flags" include multiple sales to one buyer, sales of two of the same
12 motorcycle, no financing-all cash transactions, no sales tax charged, and no trade-ins on the transactions.
13 The deal jackets for these sales show that SWRs and PDIs are incomplete or missing and in some of the
14 transactions the bills of lading show the motorcycles being picked up at Laidlaw's to be sent to
15 international shipping companies. [III 125-130, 23, Ex 50-53, 200]

16 148. "Red flags" can be significant indications of a non-retail sale if the salesperson is
17 knowledgeable about the NRSP. In this case the "red flags" were virtually meaningless to Matt who had
18 at best a minimal idea about the policy. There was no evidence presented of collusion between the buyers
19 and Matt and Chris who were the two salespersons responsible for most of the non-retail sales. If Matt
20 had been in collusion with Muneer, it would seem hardly worthwhile for Muneer to go to the trouble of
21 bringing in family and friends to purchase the new motorcycles.

22 149. After receiving Mr. Verduyn's audit letter regarding the sales to Muneer, Matt responded
23 immediately by taking full responsibility for the sales in his letter to Mr. Verduyn. [Ex 17]

24 150. Before May 2010, large motorcycles with a displacement engine exceeding 250 cubic
25 centimeters were banned from Jordan for security reasons. Although the ban was lifted in 2010 allowing
26 for their importation, an owner of a large motorcycle must pass security clearance and must be a member

27
28 ¹¹ A bill of lading shows that in addition to the motorcycles purchased from Laidlaw's, Muneer also bought motorcycles from other Harley-Davidson dealers and the vehicles ended up being shipped to Jordan.

1 of the Royal Motorcycle Club. [Ex 283, V 19]

2 151. Claude Abry has been a Harley-Davidson dealer in Amman, Jordan since May 2010. [V 8,
3 Ex 283] Mr. Abry was the personal chef to the King Abdullah of Jordan; they are both motorcycle
4 enthusiasts. [Ex 283]

5 152. According to Mr. Abry, the largest unauthorized seller of Harley-Davidson motorcycles in
6 Jordan is Alaa Al Sharif, who is the brother of Muneer Al Sharif. Alaa has sold more than 45 Harley-
7 Davidson motorcycles. [V 38]

8 153. The Free Trade Agreement between the United States and Jordan exempting goods from
9 duty has made the export of motorcycles from the United States attractive to unauthorized dealers. [Ex
10 283, V 17, 32-33] More stringent European emissions standards for the motorcycles sold in Jordan
11 through authorized channels have resulted in higher prices, than unauthorized sales. These factors have
12 allowed Alaa to sell unauthorized motorcycles for \$2,000-\$3,000 less than Mr. Abry's retail price. [V 36-
13 40]

14 154. Respondent contends that unauthorized sales in foreign countries allow resellers to "free
15 ride" on the dealership investment of authorized dealers such as Mr. Abry. There is also concern that
16 prospective dealers will be reluctant to invest in a Harley-Davidson dealership if the market is flooded
17 with unauthorized vehicles. While this might be true it was difficult if not impossible to determine the
18 order of magnitude of the problem in these countries. Questions that would need to be addressed are what
19 percent of the entire vehicle sales are unauthorized including used and new? What would be the tipping
20 point where an investor would view unauthorized sales as making an investment no longer viable? [Ex
21 283, 285, 287]

22 **Viet Nam**

23 155. Frank Albrecht is the Regional Manager, Sales & Business Development-Asia Region, of
24 Harley-Davidson Asian Pacific Private Ltd., a wholly owned subsidiary of Harley-Davidson Co. [V 167]
25 Mr. Albrecht's job includes evaluating emerging markets for Harley-Davidson products. [V 171]

26 156. The Asia Region includes countries with wholly owned subsidiaries the largest of which is
27 Japan, followed by Australia, New Zealand, China and India. [V 172] Mr. Albrecht's responsibilities
28 encompass the Asia Direct Market (ADM) which are countries that have master dealers who receive

1 products directly from Harley-Davidson Co. rather than through a subsidiary. [V172-73, 174]

2 157. The ADM countries are Thailand, Brunei, Taiwan, Malaysia, Korea, Indonesia, Singapore,
3 Hong Kong, and the U.S. territory of Guam. [V 172-73] There are no Harley-Davidson dealerships in
4 Viet Nam, but it may be considered in the future along with the Philippines and possibly Cambodia. [V
5 173-76]

6 158. In 2007, Viet Nam's membership in the World Trade Organization allowed for importation
7 of large motorcycles. However Viet Nam continues to restrict ownership of large cc motorcycles by
8 requiring a special license and membership in a motorcycle-riding club. [VI 6-7, VI 23]

9 159. As set forth in the Notice of Termination, a total of nine motorcycles were shipped to Viet
10 Nam. Over seven months, five motorcycles were sold to Bill Ngo or his associates. Two sales to Ngo
11 were made in December 2008 and June 2009. Two more sales were made to Mimi Lai, and one sale was
12 made to David Nguyen.¹² [Ex 200] The pretext for these sales was that Ngo had a second home in Viet
13 Nam and would be using the motorcycles there. [IX 126-28]

14 160. Matt met Billy Ngo in October 2008 and sold him a new motorcycle.¹³ [Ex 62, 200] A
15 copy of Ngo's California driver's license is in the deal jacket, and Matt believed that it was an allowable
16 sale because Ngo was a California resident. Matt was led to believe that Ngo was buying the motorcycle
17 for his own use in Viet Nam. [IX 126-28, Ex 62]

18 161. The December 2008 sale had the following documents in the deal jacket: Manufacturer's
19 Statement of Origin (MSO), listing "Billy Ngo dba UN Motors," and a bill of lading (BOL) to Viet Nam.
20 The deal jacket shows no sales tax was paid on the transaction. [III 51-64, 93-100, Ex 63-64]

21 162. The deal jacket for the June 2009 sales transaction shows Billy Ngo as the buyer, with the
22 same address as the previous sales, but this time his business is listed as Luxury Motor Group. [III 87-90,
23 Ex 66]

24
25
26 ¹² In January 2009, Billy Ngo emails then sales manager Rick Williams. In his first email Ngo states: "If I buy 10 Bikes a
27 month, can you sell the MSRP to me but no set up charge no Freight charge, ..." in another Ngo states: "I need the price for
the Deluxe Anniversary & the 883 C. my customer is waiting..." Another email appears to implicate Matt wherein Rick replies
with respect to pricing: "Ok Billy here is what Matt and me came up with..." However there was no evidence offered that
showed Matt knew about the emails or their contents. [III 71-76, Ex 64]

28 ¹³ The initial sale to Ngo was not included in the Notice of Termination. [See Ex 200]

1 163. In February 2009 two purchases listing Mimi Lai as the buyer were negotiated and paid for
2 by Ngo. Lai signed the documents because Ngo was in Viet Nam at the time. The deal jacket for the
3 sales shows all cash sale, no sales tax collected, no registration and a bill of lading. [III 68, 79-83, Ex 64,
4 65, 305]

5 164. After five sales, Matt stopped selling to Ngo, figuring that there were only so many
6 motorcycles he could ride. [IX 126-28, Ex 62]

7 165. The last motorcycle sale was to David Nguyen, a straw man used by Ngo to make a
8 purchase after Matt declined to sell to Ngo. The documents in the deal jacket show David Nguyen of
9 Fountain Valley as the purchaser. However a bill of lading shows the motorcycle going to Viet Nam, and
10 listing the shipper as Luxury Motor Group with the same address that Ngo used in the other transactions.
11 [III 90-92, Ex 67]

12 166. Initially Matt believed that it was all right to sell Ngo motorcycles that would be shipped to
13 Viet Nam because Ngo was the end user. After Ngo had purchased several motorcycles Matt realized that
14 Ngo was not the end user and made a decision to stop making sales to Ngo. [Ex 309]

15 167. In July 2011, several months after Laidlaw's received the termination letter, a new
16 motorcycle was sold to Mimi Lai. In her deposition testimony Lai initially states that she bought the
17 motorcycle as a gift for her husband. [III 102-10, Ex 21, 305] Lai paid tax, registration and license fees
18 and did not tell anyone at Laidlaw's that she intended to ship it to Viet Nam. [III 102-10, Ex 21, 305]
19 Lai's husband came to the dealership and was fitted for the motorcycle.

20 168. However after some degree of cajoling she finally admitted that although she had
21 purchased the motorcycle for her husband, it was ultimately shipped to her cousin in Viet Nam. [III-102-
22 10, Ex 21, 305]

23 169. The Lai deal jacket contained all necessary information including an unsigned PDI,
24 completed vehicle registration form, and completed SWR form. There is no bill of lading in the file and
25 she denied that she had told anyone at Laidlaw's that it would be sent overseas. [III 102-10, Ex 21, 305]

26 170. In his deposition testimony, salesperson Don Abundis stated that Lai's husband came in to
27 be fitted for the motorcycle. [Ex 302] Surely a prudent dealer would not have sold to Lai who had
28 previously obtained motorcycles for Ngo. However, there is no evidence of collusion with Laidlaw's and

1 it appears that Mimi Lai lied to obtain the motorcycle. The ruse even included having her husband come
2 into the dealership to be fitted for the motorcycle. [IV 33]

3 171. Don Abundis sold the remaining four motorcycles shipped to Viet Nam. The name of the
4 customer as shown in the dealer jacket is AMJ Trading Corp/An Toan Troung with a West Covina
5 address. The deal jackets on the sales show shipping documents for AMJ Trading, and that AMJ Trading
6 paid for at least one of the motorcycles. [III 112, 121-123, Ex 19, 20, 32, 33]

7 **Thailand and Others**

8 172. Chris Tolman (Chris) is 33 years old. [X 47] He is currently a college student at
9 University of La Verne. He has worked at Laidlaw since 2007. Walter is his grandfather and Brent is his
10 uncle. [X 31-33]

11 173. Chris ran the rental program for a year in 2007. In 2008 he became a salesperson and the
12 general sales manager in 2009. [X 33] Although he held a position of substantial responsibility including
13 managing the sales team, purchasing and managing new and used vehicle inventory, he had not read the
14 Non-Retail Sales Policy until November 2010. [X 33, 37]

15 174. Before Chris read the Non-Retail Sales Policy he thought that a bill of lading was
16 acceptable in lieu of tax for a valid retail sale. [X 38] After receiving the Verduyn audit letter, Chris
17 admitted that he knew the motorcycles were being shipped, but he thought he could make retail sales to
18 California residents who wanted to take their motorcycles back to their overseas homes. His response to
19 the audit letter demonstrates his lack of understanding of the Non-Retail Sales Policy. [X 38-39, Ex 17]

20 175. After receiving the termination letter, Laidlaw's staff including Chris, underwent
21 compliance training. Chris now understands that a motorcycle cannot be sold if it is going to be exported,
22 and all motorcycle sales must include applicable state tax and registration. [X 40]

23 176. Chris was initially responsible for 12-15 of the export sales. [X 60-61] He was also
24 involved in selling six more motorcycles to Ahkuputra after the termination notice. [X 69-70] Chris did
25 not think these motorcycles would be resold but thought they would be used in the California. [X 66-68]

26 177. Eleven motorcycles sold by Laidlaw's were shipped to Thailand, with eight of those sales
27 connected to Art Ahkuputra and K & K Auto in Bangkok, Thailand. Four of the sales were made to
28 Ahkuputra, and two sales were made to Jonathan Sayanath but paid for by Ahkuputra. Two more sales

1 were made to Panpong Bencharit and a single sale was made to Toy Pavaltana. Both the Sayanath
2 motorcycles and one of the Bencharit motorcycles were shipped together to K & K Auto in Bangkok,
3 Thailand. [Ex 200, III 144-53 et seq., Ex 34-41, 44, 45,125]

4 178. Three more motorcycles were shipped to Thailand with Toy Pavaltana purchasing two and
5 Tupporn Sirichoo purchasing one. The deal jackets for these purchases show that no sales taxes were
6 collected and include waybills showing shipment to Thailand. [III 169-172, Ex 44, 45, 125]

7 179. Two motorcycles sold on the same day to Ashly Dahn and paid for by Lim Lin were
8 shipped to Hong Kong. The deal jackets show no sales taxes collected and bills of lading showing
9 shipment to Hong Kong. [III 173-175, Ex 47, 48]

10 180. One motorcycle each was shipped to Taiwan and Cambodia. The motorcycle sent to
11 Taiwan showed that the customer was from Oregon, so no California sales tax was charged. This deal
12 jacket lacks the "red flags" associated with some of the other sales, but the NICB database showed it was
13 shipped. [III 178-79, Ex 68] The deal jacket of the single sale to Cambodia contains a document
14 indicating the motorcycle would be shipped to Cambodia. [III 179-82, Ex 69]

15 181. Mr. Bob Guthrie is the CEO and Dealer Operator of PowerStation Motorsport Co. Ltd.,
16 dba Harley-Davidson of Bangkok, Thailand (HDBKK). HDBKK is the only authorized dealer of Harley-
17 Davidson products in Thailand and has been in existence since late 2006. [Declaration Guthrie, V 177,
18 185, 196] Eric Sevansson is the owner of HDBKK. [V 184] The current HDBKK facility is 1,000
19 square meters located in a busy section of Bangkok. Land has been acquired to build a new facility. [Ex
20 285]

21 182. According to Mr. Guthrie new large motorcycles legally imported to Thailand are subject
22 to import duty amounting to 60% of the wholesale price. The import duty on vehicle spare parts is
23 between 20-25%. [V 205-06, Ex 285]

24 183. The differential between import duty on parts has led unauthorized sellers to disassemble
25 new motorcycles to be shipped as parts and then to reassemble the entire motorcycle once it arrives in
26 Thailand. In one instance, Mr. Guthrie discovered a motorcycle that had been reassembled with
27 mismatched parts. [V 183,205-06, Ex 285]

28 184. In 2010 the annual vehicle sales for HDBKK was 171 units. 2011 year-to-date vehicle

1 sales are 210 units. Projected vehicle sales for 2012 are expected to be more than 300 units. [V 208-09,
2 Ex 285] Mr. Guthrie does not know how many unauthorized Harley-Davidson motorcycles are sold in
3 Thailand annually. [V 208]

4 *Respondent's Fleet Sales Policy (FSP)*

5 185. The alleged violations of the fleet sales policy occurred with the first sale taking place on
6 April 21, 2009, and the last sale taking place on July 19, 2010. [Ex 200] The FSP for 2009 is set forth
7 below. There is also a 2010 FSP. [Ex 210]

8 186. Harley-Davidson Co.'s Fleet Sales Policy for 2009 Model Year states in part:

9 Harley-Davidson is concerned about the sale of and after sales support to purchasers of
10 new fleet motorcycles and has created the Fleet Sales policy to best ensure customer
11 satisfaction and safety, facilitate compliance with federal and state law and laws in various
12 foreign countries, foster reasonable competition, address local market demands, and protect
13 the integrity of the Harley-Davidson worldwide distribution network.

14
15 As provided in the Dealer Contract, dealers are prohibited from engaging in non-retail sales
16 of fleet motorcycles. A sale by a dealer/distributor of a new or previously unregistered
17 fleet motorcycle (an unregistered motorcycle is one that has not been registered with the
18 state and with Harley-Davidson) will be considered a "non-retail sale" for the purposes of
19 the Dealer contract and this policy if the fleet motorcycle is not properly set up, inspected,
20 tested, sold and all appropriate sale, lease and registration paperwork completed at the
21 dealership facility by an authorized agent of the purchasing entity.

22 ...
23 To ensure compliance, H-D reserves the right to audit Dealer/Distributor's records. Dealer/
24 Distributor is responsible for maintaining complete and accurate documentation related to
25 all fleet sales and for providing H-D with satisfactory evidence of compliance. If Dealer/
26 Distributor violates this policy, H-D reserves the right to take action including, but not
27 limited to: 1) place limitations on future product allocations or shipments, and/or 2) charge
28 back to the dealer any incentives or allowances credited or paid with respect to such sale,
and/or 3) placement of dealer in Not in Good Standing status and/or 4) charge back any
internal and external audit and legal expenses to the dealer, and/or 5) make Dealer/
Distributor ineligible to purchase fleet motorcycles for one or more model years, and/or 6)
terminate Dealer/Distributor's contract.

29 ...
30 [II 24, Ex 7]

31 187. For 2011 calendar year, Harley-Davidson Co. will allocate approximately 4,000 vehicles to
32 fleet sales, of which between 150-400 will be sold in California. [II 17-18]

33 188. The most common types of fleet sales are to rental operators and law enforcement. [II 16]
34 The Harley-Davidson Co. has its own affiliated vehicle rental program involving about half of its dealers,
35 called Harley-Davidson Authorized Rentals. The largest non-affiliated rental company in the United
36 States is called EagleRider. Non-affiliated rental companies are called "non-authorized rentals." [II 17-
37
38

1 20] Laidlaw's was a part of the Harley-Davidson Co.'s rental program but now has an EagleRider
2 franchise.

3 189. Allocation of pleasure vehicle volume to dealers is based on the dealer's market area, and
4 the dealer's retail sales performance and inventory relative to other dealers in the area. [II 28-29]

5 190. By selling pleasure vehicles dealers receive financial incentives, advertising co-op dollars
6 and other promotional and marketing incentives tied to those sales. [II 29, III 187] A dealer who sells a
7 pleasure unit to a rental company but reports it as a retail sale will receive benefits to which it was not
8 entitled. [II 29-30] Unlike pleasure vehicle volume, fleet sales volume is neither market-based nor retail
9 driven. [II 29]

10 191. Any vehicles sold out of compliance with the Fleet Sales Policy are by definition
11 considered to be non-retail sales, as stated in the 2011 Non-Retail Sales Policy. The relevant paragraph
12 states:

13 6. All motorcycle sales by Dealers/Distributors to non-authorized rental companies or
14 Harley-Davidson Authorized Rental Operators shall be sourced from the Rentals Fleet Pool
15 and governed by the Harley-Davidson Fleet Sales Policy. Any such sales which do not
16 comply with the Harley-Davidson Fleet Sales Policy shall be considered non-retail sales.
17 [Ex 209]

18 192. A similar paragraph is found in both the 2009 NRSP and the 2010 NRSP. [Ex 25, 208]

19 193. Requests to make fleet sales can be made directly to the dealer's Harley-Davidson Co.
20 representative. [II 21-22] However if the fleet pool allocation has been exhausted then the dealer is
21 required to wait until the next model year or until more production becomes available. [II 22, Ex 7]

22 194. Prior to the 2008 model year, the NRSP contained a provision allowing dealers to annually
23 transfer five motorcycles in their inventory from the pleasure pool into the fleet pool. [III 41]

24 195. Beginning with the 2008 model year, the Harley-Davidson Co. required sales to rental
25 companies to be sourced from a separate rental fleet pool as opposed to the pleasure pool and no longer
26 permitted the annual five motorcycle transfer. [IV 113-14]

27 196. During the course of the Verduyn audit there were 17 sales found to be in violation of the
28 Fleet Sales Policy. The first two sales to JC Bromac, a subsidiary of EagleRider were correctly reported
as business sales. [III 184-189, Ex 242-243] The remaining 15 were incorrectly reported as retail sales.
[III 189, Ex 244-258]

1 197. Five motorcycles were sold to Laidlaw's EagleRider rental company and the remaining 10
2 motorcycles were sold to EagleRider Finance. Those 10 were then sold to other EagleRider rental
3 companies. [III 186, VIII 77-78, Ex 244-258] Harley-Davidson Co. did not approve of these fleet sales or
4 the transfer of the motorcycles from the pleasure pool to the fleet pool. [VII 93, VIII 85-86]

5 198. In April 2009, Brent was contacted by "Eric Sevansson"/"John Severson", hereinafter
6 referred to as Mr. S¹⁴ of EagleRider. Mr. S told Brent incorrectly that Mr. St Thomas at Harley-Davidson
7 Co. had approved some fleet sales to EagleRider from the pleasure sales pool. Mr. S mentioned that some
8 40 sales would be done through Laidlaw's. [VIII.77-82] Brent had no reason to doubt Mr. S's
9 representation as Brent had dealt with him in the past. He was told by Mr. S, who said he had gotten his
10 information from Harley-Davidson Co., that Brent could sell five units to any one office from his retail
11 fleet, and that the sales would be designated non-retail. [VII 110-11]

12 199. Brent testified that there was virtually no profit in these sales as the motorcycles sold for
13 just \$500 over invoice. [VII 110] Because Brent understood that these would be rental sales he knew that
14 there would be no VIP incentives or allocation increases from these sales. He consummated the sales
15 because he knew EagleRider needed new motorcycles for the summer, and he hoped the sales would
16 ingratiate him to EagleRider which might then refer him customers. [VII 112-13]

17 200. Through clerical errors his data entry clerk entered all the remaining sales after JC Bromac
18 as retail sales rather than as business sales. [VII 111-12]

19 201. Although the Fleet Sales Policy carries the sanction of termination there has been no
20 franchise termination based solely on violations of the FSP. [III 229] Nor has there ever been a
21 termination solely based on the incorrect or incomplete filings of the SWR forms. [IV 47]

22 202. Although evidence was presented that some 20 dealers nationwide had been terminated for
23 breach of the Non-Retail Sales Policy, Harley-Davidson Co. did not present any evidence that it had
24

25 _____
26 ¹⁴ Erik Sevansson is the owner of Powerstation Motorsport Co. Ltd., in Bangkok, Thailand and is the authorized dealer of
27 Harley-Davidson Products in Thailand. [See Declaration of Bob Guthrie, attachment "A" International Motorcycle Dealer
28 Contract, and V 185] At the hearing Brent Laidlaw testified to conversations he had with "Eric Sevansson," an EagleRider
employee about fleet sales. [VIII 77, et seq.] Respondent's post-trial brief at Page 17, line 5, attempts to correct "Eric
Sevansson" to "John Severson." A Google search shows the name of "Erik Severson" as the corporate fleet manager of
EagleRider. For the purposes of this decision the individual with whom the conversations with EagleRider were conducted
with be merely referred to as Mr. S.

1 terminated a dealership solely based on violations the Fleet Sales Policy.

2 **OTHER FACTORS**

3 203. The list of good cause factors set forth in Section 3061 for termination of a franchise is not
4 exclusive. The existing circumstances must be considered, including, but not limited to the seven factors
5 specifically set forth.

6 **Protestant's Lack of Knowledge of the NRSP**

7 204. The 2010 NRSP states in part:

8 1. As provided in the Dealer Contract, dealers are prohibited from engaging in non-retail
9 sales of motorcycles. A sale by a U.S. dealer of a new or previously unregistered
10 motorcycle (an unregistered motorcycle is one that has not been registered with the state
11 and with Harley-Davidson) will be considered a "non-retail sale" for purposes of the
12 Dealer Contract and this policy if the motorcycle is not properly set up, inspected, tested,
13 sold and delivered at the dealership facility directly to the ultimate consumer. An "ultimate
14 consumer" is the retail end user who purchases, as indicated on the Certificate of Origin, a
15 new or previously unregistered motorcycle for his or her own use, without the intent to
16 resell, pays all applicable taxes and registration fees, and titles the vehicle in his or her
17 name. Please note that although payment of taxes and registration fees and titling in the
18 customer's name will normally be sufficient evidence of a retail sale, the sale to a customer
19 who the dealer knows or should know, intends to resell the motorcycle may still be deemed
20 a non-retail sale. [Ex 208]

21 205. The NRSP requires that the dealer know or should know that the buyer intends to resell the
22 motorcycle.

23 206. Brent testified that the first time he read the NRSP was after he received the Verduyn
24 inquiry letter. He does not recall reading the memos sent by Harley-Davidson Co. about the NRSP. He
25 also states that he was not aware of any dealers being terminated as a result of violating the NRSP.

26 207. Walter testified that he too had never read the NRSP. [VII 23-24] None of the sales staff,
27 including Matt and Chris, had read the policy, nor had any of the sales staff received any training on the
28 policy or its consequences. From the remedial work done with Compliance Coach, *infra*, it is evident
that, in addition to the NRSP, the staff was poorly trained on all of the transactional aspects of vehicle
sales including completion of the PDI and SWR forms.

208. Respondent contends that the Protestant knew or should have known from the "red flags"
that they were selling to resellers. It is equally obvious that the staff was not even trained to look for "red
flags," and it is difficult to look for something if one is unaware of what to look for. The only "red flag"
that the Harley-Davidson Co. sent to its dealers was to look out for multiple sales to one person.

1 209. Although Matt took business manager training courses at Harley-Davidson University,
2 none of his courses dealt with the NRSP or “red flags” or the consequences of violating the NRSP. Matt
3 had rudimentary information that a motorcycle should not be sold to resellers. However he was not
4 trained to look for resellers posing as the ultimate customer, and he made sales ignorant of the true
5 intentions of the buyers. On the Jordan exports, Muneer told Matt he was from a wealthy family and
6 showed Matt pictures of himself riding motorcycles in Jordan with his family. Had Matt been fully
7 informed about the NRSP, he would have known all sales shipped outside of the U.S. are prohibited.

8 [VIII 114-18, 128-31]

9 210. As further evidence that Protestant should have known it was selling to resellers,
10 Respondent produced an email from a former Laidlaw’s sale manager indicating a buyer named Billy Ngo
11 wants to “buy 10 bikes,” however no evidence was presented showing Laidlaw’s management knew of
12 the email or its contents.

13 211. Chris, the other salesman involved with the sales violations, appears to be utterly confused
14 about the NRSP. Like Matt, he had never read the NRSP nor had he received training on the NRSP. At
15 one point Chris says he thought receiving a bill of lading in lieu of sales tax collection constituted a valid
16 retail sale. Like Matt, he thought a buyer with a California driver’s license being the end user could buy a
17 motorcycle to ride in his home country.

18 212. Although both Matt and Chris are relatives of Brent, there is no evidence that Brent knew
19 that the sales they made were to resellers.

20 213. Respondent asserts that the NRSP is a simple policy and is easily understood. However,
21 even Harley-Davidson Co.’s highest ranking executive appeared to be stymied when asked some
22 hypothetical sales questions based on the NRSP.¹⁵

23 214. Lack of knowledge of the requirements involved in a sales transaction by the dealership
24

25 ¹⁵ Examination of Mr. Kennedy by Mr. Rasmussen. Q. Let me ask you this question: If Nevada resident came to Los Angeles,
26 bought a Harley-Davidson from a local dealer new, and had it shipped back to Nevada to his home; would that transaction
27 violate the non-retail sales policy? A. I believe it would, yes. Q. And why is that? A. Because the policy states that the bike
28 should be PDI’d and delivered at the dealership premises along with the applicable taxes and titles and registration fees and
everything else. So the delivery needs to take place at the dealership. Q. Okay. Let me refine my hypothetical and state that in
fact the customer did go to the dealership, take delivery of the bike there, but never rode it away. Simply had it placed in his
transportation company’s truck at the dealership and had it shipped off? A. And you’re asking it that’s okay? Q. Would that
violate the policy? A. I would direct them to Steve Verduyn. [II 164-65]

1 extended to the PDI forms as well. Mr. Verduyn explained to Brent and Mr. Litchfield why Pre-Delivery
2 Inspection and completion of the PDI forms was important even if the motorcycles were being sold to
3 themselves as rentals. Brent and Mr. Litchfield were both apparently unaware of the fact that the
4 dealership could face liability issues for improperly PDI'd vehicles. Brent acknowledged that the staff did
5 not fully understand or recognize the significance of having new vehicle sales properly documented. [III
6 191-94]

7 Protestant's Remedial Action

8 215. Upon learning that Laidlaw's had made sales in violation of the NRSP, Brent took the
9 following actions: readily admitted that they had unknowingly violated the NRSP, cooperated fully with
10 the investigation and audit conducted by Mr. Verduyn, removed from the sales department the two
11 salesmen responsible for the transactions, installed the general manager to oversee the sales department,
12 hired a third party specialist compliance coach, conducted training sessions for employees on the NRSP,
13 FSP, PDI and SWR compliance, and underwent independent sales audits. Laidlaw's has offered to
14 reimburse Harley-Davidson Co. for its audit costs.

15 216. Laidlaw's has fully cooperated with Harley-Davidson Co.'s investigation providing Mr.
16 Verduyn with all of the information he requested. [II 230-33, Ex 16] The initial inquiry letter prompted
17 Brent to admit that Laidlaw's had erred in violating the NRSP. [II 234-35, Ex 17] He also indicated that
18 he along with his sales team had now read the 2011 NRSP policy and would not repeat the violations.
19 [VII 92, Ex 17, 124]

20 217. Both of the salespersons involved in the sales violating the policy also submitted letters to
21 Mr. Verduyn acknowledging their errors. Chris Tolman who was the sales manager admitted his
22 mistakes, but explained that he was a relatively new sales manager and did not have a complete
23 understanding of the requirements of a retail sale. He incorrectly assumed that any sale to a buyer with a
24 California driver's license who said he would be the one riding the motorcycle (end user) would be a valid
25 retail sale, even if the buyer intended to ship the motorcycle to his home country. He did not know that
26 charging sales tax, registration of the vehicle and titling the vehicle in the buyer's name were minimally
27 necessary in order to be considered a valid retail sale. He thought that buyers took the motorcycles to
28 their home countries because the models were not available overseas or there was not a Harley-Davidson

1 dealer in their home country. He did not know that the sales he made were to resellers. [Ex 16]

2 218. Similarly Matt's letter stated that after reading the NRSP he realized that some of his sales
3 violated the NRSP policy. He too was under the incorrect assumption that a California resident and end
4 user could ship vehicles to his home country for his own use or for use by family and friends. [Ex 16]

5 219. After the Harley-Davidson Co. audit, both Matt and Chris were given other jobs and no
6 longer work in the sales department. [VII 124-25, Ex 124]

7 220. Until this incident Laidlaw's had been considered a good dealer. The management at
8 Harley-Davidson Co. expressed shock and disbelief when they received the Malzo tip. No other issues of
9 non-compliance were raised except for the Nevada sales in 1999 for which Laidlaw's was granted an
10 exemption. [Ex 12]

11 221. Although dealers often make unauthorized sales in order to increase revenues because of
12 financial stress, this does not seem to be the case for Laidlaw's, which by all measures, is a financially
13 successful dealership. [II 221]

14 222. The financial contribution to the dealership's bottom line attributed to the non-retail sales
15 made up a small fraction of the total gross profit generated by the entire dealership operations over the
16 audit period. In 2009, non-retail sales made up just .48% of the gross profits. In 2010 it made up 2.29%
17 of the gross profits. Up to March 2011 it accounted for 2.19% of the dealership gross profits. [XI 35-36,
18 Ex 634] Over the NRSP audit period 2009-2011, Laidlaw's sold 785 new motorcycles of which 42 were
19 exported. [VII 125-25, Ex 124]

20 223. Despite the number of sales there was no evidence of collusion on the part of the
21 dealership or its staff with the buyers. Had the sales staff been properly trained most of the export sales
22 could have been avoided. Certainly knowledge of possible or likely termination from such sales would
23 have been a deterrent to the non-retail sales. Given the few number of terminations until 2011, it is
24 unlikely that Laidlaw's management, as Brent testified, would have known that other dealers had been
25 terminated for NRSP violations. In 2010 there was only one dealer in the northeast who was terminated,
26 and one termination each in 2008 and 2009. [II 6, IV 43, Ex 72]

27 224. Over seven years, since 2005, Harley-Davidson Co. has sent 19 termination letters to
28 dealers based on the NRSP. Over the years the number of termination letters sent are as follows:

Year	No. of Terminations
2005	5
2006	3
2007	3
2008	1
2009	1
2010	1
2011	5

[II 66, IV 43, Ex 72]

225. Richard Litchfield is the General Manager of Laidlaw's, where he has been employed for the past five years. [VII 74, IX 5] As general manager, Mr. Litchfield oversees the day-to-day operations of most of the departments within the dealership. [IX 9-14]

226. After receiving the termination letter, Mr. Litchfield's duties were expanded to include overseeing the sales department to ensure full compliance with the NRSP. He is also in charge of implementing the compliance program. [VII 74-75, IX 7]

227. In April or May 2011 Laidlaw's retained an independent third party, Fidelity National Information Services, Compliance Coach (Compliance Coach) to train staff and to perform audits. The training by Compliance Coach includes review and training about Harley-Davidson Co.'s documents and forms including the Dealer Contract, General Conditions of Sales and Service, the Non-Retail Sales Policy, Fleet Sales Policy, Pre-Delivery Inspection Checklist and the Sales Warranty Registration form. Two more forms used in training are called Deal Checklist and Customer Investigation Report were developed for Laidlaw's. [IX 15-20, 22-23, Ex 612]

228. Significantly the Compliance Coach program includes a detailed section on "Red Flags" or what sales and service personnel should look for and what procedures are in place if a "red flag" should occur. Identifying "red flags" is meant to alert staff to the possibility of a non-retail sale. [Ex 612]

229. Laidlaw's implemented a check system if an employee encounters a "red flag" issue. The check system requires the salesman to speak to the general sales manager who will then qualify or disqualify the customer for the sale. The general sales manager must fill out a report indicating what he has done to qualify or disqualify the customer. If the general sales manager has a further issue with the qualifications of the customer, then it is turned over to either Mr. Litchfield or Brent. This system was implemented to ensure compliance with the NRSP. [IX 29-30] Both sales and service staff were required to take training sessions and were tested on their knowledge of the various policies. [IX 56-58,

1 X 7-16, Ex 616]

2 230. The first audit of Compliance Coach was for the month of June 2011. [IX 60-61]
3 Subsequent audits were conducted for the months of July, August, September and October 2011.
4 Common themes of the audits showed incomplete PDIs and SWR forms. Over time and with additional
5 training there has been a marked improvement in the completion rate of PDI, SWR and other deal jacket
6 forms. [IX 47-49, 72-75, X 15-16, Ex 603, 604, 605, 606, 607, 612]

7 231. Multiple steps were taken by the sales staff and business manager to ensure that all proper
8 inquiries are made and the forms for documentation are completed correctly. Laidlaw's staff have
9 expanded measures to ensure that buyers are purchasing motorcycles for their own use, and not for resale
10 or export. If vehicles are sold to buyers who then want to take them to their home state, the dealership
11 will have the appropriate documentation, including payment of sales taxes to the buyer's home state. [IX
12 27-28] Instead of the sales staff, Mr. Litchfield now does all the closings on the sales. [IX 47-49] Mr.
13 Litchfield has compiled and maintains a list of known exporters, which is cross-indexed by name and
14 address and is disseminated among the sales staff. [IX 46, X 54-56, Ex 614]

15 232. Even with the threat of termination looming, Laidlaw's undertook remedial action and
16 implemented a set of policies and procedures in their efforts to fully comply with all aspects of Harley-
17 Davidson Co. policies. They have taken affirmative steps to correct the haphazard way in which they
18 have documented transactions in the past.

19 **Enforcement of the NRSP by Respondent**

20 233. Harley-Davidson Co. sent termination letters to dealers when NRSP violations exceeded a
21 threshold level of 20 violations. [IV 46] There were some exceptions to the 20-violations threshold
22 involving underperforming dealers who had fewer than 20 violations and there were dealers who
23 exceeded 20 violations but were protected by Florida franchise law. [IV 46]

24 234. Respondent contends that it has consistently enforced termination proceedings against
25 known violators of its NRSP. [II 66-67] Harley-Davidson Co. takes the position that it cannot pick and
26 chose whom it terminates, as any type of selective enforcement would both impair its ability in the future
27 to enforce the NRSP and undermine the credibility of the NRSP. [II 95-97, VI 99]

28 235. Mr. Stockton disagreed with the Harley-Davidson Co.'s characterization of consistent

1 enforcement of its NRSP. He disagreed because consistent enforcement is only levied against the dealers
2 who are almost coincidentally caught violating the NRSP. This could mean that there may be other
3 dealers who are violating the policy but have just not been discovered. These dealers, because they have
4 not been caught, are not subject to enforcement of the policy. Therefore enforcement of the policy is only
5 consistent against dealers who were found out, but is not consistent against all violators of the policy. It is
6 unknown if Harley-Davidson Co. has even audited every dealership that they know is exporting or is
7 suspected of exporting. [XI 54-55]

8 236. Mr. Stockton states that if Harley-Davidson Co. had established random audits, in the
9 ordinary course of business, that random auditing would be a more credible indication of the degree of
10 potential harm to its brand. In his experience he has seen the introduction of audits of dealerships as a
11 deterrent to certain dealer behaviors. [XI 54-55]

12 237. Respondent contends that enforcement is necessary to ensure customer safety and
13 satisfaction and thereby ensure protection of the Harley-Davidson brand. The fear is that the Harley-
14 Davidson brand will be blamed for poor customer experiences because the motorcycles are not sold
15 through authorized channels. [VI 75-76] Mr. Stockton doubts that customers will blame the Harley-
16 Davidson brand for problems they may encounter. [XI 40-41]

17 238. Respondent contends that unauthorized vehicles may pose a risk to rider safety if they are
18 not properly PDI'd or reassembled incorrectly. While this may occur it is difficult to assess the extent of
19 the overall problem without knowing how many Harley-Davidson motorcycles are being exported and
20 how many new versus used motorcycles are being exported. Although there were some mechanical issues
21 reported anecdotally on some unauthorized exports, no injuries have been reported, nor were any issues
22 directly attributed to vehicles that Laidlaw's sold. [XI 62-63]

23 239. Mr. Stockton believes that the termination is disproportionate to the harm suffered by
24 Harley-Davidson Co. and that the harm to the Harley-Davidson Co. is overstated, given that the
25 magnitude of the export problem lacks clarity. [XI 38-39, 52-52]

26 240. According to Mr. Stockton, in cases of other manufacturers where unauthorized vehicles
27 were found, incentives were charged back and the dealership was charged with the cost of the audit. In
28 these cases the penalties ranged from \$2,500 to \$7,500 per vehicle. [XI 62-63] Based on Mr.

1 Woodward's calculations, if terminated, the loss to Laidlaw's would be equivalent to a penalty of
2 \$175,000 per unit. If Harley-Davidson Co. knew the full extent of the non-retail sales problem it would
3 allow them to act proportionally with appropriate penalties and the implementation of regular audits could
4 be used to curb the problem. If an assessment of the magnitude of the non-retail sales problem is done,
5 then a proportional penalty, whether termination or fine could be rationally determined. [XI 63]

6 241. From a dealer's perspective, and from the testimony at the hearing, it does not appear that
7 the Non-Retail Sales Policy is a major issue confronting Harley-Davidson Co. at this time. Therefore,
8 levying what is essentially a "death penalty" upon the dealership is disproportionate to the harm to
9 Respondent caused by Protestant's actions.¹⁶

10 242. There is no doubt that Harley-Davidson Co. has a valid interest in protecting its brand.
11 However it is not necessary for Harley-Davidson Co. to achieve its goals at the expense of terminating
12 Laidlaw's franchise for what occurred under these "existing circumstances."

13 243. Brent expressed complete surprise by the termination letter because he was not personally
14 aware of all of the terms of the Non-Retail Sales Policy. He had never heard of or known of a dealer who
15 was terminated for violating the NRSP. [VII 80] Before the Verduyn inquiry letter Brent had not
16 received any communication from Harley-Davidson Co. about the dealership violating the NRSP. [VII
17 80, 84, Ex 16]

18 244. In 1999, over 12 years earlier and before the change in management in 2008, Harley-
19 Davidson Co. issued a letter to Laidlaw's that identified three motorcycles sales that were in violation of
20 the NRSP.

21
22
23 ¹⁶ Mr. Kennedy admitted that although Harley-Davidson Co. takes breaches of the NRSP very seriously as the brand could be
affected, he stated:

24 And perhaps because we're focusing so much in a micro way on the policy and the enforcement and everything
else, it feels like it's a big thing.

25 I don't feel like it's that big of an issue broadly speaking. However, I will say that the company takes this issue
very seriously, very seriously. Our brand at the end of the day is all that we have.

26 There are companies in this world that can manufacture faster, lighter, and cheaper motorcycles than us. If
Harley-Davidson screws up its brand, we are done.

27 So we take this policy very seriously. We couldn't afford to have our product distributed through gray market
channels. We cannot afford to have our product become a commodity. And certainly we cannot afford for us not
28 to take customer safety with the most intense approach.

[II 71]

1 245. These sales involved three motorcycles that were ultimately resold by a reseller called Staz
2 in Nevada. These non-retail sales occurred in 1996, 1997, and 1998. The letter from Harley-Davidson
3 Co., granted Laidlaw's a one-time exception to the NRSP, but it was never told to Laidlaw's that it could
4 face termination if it violated it again. [VII 23-25, Ex12]

5 246. One has only to look at Harley-Davidson Co.'s Minimum Advertised Price (MAP) Policy
6 and Parts, Accessories, MotorClothes (PAM) Policy (together called the PAM MAP) to find policies that
7 provide adequate warnings to the dealers and clearly set forth the graduated penalties for initial and
8 subsequent violations of the policies. The PAM MAP policies require that dealers sign and return a form
9 acknowledging that it has read and understands the policy. In addition, the PAM MAP policies advise the
10 dealers that an independent company will monitor sales and report its findings to the Harley-Davidson
11 Co. The PAM MAP policies discourage dealer complaints about non-compliant dealers and states that
12 Harley-Davidson Co. will not use dealer-specific complaints from other dealers to enforce the policy. [Ex
13 620]

14 247. The PAM and MAP policies contain detailed provisions relating to Enforcement, Non-
15 Compliance and Notice of Non-Compliance, Penalties, and Dealer Acknowledgement Form.

16 248. The Enforcement provision of the MAP policy states in part:

17 Harley-Davidson has retained a third party to monitor and randomly sample Dealer
18 advertising in Marketing Materials in Dealer market areas and report its findings to the
19 Company. The third party will independently execute its survey process. The Company
20 discourages its Dealers from complaining to it about possibly noncompliant advertising by
21 other Dealers; Dealer-specific complaints will not be used to enforce the Policy against
22 such Dealers. [Ex 620]

23 249. The Non-Compliance and Notice of Non-Compliance of the MAP policy states in part:

24 In the event of a documented violation of its MAP Policy, Harley-Davidson will suspend
25 the Dealer's participation in the Vehicle Incentive Program (V.I.P.) for a period of three
26 months commencing the month following the date on the violation notice.

27 ...
28 A single documented violation will trigger this penalty. Any additional violation while the
suspension is in effect will extend the reduction period for an additional three months....
[Ex 620]

29 250. The Non-Compliance and Notice of Non-Compliance of the PAM MAP policy includes
30 financial penalties and states in part:

31 ///

- 1 • In the event of a documented violation of its PAM MAP Policy, Harley-Davidson will send
2 a written notice to the affected dealer to initiate a charge to the dealer. The charges that
3 may be assessed are set out below. A single documented violation will trigger application
4 of the designated penalty. Dealers with three (3) documented violations will also be placed
5 in Not in Good Standing status, Level I.

- 6 > 1st Violation: \$5,000 charge
7 > 2nd Violation: \$10,000 charge
8 > 3rd Violation: \$15,000 charge and dealer placed in Not in Good Standing status,
9 Level I

10 [Ex 620]

11 251. It should be noted that violation of the PAM MAP policies does not include a termination
12 option. The PAM MAP policy is a well thought out policy consisting of 35 pages relating to pricing and
13 advertising that contains lesser sanctions than the NRSP. In stark contrast the NRSP, which allows
14 Harley-Davidson Co. to terminate the franchise, lacks all of the features that give clarity to the PAM
15 MAP policies. [Ex 620]

16 **The Dealer Contract**

17 252. Protestant contends that the NRSP is not a binding portion of the franchise, and therefore is
18 merely a “policy.” The Dealer Contract (Section 2. General Conditions), and the General Conditions of
19 Sales and Service (Section P. Miscellaneous 8. Entire Contract) require that any supplement,
20 modification, or amendment be in writing and executed by the parties. Harley-Davidson Co. complied
21 with the writing and execution requirements in both its 2010 Addendum extending the Dealer Contract
22 and its PAM MAP policies; however the NRSP while in writing did not require execution by the parties.
23 Because it is not necessary for this decision, no finding has been made as to whether or not the NRSP is
24 invalid for its failure to comply with the execution requirements or whether the NRSP is a modification of
25 the franchise and subject to Section 3060.

26 **Respondent’s Dealership Consolidation Plan**

27 253. Protestant contends that its termination is motivated by Harley-Davidson Co.’s market
28 consolidation plan for the Los Angeles/Riverside area. [VIII 42-45, II 82-83] This contention lacks
merit.

254. The recent economic downturn in 2008-2009 had a major impact in the motorcycle
industry resulting in a 50% decrease in sales. As a result of the market contraction there were too many

1 dealers in the U.S. for the throughput that was taking place. [II 82, 104-16, 133, Ex 23,129]

2 255. Some dealerships became unsustainable and were forced to file for bankruptcy. Facing
3 unprecedented market conditions, Harley-Davidson Co. decided to proactively work with its dealer
4 network. [II 82, 104-16, 133 Ex 23,129]

5 256. By mid-2009 Harley-Davidson Co. anticipated that they would need 100 fewer dealers and
6 highlighted nine metro areas that were the most severely over-dealered. At that time Harley-Davidson
7 Co. announced a process to facilitate retirements or voluntary consolidations within the dealer network.
8 [II 82, 104-16, 133, Ex 23,129]

9 257. In March 2011, in their efforts at transparency about the consolidation process, a meeting
10 was held with southern California area dealers. During the meeting the emphasis was on a voluntary
11 process, and there was no mention of terminations being used to achieve consolidation. [II 82, 104-16,
12 133, Ex 23,129]

13 258. At the meeting Harley-Davidson Co. offered eight different LA Dealer Optimization
14 Scenarios for dealer consolidation. None of these plans involved the Baldwin Park point (Laidlaw's). [II
15 117-19, Ex 215-22]

16 **Statement of the Applicable Law**

17 259. First, it should be noted that Section 3060(a) begins with: "Notwithstanding Section
18 20999.1 of the Business and Professions Code or the terms of any franchise, no franchisor shall terminate
19 or refuse to continue any existing franchise unless all of the following conditions are met:"

20 260. One of these conditions is the finding of good cause for the termination. Section 3061
21 provides for a showing of good cause for termination and goes on further to state "the board shall take
22 into consideration the existing circumstances, including, but not limited to all of the following:...."
23 Section 3061 goes on to list seven good cause factors in subsections 3061(a) through (g). The franchisor
24 has the burden of proving good cause under Section 3066 (b).

25 261. The gravamen of this case is the good cause factor listed in Section 3061(g), which is the
26 "extent of the franchisee's failure to comply with the terms of the franchise." It is significant that the
27 language of subsection (g) requires the consideration of the extent of the failure to comply. It is equally
28 important to note that the statute does not say ANY failure to comply or simply THE failure to comply,

1 but it is the extent of the failure to comply that must be considered in evaluating whether or not there is
2 good cause to terminate the franchise.

3 262. As the U.S. Supreme Court in *New Motor Vehicle Board v. Orrin W. Fox Co.* (1978) 439
4 U.S. 96, 58 L.Ed.2d 361, 99 S.Ct. 403 recognized, the franchise is an agreement drafted by the party with
5 the superior bargaining power. State franchise laws, recognizing the disparity in power between the
6 parties, are attempts to create a level playing field, particularly where the franchisor has the power to inflict
7 such grievous losses upon a franchisee. The U.S. Supreme Court also recognized that the franchisor can
8 survive with one less franchisee but the franchisee is more likely to depend entirely upon the franchisor
9 for its continued existence.

10 263. In footnote 4 to the opinion, quoting from a Congressional Committee report, it was
11 recognized that:

12 ...Dealers have an average investment of about \$100,000. This vast disparity in economic
13 power and bargaining strength has enabled the factory to determine arbitrarily the rules by
14 which the two parties conduct their business affairs. These rules are incorporated in the
15 sales agreement or franchise which the manufacturer has prepared for the dealer's
16 signature. [*New Motor Vehicle Board v. Orrin W. Fox Co.*, *supra*, 439 U.S. at p. 102]

17 264. With the exception of the average investment amount, the above remains true today, and
18 particularly in this case where Laidlaw's, a single line-make dealership is completely dependent upon
19 Harley-Davidson Co. for its continued supply of vehicles and thus its very existence.

20 265. As the franchise is a contract, the law of contracts should be applied. Assuming the
21 validity of the NRSP as part of the Dealer Contract, it is undisputed that Laidlaw's failed to comply with
22 the terms of the contract as set forth in the NRSP. In other words, if the NRSP terms at issue are part of
23 the contract, Laidlaw's actions constituted a breach of the NRSP and hence a breach of the terms of the
24 franchise. The next issue would be to determine the materiality or "extent" of Laidlaw's failure to comply
25 with the terms of the franchise.

26 266. Since the Vehicle Code does not address the issue of materiality of breach of the franchise,
27 the principles of the Restatement, Second of Contracts are useful to analyze the materiality of the breach.

28 267. Section 241 of the Restatement, Second of Contracts, Circumstances Significant in
Determining Whether a Failure is Material, reads:

///

1 In determining whether a failure to render or to offer performance is material, the following
2 circumstances are significant:

- 3 (a) the extent to which the injured party will be deprived of the benefit which he reasonably
4 expected;
- 5 (b) the extent to which the injured party can be adequately compensated for the part of that benefit
6 of which he will be deprived;
- 7 (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- 8 (d) the likelihood that the party failing to perform or to offer to perform will cure his failure,
9 taking account of all the circumstances including any reasonable assurances;
- 10 (e) the extent to which the behavior of the party failing to perform or to offer to perform comports
11 with standards of good faith and fair dealing.

12 268. A separate analysis of each of these is as follows:

- 13 (a) The Extent to which the Injured Party will be Deprived of the Benefit which he
14 Reasonably Expected

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

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

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

- 26 (c) The Extent to which the Party Failing to Perform or to Offer to Perform will Suffer
27 Forfeiture

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

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

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

10 (e) The Extent to which the Behavior of the Party Failing to Perform or to Offer to Perform
11 Comports with Standards of Good Faith and Fair Dealing

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

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

21 275. Respondent has not met its burden of proof to establish that there is good cause to
22 terminate Laidlaw's Harley-Davidson Co. franchise.

23 **DETERMINATION OF ISSUES**

24 276. Harley-Davidson Co. has not established that Laidlaw's is not conducting an adequate
25 amount of business as compared to the business available to it. [Section 3061(a)]

26 277. Harley-Davidson Co. has not established that Laidlaw's has not made the investment
27 necessary and incurred the obligations necessary to perform its part of the Harley-Davidson Co. franchise.
28 [Section 3061(b)]

1 278. Harley-Davidson Co. has not established that Laidlaw's investment is not permanent.
2 [Section 3061(c)]

3 279. Harley-Davidson Co. has not established that it would not be injurious to the public
4 welfare for the franchise to be replaced. [Section 3061(d)]

5 280. Harley-Davidson Co. has not established that Laidlaw's does not have adequate motor
6 vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably
7 provide for the needs of the consumers for the motor vehicles handled by the franchisee and is not
8 rendering adequate services to the public. [Section 3061(e)]

9 281. Harley-Davidson Co. has not established that Laidlaw's failed to fulfill the warranty
10 obligations of Harley-Davidson Co. to be performed by Laidlaw's. [Section 3061(f)]

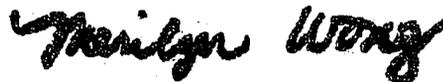
11 282. Harley-Davidson Co. has established that Laidlaw's failed to comply with some of the
12 terms of the franchise. However, Harley-Davidson Co. has not established that the extent of such failures
13 are sufficient to warrant termination of the franchise. [Section 3061(g)]

14 **PROPOSED DECISION**

15 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the
16 Protest in *Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's Harley-Davidson v. Harley-Davidson*
17 *Motor Company*, Protest No. PR-2299-11, is sustained. Respondent has not met its burden of proof under
18 Vehicle Code Section 3066(b) to establish that there is good cause to terminate Laidlaw's Harley-
19 Davidson Co. franchise.

21 I hereby submit the foregoing which constitutes my
22 Proposed Decision in the above-entitled matter, as
23 the result of a hearing before me, and I recommend
24 this Proposed Decision be adopted as the decision of
25 the New Motor Vehicle Board.

26 DATED: May 9, 2012

27 By: 
28 MERILYN WONG
Administrative Law Judge

George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV