

1 COOPER, WHITE & COOPER LLP
ROBERT L. EBE (SBN 70726)
2 rebe@cwclaw.com
3 BRETT R. WAXDECK (SBN 157645)
4 bwaxdeck@cwclaw.com
SCOTT M. McLEOD (SBN 242035)
5 smcleod@cwclaw.com
201 California Street, 17th Floor
San Francisco, California 94111
Telephone: (415) 433-1900
6 Facsimile: (415) 433-5530

7 Attorneys for Respondent
HARLEY-DAVIDSON MOTOR COMPANY

8
9 **NEW MOTOR VEHICLE BOARD**

10 **STATE OF CALIFORNIA**

11 In the matter of the Protest of
12 RIVERSIDE MOTORCYCLE, INC. dba
SKIP FORDYCE HARLEY-DAVIDSON,

13 Protestant,

14 vs.

15 HARLEY-DAVIDSON MOTOR
16 COMPANY,

17 Respondent.

PROTEST NO. PR-2310-11

**HARLEY-DAVIDSON MOTOR
COMPANY'S POST-HEARING REPLY
BRIEF**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

INTRODUCTION.....1

ANALYSIS3

I. The Evidence Demonstrates That Harley-Davidson Has Good Cause to Terminate For Riverside's Material Breach of Contract Under Section 3061(g).3

 A. Riverside Breached its Dealer Contract.3

 B. The Prohibition on Non-Retail Sales Is Material.4

 C. Riverside's Breaches Are Material Under Restatement of Contracts (2d) §241.6

 1. Harley-Davidson Is Deprived of the Benefit That It Reasonably Expected.7

 2. Harley-Davidson Has Not Been Compensated for the Harms Caused by Riverside.....8

 3. There Would Be No Forfeiture.8

 4. Riverside Has Not Cured the Breach, and its Post-Termination Efforts Do Not Suggest Otherwise.8

 5. Riverside's Conduct Is Extreme Bad Faith.....9

 D. Dabney's Alleged Ignorance Supports Termination.....11

 E. The Breach Factor Alone Justifies Termination.13

II. Riverside Does Not Transact an Adequate Amount of Business Compared to the Business Available 3061(a).14

III. The Dealership Has Recouped Any Investments Made and Will Not Suffer Significant Loss if Terminated 3061(b) and (c).14

IV. The Public Interest Is Not Served By Dealers That Put Consumers' Lives at Risk and Harm Other Dealers 3061(d).15

 A. Non-Retail Sales Put Customers' Safety at Risk.16

 B. Riverside's Breaches Harm Other Dealers.18

 C. Customers Will Not Be Inconvenienced by Termination.18

V. Riverside Is Not Adequately Servicing the Public 3061(e).19

VI. Riverside Failed to Fulfill Warranty Obligations and Violated State Law by Submitting Fraudulent Warranty Information 3061(f).20

1 VII. This Case Is Readily Distinguishable From the Recent *Laidlaw's* Decision20

2 VIII. The Protest Should Be Overruled.....21

3 A. The Protest Should Not Be Sustained Conditionally.21

4 B. Harley-Davidson Does Not Object to the Owners of Riverside Being
5 Permitted to Sell If Riverside Pays Harley-Davidson's Legal Expenses.22

6 CONCLUSION23

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 INTRODUCTION

2 Harley-Davidson’s opening brief lays out in detail how Riverside intentionally breached its
3 contract with Harley-Davidson (the “Dealer Contract”) and then submitted false information to
4 cover up its breaches. Riverside's brief acknowledges its wrongful conduct and acknowledges the
5 cover up (Riverside Post Hearing Br. at pages 3-5).

6
7 The respective briefs thus present a simple and direct question. When a dealer knowingly
8 breaches significant terms of its contract, and lies to the manufacturer to cover this up, (and in the
9 process violates the Vehicle Code and risks harm to consumers, other dealers and the brand), can a
10 manufacturer terminate its contract with the dealer even if the dealer performs in other respects,
11 e.g., providing a facility, selling vehicles locally and marketing through commercial and
12 charitable activities? That is the issue this Board must decide.

13 The evidence clearly establishes that Riverside, through its general manager, Lester Veik,
14 and with the active participation of many of Riverside's current employees and managers,
15 including the current general manager, Glen Espinoza, intentionally violated the contractual
16 prohibition on non-retail sales and engaged in fraud in an attempt to cover it up. Vehicle Code
17 section 3061 should not be read to place manufacturers at the mercy of a dishonest dealer. As set
18 forth in Harley-Davidson's opening brief, other courts and administrative bodies have reached this
19 very conclusion with respect to similar statutes. For one example, in *Chrysler Corp. v. Lee*
20 *Janssen Motor Co.*, 9 Neb. App. 721 (Neb. Ct. App. 2000), the Nebraska Motor Vehicle Industry
21 Licensing Board found Chrysler lacked good cause to terminate, but the district court and
22 appellate court disagreed. The Court applied Nebraska's good cause factors, which are very
23 similar to the California factors, reversed the state Board, and permitted Chrysler to terminate the
24 dealership agreement after the manufacturer discovered that the dealer submitted several false
25 warranty claims and several claims for purchase incentives for vehicles that were ineligible for the
26 incentives. The Court held that Chrysler had good cause to terminate the agreement based on the
27 false claims even though virtually all of the statutory factors favored the dealer. Even though the
28 dealer had been successful for a long time and had a substantial investment in its facilities, the

1 Court found that the dealer's conduct should not be condoned and termination was appropriate.

2 The same result was reached in *Ford Motor Co. v. Motor Vehicle Board of Texas DOT*, 21
3 S.W. 3d 744 (Tex. App. 2000). The Texas statutes have essentially the same factors for
4 demonstrating "good cause" for termination as does California. Just as in Nebraska, the Texas
5 court held that where the dealer takes actions directly contrary to the manufacturer's policy and
6 takes active steps to mislead the manufacturer regarding the breaches, those facts constitute good
7 cause for termination.

8 The same is true here. To the extent that Riverside persuades the Board that it has been a
9 successful dealer (which is in dispute), that should not matter. Otherwise, Harley-Davidson is
10 simply at the mercy of Riverside's dishonesty. Riverside can intentionally breach its contract and
11 lie to Harley-Davidson about it with relative impunity. That is an intolerable system.

12 By analogy, Riverside's position no doubt would be that, if Lester Veik had not already
13 left the dealership by the time of Harley-Davidson's audit, Riverside would have been fully
14 justified in terminating Lester Veik's employment based upon his dishonest conduct,
15 notwithstanding the dealership's successes while he was General Manager. Just as Riverside
16 would have been justified in terminating Lester Veik's employment, Harley-Davidson should not
17 be prohibited from separating itself from Riverside based upon that same conduct.

18 Even if the extent of the Riverside's breach was the only factor weighing in favor of
19 termination, Harley-Davidson has established good cause. But that is not the only factor. The
20 public interest supports termination. The public interest is not served by a dealer that creates
21 unreasonable risks of injury or death to consumers. The public interest is not served by a dealer
22 that intentionally violates its contracts, and thus obtains unfair advantage over its fellow dealers.

23 Finally, this case is materially distinguishable from the recent Board decision in *Laidlaw's*
24 (as explained further at pages 20-21 below), and the evidence demonstrates both that good cause
25 exists and that the Protest should be overruled unconditionally. However, to the extent that there
26 are any countervailing concerns (*e.g.*, potential customer inconvenience), they can be addressed by
27 overruling the Protest conditionally and allowing the owners of Riverside a reasonable time to sell
28 to a new owner, as the dealership itself suggests.

1 ANALYSIS

2 **I. The Evidence Demonstrates That Harley-Davidson Has Good Cause to Terminate**
3 **For Riverside's Material Breach of Contract Under Section 3061(g).**

4 **A. Riverside Breached its Dealer Contract.**

5 Riverside argues that its admitted violations of the NRSP did not breach the Dealer
6 Contract (Riverside Br. at p. 25). This argument is completely contrary to the evidence in this
7 record.

8 The Dealer Contract itself expressly prohibits the sales that Riverside admits it made.
9 Paragraph 1(A) of the contract grants to Riverside only the right to "purchase and sell at retail."
10 (Ex. 34 at HDR000437, emphasis added.) Jay Dabney admitted that the sales in question were
11 made to "wholesalers" rather than "at retail." (RT Vol. VI, 143:2-8.)

12 Further, the General Conditions of Sales and Service ("General Conditions") prohibit the
13 sales made by Riverside, and are expressly incorporated into the Dealer Contract by reference.
14 *See Woslchlager v. Fidelity National Title Ins. Co.*, 111 Cal. App. 4th 784, 790 (2003); *Shaw v.*
15 *Regents of University of California*, 58 Cal. App. 4th 44, 54 (1997). Paragraph B(6) of the General
16 Conditions provides that "Dealer shall **not** sell Harley-Davidson Products *for resale* to non-retail
17 customers." (Ex. 35 at HDR001367; emphasis added.) The meaning of this provision is clear:
18 Dabney testified that he understood "it as stating that part of our agreement is to sell new Harley-
19 Davidson motorcycles to the end user for pleasure use and not for resale." (Ex. 302 at 95:21-24.)
20 Again, Dabney and various dealership employees admit that they sold Harley-Davidson
21 motorcycles for resale to non-retail wholesaling customers. (*E.g.*, RT Vol. VI, 143:2-8.)

22 The Notice of Termination made clear that the bases for termination include Riverside's
23 violation of **Paragraph 1(A) of its Dealer Contract**, and Riverside's violation of **Paragraph B(6)**
24 **of the General Conditions**, as well as the NRSP. The Notice of Termination listed as additional
25 bases for termination that Riverside violated Paragraph F(2) of the General Conditions (which
26 obligates Riverside to perform pre-delivery inspections) as well as Paragraphs F(3) and F(7) of the
27 General Conditions (which obligate Riverside to register sales with Harley-Davidson in order to
28 establish warranty protection and provide "essential information in the event of a recall.") (Ex.

1 63.)

2 Finally, the contention that Riverside "only" breached the NRSP does not help Riverside
3 because, even if it were not clear that Riverside violated the express terms of its Dealer Contract,
4 Riverside is obligated by contract to comply with the NRSP. The General Conditions expressly
5 provide that Harley-Davidson may establish policies it believes are necessary or advisable to carry
6 out the purpose or intent of Part B of the contract (regarding sales efforts) with which Riverside
7 "shall comply." (Ex. 35.) The NRSP is such an authorized policy, and it is enforceable. *See*
8 *Facebook, Inc. v. Connectu, Inc.* 640 F.3d 1034, 1038 (9th Cir. 2012) (California law allows
9 parties to delegate choices over terms, so long as the delegation is constrained by the rest of the
10 contract and subject to the implied covenant of good faith and fair dealing); *see also Automatic*
11 *Vending Co. v. Bessie Jan Wisdom*, 182 Cal. App. 2d 354, 357-358 (1960).¹

12 For Riverside to come now before the Board and claim that there is no contractual
13 prohibition against non-retail sales is yet a further reason why Harley-Davidson ought to be
14 entitled to end its relationship with Riverside. Under Riverside's argument, it can continue to
15 make non-retail sales with impunity because such conduct, in Riverside's view, is not a breach of
16 its contract. Riverside's brief expressly reserves to itself the right to violate the NRSP, which
17 Riverside's witnesses acknowledged at trial was sensible and needed, any time that Riverside
18 decides it is in Riverside's best interest to do so. Harley-Davidson should not be required to
19 maintain its relationship with a dealer with that attitude.

20 **B. The Prohibition on Non-Retail Sales Is Material.**

21 As shown above, the most basic and essential term of the Dealer Contract is that Riverside
22 is to sell only at retail. The importance of this provision is emphasized by the General Conditions
23 which expressly prohibit sales to non-retail customers, and by the NRSP itself, which Harley-
24
25

26
27 ¹ Thus the NRSP is not a "modification" or "amendment" of the Dealer Contract requiring an executed
28 writing, as Riverside argues (Riverside Br. at p. 25). And, notably, the NRSP existed in the form relevant here when
Riverside signed its current Dealer Contract.

1 Davidson has sent to dealers for over 20 years. (Exs. 35, 50; RT Vol. I, 134:15-136:2.)² The
2 NRSP itself sets forth the reasons for the rule, and Dr. Hanssens explained at length the sound
3 distribution and marketing principals underlying such policies. (Ex. 51; Ex. 295, ¶¶ 20-51.)

4 Riverside's focus on Harley-Davidson's enforcement of the NSRP (Riverside Br. at 26-29)
5 is both misleading and irrelevant. Mr. Verduyn testified at length as to the Harley-Davidson's
6 substantial enforcement activities (*see generally*, RT Vol. II, 52:15 – 62:14),³ but the real point is
7 that Riverside breached its Dealer Contract and lied to cover it up. Riverside's unsupported
8 speculation that other dealers may violate the policy and not get caught is immaterial. Riverside
9 got caught and its breach of contract and fraud must have consequences.

10 Moreover, unlike Riverside, most dealers comply with their obligations. As to the ones
11 that do not, Harley-Davidson has a consistent practice of terminating the contracts of those with
12 20 or more violations, and in some cases terminating those with less. (RT Vol. I, 160:1-161:9; RT
13 Vol. II, 68:25-69:13, Ex. 261.) This fact alone demonstrates that Harley-Davidson considers the

14
15
16 ² Harley-Davidson does not require dealers to acknowledge their receipt of this policy in writing, because it
17 has been in effect for decades, is known by all, and is relatively simple to understand. (RT Vol. I, 99:22-100:8; Vol.
18 VI, 15:14-25, 110:7-16; Vol. VII, 49:8-16.) In contrast, when Harley-Davidson recently made significant changes to
19 the different policy governing parts and accessories advertising ("PAM MAP"), Harley-Davidson did require dealers
20 to acknowledge receipt. This difference does not suggest, as Riverside claims, that the NRSP is not material. Harley-
21 Davidson required a signature simply because of the "newness" and "complexity" of the other policy. (RT Vol. II,
22 42:1-22.) There is no doubt from the record that Dabney and Riverside knew about and understood the NRSP.

23 Also, the fact that, with respect to the MAP policies, Harley-Davidson does not rely on tips from other
24 dealers has nothing to do with materiality and everything to do with concerns unrelated to the NRSP. There are
25 antitrust reasons why Harley-Davidson does not rely on or encourage dealer tips or complaints as to price advertising
26 by competing dealers. Riverside surely knows this and most likely explains Riverside's conspicuous failure to elicit
27 *any* testimony regarding this aspect of MAP – the "no dealer tips" provision was never mentioned at hearing. On the
28 other hand, there is nothing wrong with relying on information from other dealers to enforce the pro-consumer safety
policies at issue in this case. Indeed, such whistle blowing is to be applauded, not discouraged.

Finally, the MAP policies do not provide for termination as a remedy because violations of the MAP policies
do not put customers lives at risk. Economic sanctions are sufficient in the circumstances provided by the MAP
policies.

³ Notably, one aspect of this enforcement activity by Mr. Verduyn is auditing every dealer in the nation using
the National Insurance Crime Bureau ("NICB") data, beginning in 2009 and again in 2010. (RT, Vol. II, 54:13-55:14;
58:62:14.) Specifically, Mr. Verduyn receives from the NICB a report that lists all the VINs for each Harley-
Davidson motorcycle that the NICB learned was exported, no matter which dealer sold it. He uses Harley-Davidson's
information to tie each exported motorcycle to the selling dealer and then is able to detect violations for every dealer
nationally. (RT Vol. II, 54:13-55:14; 58:22-59:8.)

1 prohibition on non-retail sales to be material.

2 Finally, Riverside itself believes that the prohibition on non-retail sales is material. Jay
3 Dabney "agree[s] that the non-retail sales policy is an important policy" and believes his
4 dealership should comply with it, not only because it is obligated to do so, but also because it is
5 "important" to dealers, the public, and consumers, and is good for his business:

6 I mean, it's a bad business practice to sell a bike that's not staying in
7 your territory, and I just described a little while ago what the
8 cornerstone of my whole belief system is and how to manage a Harley
9 dealership which is the greet and engage step to create an experience so
10 that the customer stays with your dealership for his lifetime as a Harley
11 enthusiast.

12 (Ex. 302 at 89:12-13, and 106:14-20; RT Vol. VI, 112:7-114:9.) Riverside's expert also agrees
13 that Harley-Davidson should have the policy. (RT Vol. IX, 224:8-10; 216:8-16.)

14 The crux of the contractual relationship between Harley-Davidson and Riverside is that
15 Riverside is granted the right to sell new motorcycles at retail to end-users – not to be a
16 middleman or exporter into the grey market. The evidence demonstrates that the prohibition on
17 non-retail sales is a material term of the contract.⁴

18 **C. Riverside's Breaches Are Material Under Restatement of Contracts (2d)**
19 **§241.**

20 Riverside's repeated breaches of a key provision of the contract are material. In contending
21 otherwise, Riverside merely parrots Judge Wong's opinion from the *Laidlaw's* matter, without
22 even addressing the significant differences between the two cases, most glaringly the fact that
23 Riverside intentionally violated the Dealer Contract and engaged in extensive fraud to cover it up.
24 The Board has used (*i.e.*, in the *Laidlaw's* case) the factors set forth in Restatement of Contracts

25 ⁴ Riverside disingenuously argues that Veik's story about telling Sorensen about violations demonstrates that
26 Harley-Davidson does not consider the policy or violations of it to be material. First, Veik is an admitted liar and his
27 version of his interactions with Sorensen should not be credited at all. (Harley-Davidson PFF ¶¶ 70-75.) Second,
28 Sorensen testified that, prior to March 14, 2011, Veik had *never* mentioned that Riverside violated the NRSP. (RT
Vol. III, 158:2-22.) Third, Sorensen *never* suggested to Veik or anyone at Riverside that the only consequence of
violating the NRSP was loss of incentive (or VIP) money. (RT Vol. III, 158:23-159:18.) It would be absurd for
Sorensen to do so, especially given that the NRSP clearly states that termination could result and, as Sorensen
testified, he is not the person that makes the decisions regarding sanctions. (RT Vol. III, 158:23-159:18.)

1 (2d) §241 to analyze materiality, and those factors are addressed below:

2 **1. Harley-Davidson Is Deprived of the Benefit That It Reasonably**
3 **Expected.**

4 Section 241(a) involves the extent to which the non-breaching party will be deprived of its
5 expected benefit. Here, Riverside's breaches significantly undermine Harley-Davidson's
6 reasonable expectations. The contract provides that Riverside will sell only at retail. When
7 Riverside intentionally sells to wholesalers, Harley-Davidson is deprived of the benefit it expects:
8 a dealer who sells *only at retail* – i.e. to end-users, generally in its local territory – and who does
9 not undermine Harley-Davidson's justifiable efforts to protect its customers and brand.

10 Materiality of a breach does not depend on the amount of money involved. *Associated*
11 *Lathing & Plastering Co. v. Louis C. Dunn, Inc.* (1955) 135 Cal.App.2d 40, 51 (subcontractor's
12 failure to install hangers was material breach even though cost of installing hangers was only
13 \$3,500, or 2.5% of total \$140,000 contract.) Therefore, Riverside's arguments that its fraudulently
14 obtained profits from the violation sales are only a small portion of its total receipts is irrelevant.

15 Further, the fact that Riverside may comply with other provisions of its contract does not
16 save Riverside. "A material breach of one aspect of a contract generally constitutes a material
17 breach of the whole contract." *Brown v. Grimes*, 192 Cal. App. 4th 265, 278 (2011); *see generally*
18 *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (1987). In both
19 *Brown* and *Superior Motels*, only one provision of the contract at issue had been breached, but
20 because that provision protected important interests of the non-breaching party, those breaches
21 were found to be material breaches of the whole contract. There is no doubt that here the
22 prohibition on non-retail sales serves important interests of Harley-Davidson and breached it.

23 Riverside unpersuasively argues that Harley-Davidson has received the substantial benefit
24 of its contract simply because Riverside has sold a lot of motorcycles in the past. But Harley-
25 Davidson's expectations are not simply that Riverside will sell bikes. It is that Riverside will sell
26 bikes *at retail* for all the reasons that the NRSP is vitally important. Riverside's intentional
27 violations thwarted Harley-Davidson's expectation interest and frustrated the purpose of the dealer
28 agreement: to sell at retail.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Harley-Davidson Has Not Been Compensated for the Harms Caused by Riverside.

Section 241(b) involves the extent to which the injured party can be compensated. Here, Harley-Davidson has not been compensated for the irreparable harms caused by Riverside. Riverside's conduct has created unreasonable risks of injury or death that do not have an easily quantifiable dollar value, and thus threaten irreparable harm to Harley-Davidson's brand. Riverside has interfered with product allocation. Riverside has caused harm to the dealer network (e.g., by disincentivising dealer investment and gaining unfair advantage over neighboring dealers) in ways that are difficult if not impossible to measure in dollars.

Further, Harley-Davidson has been harmed by incurring significant legal fees in enforcement of its contract – a contract which Riverside undoubtedly breached. Riverside claims it has compensated Harley-Davidson by returning the VIP money it was never entitled to. This claim rings hollow because it ignores Harley-Davidson's enforcement costs and the irreparable harms that Riverside's conduct has caused. This claim also ignores that Riverside has been unjustly enriched by, among other things, the approximately \$56,000 in profits it obtained by violating its Dealer Contract.

3. There Would Be No Forfeiture.

Section 241(c) involves the *extent* to which the breaching party will suffer a forfeiture. While Riverside will, of course, cease being a dealer,⁵ it will not suffer any forfeiture of past investments. To the contrary, and as demonstrated further in Harley-Davidson's Proposed Finding of Fact ("PFF") ¶¶ 207-211, the Dabney family has recouped any investment many times over. Additionally, if the Board overrules the Protest but gives the dealership owners time to sell, it will not lose any investment whatsoever.

4. Riverside Has Not Cured the Breach, and its Post-Termination Efforts Do Not Suggest Otherwise.

Section 241(d) addresses the likelihood that the breaching party will cure its breach. Here,

⁵ The fact that Riverside will not be permitted to be a dealer in the future cannot be dispositive – every termination case involves this type of "forfeiture."

1 Riverside's breaches are uncured. Riverside misunderstands the nature of a cure when it argues
2 that it has cured its breaches simply because it has promised not to repeat them. Promising not to
3 breach in the future is not a cure of past breaches. This is nothing better than a thief promising
4 that he will not steal again. Riverside has not found the exported bikes to make sure they were
5 safely delivered. Riverside has not found the names of the actual owners and supplied them to
6 Harley-Davidson for purposes of providing safety notices. Riverside has not disgorged its profits
7 on the improper sales. Riverside has not terminated the employment of the employees involved in
8 the cover-up. Riverside has done virtually nothing to cure.

9 Riverside also misrepresents that nature of its "new" compliance measures. Riverside
10 twice falsely asserts, in an apparent attempt to emulate the *Laidlaw's* decision, that as part of its
11 efforts to "ensure compliance with the NRSP," it has enlisted the "help of an outside consultant."
12 (Riverside Br. at pps. 5, 33.) This is false. The cited evidence demonstrates that the consultant
13 was hired prior to the termination, was only involved in the sales processes (*e.g.* starting with an
14 "enthusiast", turning it over to the floor manager, *etc.*) and had **nothing at all** to do with
15 compliance with the NRSP or selling at retail.⁶ Riverside did not hire a consultant after being
16 terminated to ensure compliance with the NRSP.

17 **5. Riverside's Conduct Is Extreme Bad Faith.**

18 Section 241(e) involves whether the breaching party's behavior comports with the
19 standards of good faith and fair dealing. Here, intentional fraud is the polar opposite of good faith
20 and fair dealing. The California Supreme Court stated that "[t]he phrase 'good faith' in common
21 usage has a well-defined and generally understood meaning, being ordinarily used to describe that
22 state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally
23 speaking, means being faithful to one's duty or obligation." *People v. Nunn*, 46 Cal.2d 460, 468
24 (1956). The absence of good faith is "equated with dishonesty, deceit or unfaithfulness to duty."
25

26
27 ⁶ It is Harley-Davidson's position that compliance consultants are not necessary for dealers to comply with
28 the NRSP. Harley-Davidson has provided to dealers specific guidance that is sufficient to monitor for compliance
with the NRSP. (*See e.g.* Ex. 56, 53, 60.)

1 (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 211.) There is no doubt that Riverside,
2 through its employees Veik, Espinoza, Wilmoth, Slagle and others, operated in bad faith.

3 Riverside attempts to throw all the "bad faith" on Veik but completely ignores the bad acts
4 of Riverside's other employees who are all still at the dealership, most in management positions.
5 Surely, Veik is a bad actor, but he was not alone. Veik knew about the policy and knew at the
6 time of the sales that they violated the policy. (RT Vol. VII, 198:15-21.) Veik also *told* the
7 employees who gave names that the sales Riverside was making violated Harley-Davidson's
8 policies, and these employees *understood* that by giving names they were trying to "mask" the
9 violations from Harley-Davidson, and they participated in the scheme anyway. (RT Vol. VIII,
10 44:22-45:14.) Veik had Riverside's HR department issue an internal memorandum in December
11 2009 informing all employees that non-retail sales were prohibited; on its face the memo shows
12 that it was sent to Wilmoth, Slagle, Espinoza and others, so Riverside must concede that the
13 employees who participated in the fraudulent 2010 sales did so knowingly. (Ex. 98.) Not only
14 Lester Veik, but also the employees that gave names, including Glen Espinoza,⁷ Jason Wilmoth,⁸
15 Mike Slagle,⁹ and Megan Vogeli¹⁰ were all acting without "honesty of purpose." To the contrary,
16 they were intentionally trying to hide conduct from Harley-Davidson that Veik told them and they
17 knew violated Harley-Davidson's policies. (RT Vol. VIII, 44:22-45:14.)

18 In sum, because the important goals of Harley-Davidson are frustrated by Riverside's
19 violations, because Harley-Davidson cannot be adequately compensated for the breach, because
20 any forfeiture is minimal, because the breach is uncured, and because Riverside's intentional
21

22 ⁷ Espinoza allowed Veik to use his own name as well as the names of his wife and mother. (RT Vol. VIII,
23 47:15-48:9; 49:24-50:7; IX, 42:21-25.) When asked if Veik could register a bike in his name, he said "Sure, Les, go
24 ahead." (RT Vol. IX, 42:16-18.) Espinoza also acted in bad faith when he knowingly repeated Veik's lies to Harley-
Davidson in a further attempt to hide the truth. (RT Vol. IX, 25:24-27:14.)

25 ⁸ Wilmoth testified that he knew, without needing to see any policy, that reporting false names was not right.
(RT Vol. VIII, 165:8-20.) But he did it anyway.

26 ⁹ Slagle knew at the time he made sales to exporters that they were wholesaling the motorcycles and that
those sales were prohibited. (Ex. 309 at 60:22-61:1; 65:12-66:5.)

27 ¹⁰ Vogeli, who has an MBA and is pursuing her CPA, admitted she was misrepresenting the nature of the
28 sales. (Ex. 312 at 9:13-18; 40:22-41:1.)

1 violations and fraudulent cover-up are extreme examples of bad faith, the breaches are material
2 and support termination.

3 **D. Dabney's Alleged Ignorance Supports Termination**

4 As discussed in detail in Harley-Davidson's opening brief (*see* pages 3-7), the improper
5 conduct in this case was conduct of and by the dealership. Allowing the dealership to be excused
6 from its improper conduct because the dealer principal failed to do the job he committed to do
7 under the Dealer Contract with Harley-Davidson as dealer principal, would be to reward the dealer
8 principal for his separate breach. In this case, Riverside Motorcycle, Inc. is legally responsible for
9 the activities of its managers and employees, and those activities breached the contract with
10 Harley-Davidson.

11 Dabney had a contractual obligation to Harley-Davidson to be "personally involved in the
12 day-to-day management and operations." (Ex. 34.)¹¹ Additionally, Riverside's own Operations
13 Manual specifically provides that it is the Dealer Principal's job to "ensur[e] compliance with
14 Harley-Davidson Corporate requirements for a Harley-Davidson Dealership" and to ensure
15 compliance with "Federal, State and Local Legal and Regulatory Requirements." (Ex. 93 at 2-3.)
16 Dabney failed to ensure compliance with the NRSP and failed to ensure compliance with State
17 law, *e.g.* Vehicle Code section 11713.1(u), which a dealer violates if it "[f]ail[s] to disclose in
18 writing to the franchisor of a new motor vehicle dealer the name of the purchaser, date of sale, and
19 the vehicle identification number of each new motor vehicle sold" or "intentionally submit[s] to
20 that franchisor a false name for the purchaser or false date for the date of sale." Riverside
21 intentionally submitted both false names and false dates. (Harley-Davidson PFF ¶¶ 91-95; RT
22 Vol. VII, 176:14-178:2.)

23 If Dabney had fulfilled his obligations to Harley-Davidson or to his own dealership, he

24
25 ¹¹ Instead, Dabney improperly delegated all day-to-day operations to Veik. (RT Vol. V, 159:17-24; 161:6-10
26 [Veik was "source of executing everything"].) Riverside argues falsely that it was Veik who created a work
27 environment in which employee concerns were to be addressed exclusively by Veik. (Riverside Br. at p. 4.) The
28 evidence shows that *Dabney* created this environment. *Dabney* himself told Wilmoth, for example, that he should go
through Veik rather than directly to Dabney. (RT Vol. VII, 179:13-180:13.) Riverside's organization chart for 2009-
2010 shows that this situation was intentional: there is only one line of communication to Dabney and it runs through
Veik. (Ex. 501; *see also* RT Vol V, 160:4-9 ["above is the ownership level ... and below are the operations."])

1 would have discovered the violations and could have prevented them. (Harley-Davidson PFF
2 ¶¶ 133-146.) Harley-Davidson told dealers like Dabney what to look for and warned that personal
3 ignorance is not an excuse. (See e.g. Ex. 56 [inspect what you expect; develop internal checks;
4 question multiple sales], Ex. 53 [question multiple sales; perform personal reviews of sales
5 jackets; inform sales personnel about the policy; warning that most trusted employees have
6 violated policy], Ex. 60 [be alert to multiple sales; ask questions of buyers].) If Dabney had
7 followed this guidance, he would have been in a position to stop the violations because the deal
8 jackets, the Traffic Log, and the F&I log all contained glaring evidence that Riverside was selling
9 to wholesalers and exporters. (Harley-Davidson PFF ¶¶ 133-146)

10 Dabney claims that he "trusted" Veik, but Harley-Davidson specifically warned that
11 dealers have found that even their most trusted employees have participated in non-retail sales
12 activity. (Ex. 53.) Dabney also had reason not to trust Veik. Espinoza thought Veik was an
13 ineffective manager "all along" and others, including Darin Goodrich and Kristen Kunzman, did
14 as well. (RT Vol. IX, 7:20-9:3.) Goodrich thought Veik was "shady" and "crooked." (RT Vol.
15 IX, 7:20-9:3.) Kunzman, who is now assistant general manager (and was previously manager of
16 merchandising) thought Veik was undisciplined, lazy, didn't care about people, took credit for
17 things he didn't deserve, and had an extreme temper. (RT Vol. IX, 7:20-9:3.) Kunzman told
18 Dabney over a four or five year period that Veik was not an effective or productive manager. (Ex.
19 306 at 16:23-17:13.) Marshall Dabney observed that Jay Dabney was growing more disenchanted
20 with Veik around 2006-2007 – prior to the violations. (RT Vol. VII, 55:12-56:7.) Veik testified
21 that the Dabney family was "unhappy with [his] performance" around the time of the violations.
22 (RT Vol. VII, 212:19-213:7.)

23 Dabney himself knew that trust alone was not sufficient, and that he should have verified
24 conduct by even trusted employees like Veik:

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

27 A. Trust but verify is a -- yes.
28

1 (RT Vol. VI, 229:22-230:1; *see also* Ex. 176 [email from Jay
2 Dabney reading "Trust, but verify."])

3 Instead, Dabney's only method of checking up on Veik was to ask him if he was complying. (RT
4 Vol. VI, 16:1-13; 37:25-38:16; V, 174:14-175:20.) Dabney may have trusted, but he never
5 verified.

6 Riverside argues, without any authority, that Dabney's alleged ignorance should
7 "presumptively" favor Riverside. (Riverside Br. at p. 29.) To the contrary, the law is clear that an
8 alleged principal's innocence is no defense. *Hartong v. Partake, Inc.*, 266 Cal. App. 2d 942, 960
9 (1968) ("The principal is subject to liability [for acts of agents] although he is entirely innocent
10 and has received no benefit from the transaction.") Dabney's alleged ignorance is no defense. To
11 the contrary, his alleged ignorance favors termination, because it demonstrates that he is not fit to
12 be a dealer principal.

13 **E. The Breach Factor Alone Justifies Termination.**

14 Even if Vehicle Code section 3061(g), regarding the extent of the breach, was the only
15 statutory factor supporting termination (which, as discussed below, it is not), Riverside's
16 intentional and fraudulent conduct supports termination. For example, in *Tara Motors dba Toyota*
17 *of El Cajon v. Toyota Motor Distributors, Inc.*, Protest No. PR-976-88 (1989) at pp. 41-42, the
18 Board determined that Toyota had not carried nearly every other factor, but nevertheless
19 concluded:

20 It is determined that Tara's material breach of the Toyota Dealer
21 Agreement as described above constitutes good cause to permit Toyota
22 to terminate the franchise of Tara.

23 Numerous cases from other jurisdictions have come to the same common sense conclusion.
24 *See e.g. Craig Foster Ford, Inc. v. Iowa DOT*, 562 N.W.2d 618 (Iowa 1997) (good cause for
25 termination where dealer submitted rebates in violation of rules despite fact that dealer prevailed
26 as factual matter on other statutory factors); *Chrysler Corp. v. Lee Janssen Motor Co.*, 9 Neb.
27 App. 721 (Neb. Ct. App. 2000) (dealership's false warranty claims and claims for purchase
28 incentives for ineligible vehicles justified termination even though virtually all of the statutory
factors favored the dealer.); *Ormsby Motors v. General Motors Corp.*, 842 F. Supp. 344 (N.D. Ill.

1 1994) (good cause for termination where employee submitted false warranty claims, despite
2 dealer's claim of ignorance).

3 To conclude otherwise would mean that dealers can intentionally defraud manufacturers,
4 as Riverside has done here, so long as they are otherwise successful.

5 **II. Riverside Does Not Transact an Adequate Amount of Business Compared to the**
6 **Business Available 3061(a).**

7 With respect to transacting an adequate amount of business compared to the business
8 available, Riverside was an "average" dealer, and its most recent numbers show it is in decline.
9 (RT Vol. IX, 175:1-176:3; Ex. 571 at SFHD017865-66.) Riverside contends that the amount of
10 business transacted by Riverside compared to the business available is comparatively high or
11 above average. (Riverside Br. at p. 10.) But the furthest Riverside's own expert would go based
12 on the relevant market opportunity data¹² was that Riverside was "essentially an average
13 performing dealership." (RT Vol. IX, 175:1-176:3.) Given that Riverside used to be average, and
14 is in decline, this factor weighs in favor of termination, if anything.

15 **III. The Dealership Has Recouped Any Investments Made and Will Not Suffer Significant**
16 **Loss if Terminated 3061(b) and (c).**

17 Harley-Davidson demonstrated in its opening brief that any investment that the Dabney
18 family has made in this dealership has already been repaid to the Dabney family three-fold. (See
19 Harley-Davidson PFF ¶¶ 207-211.) Moreover, the investment, whatever it is, should not preclude
20 termination.¹³

22 ¹² Riverside uses national sales ranking as well as "absolute sales volume" as evidence for this factor.
23 (Riverside Br. at p.10-11.) Of course, neither the ranking nor sales volume say anything about whether or not
24 Riverside is performing well relative to the amount of business available to it. Riverside also touts its Bar and Shield
25 Awards, wholly ignoring that those awards were based in part on false CSI scores submitted in the names of Veik's
26 parents and other false purchasers, as well as numerous non-retail sales that it claimed were retail. (RT Vol. III,
27 189:4-190:2.)

28 ¹³ Riverside's claims of "termination loss" are grossly overstated and certainly speculative. Woodward
conceded on cross examination, for example, that using a different, yet appropriate multiplier (two) and income
stream (5 most recent years, excluding operations of the Corona SRL) would result in a goodwill valuation of less
than \$1 million. (RT Vol IX, 82:24-83:6 and 125:2-125:23; 130:16-131:5; 134:10-135:10; 137:3-139:25.) As for real
estate value diminution, Woodward agreed there would be no such loss if the Dabney family sells or leases its
property to the new Harley-Davidson dealership. (RT Vol. IX, 113:12-22.)

1 What is clear from the evidence on “investment” is that the Dabney family is willing to
2 make investments and to be serious about matters that benefit the Dabney family. They paid
3 \$4,000,000 to upgrade a facility because that facility returned profits to them many times over.
4 They engage in marketing activities, both commercial and charitable, because it increases their
5 sales of motorcycles and increases their profits.

6
7 However, when required to “invest” in matters that do not generate immediate dollars for
8 the Dabney family, like making sure their dealership complies with the NRSP, the Dabney family
9 was completely unwilling to do so. As shown in Harley-Davidson’s post-hearing brief at pages 3-
10 6, Jay Dabney abdicated his responsibilities as a dealer principal on this issue and the Dabney
11 family, as a whole, turned a blind eye to the problem. The Dabney family invested only when it
12 benefited them and refused to invest when it did not. Because they have already received the
13 benefit of any investment that they have, the “investments” should not preclude Harley-Davidson
14 from ending its relationship with Riverside.

15 **IV. The Public Interest Is Not Served By Dealers That Put Consumers' Lives at Risk and**
16 **Harm Other Dealers 3061(d).**

17 Harley-Davidson asks the Board to consider the following questions in examining the
18 public interest factor. Does the Board want consumers to buy motorcycles that are properly
19 delivered using Harley-Davidson’s PDI procedures, or is the Board content with consumers
20 purchasing motorcycles not properly set up and pre-delivered? Does the Board want dealers in the
21 State of California to comply with their obligation under Cal. Vehicle Code § 11713.1(u) to
22 provide the franchisor with the name of the purchaser, date of sale, and vehicle identification
23 number of each new motor vehicle sold in the state or not? Does the Board want an active grey
24 market for motorcycles in California (or outside of California) or is limiting grey market sales and
25 protecting authorized dealers in the public interest?
26

27 When Riverside discusses the “public interest” factor in its post-hearing brief, Riverside
28 ignores the above issues and simply talks about Riverside: Riverside is in a high density area;

1 Riverside has a Rider's Edge Program; Riverside has a rental fleet; Riverside participates in
2 commercial and charitable marketing activities; etc. But Riverside has no basis to argue that a
3 replacement dealer would not do all these things equally well or better than Riverside.

4 On the other hand, Riverside admits it engaged in conduct that has specifically harmed the
5 public interest and the Board will be directly condoning that conduct if it does not permit Harley-
6 Davidson to terminate its Dealer Contract with Riverside.¹⁴ The Board will be sending a message
7 to dealers that in California, at least, dealers can refuse to properly pre-deliver products, submit
8 false warranty information to manufacturers in violation of the law, and engage in grey market
9 activities of a supplier's products, all without being subject to termination, and solely to protect
10 the financial interests of the dealership owners.

11 As this Board has acknowledged, "[i]n the abstract it can always be contended that the
12 closure of any dealership of any line-make adversely affects the public welfare in that there is one
13 less place for those nearby to go for sales and service... There are, however, countervailing
14 factors." *Forty-Niner Sierra Resources, Inc. dba Forty-Niner Subaru v. Subaru of America*,
15 NMVB Protest No. PR-1972-05 (Nov. 15, 2007) Here, the countervailing factors include the
16 unreasonable risk of physical harm to consumers; harm to honest dealers; and the facts that
17 Riverside will be replaced with another dealer, the transition can be seamless, and most of
18 Riverside's customers already live closer to another dealer.

19 **A. Non-Retail Sales Put Customers' Safety at Risk.**

20 Riverside's conduct put customers' safety at risk in at least two ways. Harley-Davidson's
21 Principal Engineer, Tom McGowan, testified about the importance of proper PDI to customer
22 safety, and testified with a "high degree of engineering certainty" that a population of motorcycles
23 that have not been PDI'd by a trained technician at an authorized dealership will have more
24 mechanical issues than will a similar population that was properly set-up. (RT Vol. III, 132:24-
25

26
27 ¹⁴ The Board has not required a manufacturer to prove that the public interest necessitates termination, but
28 simply that the public interest will not be harmed by termination. *See e.g. Tara Motors, supra*, Protest No. PR-976-88
at p. 41 [finding that public would not be harmed by termination].)

1 133:7.) Riverside itself recognizes the importance of proper PDI. In its Operations Manual,
2 Riverside lists requirements meant to "promote the safety of our customers" and to help avoid
3 liability. (Ex. 93 at 1-38.) The dealer must, among other things, "[s]et up and service vehicles
4 properly" and "[s]ell the product properly." The dealer must "[c]reate appropriate documentation
5 to prove" the above, and employees must "**[u]se the pre-delivery checklist.**" (ex. 93 at 1-38,
6 emphasis added; *see also* RT Vol. VI, 118:12-119:5.)

7 For every one of the violation sales, the PDI forms are blank or incomplete, and there is no
8 evidence that PDI was performed. (Exs. 1-33.) Further, even if PDI had been performed, and
9 Riverside had actually explained the owner's manual, warranties, and operational, emergency and
10 safety features of the motorcycle, Riverside explained this vital information to the *wrong people*:
11 this is information the end-users – not wholesalers – need to know about their new motorcycles.
12 (*See* Ex. 129 at §§ 3-15, 3-16.)

13 Similarly, Harley-Davidson institutes recalls when it determines that an issue poses an
14 "unreasonable likelihood of injury or death." (RT Vol. III, 88:22-89:4.) Again, McGowan
15 testified with a "high degree of engineering certainty" that a population of motorcycles that do not
16 have recall work performed will "injure or kill more people" than a population that has the work
17 done. Here, none of the motorcycles subject to recalls or product campaigns have had the work
18 done because Riverside's fraudulent SWR forms prevented Harley-Davidson from locating the
19 true end-users.

20 In its brief, Riverside contends that Harley-Davidson's concerns about safety issues are
21 "speculative." (Riverside Br. at p. 30.) Riverside argues that because Harley-Davidson has been
22 unable to identify any specific person who has yet been physically injured by one of these
23 improperly sold, delivered and inspected motorcycles, Riverside's conduct should be excused.
24 According to Riverside, "no harm, no foul."

25
26 Yet again, this attitude by Riverside demonstrates why Harley-Davidson should be entitled
27 to end its relationship with Riverside. If Riverside is not committed to proper pre-delivery
28 inspection and proper sales and warranty registrations for every motorcycle that it sells, then

1 Harley-Davidson does not want Riverside as a dealer. This insidious attitude reflecting a lack of
2 concern for the safety of the end-users of these motorcycles tells Harley-Davidson that Riverside
3 is not fit to be a Harley-Davidson dealer.

4 Harley-Davidson has a tremendous concern for the safety of end-users of Harley-Davidson
5 motorcycles. Those concerns are expressed in detail through the 180 page PDI manual issued by
6 Harley-Davidson and the Warranty Registration rules and requirements adopted by Harley-
7 Davidson. (Ex. 130 [PDI Manual]; Ex. 50 [NRSP] at ¶¶ 1, 8.) Harley-Davidson ought to be
8 allowed to end its relationship with a dealer who does not approach these safety matters with the
9 same serious concern as Harley-Davidson and as Harley-Davidson requires for all of its other
10 dealers.

11 **B. Riverside's Breaches Harm Other Dealers.**

12 Riverside intentionally breached its contract in an attempt to gain a competitive advantage
13 over honest dealers. Slagle and Veik made some of the sales with the hope to earn future business
14 from at least one of the wholesalers. (Ex. 309 at 74:17-75:13; RT Vol. VIII, 9:19-10:8.) Riverside
15 obtained over \$56,000 in profits that honest dealers forgo. (Riverside Br. at p. 30.) It earned
16 allocation of new motorcycles that other California dealers will not get due to tight supply and
17 demand. (See Ex. 259.) It earned Gold Bar & Shield awards based in part on faked CSI scores
18 and the sales it falsely reported as retail. (See RT Vol. III, 189:4-190:2.) Riverside also harmed
19 California dealers because 29 new Harley-Davidson motorcycles disappeared from the local
20 market, depriving dealers future service opportunities, merchandizing opportunities, and sales.¹⁵
21 Riverside's fraud harms not only consumers and Harley-Davidson, but also its fellow dealers.

22 **C. Customers Will Not Be Inconvenienced by Termination.**

23 Harley-Davidson intends to place a new dealer in the area if Riverside is terminated. (RT
24 Vol. I, 174:16-175:6; RT Vol. IV, 73:3-75:20.) Mr. Kennedy testified that he has dealers "today"

25
26
27 ¹⁵ Eighty-eight percent of Harley-Davidson customers intend to purchase another Harley-Davidson
28 motorcycle. (RT Vol. I, 68:13-17.) Riverside sold at least 29 Harley-Davidson motorcycles for export; that translates
into 25 lost future sales by local dealers.

1 that are interested in Southern California locations. (RT Vol. I, 177:4-13.)¹⁶ Thus any
2 inconvenience to buyers or owners would be temporary. Riverside's entire "harm to the public"
3 argument ignores the fact that the Riverside dealership is replaceable and will be replaced. Further,
4 the point could remain open seamlessly if the Dabney family LLC agrees to rent its facility to the
5 new dealer or if, as a condition to overruling the Protest the Board allows Riverside a reasonable
6 amount of time to sell the business, and a new dealer would likely hire many of Riverside's
7 employees. (RT Vol. IV, 74:19-21.) The majority of Riverside's customers actually live closer to
8 another dealership than they do to Riverside, so they will not be inconvenienced by even
9 temporary closure. (RT Vol. IV, 75:11-20; 80:18-25.) Riverside claims the public will be harmed
10 by the loss of this particular dealer based on its CSI scores, but ignores that its scores are partially
11 based on faked data and that Riverside's CSI scores have been falling under Espinoza's
12 management, especially with respect to service. (See Exs. 349, 548-549.)

13 **V. Riverside Is Not Adequately Servicing the Public 3061(e).**

14 Riverside's Second Quarter 2011 "Ownership Experience Surveys" show that its scores are
15 in decline and generally fall below comparables for its group, district, region and the nation. (See
16 generally Ex. 569 at SFHD015662-679.) Riverside's "Last 12 months" score in the majority of
17 areas is below all or most comparables, including: "Overall Dealership Rating" (Ex. 569 at
18 SFHD015663); "Consumer-friendly Personnel" and "Parts Staff" (Ex. 569 at SFHD015665);
19 "Explanation/Advice of Work and Costs" (SFHD015666); "Service Quality" (Ex. 569 at
20 SFHD015667); "Service Staff" (Ex. 569 at SFHD015668); "Service Timeliness" (Ex. 569 at
21 SFHD015669); "Clean Motorcycle" (Ex. 569 at SFHD015670). Also, Riverside's recent national
22 rankings based on the Ownership Experience Survey are dismal. It is generally ranks in the
23 bottom third or worse. (Ex. 545 [474 out of 690], Ex. 546 [514 out of 691], Ex. 547 [474 out of
24 686], Ex. 548 [459 out of 688], and Ex. 549 [467 out of 678].)

25 Riverside may attempt to emphasize its more or less acceptable Purchase Experience
26

27 ¹⁶ Harley-Davidson does not discuss particular locations with potential new dealers without permission. The
28 Dabneys have not given Harley-Davidson permission to discuss their location. (See RT Vol. I, 197:6-15.)

1 Survey scores (some of which are faked), but Riverside concedes that with respect to the public
2 welfare, service has "the largest impact on the consuming public." (Riverside Br. at p. 11.)
3 Further, section 3061(e) focuses on Riverside's ability to service customers, and the Ownership
4 Experience Surveys show that Riverside is failing miserably. The ownership surveys are
5 significant because, as Angela Stewart testified, "sales is the courtship and service is the marriage
6 with the motorcycle." (RT Vol. X, 30:6-15.) On the Purchase Experience Surveys, dealerships
7 may receive high scores because the customer is "in love with the motorcycle and in love with
8 everything that's Harley-Davidson in the beginning," but the repeated interactions with the dealer
9 as measured by the Ownership Experience Dealerships are the real test of long term customer
10 satisfaction. (RT Vol. X, 30:6-31:3.)

11 Riverside is not reasonably providing for the needs of consumers or rendering adequate
12 service, and this factor supports termination.

13 **VI. Riverside Failed to Fulfill Warranty Obligations and Violated State Law by**
14 **Submitting Fraudulent Warranty Information 3061(f).**

15 Riverside has violated its warranty obligations to Harley-Davidson by submitting false
16 warranty registration forms. This conduct breached Sections F(3) and F(7) of the General
17 Conditions. This conduct also violated the Vehicle Code with respect to warranties, because it
18 "[f]ail[ed] to disclose in writing to the franchisor of a new motor vehicle dealer the name of the
19 purchaser, date of sale, and the vehicle identification number of each new motor vehicle sold" and
20 "intentionally submit[ed] to that franchisor a false name for the purchaser or false date for the date
21 of sale." Cal. Veh. Code § 11713.1(u). Riverside has therefore not only violated its obligations to
22 Harley-Davidson but has violated state law requiring accurate warranty information.

23 **VII. This Case Is Readily Distinguishable From the Recent *Laidlaw's* Decision.**

24 Riverside predictably attempts to shoehorn the facts of this case to fit the recent Board
25 decision in *Laidlaw's Harley-Davidson Sales, Inc. v. Harley Davidson Motor Company*, NMVB
26 Protest No. PR-2299-11. Riverside, however, ignores several key distinguishing facts:

- 27 • Here, Riverside admits that it knowingly sold to re-sellers, whereas *Laidlaw's* did
28 not. *Laidlaw's* claimed that it did not know it was selling to re-sellers.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- Here, Veik and the Dabneys admitted that they knew and understood the NRSP. (RT Vol. VI, 15:14-19; Vol. VIII, 96:11-102:7; Vol. VII, 49:8-25, 70:12-23.) In *Laidlaw's*, Judge Wong found dealer confusion about what was prohibited.
- In *Laidlaw's*, Judge Wong found that the purchasers of the motorcycles at issue lied to the dealer about their intentions. Here, Veik, Slagle, Swan and others knew at the time that the buyers were purchasing the bikes to re-sell overseas. (RT Vol. VIII, 44:22-14; *see* Ex. 309 [Slagle Dep.] at 58:22-59:12, 57:19-58:21; 54:15-55:21; 56:23-57:15.)
- Here, Riverside intentionally and knowingly violated the contract and NRSP and engaged in widespread intentional fraud to cover it up. (Harley-Davidson PFF ¶¶ 76-124.) This is evidence of extreme "bad faith" under the Restatement that Judge Wong found was missing in *Laidlaw's*. This difference alone compels a different result here, as demonstrated by the numerous cases cited herein finding good cause to terminate when dishonesty is involved. In *Laidlaw's*, Judge Wong essentially found that the violations were the result of sloppiness and ignorance rather than bad faith.
- Here, Riverside intentionally violated Vehicle Code section 11713.1(u) by registering the bikes to friends and relatives who were not the purchasers.
- Here, Jay Dabney violated not only his contractual obligation to Harley-Davidson to be "personally involved" in the day-to-day operations of the dealer, but he also violated Riverside's own policies which required him to, among other things, review the Traffic Log and F&I Log.
- Here, unlike in *Laidlaw's*, Riverside's supposedly good CSI scores are inflated by faked survey responses. (RT Vol. VIII, 78:6-81:23; *see* Exs. 345-346.)
- Here, unlike in *Laidlaw's*, there is considerable evidence regarding Riverside's poor CSI scores on several key metrics. There is also considerable evidence of Riverside's financial difficulties which in no doubt contribute to its inability to adequately serve the public.
- Here, Riverside did not hire a consultant to assist in complying with the NRSP.

These facts, and especially the fact that Riverside intentionally and knowingly violated its contract and committed fraud in an attempt to cover it up compel a different result here than in *Laidlaw's*.

VIII. The Protest Should Be Overruled.

Riverside's Protest should be overruled because good cause exists to terminate its Dealer Contract under §3061.

A. The Protest Should Not Be Sustained Conditionally.

Riverside proposes that if its Protest is not sustained unconditionally, it should be sustained subject to the requirement that Riverside continue its "self-imposed compliance program" for a

1 few years, with Harley-Davidson being allowed to impose sanctions available under the NRSP for
2 violations "short of termination." (Riverside Br. at p. 40.) Riverside also proposes that Protestant
3 fully reimburse Respondent in accordance with the NRSP, which permits Harley-Davidson to
4 charge back any internal and external audit and legal expenses to the dealer.

5 This proposal should be rejected. First, Riverside was always obligated to comply with the
6 NRSP and take steps to ensure compliance. Its belated compliance efforts are simply too little, too
7 late. Second, as discussed further below, Riverside should be ordered to reimburse Harley-
8 Davidson for all costs and legal expenses, but it should be ordered to do so in the context of
9 overruling the Protest.

10 **B. Harley-Davidson Does Not Object to the Owners of Riverside Being**
11 **Permitted to Sell If Riverside Pays Harley-Davidson's Legal Expenses.**

12 Harley-Davidson does not object to Riverside's proposal that the Protest be overruled
13 conditionally, by allowing the owners of Riverside a limited amount of time to sell the dealership
14 business. This Board has approved such conditions in the past. *See e.g. Tara Motors, supra*,
15 Protest No. PR-976-88 p. 43-44.) If the Board considers such a condition, it must in fairness and
16 equity also consider significant legal expenses Harley-Davidson has incurred, which are expressly
17 recoverable under the NRSP when, as here, violations are found to have been committed. (Ex. 51,
18 ¶8.) Indeed, Harley-Davidson offered early on to assist Riverside in selling the dealership. (RT
19 Vol. I, 174:23-175:23.) Riverside ignored that pre-trial offer and since then Harley-Davidson has
20 incurred substantial legal expenses. Riverside should not be given a second opportunity to accept
21 an offer it rejected without also accepting responsibility for the additional costs it has forced
22 Harley-Davidson to incur. If California dealers are led to believe that they can intentionally
23 violate policies and engage in fraud to cover up the violations and the worst that can happen after
24 putting Harley-Davidson through expensive litigation is that they will have to sell out, Harley-
25 Davidson's enforcement efforts will be drastically eroded. If the Board is inclined to grant
26 Riverside time to sell as a condition of overruling the Protest, Riverside should be ordered to
27 reimburse Harley-Davidson for its legal expenses to date, as permitted by the NRSP.

28 Permitting Riverside's owners to sell within a reasonable time frame would also eliminate

1 most if not all of Riverside's claimed harm. For example, there would be no forfeiture of good
2 will or investments. If Riverside really has a goodwill value of \$4 million, that will be captured in
3 the sale price. Similarly, even Riverside's expert agrees there would be no "facility loss" if the
4 premises are sold (or leased) to another Harley-Davidson dealer. Further, the public will not be
5 inconvenienced by even a temporary shut down of the dealership.

6 CONCLUSION

7 Harley-Davidson's decision to terminate its contract with Riverside is fully consistent with
8 what Riverside expects: Riverside itself believes that violations of the NRSP should result in the
9 most severe sanction available – termination. (See RT Vol. VII, 213:12-214:8.) On this point,
10 Harley-Davidson agrees with Riverside.

11
12 DATED: July 18, 2012

COOPER, WHITE & COOPER LLP

13
14 By: 
15 Robert L. Ebe
16 Attorneys for Respondent HARLEY-
17 DAVIDSON MOTOR COMPANY
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 July 18, 2012, I served the following document(s): **HARLEY-DAVIDSON MOTOR COMPANY'S POST-HEARING REPLY 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

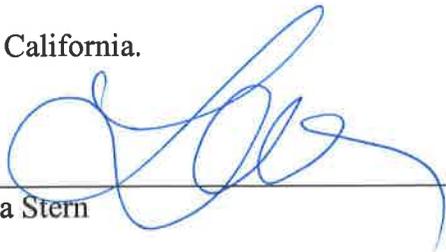
BY MAIL: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary 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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 18, 2012, at San Francisco, California.



Lana Stern