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8 **NEW MOTOR VEHICLE BOARD**  
9 **STATE OF CALIFORNIA**

11 LAIDLAW'S HARLEY-DAVIDSON SALES,  
INC. dba LAIDLAW'S HARLEY-DAVIDSON  
12 Protestant,  
13 vs.  
14 HARLEY-DAVIDSON MOTOR COMPANY,  
15 a Corporation,  
16 Respondent.

PROTEST NO. PR-2299-11  
**PROTESTANT LAIDLAW'S HARLEY-  
DAVIDSON SALES, INC. DBA  
LAIDLAW'S HARLEY-DAVIDSON'S  
POST-HEARING REPLY BRIEF**

19 Protestant Laidlaw's Harley-Davidson Sales, Inc. dba Laidlaw's Harley-Davidson  
20 ("Protestant") hereby submits its post-hearing reply brief in the above-entitled matter. References to  
21 the administrative record are abbreviated.<sup>1</sup>  
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28 <sup>1</sup> RT refers to Reporter's Transcript.

**TABLE OF CONTENTS**

1

2 I. RESPONDENT FAILS TO OVERCOME PROTESTANT’S SHOWING OF SUBSTANTIAL

3 COMPLIANCE WITH THE TERMS OF THE FRANCHISE ..... 5

4 A. Protestant’s violation units comprise a negligible percentage of Protestant’s

5 gross profit of total new retail units sold..... 5

6 B. Respondent’s contentions regarding protecting the Harley-Davidson brand,

7 ensuring customer satisfaction and safety, and ensuring proper product allocation

8 fail to consider factors that compel a finding to sustain the protest..... 6

9 i. Customer safety and customer satisfaction with the Harley-Davidson

10 brand ..... 6

11 ii. Product allocation and efforts of authorized Harley-Davidson dealers..... 9

12 iii. Compliance with state, federal and foreign laws and regulations ..... 9

13 iv. Protecting the Harley-Davidson brand ..... 10

14 II. SELECTING TERMINATION AMONG THE OTHER LESS SEVERE SANCTIONS IS

15 CONTRARY TO RESPONDENT’S DUTY OF GOOD FAITH AND FAIR DEALING IN

16 ITS ENFORCEMENT OF THE TERMS OF THE NRSP. .... 12

17 A. Even under Respondent’s view that the NRSP is part of the dealer contract,

18 rules of contractual interpretation require that Respondent abide by the NRSP’s

19 specific sanctions provisions and select the most reasonable sanction under the

20 circumstances. .... 12

21 B. Respondent’s contentions regarding “awareness” of the NRSP by Protestant’s

22 personnel does not support a conclusion that termination should apply since the

23 lack of adequate understanding and absence of any effort or means by Protestant

24 to encourage or solicit non-retail sales establishes that the violations were not

25 the result of a willful intent to make export sales in violation of the NRSP ..... 14

26 i. The receipt of VIP incentive funds occurs irrespective of a retail sale,

27 negating any possible claim of fraud or improper intent to obtain those

28 funds by making or not self-disclosing a non-retail sale. .... 16

III. THE RENTAL SOURCING RULE VIOLATIONS WERE IN NO MANNER.....

WILLFUL NOR DID THEY RESULT IN ANY HARM, DIRECT OR INDIRECT,

NOTWITHSTANDING RESPONDENT’S ARGUMENT THAT CALIFORNIA RETAIL

PURCHASERS WOULD HAVE LESS SUPPLY..... 16

IV. THE BALANCE OF EVIDENCE FAILS TO ESTABLISH GOOD CAUSE FOR

TERMINATION ..... 18

A. Protestant has adequately shown its obligations incurred, investments

necessarily made and permanency of investment are substantial. .... 20

i. Protestant’s estimate of loss in value of real estate if terminated is

relevant and credible..... 20

ii. Protestant’s goodwill estimate is relevant and credible..... 23

B. Respondent fails to overcome Protestant’s showing that termination would be

injurious to the public welfare..... 24

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2  
3  
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- C. Respondent does not dispute that Protestant has adequate motor vehicle sales and service facilities, equipment, vehicle parts and qualified personnel to reasonably provide for the needs of the consumers and has been and is rendering adequate services to the public. ....28
- D. Respondent fails to overcome Protestant’s showing that it has substantially fulfilled Respondent’s warranty obligations. ....28

V. CONCLUSION .....30

1  
2  
3  
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**TABLE OF AUTHORITIES**

**Cases**

*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654..... 12  
*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496..... 13  
*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390..... 12  
*Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833 ..... 12  
*Slivinsky v. Watkins–Johnson Co.* (1990) 221 Cal.App.3d 799 ..... 12

**Statutes**

California Vehicle Code § 3061 .....5, 19, 20, 21, 23, 29

1 **I. RESPONDENT FAILS TO OVERCOME PROTESTANT'S SHOWING OF**  
2 **SUBSTANTIAL COMPLIANCE WITH THE TERMS OF THE FRANCHISE**

3 A. Protestant's violation units comprise a negligible percentage of Protestant's gross profit  
4 of total new retail units sold.

5 The gross profits generated by Protestant's violation units in 2009, 2010 and through  
6 March 2011 are only a small fraction as compared to the total dealership gross profits for the same  
7 periods. From 2009 through March 2011, the total dealership gross profit was \$8,931,081, whereas  
8 the violation unit gross profit was \$123,846 for that period, which is only 1.38% of the total  
9 dealership gross profit. [RT Vol. XI, 35:25-36:15 (Stockton); Exh. 634, Tabs 11 and 12.]

10 Respondent's brief overstates Protestant's violations and ignores the true facts and circumstances of  
11 this case --- that these violations comprise only a negligible percentage of Protestant's business sales  
12 and activity.<sup>2</sup> Throughout its brief, Respondent overstates and aggrandizes the percentage of  
13 vehicles that were actually violation units, attempting to deflect from the fact that the balance of the  
14 California Vehicle Code Section 3061 good cause factors are in Protestant's favor.

15 Respondent also argues that it can somehow rank the degree of violation of Protestant as  
16 against other dealers. Specifically, Respondent's assertion that Protestant has the third highest level  
17 of violations than any other dealership is highly speculative. [Resp. Brief, p. 2.] The only  
18 information that Respondent has disclosed are the number of dealerships that Respondent chose to  
19 audit. [RT Vol. XI, 56:12-13 (Stockton).] Surprisingly, Respondent does not conduct regular,  
20 random audits of dealerships so Respondent's ranking of Protestant is based on a very small pool of  
21 only 30 dealerships that have been audited nationwide. [Resp. Brief, p. 2; see also [RT Vol. XI,  
22 53:23-54:5; 54:17-20; 63:12-19; 64:7-18 (Stockton).] Respondent's national dealer network  
23 consists of 702 dealerships. [RT Vol. VII, 150: 6-22 (B. Laidlaw); Exh. 120.] Accordingly,  
24 Respondent's ranking of Protestant as the third highest violator is based on an insignificant  
25 sampling of only 4% of nationwide dealerships *that have been audited*. Moreover, Respondent has  
26 created a unilateral and arbitrary "rule of thumb" (which it does not disclose in advance to  
27 dealerships in any of its policies or agreements) wherein it issues termination letters to any

28 <sup>2</sup>Clearly, no "massive failure" to comply with the dealer agreement is involved in this matter, as  
amply demonstrated by the record and putting into perspective the dealer's activities, investment,  
and fulfilled contractual duties.

1 dealership with 20 or more violations of the Non-Retail Sales Policy (“NRSP”). [Resp. Brief, p. 2;  
2 RT Vol. XI, 53:15-22 (Stockton).] Without conducting regular audits, however, this arbitrary, self-  
3 serving “rule” is meaningless in assessing how many of the hundreds of other dealerships in the  
4 Harley-Davison network have committed more than this threshold of 20 violations. It also unclear  
5 whether Respondent actually terminates every dealership that has over 20 violations, since many of  
6 those dealerships remain unknown. [RT Vol. XI, 56:7-13 (Stockton).] Without these essential  
7 pieces of information, Respondent’s stated ranking of Protestant’s dealership is inaccurate,  
8 misleading and irrelevant.

9  
10 B. Respondent’s contentions regarding protecting the Harley-Davidson brand, ensuring  
11 customer satisfaction and safety, and ensuring proper product allocation fail to consider  
12 factors that compel a finding to sustain the protest.

13 Respondent contends that selling motorcycles to grey market retailers compromises several  
14 important aspects of Harley-Davidson’s business practices. Specifically, Respondent argues that (1)  
15 customer safety and satisfaction with the Harley-Davidson brand are compromised if the vehicle is  
16 not properly set-up and tested pursuant to the pre-delivery inspection (“PDI”) procedures; (2) failure  
17 to follow the NRSP implicates the integrity of Harley-Davidson’s distribution network, specifically  
18 as to product allocation and the efforts of authorized Harley-Davidson dealers; (3) grey market  
19 resellers undermine the efforts of Harley-Davidson to ensure compliance with state, federal and  
20 foreign laws and regulations and (4) grey market activity compromises the value of the Harley-  
21 Davidson brand. As set forth below, Respondent’s contentions require examination of several  
22 significant factors that Respondent has failed to consider.

23 i. *Customer safety and customer satisfaction with the Harley-Davidson brand*

24 Respondent contends that customer safety and satisfaction are compromised when a  
25 motorcycle is disassembled, shipped overseas and then reassembled by a grey market reseller,  
26 without conducting a proper PDI pursuant to Respondent’s PDI Manual, and then resold to a  
27 customer. Respondent argues that the customer’s safety and satisfaction may be implicated if the  
28 motorcycle is reassembled following its export. [Resp. Brief, pp. 50-59.] This analysis, however,  
requires a preliminary consideration. In order to analyze the potential harm to a customer, one must

1 consider *what the customer would have purchased instead of purchasing the exported motorcycle.*  
2 Specifically, Protestant's expert, Edward Stockton, testified that Respondent has a tendency to  
3 "overstate[s] the harm from Laidlaw's exports" by not making this important distinction. [RT Vol.  
4 XI, 38:19-39:25 (Stockton).] Mr. Stockton stated:

5  
6 But then there's a single question; which is, in  
7 looking at the harm or the potential harm from Laidlaw's  
8 exports, there's an absolutely integral calculation which  
9 is the question of what would have happened had Laidlaw's  
10 not exported those vehicles. In other words, what would  
11 the consumer have bought otherwise.

12 And so you would take that third circle, which is  
13 Laidlaw's, and some of those sales, or all of them would  
14 have been fulfilled by other motorcycles. And at the end  
15 of that, what's left after that third circle is filled in  
16 by whatever those vehicles would have been replaced with,  
17 that's the harm that we are looking at, or potential harm  
18 that we are looking at from Laidlaw's exports.  
19 And I don't think that [Respondent's expert] Dr. Hanssens's  
20 report properly makes that distinction. And the tendency is to  
21 in general overstate the harm from Laidlaw's exports.

22 [RT Vol. XI, 39:10-25 (Stockton).] Accordingly, the potential harm to the customer is attenuated  
23 by the important consideration of what the customer *would have purchased* in a developing nation  
24 in lieu of the exported motorcycle. Since the possibility exists that the vehicle that the customer  
25 would have purchased in a developing nation is actually *less safe* than the exported motorcycle, the  
26 potential harm to the customer from the purchase of an exported vehicle must be reduced since it is  
27 highly speculative and only operates under the assumption that the exported motorcycle is *less safe*  
28 than any alternative vehicle the customer would have purchased. In short, there is no basis to  
conclude, as Respondent does, that a disassembled motorcycle is any safer or less safe than the  
alternative motorcycle. [RT Vol. XI, 44:11-45:13 (Stockton).] Indeed, Respondent is not aware of  
any injury to persons or property as a result of the motorcycles not being properly assembled. [RT  
Vol. I, 148:13-149:25 (Kennedy); Vol. V, 161:1-13 (McGowan).]

Furthermore, predicting a customer's alternative behavior (i.e., what the customer would  
have purchased in lieu of the exported motorcycle) is not a straightforward analysis. There are

1 further variables to consider when attempting to predict a customer's alternative behavior if a grey  
2 market vehicle is not available. Such variables include the presence of an authorized dealer in the  
3 market where the vehicle is purchased and the availability of vehicles that Respondent cannot  
4 control, such as used Harley-Davidsons or late model used Harley-Davidsons. Such vehicles may  
5 be exported without violating Respondent's corporate policies. [RT Vol. XI, 51:8-21 (Stockton).]  
6

7 A similar distinction applies to assessing customer satisfaction. Respondent contends that if  
8 a customer purchases a grey market motorcycle with which it is not satisfied (for example, because  
9 the motorcycle is an improper fit or because of some other technical deformity), the customer will  
10 direct his or her dissatisfaction towards the Harley-Davidson brand. [Resp. Brief, pp.57-59.] The  
11 potential for such "finger pointing", however, is attenuated by the nature and direction of the  
12 customer's individual reaction. Specifically, Mr. Stockton testified that the harm to Harley-  
13 Davidson, if any, would only exist if the customer demonstrates an irrational response from their  
14 dissatisfaction. For example, Mr. Stockton testified:

15 And the harm to Harley-Davidson would only come if the  
16 customer has an irrational response, if they blame  
17 Harley-Davidson for what the exporter did to them or for  
18 their own risks that they took. And while I'm not saying  
19 that's impossible -- and customers certainly have a  
20 possibility of being irrational or blaming others rather  
21 than themselves if something goes wrong -- certainly it  
22 would reduce the amount of harm to Harley-Davidson,  
23 because either the customer or the information channel,  
24 whoever they would pass on their dissatisfaction to, might  
25 understand that we are not really looking at a Harley-  
26 Davidson that the manufacturer would be happy with, this  
27 is a Harley-Davidson without the full inputs that are  
28 usually provided in -- to a Harley-Davidson customer.  
So I think it's another distinction.

24 [RT Vol. XI, 40:13-41:4.] In other words, the potential harm to the Harley-Davidson brand by a  
25 dissatisfied customer is entirely dependent on the party in the supply chain, (e.g., Harley-Davidson,  
26 the grey-market reseller, etc.) to whom the customer directs his or her dissatisfaction. Without  
27 considering this factor, Respondent overstates the potential for customer dissatisfaction directly with  
28 the Harley-Davidson brand.

1  
2                   ii. *Product allocation and efforts of authorized Harley-Davidson dealers*

3           Respondent argues that exporting vehicles compromises the integrity of Harley-Davidson's  
4 distribution network and product allocation. Specifically, Respondent contends that by exporting  
5 motorcycles in violation of the NRSP, Protestant improperly "deprived" potential California  
6 consumers of Harley-Davidson vehicles that were specifically intended to be distributed in  
7 California. [Resp. Brief, p. 60-61.]

8           Respondent's contention is once again based on specious facts and speculative claims and  
9 fails to factor in important considerations. For example, purchasing a new motorcycle in California  
10 but shipping it outside of California does not violate Respondent's NRSP, even though it has the  
11 same effect of reducing the total number of units of Harley-Davidson motorcycles in California as  
12 would exporting a motorcycle outside the United States. [RT Vol. II, 172:11-23 (Kennedy).]  
13 Moreover, Respondent has not, and indeed cannot, produce any evidence that the vehicles that were  
14 purchased as exports from Protestant would have been registered to be driven in California. If the  
15 motorcycle is not registered to be driven in California, this would have the same "deprivation" effect  
16 on the allocation of California Harley-Davidson motorcycles as would exporting the motorcycle.

17           Respondent further argues that exporting of vehicles in violation of the NRSP, and grey  
18 market activity generally, undermines the efforts of authorized dealers by negatively impacting the  
19 Harley-Davidson brand. However, as Mr. Stockton testified, the presence of grey market activity, at  
20 least preliminarily, would benefit a country that recently opened an authorized Harley-Davidson  
21 dealership, because the grey market vehicles would provide the newly-opened dealership with  
22 service opportunities. The grey market customers would give the new dealership a customer base  
23 and a chance to make more money. [RT Vol. XI, 48:13-18 (Stockton).]

24                   iii. *Compliance with state, federal and foreign laws and regulations*

25           Respondent argues that the NRSP ensures compliance with state, federal and foreign laws  
26 and regulations, including compliance with laws related to exporting and importing and laws related  
27 to proper vehicle homologation, or the manufacture of a vehicle to be in compliance with the laws,  
28 regulations and standards of a particular state or country. Non-compliance with the NRSP may

1 result in potential violations of state, federal and foreign laws and regulations [Resp. Brief, p. 59-  
2 60.] However, this argument is premature as Respondent does not have an estimate of the monetary  
3 loss or damage sustained as a result of Protestant's violations to the NRSP and the Fleet Sales Policy  
4 ("FSP") and, significantly, Respondent is not aware of any fines, sanctions, or penalties imposed on  
5 Respondent by foreign governments for units sold by unauthorized sellers in foreign countries. [RT  
6 Vol. V, 161:1-13 (McGowan).]

7 Q. You testified a bit regarding the unique  
8 requirements, varied requirements of different  
9 jurisdictions in the world for motorcycles, and also  
10 answered some questions of Mr. Waxdeck concerning the  
11 implications of grey market units that don't meet those  
12 specifications.

13 But let me ask you, are you aware of any -- I'm  
14 not limiting this to Laidlaw's -- but are you aware of  
15 instances where Harley-Davidson itself has received some  
16 kind of sanction or censure by a government regarding  
17 noncompliance of grey market, that is units sold by  
18 unauthorized sellers in foreign countries?

19 A. I'm not aware of any such actions.

20 iv. *Protecting the Harley-Davidson brand*

21 Throughout its brief and the hearing in this matter, Respondent has emphasized the  
22 importance of protecting the Harley-Davidson brand, which it asserts is affected by all of the  
23 concerns discussed above. Specifically, Respondent claims that in order to protect the brand,  
24 compliance with the NRSP is critical. [Resp. Brief, p. 64-65.] However, Respondent has failed to  
25 establish that it has consistently enforced the NRSP as to all Harley-Davidson dealerships. Mr.  
26 Stockton testified that consistency of enforcement of the NRSP would be shown if Respondent  
27 performed *regular audits* of dealerships to determine if they are in compliance with the provisions  
28 of the NRSP. Respondent does *not* perform such audits. [RT Vol. XI, 53:11-55:10 (Stockton.)] In  
fact, although Respondent provides technical training to its dealers, as well as training in sales, sales  
technique, product knowledge, management processes and techniques, it does not offer training or  
courses on the NRSP. [RT Vol. II, 174:20-175:15 (M. Kennedy).] As stated before, Respondent  
maintains an arbitrary policy that if a dealership is found to have more than 20 violations of the  
NRSP, they are subject to termination.

1  
2 However, Respondent has not set forth evidence to show that this arbitrary "Rule of 20" is  
3 enforced with any regularity. In other words, merely because a dealership is found to have over 20  
4 violations of the NRSP does not mean that Respondent has consistently terminated every such  
5 dealership. Further, Respondent has not shown that it has sent a termination letter to every  
6 dealership that has made over 20 grey market exports or that Respondent has even audited every  
7 dealership that they believed exports motorcycles. In light of the importance that Harley-Davidson  
8 places on the need to terminate dealerships because of export violations, it is highly surprising that  
9 Respondent does not conduct regular audits. Mr. Stockton explained the importance of conducting  
10 these regular audits and how failing to do so negatively implicates Respondent's claim that  
11 termination is warranted in this case:

12 *I was very surprised to hear that Harley-Davidson*  
13 *does not conduct random audits of dealerships in terms of*  
14 *export violations, something of the critical importance*  
15 *which it would be assumed to be. I would really expect,*  
16 *given the value that they are claiming to place on the*  
17 *need to terminate Laidlaw's, I was very surprised to hear*  
18 *from the day to day course of business there were no*  
19 *audits.*

20 ADMINISTRATIVE LAW JUDGE WONG: If there were  
21 random audits would that affect your decision?

22 THE WITNESS: It would -- I think in terms of my  
23 decision, I really as an expert don't try to opine on the  
24 final issue.

25 ADMINISTRATIVE LAW JUDGE WONG: That's the wrong  
26 word. Your opinion.

27 THE WITNESS: Okay. *It would matter, because it*  
28 *would establish to me more that Harley-Davidson -- that*  
*the potential harm to the brand would seem more credible*  
*to me if they were auditing on a regular basis in the day*  
*to day course of business. And it would be a much better,*  
*in my mind a much better policy to audit on a regular*  
*basis. Because I think the goal of Harley-Davidson is*  
*ultimately to reduce the amount of grey market exports.*  
*And by introducing audits -- I've seen this*  
*across the industry with respect to audits of any number*  
*of dealership behaviors, that they are a credible and a*  
*common deterrent, and hopefully neither the manufacturer*  
*nor the dealership gets to the point that we are at today.*  
*So I think it would have been an important input if I had*  
*undertaken these audits in the ordinary course of*

1 business.

2 *What's happened now is that they have attempted*  
3 *to terminate any dealership that they have audited and*  
4 *caught, but we don't know that they have audited every*  
5 *dealership that they've been aware of with grey market*  
6 *exports. And we don't know that there aren't major*  
7 *exporters out there who have not been caught, or not been*  
8 *observed by Harley-Davidson.*

9 So it's only consistent with respect to being  
10 consistent across one spreadsheet. But we don't know if  
11 it's actually consistent across all of Harley-Davidson's  
12 policies.

13 [RT Vol. XI, 53:11-55:10 (Stockton.)] If the fears of exportation and harm to the Harley-Davidson  
14 brand are as significant a concern as Respondent claims they are, Respondent's failure to perform  
15 regular audits of dealerships is inconsistent with and undermines the credibility of Respondent's  
16 allegations of harm and the necessity of terminating Protestant's franchise.

17 **II. SELECTING TERMINATION AMONG THE OTHER LESS SEVERE SANCTIONS**  
18 **IS CONTRARY TO RESPONDENT'S DUTY OF GOOD FAITH AND FAIR**  
19 **DEALING IN ITS ENFORCEMENT OF THE TERMS OF THE NRSP.**

20 A. Even under Respondent's view that the NRSP is part of the dealer contract, rules of  
21 contractual interpretation require that Respondent abide by the NRSP's specific  
22 sanctions provisions and select the most reasonable sanction under the circumstances.

23 It has long been recognized in California that "[t]here is an implied covenant of good faith  
24 and fair dealing in every contract that neither party will do anything which will injure the right of  
25 the other to receive the benefits of the agreement." *Kransco v. American Empire Surplus Lines Ins.*  
26 *Co.* (2000) 23 Cal.4th 390, 400. The scope of the duty of good faith and fair dealing depends upon  
27 the purposes of the particular contract because the covenant "is aimed at making effective the  
28 agreement's promises." *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683. The implied  
covenant "is designed to effectuate the intentions and reasonable expectations of parties reflected by  
mutual promises within the contract." *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 852;  
citing *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 806. "In the case of a  
discretionary power, it has been suggested the covenant requires the party holding such power to  
exercise it for any purpose within the reasonable contemplation of the parties at the time of  
formation—to capture opportunities that were preserved upon entering the contract, interpreted

1 objectively.” *Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 (internal citations  
2 omitted).

3 Here, Respondent’s NRSP identifies the following sanctions for violation therein: (1)  
4 placing limitations on future product allocations or shipments; (2) charging back to the dealer any  
5 incentives or allowances credited or paid with respect to the violating sale; (3) placing the dealer in  
6 Not in Good Standing status; (4) charging back any internal and external audit and legal expenses to  
7 the dealer; or (5) terminating the dealer’s contract. [RT Vol. II, 156:4-157:1 (Kennedy); Exhs. 6,  
8 208, 209.]

9 In pursuing termination of Protestant, Respondent has essentially breached the covenant of  
10 good faith and fair dealing by imposing the harshest sanctions possible that are beyond the  
11 reasonable contemplation and expectations of Protestant. Respondent did not impose less severe  
12 consequences to Protestant’s violations prior to issuing a termination notice, such as limiting future  
13 product allocations or placing Protestant in “Not in Good Standing” status. [RT Vol. II, 158:12-24  
14 (Kennedy).] However, Respondent has imposed less severe sanctions on other dealerships who  
15 have violated the NRSP. [RT Vol. IV, 48:9-17; 49:12-18 (Verduyn).]

16 Michael Kennedy, Respondent’s Vice President of North American sales, testified that as a  
17 “rule of thumb” Respondent issues termination letters to dealerships that have more than 20  
18 violations of the NRSP. Mr. Kennedy testified as follows:

19  
20 As a general rule, and I think we’ve mentioned this  
21 in the opening comments, as a well as your Honor had a  
22 question about it, is a general rule of 20 non-retail  
23 violations is a point where we tend to -- again, we  
24 look at every situation and the unique circumstances  
25 going on. But when we when we approach that 20 mark,  
26 it is typically when we will issue a termination based  
27 on the policy.

28 Now, I don’t and I think it was maybe mentioned or  
29 maybe I interpreted it, it’s not a black and white  
30 is no and 20 is yes. We try to look at each situation  
31 and the unique circumstances going on with it and make  
32 a decision on it.

33 So in short we’ve issued termination letters of  
34 less than 20 I guess is what I’m trying to say. I  
35 just wanted to clarify, it’s not an absolute “if it’s

1 20, I don't want to talk you, just issue a termination  
2 letter" situation. That's not our approach. *It's just*  
3 *a general rule of thumb.*

4 (RT Vol. II, 67:1-19 (M. Kennedy).] Respondent's enforcement of this arbitrary and self-serving  
5 "Rule of 20" runs afoul of the covenant of good faith and fair dealing. Rather than exercising the  
6 less severe and more reasonable consequences that are expressly set forth in the NRSP, Respondent  
7 has created an arbitrary and artificial cut-off rule that was: (1) never previously disclosed to  
8 Protestant, (2) not set forth in the dealer contract or the NRSP, (3) created without the consent or  
9 approval of Protestant, and (4) cannot even be inferred from the language in the dealer contract or  
10 NRSP. In imposing termination as the very first consequence to Protestant's export violations,  
11 Respondent's bad faith actions do not comply with the equitable principles of contractual  
12 interpretation which would require that Respondent abide by the NRSP's specific sanctions  
13 provisions and select the most reasonable sanction under the circumstances, within the scope of both  
14 parties' expectations. By failing to exercise its discretion in imposing the less severe alternatives set  
15 forth in the NRSP, Respondent's pursuit of termination is one-sided, unreasonable and in clear  
16 violation of the implied covenant of good faith and fair dealing.

17 B. Respondent's contentions regarding "awareness" of the NRSP by Protestant's personnel  
18 does not support a conclusion that termination should apply since the lack of adequate  
19 understanding and absence of any effort or means by Protestant to encourage or solicit  
20 non-retail sales establishes that the violations were not the result of a willful intent to  
21 make export sales in violation of the NRSP

22 Respondent contends that Protestant has "admitted awareness of the relevant policy  
23 prohibitions to a large degree." [Resp. Brief, p. 24-27.] Regardless of the truth of that assertion,  
24 evidence at the hearing revealed that there was no specific harm to Respondent and no showing of  
25 intent to deceive, but rather that there was a lack of understanding of the NRSP on the part of  
26 Protestant. [RT Vol. VIII, 54:3-14 (B. Laidlaw); Vol. X, 40:5-9 (C. Tolman); Vol. I, 148:13-149:25  
27 (Kennedy); Vol. V, 161:1-13 (McGowan).] Without a full and complete understanding and  
28 knowledge of the terms of the NRSP, it is logically impossible for Protestant to willfully intend to  
make export sales in violation of the NRSP. See *Intrieri v. Superior Court* (2004) 117 Cal.App.4th  
72, 86 ("Fraud is an intentional tort, the elements of which are (1) misrepresentation;  
(2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5)

1 resulting damage.”) (emphasis added). Accordingly, Protestant lacked the requisite knowledge such  
2 that its actions qualified as willful or fraudulent.

3  
4 In fact, as set forth in Protestant’s Opening Post-Hearing Brief, once Protestant developed a  
5 full understanding of these policies, the Compliance Coach program was immediately put into effect  
6 and Protestant has and continues to comply with all of Respondent’s policies and procedures and to  
7 go above and beyond what has been requested. [RT Vol. IX, 18:24-20:18; 21:6-31:2 (Litchfield);  
8 RT Vol. IX, 143:23; 147:8-10; 148:22-153:7; 156:4-157:4 (Gisiger); RT Vol. X, 12:1-8 (Gisiger);  
9 Exhs. 9; 36; 608; 610; 612; 614-616.]

10 i. *The so-called “plan” of Protestant to continue making export sales but to*  
11 *charge sales tax is a creation of Respondent’s rhetorical argument and not*  
12 *established by the fact.*

13 Respondent contends that as of November 2010, Protestant’s “plan” as to the NRSP is that  
14 “the dealership would continue to sell to people who were going to ship or use these motorcycles  
15 outside the United States, but simply charge them sales tax.” [Resp. Brief, p. 46.] This allegation is  
16 contradicted by the clear evidence in this case that Protestant is and will continue to practice nothing  
17 short of full compliance with the NRSP. [RT Vol. IX, 18:24-20:18; 21:6-31:2 (Litchfield); RT Vol.  
18 IX, 143:23; 147:8-10; 148:22-153:7; 156:4-157:4 (Gisiger); RT Vol. X, 12:1-8 (Gisiger); Exhs. 9;  
19 36; 608; 610; 612; 614-616.] In November 2010, Brent Laidlaw, the dealer operator, and Chris  
20 Tolman, the Sales Manager, discussed this so-called “plan,” namely that Protestant would continue  
21 to sell vehicles to exporters but charge sale tax on them. [RT Vol. VIII: 117:5-9.] This discussion  
22 took place months before Protestant received the termination notice in April 2011 and prior to the  
23 sales staff obtaining a thorough understanding of the NRSP through the implementation of the  
24 Compliance Coach program in May 2011. Respondent attempts to mislead the Board as to  
25 Protestant’s future intent to comply with the NRSP by focusing on out of context statements made  
26 by Protestant’s staff *prior* to the staff obtaining a complete understanding of and ensuring full  
27 compliance with the NRSP. Further, Respondent’s claim that Protestant intends to continue to make  
28 export sales but to charge sales tax further evidences Protestant’s initial lack of understanding of the  
NRSP’s provisions at the time this discussion took place between Mr. Tolman and Mr. Laidlaw in

1 Fall 2010.

2 Accordingly, Respondent's argument that Protestant intends to continue making export sales  
3 but to charge sales tax is unsubstantiated and unfounded based on the facts revealed at the hearing.

4  
5 ii. *The receipt of VIP incentive funds occurs irrespective of a retail sale, negating*  
6 *any possible claim of fraud or improper intent to obtain those funds by making*  
7 *or not self-disclosing a non-retail sale.*

8 In the notice of termination, Respondent charged back \$16,007.07 of VIP money from  
9 Protestant. [RT Vol. II, 29:5-11; 184:25-185:5; 187:12-20 (Kennedy); Exh. 237.] Respondent  
10 maintains a so-called incentive program called VIP. This program was formerly known as a  
11 holdback, but the terminology changed years ago to VIP. Like a holdback, VIP incentive funds are  
12 earned at the time a dealer purchases a motorcycle from Respondent and the funds include  
13 promotional and marketing incentives [RT Vol. II, 29:5-11 (Kennedy)]. While the VIP program  
14 terms state that "non-retail sales" (with the only defining document for that term being other Harley-  
15 Davidson policies) are not eligible for the incentive, significantly however, the dealer is paid for  
16 VIP incentives regardless of whether the motorcycle is sold to a customer. [Exh. 237.] In other  
17 words, regardless of whether a sale is a retail sale or a non-retail sale, such payments occur  
18 irrespective of whether the vehicle is still in the dealer's inventory or if the vehicle is sold. [RT Vol.  
19 II, 184:25-185:8 (Kennedy).] The dealer would still receive a VIP incentive under both  
20 circumstances. In other words, the VIP funds are obtained prior to the vehicle being sold to the  
21 customer. This corporate policy thereby negates any potential claim of fraud or improper or willful  
22 intent by Protestant to obtain those funds by not disclosing a non-retail sale, since the dealer would  
23 obtain those funds irrespective of the type of sale.

24 **III. THE RENTAL SOURCING RULE VIOLATIONS WERE IN NO MANNER**  
25 **WILLFUL NOR DID THEY RESULT IN ANY HARM, DIRECT OR INDIRECT,**  
26 **NOTWITHSTANDING RESPONDENT'S ARGUMENT THAT CALIFORNIA**  
27 **RETAIL PURCHASERS WOULD HAVE LESS SUPPLY.**

28 Respondent contends that Brent Laidlaw was fully aware of the Sourcing Rule, yet he made  
the 17 rental violations anyway. [Resp. Brief, p. 48-50.] Respondent claims that because the rental  
and retail allocations systems are distinct, improper sourcing of rental sales from the pleasure unit

1 allocation, rather than the rental fleet allocation, and reporting such sales as “retail” sales, denies  
2 motorcycles to retail customers. [Resp. Brief, p. 65-55.]

3 As Mr. Laidlaw testified during the hearing, Mr. Laidlaw had absolutely no willful motive or  
4 ill intent leading to the 17 rental violations. [RT Vol. VII, 113:19-114:3 (B. Laidlaw).] In April  
5 2009, Mr. Laidlaw was told by John Severson<sup>3</sup> of EagleRider Corporate that Protestant was  
6 approved to sell from its pleasure unit allocation five motorcycles for the model year to any  
7 EagleRider rental franchise. Mr. Laidlaw stated that Mr. Severson obtained this information  
8 directly from Harley-Davidson’s corporate office, and specifically from Steve St. Thomas,  
9 Respondent’s Director of Police and Fleet Sales, and Mr. Severson’s “liaison to fleet sales.” [RT  
10 Vol. VII, 115:5-117:20 (B. Laidlaw).] Mr. Laidlaw did not have a reason to doubt Mr. Severson’s  
11 representation as he had done business with him for many years and had claimed to obtain his  
12 information directly from Harley-Davidson corporate. [RT Vol. VII, 110:16-111:4 (B. Laidlaw).]  
13 Relying on this representation, Mr. Laidlaw sold the fifteen rental violation sales to EagleRider  
14 franchises. Mr. Laidlaw’s motivation for making these sales was that EagleRider often does not  
15 have the motorcycles they need, as some vehicles have high mileage and are not in “good shape.”  
16 Accordingly, by selling these motorcycles to EagleRider, Mr. Laidlaw believed that, even though he  
17 would lose profits, allocation, and VIP money through these transactions, he would instead further  
18 foster a business relationship with another EagleRider franchise, who would in turn reciprocate and  
19 send customers to Protestant’s franchise. [RT Vol. VII, 112:25-114:3 (B. Laidlaw).]

20 In accordance with the nature of these transactions and Respondent’s policies, Mr. Laidlaw  
21 specifically instructed his DMV clerk to indicate that these sales to EagleRider were *rental sales*  
22 (i.e., non-retail sales) on the computer input that electronically transfers SWR information to  
23 Respondent. However, the DMV clerk failed to do this properly and the vehicles were incorrectly  
24 and inadvertently identified as “retail sales.” [RT Vol. VII, 112:1-24 (B. Laidlaw).]

25 In short, Mr. Laidlaw relied on Mr. Severson’s representation in selling the rental violations  
26 to EagleRider and, by doing so, was merely hoping to build a professional business relationship with  
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28 <sup>3</sup> The Reporter’s Transcript for this hearing appears to misspell Mr. Severson’s name.  
The correct spelling is noted in this brief.

1 another franchise. Mr. Laidlaw testified under oath that he fully intended to disclose these sales as  
2 “rental” sales to Respondent. Irrespective of these facts, Respondent has not asserted any injury or  
3 harm as a result of these rental violations, other than the claim that these rental violations deprived  
4 17 California retail consumers of motorcycles. Moreover, Respondent has set forth no evidence to  
5 show each of these motorcycles would have been registered in California, rather than in another  
6 state, nor has Respondent shown that the “loss of sales in California” of “sales taxes and registration  
7 fees” is a certainty. Such claims are speculative at best. [Resp. Brief, p. 71, fn. 94.] In essence,  
8 Respondent has given no indication that it has suffered any direct damages, monetary or otherwise,  
9 as a result of Protestant’s violations.

10 **IV. THE BALANCE OF EVIDENCE FAILS TO ESTABLISH GOOD CAUSE FOR**  
11 **TERMINATION**

12 Respondent contends that Protestant transacts “a moderate amount of business” and that it  
13 “failed to transact business appropriately” by selling 59 new motorcycles in violation of the NRSP  
14 and FSP. [Resp. Brief, p. 66.] Respondent’s argument is disingenuous and irrelevant as it  
15 completely ignores the extensive evidence showing the substantial amount of business transacted by  
16 Protestant as compared to the business available to it. As set forth in detail in Protestant’s Opening  
17 Post-Hearing Brief, Protestant’s November 2011 year-to-date sales ranking report shows that  
18 Protestant ranks 101 out of the entire Harley-Davidson national dealer network of 702 dealerships in  
19 terms of sales volume. [RT Vol. II, 134:9-14 (Kennedy).] Protestant is ranked number one in its  
20 district and second in Southern California in terms of sales volume. [RT Vol. II, 135:15-20  
21 (Kennedy).] To characterize these rankings as “a moderate amount of business”, as Respondent  
22 does, is nothing short of misleading. In October 2011, the year-to-date aggregate data reflects a  
23 3.6% increase in net sales compared to the previous year. The same data shows a 3.1% increase in  
24 net profits before taxes compared to the previous year. The number of new vehicle net sales  
25 increased by 2.8% compared to the previous year for the same period. [RT Vol. VII, 150:23-153:9  
26 (B. Laidlaw); Exh. 540.]

27 Protestant has received numerous recognitions from Respondent for meeting and exceeding  
28 performance expectations. In calendar years 2005, 2006 and 2007, Protestant achieved Gold Bar &

1 Shield Awards. Respondent's Bar and Shield Award Program is an awards program for dealers  
2 based on excellence in retail sales performance, operations management and marketing performance  
3 in the current year in a given region. A dealer that falls into the top four in the region receives a  
4 Gold award; a dealer that falls in the next eight rankings receives a Silver award; and a dealer that  
5 falls in the next twelve rankings receives a bronze award. Only 25 stores across the country receive  
6 a Gold Bar and Shield Award. [RT Vol. IV, 70:9-72:18 (Hawken); Vol. VII, 137:16-138:17 (B.  
7 Laidlaw); Exh. 124.] In both calendar years 2008 and 2009, Protestant achieved Bronze Bar &  
8 Shield Awards. [RT Vol. IV, 70-9-72:18 (Hawken); Exhs. 158 and 159.]

9  
10 Simply put, the amount of business transacted by the Protestant relative to the business  
11 available to the dealership is comparatively high. Protestant's number of registrations and sales as  
12 compared to the national average in its dealer-assigned territory of Baldwin Park was 158% in 2010.  
13 In 2011, that figure was 164.4%. These figures show that Protestant's sales relative to other  
14 dealerships in the district is substantially higher. [RT Vol. XI, 28:5-30:22 (Stockton); Exh. 634,  
15 Tab 7.]

16 Moreover, Respondent contends that "Laidlaw's should have focused its efforts on making  
17 these sales locally, as its Dealer Contract provides..., and the sales should have been made to retail  
18 customers as its Dealer Contract and the NRSP require." [Resp. Brief, p. 66.] However,  
19 Respondent misreads Section 3061(a) of the Vehicle Code. Section 3061(a) inquires as to "the  
20 amount of business transacted by the franchisee, as compared to the business available to the  
21 franchisee" and this clear language does not require that Protestant's business has to come from any  
22 particular location. Moreover, the fact that there is vehicle "pump out" to other business territories  
23 reflects the value that Protestant brings to the brand and to the public. [Resp. Brief, p. 71, fn. 93.]

24 As stated earlier, the gross profit on the 59 violation units as compared to the total dealership  
25 gross profit is negligible, accounting for only 1.38% of Protestant's total gross profit between 2009  
26 and March 2011. [RT Vol. XI, 35:25-36:15 (Stockton); Exh. 634, Tabs 11 and 12.] Even Mr.  
27 Kennedy, Respondent's Vice President of North American Sales, testified at the hearing that  
28 Protestant's performance is adequate and not disputed in this case:

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Q So Laidlaw's facility is completely adequate in Harley-Davidson's eyes?

A I have not seen a REG Assessment on Laidlaw's facility, so I wouldn't want to stand here and say it's completely adequate. It certainly is a good facility. And it's certainly adequate in size. It's a good location that's got great signage. So there's a lot of great positives.

I wouldn't want to use your words completely fulfills all the requirements. I'm just not aware. Perhaps Paul Hawken would know that specifically.

Q *Have you ever heard of any inadequacies?*

A *I have not.*

Q How about their performance in their market in terms of selling into their designated territory? Are they properly doing that?

A *As far as I know they are.*

Q You never heard any complaints about that?

A No. I mean, no. *I will sit here and say to everybody here that Laidlaw's is not a bad dealer. This is not a performance issue with Laidlaw's.*

[RT Vol. II, 133:22-134:17 (M. Kennedy).] Thus, the undisputed fact remains that Protestant conducts a substantial amount of business as compared to the business available to it.

A. Protestant has adequately shown its obligations incurred, investments necessarily made and permanency of investment are substantial.

i. *Protestant's estimate of loss in value of real estate if terminated is relevant and credible.*

Respondent argues that the "alleged \$2,000,000 real estate loss is neither relevant nor credible" because (1) Laidlaw's does not own its facility and underlying real estate; (2) Protestant's expert, Carl Woodward's \$2,000,000 figure is without credible evidentiary support; and (3) the assumption of vacancy ignores the fact that Harley-Davidson intends to fill Protestant's Baldwin Park points after Protestant's dealer contract is terminated. [Resp. Brief, p. 69-71.] Respondent's arguments are unfounded for several reasons.

First, as Protestant set forth in its supplemental brief titled, "Specific Issue Brief Re Admissibility of Evidence of Investment by Entities Under Substantially Common Ownership with Protestant," the clear language of Vehicle Code § 3061 allows consideration of all existing circumstances and does not limit the Board to consideration of the specific factors. As such, the

1 statute imposes no limit on the introduction of evidence of investments made by commonly owned  
2 entities in dealership facilities and real property. First, the reference to “by the franchisee” in  
3 subdivision (b) of Section 3061, does not apply in any manner to subdivision (c). Moreover, the  
4 words “by the franchisee” do not even remotely address in whom legal title or ownership must  
5 reside – “by the franchisee” clearly does not foreclose consideration of investments made  
6 “indirectly” by the franchisee – such as investments made by the franchisee through an affiliate.  
7

8         Regardless, parsing “by the franchisee” cannot help Respondent exclude evidence of the real  
9 estate affiliates’ investments in the dealership facilities and real property because the directive of  
10 Section 3061 that all circumstances be considered must be considered to apply with special force  
11 where those circumstances relate to one or more of the enumerated factors.

12         Second, Mr. Woodward’s reliance on the appraiser’s real estate and facility appraisal was  
13 only to determine the total valuation of Laidlaw’s facilities and land, which was appraised at  
14 approximately \$6.64 million. By then applying his expert opinion – that Laidlaw’s facilities will  
15 sustain a thirty percent loss in value – to the appraiser’s total valuation of Laidlaw’s facilities, Mr.  
16 Woodward quantified the loss to equal approximately \$2 million. [RT Vol. X, 24:10-26:14; 33:9-14  
17 (C. Woodward).] Mr. Woodward determined Protestant’s expected \$2 million loss in the real estate  
18 value based on his own personal knowledge and experience of diminution of value working with  
19 similar dealerships. But because Respondent has not retained its own expert to rebut Mr.  
20 Woodward’s expected diminution of value, Respondent attempts to attack him by positing improper  
21 arguments not based on any foundational basis of his expertise. Therefore, it would also be improper  
22 for the Board to exclude Mr. Woodward on the basis of the weight and credibility of his testimony.

23         Moreover, Respondent’s inconsequential contentions regarding the applicability of “holding  
24 costs” [Resp. Brief, p. 68], does not change Mr. Woodward’s ultimate conclusion that there will be  
25 loss in the value of real estate, and it will be substantial:

26                         So, I know, give or take, that it's going to  
27                         be 30 percent. Could be a little less, could be a  
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1 little bit more. I'm not saying I know how to  
2 appraise a piece of real estate in California, but I  
3 know, once I'm given that value with an operating  
4 business in it and there is no replacement dealership  
5 in the near term seen, the value goes down  
6 substantial. You could have -- several experts might  
7 differ on the amount of diminished value but they  
8 wouldn't differ that there is diminished value. And  
9 I felt 30 percent was a reasonable percentage.

10 [RT Vol. X, 26:4-14 (C. Woodward).]

11 Third, Mr. Woodward properly estimated that the value of the property will decrease as a  
12 result of vacancy. Merely because Respondent intends to fill Protestant's point if the franchise is  
13 terminated and has offered to assist Protestant in selling its assets and/or allow the real estate  
14 holding companies to lease the facility does not mean that they will readily find a new dealer upon  
15 termination or that a dealer has already been identified. It is unavoidable that there will be a period  
16 wherein the facility will be vacant, and Mr. Woodward properly accounts for this vacancy period in  
17 his calculations, based on his professional experience with terminations as a valuation expert:

18 And from my own experience, because we have  
19 had several hundred dealerships terminate in the last  
20 three years, mostly Chrysler and General Motors  
21 dealerships, I have seen where they can't sell them  
22 or not been able to sell them. They discounted the  
23 prices materially. In one case they tore the  
24 building down, hoping to maybe sell it without the  
25 building on it.

26 *And I know the values go down materially,*  
27 *especially when you don't have a readily available*  
28 *replacement car dealer for, say, a car dealership or*  
*whatever available for property. So it's a matter of*  
*how much the diminished value is. It is not really a*  
*matter if there is any, unless there happens to be a*  
*dealership real close by that would want to move into*  
*the facility.*

*I have seen personally upwards of maybe ten*  
*dealerships, and several of my customers are included*  
*in there. And my customers, which is maybe five,*  
*have not been able to sell them and they got vacant*  
*properties for three years.*

And I know that the rough holding cost for a  
building, if you allow for a typical mortgage payment  
that you might have with an interest rate today -- I

1 don't know what it would be today necessarily --  
2 somewhere less than 10 percent, the holding cost,  
3 which is what the mortgage payment would be, plus  
4 property taxes and insurance, minimal utilities to  
5 keep the building back where I live so it doesn't  
6 freeze up, which I don't think you folks have that  
7 issue out here, that's roughly 10 percent a year. So  
8 if a dealership remains vacant for three years,  
9 you've got 30 percent value right there, ignoring the  
10 other factors.

11 So, I know, give or take, that it's going to  
12 be 30 percent. Could be a little less, could be a  
13 little bit more. I'm not saying I know how to  
14 appraise a piece of real estate in California, but I  
15 know, once I'm given that value with an operating  
16 business in it and there is no replacement dealership  
17 in the near term seen, the value goes down  
18 substantial. You could have -- several experts might  
19 differ on the amount of diminished value but they  
20 wouldn't differ that there is diminished value. And  
21 I felt 30 percent was a reasonable percentage.

22 [RT Vol. X, 24:20-26:14 (C. Woodward).] Moreover, because Protestant's facility is a single-  
23 purpose facility (that is, it was exclusively designed as a facility to sell motorcycles and it would be  
24 difficult to convert it to another type of retail establishment), this factor would also make it more  
25 difficult to find a new seller. [RT Vol. X, 24:10-25:10 (C. Woodward).] Accordingly, the real  
26 estate loss of \$2 million is both credible and relevant.

27 i. *Protestant's goodwill estimate is relevant and credible.*

28 The purpose of calculating goodwill is not to compensate Laidlaw's for its termination, but  
instead, is to establish a good cause factor that does not require the same specificity as the  
calculation of damages. Goodwill is an asset of a business that may be bought and sold in  
connection with the business. As mentioned above, Vehicle Code § 3061 states "the board shall  
take into consideration the existing circumstances, including, but not limited to, all of the  
following..." Section 3061 mandates that all circumstances surrounding the franchise be considered  
and to be meaningful and to honor this statutory mandate, consideration and exploration of the  
totality of investments made and permanency requires assessing intangible assets of the franchise,  
such as potential goodwill loss if Protestant is terminated. Accordingly, the goodwill value is highly

1 relevant to the good cause evaluation.

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3 Moreover, the goodwill value of \$6 million that Mr. Woodward calculated is reliable as it  
4 was based upon his consideration of multiple factors. First, Mr. Woodward looked at several  
5 vehicle industry “rules of thumb” for appraising vehicle industry dealerships’ goodwill value, such  
6 as using a multiple of five times earnings. As an expert in the field and the CPA and financial  
7 advisor for over 200 new vehicle dealerships throughout the United States, Mr. Woodward testified  
8 that it is industry practice to use multiples of 3 to 5 times earnings and he has also calculated the  
9 goodwill value based on a common “rule of thumb” of 20 percent return on a dealership’s  
10 investment, another industry practice. He further testified that he has seen goodwill values based on  
11 a range of \$15,000 to \$10,000 per new motorcycle sold per year for smaller dealerships. [RT Vol.  
12 X, 7:11-8:3 (C. Woodward).]

13 In making his goodwill valuation for Protestant’s dealership, Mr. Woodward looked at each  
14 of these “rules of thumb” to determine a “range” of values, keeping in mind that Protestant’s  
15 dealership is larger than the average Harley-Davidson new vehicle dealership. Using the figure of  
16 \$10,000 per new vehicle sold (based on 500 new motorcycles sold), Mr. Woodward arrived at a  
17 goodwill estimate of \$5 million. Using the 20 percent expected return on goodwill, Mr. Woodward  
18 looked at Protestant’s earnings over the course of 10 years, normalized the earnings, and, depending  
19 on which year’s profits he was evaluating, obtained ranges from a low million dollar range to more  
20 than \$7 or \$8 million. After calculating the goodwill value using each of these methods, Mr.  
21 Woodward arrived at a range of \$4 to \$8 million, with a midpoint of \$6 million. [RT Vol. 10, 8:4-  
22 9:17 (C. Woodward); Exh. 150.] Mr. Woodward described this method in detail at the hearing and  
23 showed that he relied on financial records, tax returns and other competent information to support  
24 his conclusion.

25 Moreover, contrary to Respondent’s contentions that “there is no evidence of what precisely  
26 Mr. Woodward calculated the dealership’s normalized pre-tax earnings to be for each of the years he  
27 weighted” and that there is no evidence “of how Mr. Woodward weighted the years” [Resp. Brief,  
28 p. 69-70], Mr. Woodward explained these calculations at the hearing:

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Q. And would you use some of the numbers on this exhibit to go through the 20 percent return approach that you just mentioned?

A. Yes, sir. I would take the second line, earnings pretax, preowners' comp, then I had added back the rent and then I took a deduction for what I felt was a reasonable range for owners' comp and reasonable rent to come out with what I would call normalized pretax earnings. And I got a wide range, depending on whether it's before the recession, as we call it, or -- in the vehicle industry, of before, to look at which years to pick. And I did it both by taking an overall average and then took the nonrecession years to come up with different normalized profits, which might go from close to zero to well in the 1 million, approaching \$2 million range.

[RT Vol. X, 10:1-17 (C. Woodward).]

Respondent urges this Board to discard Mr. Woodward's sound calculations because of lack of foundational evidence. Respondent's inability to fully comprehend Mr. Woodward's calculations is attributable to Respondent's failure to ask questions to flush out this information during the hearing. Moreover, Respondent's argument has essentially already been evaluated and dismissed by the Board on the first day of the hearing, when it ruled on Respondent's motion in limine to exclude Mr. Woodward and found that Mr. Woodward's determination of goodwill was admissible and based upon sufficient foundational knowledge. [RT Vol. I, 80:9-82:20.]

B. Respondent fails to overcome Protestant's showing that termination would be injurious to the public welfare.

Respondent argues that terminating Protestant's dealer contract "will not injure the public because Respondent intends to fill Laidlaw's point with a new dealer of comparable quality promptly after this Protest is overruled." [Resp. Brief, p. 70.] This perspective, however, ignores the many services and programs that make Protestant a unique and irreplaceable asset in the community. For example, as set forth in Protestant's Opening Post-Hearing Brief, Protestant is exclusively involved with multiple contract negotiations with police departments in neighboring communities, including the Los Angeles Police Department and Los Angeles World Airport to sell them Harley-Davidson parts, as well as leasing vehicles to other municipalities including West

1 Covina and City of El Monte. [RT Vol. IX, 85:10-86:1 (Litchfield).] Moreover, for many years,  
2 Protestant has supported its community through local, sponsored charity activities. [RT Vol. VII,  
3 11:15-12:7; 20:4-15; 68:20-69:21; 139:1-15 (B. Laidlaw); Exh. 124.]

4 As to Protestant's unique dealership services to the public, Protestant runs a thriving  
5 insurance practice within its dealership, an active and large HOG chapter, an EagleRider rental  
6 facility, and maintains the Motorcycle Value Program which offers unique privileges exclusively to  
7 Laidlaw's customers. There are currently 6,000 customers in the program and no other dealership in  
8 the western United States offers the program. [RT Vol. VII, 53:9-54:3; 55:1-4; 56:14-57:4; 130:15-  
9 131:25; 132:10-135:8 (B. Laidlaw).] Protestant's high service retention, high rankings, and half-  
10 century of longevity in the San Gabriel Valley demonstrate its dedication to serve the community  
11 and the brand, as well as the multigenerational confidence of the community and Harley-Davidson  
12 customers with the dealer. This is something that clearly cannot be easily or quickly replaced by a  
13 new operator.

14 Losses to the customer base would be significant if Protestant was terminated. Customers  
15 would no longer have the facility and the comforts and the amenities that come with use of the  
16 facility, such as the Motor Value Program, the rental opportunities, the collision repair center, the  
17 eight specially-trained technicians, the HOG chapter operated by the dealership, and the loss of use  
18 of the facility for the charitable events. Additionally, two local police departments would no longer  
19 have a number of their police vehicles because Protestant leases units to them. [RT Vol. VII, 54:19-  
20 56:5 (B. Laidlaw); Exh. 124.]

21 Another unique benefit offered by Protestant is the Priority Maintenance Service Plan which  
22 is a pre-paid, three year maintenance contract that is optional to customers. Over 600 maintenance  
23 plans are in effect. If Protestant was terminated, these plans would have to be refunded to customers  
24 since Protestant is the only dealer that provides these services and the benefit of the maintenance  
25 program to its customers. [RT Vol. VII, 56:11-18 (B. Laidlaw); Exh. 134.]

26 Each of these services and programs, including those discussed at length in Protestant's  
27 Opening Post-Hearing Brief, were implemented and developed at Protestant's establishment and are  
28 unique to its facilities. Many of these community-based services would no longer exist if

1 Protestant's dealership was replaced by a new dealer as these services were dealer implemented and  
2 exclusive to Protestant. Moreover, one aspect that certainly cannot be replaced by a new dealer is  
3 the goodwill and loyalty of customers to the "Laidlaw's Harley-Davidson" name, which has become  
4 a significant fixture in the community. In fact, Respondent's brief states: "In 2010 and the first half  
5 of 2011 respectively, 72% and 74% of Laidlaw's sales were registered to customers outside its own  
6 territory." [Resp. Brief, p. 71, fn.93.] The fact that many of Protestant's customers originate from  
7 outside territories, rather than patronize more local dealerships, is a further testament to Protestant's  
8 ability to provide high customer satisfaction, as well as value to the brand and to the public.

9 Further, Respondent's claim that "Laidlaw's Export and Rental Violations have denied  
10 California consumers 59 motorcycles specially built and allocated for the California market" [Resp.  
11 Brief, p. 71], improperly assumes that each of these 59 motorcycles would have been registered in  
12 California, rather than in another state. Respondent does not, and indeed cannot, provide any  
13 evidence that supports this unsubstantiated assumption or shows that the "loss of sales in California"  
14 of "sales taxes and registration fees" is a certainty. Respondent's claims in this regard are based on  
15 mere speculation. [Resp. Brief, p. 71 fn. 94.]

16 Respondent also contends that "termination of Laidlaw's Dealer Contract serves the public  
17 welfare because the continued consistent enforcement of the NRSP is critical to the safety and  
18 satisfaction of consumers, and to compliance with laws and regulations everywhere..." [Resp.  
19 Brief, p. 71.] First, Respondent conceded at trial that it is not aware of any injury to persons or  
20 property as a result of the violation motorcycles:

21  
22 Q Are you aware of any injury to persons or  
23 property as a result of these motorcycle not being  
24 properly setup?

A I'm not aware of any.

24 [RT Vol. II, 149:14-16 (M. Kennedy).]

25 Second, Respondent's contention neglects the fact that Protestant has, since receiving the  
26 termination notice, developed and implemented a comprehensive program to ensure compliance  
27 with Respondent's NRSP using a highly-qualified, independent third-party, FIS Compliance Coach  
28 ("Compliance Coach"). Compliance Coach was retained by Protestant in May 2011, the month

1 after Protestant received the termination notice, to provide consulting review and training on  
2 statutory regulations. John Gisiger of Compliance Coach and Richard Litchfield, Protestant's  
3 General Manager, developed the compliance training programs for the employees in Protestant's  
4 sales department. Compliance Coach conducts monthly PowerPoint training sessions and monthly  
5 audits of up to sixty (60) of Protestant's sales files for the previous month to ensure that all forms in  
6 every sales jacket are completed thoroughly and accurately in accordance with Respondent's  
7 policies and procedures. Compliance Coach reviews with Protestant's sales staff the policies and  
8 procedures for preparing deal jackets and documentation with respect to Respondent's NRSP to  
9 ensure proper completion of the SWR and post-delivery inspection ("PDI") forms. PDI forms are  
10 used to verify that the vehicle has gone through an inspection, that the owner of the vehicle  
11 understands how it operates and that it is a safe vehicle to drive. Compliance Coach also performs  
12 on-site review of compliance policies and provides written risk assessment reports containing  
13 findings and recommendations for ongoing program enhancements. [RT Vol. IX, 18:24-20:18;  
14 21:6-31:2 (Litchfield); RT Vol. IX, 143:23; 147:8-10; 148:22-153:7; 156:4-157:4 (Gisiger); RT Vol.  
15 X, 12:1-8 (Gisiger); Exhs. 9; 36; 608; 610; 612; 614-616.] Additionally, training was provided for  
16 Protestant's service technicians which focused on accurate and proper completion of the PDI forms.  
17 [RT Vol. X 5:7-12:19; 14:6-16:3 (Gisiger); Exhs. 9; 603-608; 612.] Therefore, in light of the  
18 implementation of this comprehensive compliance program, Respondent's concerns about the  
19 "continued consistent enforcement of the NRSP" have been thoroughly addressed.

20  
21 C. Respondent does not dispute that Protestant has adequate motor vehicle sales and service  
22 facilities, equipment, vehicle parts and qualified personnel to reasonably provide for the  
23 needs of the consumers and has been and is rendering adequate services to the public.

24 Respondent's brief states: "Harley-Davidson has not offered evidence that  
25 Laidlaw's lacks adequate sales and service facilities, equipment, parts and qualified personnel, or  
26 that it has been rendering inadequate services to the public." [Resp. Brief, p.72.] Accordingly, this  
27 good cause factor remains undisputed by the parties.

28 D. Respondent fails to overcome Protestant's showing that it has substantially fulfilled  
Respondent's warranty obligations.

Protestant has substantially fulfilled Respondent's warranty obligations and any alleged non-

1 compliance is insufficiently material to warrant termination. Respondent claims that “Laidlaw’s has  
2 failed to fulfill its warranty obligations to Harley-Davidson by submitting false and inaccurate SWR  
3 [“Sales and Warranty Registration”] information.” [Resp. Brief, pp. 56-57; 73.] Significantly,  
4 however, as mentioned above, these violation units comprise a negligible fraction of Protestant’s  
5 new motorcycles sold during the same period, namely only 1.38% of total gross profit earned. [RT  
6 Vol. XI, 35:25-36:15 (Stockton); Exh. 634, Tabs 11 and 12.] Again, Respondent overstates and  
7 aggrandizes the percentage of vehicles that were actually violation units, attempting to deflect from  
8 the fact that the balance of the Vehicle Code Section 3061 factors are in Protestant’s favor.

9  
10 Furthermore, Respondent’s central concern respecting the SWR forms, which are used to  
11 provide recall information to the customer’s last known address, is that the ultimate customer may  
12 not receive safety recall campaign information. However, this concern is alleviated through an  
13 alternative method without reliance on the SWR form. Specifically, the safety recall campaigns that  
14 appear on the list of Protestant’s audit report (campaigns 0141, 0144 and 0145) were all reported to  
15 the National Highway Traffic Safety Administration (“NHTSA”). [Exh. 200.] Therefore, even if  
16 the ultimate customer did not receive notice of the recall campaign through the customer registration  
17 information that Protestant submitted to Respondent via the SWR form, information regarding the  
18 recall campaigns was equally available to members of the public on the NHTSA website. Those  
19 recall campaigns are also reported to foreign governments in every country where Harley-Davidson  
20 markets its products. [RT Vol. V, 147:20-148:11 (McGowan).] Moreover, Respondent is not aware  
21 of any complaints as to Protestant’s ability to provide proper warranty services and vehicle repairs:

22 Q And I know that Mr. Ebe raised in his opening  
23 statements issues regarding the crossover or overlap  
24 between warranty obligations and what the audit results  
25 found in terms of filling out paperwork properly.  
26 In terms of servicing customers coming in for  
27 warranty work and having their vehicle repaired, have  
28 you ever heard of any complaints about Laidlaw in that  
regard?

A I have not.

[RT Vol. II, 134:18-135:1 (Kennedy).]

Further, Respondent is also not aware of any warranty claim or reimbursement that

1 Respondent has had to make as a result of Protestant's sale of violation units. [RT Vol. II, 148:13-  
2 149:25 (Kennedy).] Accordingly, Protestant has substantially fulfilled Respondent's warranty  
3 obligations and any alleged non-compliance is insufficiently material to warrant termination.  
4

5 **V. CONCLUSION**

6 Based on the foregoing, Protestant respectfully requests that the Board find that Respondent  
7 has failed to establish that good cause exists to terminate Protestant's franchise and that Protestant's  
8 protest be sustained unconditionally, or upon those conditions identified in Protestant's Opening  
9 Post-Hearing Brief.<sup>4</sup>

10  
11 DATE: April 9, 2012

MANNING, LEAVER, BRUDER & BERBERICH

12  
13  
14 BY 

Halbert B. Rasmussen, Attorneys for Protestant  
Laidlaw's Harley-Davidson Sales, Inc. dba  
Laidlaw's Harley-Davidson

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24 <sup>4</sup> In its Opening Brief, Protestant requested that if the Board is not inclined to sustain  
25 the protest, the protest should be overruled conditionally, with the condition being that  
26 Protestant should be provided time to sell the dealership business to a qualified third party buyer.  
27 Any argument by Respondent that Protestant has had adequate time to sell or that  
28 Protestant would be prejudiced by any delay in selling is unavailing. To propound such  
an argument means that Protestant must decide to forgo its right to protest or  
knowledge of the outcome of this protest in order to reserve its right to sell its  
dealership to a qualified buyer. Any anticipated argument that Respondent would be  
prejudiced is meritless in that Protestant has operated during the pendency of this  
protest for months without issue and has implemented the Compliance Coach program  
in an effort to ensure compliance with Respondent's policies and prevent future  
violations.

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**Proof of Service**

I, the undersigned, declare and say as follows:

I am 18 years of age or older, employed at the business noted above my signature which is in the county where any mailing herein stated occurred, and not a party to the within action.

On April 9, 2012, I caused to be served the document(s) listed below my signature under the heading "Document(s) Served" by placing a copy of the document(s) (or the original, if so noted below) in individual envelopes for each of the parties listed below my signature under the heading "Parties Served" (except for fax-only service), addressed to them at their last known addresses in this action exactly as shown (excepting parenthetical references to their capacity), there being U.S. Mail delivery service to those addresses used for service by mail, and by sealing said envelopes, and on the same day, as marked with "X," by --

placing each envelope for collection and processing for mailing following my firm's ordinary business practice with which I am readily familiar and under which on the same day correspondence is so placed for mailing it is deposited in the ordinary course of business with the U.S. Postal Service at my business address, 1st-class postage fully prepaid.

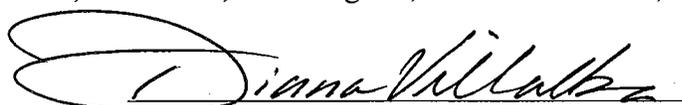
depositing each envelope into the U.S. mail with 1st-class postage fully prepaid at a mail box or collection facility in the city and state of my business address. "Parties Served" lists all parties and counsel served in the within matter, and their respective capacities. [required for federal cases, including bankruptcy, among others]

electronically sending  by email or  by fax each page of each document and this proof of service to the parties served at their last known email address or fax numbers as listed below from a email or fax system located at my business address which reported no errors and which, if by fax, produced a transmission confirmation report, a true copy of which is attached hereto. [use only if electronic service authorized or as a supplement.]

depositing each envelope at a drop box or other facility in the city and state of my business address within the time and pursuant to procedures readily familiar to me necessary for delivery  by Federal Express on the morning of the next business day or  by courier on the same day. [use only if overnight or courier service authorized or as a supplement.]

personal delivery by  travelling to the address shown on the envelope and delivering it there during normal business hours or  handing the documents to the person served.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct and that this declaration was executed on April 9, 2012 at my business address, 5750 Wilshire Blvd., Suite 655, Los Angeles, California 90036, in the County of Los Angeles.

  
Diana Villalba

**Document(s) Served (exact title)**

**PROTESTANT LAIDLAW'S HARLEY-DAVIDSON SALES, INC. DBA LAIDLAW'S HARLEY-DAVIDSON'S POST-HEARING REPLY BRIEF**

**Parties Served (exact envelope address)**

New Motor Vehicle Board  
**Email: nmvb@nmvb.ca.gov**  
1507 21st Street, Suite 330  
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(Send **ORIGINAL** Via US Mail)

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