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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 POST-HEARING BRIEF**

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1 **I. Introduction**

2 Riverside Motorcycle, Inc. (“Riverside”) breached its contract with Harley-Davidson and
3 engaged in fraud to cover up the breach. As a result, Riverside should not be permitted to remain
4 a Harley-Davidson dealer. California's Vehicle Code should not be read to mean that a dishonest
5 dealer is exempt from termination just because it otherwise sells a lot of motorcycles or has a nice
6 facility. Nothing suggests that the non-exhaustive list of factors in section 3061 should be given
7 equal weight: otherwise a supplier would be at the mercy of a dishonest, but successful, dealer.
8 Here, when the factors are given their proper weight, the evidence demonstrates that Harley-
9 Davidson has good cause to terminate its contract with Riverside.

10 This is not a case where the dealership made a mistake or misunderstood its obligations.
11 Instead this is a case where the dealership, whose efforts were spearheaded by its general manager,
12 Lester Veik, intentionally sold motorcycles to resellers for export in violation of a policy that the
13 dealership understood and that everyone agrees is important and protects consumer safety, the
14 brand, and dealers. This is a case where the dealership's general manager, sales manager, F&I
15 manager, and controller among others, engaged in fraud to cover up its contractual violations.
16 These people knew that they were violating the contract and knew that they were providing false
17 information to Harley-Davidson to cover it up.

18 The evidence as to the violations is not in dispute. The only question is what the Board is
19 going to do about it. The Board recently sustained conditionally a protest in another case which,
20 while involving the same policy restricting non-retail sales, is otherwise distinguishable. In that
21 case (involving the Laidlaw’s Harley-Davidson dealership), Judge Wong determined that the
22 violations involved were innocent mistakes. Here, Riverside's personnel are not innocent and they
23 were not mistaken. Sustaining the protest in this case would send the message that dealership
24 management can intentionally violate core policies without fear of termination. Harley-Davidson
25 urges the Board to refuse to condone fraudulent conduct by dealerships that puts lives at risk, is
26 bad for consumers, is bad for dealers, and is bad for the Harley-Davidson brand.

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1 **II. Riverside Motorcycle, Inc. Is Responsible For The Conduct Of Its Employees**

2 As a major part of its argument in this case the dealership has asserted that termination is
3 not an appropriate remedy because Jay Dabney, the Dealer Principal did not know about the
4 dealership's unlawful conduct. But that argument is without merit as a matter of law. Under the
5 law, Riverside Motorcycle Inc. is the dealer and the party to the contract. Riverside Motorcycle
6 Inc., not Jay Dabney, is required to comply with the contract. Riverside Motorcycle Inc., like all
7 corporations, acts through its employees, who are legally deemed to be agents of the corporation.
8 In this case, Riverside Motorcycle Inc. acting through its employees and managers, Lester Veik,
9 Glenn Espinoza, Michael Slagle, and others breached the contract and is legally responsible for the
10 breach.

11 **A. A Corporation is Liable For the Unlawful Acts of Its Agents**

12 Riverside attempts to escape liability for its agents' fraudulent conduct by claiming
13 ignorance and innocence. But California law holds a corporation liable for the unlawful acts of its
14 employees and agents. Specifically, California law holds an employer corporation responsible for
15 the fraudulent acts of employees and agents acting in a managerial capacity. *Kuchta v. Allied*
16 *Builders Corp.*, 21 Cal App. 3d 541, 549-550, 98 Cal Rptr. 588, 592 (4th Dist. 1971). The
17 corporation is legally responsible for its managers' fraudulent acts whether or not the corporation
18 ratified or authorized the fraudulent conduct. *Id.* Indeed, the principal is subject to liability even
19 if it is entirely innocent. *Hartong v. Partake, Inc.*, 266 Cal. App. 2d 942, 960, 266 Cal. Rptr. 722,
20 733-34 (1st Dist. 1968) (*citing* the Restatement Second of Agency §§ 261-262).

21 The reason courts hold a corporation responsible for its agents and managements conduct
22 is twofold: (1) to "encourage careful selection and control of persons placed in important
23 management positions" (*id.*); and (2) because "a corporation can only speak or act through its
24 agents, and therefore there is a stronger reason for holding it answerable for the acts and
25 representations of the agent done within the ostensible scope of their authority and while
26 transacting the business of a principal, than applies when the principal is a natural person." *Von*
27 *Schrader v. Milton*, 96 Cal. App. 192, 201-202, 273 P. 1074, 1078 (3rd Dist. 1929). Indeed, "it
28 would be a travesty on justice and common honesty to permit a corporation, whether private or

1 quasi-private, to participate in a fraud and to benefit therefrom and then escape liability on the
2 ground the act was not that of the corporation itself, but its officers who were in control thereof.”
3 *Id.* (citations omitted).

4 Here, it is undisputed that Veik, Espinoza, Slagle and all of the others involved were
5 agents and managers of Riverside. Veik was the general manager of Riverside and was the
6 “source of executing everything.” (RT Vol. V, 159:17-24; 161:6-10.) Espinoza was the controller
7 at the time and is the current general manager. Slagle is the sales manager of the dealership.
8 Thus, Riverside is legally responsible for their conduct. To hold otherwise would be a “travesty
9 on justice and common honesty.” *Von Schrader*, 273 P. at 278.

10 **B. The Ignorance of Jay Dabney is No Excuse**

11 If the Board does not permit termination in this matter, it will send a dangerous message to
12 others: Dealerships can intentionally breach a contract and commit fraud, and get away with it so
13 long as the dealer principal claims ignorance. This would create the perverse incentive for dealer
14 principals to become *less* involved in the operations of their business, so they could have a claim
15 of plausible deniability. Harley-Davidson wants its dealer principals to be, as they are required by
16 contract (and by Riverside’s own policies) to be, involved and responsible for day-to-day
17 operations.

18 Moreover, Jay Dabney has acknowledged that ignorance is not an excuse. In early 2009
19 (before the violations at issue here), Dabney's dealership was found to have violated Harley-
20 Davidson’s Minimum Advertised Price Policy (“MAP Policy”), governing advertising. Mr.
21 Dabney acknowledged in writing that “ignorance by the dealer principal has been explicitly denied
22 as an excuse” for violations. (Ex. 85.)

23 **1. Dabney Improperly Removed Himself from the Operation of the**
24 **Dealership**

25 Dabney has an express contractual obligation as dealer principal to be “personally involved
26 in the day-to-day management and operations of the dealership on a full time basis.” (Ex. 34
27 [Dealer Contract].) But Dabney regularly ignored this obligation. He testified repeatedly that his
28

1 job was to work "on" the business, but not "in" it. (RT Vol. V, 162:23; Vol. VI, 152:19-22; RT
2 Vol. VIII, 39:17-21.)

3 During the time of the violations, Dabney's detachment is graphically represented by the
4 organizational chart for 2009-2010: It shows Dabney, the dealer principal, being cut off from his
5 organization, with only one line of communication going through Veik. (Ex. 501; RT Vol V,
6 160:4-9 ["above is the ownership level ... and below are the operations."] Indeed, Dabney
7 testified that the general manager, Veik, was the "source of executing everything." (RT Vol. V,
8 159:17-24; 161:6-10.)

9 Dabney was so far removed from the day-to-day operations that his employees called him
10 the "Wizard of Oz" – they could hear his voice but never saw his body. (RT Vol. VI, 203:23-
11 204:10; Ex. 305 [Goodrich Depo at 71:10-22].) When Michael Slagle was asked how much time
12 Dabney spent in the sales department, he actually laughed, because Slagle "never saw him in the
13 sales department." (Ex. 309 [Slagle Depo at 15:21-16:2].)

14 Moreover, this conduct by Dabney was directly inconsistent with the advice and
15 information Dabney received from Harley-Davidson on this issue. Harley-Davidson specifically
16 advised dealers in its 2000 Bulletin, as just one example, that dealer principals should "Perform
17 your own personal review of sales records to assure accuracy and completeness. Dealers in the
18 past have found that even their most trusted employees have participated in non-retail sales
19 activity." (Ex. 53; *see also* Ex. 56 ["Inspect what you expect."].)

20 2. If Dabney Had Performed His Contractual Obligations, He Would 21 Have Discovered the Violations

22 Riverside's own internal policies obligated Dabney to perform certain functions, such as
23 reviewing the Traffic Log and F&I Log on a daily basis. (Ex. 93.) If, as dealer principal, he had
24 followed those policies he would have known about the violations and could have stopped them.
25 The evidence was sitting in plain view in his dealership, in form of deal jackets, the Traffic Log,
26 and the F&I Log, but Dabney breached his obligations to look.

27 **Deal Jackets.** The deal jackets for each of the sales at issue contain unmistakable evidence
28 of NRSP violations. Virtually all of the deal jackets contained bills of lading or other documents

1 evidencing the purchaser's intent to ship the motorcycles overseas. (*See, e.g.*, Ex. 1 at
2 HDR000085-86) A number of the deal jackets contained a shipping manifest showing that the
3 purchaser was shipping *sixteen* motorcycles overseas. (Exs. 1, 8, 18, 19, 28, 29) The deal jackets
4 also revealed that in every one of the violation sales, Riverside did not charge sales tax, which
5 would have only been permissible if the customer was not using the bike in California. (RT Vol.
6 II, 117:13-24; Exs. 1 through 33.) Nor was there any of the expected paperwork showing that the
7 purchaser registered the motorcycle. (RT Vol. II, 121:3-6; Exs. 1 through 33.) If Jay Dabney had
8 taken a look at *any* one of these deal jackets, he would have seen at once that the sales violated the
9 NRSP. Dabney admitted he never even checked. (RT Vol. VI, 228:16-229:9.)

10 **Traffic Logs.** Riverside's operations manual lists the "daily thirteen" – thirteen essential
11 functions that the dealer operator himself is supposed to do everyday. (Ex. 93 at 2-4 through 2-5.)
12 Second on the list is "Traffic Log Review." (Ex. 93 at 2-5 and 5-11; RT Vol. VI 208:25-210:14.)
13 If Dabney had reviewed the Traffic Log (Ex. 118) he would have found, among other things:

- 14 • A note in 2008 regarding Kevin Le (who bought four of the violation motorcycles)
15 that reads "KEVIN BUYS A LOT OF BIKES"
- 16 • A note in 2009 regarding Kevin Le that reads, in part, "HE BOUGHT 5 BIKES
17 FROM US IN 08 AND IS LOOKING TO DO A 2 BIKE DEAL IN THE NEXT
18 FEW DAYS."¹
- 19 • A note regarding Michel Kordas (who bought four of the violation motorcycles)
20 that reads "DOES NOT HAVE ANSWER FROM HIS BUYER YET", clearly
21 indicating that Kordas was not the end-user, but instead that Kordas was a
22 middleman for "his buyer."
- 23 • A 2009 note regarding Kordas that referenced "shipping crates."
- 24 • A 2009 note regarding Truong (who bought 15 of the violation motorcycles)
25 reading "BOUGHT 2 CASH." As Verdun testified, cash sales may be an
26 indication of a suspicious sale (RT Vol. II, 96:11-14, 123:18-17), especially where
27 there are two sales to the same person.
- 28 • A 2009 note regarding Svenning (who bought four Buell motorcycles in violation
of Buell's policy) that references "2 PREV BIKES" and an attempt to sell him two
more bikes.

26 ¹ Dabney testified that even buying three or four motorcycles in a short time frame is very
27 uncommon, and that Harley-Davidson had warned him to look out for multiple sales to an
28 individual. (RT Vol. VI, 212:6-213:10)

- 1 • A 2009 note regarding Svenning asking if they had more Buell motorcycles, where
2 the sales representative said he needed to "know how many he wants."
3 • A 2009 note regarding Kordas stating that Kordas brought a friend from Tahiti to
4 buy a bike.

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

6 All of this information was not only available to Dabney, but he had an obligation to his
7 company to review it.

8 ***F&I Logs.*** Also on the list of the dealer operator's "daily thirteen" is to review the F&I
9 Log. (Ex. 93 at 2-5.) If Dabney had looked at the June 2009 F&I Log, he would have seen on
10 consecutive entries that Riverside sold two motorcycles for cash to "Kevin Le." (Ex. 566 at
11 SFHD17112.) Chronologically, those two sales to Kevin Le are the first two sales underlying the
12 notice of termination. Multiple sales to one customer are, of course, a warning sign, and if
13 Dabney had just looked at the F&I Log, he could have put an early end to Riverside's violations.

14 Similarly, if Dabney had looked at the July 2009 log, he would have seen two cash sales to
15 An Tron [sic] Truong within a week or so. (Ex. 566 at SFHD017115.) Chronologically, these are
16 the third and fourth sales that underlie the termination notice, and if Dabney had investigated, he
17 again could have put an end to the violations.

18 If Dabney had looked at the August 2009 F&I Log, he would have seen two consecutive
19 entries showing two cash sales to Vu Hoang Le. (Ex. 566 at SFHD017117.) If he had looked at
20 the September 2009 F&I Log, he would have seen three consecutive entries showing cash sales to
21 An Toan Truong. Dabney admitted at the hearing that, had he bothered to look, even he would
22 have noticed these three cash sales to Troung. (RT Vol. VI, 217:20-218:6.)

23 Dabney failed to comply with his responsibilities to Harley-Davidson and to Riverside
24 when he failed to review the Deal Jackets, Traffic Log and F&I Logs. He should not be rewarded
25 for his breach by a finding that "he did not know" of the violations and, thus, the dealership is
26 exempt from conduct that would otherwise support termination of its dealer contract. Especially
27 because, unlike the *Laidlaw's* case, in which Judge Wong found that the dealer principal did not
28 know about the consequences of violating the NRSP, here the Dabney family was well aware of

1 the policy and the consequences for violating it, including termination. (See Proposed Findings of
2 Fact ("PFF") ¶¶ 147-156).

3 **III. Riverside Breached The NRSP.**

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

5 It is Riverside's contractual obligation to sell only to end-users. The "Grant of Rights" on
6 the first page of Dealer Contract between Harley-Davidson and Riverside grants Riverside the
7 right to "purchase and resell at retail." (Ex. 34 at HDR000437.) (emphasis added). Harley-
8 Davidson's General Conditions of Sales and Service ("General Conditions") are incorporated into
9 the Dealer Contract by reference. The General Conditions specifically prohibit non-retail sales
10 and provide that Harley-Davidson will adopt policies with which Riverside must comply. (Ex. 35,
11 HDR001367.).

12 Pursuant to the Dealer Contract and General Conditions, Harley-Davidson has for over 20
13 years annually issued a written policy entitled, "Non-Retail Sales Policy – Pleasure Vehicles" for
14 each model year which further details the specifics of Harley-Davidson's policy prohibiting non-
15 retail sales. (RT Vol. I, 134:15-136:2 [MK]; Ex. 5.) The NRSP is also available for review by
16 dealers on-line via h-dnet.com, where it is posted . (RT Vol I, 136:18-137:24.)

17 The reasons for the NRSP are set forth in the preamble:

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

(Ex. 50 at HDR018140.)

22 The policy clearly defines violations:

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

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applicable taxes and registration fees, and titles the vehicle in his or her name.

(*Id.* at ¶1.)

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.*)

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

B. Riverside Sold 29 Harley-Davidson Motorcycles (and 6 Buell motorcycles) in Violation of the NRSP

There is no doubt that Riverside violated the NRSP. Riverside knew it was selling to exporters, and that they were resellers. For examples of some of the evidence: Veik knew when he sold to Michel Kordas that he was going to ship his bikes overseas, and that he would not be the end user. (RT Vol. VII, 198:15-21.) Likewise, Veik knew Svenning Juhl, too, was going to ship overseas the four motorcycles he purchased (RT Vol. VII, 199:20-200:7.), and that Juhl would not be the end-user either. (RT Vol. VII, 199:20-200:7.) Mike Slagle, the current sales manager, admitted knowing when he sold motorcycles to Vu Hoang Le that Le was going to ship them to Vietnam for the purpose of reselling them. (Ex. 309 at 47:1-6.) As for large volume buyer An Toan Truong, Rory Swan, the sales floor manager who was Truong's main contact at the dealership, testified that Truong told him he was shipping the bikes to Vietnam. (Ex. 310 at 52:2-4.) And Veik, the General Manager, admitted knowing that Truong was a "wholesaler or reseller" when Riverside made the sales to Truong. (RT Vol. VIII, 60:4-17.)

Moreover, when Veik called Jim Sorenson on March 14, 2011, before Harley-Davidson did any audit, Veik confessed that Riverside had sold motorcycles to someone (Truong) who "resold" them. (Ex. 171; RT Vol. III, 156:7-157:8; RT Vol. VIII, 90:9-16.) Right after the audit, but before Harley-Davidson revealed its conclusions, Veik wrote a note for Jay Dabney

1 referencing the deals he did "that were wholesaled to brokers" and told Jay Dabney that he had
2 been "selling to wholesalers." (Ex. 46 at SFHD012480; RT Vol. VIII, 84:10-16.) Jay Dabney
3 testified that each of the sales in question here violated the NRSP, and that the sales were made to
4 "wholesalers" or "resellers." (RT Vol. VI, 143:2-8.)

5 In addition to the multiple admissions by Riverside of the violations, the documents that
6 Harley-Davidson obtained from the audit clearly show that the sales were to resellers who
7 exported the motorcycles. In total, Riverside sold 29 Harley-Davidson motorcycles in violation of
8 the NRSP – the 25 sales that were listed in the Notice of Termination plus the four additional
9 violations Harley-Davidson discovered post-termination. (Exs. 156-159) Riverside also sold six
10 Buell motorcycles to wholesalers in violation of Buell's policy. (Exs. 28-33; RT Vol. VIII, 68:24-
11 69:16.)

12 1. Riverside's Violations Were Intentional

13 It is also undisputed that Riverside's violations were intentional. "I knew what I was doing
14 was wrong," Veik testified. (RT Vol. VIII, 13:11; 42:1-10.) Veik knew about the policy and
15 knew at the time of the sales that they violated the policy. (RT Vol. VII, 198:15-21 Slagle knew
16 at the time he made sales to exporters that they were "wholesaling" the motorcycles and that those
17 sales were prohibited. (Ex. 309 at 60:22-61:1; 65:12-66:5.) These violations were not mistakes
18 where the dealer was fooled by deceptive buyers; similarly there was no confusion (real or
19 feigned) about what the policy prohibited. Instead, these were intentional, knowing violations of
20 the contract.²

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22
23 ² The evidence was overwhelming that the corporate dealership's Board of Directors – i.e., the
24 Dabneys – had reason to be concerned that Veik was not doing the job they had improperly
25 delegated to him. Managers Espinoza, Kunzman and Goodrich all thought Veik was no good, and
26 they all told the Dabneys. The Dabney family, including Jay, felt as early as 2003 that Veik may
27 not be the "right guy" for their dealership, and they were increasingly unhappy with his
28 performance, to the point of discussing whether to fire him. But they did nothing, allowing him
and the others to perpetrate the dealership's contract breaches and fraud on Harley-Davidson. See
PFF ¶ 142-150.

1 **2. Riverside Violated the NRSP in an Attempt to Gain Unfair Advantage**
2 **Over Honest Dealerships**

3 Riverside made 29 sales (35 including the Buell sales) that honest dealers would not have
4 made. Its sales rankings are therefore improperly elevated as compared to honest dealers. Based
5 on those sales, it received allocation that should go to other California dealers. It also received
6 VIP money which it was ultimately forced to return. But even more, Riverside violated the NRSP
7 not only for the sake of making the individual sales but also to win future business from at least
8 one of the buyers. Slagle testified that the violation sales to Kordas were made to "prime the
9 pump" in the hopes that Kordas would buy a "shit ton" of used motorcycles from Riverside. (Ex.
10 309 at 74:17-75:13.) Veik also testified that he was trying to use the violation sales as a way to
11 "leverage" future used bike sales. (RT Vol. VIII, 9:19-10:8.) Riverside intentionally violated its
12 contract in an attempt to gain an unfair competitive advantage over its neighboring dealers that do
13 not violate the NRSP.

14 **IV. Riverside Breached Its Obligation to Perform Pre-Delivery Inspections.**

15 **A. The Dealer Contract Requires Dealers to Perform Pre-Delivery Inspections**

16 The Dealer Contract obligates authorized dealers to perform pre-delivery inspections
17 ("PDI") to ensure delivery of motorcycles to consumers in safe condition:

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

23 (Ex. 34 at ¶F(2).)

24 The "written instructions" authorized by this provision are contained in, among other
25 places, an approximately 180 page PDI Manual (updated annually) and a PDI Checklist Form that
26 is to be completed and signed at the point of delivery. (See Ex. 130 [PDI manual]; Ex. 11 at
27 HDR000183 [example of PDI form].)

28 The PDI Manual informs dealers that Harley-Davidson:

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

3 (Ex. 130 at SFHD014079.)

4 The PDI Checklist Form instructs dealers that they must confirm in writing (on the form)
5 that the PDI procedures, including purchaser inspections and communications, have been
6 followed. The form also must be signed by a dealership technician, a dealership sales
7 representative, and the purchaser, confirming that all required procedures have been followed.
8 [See, e.g., Ex. 11 at HDR000183.]

9 **B. PDI Noncompliance**

10 The PDI process is important for customer safety and satisfaction reasons, and it is
11 important to the fill out the form for liability reasons. McGowan, who handles product liability
12 cases as part of his job, testified that a properly filled out PDI form is evidence that the process has
13 been completed. (RT Vol. III, 125:23-126:23.) Dabney agreed that filling out the PDI checklist is
14 important to avoid "product liability problems." (RT Vol. 122:22-123:6.) Riverside's own
15 Operations Manual, as created and published by the dealership itself, emphasizes the importance
16 of performing, and documenting, proper pre-delivery inspection and set-up in order to minimize
17 product liability claims against the dealership. (Ex. 93 at 1-38 and 7-35). But the deal jackets for
18 the sales at issue here (Exs. 1-33) show that not a single PDI form was completed. This is a
19 process and form that everyone agrees is important, yet Riverside breached its obligation with
20 respect to every transaction in question.

21 **V. Riverside Breached Its SWR Obligations.**

22 **A. The Dealer Contract Obligates Dealers to Provide Accurate Sales & Warranty**
23 **Registration ("SWR") Information**

24 The Dealer Contract obligates dealers to "explain Seller's customer warranty to its
25 customers prior to the consummation of any sale of Harley-Davidson Products," deliver a copy of
26 the warranty to the customer "at the time of delivery" of the product; and register all sales with
27 Harley-Davidson "for purposes of establishing warranty protection, providing essential
28 information in the event of a recall of Harley-Davidson Products and/or providing Seller with

1 useful market information, all in accordance with Seller's written procedures from time to time."
2 (Ex. 34 at ¶F(3).)

3 The Dealer Contract also requires Riverside to "complete and electronically file with Seller
4 a sales and warranty registration form for every new Harley-Davidson sold by Dealer" that
5 contains the name and address of the purchaser and "maintain a hard copy of all sale documents,
6 including a hard copy of the fully completed and signed sales and warranty registration form, in its
7 files for a minimum of five (5) years from the date of sale." (Ex. 34 at ¶F(7).) The PDI Manual
8 similarly requires both the dealer and customer to sign the hard-copy SWR form. (Ex. 130 at
9 SFHD014173.)

10 The NRSP also requires dealers to submit accurate SWR information. (Ex. 50 at ¶¶1, 8.)
11 The SWR form requires the dealer to certify that PDI procedures have been followed, all
12 warranties have been explained, all sales policies have been complied with and that dealers may be
13 terminated for misrepresenting SWR information:

14 ... the information on this form is true, correct and complete to the
15 best of my knowledge....I acknowledge that any misrepresentation
16 on this form will be considered a material breach of my dealer
17 contract and may constitute grounds for termination. (emphasis
18 added)

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

20 The SWR form (like the NRSP itself), provides specific notice that the submission of false
21 SWR information may result in termination of the Dealer Contract.

22 Moreover, it is illegal under California law for Riverside to:

23 Fail to disclose in writing to the franchisor of a new motor vehicle dealer the name
24 of the purchaser, date of sale, and the vehicle identification number of each new
25 motor vehicle sold of the line-make of that franchisor, or intentionally submit to
26 that franchisor a false name for the purchaser or false date for the date of sale.

27 See, Cal. Vehicle Code § 11713.1(u).

28 Thus, when Riverside submitted false SWR information to Harley-Davidson, Riverside was not
only breaching its contract, it was violating California law.

B. Riverside Breached Its SWR Obligations And Committed Fraud In An Attempt Cover Up Its NSRP Violations.

1 Riverside committed intentional fraud in an unsuccessful attempt to cover up the NRSP
2 violations. Riverside sold the 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.) If Riverside had accurately
5 reported, for example, 15 sales to Truong on the SWR forms, that might have raised a red flag
6 with Harley-Davidson that Riverside was violating the NRSP. (See, e.g., Ex. 60.) The only
7 explanation for the dealership submitting fraudulent forms with other names is that it was
8 knowingly attempting to avoid detection. (See RT Vol. VII, 206:23-207:4.)

9 In order to keep Riverside "under Harley's radar," Veik went to Glen Espinoza and other
10 employees he "could trust" and asked for names and addresses that he could use to show as the
11 registered owners of the motorcycles at issue. (RT Vol. VII, 206:23-207:4.; Ex. 312, Vogeli Dep.
12 at 29:24-31:19; Ex. 308, Ramirez Dep. at 16:14-18:5.) Veik asked many of Riverside's current
13 management, including Espinoza, Slagle, Wilmoth, and Vogeli for names because he "trusted"
14 that they would participate in the scam, which they did. (RT Vol. VIII, 42:11-44:12.) Veik *told*
15 these employees that what they were doing violated the NRSP, and the employees *understood* that
16 what they were doing was trying to hide the violations from Harley-Davidson, and they did it
17 anyway. (RT Vol. VIII, 44:22-14.) Each of these employees assisted in the fraud.

18 ***Glen Espinoza.*** Espinoza, then the dealership's Controller, now its General Manager,
19 gave Veik permission to register a motorcycle to his wife (RT Vol. VIII, 47:15-48:9.) and to his
20 mother. (RT Vol. VIII, 49:24-50:7.) Espinoza did not care whether the true buyers of the
21 motorcycles received information Harley-Davidson, including recall notices. He told his mother
22 to throw away any mail she got from Harley-Davidson. (RT Vol. IX, 20:19-21:3.) Espinoza also
23 assisted Veik in attempting to cover up the fraud. Espinoza adopted Veik's lies and presented
24 them to Harley-Davidson as the truth. In a June 20, 2011 email, Espinoza forwarded Veik's
25 "Narrative" to Harley-Davidson (in which Veik falsely blames then-sales manager, Darin
26 Goodrich, for the violations) even though he knew at the time that it was "dishonest." (RT Vol.
27 IX, 25:24-27:14.)

28

1 **Mike Slagle.** Slagle, Riverside's current sales manager, also actively participated in the
2 fraud. Five motorcycles sold to Troung or Le (sales 1, 6, 8, 11, and 22) were SWR'd to Harley-
3 Davidson as sold to persons connected to Slagle: two friends, his father, his brother, and the
4 brother of his fiancé. Slagle willingly provided those names so that motorcycles could be falsely
5 registered. (Ex. 309, Slagle Dep. at 58:22-59:12, 57:19-58:21; 54:15-55:21; 56:23-57:15.) Like
6 Espinoza, Slagle engaged in fraudulent conduct and then lied to Harley-Davidson about it: in
7 response to a June 2011 email from Sorenson about violations of the NRSP, Slagle cheekily writes
8 "Thank goodness. Because I know some out there that are doing this. We do not, I know Les and
9 Jay have been VERY firm about this for a long time." (Ex. 113.) Slagle conveniently ignores his
10 own role with respect to violations of the NRSP, and instead accuses other dealers of doing what
11 he knows he and Riverside did.

12 **Jason Wilmoth.** Wilmoth, Riverside's F&I manager, gave Veik several names to use for
13 reporting false SWR information to Harley-Davidson, simply because Veik asked him for them:
14 Robert Miller (friend), Jeff Crawford (friend), Kevin Coduti (friend), Daniel Zamora (brother in
15 law), Mike Genoreau (school friend), Louis DeMonte (high school friend), and Peter Carlucci
16 (Rory Swan's uncle). (RT Vol. VII at 140:17-144:19) He knew without reading any policy that
17 "putting someone else's name on the form" was not right, but he did it anyway. (RT Vol. 164:20-
18 165:20.)

19 **Megan Vogeli.** Vogeli, Riverside's Assistant Operations Manager, also supplied Veik with
20 names: Erica Haman (Vogeli's cousin) and Adam Stern (the cousin's boyfriend) are falsely
21 reported as buyers. (Ex. 312, Vogeli Dep. at 29:24-30:17.) Vogeli knew what she was doing was
22 wrong:

23 Q. Did you understand that to report the wrong names to
24 Harley-Davidson was to report to them inaccurately the activities
25 that were occurring at the dealership?

26 A. Yes.

27 (Ex. 312 at 40:22-41:1.)

28 Veik seems to have provided the remainder of the fake buyers himself: Rose Branham
(Veik's mother, used twice with different addresses), Rick Branham (Veik's stepbrother), Jerry

1 Branham (Veik's stepfather), Mary Cobb (tenant of Veik's mother), Ben Cobb (same), Rose
2 Martin (Veik's mother, using her maiden name), and Lester Veik, Sr. (Veik's father). (RT Vol.
3 VII, 210:9-211:24; Ex. 311, Veik Dep. at 92:22-96:15.)

4 The SWR information described above is blatantly fraudulent, and demonstrates an
5 intentional effort by numerous employees and managers to deceive Harley-Davidson.

6 **VI. The Evidence Establishes Good Cause for Termination**

7 When the California Legislature created the New Motor Vehicle Board, it declared, among
8 other things, that one of its purposes was to avoid undue control of dealers by vehicle
9 manufacturers, but another was to insure that dealers "fulfill their obligations under their
10 contracts." (Sec. 1 Stats 1973, c. 996, p.1964.)³ Here, the Board needs to fulfill this purpose and
11 insure that dealers fulfill their obligations under their contracts by allowing Harley-Davidson to
12 terminate its relationship with Riverside as a consequence of Riversides's contractual breaches.
13 The evidence in this matter establishes that Harley-Davidson has good cause to terminate
14 Riverside's Dealer Contract under the factors set forth in Cal. Veh. Code Sec. 3061.

15 In considering the evidence in this case the Board should take into consideration similar
16 cases. Many courts have permitted termination (under statutes very similar to California's Motor
17 Vehicle Code) on facts similar to this case.

- 18 • In *Ford Motor Co. v. Motor Vehicle Bd. of the Texas DOT*, 21 S.W.3d 744 (Tex. App.
19 2000) the Court permitted termination where the dealer (like Riverside) had submitted
20 false warranty registration forms regarding the purchasers of automobiles. The Court
21 noted that the falsified records interfered with Ford's ability to contact the purchasers to
22 provide them with important information such as recall notices. The court held that Ford
23 had good cause to determinate the dealership agreement because the dealer knew that its
24 actions were contrary to Ford's policy and the dealer had taken active steps to mislead

24 ³ There is no concern over undue control here. This is not, for example, a situation where a
25 manufacturer has "arbitrarily" determined the "rules by which the two parties conduct their
26 business affairs" and imposed them on the dealer through its contract. *See New Motor Vehicle
27 Board v. Orrin W. Fox Co.* (1978) 439 U.S. 96, 102. To the contrary, Riverside *agrees* that the
28 NRSP is an important policy that should be followed; indeed Dabney claims that he independently
has a policy requiring his dealership to sell locally as it benefits his business. (RT Vol. VI, 16:1-
13.)

1 Ford regarding the purchaser of the vehicles. The factors necessary to demonstrate “good
2 cause” for termination in Texas are extremely similar to the California factors.

- 3 • In *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb. App. 721 (Neb. Ct. App. 2000)
4 the Court applied the Nebraska “good cause” factors, which are again very similar to the
5 California factors and permitted Chrysler to terminate the dealership agreement after it
6 discovered that the dealer had submitted several false warranty claims and several claims
7 for purchase incentives for vehicles that were ineligible for the incentives. The Court held
8 that Chrysler had good cause to terminate the agreement based on the false claims even
9 though virtually all of the statutory factors favored the dealer. The Court found that even
10 though the dealer had been successful and had a substantial investment in its facilities, the
11 dealer’s conduct should not be permitted and termination was appropriate, otherwise the
12 Court pointed out that suppliers would be at the mercy of dishonest, but successful
13 dealers..
- 14 • In *Ormsby Motors v. General Motors Corp.*, 842 F. Supp. 344 (N.D. Ill. 1994), General
15 Motors terminated the dealership agreement after it discovered that an employee of the
16 dealer submitted false warranty claims to General Motors. The dealer disavowed any
17 knowledge that the employee had been falsifying warranty claims. In denying the dealer’s
18 motion for a preliminary injunction, the court held that General Motors could established
19 good cause to terminate the contract with the dealer based on the circumstances of the case
20 because the evidence demonstrated that what occurred was more than an isolated incident
21 by a rogue employee.
- 22 • In *David Glen, Inc. v. Saab Cars USA*, 837 F. Supp. 888 (N.D. Ill. 1993) the court held that
23 Saab had good cause to terminate the dealership agreement after Saab discovered that the
24 dealer had falsified its records regarding recall repairs. The dealer’s management claimed
25 that it had no knowledge that the employees had falsified the records, but the court held
26 that the evidence implicated the dealer’s management in the scheme. The court noted that
27 an isolated incident of a “rogue employee” might not provide good cause, but that it was
28 “inconceivable that the current management did not know of, and at least acquiesce in, the
continued fraud at Downtown.”
- In *Craig Foster Ford, Inc. v. Iowa DOT*, 562 N.W.2d 618 (Iowa 1997) the dealer
submitted rebates for sales outside of the rebate period and for sales to employees in
violation of Ford’s rebate rules. The court held that Ford had good cause to terminate the
dealership agreement, despite the fact that the dealer prevailed as a factual matter on most
of the statutory factors because the nature of the breach was sufficient to outweigh the
other statutory factors.

Each of these court cases makes a point that is important in this case (whose decision is
reviewable in California courts): actions by dealers that are dishonest are grounds for termination
even if the dealer is otherwise successful and even if the actions were allegedly unknown to the
owner of the dealership. Just as in the above cases, the contract breaches and false information
supplied by Riverside in this case, establish good cause for termination.

1 **A. Section 3061(g): Extent of Franchisee's Failure to Comply With the Terms of**
2 **the Franchise**

3 The factor at the heart of this case, of course, is the extent of the franchisee's failure to
4 comply with the terms of the franchise, which has been described extensively above. The
5 evidence shows that Riverside intentionally and repeatedly violated its contract for improper
6 purposes. On these facts alone, this case is unlike the recent *Laidlaw's* case where, in deciding
7 against termination, Judge Wong found that there was no evidence suggesting that the dealership
8 employees acted out of greed, corruption or the like. Here, of course, the dealership employees,
9 namely Veik and the salespersons, made the sales out of greed to obtain commissions (present and
10 future). (RT Vol. VII, 212:19-213:7.)

11 Similarly, in *Laidlaw's*, Judge Wong found that to support termination, the breach would
12 have to be "so egregious" as to override the other good cause factors and existing circumstances.
13 As explained below, the other factors do not weigh in Riverside's favor in this case, but even if
14 they did, its breaches *are* so egregious that they override the other factors. Just as in the cases
15 discussed above, the dealership's dishonesty supports termination, even if the dealership is
16 otherwise successful. In *Laidlaw's*, Judge Wong concluded that the dealership's employees
17 violated the policy because they were unaware of and/or did not understand the policy. Here, in
18 contrast, the evidence shows that Veik and the other dealership employees who were involved
19 understood the policy (as did the Dabney family), knew they were violating it, and understood
20 they were falsifying SWR forms to cover it up, and did it anyway. That is egregious under any
21 definition of that term.

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

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

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

B. Section 3061(a): Amount of Business Transacted by the Franchisee, as Compared to the Business Available to the Franchisee

Riverside's own expert, Stockton, testified that with respect to section 3061(a), Riverside is "essentially an average performing dealership" based on the metric of sales compared to market opportunity. (RT Vol. IX, 175:1-176:3.) But being an "average" dealer does not cause this factor to weigh in Riverside's favor. It means that any replacement dealer is likely to do just as well as Riverside and, as a result, this factor is a "push" when it comes to supporting or opposing termination. Moreover, the amount of business that Riverside transacts has been headed in the wrong direction. (See Ex. 571 at SFHD 017865-66 [showing decline].) Thus, this factor actually favors Harley-Davidson.

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

The dealership did not prove any significant investment in the franchise, permanent or otherwise, under factors (b) or (c).

1. The Dabneys Have Recouped Any Investment Made

The Dabney family has recouped any investment it made in the dealership. The Dabney family purchased the dealership in 1974. (RT Vol. V, 102:7-12.) Protestant offered no evidence regarding what the Dabneys paid for the dealership, and whether that purchase price included a component for goodwill. The current facility was opened in 2002. (RT Vol. V, 122:12-15.) The

1 Dabney family spent \$4 million on the current facility (real estate and building) about 10 years
2 ago. (RT Vol. VI, 77:25-78:16.) During that same 10 year period, the Dabney family has taken
3 over \$12 million out of the dealership in the form of "owner compensation." (Ex. 141.) Put in
4 context, they have taken out over three times what they put into the business. Moreover, Dabney
5 claims that the real property and building are still worth \$4 million if his family chose to sell it to
6 another Harley-Davidson dealership, which, of course, they have every ability to do.⁴ (RT Vol.
7 VI, 78:17-21.) If the family did make such a sale there would be absolutely no loss at all – they
8 would get their entire \$4 million back plus the \$12 million they have already received.

9 **2. Goodwill Is Not an Investment**

10 Because Riverside does not have any actual loss of investment in this case, it instead
11 argues that it will suffer a loss of good will. But any supposed loss of goodwill is not relevant
12 because Section 3061 requires the Board to consider "investments necessarily made" and the
13 "permanency" of such investment. The \$4 million goodwill number bandied about by Riverside is
14 not an "investment made" by the dealership; it is an alleged asset of the dealership. It is not any
15 different in this context from a piece of equipment or a special tool. From an "investment"
16 standpoint, the question is not what it is worth but what did it cost. Here the specific question is
17 what the Dabneys paid, if anything, for goodwill when they purchased the dealership. Such
18 evidence often is presented in Board hearings. But such evidence was not presented here. Thus,
19 Riverside has not shown an investment made in goodwill.

20 **D. Section 3061(d): Whether it is Injurious or Beneficial to the Public Welfare**
21 **for the Franchise to be Modified or Replaced or the Business of the Franchisee**
22 **Disrupted**

23 In considering factor (d) as to the public welfare, the Board needs to consider the purposes
24 of the NRSP and the PDI and SWR obligations. No one disputes that the NRSP is a good policy.
25 Dabney agrees that it is. Dabney agreed that the dealership should comply with the policy not
26 only because it is obligated to do so by contract but also because the policy is important to dealers,

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; RT Vol. IV, 73:3-75:20.)

1 the public and consumers, and, in fact, is good for his business – it is better to sell to someone who
2 will buy into the Harley-Davidson lifestyle and become a long term customer than to someone
3 who will just resell the bike. (RT Vol. VI, 112:7-114:9.) Riverside's expert, Stockton, also agrees
4 that Harley-Davidson should have the policy. (RT Vol. IX, 224:8-10, 216:8-16.) Likewise, no
5 one disputes the importance of completing a PDI inspection or providing accurate warranty
6 information, which California requires as a matter of law. The purposes of these provisions of the
7 contract are important because the Board needs to consider how Riverside's breaches of these
8 provisions of the contract adversely affected the public interest.

9 **1. Customer Safety**

10 As McGowan explained in great detail, authorized dealers are contractually required to
11 properly uncrate, set-up and test new motorcycles, prior to sale, per detailed manufacturer
12 instructions. RT Vol. III, 111:8-114:25.) In addition to proper set-up and testing prior to delivery,
13 Harley-Davidson's PDI procedures require proper inspection with end-user purchasers at the point
14 of delivery and proper explanation by authorized dealership personnel of the owner's manual,
15 warranties, and operational, emergency and safety features of the motorcycle. (See, e.g., PDI
16 Manual, Ex. 129 at §§ 3-15, 3-16.) As McGowan testified, most of Harley-Davidson's important
17 safety warnings are contained in the owners manual rather than, for example, on stickers on the
18 bike. (RT Vol. III, 121:13-.) At point of sale, a dealership representative checks the boxes on the
19 right side of the PDI Checklist Form, which relate to these functions, and the customer must sign
20 the Form confirming that "the dealer representative has disclosed all the information and
21 instruction to me as checked above." (Ex. 11 at HDR000183 [sample PDI form].) The interface
22 between an authorized Harley-Davidson dealer and an end user during which this critical
23 information is provided (documented by the PDI Checklist Form) is vital to consumer safety (and
24 satisfaction).

25 Grey market resellers lack the authority, training, knowledge and ability to perform pre-
26 delivery and point-of-sale PDI procedures. (See, e.g., Ex. 291, Abry Decl. at ¶¶24 and 43.] As a
27 result grey market customers do not receive accurate and complete information. (Ex. 292 ¶19, 46;
28 RT Vol. IV, 138:7-139:3.) Even Riverside's expert, Edward Stockton, agreed that grey marketing

1 results in "imperfect information consequences." (RT Vol. IX, 217:6-218:17.) The Board should
2 not condone conduct by Riverside that results in consumers being misinformed and having their
3 safety put at risk.

4 While Harley-Davidson cannot predict that any particular motorcycle sold by Riverside to
5 wholesalers will suffer mechanical failures, as McGowan testified, he deals in populations of
6 motorcycles. (RT Vol. III, 132:6-23.) He testified that he can say with a

7 high degree of engineering certainty that a population of
8 motorcycles that have not gone through a thorough predelivery
9 inspection and set-up by a trained technician an authorized
10 dealership will have more mechanical issues of all kinds throughout
11 their collective lives than will be the case with a similar population
12 of bikes that were properly set-up.

(RT Vol. III, 132:25-133:7.)

12 The safety issues here are compounded by the fact that the majority of the improper sales
13 involved exports to Vietnam where Harley-Davidson does not currently have an authorized dealer.
14 That means the exported motorcycles will be set up by grey marketers who are likely to have less
15 experience with Harley-Davidson motorcycles, and are therefore less likely to catch problems that
16 an experienced technician would catch. (RT Vol. III, 118:24-119:15; 120:21-121:11.). Further,
17 Harley-Davidson's concerns are exacerbated by the lack of strong Intellectual Property laws in
18 Vietnam. Grey-marketers in Vietnam are permitted to display Harley-Davidson's distinctive bar
19 and shield logo, which can lead consumers to believe, mistakenly, that they are purchasing from
20 an authorized dealer, with all that comes with such a purchase, e.g. warranty, etc. (RT Vol. IV,
21 110:14-112:20; Vol. V, 36:22-38:25; Vol. IV, 140:11-17.)

22 Permitting dealers to violate the NRSP without fear of termination creates an unreasonable risk of
23 harm to individuals and the public at large. The Board should not condone conduct by Riverside
24 that results in consumers being improperly served and having their safety put at risk.

25 2. Recall Obligations

26 Another significant way in which the NRSP ensures safety is that it allows Harley-
27 Davidson to provide recall notices and other safety information to end-users. Harley-Davidson
28 cannot provide essential recall information if the person Harley-Davidson notifies is Slagle's high

1 school friend, or Elia Ramirez's husband, or the other persons who did not actually purchase the
2 motorcycles and who throw away recall notices.

3 Eleven of the vehicles involved here were subject to recalls or product campaigns to repair
4 problems with the motorcycles. (RT Vol. III, 26:23-27:12; Exs. 250 and 272.) Two of the
5 motorcycles that Riverside sold to wholesalers are subject to a very serious recall campaign and
6 have not had the repair performed. (Ex. 250, Reference Nos. 18 and 24). That recall campaign
7 (number 0139) involves a fastener that holds the fender and front brakes. When the fastener fails,
8 the front fender and brakes rotate forward, with the front fender ending up underneath the front
9 wheel, which "is all but certain to cause a crash." (RT Vol. III, 97:20-99:1.) McGowan testified
10 that he is aware of no less than five crashes that were caused by the issue covered by recall 0139.
11 (RT Vol. III, 110:21-111:4.)

12 Here, Riverside delivered these bikes without first performing the recall work to fix the
13 issue. (RT Vol. III, 109:6-110:20; Ex. 273.) The recall letter for the campaign provided that "[I]n
14 the interest of the safety of our mutual customers and as required by law," dealers "may sell BUT
15 NOT deliver any motorcycles [subject to the recall] until the remedy is completed." (Ex. 273.)
16 The letter was dated June 2, 2009. Riverside sold and delivered the two bikes with this
17 unremediated issue on September 23 and July 7 of 2009, without regard for customers' safety and
18 in violation of the law. (Ex. 250.) These two motorcycles still have not had the necessary repair
19 completed.

20 Another of the motorcycles sold to a wholesaler was subject to two safety recall campaigns
21 involving fuel tanks that could leak and cause a fire and a brake issue which could lead to rear
22 brake failure. (RT Vol. III, 100:12-102:9.) Because of Riverside's SWR fraud, Harley-Davidson
23 was unable to give notice to the end-users of these bikes and innocent persons are riding
24 motorcycles that present what Harley-Davidson has determined to be an "unreasonable likelihood
25 of injury or death."

26 All of the six Buell motorcycles and two more of the Harley-Davidson motorcycles that
27 Riverside sold to wholesalers are subject to product campaigns. (Exs. 250 and 272.) The Harley-
28 Davidson motorcycles had a wire crimp issue which would cause the engine light to go on and

1 cause the motorcycle to idle erratically. (RT Vol. III, 95:13-96:4.) The Buell motorcycles had a
2 charging system issue which could cause the battery to drain and leave the rider stranded and
3 unable to start his bike. (RT Vol. III, 103:22-104:24.) These campaigns, too, are "open," meaning
4 that the work has not been done to correct the problem. (RT Vol. III, 59:18-21.)

5 **3. Compliance with State, Federal and Foreign Laws and Regulations**

6 Another purpose of the NRSP is to ensure compliance with state, federal and foreign laws
7 and regulations. (RT Vol. I, 125:3-126:2.) This includes compliance with laws related to
8 exporting and importing (such as the import tax and duties laws of Vietnam discussed above) and
9 laws related to proper vehicle "homologation." "Homologation" refers to the manufacture of a
10 vehicle to be in compliance with the laws, regulations and standards of a particular state or
11 country. (RT Vol. III, 131:8-11.) When Harley-Davidson enters the Vietnam market as planned
12 in 2013, the motorcycles it sells there will be based on European specifications rather than the
13 U.S./California motorcycles that Riverside sold for export to Vietnam. (RT Vol. IV, 115:5-18.)

14 Different states and countries have widely different laws, regulations and standards
15 relevant to homologation. These affect things ranging from braking and lighting, to mufflers and
16 noise, to emissions systems. California, for example, has stricter emissions control laws than
17 other U.S. states. Harley-Davidson, therefore, specially builds motorcycles for California. (RT
18 Vol. 1, 79:20-80:2; RT Vol. II, 14:15-18.) By requiring that motorcycles be sold only by
19 authorized dealers (who, as noted above, have homologation related obligations) and not for
20 shipment abroad (i.e., to jurisdictions with unique laws, regulations and standards), the NRSP
21 facilitates compliance with state, federal and foreign laws.

22 **4. Riverside's Breaches Have Adversely Affected Other Dealers and the** 23 **Public Interest.**

24 If the Board does not permit termination in this matter, it would undermine Harley-
25 Davidson's efforts to enforce the policy not only in California but in every state that has a motor
26 vehicle dealer statute like California's. This could have several adverse ramifications for other
27 dealers and the public interest. First, it could result in an influx of motorcycles into California via
28 the grey market. Verduyn testified that he has seen "firsthand" instances of non-California U.S.

1 dealers selling new motorcycles to unauthorized after-market dealers in California for resale.
2 (RT Vol. III, 81:7-82:6; *see also* RT Vol. III, 43:14-45:15 ["... if we take the enforcement of the
3 policy away, then that's only going to happen more and more."])

4 Allowing grey marketers to compete with authorized dealers adversely erodes dealer sales
5 and profit margins. (PFF 180-189). California dealers should not have to compete with chop
6 shops who sell new Harley-Davidson motorcycles but do not have the same obligations (*e.g.*
7 investments, warranty work, *etc.*) In addition to losing the up front sales, California dealers will
8 also lose the opportunity to build a long-term relationship with customers who purchase from chop
9 shops causing even more losses.

10 It is also important, when considering enforcement of the NRSP, to remember that
11 Riverside is not the only Harley-Davidson dealer out there. Harley-Davidson has approximately
12 700 dealers in the U.S. (RT Vol. I, 82:6-8.) If each of them is permitted to sell 25 or more
13 motorcycles in violation of the NRSP without fear of being terminated, that is at least 17,500
14 motorcycles being sold to non end-users; 17,500 customers who are potentially unsatisfied, which
15 harms the brand and dealers that will lose future sales and service opportunities; 17,500 vehicles
16 put into markets competing with authorized dealers or sold in markets where no authorized dealer
17 (and therefore no authorized service) exists; 17,500 vehicles wreaking havoc on Harley-
18 Davidson's allocation system; and 17,500 consumers whose lives, for reasons explained below, are
19 unreasonably put at risk. It may be true that we do not know if anyone has died riding one of the
20 bikes that Riverside sold for grey market export and resale, but termination cannot depend on such
21 fortuity. If 700 dealers each sell 25 bikes in violation of the NRSP, it cannot be said that only the
22 dealer who is unlucky enough to have sold the bike that kills someone should be terminated.

23 Finally, customers would not be inconvenienced by the temporary closure of the Riverside
24 point. Harley-Davidson has stated clearly that, if it is allowed to terminate its contract with
25 Riverside, Harley-Davidson intends to put a new dealer in this point. Thus, any inconvenience to
26 the public of the closure of Riverside would be only temporary, and the public would benefit by
27 the existence of a dealer that protects the public interest by complying with the NRSP, PDI and
28 SWR obligations. What is more, the point could remain open seamlessly if the Dabney family

1 LLC agrees to rent its facility to the new dealer. (RT Vol. IV, 74:19-21.) In addition, Riverside
2 sells more than half of its motorcycles outside of its territory – in the most recent report, it made
3 61% of its sales outside its territory. This means that the majority of its customers are actually
4 already located closer to another dealership, so they would not be inconvenienced by even a
5 temporary closure. (RT Vol. IV, 75:11-20; 80:18-25.)

6 The “public interest” factor weighs strongly in favor of permitting termination in this case.

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

12 Riverside offered little or no evidence on factor (e). Riverside's expert, Edward Stockton,
13 "presumed" this factor was uncontested. (RT Vol. IX, 169:24-170:8.) But customer survey index
14 (CSI) data shows that on key metrics, Riverside is an underperforming dealership, demonstrating
15 that it is not reasonably providing for the needs of consumers in the area.

16 More specifically, Riverside's most recent service satisfaction scores show that it is in
17 steep decline and below the comparables its district, region and the nation.⁵ (Ex. 349.) For
18 example, for the "overall dealership experience," Riverside fell below all comparable scores in the
19 second quarter of 2012. (Ex. 349.) The same is true of the category "recommendation of service
20 department." (Ex. 349.) In the category of "likelihood of recommending H-D to a friend or
21 relative," Riverside's scores are again falling and are below all comparables. (Ex. 349.) Dabney
22 agrees that the success of a Harley-Davidson dealership depends "to a large extent on customer
23 satisfaction" with its service department and that referrals are good sources of business, but his
24 dealership is lagging behind in these important categories. (RT Vol. VI, 133:13-134:24.)

25 Exhibit 549 is the December 2011 "Dealer Retail Excellence Report" for Riverside, the
26 most recent such report in evidence. It too shows that the dealership is not meeting the needs of
27

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

1 its customers. On the 18 month CSI survey,⁶ Riverside ranked 467 out of 678. Riverside's
2 ranking on the 18 month survey is similarly bad in prior months. (*See e.g.* Ex. 548-545.)

3 These negative numbers all reflect the dealership's decline since Glen Espinoza took over.
4 Dabney replaced Veik not because of the violations (Veik was gone before Dabney found out
5 about them) but because Riverside outgrew Veik's "skill set." (RT Vol. VI, 9:19-10:8.). But
6 Dabney replaced him with someone, Glen Espinoza, who appears to have an even worse skill set.
7 Riverside is not a "great" dealership. It is not even a "good" dealership. In some respects (e.g.
8 business transacted, described above), it is average. In many respects, it is below average and
9 getting even worse.

10 Further, as bad as they are, Riverside's CSI numbers are inflated in Riverside's favor by
11 the phony ownership experience surveys submitted by Riverside, which have the appearance of
12 coming from the fake buyers of some of the motorcycles at issue. Two surveys appear to have
13 been completed by Veik's mother and father. (Ex. 346.) In reality, Veik himself completed them,
14 giving Riverside the highest numerical scores possible, and writing in that Riverside was a "Great
15 Dealership" and that Riverside "has the best GM in Southern Cal." (RT Vol. VIII, 80:12-81:23.)
16 Veik acknowledged that the phony high scores would help the dealership. (RT Vol. VIII, 81:3-
17 11.) Two other surveys look like they were completed by the tenants of Veik's parents, Ben and
18 Mary Cobb, who, of course, never bought a motorcycle from Riverside. (Ex. 345.) Again,
19 whoever filled out these forms gave Riverside the highest numerical scores possible, and also
20 wrote in that Riverside was "better than we were told they would be, and we were told they were
21 the very best," and that they "can't say enough good things." (Ex. 345, RT Vol. VIII, 78:6-80:11.)
22 Whoever filled them out – the Cobbs or some other Riverside conspirator – they are clearly fake
23 survey responses intended to raise the dealership's scores⁷.

24 _____
25 ⁶ This is the survey that is sent out about 18 months after the purchase of the bike, and measures
26 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.)

27 ⁷ Riverside boasts that it received a Gold Award for its performance but its award was premised on
28 the CSI surveys including these fake surveys. (*See* RT Vol. III, 189:4-190:2.) This is yet another
(footnote continued)

1 Riverside's poor service performance was no doubt contributed to by Riverside's financial
2 problems. As reflected in Ex 348, in 2011 Riverside was in substantial default of its financial
3 obligations under its agreement with Harley-Davidson Financial Services (Riverside was past due
4 in the amount of \$780,200.44) and "Sold out of Trust" in excess of \$500,000. Riverside's
5 financial problems were likely a function of its poor management, and meant that Riverside was
6 simply unable to perform all of its obligations as a dealer. Given Riverside's overall poor
7 financial performance and its poor CSI survey scores, this factor weighs in favor of termination.

8 **F. Section 3061(f): Whether the Franchisee Fails to Fulfill the Warranty**
9 **Obligations of the Franchisor to be Performed by the Franchisee**

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

12 register with Seller all Harley-Davidson Motorcycles...sold by
13 Dealer for purposes of establishing warranty protection, providing
14 essential information in the event of a recall of Harley-Davidson
15 Products...all in accordance with Seller's written procedures from
16 time to time.

17 (Ex. 34.)

18 It also violates the NRSP and the instructions on the SWR Forms, both of which expressly
19 require the submission of accurate SWR information, *on penalty of possible termination*.

20 In the *Laidlaw's* case, Judge Wong found that this conduct was not enough to satisfy this
21 factor. Judge Wong read the language of § 3061(f) –“ Whether the franchisee fails to fulfill the
22 warranty obligations of the franchisor to be performed by the franchisee” – to be limited to the
23 dealership's conduct of performing warranty service (on behalf of Harley-Davidson) to customers.
24 Thus, Judge Wong believed that if the dealer performs adequate warranty service to the customers
25 who come to its facility, this factor favors the dealer.

26 Harley-Davidson respectfully disagrees for two reasons. First, the customers who ended
27 up owning the motorcycles that Riverside sold to exporters for resale have been denied warranty

28 way that Riverside's fraudulent conduct benefited Riverside to the detriment of honest dealers
who competed for this award.

1 service that they are entitled to. As set forth at length above, they have open recall and product
2 campaigns that have not been performed because Riverside's conduct caused them not to receive
3 notice. Second, Riverside's conduct expressly violates California Vehicle Code § 11713.1(u)
4 which required Riverside to provide Harley-Davidson with accurate warranty registration
5 information. This direct violation of California law must be taken into consideration when
6 applying the factor that deals with Riverside's compliance with its warranty obligations. Judge
7 Wong did not do that in the *Laidlaw's* case.

8 But even if Harley-Davidson is wrong about the meaning of this factor, Riverside's poor
9 CSI service scores support the conclusion that Riverside is not meeting its warranty service
10 obligations to customers and to Harley-Davidson. That, too, is a difference from the *Laidlaw's*
11 case.

12 ***

13 If a sales person steals from his employer by submitting fake reimbursement reports or
14 otherwise, the employer would be justified in terminating the employee, even if the person was
15 one of the employer's best sales people. If a public employee fails to work his or her assigned
16 hours and covers it up by submitting false time sheets, the government would be justified in
17 terminating that person's employment, even if the person was extremely good at dealing with the
18 public. If a lawyer submitted false bills to a client, the client would be justified in terminating the
19 representation even if the lawyer demonstrated great legal skills in the representation.

20 Honesty is a basic requirement when two people or two companies share a business
21 relationship. Riverside failed that basic requirement in this case. It intentionally breached its
22 contract with Harley-Davidson and then submitted false reports to cover up the breach. As a
23 result, Harley-Davidson should be entitled to end its relationship with Riverside.

24 ///
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1 **VII. Conclusion**

2 Under the statutory factors set forth in the California Vehicle Code, good cause exists for
3 Harley-Davidson to terminate its Dealer Contract with Riverside Motorcycle, Inc. and the Protest
4 should be overruled.

5 DATED: June 8, 2012

COOPER, WHITE & COOPER LLP

6
7 By: 

8 Robert L. Ebe
9 Scott M. Mcleod
Attorneys for Respondent HARLEY-
10 DAVIDSON MOTOR COMPANY
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PROOF OF SERVICE

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 POST-HEARING BRIEF** 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: nmvp@nmvp.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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