

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

STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

RIVERSIDE MOTORCYCLE, INC. dba SKIP
FORDYCE HARLEY-DAVIDSON,

Protestant,

v.

HARLEY-DAVIDSON MOTOR COMPANY, a
Corporation,

Respondent.

Protest No. PR-2310-11

DECISION

At its regularly scheduled meeting of August 22, 2012, the Public Members of the Board met and considered the administrative record and Proposed Decision in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 22nd DAY OF AUGUST 2012.


BISMARCK OBANDO
Vice President
New Motor Vehicle Board

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2 Sacramento, California 95811
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CERTIFIED MAIL

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5 STATE OF CALIFORNIA
6 NEW MOTOR VEHICLE BOARD
7

8 In the Matter of the Protest of
9 RIVERSIDE MOTORCYCLE, INC. dba SKIP
FORDYCE HARLEY-DAVIDSON,
10
11 Protestant,
12
13 v.
HARLEY-DAVIDSON MOTOR COMPANY, a
Corporation,
14
15 Respondent.

Protest No. PR-2310-11

PROPOSED DECISION

16 **PROCEDURAL BACKGROUND**

17 **Statement of the Case**

18 1. By letter dated June 23, 2011, Harley-Davidson Motor Company, a Corporation (“Harley-
19 Davidson Co.” or “Respondent”), gave notice to Riverside Motorcycle, Inc. dba Skip Fordyce Harley-
20 Davidson (“Riverside” or “Protestant”) pursuant to California Vehicle Code section 3060¹ of its intention
21 to terminate Riverside’s Harley-Davidson Motorcycle Dealer Contract. The New Motor Vehicle Board
22 (“Board”) received the notice on June 27, 2011.

23 2. The notice states in pertinent part the following reasons for termination:

24 [An] audit [conducted by Harley-Davidson Co. on or about April 20, 2011]
25 revealed approximately twenty-five (25) violations of [its] non-retail policy since July
26 2009, a period of almost two ... years.... The violations include generally sales to resellers
27 such as non-authorized dealers and/or exporters, and/or providing false SWR [sales and
warranty registration] information regarding customers, among other things.

28 [T]he violations include many false reports on SWR forms of customer names and
addresses, as well as inadequate completion. Other required documentation was missing

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

1 for many transactions, such as PDI [Pre-Delivery Inspection] forms, none of which were
2 completed and/or signed properly by dealership personnel and the purchaser. There was no
3 proof of sales taxes paid or registration obtained for any of the vehicles. There are many
4 false reports of vehicles which [Riverside's] documents indicate were intended to be
shipped to locations outside the United States. These vehicles were not delivered directly
to end user consumers at [the Riverside dealership]. You sought and obtained incentives to
which you were not entitled in these regards.

5 In sum, [Harley-Davidson Co.'s] audit revealed at least twenty-five (25) violations
6 of Harley-Davidson policies and procedures, and [Riverside's] Dealer Contract. (Ex 63)

7 3. On July 20 2011, Riverside filed a timely protest.

8 4. A 10-day hearing on the merits of Protest No. PR-2310-11 was held March 5-8, 2012,
9 March 12-16, 2012, and March 19, 2012, before Administrative Law Judge Victor D. Ryerson.

10 **Pre-Hearing Motions and Orders**

11 5. Protestant's Request to Cross-Examine Affiants Bob Guthrie, Claude Abry, and Nick
12 Colledge telephonically, was granted.

13 6. The matter was submitted on July 18, 2012.

14 **Parties and Counsel**

15 7. Protestant is an authorized Harley-Davidson dealership located at 7688 Indiana Avenue,
16 Riverside, California. (V, 115; Ex 34)² It is owned by the Ida Dabney Trust (50%); Jay Dabney
17 (12.5%); Ty Dabney (12.5%); Marshall Dabney (12.5%); and Susan Dabney (12.5%). (VIII, 41-2)
18 Protestant is a "franchisee" within the meaning of Sections 331.1 and 3060(a)(1).

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

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

23 10. Respondent is represented by Robert L. Ebe and Scott McLeod of Cooper, White &
24 Cooper LLP, 201 California Street, 17th Floor, San Francisco, California, and Brian W. McGrath, of
25 Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, Wisconsin.

26 ///

27 _____
28 ² All citations to testimony refer to the volume (Roman numeral) and page number(s). Other citations refer to exhibit (Ex) numbers.

1 **Summary of Witnesses' Testimony and Exhibits Introduced at Hearing**³

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

3 11. Protestant called the following witnesses: Judson V. Dabney, II ("Jay"), dealer principal
4 and one of the owners of Riverside; Marshall Dabney, Jay's younger brother and Chief Technical Officer
5 and partial owner of Riverside; Megan Palmer, Riverside's General Ledger Accountant; Jason Wilmoth,
6 Riverside's F & I Manager; Lester Veik, former Riverside General Manager; Glen Espinoza, Riverside's
7 General Manager; and expert witnesses Carl Woodward, CPA, and Edward Stockton of The Fontana
8 Group.⁴

9 12. Protestant submitted deposition testimony of the following witnesses, in whole or in part,
10 as exhibits: Brian Martin, Jim Sorenson, Elia Ramirez, Michael Slagle, Rory Swan, and Megan Vogeli.

11 **Respondent's Witnesses' Testimony and Exhibits**

12 13. Respondent called the following Harley-Davidson Co. employees as witnesses: Michael
13 Kennedy, Vice President of the North American Region; Steve Verduyn, Manager, Dealer Credit and
14 Compliance; Thomas McGowan, Principal Engineer and technical lead of the Recall Investigation
15 Committee; Jim Sorenson, District Manager; Angela Stewart, Director of Regional Sales Operations,
16 Western Region; and Frank Albrecht, Director for Sales and Business Development-Asia Direct Markets.
17 Respondent called Dr. Dominique Hanssens, Professor of Marketing at the UCLA Anderson School of
18 Management, as its expert witness.

19 14. Respondent submitted as an exhibit the declaration of Robert Guthrie, Dealer Operator of a
20 Harley-Davidson dealership in Bangkok, Thailand, who was cross-examined telephonically during the
21 hearing.

22 15. Respondent submitted the deposition testimony of the following witnesses, in whole or in
23 _____

24 ³ Three hundred eighty-six exhibits were offered by the parties, and all were received in evidence. Most of the exhibits had
25 been pre-marked for identification, as required by the pre-hearing order. Exhibits numbered 1 through 201 were deposition
26 exhibits, and were marked as joint hearing exhibits with the stipulation that any exhibit referred to in the testimony would be
27 deemed admitted unless there were an objection interposed. All exhibits numbered 250 through 499 were offered by
28 Respondent, and all exhibits numbered 500 and above were offered by Protestant. The numbers marked on the exhibits do not
reflect the order in which they were offered or admitted into evidence at the hearing. Individually numbered exhibits may
contain several different but related documents.

⁴ In addition to these witnesses, Protestant intended to call Darin Ray Goodrich, but he was injured in a vehicular accident
during the course of the hearing, and was unavailable to testify. (IV,143) His deposition testimony is included in the record.
(Ex 305)

1 part, as exhibits: Lester Veik, Glen Espinoza, Darin Goodrich, Megan Palmer, Elia Ramirez, Michael
2 Slagle, Rory Swan, Megan Vogeli, and Jason Wilmoth.

3 **ISSUES PRESENTED**

4 16. The ultimate issue presented in this matter is whether good cause has been established for
5 terminating Riverside's franchise with Harley-Davidson Co. Pursuant to Section 3066, subdivision (b)
6 Harley-Davidson Co. has the burden of proof to establish good cause for the termination. Section 3061
7 requires that the Board consider the "existing circumstances" in determining whether Harley-Davidson
8 Co. has established good cause, including but not limited to all of the following:

9 (a) Amount of business transacted by the franchisee, as compared to the business available to
10 the franchisee;

11 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
12 of the franchise;

13 (c) Permanency of the investment;

14 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
15 or replaced or the business of the franchisee disrupted.

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

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

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

22 17. Consequently, the issues in this matter include those defined by evidence concerning these
23 good cause factors, as well as other existing circumstances. The Board must make a determination on
24 each of the enumerated good cause factors, and on any other issues raised by the existing circumstances
25 relating to this matter.

26 **RESPONDENT'S CONTENTIONS**

27 18. Respondent contends that good cause exists to terminate Riverside's franchise because,
28 over a 13-month period, Riverside sold 29 new motorcycles in violation of Respondent's Non-Retail

1 Sales Policy for Pleasure Vehicles ("NRSP"). Respondent further contends that Protestant's failure to
2 perform Pre-Delivery Inspections ("PDI") and Protestant's filing of false Sales Warranty Registration
3 ("SWR") information are violations of the franchise as set forth in Respondent's General Conditions of
4 Sales and Service.

5 **PROTESTANT'S CONTENTIONS**

6 19. Protestant contends that, although it violated Respondent's NRSP and failed to perform
7 PDI and SWR responsibilities as disclosed by the April 20, 2011 audit, this circumstance does not
8 constitute good cause for termination of its franchise in light of other circumstances surrounding this
9 occurrence. Specifically, Protestant contends that the violations at issue were the result of a deliberate
10 scheme by its former general manager, who made the prohibited sales to further his own personal
11 financial interests, and deliberately concealed them from the dealer principal. Protestant consequently
12 contends that it was effectively unaware of the prohibited sales at the time of their occurrence and until
13 they were revealed to its owners after the sales activity stopped many months before the audit.

14 20. Protestant further contends that good cause does not exist for termination, because the
15 number of prohibited sales was relatively small in relation to its total volume of motorcycle sales, and
16 because the duration of the activity was limited. Protestant contends that termination is an unreasonably
17 harsh sanction in light of the availability of other, less drastic sanctions under the terms of the dealer
18 agreement, and because termination would be injurious to the public welfare. Finally, Protestant
19 contends that good cause does not exist because it repaid the incentives it had received for the prohibited
20 non-retail sales when it received the termination notice, and because it has taken various remedial
21 actions to address its failure to perform and prevent the recurrence of sales transactions that would
22 violate the NRSP, and its failure to complete paperwork and furnish reports to Respondent.

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1 **FINDINGS OF FACT**⁵

2 **Preliminary Findings**

3 21. Harley-Davidson Co. was established in 1903 and manufactures, markets, and distributes
4 heavyweight motorcycles (651 cc and above) and associated products. (I, 66-67) Its stock is publicly
5 traded. (I, 75-76)

6 22. Harley-Davidson Co.'s brand is a premium brand, and its products are priced accordingly.
7 (I, 66; V, 19) Its production policy is to match supply closely with demand to avoid commoditization of
8 its motorcycles, as reflected by its business philosophy to produce one less motorcycle than demand. (I,
9 80; V, 39, 90-91)

10 23. Harley-Davidson Co. sells its products in the United States, and in many countries around
11 the world. (I, 76) Approximately 70% of its motorcycles are sold in North America, 65% in the United
12 States. The remaining 35% are sold in countries other than the United States and Canada. (I, 66, 78)

13 24. Harley-Davidson Co. has a very strong branded identity that is reinforced by the company
14 in a variety of ways. For example, it has its own line of "Motorclothes" and other branded accessories
15 that are sold at retail exclusively through its dealer system. (I, 74; Ex 255) It offers its customers
16 membership in HOG its Club (derived from the initials of "Harley Owners Group") that sponsors rides
17 and provides owners with relevant information. (I, 93-94) In various ways, through special events and
18 activities, it strengthens the perception that Harley owners are a unique group set apart from the general
19 public in terms of their values and experiences. The company emphasizes that its brand represents a
20 distinct lifestyle, and regards it a very important asset. (I, 82-83; V, 26)

21 25. The company sells its products exclusively through a network of dealers. (I, 81) It has
22 approximately 1,300 dealers worldwide, of which approximately 700 are in the United States, including
23 50 in California. (I, 82)

24
25 ⁵ References to testimony, exhibits or other parts of the record are intended to be examples of evidence relied upon to reach a
26 finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to
27 indicate an exclusive relationship to an issue denoted by the topic heading. The Board may apply a particular finding to any
28 "existing circumstance" or "good cause" factor under Section 3061.

Citations to the record are for convenience of the Board. The absence of a citation generally signifies that the underlying
facts are foundational or uncontested, or that the finding is an ultimate fact finding of the Board based upon other facts in the
record and reasonable inferences therefrom.

1 26. Riverside has been under the continuous ownership of the Dabney family since 1974. (V
2 102) It is the successor to a Harley-Davidson Co. dealership established by Skip Fordyce, a pioneering
3 Southern California motorcycle dealer and well-known stunt rider, and Riverside continues to use Skip
4 Fordyce's name to identify its dealership. (V, 106-107, 109)

5 27. Riverside's founder, Judson ("Jud") Dabney, purchased the dealership from Skip Fordyce
6 in 1974. (V, 102) At the time it was a Honda motorcycle dealership, as well as a Harley-Davidson Co.
7 dealership. (V, 109-110) After purchasing the dealership, Jud Dabney relocated the store from 14th and
8 Main Streets in downtown Riverside to a new 14,000 square foot facility near an evolving auto mall on
9 Indiana Avenue in the city. (V, 106-111) In 1993 Riverside invested \$250,000 in remodeling the store to
10 make Harley-Davidson the premier brand sold at the dealership, converting retail space into a "designer
11 store" through a program that Harley-Davidson Co. offered with a design firm. (V, 121)

12 28. Jay is Jud's oldest son. In 1984, while he was still in high school, Jay started working at the
13 dealership, performing various jobs. He worked there while he was in college, and while waiting to
14 attend graduate school. (V, 102, 104)

15 29. Jay graduated with high honors from the University of Southern California. After waiting
16 a year and taking additional coursework, he entered a doctoral program in political science at Columbia
17 University with the intention of completing his Ph.D. and finding employment in that field. However, he
18 left graduate school unexpectedly because his father became ill. Jud died on July 14, 1992. At that time
19 Jay was selected by members of the Dabney family to become Riverside's dealer principal, and he has
20 held that position ever since. (V,105, 118)

21 30. Jay also assumed the duties of interim general manager at the time he became dealer
22 principal, but subsequently turned that function over to his younger brother, Ty, in 1997. (V, 105-106)

23 31. In 2005 Riverside also acquired a Buell motorcycle franchise from Harley-Davidson Co.
24 under a pilot program, and held it until Harley-Davidson dissolved its Buell subsidiary in 2008. (V 126 -
25 127; I, 62-63; Ex 41) The Buell brand encompassed a product line of lighter weight street motorcycles
26 that proved commercially unsuccessful. (I, 63)

27 32. In 2000 Riverside sold the Honda portion of the dealership and devoted the proceeds of the
28 sale to paying part of the cost of building a new building to house the dealership. (V, 121) In 2002

1 Riverside built a 35,000 square foot state-of-the-art dealership at the present location in Riverside, 7688
2 Indiana Avenue, near its former store. The new dealership opened on August 1, 2002. (V, 121-122)

3 33. The new dealership is situated on a parcel owned by the Dabney family members through
4 their real estate entity, Dabney Properties LLC. (VI, 78)

5 34. The new store incorporates architectural design principles of Frank Lloyd Wright, and
6 Riverside worked in cooperation with Harley-Davidson Co. on the interior design details. It purchased
7 proprietary Harley-Davidson Co. fixtures to furnish the store. The cost of the new facility was more than
8 \$4 million. (V, 121-122, 125; VI, 78)

9 35. In the Fall of 2006 Riverside opened a secondary retail location ("SRL") in Corona,
10 California. The SRL was designed to extend Riverside's reach within its defined territory, and was built
11 after Riverside persuaded Harley-Davidson Co. that it could service the market adequately with the SRL,
12 rather than Harley-Davidson Co. relocating another dealer to the area. (V, 148-151; Exs 38, 96)
13 Riverside's cost to open the new facility was more than \$1 million. (V, 153)

14 36. In March 2007 Jay and three others, including Lester Veik ("Veik"), who was then the
15 General Manager of Riverside, purchased a Harley-Davidson Co. dealership in Salinas, Monterey County
16 ("Monterey"). (VI, 6-7)

17 Dealer Contract and General Conditions

18 37. On January 5, 2005, Riverside entered into a "Harley-Davidson Motor Company
19 Motorcycle Dealer Contract" with Harley-Davidson Co. (the "Dealer Contract"). Among the rights
20 granted to Riverside under Paragraph 1 of the Dealer Contract is the right under subparagraph A, "To
21 purchase and sell at retail, primarily to persons residing or doing business in [Riverside's assigned
22 territory] ... 'Harley-Davidson Products,' " including motorcycles. (Ex 34)

23 38. Paragraph 2 of the Dealer Contract incorporates by reference the "Harley-Davidson Motor
24 Company General Conditions of Sales and Service" (January 2005) ("General Conditions"), including any
25 duly executed and delivered supplement or amendment thereto. (Ex 34, Paragraph 2)

26 39. The General Conditions obligate Riverside, *inter alia*, to "develop, maintain, and direct a
27 competent sales organization for Harley Davidson Products." (Ex 35, Paragraph B)

28 40. Subparagraph 6 of Paragraph B of the General Conditions states in pertinent part:

1 [Riverside] shall not sell Harley-Davidson Products for resale to non-retail customers,
2 except to other United States authorized Harley-Davidson dealers in accordance with [Harley-
3 Davidson Co.'s] written policies.... [Harley-Davidson Co.] reserves the right to establish from
4 time to time such policies and position statements it believes are necessary or advisable to carry
5 out the purpose or the intent of this part of this [Dealer] Contract and [Riverside] shall comply
6 with all such policies and position statements. (Ex 35)

7 41. Paragraph M, subparagraph 4 of the General Conditions provides that Harley-Davidson
8 Co. may terminate the Dealer Contract prior to its expiration upon no less than 30 days' prior written
9 notice if [Riverside] submits to Harley-Davidson Co. "any ... report, record or other information which is
10 fraudulent or contains any material misrepresentation by [Riverside]...." Subparagraph 6(f) permits
11 Harley-Davidson Co. to terminate the Dealer Contract with prior written notice for "[b]reach, violation or
12 failure to fulfill any of [Riverside's] other responsibilities under [the Dealer Contract]. (Ex 35)

13 **Non-Retail Sales Policy**

14 42. Pursuant to the Dealer Contract (including the General Conditions), Harley-Davidson Co.
15 annually issues a written, two-page policy entitled, "Non-Retail Sales Policy - Pleasure Vehicles" (the
16 "NRSP," as defined above) for each model year. The NRSP "expands upon and interprets the non-retail
17 sales provision in the Dealer Contract (paragraph B.6)." (I, 134; Exs 50, 51) The NRSP is sent to dealers
18 each year, and is also available for review by dealers online via Harley-Davidson Co.'s internal online
19 network.⁶ (I, 134-137; Ex 58)

20 43. The NRSP preamble articulates Harley-Davidson Co.'s concern about the sale of new
21 motorcycles to non-retail purchasers, including sales outside the United States by domestic dealers. It
22 further states that in light of that concern, Harley-Davidson Co. has created the NRSP "to ensure customer
23 satisfaction and safety, facilitate compliance with federal and state law and laws in various foreign
24 countries, and protect the integrity of Harley-Davidson's worldwide distribution network," and states that
25 the policy expands upon and interprets the non-retail sales provision in the Dealer Contract (paragraph
26 B.6.). (Ex 52; *see also* Ex 51)

27 44. In pertinent part the NRSP states:

28 1. As provided in the Dealer Contract, dealers are prohibited from engaging in non-retail
sales of motorcycles. A sale by a U.S. dealer of a new or previously unregistered

⁶ The sale of Buell motorcycles was also subject to a NRSP identical in its terms to that of Harley-Davidson Co. (I, 99; Ex 76)

1 motorcycle (an unregistered motorcycle is one that has not been registered with the state
2 and with Harley-Davidson) will be considered a "non-retail sale" for purposes of the Dealer
3 Contract and this policy if the motorcycle is not properly set up, inspected, tested, sold and
4 delivered at the dealership facility, directly to the ultimate consumer. An "ultimate
5 consumer" is the retail end user who purchases, as indicated on the Certificate of Origin, a
6 new or previously unregistered motorcycle for his or her own use, without the intent to
7 resell, pays all applicable taxes and registration fees, and titles the vehicle in his or her
8 name... A sale by a U.S. dealer of a new or previously unregistered motorcycle will also be
9 considered a non-retail sale if it is sold to a customer who resides outside the United States
10 or for shipment or use outside the United States. ...

11 2. Factory incentives and allowances, which are intended to promote dealer retail sales,
12 will not apply to any non-retail sales by domestic dealers. These incentives and allowances
13 include the Vehicle Incentive Performance payment [VIP]. ...

14 * * *

15 7. To ensure compliance with this policy, Harley Davidson reserves the right to audit
16 dealer records as appropriate. Dealers who are audited will be responsible for providing...
17 satisfactory evidence substantiating each claimed retail sale...If the dealer is unable to
18 provide [appropriate] documentation, the sale will be automatically considered a non-retail
19 sale.

20 8. Harley-Davidson will strictly enforce the terms of this policy using all available means.
21 If a dealer sells a motorcycle in an unapproved non-retail sale, records a non-retail sale as a
22 retail sale on the SWR form, submits false SWR information or falsifies any documentation
23 with respect to a sale or otherwise violates this policy, Harley-Davidson reserves the right
24 to take any action it deems appropriate depending upon the circumstances around the
25 violations. Such actions may include, but are not limited to: (1) place limitations on future
26 product allocations or shipments, and/or (2) charge back to the dealer any incentives or
27 allowances credited or paid with respect to such sale, and/or (3) placement of dealer in Not
28 in Good Standing status, and/or (4) charge back any internal and external audit and legal
expenses to the dealer, and/or (5) terminate the dealer's contract. (Ex 52; see also Ex 51.)

45. Harley-Davidson Co. issues an updated version of the NRSP annually, just before issuing
its price list for the new model year. It is sent to all dealers in a printed version, and is also communicated
by means of the company's internal online network. (I, 133-137)

46. Harley-Davidson Co. communicates the NRSP and its requirements to its dealers
frequently by a variety of methods, both written and verbal. Among these methods are memoranda sent
to dealers with an indication that they should be circulated to the dealer principal and the general
manager, among others; presentations at annual "town hall meetings" and "executive forums" with
dealers; and e-mails from its district managers to dealer principals and dealership managers. (I, 133, 154;
V, 58; Ex 171)

47. Included in its communications and presentations concerning the NRSP are reminders that
ensuring compliance is a responsibility of the dealer principal, and identification of various "red flags"

1 that indicate the occurrence of a sales transaction which may violate the NRSP. Examples of such red
2 flags communicated to dealers in recent years include:

- 3 • Multiple sales to a single individual;
- 4 • Indications, such as inclusion of a shipping manifest, that a motorcycle was to be shipped out
5 of the United States;
- 6 • Absence of proof of sales tax being paid;
- 7 • Absence of proof of the motorcycle's registration with the state.
- 8 • Payment for the motorcycle in cash or equivalent, rather than with financing.
- 9 • Delivery of the motorcycle elsewhere than the dealership. (I, 148; II, 123, 191)

10 48. The consequence of a domestic dealer violating the NRSP by selling a new Harley-
11 Davidson Co. motorcycle to a reseller, exporter, or other non-retail customer without registering it with
12 the state and with Harley-Davidson Co. is that the motorcycle will be sold to an end user by someone
13 outside Harley-Davidson Co.'s dealer network (*i.e.*, gray-marketed). The end user will thus lose the
14 benefits and protections afforded to retail customers through Harley-Davidson Co.'s retail sales process
15 and dealer network. (I, 126 ; V, 22-23)

16 49. Sale of Harley-Davidson Co. motorcycles outside the authorized dealer network potentially
17 may produce a number of adverse consequences, including:

- 18 • Failure of the motorcycle to be properly set up for the customer by a qualified technician; (I,
19 102-103, 105; Ex 11)
- 20 • Failure of the motorcycle to be custom fitted to the end user; (I, 110)
- 21 • Failure of the customer to receive information about the operation, maintenance, safety
22 features, and warranty coverage of the motorcycle, as required under Harley-Davidson Co.'s
23 post-sale procedures; (I, 118-120)
- 24 • Loss to the customer of the protection afforded under the Harley-Davidson Co.'s warranty
25 program; (I, 117-119; Ex 11)
- 26 • Loss of the capability of Harley-Davidson Co. to contact the customer through its warranty
27 registration records in the event of a recall of the motorcycle; (I, 123; Ex 11)
- 28 • The possibility that the motorcycle is not properly homologated, *i.e.*, that it fails to conform to
laws and regulations applicable to the state or country where it will be delivered to the end-
user; (V, 22-23)
- Possible economic harm to authorized Harley-Davidson dealers in a country where the
motorcycle is sold in the gray market, because of the seller's "free-riding" (*i.e.*, taking

1 advantage of the authorized dealer's marketing expense and facility investment to sell Harley-
2 Davidson Co. motorcycles, generally at a lower price); (V, 30-32)

- 3 • Possible discouragement of investment in the establishment of authorized Harley-Davidson
4 Co. dealerships because of the adverse competitive and customer-satisfaction effects of gray
5 market activity; (V, 35)
- 6 • Ultimately, the possible death or injury of end users because information chain between the
7 end user and Harley-Davidson Co. is broken due to the absence of accurate buyer registration;
8 (V, 27)
- 9 • Possible harm to the company's ability to enter new foreign markets, or to maintain its
10 activities in existing ones, because of the lack of compliance with laws and regulations; (V,
11 28) and
- 12 • Possible harm to Harley-Davidson Co.'s brand because of the adverse reputation the company
13 might suffer as the indirect result of other event.⁷ (V, 22-23)

14 50. As reflected in the express language of the General Conditions, the written NRSPs
15 issued each year, and other Harley-Davidson Co. communications reproduced or cited above,
16 the NRSP specifically provides for at least five alternative or cumulative sanctions that the
17 company may impose if a dealer violates this policy. Termination is the most drastic available
18 sanction. (*See, e.g.*, Ex 52)

19 Pre-Delivery Inspection

20 51. Paragraph F, subparagraph 2, of the General Conditions sets forth the pre-delivery
21 obligations of a dealer under the Dealer Contract. It obligates the dealer to,

22 Uncrate, set up, inspect and test each new Harley-Davidson Motorcycle prior to delivery to
23 Dealer's customer, in accordance with [Harley-Davidson Co.'s] written instructions. Dealer
24 agrees to make all necessary repairs to such Harley-Davidson Motorcycle and agrees that
25 each Harley-Davidson Motorcycle, including any accessories or equipment added thereto
26 and sold by Dealer, will be received directly by its customer fully set up by a qualified
27 Dealer technician and in satisfactory, lawful and safe operating condition. ... (Ex 35)

28 The written instructions are contained in the PDI Manual that is updated annually and a PDI Checklist
Form that is to be completed and signed at the point of delivery. (I, 102 -103; Exs 11, 129, 130, 131)

52. The PDI Manual states that the pre-delivery inspection procedures are necessary to verify
customer safety and satisfaction, that none of the inspection procedures should be left out, and that only

⁷ Third parties ultimately might suffer incidental harm as well, such as states that are deprived of sales taxes that would have been collected if a dealer had complied with the NRSP; owners and prospective owners of other dealerships because of harm to the brand; and investors in Harley-Davidson Co.'s stock, for the same reason. The actual occurrence of such harm is either speculative or of such nature that its amount cannot be ascertained from the evidence in this record. *See, eg.*, IX, 205)

1 qualified technicians should perform them. Prior to delivery, the dealership must follow detailed setup
2 and testing procedures. At the point of delivery, the dealership must inspect the motorcycle with the end-
3 user purchaser and make certain that he or she understands the owner's manual and materials in the
4 owner's kit, operation of the vehicle controls, certain emergency and safety features, and the scheduled
5 maintenance procedures. (Exs 130,11)

6 53. The PDI Checklist Form instructs dealers that various boxes must be checked, confirming
7 that the PDI procedures, including purchaser inspections and communications, have been followed. The
8 form must also be signed by the delivering dealer's service technician and sales representative, and by the
9 purchaser. Above each of these respective signature lines is a written certification. By signing, the
10 technician certifies that he or she has completed the set-up and inspection of the vehicle in accordance
11 with the Pre-Delivery and Set-up Manual; the sales representative certifies that he or she has provided the
12 purchaser with all required information and instructions, as indicated by boxes checked on the form; and
13 the purchaser certifies that the dealer representative has done so. (Ex 11)

14 54. The consequence of a dealer failing to perform Harley-Davidson Co.'s required pre-
15 delivery set-up and inspection procedures for a motorcycle, or to complete the PDI form, is that there is
16 no assurance that the motorcycle was assembled in a satisfactory, safe, and lawful condition when it was
17 delivered to the customer. This may have particularly important consequences later if the motorcycle is
18 exported, as the motorcycle may be disassembled and improperly reassembled before it is delivered. The
19 motorcycle also may not be homologated for the state or country of delivery if it is not inspected where it
20 is ultimately delivered to the purchaser. (III, 111; V, 33)

21 Sales and Warranty Registration

22 55. Paragraph F, subparagraph 3 of the General Conditions requires the dealer to register with
23 Harley-Davidson Co. all Harley-Davidson motorcycles sold by the dealer, "for purposes of establishing
24 warranty protection, providing essential information in the event of a recall [of the motorcycle], and/or
25 providing [Harley-Davidson Co.] with useful market information, all in accordance with [Harley-
26 Davidson Co.'s] written procedures," and to "maintain an effective service and warranty management
27 system that complies with the requirements established by [Harley-Davidson Co.] from time to time."
28 (Ex 35)

1 56. Paragraph F, subparagraph 7 of the General Conditions requires the dealer to complete and
2 electronically file with Harley-Davidson Co. a SWR form for every new Harley-Davidson motorcycle
3 sold by the dealer. The dealer must file the form within ten days of delivery of the motorcycle to the
4 customer in order to comply with certain legal requirements and qualify the motorcycle for coverage
5 under Harley-Davidson Co.'s customer warranty. The dealer must also maintain a hard copy of the fully
6 completed and signed SWR form, as well as all other sales documents, for a period of five years. (I, 117,
7 119; Ex 35)

8 57. At the bottom of the SWR form is a certification that must be signed and dated by the
9 delivering dealer. This certification states in pertinent part:

10 DEALER: I certify that I am the delivering dealer and that the sale of this vehicle meets all
11 requirements of all Harley-Davidson sales policies; this vehicle has been prepared for
12 delivery according to all applicable Pre-Delivery and Set-Up Instructions; the warranty has
13 been explained to purchaser; the Owner's Manual has been delivered to the purchaser; and
14 that the information on this form is true, correct and complete to the best of my knowledge.
I also certify that this vehicle was ordered with the intention for Retail Sale...I
acknowledge that any misrepresentation on this form will be considered a material breach
of my dealer contract and may constitute grounds for termination. (Ex 102; see, e.g., Ex 11)

15 58. The consequence of a dealer failing to accurately complete or file the SWR with Harley-
16 Davidson Co. is that the customer's warranty protection may be lost, or the flow of warranty information
17 will be misdirected or lost, to the detriment of the actual end user. The resultant effects are that the end-
18 user might be unaware that the motorcycle is not under warranty, might not receive the notice of a
19 regulatory or safety recall of the motorcycle that Harley-Davidson sends to the registered buyer, and will
20 not receive customer perquisites (such as membership in Harley-Davidson Co.'s proprietary HOG Club).
21 Absent or inaccurate SWR registration will also prevent the generation of marketing information (such as
22 customer satisfaction surveys) that is important to Harley-Davidson Co. A customer's failure to receive
23 recall information could place his or her safety in jeopardy and increase Harley-Davidson Co.'s liability
24 exposure. Delay or absence of the information will also affect the company's sales process by distorting
25 its system of allocating motorcycles to dealers. (III, 89; V, 27-29)

26 **Potential Impact of Non-Compliance on the Harley-Davidson Co. Brand**

27 59. A dealer's violation of the NRSP, failure to complete PDIs, or disregard of its obligation to
28 accurately complete and file SWRs could ultimately erode the strength of the Harley-Davidson Co. brand

1 by creating safety concerns, damaging customer satisfaction, and disrupting the integrity of the sales
2 process. (V, 22 -24)

3 Harley-Davidson Co.'s Enforcement of the NRSP

4 60. Harley-Davidson Co. enforces the NRSP on an exception basis, rather than
5 auditing every dealership's records at regular intervals or on a random basis. The company may
6 start investigating a dealer's transactions when it receives tips about the occurrence of suspicious
7 activities from third parties or detects irregularities in reported sales records.⁸ The general
8 procedure Harley-Davidson Co. now follows when questionable sales are identified is to check
9 its internal SWR report and NICB report. If there still appears to be questionable sales activity,
10 the company will send an inquiry letter to the dealer concerning each transaction, by Vehicle
11 Identification Number ("VIN"), to obtain documentation and further information about the sale
12 and evaluate whether the sale violated the NRSP. When the number of questionable sales
13 detected is relatively large, Harley-Davidson Co. will perform a formal audit of the underlying
14 sales records. Audits are not performed frequently.⁹ (II, 57-58; 61, 65; III, 62-63; Ex 261)

15 61. If the audit confirms the occurrence of a significant number of sales that violated
16 the NRSP, Harley-Davidson Co. begins the process of terminating the dealer's Dealer Contract.
17 The company employs a "rule of 20" to determine whether to terminate a dealer's franchise for
18 violating the NRSP: If the company determines through its investigation that the dealership has
19 made 20 or more sales in violation of the NRSP during the period in question, it will terminate
20 the franchise.¹⁰ This is a rule of thumb, not a formal rule, and is based upon the company's
21 experience that 20 is "a scalable amount of business that demonstrates some serious issues
22 within [a] dealership." (I, 160-161; II, 75-76; III, 64) The company strives for consistent
23 application of this rule, and invokes it whenever it detects that 20 or more prohibited sales were
24

25 ⁸ In recent years the company has also utilized the National Insurance Crime Bureau's (NICB) annual reports of motorcycle
26 exports to identify motorcycles that were exported in the previous year, and cross-checks this information against its internal
27 list of SWR registrations during the same period. It is not clear whether this was done before the audit in the present instance.
(II, 54, 61)

28 ⁹ Certain other Harley-Davidson Co. sales policies, e.g., that governing minimum advertised prices (MAP), are more
systematically enforced by the company than the NRSP, using techniques such as random audits by third-party organizations.

¹⁰ The company does not disclose this internal rule to dealers out of concern that dealers, irrespective of their size, will interpret
the rule as a "free pass" to sell up to 19 motorcycles to resellers in violation of the NRSP. (I, 162; V, 59)

made, regardless of the total level of the dealership's sales volume or performance by other criteria. (I, 160-161; II, 75-76)

History of the Management and Organizational Structure of Riverside

62. When Jay assumed the position of dealer principal following his father's death, Riverside still functioned as a "mom-and-pop" dealership in the sense that it did not have structured sales processes. By the latter part of the 1990s Jay perceived the need to institute such processes because of the rapid growth of the dealership's business. (V, 157)

63. Jay performed the additional role of general manager until 1997, but as the dealership became busier, that job was turned over to his brother Ty. (V, 105-106) Ty was Riverside's General Manager from 1997 until 2000, when the family perceived the need to hire a non-family general manager to make it easier to manage performance because of the rapid growth of the business. (V, 117-118, 156-160)

64. Veik succeeded Ty as General Manager in 2000. (V, 117-118) Veik was selected for the position of General Manager with the support of the Dabney family members, all of whom had known him for many years. He was the first general manager of Riverside who was not a Dabney family member. He was a close personal friend of Jay's. Their friendship extended back to elementary school, where Jay was in the class ahead of him. He was in the same class as Ty, and he knew their brother Marshall as well. He had participated in high school sports programs with Jay and Ty. The family considered Veik to be a trusted friend. (V, 164-66)

65. Veik first started working for Riverside in the summer of 1996, when he worked part time as a weekend salesman, supplementing the regular sales staff. For some time he worked concurrently for Riverside and for the United States Postal Service. He was promoted to Riverside's Service Manager in the late 1990s, and took the service department from a substantially money-losing operation to profitability over the course of two or three years. (V, 164-65)

66. Also in 2000 Jay restructured the dealership. (V, 156) The restructuring was partially in reliance upon recommendations he received through participation in a Harley-Davidson Co. training program, Performance Consulting, in a module called, "organizational excellence." (V, 144; 157, 161-62) Jay sought to "make the store more progressive and reflect a higher level of organization and training, and

1 having a little more organizational structure so it would be more structured and process driven." (V, 157)
2 The general concept of the recommended organization was to separate the owners from the management,
3 leaving the general manager to execute the guidance, policy, practices, and structures to achieve the
4 owner's objectives, leaving the owners to "work on [the] business, not in it." (V, 161-162)

5 67. As part of this restructuring, Riverside adopted a new organization chart in which there
6 was a structural line drawn between the owner board members above, and the management and their
7 departments below. The functions above this line were principally devoted to the strategic aspects of the
8 business, and not to its day-to-day operations. Jay, as dealer principal, was above this line. The position
9 of General Manager reported exclusively to him, and there were no other reporting relationships across
10 the line. (V, 157-161; Ex 501)

11 68. When Veik became Riverside's General Manager, he had full responsibility for all the day-
12 to-day operations of the dealership. His only family contact was with Jay, the dealer principal. Jay
13 addressed "big picture" issues, such as the development of new markets, and did not regularly become
14 involved in the day-to-day operations of the dealership. He relied upon the general manager, who
15 reported directly to him at the time, to handle those aspects of the business. (V, 157-162)

16 69. Jay's efforts to perform his role included taking coursework from Harley-Davidson Co. and
17 elsewhere to develop better sales techniques and processes so as to get away from the "mom-and-pop" era
18 of the dealership. He devoted a lot of time to working on the plans for the new dealership facility, and
19 developed strategic concepts for sales practices utilizing the Harley-Davidson Co. training programs for
20 dealers.¹¹ During this timeframe Jay seldom visited the operations and sales areas of the facility.¹² (V,
21 145-146)

22 70. Initially the new organization, and Riverside's selection of Veik as General Manager,
23 worked well. There was a "significant spike in ... performance," and by 2006 - 2007 the dealership had
24 gone from a "very tiny mom and pop store" to "one of the leading dealerships in the country," selling
25 1,400 new and used Harley-Davidson Co. motorcycles, and earning \$32 million in revenue. Riverside
26

27 ¹¹ Some of these concepts involved a high level of abstraction. For example, Dabney adopted a special sales lexicon, referring
28 to first-time buyer prospects as "dreamers" and sales personnel as "enthusiasts." (VI, 39-41)

¹² Some employees referred to Jay as the "Wizard of Oz," because they heard his voice but did not see his face. (Exs 305, 71)

1 also repeatedly won the company's Bar and Shield awards and incentive trips, and was approached by the
2 company to participate in no less than 15 pilot programs. (V, 170-171)

3 71. Jay regarded Veik's performance as General Manager until 2007 as "great." (V, 172) On
4 the few occasions that Jay discussed Veik with subordinate employees, he received some negative
5 comments about Veik's communication skills, organizational skills, and decisions, but Jay dismissed the
6 negative feedback as being of the normal sort that employees make about any general manager. (V, 173-
7 174)

8 72. Riverside's business reached a high point in 2006 and 2007, with the sale of 1,400
9 motorcycles and revenues of \$32 million. (V, 154, 171)

10 73. At the peak of Riverside's performance in early 2007, Jay and Veik each became 25%
11 partners in purchasing the Monterey Harley-Davidson dealership with two other investors. (VI, 6)

12 74. With the onset of the recession in 2007, Riverside's sales fell precipitously. The sudden
13 decline in the housing market, which hit the Riverside area particularly hard, resulted in an immediate loss
14 of motorcycle sales. Riverside lost its blue collar customer base, which was its "bread and butter." (V,
15 154 -155)

16 75. As Riverside had to adapt to the recessionary environment, Jay's perception of Veik's
17 performance changed. Jay felt that Veik was not utilizing the discipline of newly instituted formal sales
18 processes that he believed were necessary to survive the economic downturn, and that Veik's performance
19 began to deteriorate as a result. He began to meet with Veik regularly to question him about what he was
20 doing. (V, 174-175; VI, 8) Other family members also were not happy with Veik. (V, 172) Veik felt that
21 he was under intense pressure from Jay and the rest of the family about his financial performance. (VII,
22 212; VIII, 12-13)

23 76. By the latter part of 2010 Jay began to take steps to effect a transition and ease Veik out of
24 the General Manager position because of his concerns about Veik's ability to embrace the new
25 management processes. He removed Veik from the General Manager position and split it into two
26 functions, assuming one of those roles himself and assigning Glen Espinoza ("Espinoza"), who was then
27 a senior operations manager (and essentially the dealership's controller), to perform the other. (VI, 7-9,
28 VII, 123-124) At the end of 2010 Jay sent Veik to manage the smaller Monterey dealership, which Jay

1 believed was "more tailored to his skill sets as a manager." (VI, 6, 9)

2 77. Following Veik's departure from Riverside at the end of 2010, Espinoza was promoted to
3 the position of General Manager in the spring of 2011. (VIII, 119, 123-124) Jay started making
4 significant changes in the dealership. (VIII, 131) On March 1, 2011, Riverside adopted a new
5 organizational chart, moving the dealer principal below the structural line that separated owners and
6 management. (VI, 54-56; Ex 502) Throughout this transitional period, Jay began having more personal
7 contact with dealership employees on a day-to-day basis, and became "extremely hands-on." (VI, 35-36;
8 VIII, 134)

9 78. Veik's fellow employees had generally liked him before he became General Manager, but
10 when they became his subordinates, many of them disliked his personal style. They regarded him
11 variously as lazy, dishonest, manipulative, overbearing, and micromanaging. He reputedly had a bad
12 temper, and reduced an office employee to tears by criticizing her. (Exs 306, 37) He also attempted to
13 ensure that none of his employees had any direct contact with Jay. (VI, 37-38) Jay was unaware of this
14 until Veik departed to Monterey and the employees began to speak more openly with him. (VI, 7) After
15 hearing their complaints and analyzing the dealership's performance over the previous year and a half, Jay
16 concluded that Veik, "instead of bringing the team together collectively to move forward and do the
17 things ... to address the remainder of the recession, ... was dividing the team, isolating people, pitting
18 people against each other, communicating things incorrectly, outright lying, deceiving people, and just
19 destroying the morale of the whole team." (VI, 36-37) Veik also failed to adopt the procedural changes
20 Jay sought to have him make, but told Jay he did the contrary. (VI, 37-38) The consequence of Veik's
21 conduct was that "the operation slipped away from him, and he just didn't reveal the things that [Jay
22 needed] to know to fix the situation." (VI, 38)

23 **APPLICABLE LAW**

24 79. Section 3060(a) provides: "Notwithstanding ... the terms of any franchise, no franchisor
25 shall terminate or refuse to continue any existing franchise unless all of the following conditions are
26 met:..." One of the conditions is finding that there is good cause for the termination.

27 80. The prefatory language of Section 3061 specifies the showing of good cause necessary for
28 termination, enumerating seven factors, without limitation, that the Board must consider in deciding

1 whether termination is permissible in a particular case. The enumerated factors are:

2 (a) Amount of business transacted by the franchisee, as compared to the business available to
3 the franchisee;

4 (b) Investment necessarily made and obligations incurred by the franchisee to perform its part
5 of the franchise;

6 (c) Permanency of the investment;

7 (d) Whether it is injurious or beneficial to the public welfare for the franchise to be modified
8 or replaced or the business of the franchisee disrupted.

9 (e) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment,
10 vehicle parts, and qualified service 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 adequate services to the public;

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

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

15 In addition, the Board must consider other "existing circumstances."

16 81. Section 3066(b) places the burden of proving good cause on the franchisor. In this matter
17 Harley-Davidson Co. is the franchisor and accordingly has that burden.

18 **FINDINGS RELATING TO GOOD CAUSE UNDER §3061**

19 **Amount of Business Transacted by the Franchisee,**
20 **as Compared to the Business Available to the Franchisee [§ 3061(a)]**

21 82. In recent years Riverside has won several Harley-Davidson Bar and Shield awards, which
22 are based upon performance measures "...of aspects of vehicle sales, parts and accessories, general
23 merchandise, service, sales, customer satisfaction index scores, Harley-Davidson Financial Service['s]"
24 market share, and other business-related variables. (III, 197) In 2009 six awards were made in District
25 25, the 17-dealer district encompassing Riverside, and Riverside received one of them. (III, 150-151,
26 197-198) In 2010 there were five awards in the district, and Riverside received one. (III, 197-198)

27 83. For calendar year 2011, Riverside's rankings for the sale of pleasure vehicles (*i.e.*, those
28 sold to end users, as opposed to fleet sales) were second for the district, 12th regionally, and 107th

1 nationally. (IV, 62; Ex 278)

2 84. For calendar year 2011 Riverside's national ranking for the sale of new unit sales, both
3 pleasure units and fleet sales, was 110 out of 689. (IV, 67; Ex 549)

4 85. Riverside's recent dealership sales were above the average sales and registrations in the
5 nation and in Riverside's dealer assigned territory (DAT). In 2010 the national average number of dealer
6 registrations by dealership was 353; Riverside's was 391. Riverside had a 93.8% effectiveness/
7 penetration within its DAT and a 110.8 % effectiveness/penetration nationally. (IX, 175-176; Ex 571, Tab
8 6)

9 86. Based upon sales effectiveness, the ratio of sales to some degree of market opportunity,
10 Riverside's sales are slightly higher than market opportunity. In view of the fact that Riverside is a
11 premium price and premium service dealership in an area that has been hit substantially by the housing
12 market crash, which affects the credit profile of its residents, Riverside may actually be doing an even
13 better job than it appears. (IX, 175-176; Ex 571, Tab 6)

14 87. Riverside's new vehicle sales portion of business transacted compared to business available
15 is solidly average or better, given the recessionary economic pressure related to its market area. (IX, 183)

16 88. Riverside's December 2011 year-to-date service retention of sales customers was 77.6%.
17 (Ex 549)

18 89. There is no evidence in the record that the amount of business transacted by Riverside, as
19 compared to the business available to it, is anything less than average.

20 **Investment Necessarily Made and Obligations Incurred**
21 **by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]**

22 90. Riverside has invested approximately \$1.4 million on equipment, and the dealership has
23 other assets of approximately \$3.8 million. (IX, 57) The equipment includes proprietary Harley-Davidson
24 Co. branded fixtures and tools. (V, 129 *et seq.*)

25 91. Dabney Properties, LLC purchased the real property for the store at 7688 Indiana Avenue,
26 and that parcel is its only asset. The owners of Dabney Properties, LLC are Jay and his three siblings,
27 who are also the owners of Riverside. Their investment in the real property, through Dabney Properties,
28 is approximately \$4 million. (VI, 78, 82; VII, 41-42; IX, 57, 80; Ex 140)

1 92. Although the dealership store, fixtures and other assets, and the real property on which it is
2 situated, are respectively owned by different legal entities, there is complete identity of the owners of
3 those entities, the four Dabney siblings. They have elected to hold their assets individually or by trust, as
4 the case may be, and under the umbrella of different legal entities, for reasons not germane to this matter.
5 Their ownership of the respective assets is entirely for the common purpose of owning and operating
6 Riverside, and all of the assets are devoted to that purpose. (IX 57; Ex 140) Their total investment in the
7 Riverside entities exceeds \$9 million. (IX, 57; Ex 140)

8 93. Riverside also made previous investments to purchase and, at an expense in 1993 of
9 \$250,000, to improve as a "designer store" its previous dealership building. (V, 121)

10 94. Riverside also made investments exceeding \$750,000 to establish the SRL in 2007 in the
11 expectation that the SRL would be a successful operation under Riverside's franchise. (V, 148-153)

12 95. At original cost the total investment of Riverside and Dabney Properties, LLC in assets is
13 \$9,336,000. The estimated current value is \$12,273,000.¹³ (Ex 140)

14 **Permanency of the Investment [§ 3061(c)]**

15 96. "Permanency" of a franchisee's investment is a term used by a relatively few jurisdictions
16 to refer to the degree to which a franchisee's assets and obligations are long-term, rather than ephemeral,
17 in nature. Its permanent investment includes goodwill, or "blue sky," which is intangible.¹⁴ (IX, 85-88)

18 97. Riverside's investment is predominantly in the purpose-built dealership built in 2003, the
19 Harley-Davidson tools and store fixtures, and the underlying parcel of land; liquid assets, such as
20 inventory, comprise a smaller proportion of its investment. (IX, 86-87; Ex 140) The estimated range of
21 the permanency of Riverside's investment is \$5,521,000 to \$8,458,000. (IX, 88)

22 98. Blue sky, or goodwill, is the premium a willing buyer will pay to have the opportunity to
23 buy the business. (IX, 59) In industry practice it is usually calculated as a multiple of 3 to 5 times
24 expected profits, based upon average historical profits adjusted for aberrations in the circumstances of the
25

26 ¹³ We disregard Respondent's contention that the total return Riverside has received on this investment should be netted against
27 the amount of the investment, as its return -- positive or negative -- is, by definition, a return *on* the investment, and does not
negate the amount that Riverside has invested and thus placed at risk.

28 ¹⁴ In general, the underlying concept appears to be that permanent investments are assets which would not lose their value in
the short run, and obligations which would persist, if the franchise were terminated abruptly. (IX, 86-87)

1 franchisee. (IX, 83-84, 116-117) Riverside's average adjusted profit is approximately \$900,000
2 annually. (IX, 82) Using a multiple of four, the value of Riverside's goodwill is at least \$3.6 million.
3 (IX, 82; VI, 76-77)

4 99. A dealership with a strong brand identity such as that of Harley-Davidson Co. is more
5 difficult to unbrand and return to general use than other business enterprises or even other dealerships not
6 so strongly branded. Consequently, the value of the franchisee's investment is more dependent and more
7 strongly linked to the franchisor's brand than may be the case with other dealerships in the retail
8 automotive industry. (IX, 172-173)

9 **Whether it is Injurious or Beneficial to the Public Welfare**
10 **For the Franchise to be Modified or Replaced or the**
11 **Business of the Franchisee Disrupted [§ 3061(d)]**

12 100. Respondent credibly asserts that, in the event Riverside's franchise is terminated, it will
13 replace the dealership at the same location or, if that cannot be arranged, at a nearby site. Qualified
14 candidates are available to assume the franchise. The transition to a new franchisee could be
15 accomplished overnight at the existing location, or with little disruption and loss of service to customers if
16 the transition involved moving to a new location nearby. (I, 176-177, 179; IV, 73-75)

17 101. There are other Harley-Davidson Co. dealerships within a twenty-minute or half-hour drive
18 of Riverside, but they are smaller than Riverside. (IV, 89; VI, 84-85)

19 102. Currently, 65 to 70 employees are employed by Riverside. (V, 153) If they lose their
20 employment in the event of termination of Riverside's Dealer Contract, they will be adversely affected by
21 the loss of income and benefits. (IX, 208; VI, 62-3)

22 103. If the Dealer Contract is terminated, the members of the Dabney family who own the
23 dealership will be adversely affected to the extent that they will lose their income, benefits and perquisites
24 under the terms of the Dealer Contract. (VI, 62-3)

25 104. There is no evidence in the record establishing that it would be beneficial to the public
26 welfare for Riverside's franchise to be terminated. The Notice of Termination reflects that the conduct
27 allegedly constituting good cause was of limited duration. (Ex 63, p.2) Therefore, no benefit to the public
28 welfare would result from termination of the Dealer Contract. At this point, termination would only
benefit Harley-Davidson Co. by furthering its interest in signaling other dealers not to violate the NRSP.

1 (V, 43)

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

7 105. Respondent has not produced evidence that Riverside lacks adequate sales and service
8 facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of
9 its customers, or that Riverside is rendering *inadequate* service to the public.

10 106. Although the burden rests with the Respondent, Protestant's showing established that it has
11 exemplary state-of-the-art sales and service facilities, equipment, parts, and qualified service personnel,
12 and has been rendering services to its customers that are *at least* adequate. Specifically, the evidence
13 shows Protestant's 35,000 square foot facility, which was built in 2003, has an adequate selection of
14 Harley-Davidson Co. motorcycles; a large service area with a wash rack and double lifts to promote
15 efficiency; a full-service F&I (finance and insurance) department; an adequate inventory of parts and
16 accessories; an entire line of Harley-Davidson Co. Motorclothes; and qualified service technicians with
17 proprietary Harley-Davidson diagnostic equipment and tools. (V, 124-140; Ex 500)

18 107. The standards of performance that a dealer must attain to avoid a "good cause"
19 determination are expressed in the applicable law in terms of adequacy and reasonableness, *supra*.
20 Harley-Davidson Co. has a program of awards and incentives to reward dealers whose performance
21 exceeds these levels. (*See, e.g., V, 170-171*) If dealers were required to attain performance above
22 "adequate" and "reasonable" levels in order to avoid a finding of good cause under Section 3061(e),
23 adequately performing franchisees would risk termination of their franchises. There is no evidence in the
24 record that would support a finding that Riverside has ever performed below adequate or reasonable
25 levels.

26 **Whether the Franchisee Fails to Fulfill the Warranty Obligations**
27 **of the Franchisor to be Performed by the Franchisee [§ 3061(f)]**

28 108. There is no evidence that Riverside failed to fulfill Harley-Davidson Co.'s warranty
obligations to be performed by Riverside, specifically because there is no evidence in the record that

///

1 Riverside ever refused to accept any motorcycle to perform warranty work.¹⁵

2 **Extent of the Franchisee's Failure to Comply with**
3 **the Terms of the Franchise [§ 3061(g)]**

4 109. The gravamen of this case, as defined by the Notice of Termination, is the allegation that
5 Riverside breached the Dealer Contract by selling motorcycles in violation of the NRSP on approximately
6 25 occasions, and in relation to those sales by failing to document PDIs of the motorcycles and falsely
7 registering them with Harley-Davidson Co. under its SWR procedure.¹⁶ These alleged acts and omissions
8 are the basis of Respondent's contention that Protestant failed to comply with the terms of its Harley-
9 Davidson Co. franchise, and its contention that the Dealer Contract should therefore be terminated. (Ex
10 63)

11 110. Riverside was aware of the NRSP and its responsibilities under that policy in 2009 and
12 2010.¹⁷ (VI, 15) Riverside had received copies of the NRSP, as well as various communications directed
13 to its owner and managers concerning the policy and its enforcement by Harley-Davidson Co., and had
14 disseminated it to sales employees and the general manager. (I, 133-137; VI, 15; VII, 49-50; Ex 36) Jay
15 was aware of the policy, and had instructed Veik not to violate the NRSP and other Harley-Davidson Co.
16 policies. (VI, 15-16)

17 111. In 2008 Harley-Davidson Co. became concerned about the level of exporting activity
18 resulting from the decline in the value of the dollar with respect to other currencies. Because of the
19 proximity of West Coast dealers to ports, the company alerted them to be watchful for transactions that
20 might be prohibited export sales under the NRSP. Protestant received an e-mail to this effect from the
21 company's district manager. Veik received this e-mail. (III, 152; Ex 60)

22 112. On April 20, 2010, in response to its internal investigation of Riverside's sales records and
23 other information, Harley-Davidson Co. conducted an audit of 27 questionable sales at Riverside. The
24 audit was conducted in Riverside's dealership offices. (I, 164-165; VI, 14) Espinoza was present. In

25
26 ¹⁵ There is evidence that Riverside's failure to report accurate SWR information disabled Harley-Davidson Co. from
undertaking its warranty obligations to purchasers in the first place, but this fact relates to the extent of Riverside's failure to
27 comply with the terms of the franchise, *infra*. (III, 152; Ex 60)

28 ¹⁶ The final number of sales Harley-Davidson Co. determined that Riverside made in violation of the NRSP is 29. (Ex 250)

¹⁷ Riverside acknowledges that it had received the policy and disseminated it to sales employees and managers, as it was
included with the price list issued each year. (VII, 49-50)

1 response to Jay's directions to Espinoza, Riverside responded fully to the auditor's request for files and
2 documents, and further cooperated by making available its facilities, equipment, and personnel to assist
3 the auditor. (VI, 13-14; VIII, 150)

4 113. The audit results disclosed that during calendar years 2009 and 2010, more than 25 sales of
5 new Harley-Davidson and Buell motorcycles had been made to resellers or exporters in violation of the
6 NRSP, PDIs had not been completed for the motorcycles, and falsified names and addresses had been
7 reported to Harley-Davidson Co. in registering them on the SWRs. Reporting of the SWR information
8 for several motorcycles had been delayed for more than 10 days, and in one instance for about 8 months.
9 (II, 93-168; Ex 250)

10 114. A total of 17 motorcycles were sold to a buyer named An Toan Truong, all of which were
11 exported to Vietnam. (II, 205; Ex 250) Four motorcycles were sold to Michel Kordas and were exported
12 to Tahiti. (II, 206-7; Ex 250) Four motorcycles were sold to Svenning Juhl, and were exported to
13 Denmark. (II, 212, 214; Ex 250) Eight motorcycles were sold to Vu Hoang Le, four of which were
14 exported to Vietnam. (II, 153; Ex 250)

15 115. At the time of the audit, Jay was unaware of why it was being conducted, and was unaware
16 of any irregularities in the sales records produced during the course of the audit. (VI, 13-16)

17 116. Jay first became aware of the possibility that sales may have been made in violation of the
18 Dealer Contract after the audit, when Espinoza showed him that false names had been used to register
19 motorcycles that were sold. He first confirmed that sales violating the NRSP had been made when he
20 confronted Veik about his suspicions a few days after the audit. (VI, 11-12, 17)

21 117. Harley-Davidson Co. did not divulge the audit results to Riverside or seek to obtain any
22 explanation of the irregularities in the sales documents until June 23, 2011. On that date Harley-Davidson
23 Co. reported the results of the audit to Jay when its district sales manager and regional sales manager
24 personally delivered the Notice of Termination to him. (VI, 20-26)

25 118. Riverside acknowledges that it sold the motorcycles in violation of the NRSP as disclosed
26 by the audit, and that in the course of doing so failed to document PDIs and perform the SWR
27 registrations fully and accurately. (VI, 30)

28 119. The sales occurred as the result of a scheme orchestrated by Veik when he was Riverside's

1 General Manager in which Riverside sold multiple new motorcycles to exporters who were not the end
2 users, concealing the sales by registering them fictitiously to other persons. In the course of making these
3 sales PDIs were not properly completed, and SWR reports were falsified and delayed. (VI, 143-144)
4 Specifically, when these sales were made, Veik caused each of the motorcycles to be registered on the
5 SWR under a fictitious name and address rather than that of the individual who had actually purchased the
6 motorcycle for resale or export. In each instance Veik obtained the name and address by asking a
7 dealership employee to furnish them. The names and addresses he obtained in this manner included those
8 of friends and in-laws of the employees, and of the employees themselves, among others. (VII, 92-96;
9 136-137; 159; 163; 202; 206; 210-211; 215-216)

10 120. Veik knew at the time of these transactions that the sales were improper because they
11 violated the terms of the NSRP and the Dealer Contract, but he accomplished them anyway. In his own
12 words, "I was aware of it, I sanctioned them. And I took steps to hide them." (VII, 194)

13 121. Veik concealed these transactions from Jay by means of a number of stratagems, as he was
14 aware that Jay would not have permitted them, and would have fired Veik if he found out about them.
15 (VII, 213-214) For example, Veik would record the sales under the fictitious names on the daily F&I log
16 that was maintained in the office, so Jay would not notice that multiple sales were made to the same
17 person in the course of his occasional spot checking of daily sales. (VII, 137) On one occasion, after
18 Harley-Davidson Co.'s district sales manager alerted Riverside about not selling in violation of the NRSP,
19 Veik directed that a group of bikes be delivered to the purchaser on a Monday, when Jay would be out of
20 the office, to avoid detection. (VII, 11-12) In Veik's own words, it "wasn't very hard to do because Jay ...
21 because of our long relationship, some 40 years, ...placed a lot of faith and trust in me. And Jay placing
22 that trust in me allowed me to get away with things that I probably wouldn't have been able to get away
23 with [*i.e.*, otherwise]." (VII, 214)

24 122. Veik also attempted to deflect the blame for these sales to other employees. On one
25 occasion he had each employee sign a certification that he or she was aware of the NRSP and would not
26 engage in sales prohibited by the policy; he then continued to cause prohibited sales to be made in
27 violation of the policy. (VIII, 12; 72-73; Ex 98)

28 123. The first sale made in violation of the NRSP that was revealed by the audit was on July 22,

1 2009. The final prohibited sale was registered on the SWR on August 17, 2010, although the actual sale
2 had taken place several months before. After that Veik discontinued the practice of selling motorcycles in
3 violation of the NRSP altogether. (VIII, 15; Ex 250)

4 124. Even after the prohibited sales ceased, Veik continued to dissemble about how they had
5 occurred. Veik was working at the Monterey dealership by the time Harley-Davidson Co. delivered the
6 Notice of Termination and the audit results. In a narrative he prepared for Jay to send to the company,
7 Veik claimed that the sales had been made by a former Riverside sales Manager, Darin Goodrich, who
8 had been terminated several months before. He did this because, at the time, he was negotiating a deal to
9 purchase a 51% interest in the Monterey dealership, and he wanted to maintain his good standing with
10 Harley-Davidson, which would have to approve the change of ownership. He now admits that the
11 narrative was totally false.¹⁸ (VIII, 2 -25; 85-87; Ex 65)

12 125. The knowledge and involvement of employees who contributed names for SWR
13 registration or participated in registering the motorcycles under false names varied. Some employees in
14 the business office were unaware of the NRSP or did not know that the substitution of names and use of
15 fictitious addresses in the SWR reporting was improper. This was because they either trusted Veik and
16 followed his instructions because of his authority as General Manager, or because they were intimidated
17 by his behavior. Other employees, particularly those in sales positions, either knew or should have known
18 that the transactions violated the NRSP and should not have been made. These employees may have been
19 influenced to cooperate to some degree because they would receive more commission income, but they
20 were also concerned that they would suffer negative consequences if they refused to cooperate with Veik's
21 scheme.¹⁹ (VII, 91; 144; 166)

22 126. The extent of the violation of the Dealer Contract that occurred because of these sales is
23 limited to the time that Veik was Riverside's General Manager. The fact that Riverside replaced Veik as
24

25 18 Q:"So you trashed this guy Goodrich, trashed his reputation in the industry, accusing him of intentional wrongdoing
so you wouldn't jeopardize your chance to become a dealer principal of a Harley-Davidson dealership. Right?"

26 A:"Yes." (VIII, 87)

27 ¹⁹ Glen Espinoza, Veik's successor as General Manager -- who was himself implicated to some degree in providing false names
to be registered -- summed up his opinion regarding the actions of Veik's subordinates: "[T]hese individuals were manipulated
28 by Mr. Veik, and their involvement was for varying reasons, but all related to his decision-making and his actions...[T]hey
were generally good people, they were honest people, they were decent people, people that needed better leadership..." (VIII,
166-167)

1 General Manager and removed him from the dealership, and that Jay is now taking a much more active
2 role in Riverside's management under its new organizational structure, greatly reduces the likelihood that
3 such activity will ever recur at Riverside.

4 **Other Existing Circumstances**
5 **§3061 Prefatory Language**

6 127. As an initial matter, Harley-Davidson Co. does not consider Riverside (or Jay) to
7 be "a bad dealer by [the company's] standards ... at all." (I, 166)

8 128. The occurrence of the prohibited sales underlying Harley-Davidson Co.'s decision
9 to terminate Riverside's franchise resulted from a convergence of Jay's misplaced trust in Veik;
10 Veik's corrupt conduct; and Jay's omission to supervise the day-to-day operation of the
11 dealership because of the 2000 reorganization of the dealership. Although other employees
12 played a contributory role in the sales to a greater or lesser extent, they were manipulated or
13 intimidated to do so by Veik, and would otherwise not have played a part in a scheme to engage
14 in prohibited sales transactions. (VI, 32; 36-7, 39)

15 129. Veik engaged in the sales activity that violated the NRSP to promote his personal
16 financial interest. (VIII, 12-13)

17 130. The existing circumstances for determining whether good cause has been
18 established to terminate Riverside's franchise include those following cessation of the sales
19 activity that violated the NRSP. These circumstances include the remedial actions that Riverside
20 has taken since Jay first became aware of the sales. In addition to the organizational and
21 procedural changes that Riverside made after Veik's departure and before the Harley-Davidson
22 Co. audit, which remain in place, Riverside has taken various specific remedial actions to ensure
23 that sales in violation of the NRSP, PDI, and SWR requirements under the Dealer Contract do
24 not occur again. Many of these are in the nature of checks and balances to ensure that
25 paperwork crosses departmental lines and is reviewed by as many people as possible. (*See*
26 *generally*, VI, 89-90; 99-101; 123-129; 153; VIII, 163 *et seq.*) Among these are:

- 27 • A deal jacket checklist was added as a control measure after the Notice of
28 Termination was issued. This is a document used to prevent problems from arising in
the sale of motorcycles. It includes an acknowledgement by the buyer that he or she

1 is buying the motorcycle for personal use. (VII, 97)

- 2 • A sales and use tax checklist has been implemented so that the finance department can
3 review a transaction and determine whether the sale is subject to the payment of sales
4 taxes. (VII, 153)
- 5 • Cross-checks in the processing of SWRs by people independent of the sales
6 department to ensure that the forms are properly filled out. (VII, 99-101)
- 7 • Review of every deal jacket by the General Manager or his assistant within 24 to 48
8 hours after the deal is completed to ensure completeness of the jacket. (VII, 163)
- 9 • New computer reports that Marshall Dabney runs to help detect and prevent any deal
10 impropriety. (VII, 63 *et seq.*)
- 11 • A rigorous training program concerning the NRSP for all members of the
12 management, as well as all new hire sales and finance employees. (VIII, 164)
- 13 • Dissemination and explanation of the NRSP to employees, who must each sign an
14 acknowledgement that he or she has been trained on it. (VIII, 164)
- 15 • Meetings to discuss the NRSP. (VIII, 164)
- 16 • Specific pre-delivery and inspection processes with paperwork routed to specific
17 individuals. (VIII, 164)
- 18 • Creation and internal distribution of a "no sell" list containing the names of the buyers
19 involved in purchases of motorcycles that were the subject of the Notice of
20 Termination. (VIII, 161-165)

21 131. There is no evidence in the record of sales activity at Riverside that has violated
22 the NRSP since Riverside received the audit results.

23 132. Riverside voluntarily repaid the \$28,285.75 in VIP that it had received for the
24 prohibited sales after receiving the Notice of Termination. (VI, 30-31, 61)

25 133. Although Respondent has established that there are rational reasons for the NRSP,
26 PDI and SWR requirements, there is no evidence that any actual harm resulted from the sales in
27 this matter, such as evidence of injury or death resulting from the purchase of any of the
28 motorcycles from an end user; evidence that any litigation has been brought against Harley-
Davidson Co., or economic loss experienced by the company or others, as a consequence of the
sales; or evidence that actual harm has been caused to the Harley-Davidson brand as the result
of these sales. Respondent's claim that the sales caused harm is speculative, and the likelihood
of harm is remote. (IX, 205-206)

134. Harley-Davidson Co.'s consistent invocation of its "rule of 20" to terminate any

1 dealer determined to have made 20 or more sales in violation of the NRSP is essentially a matter
2 of principle, and its manner of being applied by Harley-Davidson Co. conflicts with the NRSP
3 in that the sanction imposed for a violation does not always "[depend] upon the circumstances of
4 the violation," but rather depends strictly upon the fact that the dealer has made more than 20
5 sales in violation of the NRSP. (Ex 52, ¶8)

6 DETERMINATION OF ISSUES

7 135. Harley-Davidson Co. has not established that Riverside is not transacting an adequate
8 amount of business as compared to the business available to it. [Section 3061(a)]

9 136. Harley-Davidson Co. has not established that Riverside has not made the investment
10 necessary and incurred the obligations necessary to perform its part of the Harley-Davidson Co. franchise.
11 [Section 3061(b)]

12 137. Harley-Davidson Co. has not established that Riverside has not made an investment of
13 sufficient permanency to comply with the terms of the franchise. [Section 3061(c)]

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

16 139. Harley-Davidson Co. has not established that Riverside does not have adequate motor
17 vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably
18 provide for the needs of the consumers for the motor vehicles handled by the franchisee and is not
19 rendering adequate services to the public. [Section 3061(e)]

20 140. Harley-Davidson Co. has not established that Riverside failed to fulfill the warranty
21 obligations of Harley-Davidson Co. to be performed by Riverside. [Section 3061(f)]

22 141. Harley-Davidson Co. has established that Riverside failed to comply with the terms of the
23 franchise by breaching its obligations under the Dealer Contract. However, in the context of Riverside's
24 history of successful performance, its failure to do so was not extensive. The totality of the circumstances
25 surrounding that failure indicate that its extent is insufficient to constitute good cause for termination of
26 the franchise, particularly in light of the fact that less drastic sanctions are provided under the terms of the
27 Dealer Contract. [Section 3061(g)]

28 ///

1 **PROPOSED DECISION**

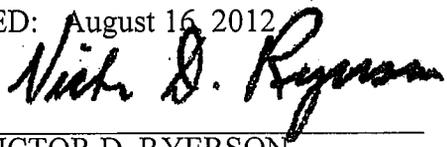
2 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the
3 Protest in *Riverside Motorcycle, Inc. dba Skip Fordyce Harley-Davidson v. Harley-Davidson Motor*
4 *Company*, Protest No. PR-2310-11, is conditionally sustained. Respondent has not met its burden of
5 proof under Vehicle Code Section 3066(b) to establish that there is good cause to terminate Riverside's
6 Harley-Davidson Co. franchise, but in order to assure performance of binding contractual agreements
7 between franchisees and franchisors or otherwise serve the purposes of Article 4 of Division 2 of Chapter
8 6 of the Vehicle Code, Protestant shall fully reimburse Respondent for "...any internal and external audit
9 and legal expenses," as provided for in the NRSP, that are associated with the audit upon which the
10 Notice of Termination is based. For purposes of this condition, the term, "legal expenses associated with
11 the audit" in the NRSP does not include attorney's fees, legal costs, or other legal expenses associated
12 with the termination proceedings before the Board.

13 Respondent shall promptly provide Protestant with an accounting of its "audit and legal expenses."
14 Within 30 days of receipt of this accounting, Protestant shall fully reimburse Respondent.

15
16
17 I hereby submit the foregoing which constitutes my
18 Proposed Decision in the above-entitled matter, as
19 the result of a hearing before me, and I recommend
20 this Proposed Decision be adopted as the decision of
21 the New Motor Vehicle Board.

22 DATED: August 16, 2012

23 By:


VICTOR D. RYERSON
Administrative Law Judge

24
25
26
27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV