

1 Halbert B. Rasmussen, Esq., SBN 108566
2 Franjo M. Dolenac, Esq., SBN 259036
3 Crystal S. Yagoobian, Esq., SBN 261088
4 MANNING, LEAVER, BRUDER & BERBERICH
5 Attorneys at Law
6 5750 Wilshire Boulevard Suite 655
7 Los Angeles, California 90036
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Attorneys for Protestant Riverside Motorcycle, Inc.
dba Skip Fordyce Harley-Davidson

NEW MOTOR VEHICLE BOARD
STATE OF CALIFORNIA

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

Protestant,

vs.

HARLEY-DAVIDSON MOTOR COMPANY,
a Corporation,

Respondent.

PROTEST NO. PR-2310-11

**PROTESTANT RIVERSIDE
MOTORCYCLE, INC. DBA SKIP
FORDYCE HARLEY-DAVIDSON'S POST-
HEARING BRIEF**

Protestant Riverside Motorcycle, Inc. dba Skip Fordyce Harley-Davidson ("Protestant")
hereby submits its post-hearing brief in the above-entitled matter. References to the administrative
record are abbreviated.¹

¹ RT refers to Reporter's Transcript.

TABLE OF CONTENTS

1

2 I. FACTUAL AND PROCEDURAL BACKGROUND 1

3 A. Skip Fordyce Harley-Davidson’s Historical Background and Ownership Structure 1

4 B. Lester Veik’s Tenure at Skip Fordyce Harley-Davidson 3

5 C. Respondent’s Non-Retail Sales Policies and Protestant’s Violations 3

6 D. Protestant’s Remedial Measures 5

7 E. Audit, Termination and Legal Proceedings 7

8 II. STATUTORY STANDARD..... 8

9 III. PROTESTANT TRANSACTS A MORE THAN ADEQUATE AMOUNT OF BUSINESS

10 COMPARED TO THE BUSINESS AVAILABLE TO IT. 9

11 IV. PROTESTANT’S INVESTMENTS NECESSARILY MADE AND OBLIGATIONS

12 INCURRED ARE SUBSTANTIAL..... 12

13 V. PROTESTANT’S PERMANENCY OF INVESTMENT IN THE DEALERSHIP IS

14 SUBSTANTIAL 15

15 VI. TERMINATION WOULD BE INJURIOUS TO THE PUBLIC WELFARE..... 18

16 VII. PROTESTANT HAS ADEQUATE MOTOR VEHICLE SALES AND SERVICES

17 FACILITIES, EQUIPMENT, VEHICLE PARTS AND QUALIFIED SERVICE

18 PERSONNEL TO REASONABLY PROVIDE FOR THE NEEDS OF CUSTOMERS

19 AND IT HAS BEEN RENDERING MORE THAN ADEQUATE SERVICES TO THE

20 PUBLIC 22

21 VIII. PROTESTANT HAS FULFILLED RESPONDENT’S WARRANTY OBLIGATIONS 24

22 IX. PROTESTANT HAS SUBSTANTIALLY COMPLIED WITH THE TERMS OF THE

23 FRANCHISE 25

24 A. The Dealer Contract and the NRSP 25

25 B. Respondent Does Not Consistently Monitor the NRSP 26

26 C. The Dealer Principal’s Lack of Knowledge of the Violations Should Presumptively

27 Favor Protestant Respecting this Factor. 29

28 D. The Less than One Percent of Gross Profit Generated by the Violation Units is

Insubstantial Compared to the Amount of Business Protestant Transacts Under its

Dealer Contract 30

E. Respondent Provides No Evidence of Any Material Harm or Damage Resulting from

the Violations 30

F. Any Practice of Violating the Policy was Discontinued and any Resulting Contract

Breach was Cured Prior to the Audit as Reflected by The Last Violation Occurring

in Summer 2010 32

G. Protestant has Implemented Extensive Policies and Procedures to Ensure Compliance

With the NRSP 33

H. Under the Facts of the Case, Any Violation of the Policy and/or Dealer Agreement

Resulting from Policy Violations Was Not of a Sufficient Extent to Establish Good

Cause, As Reflected By an Analysis of the Materiality of the Alleged Contractual

Breach 34

X. THE BOARD SHOULD SUSTAIN THE PROTEST 37

A. The Board Should Sustain the Protest Unconditionally 37

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

B. If the Board is not Inclined to Sustain the Protest Unconditionally, it Should Sustain the Protest Conditionally 39

C. If the Board is Not Inclined to Sustain the Protest, Then it Should be Overruled Only Conditionally 40

XI. CONCLUSION.....41

TABLE OF AUTHORITIES

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

Cases

American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal.App.3d 464 39
New Motor Vehicle Board v. Orrin W. Fox Co. (1978) 439 U.S. 96 34
Yamaha Motor Corp. v. Superior Court (1986) 185 Cal.App.3d 1232 12

Statutes

Vehicle Code § 655..... 3
Vehicle Code § 3060..... 8, 38
Vehicle Code § 3061..... 8, 34, 40
Vehicle Code § 3066..... 8
Vehicle Code § 3067..... 37, 39, 40

Other Authorities

Restatement of Contracts, 2d (§ 241) 35, 39

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 A. Skip Fordyce Harley-Davidson’s Historical Background and Ownership Structure

3 Protestant has a long, well-established history as a Harley-Davidson dealership that reflects a
4 long-standing commitment to the Harley-Davidson brand. The dealership was founded in 1941 by a
5 legend in the post-World War II motorcycle history – Skip Fordyce. Mr. Fordyce settled the
6 dealership in downtown Riverside, California and built the dealership into a local institution, with a
7 highly recognizable logo. [RT Vol. V, 106:8-10 (J. Dabney).] The dealership sold many brands
8 over the years, but by the 1970s, only Harley-Davidson and Honda remained. [RT Vol. V, 109: 23-
9 110:1 (J. Dabney).]

10 In February 1974, under the direction of Judson “Jud” Dabney, Protestant, Riverside
11 Motorcycle, Inc. bought out the Skip Fordyce dealership and relocated to a larger facility in
12 Riverside to continue to serve the community. [RT Vol. V. 110:14-24 (J. Dabney).] The new
13 facility was approximately 14,000 square feet, which was substantially large for that time. [RT Vol.
14 V, 110:25-111:9 (J. Dabney).] In September 1991, however, Jud was diagnosed with Parkinson’s
15 disease and a very aggressive form of brain cancer. He died in July 1992. [RT Vol. V, 105:13-20
16 (J. Dabney).] Soon after his father’s death, Jud’s son, Judson (“Jay”) Dabney, II, took over the
17 business as general manager and each of Jud’s children, Ty, Marshall and Susan, assumed
18 operational duties, including Jay, who assumed dealer principal and interim general manager, a
19 position which was subsequently assumed by Jay’s brother, Ty. [RT Vol. V, 118:7-120:11.] In
20 1993, as part of their decision to make Harley-Davidson the premier brand to sell at the dealership,
21 Protestant invested \$250,000 in remodeling the store to convert its retail space into a “designer
22 store” through a program that Harley-Davidson offered with a design firm. The newly remodeled
23 store won many awards for excellence in design and was very successful. [RT Vol. V, 121:7-24 (J.
24 Dabney).] In or around 1997, Jay focused solely on his role as dealer principal, and his brother Ty
25 was appointed interim general manager. Jay’s brother Marshall served as sales manager for the
26 dealership. [RT Vol. V, 105:21-25 (J. Dabney).] Jay’s sister Susan managed the general
27 merchandise department. [RT Vol. V, 119:24-120:11 (J. Dabney).]

28

1 In 2005, Harley-Davidson awarded Protestant a Buell motorcycle franchise as part of
2 Harley-Davidson's Buell pilot program, until the Buell subsidiary was dissolved by Harley-
3 Davidson in late 2008. Harley-Davidson motorcycles are cruisers and touring motorcycles whereas
4 Buell motorcycles are more street performance oriented motorcycles. [RT Vol. V, 126:24-127:1 (J.
5 Dabney); Vol. I, 62:21-63:9 (Kennedy); Exh. 41.]

6 In 2000, the Dabney family changed the dealership's corporate and organizational structure.
7 The dealer contract was amended so that Jay, Ty, Marshall and Susan became members of the
8 dealership's Board of Directors, and each assumed a 12.5% ownership interest in the dealership,
9 with the remaining 50% being owned by the trust of Jay Dabney's mother, Ida Dabney. The trust is
10 a 50% shareholder of Riverside Motorcycle, Inc. and Ida's children are the beneficiaries of that
11 trust. Jay Dabney is the trustee of the trust. [RT Vol. VI, 77:25-79:6; 82:7-24 (J. Dabney); Vol.
12 VII, 40:25-43:3 (M. Dabney); Exh. 34.] Notwithstanding these changes, Protestant's business is,
13 and has always been, family owned. [Exh. 501.] That same year, the Dabney family decided as a
14 business decision to have only Jay, as dealer principal, oversee the day-to-day operations of the
15 business with the appointment of a non-family member, Lester Veik, as the dealership's general
16 manager.

17 In 2000, Protestant sold the Honda franchise to raise revenue to build a new superstore
18 devoted exclusively to Harley-Davidson and Buell products. In August 2002, Protestant opened a
19 new, state-of-the-art 35,000 square-foot store located on two-acres of land owned by the Dabney
20 family down the street from its previous, 14,000 square foot location. [RT Vol. V, 121:25-122:11
21 (J. Dabney).]

22 Jay has been actively involved in both the Harley-Davidson company and the motorcycle
23 industry generally. Jay served on the Harley-Davidson Dealer Advisory Council from 2005 to
24 2007. [RT Vol. V, 142:24-143:3 (J. Dabney).] Jay is a member of the Southern California Harley-
25 Davidson Dealers Association and was vice president of the organization from 1995 to 1996. He is
26 also a member of the California Motorcycle Dealers Association. [RT Vol. V, 146:17-23 (J.
27 Dabney).]

28

1 B. Lester Veik’s Tenure at Skip Fordyce Harley-Davidson

2 Lester Veik has been a childhood family friend of the Dabney family for over 40 years and
3 was appointed as general manager of Skip Fordyce by the Dabney family. Prior to his appointment
4 as a general manager, in 1996, Mr. Veik began working part-time in retail sales to assist the Dabney
5 family. [RT Vol. VII, 183:24-184:15; 186:21-187:12 (Veik).] In 1998, the Dabney family asked
6 Mr. Veik to manage the dealership’s service department. [RT Vol. VII, 185:17-186:3 (Veik).]
7 Impressed with his performance, the family asked Mr. Veik to become general manager of the
8 dealership in 2000. [RT Vol. VII, 187:8-12 (Veik).] Mr. Veik managed the dealership from 2000 to
9 February 2011. [RT Vol. VIII, 123:17-25 (Espinoza).]

10 C. Respondent’s Non-Retail Sales Policies and Protestant’s Violations

11 Protestant’s Dealer Contract incorporates the General Conditions of Sales and Service
12 agreement and the General Conditions of Sales and Service agreement incorporates the Non-Retail
13 Sales Policy. [Exhs. 34-35.] The General Conditions of Sales and Service includes a “Non-Retail
14 Sales” provision which states that “Dealer shall not sell Harley-Davidson Products for resale to non-
15 retail customers, except to other United States authorized dealers in accordance with Seller’s written
16 policies.” [Exh. 35, pg. 2.] In contrast to the “Non-Retail Sales” provision found within the Dealer
17 Agreement, the Non-Retail Sales Policy (“NRSP”) is a separate, very detailed set of rules issued by
18 Respondent prohibiting the sale of new or previously unregistered motorcycles to a customer who
19 intends to resell the vehicle or who intends to ship the motorcycle outside the United States. The
20 NRSP does not prohibit the export of, or otherwise apply to, used motorcycles. [Exhs. 47-52.]
21 Vehicle Code Section 655 defines a used motorcycle as a vehicle that has been: (1) sold or
22 registered with the DMV; (2) sold and operated on the highways of any other state or country; (3)
23 registered with the DMV of any other state or country; or (4) has been operated as an unregistered
24 demonstrator vehicle in the sales work of a dealer or used by a manufacturer in his or her sales or
25 distribution work.

26 In order to boost sales during an extreme downturn in the economic cycle, maintain his job
27 and to continue his rise within the Harley-Davidson dealer network, Mr. Veik began to condone the
28 occasional sales of new Harley-Davidson vehicles for export in violation of the NRSP. [RT Vol.

1 VI, 17:17-19:24; 32:6-19 (J. Dabney); Vol. VIII, 12:24-13:4 (Veik).] Specifically, he began
2 directing various sales employees who had no or limited knowledge of Respondent's NRSP to
3 complete motorcycle sales he knew were non-retail sales under the policy. Mr. Veik, for example,
4 directed the F&I Manager, Jason Wilmoth, to leave Safety and Warranty Registration ("SWR")
5 forms blank so that Mr. Veik could obtain names and addresses from dealership employees. [RT
6 Vol. VII, 202:25-204:12 (Veik).] Mr. Veik obtained random names and addresses from various
7 dealership employees, including information from those in the business office who had no
8 knowledge of the sales process. [RT Vol. VII, 205:23-208:4 (Veik); Vol. VII, 11:9-21 (Veik).] Mr.
9 Veik would then have those names transferred to the SWR forms to conceal the fact that
10 motorcycles were sold to individuals who intended to export the vehicles, or he would change the
11 customers' names in internal sales logs to conceal the transactions. [RT Vol. VII, 205:23-208:4
12 (Veik); Vol. III, 4-9 (Veik).] Additionally, Mr. Veik directed Ms. Palmer to input certain names and
13 addresses to be electronically submitted to Respondent as the purchasers of motorcycles, which
14 names Mr. Veik used to conceal his activities in violation of the NRSP. [RT Vol. VII, 95:2-27
15 (Palmer).] Mr. Veik created illusory internal policies to shift blame to lower level dealership
16 employees if violations were ever discovered. [RT Vol. 86:8-87:13 (Veik); Exh. 305 (pgs. 71-72;
17 excerpt from deposition of Darin Goodrich).] Mr. Veik actively concealed the violations from
18 Harley-Davidson, Jay Dabney (the dealer principal), and the Dabney family (sole owners of the
19 Protestant). Jay's business philosophy is, and always has been, to fully comply with all of
20 Respondent's policies. [RT Vol. VII 190:3-190:21; 213:8-22 (Veik).] If Jay discovered the
21 violations, Mr. Veik knew that he would be terminated. [RT Vol. VII 213:24-214:8 (Veik).]

22 To further assist in masking his indiscretions, Mr. Veik created a work environment whereby
23 any concerns by dealership employees were to be addressed exclusively and handled by Veik
24 personally, thus creating a barrier between the lower level employees and Jay Dabney [Vol. VI,
25 35:15-40:1 (J. Dabney).] Mr. Veik instructed others to transmit false information to Respondent, so
26 that Respondent would not discover violations and in turn inform Jay. [Vol. VII 190:3-190:21;
27 213:8-22 (Veik).] Thus, Jay was being deliberately shielded and isolated from knowing the truth
28 about the NRSP violations by this environment, as well as by Mr. Veik's alteration of certain

1 internal dealership documents to reflect false information so that Jay would not discover the
2 violations. [RT Vol. VII, 202:25-204:12; 205:23-208:4 (Veik); Vol. VIII, 4-9 (Veik).] Mr. Veik
3 does not dispute that he performed these prohibited actions without Jay's knowledge and by
4 intimidating employees to comply, or face possible termination. In fact, he documented his
5 indiscretions in numerous writings, and acknowledged that Jay had no knowledge of the violation
6 units. [Exhs. 46, 64, 69-70.] Whether as a matter of conscious or fear of being eventually detected,
7 Mr. Veik stopped his scheme in June 2010, well before the April 2011 audit. [RT Vol. VIII, 15:20-
8 16:7 (Veik); Exh. 114.]

9 D. Protestant's Remedial Measures

10 Mr. Veik left the dealership in February 2011 to assume a general manager position at an
11 authorized Harley-Davidson dealership in Monterey County in which he had a 25% stake. [Vol.
12 VIII, 82:13-83:7 (Veik); Vol. V, 6:3-7:9).] At that time, Glen Espinoza was promoted to general
13 manager at Skip Fordyce. [RT Vol. VIII, 116:9-11 (Espinoza); RT Vol. VI, 10:10-12 (J. Dabney)]
14 Jay discovered that Mr. Veik's management style created an unfavorable and disjointed work
15 environment that was not in line with Jay's vision of the dealership [RT Vol. VI, 7:10-10:9; 35:15-
16 40:1 (J. Dabney); Vol. VIII, 132:8-23 (Espinoza).] Since then, the management and employee
17 structure was reorganized so that Jay has contact with not only the general manager, but also several
18 lower level managers so that he is no longer isolated from day-to-day operations, but instead is
19 involved in monitoring and managing those operations. [RT Vol. VI, 53:23-54:5; 55:22-56:15 (J.
20 Dabney); Exh. 502 (new organizational structure of dealership implemented in March 2011, prior to
21 Respondent's audit); Vol. VIII, 132:24-134:15 (Espinoza).] Mr. Espinoza implemented new
22 internal policies, including policies designed to ensure compliance with the NRSP in March 2011,
23 before the audit even occurred in April 2011. [Vol. VIII, 132:24-134:15 (Espinoza).] In fact,
24 Protestant's District Manager, Jim Sorensen, and Harley-Davidson's lead of its Performance
25 Consulting Group, Ryan Farage, were asked to come to the dealership to spend time with Mr.
26 Espinoza, and Michael Slagle, the assistant sales manager at the time, to train them on the priorities
27 and essential functions of their positions. [RT Vol. VI, 10:21-11:21 (J. Dabney).]
28

1 As part of these internal policies to ensure compliance with the NRSP, Protestant developed
2 a new sales process incorporating each level of management, which was implemented with the help
3 of an experienced outside consultant. [RT Vol. VI, 40:2-47-14 (J. Dabney); Exhs. 74-75.] Each of
4 the employees who provided a name that was improperly used on the SWR reports under Veik's
5 leadership, were coached and trained on the SWR reports and NRSP, as well as the new policies
6 implemented by Protestant to ensure compliance with the NRSP. [RT Vol. VI, 53:12-22 (J.
7 Dabney).]

8 Protestant also developed an audit process that takes place after all the documentation is put
9 together for each transaction. The audit process includes an electronic sign-off indicating that the
10 deal jacket has been reviewed. [RT Vol. VI, 44:4-45:25 (J. Dabney).] Each deal jacket includes a
11 deal jacket checklist that breaks down all documents that needs to be included in the jacket,
12 including the purchase agreement, the completed SWR form, and a purchase receipt. No vehicle is
13 registered via the SWR form until the SWR form is accurately completed and printed and included
14 within the deal jacket. Protestant now also creates a sales log that lists every unit sold and when a
15 vehicle is registered via the SWR process, Protestant ensures that the vehicle is on that sales log list.
16 [RT Vol. VII, 96:24-98:2 (Palmer).] Megan Palmer, Protestant's general ledger accountant, testified
17 that she now has far more interaction with Jay Dabney since these policies and procedures were
18 implemented. [RT Vol. 105:20-106:4 (Palmer).]

19 Protestant also analyzes dealer profitability reports to ensure that the dealership is in
20 compliance with the NRSP. Specifically, Protestant looks for recurring customer names in the
21 reports every month for all finalized deals for that month. Protestant also runs a monthly variable
22 report to retroactively determine whether sales tax has been paid for each particular deal. Since
23 implementing this monitoring process after receipt of the Notice of Termination, there have been no
24 instances where the dealership has violated the non-retail sales policy. [RT Vol. VII, 65:3-68:9 (M.
25 Dabney); Exh. 73.] Respondent has never given or provided Protestant with any information as to
26 how to monitor for violations of the non-retail sales policy. [RT Vol. VII, 71:20-72:14 (M.
27 Dabney).] Since Mr. Veik's departure and Mr. Espinoza's transition as general manager, there is
28 greater communication between the upper and lower level employees, as well as between

1 departments. The dealership practices an open door policy. The paperwork process has become
2 more efficient and Jay Dabney has an increased presence at the dealership, including at weekly
3 manager meetings. The employees are encouraged to consult with Jay if they have any issues,
4 questions or concerns. [RT Vol. VIII18-153:13 (Wilmoth).]

5 E. Audit, Termination and Legal Proceedings

6 On or about April 18, 2011, Protestant received a letter from Steve Verduyn, Manager of
7 Dealer Credit and Compliance for Harley-Davidson, which stated that a representative from Harley-
8 Davidson will arrive at the dealership on April 20, 2011 to “review, copy, and/or obtain the new
9 vehicle sales records of the dealership for the 2009-2011 model years.” [Exhs.62, 71.] Protestant
10 fully cooperated with Mr. Verduyn during the course of the on-site audit. [Vol. VI, 13:1-10 (J.
11 Dabney); Exh. 564 (pgs. 27, 32; excerpts from Brian Martin deposition).] Once the audit results
12 were provided to Protestant, the dealership increased its monitoring and enforcement efforts. [RT
13 Vol. VIII, 154:8-15 (Espinoza).]

14 On June 23, 2011, based on the results of the audit, Protestant received the Notice of
15 Termination of its franchise agreement from Respondent. The Notice identifies 25 violations of the
16 Non-Retail Sales Policy since July 2009.² [Exh. 63.] Mr. Verduyn had obtained this list of vehicles
17 shipped overseas using database information from the National Insurance Crime Bureau. [RT Vol.
18 I, 159:7-25 (Kennedy); Vol. II, 2-18 (Kennedy).]

19 In the Notice of Termination, Respondent charged back \$28,285.75 of VIP money from
20 Protestant in relation to violations in the Notice which have been paid back in full by the
21 dealership.³ [RT Vol. I, 173:13-18 (Kennedy); Vol. VI, 61:4-5 (J. Dabney); Exh. 63.] Protestant
22 did not challenge the chargebacks. [RT Vol. VI, 30:20-23 (J. Dabney).] Respondent maintains a
23 so-called incentive program called VIP. This program was formerly known as a holdback, but the
24 terminology changed years ago to VIP. Like a holdback, VIP is earned at the time a dealer

25
26 ² The audit also revealed six (6) Buell motorcycles. However, those sales were not the basis for
27 Respondent’s notice of termination. [See Exh. 63, pgs. 2-3 (“our audit revealed approximately twenty-five
(25) violations of our non-retail policy.”)]

28 ³ Protestant was charged back \$5,285.75 for the Harley-Davidson sales and \$23,000 for the Buell motorcycle
sales. [Exh 63.]

1 purchases a motorcycle. The dealer gets paid whether or not the motorcycle is sold. The VIP
2 program terms do, however, state that “non-retail sales” (with the only defining document for that
3 term being other Harley-Davidson policies) are not eligible for the incentive. [RT Vol. I, 121:8-14;
4 136:2 (Kennedy);see, e.g., Exh. 52.]

5 On July 22, 2011, in response to the Notice of Termination, Protestant timely filed the
6 within protest with the New Motor Vehicle Board challenging Respondent’s termination notice and
7 threat to terminate Protestant’s franchise agreement until such time that the Board held a hearing
8 and made a determination as to whether good cause existed for termination.

9 A hearing was held from March 5 to March 19, 2012 before J. Victor Ryerson,
10 Administrative Law Judge for the Board, in Sacramento, California. Respondent was represented
11 by Robert Ebe and Scott McLeod of Cooper White & Cooper, 201 California Street, 17th Floor, San
12 Francisco, California. Protestant was represented by Halbert Rasmussen and Franjo Dolenac of
13 Manning, Leaver, Bruder & Berberich, 5750 Wilshire Blvd., Suite 655, Los Angeles, California.
14 [RT Vols. I-X.] The evidence at the hearing showed that Respondent failed to show sufficient
15 evidence that good cause in fact exists to terminate Protestant’s franchise.

16

17 **II. STATUTORY STANDARD**

18 In accordance with Vehicle Code Section 3060, when a seasonable protest has been filed
19 in response to a notice of intent to terminate a franchise, as is present in the within Protest, the
20 Board must hold a hearing to determine if “good cause” exists for termination. [section 3060.]

21 Vehicle Code Section 3066 places the burden of proof on the Respondent-franchisor to
22 establish that there is good cause to terminate the franchise. [section 3066.]

23 Pursuant to Vehicle Code Section 3061, Protestant contends that good cause does not
24 exist to terminate Protestant’s franchise for the following reasons, among others:

25 (a) The amount of business transacted by the Protestant is substantial, as compared to the
26 business available to it [section 3061(a)];

27 ///

28 ///

- 1 (b) The investments necessarily made and obligations incurred by the Protestant to perform
2 its part of the franchise have been substantial and termination will result in a significant
3 loss to Protestant as to these investments [section 3061(b)];
- 4 (c) The investment in Protestant's Harley-Davidson business is substantial, has significant
5 permanency and will be significantly adversely affected by termination [section
6 3061(c)];
- 7 (d) Protestant's permanent investment will be significantly adversely affected by the
8 termination of its franchise [section 3061(c)];
- 9 (e) Termination of Protestant's franchise will be injurious to the public welfare [section
10 3061(d)];
- 11 (f) The current franchisees are providing more than adequate motor vehicle sales and service
12 facilities, equipment, vehicle parts and qualified service personnel to reasonably provide
13 for the needs of the consumers for the motor vehicles handled by the Protestant and has
14 been and is rendering adequate services to the public [section 3061(e)];
- 15 (g) The Protestant has fulfilled the warranty obligations of the Respondent [section 3061(f)];
- 16 (h) The extent of Protestant's failure to comply with the terms of the franchise agreement is
17 insufficiently material to warrant termination [section 3061(g).]

18
19 **III. PROTESTANT TRANSACTS A MORE THAN ADEQUATE AMOUNT OF
BUSINESS COMPARED TO THE BUSINESS AVAILABLE TO IT**

20 Respondent has failed to meet its burden to show that Protestant has not transacted an
21 adequate amount of business compared to the business available to it. As an initial matter,
22 Respondent does not dispute that Protestant is properly performing in terms of its sales volume or
23 that there are any concerns with Protestant's sales performance, other than the allegations arising
24 from this Protest. [RT Vol. I, 210:17-211:1 (Kennedy).] Jim Sorensen, Protestant's District
25 Manager, testified that he has never voiced any complaints over the three years (2011-2008) with
26 respect to Protestant's sales or performance within its dealer assigned territory. [RT Vol. III,
27 199:21-23 (Sorensen); Exh. 565 (pgs. 27-30; excerpts of Sorensen deposition).] Indeed, at no point
28

1 in the last two years has Respondent contacted Protestant regarding any deficiencies in performance.
2 [RT Vol. IV, 92:16-93:2 (Stewart).]

3 The amount of business transacted by the Protestant relative to the business available to
4 the dealership is comparatively high. According to Respondent's sales ranking report, as of January
5 3, 2012, Protestant ranks 107 out of the entire Harley-Davidson national dealer network of 678
6 nationwide dealerships, in its sale of pleasure vehicles, which are vehicles sold to the end user.
7 Protestant is ranked number two in its district relative to pleasure vehicles. [RT Vol. IV, 62:1-12
8 (Stewart); Exh. 278.] According to Protestant's January 2012 Dealer Retail Excellence Report,
9 Protestant is ranked 86th out of 678 nationwide Harley-Davidson dealership in new vehicle unit
10 retail sales and 68th out of 681 dealerships in new vehicle net sales. [RT Vol. IV, 65:13-22
11 (Stewart); Exh. 550.]

12 In fact, Protestant's recent dealership sales were above the average sales and registrations in
13 the nation and in Protestant's dealer assigned territory. In 2010, the national average number of
14 vehicle registrations by dealerships was 353. Protestant's average number was 391. Protestant had
15 a 93.8% effectiveness/penetration within its dealer assigned territory and a 110.8%
16 effectiveness/penetration nationally. For the rolling 12-month period as of August 2011, Protestant
17 had an 81.4% effectiveness/penetration within the dealer assigned territory and 105%
18 effectiveness/penetration rate nationally. The inland empire, where Protestant's dealership is
19 located, was hit particularly hard by the housing market crash. Therefore, it is particularly
20 significant that Protestant has been able to perform better in 2010 and 2011 than the nationwide and
21 local averages for vehicle sales and registration. [RT Vol. IX, 175:3-176:20 (Stockton); Exh. 571,
22 Tab 6.]

23 Protestant has received numerous recognitions from Respondent for meeting and exceeding
24 performance expectations. Respondent's Bar and Shield Award Program is an awards program for
25 dealers based on excellence in retail sales performance, representation of the brand and customer
26 experience in the current year in a given region. A dealer that falls into the top four in the region
27 receives a Gold award; a dealer that falls in the next eight rankings receives a Silver award; and a
28 dealer that falls in the next twelve rankings receives a bronze award. Only 25 stores across the

1 country receive a Gold Bar and Shield Award. Dealers are then provided a plaque of recognition
 2 and are taken on dealer incentive trips to a location pre-determined by Respondent. [RT Vol. III,
 3 189:17-190:2; 197:1-14 (Sorensen).] Protestant received Bar and Shield Awards for performance
 4 excellence in 2009, 2010 and 2011. [RT Vol. III, 19:3-11 (Sorensen).] In 2006 to 2007, Protestant
 5 sold 1,400 new and used motorcycles and had an estimated \$32 million in revenue. [RT Vol. V,
 6 171:8-10 (J. Dabney).]

7 Protestant's rankings were similarly high in 2010 and November 2011 year-to-date across
 8 multiple financial metrics. Protestant's expert, Edward Stockton, found data showing that
 9 Protestant's numbers are quite high when looking at absolute sales volume. These numbers confirm
 10 that Protestant's sales are high relative to the amount of business available. The sale of new
 11 vehicles was the most significant factor considered by Mr. Stockton as new vehicles sales generate
 12 service and parts revenues. The second most important factor is the volume of service, as this
 13 amount will have the largest impact on the consuming public. [Exh. 571, Tab 9.] With regard to
 14 service loyalty, Protestant's December 2011 year-to-date service retention of sales customers was
 15 77.6%. This figure demonstrates the high level of loyalty of the buying customer to the dealership.
 16 [Exh. 549.] Moreover, Protestant was ranked 131 out of 695 nationwide Harley-Davidson
 17 dealerships as to the likelihood that customers would return to Protestant to repurchase from the
 18 dealership. [Exh. 549.]

	2010	November 2011 Year To Date
Net Sales	97 of 706 (86.3 percentile)	68 of 686 (90.1 percentile)
New Vehicle Retail Sales	142 of 706 (79.9 percentile)	103 of 686 (85.0 percentile)
Pre-Owned Retail Sales	181 of 703 (74.3 percentile)	86 of 680 (87.4 percentile)
Parts & Accessories Sales	67 of 705 (90.5 percentile)	49 of 686 (92.9 percentile)
General Merchandise Sales	147 of 702 (79.1 percentile)	135 of 684 (80.3 percentile)
Service Net Sales	9 of 701 (98.7 percentile)	8 of 682 (98.8 percentile)
Service Labor Net Sales	7 of 701 (99.0 percentile)	6 of 682 (99.1 percentile)

1 Based on the evidence adduced at trial, Respondent does not, and indeed cannot, dispute that
2 the amount of business transacted by Protestant relative to the business available to it is
3 comparatively high and satisfactory.

4
5 **IV. PROTESTANT'S INVESTMENTS NECESSARILY MADE AND OBLIGATIONS
INCURRED ARE SUBSTANTIAL**

6 Vehicle Code Section 3061, subdivisions (b) and (c) require consideration of investments
7 made, obligations incurred, and permanency of investment. Respondent contends that these good
8 cause factors are limited to consideration of investments by the franchisee entity only. Respondent
9 would establish a bright line rule that forecloses consideration of any investment made or owned by
10 anyone other than the nominal franchisee legal entity. The only support Respondent would have for
11 this interpretation is a one-sided reading of the statute wherein the reference to investments made
12 "by the franchisee" in subdivision (b) would be read as a directive to the Board to completely ignore
13 investments made by anyone other than the nominal franchisee, regardless of the investing person or
14 entity's relationship or common ownership with the franchisee. But the statute does not call for any
15 such evidence foreclosing rule. First, the reference to "by the franchisee" in subdivision (b), first,
16 does not apply in any manner in subdivision (c). Second, the words "by the franchisee" do not even
17 remotely address in whom legal title or ownership must reside – "by the franchisee" clearly does not
18 foreclose consideration of investments made "indirectly" by the franchisee – such as investments
19 made by the franchisee through an affiliate.

20 In any event, parsing "by the franchisee" cannot help Respondent keep out evidence of the
21 real estate affiliates' investments in the dealership facilities and real property because the directive
22 of Section 3061 that all circumstances be considered must be considered to apply with special force
23 where those circumstances relate to one or more of the enumerated factors.

24 In other words, to be meaningful and to honor the statutory mandate to consider existing
25 circumstances, consideration and exploration of the totality of investments made and permanency
26 requires considering investments made by the franchisee owners or entities under common
27 ownership with the franchisee. See *Yamaha Motor Corp. v. Superior Court* (1986) 185 Cal.App.3d
28 1232, 1242 ("Section 3061 places emphasis on the need for the board to consider existing

1 circumstances in each determination of good cause, including, *but not limited to*, all seven factors
2 relating to the specific franchisee’s business. This underscores the need for case-by-case
3 determination as to whether there is good cause to modify a franchise.”) (emphasis added).

4 Excluding evidence of investments in dealership real estate and facilities by commonly
5 owned entities would mean that the Board would be forced to treat identically for investment
6 purposes a dealer who owns its facility through an affiliate and one who leases the facility from an
7 unrelated third party. This would be inequitable, create an unrealistic record, and, as demonstrated
8 above, be inconsistent with the statutory mandate regarding consideration of existing circumstances.
9 It is common experience that many dealerships must rent their facilities from third parties.
10 Committing to a long term lease for the dealership’s facility is certainly a long term, permanent
11 investment. However, where the owners of the dealership business also make the further investment
12 of purchasing and retaining real property for the dealership – whether through the dealership entity
13 or a stand-alone entity for estate planning or tax purposes – the investment is not only much greater
14 in dollar value, but more permanent as well, as single use real property dealership facilities are
15 obviously not liquid or short term assets.

16 Here, Riverside Motorcycle, Inc. is family owned and operated; there is substantial identity
17 of ownership between the franchisee entity and the real estate entity. The real estate entity, Dabney
18 Properties, LLC owns the real estate and facility on which the dealership is located. The
19 dealership’s current address is 7688 Indiana Avenue in Riverside, California. Each of the four
20 Dabney siblings, Judson (Jay) Dabney, II, Marshall Dabney, Susan Dabney and Ty Dabney, owns a
21 25% share in Dabney Properties, LLC. [RT Vol. V, 114:22-116:6 (J. Dabney).] All four siblings
22 are also concurrent owners/shareholders of Riverside Motorcycle, Inc. and all are members of
23 Dabney Properties, LLC. Each of the four siblings owns a 12.5% share of Riverside Motorcycle,
24 Inc. The remaining 50% is owned by the trust of Jay Dabney’s mother, Ida Dabney. The trust is a
25 50% shareholder of Riverside Motorcycle, Inc. and her children are the beneficiaries of that trust.
26 Jay Dabney is the trustee of the trust. [RT Vol. VI, 77:25-79:6; 82:7-24 (J. Dabney); Vol. VII,
27 40:25-43:3 (M. Dabney); Exh. 34.]

28

1 Protestant has made substantial investments in his dealership to promote the Harley-
2 Davidson brand. In 1993, as part of their decision to make Harley-Davidson the premier brand to
3 sell at the dealership, Protestant invested \$250,000 in remodeling the store to convert its retail space
4 into a “designer store” through a program that Harley-Davidson offered with a design firm. The
5 remodeled previous store was 14,000 square feet and won many awards for excellence in design and
6 was very successful. [RT Vol. V, 121:7-24 (J. Dabney).]

7 Protestant also incurred substantial costs to establish its current, 35,000 square foot state-of-
8 the-art facility in August 2002. [RT Vol. V, 121:25-122:7 (J. Dabney).] The total acquisition costs
9 for the expansion of the dealership to its current Riverside facility was approximately \$4 million.
10 The property is currently valued at approximately \$4 million. [RT Vol. VI, 78:11-79:6 (J.
11 Dabney).] In Fall 2006, Protestant opened a secondary retail location (“SRL”) in Corona,
12 California, which was designed to extend their reach within their defined territory. Protestant
13 opened their SRL after Respondent indicated that Harley-Davidson may relocate a Los Angeles-
14 based dealer into the market next to their Riverside location. Protestant prepared a proposal to build
15 an SRL in Corona, believing that the SRL could service that market adequately without the need to
16 relocate a dealer into the area. [Exh. 96.] Respondent accepted Protestant’s proposal for the Corona
17 SRL. The SRL sold Harley-Davidson products, as well as new and used Harley-Davidson
18 motorcycles, parts, accessories, services and general merchandise. The SRL operated under Fall
19 2010 when Protestant decided to wind it down. [RT Vol. V, 148:10-151:21 (J. Dabney).] The
20 development of the SRL demonstrates the scope of Protestant’s substantial financial investment and
21 loyalty to the Harley-Davidson brand. It also demonstrates Protestant’s strong performance as a
22 dealership as only dealers in good standing can obtain SRLs. [RT Vol. II, 35:2-12 (Kennedy).]

23 Investments made are assets funded by the Protestant and its related entity, Dabney
24 Properties, LLC. Assets are created from funds contributed as capital from owners, loans from non-
25 third parties (obligations), funds contributed by loans from related entities (obligations), and
26 retained earnings (cumulative profits less distributions) of the entities. Investments made are from
27 capital infused into the dealership, retained earnings and obligations of the Protestant and its related
28 entity. [Exh. 140, p.4.]

The chart below shows Protestant and its related entity Dabney Properties, LLC's total investments in assets at original cost:

Entity	Total Investments
Riverside Motorcycle, Inc.'s depreciable assets	\$1,472,000 [Ex. 140, p.4.]
Riverside Motorcycle, Inc., Inc.'s cash, receivables and inventory	\$3,798,000 [Exh. 140, p. 4.]
Dabney Properties, LLC's investments in facilities and other depreciable assets	\$4,049,000 [Exh. 140, p. 4.]
Dabney Properties, LLC's cash and other assets	\$17,000 [Exh. 140, p.4.]
Total Investments:	\$9,336,000 [Exh. 140, p. 4.]

The chart below shows Protestant and its related entity Dabney Properties, LLC's total investments in assets at estimated current value:

Entity	Total Investments
Riverside Motorcycle, Inc.'s investments in furniture and equipment	\$458,000 [Exh. 140, p. 4.]
Riverside Motorcycle, Inc.'s Goodwill/Bluesky and intangibles	\$4,000,000 [Exh. 140, p.4.]
Riverside Motorcycle, Inc.'s cash, receivables, and inventory	\$3,798,000 [Exh. 140, p. 4.]
Facilities (based on original cost and owner)	\$4,000,000 [Exh. 140, p. 4.]
Dabney Properties, LLC's cash and other assets	\$17,000 [Exh. 140, p. 4.]
Total Investments	\$12,273,000 [Exh. 140, p. 4.]

Based on the foregoing review of Protestant's asset classes, it is indisputable that Protestant has incurred substantial obligations and has made significant investments in the dealership to preserve its longevity.

V. PROTESTANT'S PERMANENCY OF INVESTMENT IN THE DEALERSHIP IS SUBSTANTIAL

As Protestant's expert, Carl Woodward, stated in his expert report, permanency of investment is not a term of art used in or otherwise defined by the accounting profession or automobile dealer industry. Analysis therefore requires an exploration of all investments made in the business, which in turn requires a review of all aspects of permanency, not merely the degree of liquidity. While nothing is permanent from a business perspective, permanency would be considered a relative term with certain assets being less permanent while other assets would be

1 comparatively more permanent. The long term assets which are more permanent in nature include
2 furniture, fixtures, equipment, land, buildings and facilities, goodwill-blue sky, and customer lists
3 and other assets necessary to honor contingent future liabilities. [RT Vol. IX, 56:24-57:4
4 (Woodward); Exh. 140, p. 3, 5.]

5 As discussed above, to disregard the investments made and their permanency as not being
6 relevant would be putting form over substance. The same family members made investments in
7 both the realty and in the dealership for the sole purpose of selling and servicing Harley-Davidson
8 motorcycles. For Respondent to assert that the Board should look only to the actual investments of
9 the “fictional franchisee” to evaluate the impact of the intended termination cannot be reconciled
10 with the language of the very contract it seeks to terminate. The Dealer Contract that the franchisor
11 is relying upon is based on the “personal qualifications, experience, skill and commitment” of the
12 person identified as the “Dealer Operator and Owner(s).” The Dealer Contract then identifies
13 “Judson V. Dabney, II” as “Dealer Operator” and it lists as owners: Ty Dabney, Marshall Dabney
14 and Susan Dabney, as well as the trustees of the Living Trust of Judson Dabney and Ida Dabney.
15 [Exhs. 34 and 35.] It is common for family-owned dealerships operated in California to have
16 similar arrangements in regards to ownership and leasing of the realty needed for compliance with
17 the dealer contract and operation of the business. To conclude that any time a Dealer
18 Operator/Owner of the “franchisee” would have no permanent investment that could be considered
19 under Section 3061 would effectively remove Section 3061(b) and 3061(c) from the statutory good
20 cause factors and could not be what was intended by the legislature.

21 As discussed earlier, Protestant has incurred substantial costs to establish its modern, state-
22 of-the-art facility in August 2002. The total acquisition costs for the expansion of the dealership to
23 its current 35,000 square-foot, Riverside facility was approximately \$4 million. The property is
24 currently valued at approximately \$4 million. [RT Vol. VI, 78:11-79:6 (J. Dabney).]

25 The guarantees (obligations of loans) to the dealer-licensee, Riverside Motorcycle, Inc.,
26 which include the debt of the dealer-licensee and real estate mortgages exceeds \$4 million and
27 varies monthly. [Exh. 140, p. 5.] Dabney Properties, LLC, the entity that owns the property and
28

1 facility of Riverside Motorcycle, Inc. loaned \$2,204,000 to the dealer-licensee. The original
2 investment of the dealer-licensee was \$113,000. [Exh. 140, p. 5.]

3 Long term (more permanent) non-current assets at cost and current value which include
4 furniture, fixtures, equipment, leasehold improvements, bluesky/goodwill are other intangible assets
5 are substantial.⁴ Riverside Motorcycle, Inc.'s cost value for equipment at its current facility is
6 \$1,472,000 and the current value of that equipment is \$458,000. Protestant's expert, Mr.
7 Woodward, estimates that the bluesky/goodwill value of the dealer-licensee is \$4 million. The cost
8 value of the facilities owned by the Dabney Properties, LLC is \$4,049,000 and the current value is
9 \$4,000,000. As a summary, the investments made and obligations incurred range from a low of
10 \$113,000 (initial investment) to a high of \$12,273,000 (assets valued as current values). The
11 permanency of investment made can range from \$113,000 on an original investment basis to
12 \$5,521,000 for the most permanent assets at original cost to a high of \$8,458,000 for the most
13 permanent assets at current values. The property is a single purpose facility which makes the
14 investment therein more permanent. [RT Vol. IX, 56:17-59:18 (Woodward); Exh. 140, p. 5-7.]
15 Particularly for a brand like Harley-Davidson, the brand's identity is etched into the dealership,
16 therefore Protestant's dealership has been very specifically invested and specially organized to be a
17 Harley-Davidson dealership. This makes the permanency of its investment much more permanent
18 than the average dealership in the retail automotive industry. As Mr. Stockton testified during the
19 hearing: [RT Vol. IX, 172:12-173:10 (Stockton) (emphasis added).]

20 12 Now, one thing that Harley-Davidson and other
21 13 manufacturers -- Harley does do some very specific
22 14 investments. So when you go to a Harley-Davidson
23 15 dealership it's extremely noteworthy just how deeply the
24 16 brand's identity is etched into the stone. And Harley-
25 17 Davidson has an objective that each encounter that a
26 18 customer has at a dealership is a holistic experience with
27 19 Harley-Davidson. So what you see are more, much more so
28 20 than other brands, even the color of paint, the types of
21 22 shelves, the way that the merchandise are displayed, the
22 23 emblems, the organization, the dealership has been very

27 ⁴ Protestant's other substantial intangibles include the training of employees, establishing a customer base,
28 long term ownership (incorporated in 1974), long term continuity of ownership, foregone investment
opportunity by placing capital and other available funds in the dealership and its related entity, Dabney
Properties, LLC. [Exh. 140, p.6.]

1 23 specifically invested and specifically organized to be a
2 24 Harley-Davidson dealership.

3 25 *Now, for an operational dealership they get in*
4 *1 competition in terms of being able to earn good margins,*
5 *2 which Skip Fordyce has been able to do. The down side of*
6 *3 this is if they lose the Harley-Davidson operation it's*
7 *4 going to be much more difficult for a Harley-Davidson*
8 *5 dealer to unbrand their facility and return the facility*
9 *6 to a general use facility. So what you see is what, for*
10 *7 this dealership in particular and Harley-Davidsons in*
11 *8 general, the investment is much more permanent than you*
12 *9 would see if you looked at an average of dealerships*
13 *10 across the retail automotive industry.*

14
15 The current goodwill or franchise value of Skip Fordyce is \$4 million. [RT Vol. IX, 56:17-
16 59:18 (Woodward); Exh. 140, p. 6.] Termination of Respondent's dealership will result in a loss of
17 30% of the facility value of \$4,000,000 which is \$1,200,000. Combined with the complete loss of
18 the goodwill or franchise value of \$4,000,000, the total loss by sustained by Protestant if the
19 dealership is terminated is \$5,200,000. [RT Vol. IX, 88:24-101:12 (Woodward); Exh. 140, p. 6-7.]

20 VI. TERMINATION WOULD BE INJURIOUS TO THE PUBLIC WELFARE

21 If Protestant was terminated as a Harley-Davidson dealership, its business would be forced
22 to close down which would negatively impact its clientele and Protestant's community. Indeed, if
23 Protestant was terminated, the surrounding dealers would not be able to provide the same level of
24 adequate customer care since Protestant's closest dealership, located in Loma Linda, California, is
25 relatively smaller than Protestant's dealership. [RT Vol. IV, 89:7-24 (Stewart); RT Vol. VI, 83: 20-
26 84:4 (J. Dabney); Exh. 280B] Though there are dealers that are geographically close to Protestant's
27 dealership, the evidence shows that customers prefer, and therefore travel to, Skip Fordyce over
28 other dealerships. [Exh. 280B.] Indeed, market penetration data shows that not only does Protestant
adequately meet the demands of its dealer assigned territory, but that overall demand of Protestant's
sales and service is not limited to its assigned territory. [Exh. 571, Tab 9.]

Market studies further show that Protestant is located within the highest density of
registrations within that geographic area, which indicates that there is substantial demand for new
and used motorcycles sales within the Riverside metropolitan area. It also indicates the importance

1 of Protestant's service facilities to service the motorcycles in operation. [Exhs. 119, 297.] Based on
2 Respondent's Purchase Experience Survey, the data shows that Protestant exceeds the average for
3 the District, Region and nationwide for every quarter from Q2 2009 through Q2 2011. Based on the
4 results of the Ownership Experience Survey, Protestant either exceeds or is roughly on par with the
5 averages for the District, Region and nationwide for the same time period. [Exh. 571, Tab 8.]
6 Overall, on the purchase experience metric, Protestant's scores on the purchase experience surveys
7 are generally higher than all of the benchmarks against which it is compared. [RT Vol. IX: 185:20-
8 186:18; 186:19-187:9 (Stockton).]

9 One of Protestant's most prominent services to the inland empire community is the "Rider's
10 Edge" program, which is a five-day motorcycle training program, staffed by a site manager and
11 hired driving instructors. The program's training course involves two days of on-the-range training
12 and enables customers to obtain their motorcycle endorsement without taking the range test at the
13 Department of Motor Vehicles. Protestant has been actively involved in this program since its
14 adoption by Harley-Davidson because it assists in growing customer demand in the area by allowing
15 customers to overcome barriers and enter the world of Harley-Davidson. No other dealers in the
16 inland empire offer the Rider's Edge program. [RT Vol. V., 138:9-140:8 (J. Dabney).]

17 Protestant also maintains and operates a Harley-Davidson sponsored rental facility that
18 includes a large fleet of rental bikes for customers who are considering purchasing a motorcycle or
19 for customers whose motorcycle is in repair or there is an emergency breakdown and the customer
20 needs a loaned vehicle while it is serviced. [RT Vol. V, 138:6; 140:15 (J. Dabney).]

21 Protestant has frequently been asked by Harley-Davidson to participate in "pilot" programs,
22 which are newly-created programs being tested by Respondent wherein only a select group of
23 dealerships are chosen to participate. Protestant has participated in at least 15 pilots over the last six
24 or seven years for Harley-Davidson. [RT Vol. V, 140:16-22 (J. Dabney).] Examples of pilot
25 programs that Protestant has participated in include the "Connect System" which is the customer
26 relations management system that guides the customer through the pre and post-vehicle purchase
27 process. Protestant also recently participated in an Apple iPad pilot that assists dealerships in
28 monitoring how customers ride their vehicles. [RT Vol. V, 140:24-142:13 (J. Dabney).]

1 For many years, Protestant has supported its community through local, sponsored charity
2 activities held each year, including fundraising rides sponsored by the dealership. One of their
3 largest charity events is the West Coast Thunder, which has been held for thirteen years. The event,
4 held each year on Memorial Day, is a motorcycle parade and concert to honor the men and women
5 in the armed forces. The parade travels to Riverside National Cemetery and includes about 6,000
6 motorcycles and approximately 8,000 participants, including thousands of local community
7 members. The proceeds from West Coast Thunder go to the Riverside National Cemetery Support
8 Committee, which is a committee of volunteers who raise funds to assist the cemetery in meeting its
9 mission, such as building memorials and monuments. Protestant was the largest private donor to the
10 National POW-MIA Memorial and Protestant is currently raising money for the Vietnam Veterans
11 Memorial, which will be built in Riverside National Cemetery. Protestant also hosts an event called
12 Buffalo Soldiers Memorial which raises money to honor the first African-American soldiers in the
13 armed forces. [RT Vol. VI, 86:7-87:24 (J. Dabney).]

14 Additionally, Protestant hosts events to help its local humane societies and animals shelters.
15 For instance, Protestant hosts “Dogtoberfest” where it partners with local animal services and
16 shelters to hold dog adoptions and raise money for these organizations. The event also draws a
17 large number of community members together, up to 5,600 people. [RT Vol. VI, 88:11-89:18 (J.
18 Dabney).]

19 Another event hosted by Protestant is called Karen’s Ride of Hope which is designed to raise
20 money for research in mitochondrial disease. [RT Vol. VI, 89:19-90:2 (J. Dabney).] Other events
21 include Bikers Against Diabetes, Bikers Against Cancer, and Ronald McDonald House Poker runs.
22 Moreover, Harley-Davidson selected Protestant’s dealership as the location to film its documentary
23 “Harlistas,” a film created to reach out to the Latino market. In essence, Protestant is constantly in
24 the process of hosting, planning or marketing new community events, promoting a minimum of two
25 or three events each month. [RT Vol. VI, 90:3-7; 92:4-11 (J. Dabney).] In fact, Protestant’s district
26 manager, Jim Sorensen, testified that Protestant holds “an adequate number of special events over
27 the past two or three-year period” and that Protestant is in the “top half” as one of the more
28 prominent dealers in holding Harley-Davidson events.” [RT Vol. III, 201:1-14 (Sorensen); Exh.

1 565 (pg. 79; excerpts from Sorensen deposition) (“the dealer is a big special events dealer”; “they
2 hold more events than some other dealers within the district”).]

3 Protestant has a very active Harley Owners Group (“HOG”) chapter which includes over 300
4 members and has accumulated over 440,000 miles on HOG chapter rides last year alone. Of these
5 members, 100 are new, first year members. Membership in Protestant’s HOG chapter brings Harley
6 enthusiasts together on group rides, which the dealership supports by riding with the group.
7 Protestant charters the HOG chapter and holds HOG events each year at the dealership. HOG
8 members hold regular meetings and dealership employees, including Jay Dabney, show their
9 support by attending. The dealership also extends special services and discounts on parts for
10 customers who join Protestant’s HOG chapter. [RT Vol. VI, 90:18-92:3 (J. Dabney).]

11 The harm to the public caused by the loss of the dealership would be greater than just the
12 loss of motorcycle sales. Losses to the customer base would be significant if Protestant was
13 terminated. Customers would no longer have the facility and the comforts and the amenities that
14 come with use of the facility, such as the rental opportunities, the motorcycle training program, the
15 HOG chapter operated by the dealership, the loss of use of the facility for the charitable events, as
16 well as the loss of tax revenues for the community. Significantly, customers would lose the comfort
17 and confidence associated with doing business with an almost 40-year old institution. Jay Dabney
18 discussed the devastating ramifications of termination of the dealership during the hearing: [RT
19 Vol. VI, 62:1-63:10 (J. Dabney).]

20

21 24 Q. And other than what you've already stated, can
25 you say why you object to that as a personal matter?

22 1 A. Because it would, it would just be a devastation
23 2 to me, my family, the legacy, history of the dealership
24 3 going back would be obliterated.

25 4 My customers would go into a future that I don't
26 5 know what it would be like. And I have a great HOG
27 6 chapter, fantastic group of people and a good customer
28 7 base.

8 All the stakeholder groups in my view would be
9 damaged by the termination. So customers, employees would
10 obviously lose their jobs, and that talent would be wasted
11 for the dealer network.

12 Owners, we would be each devastated. My family

13 would be wiped out. And for me personally, I gave up my
14 life on what I had planned to do at Columbia University to

15 come back and help my family survive my father's illness.

16 And now 20 years later fighting for my life to keep that
17 from happening to destroy everything I've done.

18 And I feel like, absent this situation, that all

19 the feedback indicated that we were doing great. We were

20 having problems with the recession, but we were going to

21 get through it, I believe. I believe now in the team, the

22 hard working people who now have the right guidance can

23 get to where we need to be to be a premier dealership, a

24 world class dealership.

25 I think that's good for Harley-Davidson. If you

1 balance everything out and take these 25 sales versus

2 10,000 bike sales, north of 10,000 over the last ten

3 years, approximately, and the way we've developed that

4 market and created excitement and fun, and the largest

5 single day ride west of the Mississippi that celebrates

6 our military people, and all the things we do in the

7 community, which is we are very active, and our marketing

8 approach to convert dreamers to buyers in all the emerging

9 markets, and really doing what Harley-Davidson, I think,

10 and what I've always been told wants to do.

12 Possibly the most immediate injurious impact of termination would be to Protestant's staff.

13 There are approximately 65 to 70 employees who would lose their jobs if Protestant was terminated,

14 the majority of who are full-time employees. Most of these employees are specifically trained to

15 work with Harley-Davidsons. The employees would also lose their health benefits and other

16 exclusive employment benefits. [RT Vol. VI, 93:14-19 (J. Dabney); RT Vol. IX, 208:15-25

17 (Stockton.)]

18 In essence, the termination of Protestant would leave a void for Protestant's staff,

19 community and clientele. The significance of this factor was overlooked by Respondent in issuing

20 the Notice of Termination. Respondent did not account at all for the public welfare prior to issuing

21 the Notice of Termination, and only after the issue was raised in Mr. Kennedy's deposition did

22 Respondent even remotely consider it. [RT Vol. I, 174:24-176:6 (Kennedy).]

24 **VI. PROTESTANT HAS ADEQUATE MOTOR VEHICLE SALES AND SERVICES**
25 **FACILITIES, EQUIPMENT, VEHICLE PARTS AND QUALIFIED SERVICE**
26 **PERSONNEL TO REASONABLY PROVIDE FOR THE NEEDS OF CUSTOMERS**
27 **AND IT HAS BEEN RENDERING MORE THAN ADEQUATE SERVICES TO THE**
28 **PUBLIC**

27 For the reasons set forth below, Protestant asserts that it has adequate motor vehicle sales

28 and service facilities, equipment, vehicle parts and qualified service personnel to reasonable provide

1 for the needs of the public. Respondent has failed to provide any evidence supporting the
2 proposition that Protestant's sales and service facilities, do not reasonably meet the needs of its
3 consumers.

4 As an initial matter, Respondent does not dispute that Protestant maintains an adequate
5 facility that is in compliance with Harley-Davidson's requirements. [RT Vol. III, 199:4-14
6 (Sorensen).] In fact, Respondent is not aware of any inadequacies in Protestant's staff as to their
7 size, training or capacity to handle customer service or with regard to any deficiencies in the number
8 of trained technicians. [RT Vol. III, 199:24-200:11 (Sorensen).] Furthermore, Respondent asserts
9 that Protestant has maintained an adequate inventory of new vehicles at its dealership. [RT Vol. III,
10 200:12-18 (Sorensen).] Between 2008 and 2011, Respondent has not observed any inadequacies or
11 substandard performance in any of Protestant's programs or services such as Rider's Edge. The
12 only inadequacy, that was promptly addressed and remedied by Protestant, was a facility assessment
13 as to the lighting at the dealership. [Exh. 565 (p.34-35; excerpts from Sorensen deposition).]

14 Protestant maintains and operates a Harley-Davidson sponsored rental facility that includes a
15 large fleet of rental bikes for customers who are considering purchasing a motorcycle or for
16 customers whose motorcycle is in repair or there is an emergency breakdown and the customer
17 needs a loaned vehicle while it is serviced. [RT Vol. V, 138:6; 140:15 (J. Dabney).]

18 The dealership is also well-equipped to handle heavy consumer service demands, if
19 necessary. The dealership has a full finance and insurance department, parts and accessories
20 department, and service department, carrying a full array of all products, services and motorcycle
21 sales. [RT Vol. V, 138:1-5 (J. Dabney).] Protestant's service department includes numerous repair
22 lifts and specially-skilled service technicians. [Exh. 500 (photographs of facility).] The technicians
23 are factory-trained through Harley-Davidson and receive various levels of recognition through their
24 training coursework. Such training is not unique to the service department. Each of Protestant's
25 other departments, including Motorclothes (Harley-Davidson merchandise department), finance and
26 insurance, and the sales departments comply with the managerial training programs offered through
27 Harley-Davidson which train employees on various department-specific areas, including selling and
28

1 customer service skills. Protestant strongly believes and mandates that its employees be fully
2 trained through Respondent's managerial training program. [RT Vol. V, 147:2-25 (J. Dabney).]

3 The dealership employs approximately 65 to 70 employees and the physical dealership
4 measures 35,000 square feet, including the showroom and service department. This brand new,
5 state-of-the-art building was opened and designed under Respondent's specifications in 2002. [RT
6 Vol. V, 121:25-122:7; 153:25 (J. Dabney); Exh. 500 (photographs of facility); Vol. III, 199:4-14
7 (Sorensen).]

8 In terms of service proficiency, Protestant's 2010 and November 2011 year-to-date rankings
9 show that Protestant consistently ranks in the top quartile of dealerships nationwide:

	2010	November 2011 Year To Date
11 Parts & Accessories Sales	67 of 705 (90.5 percentile)	49 of 686 (92.9 percentile)
12 General Merchandise Sales	147 of 702 (79.1 percentile)	135 of 684 (80.3 percentile)
13 Service Net Sales	9 of 701 (98.7 percentile)	8 of 682 (98.8 percentile)
14 Service Labor Net Sales	7 of 701 (99.0 percentile)	6 of 682 (99.1 percentile)

16 Indeed, Mr. Sorensen, Protestant's district manager agrees that Protestant's dealership is
17 "what a great workplace looks like and keeps employees loyal." [Exh. 565 (pgs. 64-67; excerpts of
18 Sorensen deposition).]

20 **VII. PROTESTANT HAS FULFILLED RESPONDENT'S WARRANTY OBLIGATIONS**

21 Respondent is not aware of any customer complaints, issues, problems or injuries resulting
22 from Protestant's violations of the non-retail sales policy or any complaints from other dealers,
23 either domestically or internationally, regarding the violation vehicles. [RT Vol. II, 15:23-16:5
24 (Kennedy); Vol. III, 199:2-5 (Sorensen).]

25 Respondent contends that Protestant has significantly failed to fulfill its warranty obligations
26 to Harley-Davidson by submitting false and inaccurate Sales Warranty Registration information in
27 violation of paragraph F.3 Protestant's Dealer Contract. [Exh. 35.] However, significantly, Section
28 3060(f) of the Vehicle Code refers to the failure of the franchisee to perform "warranty obligations

1 of the franchisor” that are to be performed by the franchisee. Submitting the SWR information to
2 Harley-Davidson is an obligation of the franchisee pursuant to Section F, Service 3. Product
3 Warranty of the General Conditions of Sales and Service, but is not a “warranty obligation of the
4 franchisor.” [Exh. 35.] There is no allegation that Protestant has failed to provide proper warranty
5 services and vehicle repairs, pursuant to the statutory language of Section 3060(f). Accordingly,
6 Respondent’s contentions as to this factor are irrelevant.

7
8 **VIII. PROTESTANT HAS SUBSTANTIALLY COMPLIED WITH THE TERMS OF THE FRANCHISE**

9 A. The Dealer Contract and the NRSP

10 Respondent’s only basis for termination is non-compliance with Respondent’s Non-Retail
11 Sales Policy, as set forth in the Notice of Termination. [Exh. 63.] The NRSP does not amend or
12 modify the Dealer Contract or the General Conditions of Sales and Service nor are its specific terms
13 incorporated into the Dealer Contract. However, the Dealer Contract does provide that dealers shall
14 comply with the policies and position statements issued by Respondent regarding the requirement
15 that sales not be “for resale.” [Exh. 35, pg. 2.] The NRSP is not a material term of the Dealer
16 Contract because it is not incorporated in the Dealer Contract, and also because Respondent’s
17 monitoring, communication, and enforcement of the policy is arbitrary. The Dealer Contract does
18 not incorporate the NRSP in any specific terms, and to the extent that it is incorporated, it is only a
19 small portion of the voluminous obligations under the dealer contract.

20 Moreover, the Dealer contract (Section 2. General Conditions), and the General Conditions
21 of Sales and Service (Section P. Miscellaneous 8. Entire Contract) require that any supplement,
22 modification, or amendment be in writing and executed by the parties. [Exhs. 34 and 35.]
23 Respondent complied with the writing and execution requirements in the 2010 Addendum to the
24 Dealer Contract and the Amendment to the Dealer Contract [Exhs. 36 and 37.] However, the
25 NRSP, while in writing, does not require execution by the parties. [See Exhs. 47-52.] Accordingly,
26 by the terms in the Dealer Contract itself, the NRSP is invalid and unenforceable for its failure to
27 comply with Respondent’s own execution requirements.

28

1 B. Respondent Does Not Consistently Monitor the NRSP

2 Respondent does not perform regular audits on its dealer network for violation of the NRSP
3 unlike the monitoring of its other policies. For example, Respondent admits it performs regular
4 audits for the NRSP's companion Minimum Advertised Price ("MAP") policy.⁵ [RT Vol. II, 13:21-
5 14:2 (Kennedy).] As a testament to Respondent's inconsistent monitoring protocol for the NRSP,
6 monitoring of a dealership's records has historically been initiated only by a "tip" of suspected non-
7 retail sale activity. [RT Vol. III, 62:15-63:8 (Verduyn).] Respondent has no guidelines as to when
8 an inquiry letter is sent to a particular dealership as to suspected non-retail sale activity. [RT Vol.
9 III, 62:15-63:8 (Verduyn).] Respondent's expert, Dr. Dominique Hanssens, testified that there is no
10 sampling process or any other methodology used by Respondent to monitor the NRSP. [RT Vol. V,
11 55:16-56:4 (Hanssens).]

12 Mr. Verduyn also exaggerates the stringency of Harley-Davidson's languid audit and
13 monitoring of NRSP by claiming that he monitors potential violations of the NRSP through
14 "different sources of information." [RT Vol. II, 52:11-57:3 (Verduyn).] However, each of these
15 identified "sources" is essentially based on random tips he receives from Harley-Davidson
16 employees, such as field salespeople and district managers, and other dealers. Indeed, Mr. Verduyn
17 only began reviewing reports from the National Insurance Crime Bureau beginning in 2010, the
18 same year that Mr. Veik stopped all export activity. [RT Vol. II, 54:13-14 (Verduyn).] Such non-
19 stringent methods of enforcement and monitoring the NRSP discredit Respondent's assertion that
20 enforcement of the NRSP is of vital importance to preserve Respondent's brand and image.

21 Enforcement of the NRSP by Respondent is inconsistent at best. Respondent contends that it
22 has consistently enforced termination proceedings against known violators of its NRSP. [RT Vol. I,
23 174:1-5 (Kennedy); Vol. II, 70:1-13 (Kennedy).] However, Protestant's expert, Edward Stockton,
24 disagreed with Respondent's characterization of consistent enforcement of its NRSP. This is
25 because consistent enforcement is only levied against the dealers who are almost coincidentally
26 caught violating the NRSP. This could mean that there may be other dealers who are violating the

27 _____
28 ⁵ The MAP policy is "designed to put a certain set of controls on the types of advertising you do in terms of
price for new Harley-Davidsons." [RT Vol. 14:10-19 (J. Dabney).]

1 policy but have just not been discovered. These dealers, because they have not been caught, are not
2 subject to enforcement of the policy. Therefore enforcement of the policy is only consistent against
3 dealers who were discovered, but is not consistent against all other violators of the policy.

4 Respondent will perform an on-site audit based either on the unsatisfactory response to the inquiry
5 letter, or if no inquiry letter is sent, on the decision of Mr. Verduyn. [RT Vol. II, 57:4-58:13; 63:7-
6 13; 64:6-18 (Verduyn).] On-site audits consist of only a document review with no investigation as
7 to the facts or circumstances surrounding the violations as required by the NRSP. [Exh. 564 (pg.
8 34; excerpts from Brian Martin deposition).]

9 It is unknown if Respondent has even audited every dealership that they know is exporting,
10 or is suspected of exporting, vehicles. [RT Vol. V, 52:10-17 (Hanssens).] Despite his proffered
11 comprehensive review and analysis of the policy and its enforcement, Dr. Hanssens cannot opine on
12 the number of violations that other dealerships may have had for dealerships that have not been
13 audited. [RT Vol. V, 52:14-17 (Hanssens).] According to Mr. Stockton, although Dr. Hanssens
14 testified about frequent enforcement of the NRSP, he only identified 140 inquiry letters over a 6
15 year period. [RT Vol. II, 64:21-65:12 (Verduyn).] Harley-Davidson has had about 700 dealerships
16 nationwide. This indicates very light enforcement of the NRSP; statistically, the probability of
17 receiving an inquiry letter is very low. If the fears of exportation and harm to the Harley-Davidson
18 brand are as significant a concern as Respondent claims they are, Respondent's failure to perform
19 regular audits of dealerships is inconsistent with and undermines the credibility of Respondent's
20 allegations of harm and the necessity of terminating Protestant's franchise. [RT Vol. IX, 211:4-
21 212:1 (Stockton); Exh. 571, Tab 12.]

22 In stark contrast, the MAP policy specifically discourages dealers from reporting alleged
23 violations. [See Exh. 174.] Unlike the NRSP, Respondent sends an email of its MAP policy to both
24 the dealer principal and general manager, because of the severe financial consequences associated
25 with violation of that policy. [Exh. 565 (pgs. 49-50; excerpts from Sorensen deposition); Vol. III,
26 202:3-15 (Sorensen); Ex 174).] Both the MAP and the Parts, Accessories, Motorclothes (PAM)
27 policy (collectively, the PAM MAP) provide adequate warnings to dealers and clearly set forth the
28 graduated penalties for initial and subsequent violations of the policies. The PAM MAP policies

1 require the dealer principal's signature acknowledging that any violation of that policy is material
2 whether or not the dealer principal is aware of the violation and that the dealer principal has read
3 and understands the policy. [RT Vol. I, 217:6-14 (Kennedy).] In addition, the PAM MAP policies
4 advise the dealers that an independent company will monitor sales and report its findings to Harley-
5 Davidson. (Ex 174).] The increased awareness and communication of MAP, a violation of which
6 does not constitute termination, is inconsistent with the sparse and disproportionate communication
7 of the NRSP, a violation of which can constitute termination. The NRSP, which allows Respondent
8 to terminate the franchise, lacks all of the features that give clarity to the MAP policy, which does
9 not provide for termination. [Compare Exh. 174 with Exh. 52.]

10 Respondent's so-called consistent policy of terminating dealers for certain levels of NRSP is
11 based on an irrational rule of thumb and is unreasonable. Respondent's general rule of thumb is to
12 terminate a dealership for 20 or more violations of the NRSP. [RT Vol. I, 160:13-22 (Kennedy).]
13 This rule of thumb is based solely on the notion that at 20 violations, Respondent deems a
14 dealership's conduct to be a systematic effort to violate the NRSP. [RT Vol. I 160:23-161:9.]
15 Respondent cannot articulate a cognizable difference between the 19th violation, which warrants the
16 consequence of a dealership being placed on not in good standing status, and the 20th violation,
17 which warrants unequivocal termination [RT Vol. I, 162:2-12 (Kennedy).] Nor is this arbitrary rule
18 of thumb disclosed to dealerships. [RT Vol. I, 161:23-25 (Kennedy).]

19 Respondent's decision to terminate is based solely on the number of violations and does not
20 account for any other factors, which is contrary to the express provisions of the NRSP. [RT Vol. III,
21 65:5-11 (Verduyn); Exhs. 50-51.] Though Respondent contends that a factor in terminating Skip
22 Fordyce was its transmission of false information on the SWR forms, this is inconsistent with
23 Respondent's general course of dealing. As an example, Respondent did not terminate Protestant's
24 Monterey dealership for 15 violations, which Respondent contends also included false SWR
25 information [RT Vol. III, 36:6-19 (Verduyn); Exh. 283.] Unlike the MAP policy, the NRSP does
26 not provide for termination if the dealer principal does not know of the violations (Hanssens
27 Testimony). The only conclusion arguably supported by Respondent's enforcement is consistent
28 (but not necessarily rational) only for those dealers that are audited and caught, but Respondent does

1 not account for dealers which are not audited and caught but are violating the NRSP. [RT Vol. V,
2 55:2-15 (Hanssens).]

3 Furthermore, Mr. Sorensen's failure to report to Respondent that at least 18 violations
4 occurred at the dealership indicates no materiality. Mr. Sorensen knew of the potential for
5 violations prior to the audit. Notably, he had two conversations with Mr. Veik wherein Mr. Veik
6 soft-sold the number of violations, but did disclose that violations had occurred. [RT Vol. VIII,
7 17:8-19:2 (Veik).] Mr. Sorensen informed Mr. Veik that if violations were discovered, the penalty
8 was chargebacks. Termination was *never* mentioned as a possible consequence for violation of the
9 NRSP. (RT Vol. VII, 191:7-193:5 (Veik).] Mr. Sorensen discovered the possible exports when an
10 exporter was at an authorized San Diego dealership and informed him that Skip Fordyce had sold
11 exporters motorcycles. [RT Vol. VIII, 10:3-11:6 (Veik).] Mr. Veik called Mr. Sorensen in mid-
12 March 2011 informing him that the dealership had engaged in activity that violated NRSP. [RT
13 Vol. III, 161:3-9 (Sorensen).] Mr. Sorensen had not spoken to anyone at Harley-Davidson prior to
14 the company deciding to perform an audit. [Exh. 565 (pg. 41; excerpts from deposition of
15 Sorensen); Vol. III, 193:5-18; Stewart Testimony; Verduyn Testimony).] Mr. Sorensen never spoke
16 to Mr. Verduyn about the violations. [RT Vol. III, 193:19-25 (Sorensen). Mr. Sorensen informed
17 Ms. Stewart about the conversation only after Ms. Stewart informed Mr. Sorensen of the audit
18 several weeks after the conversation with Mr. Veik. [RT Vol. III, 192: 22-25 (Sorensen).] Mr.
19 Sorensen's failure to report the potential violations to Harley-Davidson is a strong indication of the
20 immateriality of the violations to the company.

21
22 C. The Dealer Principal's Lack of Knowledge of the Violations Should Presumptively
23 Favor Protestant Respecting this Factor

24 Dr. Hanssens claims that the NRSP is clear, and opines that dealer principal is responsible
25 for enforcing the policy, but nowhere in the NRSP is that specified. [RT Vol. V, 20:22-21:8; 78:14-
26 79:7 (Hanssens).] The evidence concretely shows that Jay Dabney had no knowledge of the
27 wrongdoing by his rogue general manager, Lester Veik, and Mr. Veik instructed his employees not
28 to reveal these transgressions to Jay. [RT Vol. VII 190:3-190:21; 213:8-22 (Veik).] Other than Mr.
Veik, none of the employees accurately understood or, in most cases, even knew that Respondent

1 had a policy against selling to exporters. [RT Vol. VII, 145:1-6 (Wilmoth); Vol. VII, 96:6-17
2 (Palmer); Exhs. 304-313).] Employees that were involved were instructed to follow through with
3 the transaction violations by Mr. Veik. Mr. Veik actively concealed the transactions from Jay
4 Dabney and from Respondent, because he knew he would have been terminated if he was caught.
5 [RT Vol. VII 213:24-214:8 (Veik).]

6 D. The Less than One Percent of Gross Profit Generated by the Violation Units is
7 Insubstantial Compared to the Amount of Business Protestant Transacts Under its Dealer
8 Contract

8 The gross profits generated by Protestant's violation units in 2009 and 2010
9 are only a small fraction as compared to the total dealership gross profits for the same periods. [See
10 Exh. 571, Tab 11).] In 2009, the total violation unit gross profit as a percentage of total dealership
11 gross profit was only 1.03% (\$56,008 gross violation profit; \$5,417,741 total gross profit). That
12 same calculation for 2010 was 0.53% (\$23,392 gross violation profit; \$4,448,751 total gross profit).
13 In total for both years, the profit on the violation units account for only 0.80% of the total gross
14 profit (\$79,400 gross violation profit; \$9,866,492 total gross profit). The analysis of the gross
15 margin for each new unit sold indicates that violation units are scattered within non-violation units.
16 [See Exh. 571, Tab 12; RT Vol. IX, 190:13-192:7 (Stockton).] The scatter graph of Tab 12 indicates
17 that there was no added financial incentive to engage in violation transactions. In other words, the
18 dealership's incentives were not served by making these sales; the sales were counter to the
19 dealership's interest. In total, only 31 out of a total of 966 new units sold were violation units in
20 2009 and 2010. [RT Vol. IX, 192:8-196:4 (Stockton).]

21
22 E. Respondent Provides No Evidence of Any Material Harm or Damage Resulting from the
23 Violations

23 Respondent testified that there have been no customer complaints or reported injuries
24 resulting from Protestant's violations, no notices from any government entity for export of non-
25 homologized vehicles, no evidence of quantifiable brand damage caused by violations and no
26 complaints from other dealers, either domestically or internationally. [RT Vol. II, 15:14-16:12
27 (Kennedy); Vol. V, 45:13-18; 77:12-18 (Hanssens).] Moreover, as Mr. Stockton testified, any
28 evidence of potential harm to customers is purely speculative. In order to analyze the potential harm

1 to a customer, one must consider what the customer would have purchased instead of purchasing the
2 exported motorcycle in the gray market. The potential harm to the customer is attenuated by the
3 important consideration of what the customer would have purchased in a developing nation in lieu
4 of the exported motorcycle. Since the possibility exists that the vehicle that the customer would
5 have purchased in a developing nation is actually less safe than the exported motorcycle, the
6 potential harm to the customer from the purchase of an exported vehicle must be reduced since it is
7 highly speculative and only operates under the assumption that the exported motorcycle is less safe
8 than any alternative vehicle the customer would have purchased. [RT Vol. IX, 203:7-206:12
9 (Stockton).]

10 Further, there has been no monetary loss or damage sustained as a result of Protestant's
11 violations of the NRSP as reflected by Respondent's lack of evidence regarding any such loss and
12 absence of any estimate of the possible existence or extent of any such loss. Respondent intimated,
13 but did not prove, that motorcycles exported were disassembled and even then there is no evidence
14 or proof of any kind that there was any injury or monetary loss. [RT Vol. V, 56:5-13 (Hanssens).]
15 In essence, Respondent has given no indication that it has suffered any direct damages, monetary or
16 otherwise, as a result of Protestant's purported violations. The termination is disproportionate to the
17 harm suffered by Harley-Davidson and the harm to Harley-Davidson is overstated, given that the
18 magnitude of the export problem lacks clarity. [RT Vol. IX, 203:7-206:12 (Stockton).]

19 Furthermore, Mr. Stockton identified other factors that Dr. Hanssens neglected to include in
20 his report in concluding that termination was warranted. Such factors include the effects of the
21 termination, such as the harm to Protestant's employees who would be out of work, the harm to
22 Protestant's investments, the windfall for either the successor dealer or the surrounding dealers who
23 are able to benefit from the ongoing value of Protestant's investment that Protestant can no longer
24 benefit from, and the harm to the consuming public if Protestant was terminated and the broken
25 relationships with customers. [RT Vol. IX, 207:23-209:2 (Stockton).] Thus, Respondent has failed
26 to take all relevant factors into account in justifying their decision to terminate the franchise. Mr.
27 Stockton ultimately opined that from an economic theory of enforcement, it would not be
28 appropriate or justified to terminate the dealer. Indeed, Dr. Hanssens is not aware of any other

1 motor vehicle manufacturers who have terminated a dealership for violation of their non-retail sales
2 policy. [RT Vol. V, 50:12-16. (Hanssens).] Significantly, Dr. Hanssens' report does not opine
3 whether termination is appropriate or justified under Section 3061 "good cause" factors. [RT Vol.
4 V, 51:20-24 (Hanssens).]

5 Respondent also claims that customers may be injured if they are not informed of Harley-
6 Davidson's open recall campaigns through the contact information submitted by Protestant on the
7 SWR forms to Respondent. However, this argument does not hold water. All safety recall
8 campaigns are reported to the National Highway Traffic Safety Administration ("NHTSA").
9 Therefore, even if the ultimate customer did not receive notice of the recall campaign through the
10 customer registration information that Protestant submitted to Respondent via the SWR form,
11 information regarding the recall campaigns is equally available to members of the public on the
12 NHTSA website. Those recall campaigns are also reported to foreign governments in every country
13 where Harley-Davidson markets its products. [RT Vol. III, 139:21-140:12 (Verduyn); Vol. III,
14 137:24-138:2 (McGowan).]

15 F. Any Practice of Violating the Policy was Discontinued and any Resulting Contract
16 Breach was Cured Prior to the Audit as Reflected by The Last Violation Occurring in
17 Summer 2010

18 Protestant has completely cured the contract breach arising from the NRSP violations. First,
19 and significantly, there have been no NRSP violations since Summer 2010, approximately 8 months
20 prior to the audit of Protestant's records. Mr. Veik stopped his scheme in June 2010, well before the
21 April 2011 audit conducted by Respondent. [RT Vol. VIII, 15:20-16:7 (Veik); Exhs. 114, 4 (deal
22 jacket showing sale of last violation unit was June 22, 2010.)]

23 Second, Mr. Veik was removed as general manager of the dealership in February 2011, prior
24 to the audit and Skip Fordyce is now under the oversight of a new general manager, Mr. Espinoza.
25 Since then, the management and employee structure has been reorganized so that Jay has contact
26 with not only the general manager, but also several lower level managers so that he is no longer
27 isolated from day-to-day operations, but instead is involved in monitoring and managing those
28 operations. [RT Vol. VI, 53:23-54:5; 55:22-56:15 (J. Dabney); Exh. 502 (new organizational
structure of dealership implemented in March 2011, prior to Respondent's audit); Vol. VIII, 132:24-

1 134:15 (Espinoza).] Mr. Espinoza implemented new internal policies, including policies designed
2 to ensure compliance with the NRSP in March 2011, before the audit even occurred in April 2011.
3 [Vol. VIII, 132:24-134:15 (Espinoza).]

4 Lastly, in the Notice of Termination, Respondent charged back \$28,285.75 of VIP money
5 from Protestant in relation to violations in the Notice. The chargebacks for this VIP money has
6 been paid in full by the dealership. [RT Vol. I, 173:13-18 (Kennedy); Vol. VI, 61:4-5 (J. Dabney);
7 Exh. 63.] Protestant did not challenge the chargebacks. [RT Vol. VI, 30:20-23 (J.Dabney).]
8 Collectively, the discontinued practice of violating the NRSP policy have cured and remedied any
9 contract breach arising from the export violations.

10
11 G. Protestant has Implemented Extensive Policies and Procedures to Ensure Compliance
With the NRSP

12 As part of these internal policies to ensure compliance with the NRSP, Protestant developed
13 a new sales process incorporating each level of management, which was implemented with the help
14 of an experienced outside consultant. [RT Vol. VI, 40:2-47-14 (J. Dabney); Exhs. 74-75.] Each of
15 the employees who provided a name that was improperly used on the SWR reports were coached
16 and trained on the SWR report and NRSP policies, as well as the new policies implemented by
17 Protestant to ensure compliance with the NRSP. [RT Vol. VI, 53:12-22 (J. Dabney).] Protestant
18 also developed an audit process once all the documentation is put together for each vehicle
19 purchase. The audit process includes an electronic sign-off indicating that the deal jacket has been
20 reviewed. [RT Vol. VI, 44:4-45:25 (J. Dabney).] Each deal jacket includes a deal jacket checklist
21 that breaks down all documents that needs to be included in the jacket, including the purchase
22 agreement, the completed SWR form, and a purchase receipt. [RT Vol. VIII, 161:3-9 (Espinoza).]
23 Further, no vehicle is registered via the SWR form until the SWR form is properly completed and
24 printed and included within the deal jacket. Protestant also compiles a sales log that lists every unit
25 sold and when a vehicle is registered via the SWR process, Protestant ensures that the vehicle is on
26 that sales log list. [RT Vol. VII, 96:24-98:2 (Palmer).] Megan Palmer, Protestant's general ledger
27 accountant, testified that she now has far more interaction with Jay Dabney since these policies and
28 procedures were implemented. [RT Vol. 105:20-106:4 (Palmer).]

1 Protestant also analyzes dealer profitability reports to ensure that the dealership is in
2 compliance with the NRSP. Specifically, Protestant looks for recurring customer names in the
3 reports every month for all finalized deals for that month. As a further precautionary measure,
4 Protestant also runs a monthly variable report to retroactively determine whether sales tax has been
5 paid for each particular deal. Since implementing this monitoring process after receipt of the Notice
6 of Termination, there have been no instances where the dealership has violated the NRSP. [RT Vol.
7 VII, 65:3-68:9 (M. Dabney); Exh. 73.] Respondent has never given or provided Protestant with any
8 information as to how to monitor for violations of the non-retail sales policy. [RT Vol. VII, 71:20-
9 72:14 (M. Dabney).] Since Mr. Veik's departure and Mr. Espinoza's transition as general manager,
10 there is greater communication between the upper and lower level employees, as well as between
11 departments. The dealership practices an open door policy. The paperwork process has become
12 more efficient and Jay Dabney has an increased presence at the dealership, including at weekly
13 manager meetings. The employees are encouraged to consult with Jay if they have any issues,
14 questions or concerns. [RT Vol. VII18-153:13 (Wilmoth).]

15
16 H. Under the Facts of the Case, Any Violation of the Policy and/or Dealer Agreement
17 Resulting from Policy Violations Was Not of a Sufficient Extent to Establish Good
18 Cause, As Reflected By an Analysis of the Materiality of the Alleged Contractual
19 Breach.

20 It is significant that the language of subsection (g) of Vehicle Code Section 3061 requires the
21 consideration of the extent of the failure to comply. It is equally important that the statute does not
22 say *any* failure to comply or simply *the* failure to comply, but it is the extent of the failure to comply
23 that must be considered in evaluating whether or not there is good cause to terminate the franchise.
24 The U.S. Supreme Court in *New Motor Vehicle Board v. Orrin W. Fox Co.* (1978) 439 U.S. 96,
25 recognized that the franchise is an agreement drafted by the party with the superior bargaining
26 power. State franchise laws, recognizing the disparity in power between the parties, are attempts to
27 create a level playing field, particularly where the franchisor has the power to inflict such grievous
28 losses upon a franchisee. The U.S. Supreme Court also recognized that the franchisor can survive
with one less franchisee but the franchisee is more likely to depend entirely upon the franchisor for
its continued existence.

1 The franchise is a contract, therefore the law of contracts should apply. While Protestant's
2 actions constitute a breach of the NRSP, the subsequent issue to determine is the materiality or
3 "extent" of Protestant's failure to comply with the terms of the franchise. Since the Vehicle Code
4 does not address the materiality of breach of the franchise, the principles of the Restatement, Second
5 of Contracts serve as a guide to analyze the materiality of the breach.

6 Section 241 of the Restatement, Second of Contracts, Circumstances Significant in
7 Determining Whether a Failure is Material, reads:

8 In determining whether a failure to render or to offer performance is material, the following
9 circumstances are significant:

- 10 (a) the extent to which the injured party will be deprived of the benefit which he reasonably
11 expected;
- 12 (b) the extent to which the injured party can be adequately compensated for the part of that
13 benefit of which he will be deprived;
- 14 (c) the extent to which the party failing to perform will suffer forfeiture;
- 15 (d) the likelihood that the party failing to perform or to offer to perform will cure his failure,
16 taking account of all the circumstances including any reasonable assurances;
- 17 (e) the extent to which the behavior of the party failing to perform or to offer to perform
18 comports with standards of good faith and fair dealing.

19 Below is an analysis of each of these factors:

- 20 (a) *The extent to which the injured party will be deprived of the benefit which he reasonably
21 expected*

22 Here, the injured party is Harley-Davidson, which has received and continues to receive a
23 substantial majority of the benefits of the contract with Skip-Fordyce over a period of almost 40
24 years, namely that of selling and servicing motorcycles, Harley-Davidson products and promoting
25 the Harley-Davidson lifestyle. In light of Protestant's past business success as a dealership, it is
26 most likely that Skip Fordyce will continue to be a successful dealer and, as Protestant has already
27 shown, it is inconceivable that Protestant's employees will engage in any future violations of the
28 NRSP, in light of the extraordinary circumstances that gave rise to the breach in the first instance.

- 29 (b) *The extent to which the injured party can be adequately compensated for the part of that
30 benefit of which he will be deprived*

31 As discussed above, Respondent charged back \$28,285.75 of VIP money from Protestant in
32 relation to violations in the Notice. The chargebacks for this VIP money has been paid in full by the

1 dealership. [RT Vol. I, 173:13-18 (Kennedy); Vol. VI, 61:4-5 (J. Dabney); Exh. 63.] Protestant did
2 not challenge the chargebacks. [RT Vol. VI, 30:20-23 (J.Dabney).] Therefore, any breach of the
3 contract arising from Protestant's actions have been cured.

4
5 (c) *The extent to which the party failing to perform or to offer to perform will suffer
forfeiture*

6 The issue of the policy of avoidance of forfeiture weighs heavily in Protestant's favor. To
7 permit a termination of the franchise would cause the Dabney family to "suffer forfeiture" of their
8 family's investment and future livelihood.

9
10 (d) *The likelihood that the party failing to perform or to offer to perform will cure his
failure, taking account of all the circumstances including any reasonable assurances*

11 This factor also weighs in favor of Protestant as it has already undertaken measures to ensure
12 that its dealership will adhere to the policies mandated by Harley-Davidson. Additionally, as
13 discussed at length above in Section IX.F. of this brief, Protestant has cured any breach of the
14 Dealer Contract by (1) paying back the chargebacks of VIP money in full; (2) replacing Mr. Veik
15 with a new general manager, Glen Espinoza who has created, implemented and enforced new
16 policies and procedures at the dealership to ensure compliance with all of Respondent's policies;
17 and (3) maintaining compliance with the NRSP as evidenced by the fact that the dealership has not
18 had a violation of the NRSP since Summer 2010, far before Respondent's audit took place.

19
20 (e) *The extent to which the behavior of the party failing to perform or to offer to perform
comports with standards of good faith and fair dealing*

21 Mr. Veik's deviant actions are not representative of Jay Dabney or Protestant's employees'
22 commitment to comply with all of Respondent's policies and procedures. There is nothing to
23 indicate that Mr. Veik's behavior is a reflection of greed, corruption, or collusion on the part of
24 Protestant's employees or dealer operator.

25 Accordingly, in applying the Section 241 of the Restatement of Contracts, 2d, although
26 Protestant did breach the NRSP, the breach is not sufficiently material under the analysis of Section
27 241. Respondent has not met its burden of proof to establish that there is good cause to terminate
28 Skip Fordyce.

1 **IX. THE BOARD SHOULD SUSTAIN THE PROTEST**

2 Vehicle Code Section 3067(a) provides: "The decision of the board shall be in writing and
3 shall contain findings of fact and a determination of the issues presented. The decision shall
4 sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed
5 by the board shall be for the purpose of assuring performance of binding contractual agreements
6 between franchisees and franchisors or otherwise serving the purposes of this article." In
7 accordance with this clear language, Protestant proposes that the Board sustain the protest
8 unconditionally.

9 A. The Board Should Sustain the Protest Unconditionally

10 As an initial matter, Protestant should not be terminated for the reasons previously
11 identified. In its notable, 38 year history, the amount of business transacted by the Protestant has
12 been substantial and the amount of business transacted by the Protestant relative to the business
13 available to the dealership is comparatively high. Protestant's recent dealership sales were above
14 the average sales and registrations in the nation and in Protestant's dealer assigned territory. In
15 2010, the national average number of vehicle registrations by dealerships was 353. Protestant's
16 average number was 391. Protestant had a 93.8% effectiveness/penetration within its dealer
17 assigned territory and a 110.8% effectiveness/penetration nationally. For the rolling 12-month
18 period as of August 2011, Protestant had an 81.4% effectiveness/penetration within the dealer
19 assigned territory and 105% effectiveness/penetration rate nationally. [RT Vol. IX, 175:3-176:20
20 (Stockton); Exh. 571, Tab 6.]

21 The investments necessarily made and obligations incurred by the Protestant to perform its
22 part of the franchise have been significant and termination will result in a significant loss to
23 Protestant as to these investments. The current goodwill or franchise value of Protestant is \$4
24 million. [RT Vol. IX, 56:17-59:18 (Woodward); Exh. 140, p. 6.] Furthermore, the investment in
25 Protestant's Harley-Davidson has significant permanency and will be adversely affected by
26 termination. As set forth above, Protestant has made substantial investments in the facility and the
27 total investments of the franchisee and related entity total up to \$12,273,000. [Exh. 140, p. 4.]
28

1 Protestant is actively involved in community-based charity activities, has extensive rental
2 services and offers exclusive discounts and benefits to its customers. For these reasons among
3 many others, termination of Protestant's franchise will be injurious to the public welfare.

4 Additionally, as discussed at length above, it is undisputed that the Protestant provides more
5 than adequate motor vehicle sales and service facilities, equipment, vehicle parts and qualified
6 service personnel to reasonably provide for the needs of its consumers and has been and is rendering
7 adequate services to the public. The Protestant has fulfilled the warranty obligations of the
8 Respondent and the extent of Protestant's failure to comply with the terms of the franchise
9 agreement is insufficiently material to warrant termination.

10 Furthermore, while the franchise agreement between the parties states that Respondent may
11 exercise its right to terminate the franchise if the Dealer fails to perform its sales, service or facility
12 responsibilities [Exh. 35, p. 17.], Vehicle Code Section 3060 mandates specific conditions that must
13 be met before a contract can be terminated. Section 3060(a) states, in relevant part:

14 (a) Notwithstanding . . . the terms of any franchise, no franchisor shall
15 terminate or refuse to continue any existing franchise unless all of the
following conditions are met:

16 (1) The franchisee and the board have received written notice from the
franchisor as follows:

17 (A) Sixty days before the effective date thereof setting forth the
18 specific grounds for termination or refusal to continue.

19 In other words, Vehicle Code Section 3060 remains unaltered by the terms of the franchise
20 agreement between the parties. This is particularly true in light of the showing that there was no
21 specific harm to Respondent . [RT Vol. V, 45:13-18; 56:5-13; 77:12-18 (Hannsens); Vol. II, 15:14-
22 16:12 (Kennedy).] Respondent does not have an estimate of the monetary loss or damage sustained
23 as a result of Protestant's violations to the Non-Retail Sales Policy and the Fleet Sales Policy.
24 Respondent is not aware of any fines, sanctions, or penalties imposed on Respondent by foreign
25 governments for units sold by unauthorized sellers in foreign countries. Respondent is not aware of
26 any injury to persons or property as a result of the motorcycles not being properly assembled.
27 Indeed, Protestant's current general manger, Glen Espinoza, implemented new internal policies,
28 including policies designed to ensure compliance with the NRSP, before the audit even occurred.

1 Once the audit results were provided to Protestant, the dealership increased its monitoring and
2 enforcement efforts. [RT Vol. VIII, 154:8-15 (Espinoza).] Protestant continues to comply with all
3 of Respondent’s policies and procedures and to go above and beyond what has been requested.

4 Under Respondent’s own NRSP under which Respondent is seeking to terminate the
5 franchise, there is a series of progressively severe consequences for violation of the policy.
6 Respondent’s NRSP identifies the following consequences for violation therein: (1) placing
7 limitations on future product allocations or shipments; (2) charging back to the dealer any incentives
8 or allowances credited or paid with respect to the violating sale; (3) placing the dealer in Not in
9 Good standing status; (4) charging back any internal and external audit and legal expenses to the
10 dealer...” [Exh. 52.] These viable, alternate consequences run contrary Respondent’s assertion that
11 it must terminate the franchise in order to effectively enforce the policy. Levying what is essentially
12 a “death penalty” upon the dealership is disproportionate to the harm to Respondent caused by
13 Protestant’s actions. It is simply not necessary for Respondent to achieve its goals of protecting its
14 brand at the expense of terminating Protestant’s franchise for what occurred under these “existing
15 circumstances.” And, notably, Protestant’s breach of the NRSP is not sufficiently material to
16 warrant termination based on the factors set forth in determining materiality pursuant to Section 241
17 of Restatement of Contracts, 2d.

18 Based on the foregoing, Protestant respectfully requests the Board to sustain the protest
19 unconditionally.

20
21 B. If the Board is Not Inclined to Sustain the Protest Unconditionally, It should Sustain the
22 Protest Conditionally

23 If the Board is not inclined to sustain the protest unconditionally, Protestant respectfully
24 requests the Board to sustain the protest conditionally, pursuant to Vehicle Code Section 3067(a).
25 The language of Section 3067(a) clearly states that the purpose of any conditions imposed by the
26 board is to fulfill any contractual obligations between the parties: “Conditions imposed by the board
27 shall be for the purpose of assuring performance of binding contractual agreements between
28 franchisees and franchisors or otherwise serving the purposes of this article.” See *American Isuzu
Motors, Inc. v. New Motor Vehicle Bd.* (1986) 186 Cal.App.3d 464, 477 (“The board does indeed

1 have the power to issue a conditional order ‘for the purpose of assuring performance of binding
2 contractual agreements between franchisees and franchisors or otherwise serving the purposes of
3 this article.’”).

4 In accordance with this statutory purpose of compliance with the franchise terms, if the
5 Board is not inclined to sustain the protest unconditionally, Protestant respectfully requests that the
6 Board sustain this protest conditionally, and that as a condition, the Board order that Protestant’s
7 self-imposed compliance program continue in full effect for a specified duration (e.g., three years).
8 In turn, Protestant will comply with all available sanctions under the terms of the Non-Retail Sales
9 Policy that Respondent wishes to impose, or gives notice that it is exercising, short of termination.
10 Such a proposal would be consistent with the board’s statutory authority set forth in Vehicle Code
11 Section 3067(a), which allows the Board to set such conditions for purposes of furthering
12 compliance with the franchise agreement.

13 Protestant also proposes, as another condition of sustaining the protest, that the Board
14 require Protestant to provide full reimbursement of expenses to Respondent in accordance with the
15 NRSP (“charge back any internal and external audit and legal expenses to the dealer...”). [Exhs. 51-
16 52.]

17
18 C. If the Board is Not Inclined to Sustain the Protest, Then It Should be Overruled Only
Conditionally

19 While it is clearly the appropriate course to unconditionally sustain the protest and, if not, to
20 conditionally sustain the protest as set forth above, if the Board elects not to proceed in that regard,
21 then at an absolute minimum, the only way the protest should ever be contemplated as overruled is
22 if the overruling was conditional. This option is also afforded by Vehicle Code Section 3067(a),
23 which states that the board may issue a decision to “conditionally overrule” the protest. If the Board
24 is inclined to overrule the protest, Protestant proposes that as a condition, Protestant should be
25 provided time to sell the dealership business to a qualified third party buyer. This option supports
26 an approach that would alleviate the injury or loss to the public even temporarily before a
27 replacement dealer can be retained, which is consistent with the considerations of Vehicle Code
28

1 Section 3061(d) (“Whether it is injurious or beneficial to the public welfare for the franchise to be
2 modified or replaced or the business of the franchisee disrupted.”).

3 Accordingly, if the Board is not inclined to sustain Protestant’s protest conditionally or
4 unconditionally, Protestant respectfully requests the Board to overrule the protest conditionally.

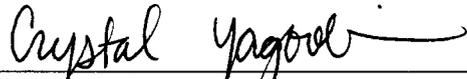
5
6 **X. CONCLUSION**

7 Based on the foregoing, Protestant respectfully requests that the Board find that Respondent
8 has failed to establish that good cause exists to terminate Protestant’s franchise and that Protestant’s
9 protest be sustained unconditionally.

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

DATE: June 8, 2012

MANNING, LEAVER, BRUDER & BERBERICH

BY 

Halbert B. Rasmussen
Franjo M. Dolenac
Crystal S. Yagoobian
Attorneys for Protestant Riverside Motorcycle,
Inc. dba Skip Fordyce Harley-Davidson

1 **Proof of Service**

2 I, the undersigned, declare and say as follows:

3 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.

4 On June 8, 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 --

7 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.

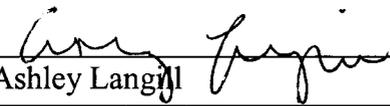
electronically sending by email or by fax each page of each document and this proof of service to the parties served at their last known email address or fax numbers as listed below from a email or fax system located at my business address which reported no errors and which, if by fax, produced a transmission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

11 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]

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.]

15 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.

16 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 June 8, 2012 at my business address, 5750 Wilshire Blvd., Suite 655, Los Angeles, California 90036, in the County of Los Angeles.

19 
Ashley Langill

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

21 **PROTESTANT RIVERSIDE MOTORCYCLE, INC. DBA SKIP FORDYCE HARLEY-DAVIDSON'S POST-HEARING BRIEF**

22 **Parties Served (exact envelope address)**

23 New Motor Vehicle Board
24 **Email: nmvb@nmvb.ca.gov**
1507 21st Street, Suite 330
Sacramento, CA 95814
25 (Send ORIGINAL Via US Mail)

Robert L. Ebe, Esq.
(rebe@cbclaw.com)
Brett Waxdeck, Esq.
(bwaxdeck@cbclaw.com)
COOPER, WHITE & COOPER,
LLP
201 California Street, 17th Floor
San Francisco, California 94111
(Via Email and US Mail)