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HARLEY-DAVIDSON MOTOR COMPANY

8
9 **NEW MOTOR VEHICLE BOARD**

10 **STATE OF CALIFORNIA**

11 In the matter of the Protest of
12 RIVERSIDE MOTORCYCLE, INC. dba
SKIP FORDYCE HARLEY-DAVIDSON,
13
14 Protestant,
15 vs.
16 HARLEY-DAVIDSON MOTOR
COMPANY,
17 Respondent.

PROTEST NO. PR-2310-11
**HARLEY-DAVIDSON MOTOR
COMPANY'S PROPOSED FINDINGS OF
FACT AND DECISION**

1 Harley-Davidson Motor Company (“Harley-Davidson”) respectfully submits the following
2 proposed findings of fact and decision:

3 **PROCEDURAL BACKGROUND**

4 **Statement of the Case**

5 1. By letter dated June 23, 2011, Harley-Davidson Motor Company, a Corporation
6 (“Harley-Davidson” or “Respondent”), gave notice to Riverside Motorcycle, Inc. d/b/a Skip
7 Fordyce Harley-Davidson Sales (“Riverside” or “Protestant”) pursuant to California Vehicle Code
8 § 3060 of its intention to terminate Riverside’s Harley-Davidson Motorcycle Dealer Contract. The
9 New Motor Vehicle Board (“Board”) received the notice on June 27, 2011.

10 2. On July 20, 2011, Riverside filed a timely protest.

11 3. A 10-day hearing on the merits of Protest No. PR-2310-11 was held March 5-8, 12-
12 16, and 19, 2011, before Administrative Law Judge Victor Ryerson.

13 **Parties and Counsel**

14 4. Protestant Riverside is an authorized Harley-Davidson dealership located at 7688
15 Indiana Ave., Riverside, CA 92504-4150. (Ex. 34.) It is owned by the Dabney family which
16 includes: Judson V. Dabney II, Ty C. Dabney, Marshall K. Dabney, and Susan Dabney Moore.
17 (*Id.*) The Survivor’s Trust of Judson V. Dabney and Ida C. Dabney holds a 50% ownership stake.
18 (*Id.*) Protestant is a “franchisee” within the meaning of §§ 331.1 and 3060(a)(1).

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

21 6. Respondent Harley-Davidson is a “franchisor” within the meaning of §§ 331.2 and
22 3060(a)(1).

23 7. Respondent is represented by Robert L. Ebe, Scott M. McLeod, and Brett R.
24 Waxdeck of Cooper, White & Cooper LLP, 201 California Street, 17th Floor, San Francisco,
25 California.

1 Summary of Witnesses' Testimony Introduced at Hearing

2 Protestant's Witnesses' Testimony and Exhibits

3 8. Protestant called the following witnesses: Judson "Jay" Dabney, dealer-principal of
4 Riverside; Marshall Dabney, part owner of Riverside; Megan Palmer, General Ledger Accountant
5 at Riverside; Jason Wilmoth, F&I Manager at Riverside; Lester Veik, former General Manager of
6 Riverside; Glen Espinoza, current General Manager of Riverside; and expert witnesses Carl
7 Woodward, CPA and Edward Stockton from the Fontana Group.

8 9. Respondent called the following witnesses: Michael Kennedy, Vice President,
9 North America; Steve Verduyn, Manager, Dealer Credit and Compliance; Thomas McGowan,
10 Principal Engineer and Member of Recall Investigation Committee; Jim Sorenson, District
11 Manager of District 25; Angela Stewart, Director, Western Regional Sales Operations; Frank
12 Albrecht, Regional Manager, Sales and Business Development – Asia Region; Robert Guthrie,
13 Dealer Operator of a Harley-Davidson dealership in Bangkok, Thailand. Respondent called one
14 expert witness: Dr. Dominique Hanssens, Bud Knapp Professor of Marketing at the UCLA
15 Anderson School of Management.

16 10. Respondent submitted the declarations of the following witnesses: Robert Guthrie
17 (who was cross-examined telephonically at trial); Claude Abry, Managing Partner of a Harley-
18 Davidson dealership in Amman, Jordan; and Nick Colledge, Regional District Manager, Middle
19 East and North Africa, Harley-Davidson Europe.

20 11. Respondent submitted the deposition testimony of the following witnesses: Judson
21 Dabney; Marshall Dabney; Glen Espinoza; Darrin Ray Goodrich, former sales manager at
22 Riverside; Kristen Kunzman, Assistant General Manager at Riverside; Megan Palmer; Elia M.
23 Ramirez, Accounts Payable at Riverside; Michael Slagle, Sales Manager at Riverside; Rory Swan,
24 Sales Floor Manager at Riverside; Lester Veik; Megan Vogeli, Assistant Operations Manager at
25 Riverside; and Jason Wilmoth.

26 ISSUES PRESENTED

27 12. Pursuant to Section 3066(b), Harley-Davidson has the burden to establish good
28 cause for the termination of Riverside's Harley-Davidson franchise. In determining whether

1 Harley-Davidson has established good cause for the termination, Section 3061 requires that the
2 Board consider the “existing circumstances,” including, but not limited to, all of the following:

- 3 (a) Amount of business transacted by the franchisee, as compared to the business
4 available to the franchise;
- 5 (b) Investment necessarily made and obligations incurred by the franchisee to perform
6 its part of the franchise;
- 7 (c) Permanency of the investment;
- 8 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be
9 modified or replaced or the business of the franchise disrupted;
- 10 (e) Whether the franchisee has adequate motor vehicle sales and service facilities,
11 equipment, vehicle parts, and qualified service personnel to reasonably provide for
12 the needs of the consumers for the motor vehicles handled by the franchisee and
13 has been and is rendering adequate services to the public;
- 14 (f) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to
15 be performed by the franchisee; and
- 16 (g) Extent of the franchisee’s failure to comply with the terms of the franchise.

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19 **RESPONDENT’S CONTENTIONS**

20 13. Respondent contends that good cause exists to terminate Riverside’s franchise
21 because, over a 13-month period, Riverside sold 29 new motorcycles in violation of Respondent’s
22 Non-Retail Sales Policy for Pleasure Vehicles. Respondent further contends that Protestant’s
23 failure to perform Pre-Delivery Inspection and Protestant’s filing of false Sales Warranty
24 Registration information are violations of the franchise as set forth in Respondent’s General
25 Conditions of Sales and Service.
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1 **PROTESTANT'S CONTENTIONS**

2 14. Protestant contends that although Riverside violated Harley-Davidson's Non-Retail
3 Sales Policy for Pleasure Vehicles, those violations do not constitute good cause for termination
4 when considered with the existing circumstances. Protestant contends that good cause does not
5 exist because Riverside's dealer principal did not know of or condone the violations, because harm
6 to Harley-Davidson is merely hypothetical, and because termination of the dealership would be
7 injurious to the public welfare.

8 **PROPOSED FINDINGS OF FACT**

9 **I. The Relevant Contract Provisions and Policies**

10 **A. The Dealer Contract and Harley-Davidson's Policies Prohibit Non-Retail Sales**

11 15. Riverside entered into a Dealer Contract with Harley-Davidson on January 5, 2005.
12 (Ex. 34).

13 16. Under its Dealer Contract Riverside is only entitled to sell Harley-Davidson
14 motorcycles at retail to end-users. The "Grant of Rights" on the first page of Dealer Contract
15 between Harley-Davidson and Riverside only grants Riverside the right to "purchase and resell at
16 retail." (Ex. 34 at HDR000437.)

17 17. Harley-Davidson's General Conditions of Sales and Service ("General Conditions")
18 are incorporated into the Dealer Contract by reference, and obligates Riverside to "devote its best
19 efforts to promote aggressively the sale at retail" and to focus those efforts on customers within
20 Riverside designated territory. (Ex. 35 at HDR001366.)

21 18. The General Conditions prohibit non-retail sales and provides that Harley-
22 Davidson will adopt policies with which Riverside is obligated to comply:

23 NON-RETAIL SALES. Dealer shall not sell Harley-Davidson
24 Products for resale to non-retail customers ... Seller reserves the right
25 to establish from time to time such policies and position statements it
26 believes are necessary or advisable to carry out the purpose or intent of
27 this part of this Contract and Dealer shall comply with all such policies
28 and position statements.

(Ex. 35, HDR001367.)

1 19. Pursuant to the Dealer Contract and General Conditions, Harley-Davidson annually
2 issues written, two-page policy entitled, "Non-Retail Sales Policy – Pleasure Vehicles" ("NRSP")
3 for each model year. (RT Vol. I, 134:15-136:2; Ex. 50 at HDR018140 ["This policy expands upon
4 and interprets the non-retail sales provision in the Dealer Contract (paragraph B-6)].")

5 20. Harley-Davidson sends the NRSP to its dealers each year. (RT Vol. I, 134:15-
6 136:2; *see* Ex. 58.)

7 21. The NRSP is available for review by dealers on-line via h-dnet.com, where it is
8 posted. (RT Vol I, 136:18-137:24.)

9 22. The reasons for the NRSP are set forth in the NRSP's preamble:

10 Harley-Davidson has created a Non-Retail Sales Policy to ensure
11 customer satisfaction and safety, facilitate compliance with federal and
12 state law and laws in various foreign countries, and protect the integrity
13 of Harley-Davidson's world-wide distribution network.

14 (Ex. 50 at HDR018140.)

15 23. The NRSP clearly defines violations:

16 As provided in the Dealer Contract, dealers are prohibited from
17 engaging in non-retail sales of motorcycles. A sale by a U.S. dealer of
18 a new or previously unregistered motorcycle (an unregistered
19 motorcycle is one that has not been registered with the state and with
20 Harley-Davidson) will be considered a "non-retail sale" for purposes of
21 the Dealer Contract and this policy if the motorcycle is not properly set
22 up, inspected, tested, sold and delivered at the dealership facility,
23 directly to the ultimate consumer. An "ultimate consumer" is the retail
24 end user who purchases, as indicated on the Certificate of Origin, a
25 new or previously unregistered motorcycle for his or her own use,
26 without the intent to resell, pays all applicable taxes and registration
27 fees, and titles the vehicle in his or her name.

28 (*Id.* at ¶1.)

 24. The NRSP makes it completely clear that sales to exporters violate the policy:

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

 (*Id.*)

1 25. The NRSP explicitly provides that it will be "strictly enforce[d]" and that penalties
2 include "terminat[ing] the dealer's contract." (Ex. 50 at ¶8.)

3 26. In addition, certain factory incentives and allowances, such as Vehicle Incentive
4 Program ("V.I.P.") payments, set-up and delivery allowances, Co-Op advertising allowances, and
5 various rebates, refunds and credits apply *only* to retail sales. (Ex. 50 at ¶2.)

6 **B. The Dealer Contract Requires Dealers to Perform Pre-Delivery Inspections**

7 27. Paragraph F(2) of the Dealer Contract obligates dealers to perform pre-delivery
8 inspections ("PDI"):

9 PRE-DELIVERY OBLIGATIONS. Dealer agrees to uncrate, set up,
10 inspect and test each new Harley-Davidson motorcycle prior to
11 delivery to Dealer's customer, in accordance with Seller's written
12 instructions. Dealer agrees to make all necessary repairs to such
13 Harley-Davidson Motorcycle and agrees that each Harley-Davidson
14 Motorcycle, including any accessories or equipment added thereto
15 and sold by Dealer, will be received directly by its customer fully set
16 up by a qualified Dealer technician and in satisfactory, lawful and safe
17 operating condition.

18 (Ex. 34 at ¶F(2).)

19 28. The "written instructions" authorized by Paragraph F(2) of the Dealer Contract are
20 contained in, among other places, an approximately 180 page PDI Manual (updated annually) and
21 a PDI Checklist Form that is to be completed and signed at the point of delivery. (*See* Ex. 130
22 [PDI manual]; Ex. 11 at HDR000183 [example of PDI form].)

23 29. The PDI Manual informs dealers that Harley-Davidson:

24 ...considers the pre-delivery inspections procedures in this manual
25 necessary to verify customer safety and satisfaction. None of these
26 inspections or procedures should ever be left out, and only qualified
27 technicians should perform them.

28 (Ex. 130 at SFHD014079.)

29 30. The PDI Manual requires that, prior to delivery, the dealership follow detailed set-
30 up and testing procedures. At the point of delivery, the dealership must inspect the vehicle with
31 the end-user purchaser and make sure that he or she understands the owner's manual and materials
32 in the owner's kit, the warranties, the operation of the vehicle controls, certain emergency and
33 safety features, and the scheduled maintenance requirements. (Ex. 130 at SFH014139.)

1 31. The PDI Checklist Form instructs dealers that various boxes must be checked,
2 confirming that the PDI procedures, including purchaser inspections and communications, have
3 been followed. The form also must be signed by a dealership technician, a dealership sales
4 representative, and the purchaser, confirming that all required procedures have been followed.
5 (*See, e.g.*, Ex. 11 at HDR000183.)

6 **C. The Dealer Contract Obligates Dealers to Provide Accurate Sales & Warranty**
7 **Registration ("SWR") Information**

8 32. The Dealer Contract obligates Riverside to "explain Seller's customer warranty to
9 its customers prior to the consummation of any sale of Harley-Davidson Products"; deliver a copy
10 of the warranty to the customer "at the time of delivery" of the product; and register all sales with
11 Harley-Davidson "for purposes of establishing warranty protection, providing essential
12 information in the event of a recall of Harley-Davidson Products and/or providing Seller with
13 useful market information, all in accordance with Seller's written procedures from time to time."
14 (Ex. 35 at ¶F(3).)

15 33. The Dealer Contract also requires Riverside to provide Harley-Davidson with the
16 name and address of each purchaser by completing and filing with Harley-Davidson "a sales and
17 warranty registration ["SWR"] form for every new Harley-Davidson sold by Dealer" and
18 "maintain a hard copy of all sale documents, including a hard copy of the fully completed and
19 signed sales and warranty registration form, in its files for a minimum of five (5) years from the
20 date of sale." (Ex. 35 at ¶F(7).)

21 34. The PDI Manual, like the Dealer Contract, requires both the dealer and customer to
22 sign the hard-copy SWR form. (Ex. 130 at SFHD014173.)

23 35. The NRSP also requires dealers to submit accurate SWR information. (Ex. 50 at
24 ¶¶1, 8.) This includes accurately checking a box on the SWR form to indicate whether the sale is
25 "Retail (Direct to Ultimate Consumer)," "Police/Shrine" or "Other;" supplying accurate ownership
26 information; and expressly certifying compliance with sales policies and pre-delivery inspection
27 ("PDI") procedures. (*See* Ex. 11 at HDR000182.)

1 36. The SWR form requires the dealer to certify that PDI procedures have been
2 followed, all warranties have been explained, all sales policies have been complied with and that:

3 ...the information on this form is true, correct and complete to the best
4 of my knowledge....I acknowledge that any misrepresentation on this
5 form will be considered a material breach of my dealer contract and
6 may constitute grounds for termination.

7 (See, e.g., Ex. 11 at HDR000182.)

8 37. The SWR form (like the NRSP itself), provides notice that the submission of false
9 SWR information may result in termination of the Dealer Contract. (Ex. 11 at HDR000182.)

10 **II. Harley-Davidson Consistently Enforces the NRSP**

11 38. Steve Verduyn is charged with monitoring and enforcing compliance with the
12 NRSP. (RT Vol. II, 51:6-25.)

13 39. Steve Verduyn monitors compliance in a variety of ways. (See generally, RT Vol.
14 II, 52:15-62:14.) Primarily, in recent years, Verduyn has used National Insurance Crime Bureau
15 ("NICB") data. (RT Vol. II, 54:13-55:14, 58:62:14.)

16 40. Steve Verduyn also receives information from other sources, such as District
17 Managers, other dealers, other Harley-Davidson departments, and internet reviews that may cause
18 him to suspect violations. (RT Vol. II, 55:14-56:12, 77:9-25.)

19 41. When Steve Verduyn detects questionable sales by a dealer, he will take one of
20 three possible actions: (a) do nothing if his further investigation reveals no violation, (b) send an
21 inquiry letter to the dealer requesting information regarding the suspect sales, or (c) recommend an
22 on site audit. (RT Vol. II, 58:4-13.)

23 42. Since 2005, Harley-Davidson has sent about 150 such inquiry letters based on
24 possible questionable sales by a dealer. (Ex. 260A; RT Vol. II, 63:15-64:25.) As shown by
25 Exhibit 260A, most of the dealers have no or very small numbers of violations, *i.e.* they comply
26 with their obligations.

27 43. When Steve Verduyn identifies a significant number of questionable sales, he
28 recommends that Harley-Davidson perform an on site audit rather than simply sending an inquiry
letter. (RT Vol. II, 65:13-66:1.)

1 44. Since 2005, Harley-Davidson has conducted approximately 30 on-site audits based
2 on reports suggesting there were a significant number of questionable sales. (Ex. 261; RT Vol. II,
3 66:8-67:12.)

4 45. Mike Kennedy and Steve Verduyn testified that Harley-Davidson has a practice of
5 terminating its contracts with all dealers that have been found to have committed more than 20
6 NRSP violations.¹ (RT Vol. I, 160:1-161:9; RT Vol. II, 68:25-69:13.)

7 46. Harley-Davidson takes this action in order to maintain consistency and ensure
8 fairness to similarly-situated dealers:

9 We try to operate in an atmosphere of fundamental fairness with the
10 dealers. We can't pick and choose who we like or who we are going to
11 handle and how we are going to, how we are going to ultimately deal
12 with a situation that we find that there was a violation of policy. If we,
13 if we didn't do that, if we weren't consistent and fair, that undermines
14 our credibility and my credibility with the network. They know that if
15 they violate the policies there's going to be a sanction, it's not play
16 favorites or anything like that. Big dealers and little dealers alike,
17 north and south, have all been treated in a fair and consistent manner in
18 the time that I've been dealing with this.

19 (RT Vol. II, 69:20-70:13.)

20 **III. Harley-Davidson Communicated the NRSP and Consequences of Violation**

21 **A. Harley-Davidson Effectively Communicated the NRSP and Warned that**
22 **Violations Could Result in Termination**

23 47. Harley-Davidson sends its dealers the NRSP at least annually, regardless of
24 whether there have been any changes to them to ensure dealers' compliance with the NRSP. (RT
25 Vol. I, 134:15-136:2.)

26 48. For many years, Harley-Davidson has sent dealers hard copies of the NRSP along
27 with annual pricing lists and packages of critical documents. (*See, e.g.*, Ex. 58, Ex. 59 at
28 HDR018159.)

49. The NRSP is also available on h-dnet.com. (RT Vol. I, 136:20-22.)

¹Two of the instances involve Florida dealerships. Florida law did not permit termination for this
conduct. (RT Vol. II, 66:15-67:12.)

1 50. The NRSP itself provides notice that a dealer may be terminated for violating its
2 provisions. (Ex. 50 at ¶8.)

3 51. Harley-Davidson also sends written notices and reminders about the NRSP. (*See*,
4 *e.g.*, RT Vol. I, 141:15-143:8.)

5 52. In November 2000, Harley-Davidson sent its dealer principals, and their general
6 managers and vehicle sales managers, a bulletin attaching the MY 2001 NRSP. The bulletin
7 warned dealers that violations of the NRSP had in fact resulted in terminations:

8 [D]ocumented non-retail sales are a serious issue and a breach of the
9 dealer contract. ***Past violations have resulted in dealer termination in
several cases.***

10 (Ex. 53, emphasis added.)

11 53. The November 2000 bulletin attaching the MY 2001 NRSP also warned dealer
12 principals, such as Jay Dabney:

13 ***It is your responsibility*** to ensure that your dealership and dealership
14 personnel are complying with this policy. Non-retail sales are a breach
of the dealer contract and the policy, ***regardless of whether your
employees engage in non-retail sales with or without your knowledge.***

15 (*Id.*)

16 54. The November 2000 bulletin attaching the MY 2001 NRSP warned that "[a] person
17 or business ***buying multiple motorcycles in a short time period***" (something that happened in this
18 case) may be evidence of a violation, emphasizing that "***It is up to you*** to monitor and police such
19 sales." (*Id.*)

20 55. Mike Kennedy testified that Harley-Davidson sent communications such as these
21 because "not only is it critical that the dealer is aware of the policy, but it's critical that the dealer
22 take the action necessary to ensure the policy's being followed." (RT Vol. I, 142:8-143:18.)

23 56. Jay Dabney does not deny receiving the November 2000 bulletin attaching the MY
24 2001 NRSP. (RT Vol. VI, 180:7-15.)

25 57. In March 2004, Harley-Davidson sent its dealer principals another bulletin
26 announcing that the relatively recent phenomenon of internet sales required amendment to the
27 NRSP to define such sales as "non-retail," and enclosed a copy of the NRSP. (Ex. 54.)

1 58. In May 2006, Harley-Davidson held a "Town Hall" meeting during which the
2 NRSP was discussed. A slide presentation for the May 2006 Town Hall devotes three pages to the
3 NRSP, reminding dealers of the reasons for the policy, types of violations (including sales for
4 shipment abroad and the submission of false SWR information) and dealers' obligations to
5 perform "internal checks/audits" to ensure compliance. (Ex. 55 at HDR014437-14439; RT Vol. I,
6 139:8-141:4.) The dealers were advised to:

- 7 • Put internal check/audits in place to prevent your dealership from selling
8 motorcycles to non-retail purchasers, particularly brokers.
- 9 • Perform your own personal review of sales records to assure accuracy and
10 completeness.
- 11 • Question multiple sales to same individual in short period of time.

(Ex. 55 at HDR014439.)

12 59. The May 2006 Town Hall was followed shortly by yet another bulletin dated May
13 24, 2006 to dealers documenting the discussion of the NRSP at the meeting and again reminded
14 dealer principals:

It is your responsibility to ensure that all dealership personnel are
15 complying with all aspects of this policy ... As discussed at the recent
16 Town Hall meetings, we have and will continue to monitor and review
17 sales records and conduct dealership audits when necessary and take
18 appropriate action...

(Ex. 56, emphasis in original.)

19 60. The May 24, 2006 bulletin also warned:

Be aware that non-retail sales is a breach of the Dealer Contract and
20 the consequences could include...in situations involving repeated or
21 substantial breaches of this policy or submission of false SWR
22 information, termination of your Dealer Contract.

(Ex. 56.)

23 61. The slide presentation for the next Town Hall meeting in 2007 similarly shows
24 discussion of the NRSP. (Ex. 57 at HDR014486.)

25 62. Jay Dabney testified that he attended the 2006 and 2007 Town Hall meetings that
26 the NRSP was in fact discussed. (RT Vol. VI, 58:19-59:1.)
27
28

1 63. Marshall Dabney testified that he also attended the 2006 and 2007 Town Hall
2 meetings. (RT Vol. VII, 70:2-11.)

3 64. In February 2008, Jim Sorenson, Harley-Davidson's District Manager for Skip
4 Fordyce's district, sent an email to all dealers in his district, including Jay Dabney, advising of an
5 increase in exporting and warning that dealers must take steps to avoid violations of the NRSP:

6 With the decrease in value of the US dollar against other currencies,
7 there has been a rise in activity from overseas people who want to
8 purchase a vehicle manufactured for the United States and ship it back
9 to 'their country'. *Please alert your staff that it is a violation of the
10 Non-Retail Sales Policy to sell a new or previously unregistered
11 vehicle for use outside the United States.*

12 Additionally, be alert of individuals in the United States that wish to
13 purchase "multiple" new or previously unregistered vehicles. A few
14 questions may uncover their intent to re-sell these units acting as a
15 broker or something along these lines.

16 (Ex. 60.)

17 65. Jim Sorenson testified that he sent this email to "reinforce the importance of the
18 non-retail sales policy." (RT Vol. III, 152:5-153:16.)

19 66. Dabney has no reason to believe that he did not receive and read the February 2008
20 email from Jim Sorenson. (Ex. 302, Jay Dabney Depo at 126:5-127:8.)

21 67. Jay Dabney testified that the NRSP itself is "clear" that termination is a sanction.
22 (RT Vol. VI, 59:2-6; 184:2-7.)

23 68. Jay Dabney agrees that termination would apply to dealers that make a "conscious
24 strategic decision" to make nonretail sales. (RT Vol. VI, 59:2-12.)

25 69. Marshall Dabney testified that he knew from reading the NRSP that a dealer that
26 violated it could be terminated. (RT Vol. VII, 70:21-23.)

27 **B. Lester Veik's Claims That He Was Not Aware That Termination Was an
28 Option Are Not Credible**

29 70. Lester Veik lied to Harley-Davidson about who the real buyers of the motorcycles
30 were. (Ex. 250)

31 71. Lester Veik lied to Harley-Davidson about when some of the sales were made. (RT
32 Vol. VIII, 76:24-77:1.)

1 72. Lester Veik lied in his written narrative (Ex. 69) when he blamed the NRSP
2 violations on Darin Goodrich; he testified at trial that Goodrich was not to blame (RT Vol. VIII,
3 86:8-87:13.)

4 73. Lester Veik lied in his written narrative (Ex. 69) when he claimed that senior
5 management was not aware of and did not approve the violation sales; he in fact was aware of and
6 did approve the sales (RT Vol. VIII, 42:1-5.)

7 74. Lester Veik lied in his written narrative (Ex. 69) when he claimed that the 2010
8 violations slipped by him because he was too busy devoting his attention to the Corona secondary
9 location; he testified that he knew about and approved the 2010 sales. (See RT Vol. VII, pp. 212-
10 213.)

11 75. Lester Veik lied when he claimed in an April 25, 2011 email that he first became
12 aware of NRSP violations in June 2010 (Ex. 65); he testified he knew about the violations as they
13 were occurring (RT Vol VII, 196:25-197:3, 197:13-15, 198:15-21.)

14 **IV. Riverside Violated the Dealer Contract, the NRSP, its SWR and PDI Obligations, and**
15 **Engaged in Fraud**

16 **A. Riverside Intentionally Sold 29 Harley-Davidson Motorcycles in Violation of**
17 **the NRSP**

18 76. Riverside sold 29 Harley-Davidson motorcycles in violation of the NRSP – the 25
19 sales that were listed in the Notice of Termination plus the four additional violations Harley-
20 Davidson discovered post-termination. (RT Vol. II, 125:25-126:22; Exs. 156-159.)

21 77. Riverside also sold six Buell motorcycles to wholesalers in violation of Buell's
22 policy. (Exs. 28-33; RT Vol. VIII, 68:24-69:16.) Jay Dabney agrees that each of the sales in
23 question violated the NRSP. (RT Vol. VI at 143:2-8.)

24 78. Lester Veik admits the sales violated the NRSP. (RT Vol. VIII, 42:1-10.)

25 79. Lester Veik testified that “I knew what I was doing was wrong.” (RT Vol. VIII,
26 13:11; 42:1-10.)

27 80. Veik knew when he sold to Michel Kordas that he was going to ship his bikes
28 overseas, and that he would not be the end user. (RT Vol. VII, 198:15-21.)

1 81. Veik knew Svenning Juhl was going to ship overseas the four motorcycles he
2 purchased and that Juhl would not be the end-user. (RT Vol. VII, 199:20-200:7.)

3 82. Mike Slagle, the current sales manager, knew when he sold motorcycles to Le that
4 Le was going to ship them to Vietnam to sell them. (Ex. 309 at 47:1-6.)

5 83. Rory Swan, sales floor manager, and Troung's main contact at the dealership,
6 testified that Troung told him he was shipping the bikes to Vietnam. (Ex. 310 at 52:2-4.)

7 84. Veik, the General Manager, admitted knowing that Truong was a "wholesaler or
8 reseller" when Riverside made the sales to Truong. (RT Vol. VIII, 60:4-17.)

9 85. Veik called Jim Sorenson on March 14, 2011, before Harley-Davidson did any
10 audit, and confessed that Riverside had sold motorcycles to someone (Truong) who "resold" them.
11 (Ex. 171; RT Vol. III, 156:7-157:8; RT Vol. VIII, 90:9-16.)

12 86. Right after the audit, but before Harley-Davidson revealed its conclusions, Veik
13 wrote a note for Jay Dabney referencing the deals he did "that were wholesaled to brokers" and
14 told Jay Dabney that he had been "selling to wholesalers." (Ex. 46 at SFHD012480; RT Vol. VIII,
15 84:10-16.)

16 87. Lester Veik knew about the NRSP policy and knew at the time of the sales that
17 they violated the policy. (RT Vol. VII, 196:25-197:3, 197:13-15, 198:15-21.)

18 88. Mike Slagle knew at the time he made the sales that those sales were prohibited.
19 (Ex. 309 at 60:22-61:1, 65:12-66:5.)

20 **B. Riverside Violated its Contract in Order to Increase Sales**

21 89. Riverside made 29 sales (35 including the Buell sales) that honest dealers would
22 not have made. Mike Slagle testified that the violation sales to Kordas were made to "prime the
23 pump" in the hopes that Kordas would buy a "shit ton" of used motorcycles from Riverside. (Ex.
24 309 at 74:17-75:13.)

25 90. Lester Veik testified that he was trying to use the violation sales as a way to
26 "leverage" future used bike sales. (RT Vol. VIII, 9:19-10:8.)

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28

1 **C. Riverside's SWR Fraud**

2 91. Riverside sold motorcycles to persons such as An Toan Troung or Kevin Le, but
3 would report to Harley-Davidson that the motorcycles were sold to different people who had no
4 actual connection to the sale. (RT Vol. VIII, 46:14-47:5, 60:4-62:6.)

5 92. If Riverside had accurately reported, for example, 15 sales to Truong on the SWR
6 forms, that might raise a red flag with Harley-Davidson that Riverside was violating the NRSP.
7 (*See, e.g.,* Ex. 60.) Riverside therefore used other names in an attempt to avoid detection. (*See*
8 RT Vol. VII, 206:23-207:4.)

9 93. Lester Veik went to Glen Espinoza and other employees he "could trust" and asked
10 for names and addresses that he could use to show as the registered owners of the motorcycles at
11 issue. (RT Vol. VII, 206:23-207:4, Ex. 312, Vogeli Depo at 29:24-31:19, Ex. 308, Ramirez Depo
12 at 16:14-18:5).

13 94. Lester Veik asked many of Riverside's current management, including Espinoza,
14 Slagle, Wilmoth, and Vogeli for names because he "trusted" that they would participate in the
15 scam, which they did. (RT Vol. VIII, 42:11-44:12.)

16 95. Lester Veik told these employees that what they were doing violated the NRSP,
17 and the employees understood that what they were doing was trying to hide the violations from
18 Harley-Davidson, and they did it anyway. (RT Vol. VIII, 44:22-14.)

19 **1. Glen Espinoza**

20 96. Glen Espinoza is Riverside's current general manager and was at the time the
21 controller.

22 97. Glen Espinoza gave Lester Veik permission to falsely report a sale as being made
23 to him, when the purchaser was actually Le. (RT Vol. VIII, 47:15-48:9, 155:4-22.)

24 98. Glen Espinoza also gave Lester Veik permission to register a motorcycle to his
25 wife. (RT Vol. VIII, 47:15-48:9) and another to Espinoza's mother. (RT Vol. VIII, 49:24-50:7;
26 Vol. IX, 42:21-25.)

27 99. Glen Espinoza testified that he told his mother to throw away any mail she got from
28 Harley-Davidson. (RT Vol. IX, 20:19-21:3.)

1 100. On June 20, 2011, Glen Espinoza forwarded Lester Veik's "Narrative" to Harley-
2 Davidson by e-mail (in which Veik falsely blames then-sales manager, Darin Goodrich, for the
3 violations) even though Espinoza believed at the time that Veik's narrative was "dishonest." (RT
4 Vol. IX, 25:24-27:14.) Espinoza also presents as "important" the lie that Darin Goodrich was the
5 one who had the motive and opportunity to make the sales and went to great lengths to conceal
6 them. (Ex. 46; RT Vol. IX, 28:6-29:1.) Espinoza finally admitted he knew those words were "not
7 entirely correct" when he wrote them. (RT Vol. IX, 28:6-29:1.)

8 101. Veik asserted in his narrative, and Espinoza adopted the statement by forwarding
9 the narrative, that upper management of the dealership did not approve the sales, but Espinoza
10 testified that Lester Veik was "upper management" and that Espinoza believed at the time of the
11 email that Veik *did* know about the sales. (RT Vol. IX, 27:14-28:5.)

12 102. Glen Espinoza claimed on direct examination that he had "no responsibility over
13 the SWR process." (RT Vol. VIII, 122:2-6.) On cross examination, Espinoza admitted that that
14 statement was "[n]ot entirely" correct – he was in charge of the office that was responsible for
15 SWR processing. (RT Vol. IX, 17:6-21.)

16 **2. Mike Slagle**

17 103. Mike Slagle is Riverside's current sales manager.

18 104. Five motorcycles sold to Troung or Le (sales 1, 6, 8, 11, and 22) were SWR'd to
19 persons connected to Mike Slagle: two friends, his father, his brother, and the brother of his
20 fiancé.

21 105. Mike Slagle willingly provided those names so that motorcycles could be falsely
22 registered. (Ex. 309, Slagle Depo at 58:22-59:12, 57:19-58:21, 54:15-55:21, 56:23-57:15.)

23 106. In response to a June 2011 email from Jim Sorenson about violations of the NRSP,
24 Mike Slagle writes "Thank goodness. Because I know some out there that are doing this. We do
25 not, I know Les and Jay have been VERY firm about this for a long time." (Ex. 113.)

26 **3. Jason Wilmoth**

27 107. Jason Wilmoth is Riverside's F&I manager.

28

1 108. Jason Wilmoth provided Lester Veik with several names to falsely register
2 motorcycles because Veik asked him for them: Robert Miller (friend), Jeff Crawford (friend),
3 Kevin Coduti (friend), Daniel Zamora (brother in law), Mike Genoreau (school friend), and Louis
4 DeMonte (high school friend) and Peter Carlucci (Rory Swan's uncle). (RT Vol. VII at 140:17-
5 144:19.)

6 109. Jason Wilmoth knew without reading any policy that "putting someone else's name
7 on the form" was not right, but he did it anyway. (RT Vol. VII, 164:20-165:20.)

8 **4. Megan Vogeli**

9 110. Megan Vogeli, Riverside's general accountant (now assistant operations manager),
10 also supplied Lester Veik with names: Erica Haman (Vogeli's cousin) and Adam Stern (the
11 cousin's boyfriend) are falsely reported as buyers. (Ex. 312, Vogeli Depo at 29:24-30:17.)

12 111. Megan Vogeli knew what she was doing was wrong:

13 Q. Did you understand that to report the wrong names to
14 Harley-Davidson was to report to them inaccurately the activities
15 that were occurring at the dealership?

16 A. Yes.

17 (Ex. 312, 40:22-41:1.)

18 112. Lester Veik provided the remainder of the fake buyers himself: Rose Branham
19 (Veik's mother, used twice with different addresses) Rick Branham (Viek's stepbrother), Jerry
20 Branham (Veik's stepfather), Mary Cobb (tenant of Veik's mother), Ben Cobb (same), Rose
21 Martin (Veik's mother, using her maiden name), and Lester Veik, Sr. (Veik's father). (Ex. 311,
22 Veik Depo at 92:22-96:15; RT Vol. VII, 210:9-211:24.)

23 **D. SWR Noncompliance**

24 113. The SWR forms warn dealers that they may be terminated if they provide false
25 SWR forms. (*See, e.g.*, Ex. 92.)

26 114. Riverside is obligated to properly fill out an SWR form for each sale and have the
27 customer sign it. (Ex. 35, ¶7.)

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1 115. Before June 23, 2011, Riverside had no procedure or practice of actually
2 complying with this obligation. (RT Vol. VII, 124:1-126:1.)

3 116. Jason Wilmoth, the person whose job it was to fill out the SWR forms, testified that
4 "There was no procedure. Some would get signed, most of them didn't." (RT Vol. VII, 124:1-5,
5 135:22-25.)

6 **E. PDI Noncompliance**

7 117. Tom McGowan, who handles product liability cases as part of his job, testified that
8 a properly filled out PDI form is evidence that the process has been completed. (RT Vol. III,
9 125:23-126:23.)

10 118. Jay Dabney testified that filling out the PDI checklist is important to avoid "product
11 liability problems." (RT Vol. 122:22-123:6.)

12 119. The deal jackets for the sales at issue here (*See Exs. 1-33*) show that not a single
13 PDI form was completed.

14 120. Jason Wilmoth testified that, prior to the notice of termination, Riverside did not
15 have a practice of requiring that PDI forms were filled out. (RT Vol. VII, 125:23-126:1.) Rory
16 Swan provided the same testimony. (Ex. 310 at 46:14-18.)

17 **F. Fraudulent Ownership Experience Surveys**

18 121. Harley-Davidson sends surveys to buyers within 30 days of purchase, and the
19 results contribute to scores that each dealer gets, which scores can lead to awards and incentives.
20 (RT Vol. III, 189:4-190:2; RT Vol. VIII, 78:10-23.)

21 122. Two surveys appear to have been completed by Lester Veik's mother and father.
22 (Ex. 346.) Those surveys were completed by Veik himself, giving Riverside the highest numerical
23 scores possible, and writing in that Riverside was a "Great Dealership" and that Riverside "has the
24 best GM in Southern Cal." (RT Vol. VIII, 80:12-81:23.)

25 123. Lester Veik acknowledged that the phony high scores would help the dealership.
26 (RT Vol. VIII, 81:3-11.) As one example, they contribute to awards that are made to dealers. (RT
27 Vol. III, 189:4-190:2.)

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1 124. Two other surveys were completed by the tenants of Lester Veik's parents, Ben and
2 Mary Cobb, who never bought a motorcycle from Riverside. (Ex. 345.) Whoever filled out these
3 forms gave Riverside the highest numerical scores possible, and also wrote in that Riverside was
4 "better than we were told they would be, and we were told they were the very best," and that they
5 "can't say enough good things." (Ex. 345, RT Vol. VIII, 78:6-80:11.)

6 **V. The Dealer Principal's Asserted Ignorance Is Not an Excuse**

7 125. Jay Dabney was both dealer principal and General Manager for about four or five
8 years. (RT Vol. V, 105:21-106:3.)

9 126. Jay Dabney had a contractual obligation as dealer principal to be "personally
10 involved in the day-to-day management and operations of the dealership on a full time basis."
11 (Ex. 34 [Dealer Contract].)

12 127. Jay Dabney testified that his job was to work on the business, but not in it. (RT
13 Vol. V, 162:23; Vol. VI, 152:19-22; RT Vol. VIII, 39:17-21.)

14 128. Jay Dabney's only line of communication with the Riverside dealership was Lester
15 Veik. (Ex. 501; RT Vol V, 160:4-9 ["above is the ownership level ... and below are the
16 operations."].)

17 129. Jay Dabney testified that the general manager, Lester Veik, was the "source of
18 executing everything." (RT Vol. V, 159:17-24.)

19 130. Jay Dabney was so far removed from the day-to-day operations that his employees
20 called him the "Wizard of Oz" – they could hear his voice but never saw his body. (RT Vol. VI,
21 203:23-204:10; Ex. 305 [Goodrich Depo at 71:10-22].)

22 131. When Michael Slagle was asked how much time Jay Dabney spent in the sales
23 department, he laughed because Slagle "never saw him in the sales department." [Ex. 309 [Slagle
24 Depo at 15:21-16:2].)

25 132. In early 2009, Jay Dabney's dealership was found to have violated Harley-
26 Davidson's Minimum Advertised Price Policy ("MAP Policy"), governing advertising and
27 acknowledged in writing that "ignorance by the dealer principal has been explicitly denied as an
28 excuse" for violations. (Ex. 85.)

1 **1. If Dabney Had Performed His Contractual Obligations, He Would Have**
2 **Discovered the Violations**

3 **a. Deal Jackets**

4 133. Harley-Davidson advised dealers to spot check deal jackets: its 2000 Bulletin to
5 dealers said "Dealer Action Required...Perform your own personal review of sales records to
6 assure accuracy and completeness. Dealers in the past have found that even their most trusted
7 employees have participated in non-retail sales activity." (Ex. 53; *see also* Ex. 56 ["Inspect what
8 you expect."].)

9 134. Jay Dabney admitted he never checked any deal jackets related to the fraudulent
10 transactions. (RT Vol. VI, 228:16-229:9.)

11 135. Virtually all of the deal jackets contained bills of lading or other documents
12 evidencing the purchaser's intent to ship the motorcycles overseas. (*See, e.g.*, Ex. 1 at
13 HDR000085-86.)

14 136. The deal jackets also revealed that in every one of the violation sales, Riverside did
15 not charge sales tax, which would have only been permissible if the customer was not using the
16 bike in California. (Ex. 1 through 33; RT Vol. II, 117:13-24.)

17 137. The deal jackets did not contain any of the expected paperwork showing that the
18 purchaser registered the motorcycle. (Ex. 1 through 33; RT Vol. II, 121:3-6.)

19 **b. Traffic Log**

20 138. Riverside's operations manual lists the "daily thirteen" – thirteen essential functions
21 the dealer operator (Jay Dabney) must do everyday. (Ex. 93 at 2-4 through 2-5.) Second on the
22 list is "Traffic Log Review," because the Traffic Log is a critical document. (Ex. 93 at 2-5 and 5-
23 11; RT Vol. VI, 208:25-210:14.)

24 139. Riverside's Traffic Log Review indicated:

- 25 • A note in 2008 regarding Kevin Le (who bought four of the violation motorcycles)
26 that reads "KEVIN BUYS A LOT OF BIKES"
27 • A note in 2009 regarding Kevin Le that reads, in part, "HE BOUGHT 5 BIKES
28 FROM US IN 08 AND IS LOOKING TO DO A 2 BIKE DEAL IN THE NEXT
29 FEW DAYS."

- 1 • A note regarding Michel Kordas (who bought four of the violation motorcycles)
2 that reads "DOES NOT HAVE ANSWER FROM HIS BUYER YET," clearly
3 indicating that Kordas was not the end-user, but instead that Kordas was a
4 middleman for "his buyer."
- 5 • A 2009 note regarding Kordas that referenced "shipping crates."
- 6 • A 2009 note regarding Truong (who bought 15 of the violation motorcycles)
7 reading "BOUGHT 2 CASH." As Verduyn testified, cash sales may be an
8 indication of a suspicious sale (RT Vol. II, 96:11-14; 123:18-17), especially where
9 there are two sales to the same person.
- 10 • A 2009 note regarding Svenning (who bought four Buell motorcycles in violation
11 of Buell's policy) that references "2 PREV BIKES" and an attempt to sell him two
12 more bikes.
- 13 • A 2009 note regarding Svenning asking if they had more Buell motorcycles, where
14 the sales representative said he needed to "know how many he wants."
- 15 • A 2009 note regarding Kordas stating that Kordas brought a friend from Tahiti to
16 buy a bike.

17 (Ex. 118; RT Vol VI, 211:11-214:15.)

18 140. Jay Dabney testified that even buying three or four motorcycles in a short time
19 frame is very uncommon, and that Harley-Davidson had warned him to look out for multiple sales
20 to an individual. (RT Vol. VI, 212:6-213:10.)

21 **c. F&I Logs**

22 141. Riverside's operations manual also requires the dealer principal to review of the
23 F&I Log on a daily basis. (Ex. 93 at 2-5.)

24 142. The June 2009 F&I Log included consecutive entries that Riverside sold two
25 motorcycles to "Kevin Le." (Ex. 566 at SFHD17112.)

26 143. The July 2009 F&I Log included two cash sales to An Tron [sic] Truong within a
27 week or so. (Ex. 566 at SFHD017115.)

28 144. The August 2009 F&I Log included two consecutive entries showing two cash
sales to Vu Hoang Le. (Ex. 566 at SFHD017117.)

145. The September 2009 F&I Log included three consecutive entries showing cash
sales to An Toan Truong.

1 146. Jay Dabney admitted that if he read the September 2009 F&I log, he would have
2 noticed these three cash sales to An Toan Troung. (RT Vol. VI, 217:20-218:6.)

3 **2. Dabney Had Reason to Question Veik**

4 147. Glen Espinoza testified that he thought Lester Veik was an ineffective manager "all
5 along" and that others, including Darin Goodrich and Kristen Kunzman, did as well. (RT Vol. IX,
6 7:20-9:3.)

7 148. Darin Goodrich thought Lester Veik was "shady" and "crooked." (RT Vol. IX,
8 7:20-9:3.)

9 149. Kristen Kunzman, who is now assistant general manager (and was previously
10 manager of merchandising) thought Lester Veik was undisciplined, lazy, didn't care about people,
11 took credit for things he didn't deserve, and had an extreme temper. (RT Vol. IX, 7:20-9:3.)

12 150. Kristen Kunzman told Jay Dabney over a four or five year period that Lester Veik
13 was not an effective or productive manager. (Ex. 306, Kunzman Depo at 16:23-17:13.)

14 151. Marshall Dabney testified that around 2003, it became "more and more apparent"
15 to the Dabney family that Lester Veik may not be "the right guy" for the dealership and grew
16 toward the middle of the decade. (RT Vol. VII, 54:21-55:5.)

17 152. Lester Veik testified that the Dabney family was "unhappy with [his] performance"
18 around the time of the violations. (RT Vol. VII, 212:19-213:7.)

19 153. Jay Dabney told Lester Veik that a couple family members were looking to remove
20 Veik. (RT Vol. VIII, 41:2-25.)

21 154. Jay Dabney's wife wasn't happy with Lester Veik's performance. (RT Vol. VIII,
22 41:2-25.)

23 155. The Dabney family took a vote, and decided not to let Lester Veik have a stake in
24 the company. (RT Vol. VIII, 41:2-25.)

25 156. Jay Dabney's only method of checking up on Lester Veik was to ask Veik if he was
26 doing what he was supposed to do. (RT Vol. VI, 228:23-229:9.) Dabney knows that this is
27 insufficient:

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Q. Trust and verify. Isn't that something you should be doing? It's okay to trust people in life, but we got to verify what they are doing to make sure they are doing the job right.

A. Trust but verify is a -- yes.
(RT Vol. VI, 229:22-230:1.)

VI. Reasons for the NRSP and SWR and PDI Obligations

157. Jay Dabney agrees that the NRSP is a good policy; he says his dealership should comply with it not only because it is obligated to do so but also because it is important to dealers, the public and consumers, and is good for his business – it is better to sell to someone who will buy into the whole lifestyle and become a long term customer than to someone who will just resell the bike. (RT Vol. VI, 112:7-114:9.)

158. Riverside's expert agrees that Harley-Davidson should have the NRSP. (RT Vol. IX, 224:8-10; 216:8-16.)

A. Customer Safety
1. Proper Set-up and Testing Prior to Delivery

159. Tom McGowan explained that authorized dealers are contractually required to properly uncrate, set-up and test new motorcycles, prior to sale, per detailed manufacturer instructions, such as those in the 180 page PDI Manual, which goes only to authorized Harley-Davidson dealers. (RT Vol. III, 111:8-114:25.)

160. Prior to sale, an authorized dealer service representative must fill out and sign a PDI form, confirming that pre-delivery set-up and testing has occurred. (See Ex. 11 at HDR000182 [PDI form]; RT Vol. III, 124:3-125:22.)

161. Selling to resellers creates safety concerns because the grey market sellers do not have trained technicians, do not have access to the PDI manual, don't have access to the warranty system to correct anything that might be wrong, and, in a country like Vietnam where Harley-Davidson doesn't currently sell bikes, the grey marketer is likely to have less experience with Harley-Davidson motorcycles, and is therefore less likely to catch problems that an experienced technician would. (RT Vol. III, 118:24-119:15; 120:21-121:11.)

1 162. McGowan testified that he can say with a
2 high degree of engineering certainty that a population of motorcycles
3 that have not gone through a thorough predelivery inspection and set-
4 up by a trained technician an authorized dealership will have more
5 mechanical issues of all kinds throughout their collective lives than
6 will be the case with a similar population of bikes that were properly
7 set-up.

(RT Vol. III, 312:25-133:7.)

8 163. Instances of improperly set-up motorcycles by grey-marketers are often discovered
9 by Harley-Davidson's authorized dealers in the countries of export; often purchasers of grey
10 market motorcycles bring their improperly set-up motorcycles into the authorized dealer for
11 service. (See Ex. 291, Abry Declaration; Ex. 292, Guthrie Declaration.)

12 164. Harley-Davidson does not currently have an authorized dealer in Vietnam² where
13 the majority of the violation motorcycles were exported. (RT Vol. IV, 102:1-3.)

14 165. The experiences of authorized dealers in Thailand and Jordan with grey market
15 motorcycles are indicative of the problems that can and do occur when motorcycles are exported
16 and sold by non-authorized dealers. (RT Vol. V, 31:23-34:3.)

17 166. New large motorcycles legally imported into Vietnam are subject to import duties
18 and taxes totaling about 100% of the wholesale price, while the tax for parts is only 50%. (RT
19 Vol. IV, 102:25-103:11.)

20 167. A similar disparity exists in Thailand. (RT Vol. IV, 109:9-17.) Grey-
21 marketers/exporters in Thailand take advantage of this difference by buying new motorcycles
22 abroad, disassembling them, shipping the parts to Thailand, and reassembling them in those
23 countries. Harley-Davidson knows that this practice happens in Thailand, because the authorized
24 dealer in Thailand, has seen the results of this practice. (See Ex. 292, ¶16; RT IV, 114:10-115:1.)
25 Robert Guthrie, Harley-Davidson's authorized dealer in Thailand, testified that he has personally
26 seen evidence of disassembly and reassembly in that country:

27 ² Harley-Davidson does have plans to enter Vietnam, potentially in 2013. (RT Vol. IV, 102:4-11.)
28

1 I have seen parts and engines and frames in a grey market shop that
2 were disassembled and laid out for reassembly. We have on at least
3 two occasions received information from Thai customs on frames and
4 engines, VIN numbers on the frames, the frames the engine was on,
5 and the engines that had come in two different shipments that Thai
6 customs was trying to determine what they would be once they were
7 put back together.

8 (RT Vol. IV, 134:21-135:6.)

9 168. Disassembly and reassembly raises safety concerns, because, among other things,

10 There are a lot of critical adjustments, such as steering head bearing
11 adjustments, that have to be done just right in order for the bike to be
12 stable at speed and handle properly. There are any number of items on
13 the bike that are very dependent on the torque, on particular fasteners
14 being right in order for safe operation of the vehicle, making sure
15 things don't come apart, making sure parts don't just fall off the bike.
16 We spend an enormous amount of money at our vehicle assembly
17 plants and very sophisticated torque driving tooling. Millions, literally
18 millions of dollars of torque tools on every assembly line. And if
19 somebody is taking apart what we built and then shipping it to some
20 unknown to me person to put it back together, I have no idea what that
21 person is using in order to achieve torque control, or if he's even aware
22 of the importance of torque control in putting the bike back together.

23 (RT Vol. III, 115:16-116:7.)

24 **2. Proper Inspection and Explanation at Point of Delivery**

25 169. Harley-Davidson PDI procedures require proper inspection with end-user
26 purchasers at the point of delivery and proper explanation by authorized dealership personnel of
27 the owner's manual, warranties, and operational, emergency and safety features of the motorcycle.

28 (See PDI Manual, Ex. 129 §§3-15, 3-16.)

170. McGowan testified that most of Harley-Davidson's important safety warnings are
contained in the owners manual rather than, for example, on stickers on the bike. (RT Vol. III,
121:13-122:21.)

171. At point of sale, a dealership representative checks the boxes on the right side of
the PDI Checklist Form, which relate to these functions and the customer must sign the Form
confirming that "the dealer representative has disclosed all the information and instruction to me
as checked above." (Ex. 11 at HDR000182.)

1 172. Grey market resellers lack the authority, training, knowledge and ability to perform
2 this point-of-sale portion of PDI procedures. (*See, e.g.*, Ex. 291 [Abry Decl. ¶¶24 and 43].) As a
3 result, grey market customers lack the accurate and complete information that only authorized
4 Harley-Davidson dealers can provide and are, even more troubling often misinformed, such as
5 being told the motorcycles are covered by warranty. (Ex. 292 ¶19, 46; RT Vol.IV, 138:7-139:3.)

6 173. Riverside's expert, Edward Stockton, agreed that grey marketing results in
7 "imperfect information consequences," such that grey market customers may believe that the
8 motorcycle they purchased is covered by warranty when it is not, or that the product may not be
9 what the customer believes it to be. (RT Vol. IX, 217:6-218:17.)

10 174. Grey-marketers in Vietnam are permitted to display Harley-Davidson's distinctive
11 bar and shield logo, which can lead consumers to believe, mistakenly, that they are purchasing
12 from an authorized dealer, with all that comes with such a purchase, e.g. warranty, etc. (RT Vol.
13 IV, 110:14-112:20; Vol. V, 36:22-38:25; Vol. IV, 140:11-17 [describing same confusion in
14 Thailand].)

15 3. Recall Obligations

16 175. Harley-Davidson does a safety recall when it determines that an issue "poses an
17 unreasonable likelihood of injury or death." (RT Vol. III, 88:22-89:4.)

18 176. Harley-Davidson does a recall only after rigorous "hazard analysis" involving its
19 recall investigation committee and a group of engineers, including Tom McGowan. (RT Vol. III,
20 87:8-88:6.)

21 177. While Harley-Davidson cannot determine whether the particular motorcycles that
22 Riverside sold will suffer the failures which prompted the recalls and kill or injure the rider,
23 Harley-Davidson deals in populations of motorcycles. (RT Vol. III, 132:6-23.)

24 178. Harley-Davidson can determine with a "high degree of engineering certainty" that a
25 population of motorcycles with open recalls "will be involved in more crashes and will injure or
26 kill more people than will be the case with a similar population of bikes that have had these
27 identified issues addressed properly through the recall process." (RT Vol. III, 133:16-21.)

1 179. Two of the motorcycles that Riverside sold to wholesalers are subject to a very
2 serious recall campaign and have not had the repair performed. (Ex. 250, Reference Nos. 18 and
3 24; RT Vol. III, 23:23-25:8, 59:18-21.) That recall campaign (number 0139) involves a fastener
4 that holds the fender and front brakes. When the fastener fails, the front fender and brakes rotate
5 forward, with the front fender ending up underneath the front wheel, which "is all but certain to
6 cause a crash." (RT Vol. III, 97:20-99:1.) Tom McGowan testified that he is aware of no less
7 than five crashes that were caused by the issue covered by recall 0139. (RT Vol. III, 110:21-
8 111:4.)

9 180. The recall letter for the campaign (number 0139), dated June 2, 2009, provided
10 that "[I]n the interest of the safety of our mutual customers and as required by law," dealers "may
11 sell BUT NOT deliver any motorcycles [subject to the recall] until the remedy is completed." (Ex.
12 273.)

13 181. Riverside should not have delivered either of these bikes to anyone without first
14 performing the recall work to fix the issue. (RT Vol. III, 109:6-110:20; Ex. 273.) Riverside sold
15 and delivered the two bikes with this unremediated issue on September 23 and July 7 of 2009,
16 without regard for customers' safety and in violation of the law. (Ex. 250.) These two
17 motorcycles still have not had the necessary repair because Harley-Davidson sent recall notices to
18 Elia Ramirez's husband (Reference No. 18) and to Truong (reference No. 24), neither of whom are
19 the end-user of the bikes. Ramirez testified that she threw away all mail that Harley-Davidson
20 sent regarding the two motorcycles SWR'd to her and her husband. (Ex. 308, Ramirez Depo at
21 19:6-20:7.)

22 182. Another of the motorcycles sold to a wholesaler was subject to two safety recall
23 campaigns involving fuel tanks that could leak and cause a fire and a brake issue which could lead
24 to rear brake failure. (RT Vol. III, 100:12-102:9.)

25 **B. Customer Satisfaction**

26 **1. Ensuring the Proper Fit**

27 183. Harley-Davidson motorcycles are offered in a wide variety of makes and models,
28 with a wide variety of options and accessories. Customers will not be satisfied if they receive a

1 motorcycle which does not meet or is not set up to meet riding needs and physical needs of the
2 customer. (See Ex. 254.) Fit is a safety issue as well, e.g. where the motorcycle is set up such that
3 the rider's feet do not flatly meet the ground. (Ex. 254 at HDR020162.) Harley-Davidson
4 explained the importance of fit in a dealer bulletin about the NRSP:

5 Safety and satisfaction can be compromised where the dealer is not
6 able to assist in selecting right motorcycle, the fit that the individual
needs and abilities.

7 (Ex. 54.)

8 184. Grey-marketers do not have the large inventory and access to parts and accessories
9 that are necessary for proper fit. Frank Albrecht visited two grey marketers in Vietnam; one had
10 two Harley-Davidson motorcycles and the other had five.³ (RT Vol. 120:10-17.) Riverside has
11 dozens of models and an extensive parts and accessories department. (See Ex. 251-255.)

12 185. Fit and customer satisfaction is much more likely to be achieved when motorcycles
13 are sold in compliance with the NRSP at an authorized dealership. (RT Vol. V, 80:17-81:5.)

14 2. Product Programs

15 186. McGowan testified that a product program is like a recall, where Harley-Davidson
16 may discover an issue with its bikes that is not safety-related and is not compliance related, so
17 doesn't justify a safety or compliance recall campaign, but is nonetheless a "significant customer
18 satisfaction issue" that Harley-Davidson would like to address and correct before customers
19 become dissatisfied. (RT Vol. III, 90:20-91:1.)

20 187. Harley-Davidson relies on accurate SWR information to contact customers during a
21 product campaign to have the issue fixed for free. (RT Vol. III, 96:5-97:19.)

22 188. All of the Buell motorcycles and two of the Harley-Davidson motorcycles that
23 Riverside intentionally sold to wholesalers are subject to product campaigns. (Ex. 250.)

24 189. The Harley-Davidson motorcycles had a wire crimp issue which would cause the
25 engine light to go on and cause the motorcycle to idle erratically. (RT Vol. III, 95:13-96:4.)

26
27 ³ The VINs of all the motorcycles showed that they had been imported from the U.S. (RT Vol. III,
120:10-17.)

1 190. The Buell motorcycles had a charging system issue which could cause the battery
2 to drain and leave the rider stranded and unable to start his bike. (RT Vol. III, 103:22-104:24.)

3 191. These campaigns are "open," meaning that the work has not been done to correct
4 the problem. (RT Vol. III, 93:14-94:1, 103:12-104:24; Exs. 272, 276.) This is because the
5 product program letters were sent to friends and relatives of Wilmoth, Swan, and Vogeli. (Ex.
6 250.)

7 **C. Compliance with State, Federal and Foreign Laws and Regulations**

8 192. One purpose for the NRSP is to ensure compliance with state, federal and foreign
9 laws and regulations. (RT Vol. I, 125:3-126:2.) This includes compliance with laws related to
10 exporting and importing (such as the import tax and duties laws of Vietnam discussed above) and
11 laws related to proper vehicle "homologation."

12 193. "Homologation" refers to the manufacture of a vehicle to be in compliance with the
13 laws, regulations and standards of a particular state or country. (RT Vol. III, 131:8-11.) When
14 Harley-Davidson enters the Vietnam market as planned in 2013, the motorcycles it sells there will
15 be based on European specifications rather than the U.S./California motorcycles that Riverside
16 sold for export to Vietnam. (RT Vol. IV, 115:5-18.)

17 194. Different states and countries have widely different laws, regulations and standards
18 relevant to homologation. These affect things ranging from braking and lighting, to mufflers and
19 noise, to emissions systems. California, for example, has stricter emissions control laws than
20 other U.S. states. Harley-Davidson, therefore, specially builds motorcycles for California. (RT
21 Vol. I, 79:20-80:2; RT Vol. II, 14:15-18.)

22 195. By requiring that motorcycles be sold only by authorized dealers (who, as noted
23 above, have homologation related obligations) and not for shipment abroad (i.e., to jurisdictions
24 with unique laws, regulations and standards), the NRSP facilitates compliance with state, federal
25 and foreign laws. (See RT Vol. I, 125:3-126:2.)

1 **D. Integrity of Harley-Davidson's Worldwide Distribution Network**

2 **1. Product Allocation**

3 196. The shipment of product homologated and allocated for one geographic area into
4 another interferes with Harley-Davidson's carefully determined allocation decisions, and denies
5 customers in the markets from which product is shipped vehicles specially homologated for them.
6 Davidson's production and allocation policy is to supply one less vehicle than total demand. (RT
7 Vol. I, 79:6-80:20.)

8 197. In California, supply and demand for motorcycles is tight due to the State's unique
9 homologation requirements, where "dealers are allocated units from a separate pool of available
10 production consisting of motorcycles built to California state law specifications." (Ex. 259.)

11 198. Riverside's sale of 25 Harley-Davidson and six Buell motorcycles intended for
12 retail end-users in California has denied California consumers these motorcycles, because due to
13 tight supply and demand, these motorcycles built and allocated for California would have been
14 sold here. The same problem arises in any jurisdiction from which grey-market sales are exported.
15 (See RT Vol. I, 79:6-80:20; Ex. 259.)

16 **2. Interference With Dealer Network Expansion**

17 199. Harley-Davidson depends upon the efforts and investments of its authorized dealers
18 to sell product and promote the brand. This is true both domestically and internationally. (See RT
19 Vol. I, 82:14-83:7; Ex. 163 at ¶ 23.) In order to maintain an effective and mutually-beneficial
20 network of dealers, Harley-Davidson must be able to promote investment by its authorized
21 dealers. (See RT Vol. IX, 216:17-217:5.)

22 200. Most of Riverside's non-U.S. sales went to Vietnam, a county with no current
23 authorized dealer, but one that Harley-Davidson plans to enter in 2013. (RT Vol. IV, 102:1-11,
24 154:12-20.)

25 201. Export sales could impede Harley-Davidson's ability to effectively enter markets
26 such as Vietnam, further obstructing the growth of the distribution network. In particular, the
27 presence of grey-market dealers makes the Vietnamese market less attractive for qualified dealer
28

1 prospects, especially since authorized dealers will be expected to invest in an appropriate
2 dealership facility, tools, and training. (RT Vol. V, 34:4-35:16; Ex. 293 at ¶11.)

3 202. The presence of grey market motorcycles that are not properly homologated for the
4 market could also foster the belief that Harley-Davidson does not respect Vietnamese regulations.
5 In turn, this could damage Harley-Davidson's reputation in Vietnam and interfere with its
6 relationship with the Vietnamese government. (RT Vol. V, 67:24-68:5; Ex. 163.)

7 203. Grey marketing undermines the efforts of authorized dealers. It negatively impacts
8 the Harley-Davidson brand, which authorized dealers strive so hard to promote. For example, the
9 Harley-Davidson brand is adversely affected by the problems discussed above, such as improper
10 disassembly and reassembly, improper or non-existent PDI, poorly or mis-informed end-users,
11 end-users who lack recall and other important information, and the like. Even though these
12 problems result from the actions of grey-marketers (and the enabling actions of dealers such as
13 Riverside), grey-market purchasers are likely to blame the brand for these problems, as much as,
14 or more than, the grey-marketers:

15 Regardless of the process by which these gray-market Harley-
16 Davidson motorcycles are brought into foreign markets, they all carry
17 the Harley-Davidson brand and are marketed to the ultimate consumer
18 as such. Therefore, consumers within the gray-market still hold the
19 highest expectations for their Harley-Davidson motorcycle with
20 regards to both performance and safety.

21 (Ex. 163.)

22 204. "Free-riding" refers to a phenomenon in distribution in which a low investment
23 seller exploits the efforts of a high investment seller. Consumers obtain information and form
24 brand opinions based on the efforts of the high investment seller and then purchase the product
25 more cheaply from the low investment cost seller. The low investment seller "rides for free" off of
26 the promotion efforts of the high investment seller. Riverside's expert agrees that free riding is a
27 problem for authorized dealers. (RT Vol. IX, 216:17-218:5.)

28 205. Due to free riding and other questionable practices (such as the disassembly and
reassembly of motorcycles in Southeast Asia to avoid taxes and tariffs), grey-marketers often are
able to undersell authorized dealers. This makes it more difficult for authorized dealers to recoup

1 their substantial investments and succeed against inter-brand competitors. (Ex. 293, ¶¶6-11; Ex.
2 163.)

3 206. It also threatens Harley-Davidson's ability to find persons willing to make the
4 investments necessary to establish a presence in new markets (such as Vietnam) in which there
5 currently is no Harley-Davidson dealer, but where the Company has plans to enter. (Ex. 293 ¶6;
6 Ex. 163.) In the long run, grey marketing threatens to disincentivize authorized dealers from
7 undertaking obligations and making necessary investments necessary to promote the brand. This
8 threatens the entire distribution network, both in developing markets which Harley-Davidson
9 intends to enter, such as Vietnam, and elsewhere, *e.g.*, domestically and in California.

10 **VII. Investments in the Dealership**

11 207. The Dabney family purchased the dealership in 1974. (RT Vol. V, 102:7-12.)

12 208. Protestant offered no evidence regarding what the Dabney family paid for the
13 dealership, and whether that purchase price included a component for goodwill. The current
14 facility was opened in 2002. (RT Vol. V, 122:12-15.)

15 209. The Dabney family spent \$4 million on the current facility (real estate and
16 building) about 10 years ago. (RT Vol. VI, 77:25-78:16.)

17 210. During that same 10 year period, the Dabney family has taken over \$12 million out
18 of the dealership in the form of "owner compensation." (Ex. 141.) They have taken out over three
19 times what they put into the business.

20 211. Dabney claims that the real property and building are still worth \$4 million if his
21 family chose to sell it to another Harley-Davidson dealership, which, of course, there is nothing
22 preventing them from doing.⁴ (RT Vol. Vol. VI, 78:17-21.)

23 **VIII. Riverside's Customer Survey Data.**

24 212. Customer survey index (CSI) data shows that on key metrics, Riverside is an
25 underperforming dealership, demonstrating that it is not reasonably providing for the needs of

26 _____
27 ⁴ Both Kennedy and Stewart testified unequivocally that Harley-Davidson intends to place a new
28 dealer in the area if Riverside is terminated. (RT Vol. I, 174:16-175:6; Vol. IV, 73:3-75:20.)

1 consumers in the area. Specifically, Riverside's most recent service scores show that it is in steep
2 decline and below the comparables its district, region and the nation.⁵ (Ex. 349.) For example,
3 for the "overall dealership experience," Riverside fell below all comparable scores in the second
4 quarter of 2012. (Ex. 349.) The same is true of the category "recommendation of service
5 department." (Ex. 349.) In the category of "likelihood of recommending H-D to a friend or
6 relative," Riverside's scores are again falling and are below all comparables. (Ex. 349.)

7 213. Jay Dabney agrees that the success of a Harley-Davidson dealership depends "to a
8 large extent on customer satisfaction" with its service department and that referrals are good
9 sources of business, but his dealership is lagging behind in these important categories. (RT Vol.
10 VI, 133:13-134:24.)

11 214. Exhibit 549 is the December 2011 "Dealer Retail Excellence Report" for Riverside,
12 the most recent such report in evidence. It shows that the dealership is not meeting the needs of its
13 customers. On the 18 month CSI survey,⁶ Riverside ranked 467 out of 678. Riverside's ranking
14 on the 18 month survey is similarly bad in prior months. (*See, e.g.*, Ex. 548-545.)

15 215. These negative numbers all reflect the dealership's decline since Glen Espinoza
16 took over. Jay Dabney replaced Lester Veik not because of the violations (Veik was gone before
17 Dabney found out about them) but because Riverside outgrew Vieik's "skill set." (RT Vol. VI,
18 9:19-10:8.) But Dabney replaced him with someone, Glen Espinoza, who appears to have an even
19 worse skill set.

20 216. In addition, the CSI data is inflated in Riverside's favor due to the fraudulent
21 survey responses submitted by Riverside from the fake buyers. (Exs. 344-346.)

22
23
24
25 ⁵ Riverside's expert did include some aggregate CSI data but conveniently excluded the more
recent low scores. (Ex. 571.)

26 ⁶ This is the survey that is sent out about 18 months after the purchase of the bike, and measures
27 the customers' experience with the dealership overall (e.g. service, repair, warranty, upgrades, etc.)
during the 18 months following purchase. (RT Vol. IV, 72:8-73:1.)

1 PROPOSED DECISION

2 **IX. The Evidence Establishes Good Cause for Termination**

3 217. The evidence establishes good cause to terminate Riverside's Dealer Contract
4 under the factors set forth in Cal. Veh. Code Sec. 3061.

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

7 218. Riverside's expert testified that with respect to section 3061(a), Riverside is
8 "essentially an average performing dealership" based on the metric of sales compared to market
9 opportunity. (RT Vol. IX, 175:1-176:3.) But the evidence establishes that the amount of business
10 that Riverside transacts according to this metric is headed down. (See Ex. 571 at SFHD 017865-
11 66 [showing decline].) As a result, this factor favors termination.

12 **B. Sections 3061 (b) and (c): Investment Necessarily Made and Obligations**
13 **Incurred by the Franchisee to Perform Its Part of the Franchise; Permanency**
14 **of the Investment**

15 219. Given that Jay Dabney has agreed that the real property is still worth \$4 million
16 (which is the amount the family paid for the property), and given that the family had taken over
17 \$12 million out of the business since it bought this property, if the family sold the property there
18 would be absolutely no loss at all – they would get their entire \$4 million back on top of the \$12
19 million they have already received.

20 220. Riverside's expert Carl Woodward agreed that there would be no loss if the
21 property were sold to another dealer. (RT Vol. IX, 113:12-22.)

22 221. Similarly, the Dabney family could lease the property to a new Harley-Davidson
23 dealer. Dabney testified that Riverside was paying market rent (RT Vol. VI, 109:10-22) and there
24 is nothing to suggest that the family could not obtain market rent from a new tenant.

1 222. Mike Kennedy testified that he has dealers "right now" that are interested in
2 Southern California locations. (RT Vol. I, 177:4-15.)⁷

3 223. Angela Stewart testified that if Riverside closed on a Friday, the new dealer could
4 open on a Saturday. (RT Vol. IV 74:19-21.)

5 224. There is no credible evidence that the Dabney family will suffer any so-called real
6 estate loss at all.

7 225. Any supposed loss of goodwill is not relevant because Section 3061 requires the
8 Board to consider "investments necessarily made" and the "permanency" of such investment.

9 226. The \$4 million goodwill number is not an "investment made" by the dealership; it
10 is an alleged asset. An example of a goodwill "investment made" might be what the Dabney
11 family paid, if anything, for goodwill value when they purchased the dealership. Such evidence
12 often is presented in Board hearings. But Protestant offered no such evidence here.

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

16 227. Harley-Davidson has established that violations of the NRSP are injurious to the
17 public so it is beneficial to the public welfare to terminate violating dealers such as Riverside.

18 228. Harley-Davidson has also established that Riverside's violations of its SWR and
19 PDI obligations also have caused injury to the public. Replacing Riverside with a dealer that will
20 meet its SWR and PDI obligations will be beneficial to the public interest.

21 229. Customers would not be inconvenienced by the temporary closure of the Riverside
22 point. First, the point could remain open if the Dabney family LLC agrees to rent its facility to a
23 new dealer. Second, Riverside sells more than half of its motorcycles outside of its territory – in
24 the most recent report, it made 61% of its sales outside its territory. This means that the majority
25

26 ⁷ Harley-Davidson does not discuss particular dealership locations with potential new dealers
27 without permission from the current dealer. The Dabneys have not given Harley-Davidson
28 permission to discuss their dealership location.

1 of its customers are actually already located closer to another dealership. (RT Vol. IV, 75:11-20;
2 80:18-25.)

3 230. Finally, Riverside's conduct has caused a revenue loss to the State of California.
4 Steve Verduyn prepared an analysis of the revenue that the State would have received if the
5 purchasers of the motorcycles at issue had in fact been end-users, as Riverside represented them to
6 be. (Ex. 270, 271.) Verduyn concluded that the State would have received \$38,671 in fees and
7 taxes. (Ex. 270, SV Vol. III, 39:21-42:23.)

8 **D. Section 3061(e): Whether the Franchisee Has Adequate Motor Vehicle Sales**
9 **and Service Facilities, Equipment, Vehicle Parts, and Qualified Service**
10 **Personnel to Reasonably Provide for the Needs of the Consumers for the**
11 **Motor Vehicles Handled by the Franchisee and Has Been and Is Rendering**
12 **Adequate Services to the Public**

13 231. Riverside offered little or no evidence on this factor. Riverside's expert, Edward
14 Stockton, "presumed" this factor was uncontested. (RT Vol. IX, 169:24-170:8.)

15 232. Based on the CSI data, Riverside is not meeting the needs of the customers in its
16 area. Most of its sales are to customers outside of its area and it gets low CSI scores from the
17 customers that it does service.

18 233. Riverside's poor service performance was no doubt contributed to by Riverside's
19 financial problems. As reflected in Ex 348, in 2011 Riverside was in substantial default of its
20 financial obligations under its agreement with Harley-Davidson Financial Services (Riverside was
21 past due in the amount of \$780,200.44) and "Sold out of Trust" in excess of \$500,000.
22 Riverside's financial problems were likely a function of its poor management, and meant that
23 Riverside was simply unable to perform all of its obligations as a dealer.

24 234. Given Riverside's overall poor financial performance and its poor CSI survey
25 scores, this factor weighs in favor of termination.

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

28 235. Riverside has failed to fulfill its warranty obligations to Harley-Davidson by
submitting fraudulent SWR information. This violates paragraph F(3) of its Dealer Contract
which requires it to:

1 register with Seller all Harley-Davidson Motorcycles...sold by
2 Dealer for purposes of establishing warranty protection, providing
3 essential information in the event of a recall of Harley-Davidson
4 Products...all in accordance with Seller's written procedures from
5 time to time.

6 (Ex. 34.)

7 236. It also violates the NRSP and the instructions on the SWR Forms, both of which
8 expressly require the submission of accurate SWR information, on penalty of possible termination.

9 237. Riverside's conduct expressly violates California Vehicle Code § 11713.1(u) which
10 required Riverside to provide Harley-Davidson with accurate warranty registration information.
11 This direct violation of California law must be taken into consideration when applying the factor
12 that deals with Riverside's compliance with its warranty obligations.

13 238. Customers who ended up owning the motorcycles that Riverside sold to exporters
14 for resale have been denied warranty service that they are entitled to. As set forth at length above,
15 they have open recall and product campaigns that have not been performed because Riverside's
16 conduct caused them not to receive notice.

17 239. Finally, Riverside's poor CSI service scores support the conclusion that Riverside
18 is not meeting its warranty service obligations to customers and to Harley-Davidson.

19 **F. Section 3061(g): Extent of Franchisee's Failure to Comply With the Terms of**
20 **the Franchise**

21 240. The factor most at issue here is the extent of the franchisee's failure to comply with
22 the terms of the franchise, which has been described extensively above.

23 241. In terms of relevant contract provisions, Riverside violated paragraph 1(A) of its
24 Dealer Contract which grants Riverside the right to purchase and resell vehicles at retail, and the
25 following paragraphs of the General Conditions of Sales and Services incorporated into the
26 contract:

27 ¶B(6), which provides that it shall not sell for resale to non-retail
28 customers and that it shall comply with policies and position
statements in that regard;

¶F(2), which requires compliance with the PDI and customer
signature requirements discussed in this brief;

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¶F(3), which requires compliance with SWR-related requirements discussed in this brief;

¶M(4)(b), which permits termination for, among other things, the submission of information that contains material misrepresentations;

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

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

242. The evidence shows that Riverside intentionally and repeatedly violated its contract in order to earn additional profits from further sales to the grey market resellers of both new and used motorcycles.

243. The evidence shows that the dealership knew it was violating, the NRSP and the contract, understood it was falsifying SWR forms to cover it up, and did it anyway.

244. The dealership also regularly failed to meet its PDI obligations under the Dealer Contract.

245. Because of its intentional, egregious breaches of the Dealer Contract, this factor overrides any other considerations that might fall in Riverside's favor.

FINAL CONCLUSION

Based on the application of the factors under § 3601, Harley-Davidson should be permitted to terminate its Dealer Contract with Riverside and the Protest is overruled.

DATED: June 8, 2012

COOPER, WHITE & COOPER LLP

By: 
Robert L. Ebe
Scott M. Mcleod
Attorneys for Respondent HARLEY-
DAVIDSON MOTOR COMPANY

PROOF OF SERVICE

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CASE NAME: In the Matter of the Protest of
RIVERSIDE MOTORCYCLE, INC. dba
SKIP FORDYCE HARLEY-DAVIDSON
v.
HARLEY-DAVIDSON MOTOR COMPANY
COURT: STATE OF CALIFORNIA, NEW MOTOR VEHICLE BOARD
CASE NO.: Protest No.: PR-2310-11

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

On June 8, 2012, I served the following document(s): **HARLEY-DAVIDSON MOTOR COMPANY'S PROPOSED FINDINGS OF FACT AND DECISION** on each of the parties listed below at the following addresses:

New Motor Vehicle Board Attn: Legal 1507 21 st Street, Suite 330 Sacramento, California 95811	Telephone: (916) 445-1888 Facsimile: (916) 323-1632 Email: nmvb@nmvb.ca.gov
Halbert B. Rasmussen Franjo M. Dolenac Crystal Yagoobian Manning, Leaver, Bruder & Berberich 5750 Wilshire Blvd., Suite 655 Los Angeles, California 90036	Attorneys for Protestant Riverside Motorcycle, Inc., dba Skip Fordyce Harley- Davidson Telephone: (323) 937-4730 Facsimile: (323) Email: hasmussen@manningleaver.com fdolenac@manningleaver.com cyagoobian@manningleaver.com

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

BY ELECTRONIC DELIVERY: On the date specified above, by or before 4:00 p.m., I transmitted from electronic notification address rcarpenter@cwclaw.com, a true copy of the above-referenced document(s) to the notification address(es) identified in the above service list, each of which electronic notification address is the last electronic notification address given on any document filed in the cause by the party served. The described transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is

///

1 true and correct.

2 Executed on June 8, 2012, at San Francisco, California.

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5 Ruth Carpenter

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