



DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: August 16, 2012

From : ADMINISTRATIVE LAW JUDGE VICTOR D. RYERSON

CASE: RIVERSIDE MOTORCYCLE, INC. dba SKIP FORDYCE HARLEY-DAVIDSON v. HARLEY-DAVIDSON MOTOR COMPANY
Protest No. PR-2310-11

TYPE: Vehicle Code section 3060 Termination
Proposed Decision

PROCEDURE SUMMARY:

- FILED ON CALENDAR: July 20, 2011
- MOTIONS FILED: None
- HEARING ON MERITS: March 5-19, 2012
- COUNSEL FOR PROTESTANT: Halbert B. Rasmussen, Esq.
Franjo M. Dolenac, Esq.
Manning, Leaver, Bruder & Berberich
- COUNSEL FOR RESPONDENT: Robert L. Ebe, Esq.
Scott M. McLeod, Esq.
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EFFECT OF PROPOSED DECISION: This Proposed Decision would conditionally sustain Protest No. PR-2310-11.

SUMMARY OF PROPOSED DECISION:

- Respondent contends that good cause exists to terminate Riverside's franchise because, over a 13-month period, Riverside sold 29 new motorcycles in violation of Respondent's Non-Retail Sales Policy for Pleasure Vehicles ("NRSP"). Respondent further contends that Protestant's failure to perform Pre-Delivery Inspection ("PDI") and Protestant's filing of false Sales Warranty Registration ("SWR") information are violations of the franchise as set forth in Respondent's General Conditions of Sales and Service.

- Protestant contends that, although it violated the NRSP and failed to perform PDI and SWR responsibilities as disclosed by the April 20, 2011 audit, this circumstance does not constitute good cause for termination of its franchise in light of other circumstances surrounding this occurrence. Specifically, Protestant contends that the violations at issue were the result of a deliberate scheme by its former general manager, who made the prohibited sales to further his own personal financial interests, and deliberately concealed them from the dealer principal. Protestant consequently contends that it was effectively unaware of the prohibited sales at the time of their occurrence and until they were revealed to its owners after the sales activity stopped many months before the audit.
- Protestant further contends that good cause does not exist for termination, because the number of prohibited sales was relatively small in relation to its total volume of motorcycle sales, and because the duration of the activity was limited. Protestant contends that termination is an unreasonably harsh sanction in light of the availability of other, less drastic sanctions under the terms of the dealer agreement, and because termination would be injurious to the public welfare. Finally, Protestant contends that good cause does not exist because it repaid the incentives it had received for the prohibited non-retail sales when it received the termination notice, and because it has taken various remedial actions to address its failure to perform and prevent the recurrence of sales transactions that would violate the NRSP, and its failure to complete paperwork and furnish reports to Respondent.
- The gravamen of the case is the allegation that Riverside breached the dealer contract by selling motorcycles in violation of the NRSP on approximately 25 occasions and in relation to those sales by failing to document PDIs of the motorcycles and falsely registering them with Respondent under the SWR procedure. These alleged acts and omissions are the basis of Respondent's contention that Protestant failed to comply with the terms of its franchise, and that its dealer contract accordingly should be terminated.
- Although Protestant admits that the prohibited activity occurred, it offers a credible explanation of the circumstances. The sales were the result of a deliberate effort by the Protestant's general manager to accomplish them for his own personal financial benefit, and of his successful efforts to conceal them from the dealer principal.
- In addition, the prohibited sales activity was limited in amount and duration, lasting 13 months, and was not extensive in comparison to the Protestant's history of successful sales performance. Protestant began to improve its sales procedures even before the prohibited sales were discovered, and has taken many remedial actions to prevent the recurrence of such activity since the sales came to light. The extent of its failure to comply with the terms of the franchise is insufficient to constitute good cause for termination, particularly in light of the availability of less drastic sanctions under the NRSP.

RELATED MATTERS:

- Related Case Law: There are no published court decisions applicable to this case.
- Applicable Statutes and Regulations: Vehicle Code sections 3060, 3061, and 3066.
- Related Board Protests:
 - *Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's Harley-Davidson v. Harley Davidson Motor Company, a Corporation*, Protest No. PR-2299-11, contained similar facts and allegations. Judge Wong issued a Proposed Decision that was adopted by the Public Members at the May 22, 2012, General Meeting; it conditionally sustained the protest.
 - *Monterey Motorcycles, Inc. dba Monterey County Harley-Davidson v. Harley-Davidson Motor Company*, Protest No. PR-2338-12. This is a termination protest involving a dealership that is owned in part by Jay Judson, Riverside's dealer principal, and Lester Veik, Riverside's former General Manager.