

FILED
NEW MOTOR VEHICLE BOARD
DATE 5-12-11
BY na

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MAY 16 2011
NEW MOTOR VEHICLE BOARD
Sent by

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8 Attorneys for Protestant LAIDLAW'S HARLEY-
9 DAVIDSON SALES, INC. dba LAIDLAW'S
10 HARLEY-DAVIDSON

Certified Mail
Postmarked 5-12-11
DATE

Rec'd by NMVB 5-16-11
DATE

7001-0360-0003-3156-4995

NEW MOTOR VEHICLE BOARD
STATE OF CALIFORNIA

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

14 Protestant,

15 vs.

16 HARLEY-DAVIDSON MOTOR
17 COMPANY, a Corporation,

18 Respondent.

PROTEST NO. PR-2299-11

PROTEST PURSUANT TO VEHICLE
CODE SECTION 3060 AND REQUEST
FOR PREHEARING CONFERENCE AND
HEARING

19 1. The respondent is Harley-Davidson Motor Company, a corporation. Respondent's
20 address is 3700 West Juneau Avenue, Milwaukee, Wisconsin 53280, telephone (414) 342-
21 4080. The notice to which this protest relates was signed by the Vice President of North
22 American Sales at the address set forth above.

23 2. The protestant is Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's Harley
24 Davidson ("dealer" or "protestant"). Protestant's address 1919 Puente Avenue, Baldwin
25 Park, CA 91706.

26 3. Protestant is a duly licensed California new motor vehicle dealer doing business at
27 the aforesaid address.

28 4. Protestant sells new motor vehicles and associated parts, accessories, and service,

1 pursuant to an agreement and franchise entered into by and between protestant and
2 respondent, wherein respondent is franchisor, and protestant is franchisee, all subject to the
3 jurisdiction of this Board.

4 5. On or about and no earlier than April 14, 2011, protestant received a letter from
5 respondent (a copy of which is attached as Exhibit "A") purporting to give protestant notice
6 of termination of protestant's franchise as a Harley-Davidson motorcycle dealer (hereinafter
7 the "Notice").

8 6. At no time has protestant agreed to, acquiesced in, or otherwise indicated any
9 approval whatsoever for the purported termination of the franchise.

10 7. Protestant denies that the reasons for termination set forth in the Notice are true.
11 Protestant avers that the reasons for termination set forth in the Notice are misleading.

12 8. Protestant denies that any of the reasons for termination set forth in the Notice
13 (whether or not true) constitute good cause for the termination of protestant's franchise
14 pursuant to Vehicle Code Section 3061, and other applicable law.

15 9. Protestant denies that any of the reasons for termination set forth in the Notice
16 (whether or not true) constitute valid contractual grounds for termination under the franchise
17 agreement.

18 10. Protestant furthermore denies that good cause exists for terminating protestant's
19 franchise. By way of example, and among other legal and factual contentions, the following
20 reflect the lack of such good cause:

21 (a) Protestant has made a substantial and permanent investment in the dealership
22 which will be damaged if respondent's purported termination of protestant's franchise
23 is allowed;

24 (b) Protestant has transacted and is transacting an adequate amount of business
25 compared to the business available to it.

26 (c) The extent of protestant's noncompliance, if any, with the terms of the
27 franchise agreement is legally privileged and/or excused and lacks sufficient
28 materiality to warrant termination.

1 (d) Protestant has adequate motor vehicle sales and service facilities, equipment,
2 vehicle parts, and qualified service personnel to reasonably provide for the needs of
3 buyers and owners of respondent's products in the market area and is rendering
4 adequate service to the public.

5 (e) It would be injurious to the public welfare for protestant's franchise to be
6 terminated by respondent.

7 (f) Protestant is informed and believes and thereon alleges that the purported
8 termination runs contrary to certain legal, equitable, and contractual obligations of
9 respondent, and rights of protestant.

10 11. Protestant desires to appear before the Board and to have a hearing on this
11 Protest and estimates that the time required for a hearing will be approximately 15 days.

12 12. Protestant requests a prehearing conference.

13 WHEREFORE, Protestant prays for relief as follows:

14 1. That the New Motor Vehicle Board hold a hearing and based on the evidence and
15 proof produced therein determine that good cause does not exist for the termination of
16 protestant's franchise and thereby sustain this protest; or, if the Board does not enter such an
17 order, that the Board conditionally sustain this protest on such terms as comport with the
18 Board's authority under Vehicle Code section 3067; or, if the Board does not enter the
19 orders aforesaid, that any order overruling the protest be conditioned in such a manner as
20 shall preserve the dealer's rights under Vehicle Code section 11713.3 and applicable law.

21 2. For such other rulings and relief as the Board deems just and equitable.
22

23 DATE: May 12, 2011

MANNING, LEAVER, BRUDER & BERBERICH

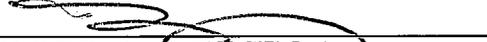
24
25
26 BY 
27 HALBERT B. RASMUSSEN, Attorneys
28 For Protestant Laidlaw's Harley-Davidson Sales,
Inc. dba Laidlaw's Harley-Davidson

Exhibit "A."

Termination notice letter

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Harley-Davidson Motor Company
3700 West Juneau Ave., PO Box 653, Milwaukee, WI 53201
414/342-4680

April 14, 2011

VIA HAND DELIVERY AND CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Brent Laidlaw
Laidlaw's Harley-Davidson
1919 Puente Avenue
Baldwin Park, CA 91706

Dear Mr. Laidlaw:

This is notice pursuant to your Dealer Contract ("the Contract") and applicable California law that Harley-Davidson Motor Company ("Harley-Davidson") is exercising its right to terminate your Contract effective sixty (60) days after you receive this letter.

"NOTICE TO DEALER: You have the right to file a protest with the NEW MOTOR VEHICLE BOARD in Sacramento and have a hearing in which you may protest the termination of your franchise under provisions of the California Vehicle Code. You must file your protest with the board within 30 calendar days after receiving this notice or within 30 days after the end of any appeal procedure provided by the franchisor or your protest right will be waived."

For your information, Harley-Davidson has no appeal procedure.

You have violated the following provisions of your Dealer Contract, as discussed in greater detail below:

- ¶1(A) grants you the right to purchase and resell vehicles "at retail" (see also ¶B).
- ¶B(6) provides that you "shall not sell" "for resale to non-retail customers", among other things. It also obligates you to comply with Harley-Davidson's policy and position statements in that regard, which the Dealer Contract expressly permits Harley-Davidson to establish.
- Pursuant to ¶B(6), Harley-Davidson has had in effect for many years, including the 2009-2011 model years, a Non-Retail Sales Policy – Pleasure Vehicles. It reiterates your contract's prohibition against non-retail sales, and clarifies what that term means, i.e., 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 the motorcycle for his or her own use, without the intent to resell, among other things. A sale to a customer whom you know, or should know, intends to resell the motorcycle may be deemed to be a non-retail sale. It will also be deemed non-retail if sold to a customer who resides outside of the United States or for shipment or use outside of the United States. (¶ 1) A sale to an ultimate consumer business will not be considered a retail sale if, among other things, applicable taxes are not paid and the SWR form does not appropriately report the sale. (¶4) There are specific requirements for sales to a lease financing agency for use in the United States to be considered a "retail" sale. (¶5) Similarly, sales to rental companies have specific requirements, including compliance with the Harley-Davidson Fleet Sales Policy (¶1&6). For sales into another state, the dealer must obtain a copy of the title application and/or vehicle registration; if the dealer is unable to provide this, the sale is automatically considered non-retail. (¶7) This policy advises that Harley-Davidson intends to enforce it strictly, and that violations may result in termination of your contract. (¶8) These are not the entire policy, with all of which you are obligated to comply.

- Harley-Davidson's Harley-Davidson Fleet Sales Policy, referenced above, prohibits generally sales to rental operators unless they are bona fide and previously authorized or specifically approved, and also unless the motorcycle is supplied to dealer from the Rentals Fleet Pool and is properly set up, inspected, tested, sold and delivered directly at the dealership facility.
- ¶F(2) obligates you to uncrate, set up, inspect and test each new Harley-Davidson Motorcycle prior to delivery to your customer (so-called "PDI"). The Harley-Davidson checklist for these purposes requires, among other things, certification of performance and purchase signature.
- ¶F(3) obligates you to deliver a copy of the customer warranty at the time of delivery, and to register with Harley-Davidson all motorcycles sold by you for purposes of establishing warranty protection, and providing essential information in the event of a recall.
- ¶F(7) obligates you to complete and electronically file with Harley-Davidson a sales and warranty registration ("SWR") form for every new motorcycle you sell. This must be done within ten (10) days of delivery to the customer to comply with federal law and to qualify the motorcycle for coverage under Harley-Davidson's customer warranty. This form requires, among other things, certification of certain important facts, including without limitation the "retail" or other status of the sale, compliance with sales policies and PDI obligations, explanation of warranty, and purchaser signature. All sale documents must be maintained for at least five (5) years.
- ¶M(4)(b) permits Harley-Davidson to terminate your Dealer Contract on 30 days notice if you submit to Harley-Davidson any application, claim, report, record or other information which is fraudulent or contains any material misrepresentations, among other things.

- ¶M(6)(c) permits Harley-Davidson to terminate your Dealer Contract on 60 days notice if you fail, refuse or neglect to conform your conduct with Harley-Davidson's Mission, standards of good citizenship or generally acceptable behavior, in a way that may adversely affect the Ownership, operation, management, reputation, business, goodwill or interests of you or Harley-Davidson, or may impair the goodwill associated with the Trademarks. The Values of your Dealer Contract include telling the truth, being fair, and keeping your promises (¶A).
- ¶M(6)(f) permits Harley-Davidson to terminate your Dealer Contract on 60 days notice if you breach, violate or fail to fulfill any of your other responsibilities under the Contract.

On March 15, 2011, we advised that we intended to conduct an audit beginning March 23, 2011 of your dealership's records of sales for the model years 2009-2011. The audit actually began on March 24 due to logistical delays. We reviewed and copied various of your records, and have analyzed them since returning to Wisconsin, as well as exchanged emails regarding various issues. We now regard our audit as completed.

Our audit revealed approximately forty-two (42) violations of our non-retail policy since December 27, 2008, a period of approximately two years spanning four model years. Attached is a table identifying the specific vehicles, which we incorporate here by this reference. The violations include generally sales to resellers such as non-authorized dealers and/or exporters, and/or providing false SWR information regarding customers, among other things.

As examples, and not by way of limitation of our audit's more specific findings, the violations included many false reports on SWR forms of customer addresses, as well as inadequate completion. Other required documentation was missing for many transactions, such as PDI forms, few of which were completed and/or signed properly by dealership personnel and the purchaser. There are many false reports of vehicles which your documents indicate were intended to be shipped to locations outside the United States such as Vietnam, Thailand, Cambodia, and Jordan. These vehicles were not delivered directly to end user consumers at your dealership.

A number of these motorcycles were ones for which recalls were in process, and because you provided false SWR information, Harley-Davidson was unable to provide recall notices to the end users.

In addition, we also discovered seventeen (17) sales of pleasure vehicles to rental sales and/or operations that were not sourced from the Rentals Fleet Pool and/or did not have authorization from Riders Services for conversion from pleasure allocation to rentals/fleet allocation. The attached table shows these additional violations, too.

Thus there are a total of at least fifty-nine (59) violations of Harley-Davidson policies and procedures, and your Dealer Contract.

This decision to terminate your Dealer Contract is consistent with and supported by the factors identified under California Vehicle Code §3061. For examples, but not by way of

limitation, it is contrary to the welfare of the California public for you to report false addresses and deny Harley-Davidson the opportunity to provide, and consumers the opportunity to receive, notices of recalls, when applicable. It is also contrary to that welfare to ship outside of California motorcycles that were specially built to meet California's special pollution laws. Violation of these policies increases the likelihood of customer dissatisfaction, increases safety risks, and increases risk of noncompliance with state, federal and foreign laws, among other things.

As provided in your Dealer Contract and applicable policies, Harley-Davidson is charging back against your account factory incentives and allowances on non-retail sales for the period permitted by applicable law. A copy of the violation and chargeback summary is attached. Harley-Davidson will also be adjusting your vehicle allocation based on the misreporting of these sales.

Harley-Davidson reserves the right to perform additional audits and to supplement this notice regarding additional violations that are discovered by whatever means.

Finally, you are obligated to follow your post-termination contractual obligations as set forth in ¶M(7).

Very truly yours,


Michael W. Kennedy
Vice President, North American Sales
Harley-Davidson Motor Company

Enclosures

cc: California New Motor Vehicle Board - (via Certified - Return Receipt Requested)

Proof of Service

I, the undersigned, declare and say as follows:

I am 18 years of age or older, employed at the business noted above my signature which is in the county where any mailing herein stated occurred, and not a party to the within action.

On May 12, 2011, I caused to be served the document(s) listed below my signature under the heading "Document(s) Served" by placing a copy of the document(s) (or the original, if so noted below) in individual envelopes for each of the parties listed below my signature under the heading "Parties Served" (except for fax-only service), addressed to them at their last known addresses in this action exactly as shown (excepting parenthetical references to their capacity), there being U.S. Mail delivery service to those addresses used for service by mail, and by sealing said envelopes, and on the same day, as marked with "X," by --

placing each envelope for collection and processing for mailing following my firm's ordinary business practice with which I am readily familiar and under which on the same day correspondence is so placed for mailing it is deposited in the ordinary course of business with the U.S. Postal Service at my business address, 1st-class postage fully prepaid.

faxing each page of each document and this proof of service to the parties served at their last known fax numbers as listed below from a fax machine located at my business address which reported no errors and which produced a transmission confirmation report, a true copy of which is attached hereto. [use only if fax service authorized or as a supplement.]

depositing each envelope into the U.S. mail with 1st-class postage fully prepaid at a mail box or collection facility in the city and state of my business address. "Parties Served" lists all parties and counsel served in the within matter, and their respective capacities. [required for federal cases, including bankruptcy, among others]

depositing each envelope at a drop box or other facility in the city and state of my business address within the time and pursuant to procedures readily familiar to me necessary for delivery by **Federal Express** on the morning of the next business day or by **Express Mail** on the same day.

personal delivery by travelling to the address shown on the envelope and delivering it there during normal business hours or handing the documents to the person served.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on May 12, 2011 at my business address, 5750 Wilshire Blvd., Suite 655, Los Angeles, California 90036, in the County of Los Angeles.


Jyoti Kehl

Document(s) Served (exact title)

PROTEST PURSUANT TO VEHICLE CODE SECTION 3060 AND REQUEST FOR PREHEARING CONFERENCE AND HEARING

Parties Served (exact envelope address)

New Motor Vehicle Board
1507 21st Street, Suite 330
Sacramento, California 95814

Harley-Davidson Motor Company
Attn: Michael Kennedy
3700 West Juneau Avenue
Milwaukee, Wisconsin 53280

(By certified mail, return receipt requested)

(Regular Mail)