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11 dba Skip Fordyce Harley-Davidson

12 **NEW MOTOR VEHICLE BOARD**

13 **STATE OF CALIFORNIA**

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

16 Protestant,

17 vs.

18 HARLEY-DAVIDSON MOTOR COMPANY,  
19 a Corporation,

20 Respondent.

PROTEST NO. PR-2310-11

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

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

24 <sup>1</sup> RT refers to Reporter's Transcript.

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

- 3  
4 a. Protestant does not dispute that it breached the franchise agreement or that a  
5 corporation is liable for the unlawful acts of its agents. However, the extent of the  
6 breach does not warrant imposing a death sentence in the form of termination when  
7 considering the totality of the circumstances.

8 Pursuant to Respondent’s own Non-Retail Sales Policy (“NRSP”), under which Respondent  
9 is seeking to terminate the franchise, there is a series of progressively severe consequences for  
10 violation of the policy. Respondent’s NRSP identifies the following consequences for violation  
11 therein: (1) placing limitations on future product allocations or shipments; (2) charging back to the  
12 dealer any incentives or allowances credited or paid with respect to the violating sale; (3) placing the  
13 dealer in Not in Good Standing status; (4) charging back any internal and external audit and legal  
14 expenses to the dealer...” [Exh. 52.] These viable, alternate consequences run contrary to  
15 Respondent’s assertion that it must terminate the franchise in order to effectively enforce the policy.  
16 Levying what is essentially a “death penalty” upon the dealership is disproportionate to the harm  
17 caused by Protestant’s actions. It is simply not necessary for Respondent to achieve its goals of  
18 protecting its brand at the expense of terminating Protestant’s franchise for what occurred under  
19 these existing circumstances. And, notably, Protestant’s breach of the NRSP is not sufficiently  
20 material to warrant termination based on the factors set forth in determining materiality pursuant to  
21 Section 241 of Restatement of Contracts, 2d, as discussed in detail in Protestant’s Opening Brief  
22 (pp.33-36). Protestant’s expert witness, Edward Stockton, testified that from an economic  
23 perspective, there is no credible reason to terminate the dealership, and termination is unjustified  
24 under the circumstances of this case:

25 Q. So from an economic theory of enforcement, can  
26 you determine if it would be appropriate and justified to  
27 terminate the dealer?

28 A. From a theory of enforcement I have seen no  
1 credible evidence that the proposed termination is in line  
2 with an economically rational outcome. I’m not opining on  
3 the final issue here, but I do see a severe imbalance.  
4 From an enforcement perspective you have an  
5 extremely interesting perspective that these sales were  
6 outside of the economic interests of the dealership. The  
7 dealer principal would not have wanted these sales to be  
8 made with or without the policy because the dealership was

1 9 deprived of the opportunity to have a relationship with  
2 10 the customer, to earn future service and merchandise  
3 11 business. So their expected value of committing these  
4 12 violations was actually zero, or it was negative. So a  
5 13 strict system to stop something where the dealership would  
6 14 not have benefited, would not have chosen to do so, and  
7 15 even if they wouldn't have gotten caught the dealership  
8 16 wouldn't have wanted these sales, it leads to an  
9 17 economically irrational outcome.

6 Based on the totality of the circumstances, termination is an unjustified and disproportionate  
7 remedy in light of Respondent's failure to show any other damages other than the loss of VIP  
8 money from the sales of the violation units, which has been reimbursed in full by Protestant.  
9 Protestant has also implemented and enforced comprehensive measures to ensure continued  
10 compliance with Respondent's corporate policies. Termination of Protestant's dealership would  
11 send other dealerships the message that regardless of the extent of violation, a franchisee is  
12 incapable of "making good" after a violation of Respondent's policies, and it would discourage  
13 other dealerships from rectifying their own policies and implementing measures to improve their  
14 dealership's operations to be in compliance with Respondent's policies.

15 i. *Protestant's violation units comprise a negligible percentage of Protestant's*  
16 *gross profit of total new retail units sold.*

16 The gross profits generated by Protestant's violation units in 2009 and 2010 are only a small  
17 fraction as compared to the total dealership gross profits for the same periods. [See Exh. 571, Tab  
18 11).] In 2009, the total violation unit gross profit as a percentage of total dealership gross profit was  
19 only 1.03% (\$56,008 gross violation profit; \$5,417,741 total gross profit). That same calculation for  
20 2010 was 0.53% (\$23,392 gross violation profit; \$4,448,751 total gross profit). In total for both  
21 years, the profit on the violation units account for only 0.80% of the total gross profit (\$79,400 gross  
22 violation profit; \$9,866,492 total gross profit). The analysis of the gross margin for each new unit  
23 sold indicates that violation units are scattered within non-violation units. [See Exh. 571, Tab 12;  
24 RT Vol. IX, 190:13-192:7 (Stockton).] The scatter graph of Tab 12 of Mr. Stockton's expert report  
25 indicates that there was no added financial incentive to engage in violation transactions. In other  
26 words, the dealership's incentives were not served by making these sales; the sales were counter to  
27 the dealership's interest. In total, only 35<sup>2</sup> out of a total of 966 new units sold were violation units in  
28

<sup>2</sup> This figure includes 29 new Harley-Davidson motorcycles and 6 Buell motorcycles.

1 2009 and 2010. [RT Vol. IX, 192:8-196:4 (Stockton); Exh. 140.] Respondent’s brief overstates  
2 Protestant’s violations and ignores the true facts and circumstances of this case --- that these  
3 violations comprise only a negligible percentage of Protestant’s business sales and activity.  
4 Throughout its brief, Respondent overstates and aggrandizes the percentage of vehicles that were  
5 actually violation units, attempting to deflect from the fact that the balance of the California Vehicle  
6 Code Section 3061 good cause factors are in Protestant’s favor.

7           ii. *The evidence concretely shows that Jay Dabney had no knowledge of the*  
8           *wrongdoing by his rogue general manager, Lester Veik, and Mr. Veik*  
9           *instructed his employees not to reveal these transgressions to Mr. Dabney.*

10 Respondent contends that “the dealership employees, namely [Lester] Veik and the  
11 salespersons, made the sales out of greed to obtain commissions...” and that “[h]ere, in contrast [to  
12 the Board’s recent decision in *Laidlaw’s Harley-Davidson v. Harley-Davidson Motor Company*  
13 (PR-2299-11)], the evidence shows that Veik and the other dealership employees who were  
14 involved understood the policy (as did the Dabney family), knew they were violating it, and  
15 understood they were falsifying SWR forms to cover it up, and did it anyway.” [Resp. Brief, p. 17.]  
16 Respondent’s contention is disingenuous, false and unsupported by the evidence in the record. The  
17 fact is that other than Mr. Veik, none of the employees accurately understood or, in most cases, even  
18 knew that Respondent had a policy against selling to exporters. [RT Vol. VII, 145:1-6 (Wilmoth);  
19 Vol. VII, 96:6-17 (Palmer); Exhs. 304-313.)] Employees that were involved were instructed to  
20 follow through with the transaction violations by their supervisor, Mr. Veik. Mr. Veik actively  
21 concealed the transactions from Jay Dabney and from Respondent, because he knew he would have  
22 been terminated if he was caught. [RT Vol.VII 213:24-214:8 (Veik).] Mr. Veik controlled the  
23 dealership’s employees and, accordingly, directed various sales employees who had no or limited  
24 knowledge of Respondent’s NRSP to complete motorcycle sales he knew were non-retail sales  
25 under the policy. Mr. Veik, for example, directed the F&I Manager, Jason Wilmoth, to leave Safety  
26 and Warranty Registration (“SWR”) forms blank so that Mr. Veik could obtain names and addresses  
27 from dealership employees. [RT Vol. VII, 202:25-204:12 (Veik).] Mr. Veik obtained random  
28 names and addresses from various dealership employees, including information from those in the  
business office who had no knowledge of the sales process. [RT Vol. VII, 205:23-208:4 (Veik); Vol.

1 VII, 11:9-21 (Veik).] Mr. Veik would then have those names transferred to the SWR forms to  
2 conceal the fact that motorcycles were sold to individuals who intended to export the vehicles, or he  
3 would change the customers' names in internal sales logs to conceal the transactions. [RT Vol. VII,  
4 205:23-208:4 (Veik); Vol. III, 4-9 (Veik).] Mr. Veik actively concealed the violations from Harley-  
5 Davidson, Jay Dabney (the dealer principal), and the Dabney family (sole owners of the Protestant).  
6 To further assist in masking his indiscretions, Mr. Veik created a work environment whereby any  
7 concerns by dealership employees were to be addressed exclusively and handled by Veik personally,  
8 thus creating a barrier between the lower level employees and Jay Dabney [Vol. VI, 35:15-40:1 (J.  
9 Dabney).] Mr. Veik instructed others to transmit false information to Respondent, so that  
10 Respondent would not discover violations and in turn inform Jay. [Vol. VII 190:3-190:21; 213:8-22  
11 (Veik).]<sup>3</sup>

12 Thus, Jay was being deliberately shielded and isolated from knowing the truth about the  
13 NRSP violations by this environment, as well as by Mr. Veik's alteration of certain internal  
14 dealership documents to reflect false information so that Jay would not discover the violations. [RT  
15 Vol. VII, 202:25-204:12; 205:23-208:4 (Veik); Vol. VIII, 4-9 (Veik).] Mr. Veik confirmed that he  
16 performed these prohibited actions without Jay's knowledge and by intimidating employees to  
17 comply, or face possible termination. In fact, he documented his indiscretions in numerous  
18 writings, and acknowledged that Jay had no knowledge of the violation units. [Exhs. 46, 64, 69-70.]

19 Respondent contends that the ignorance of Jay Dabney is "no excuse" and that a corporation  
20 is still liable for the unlawful acts of its agents. [Resp. Brief, p. 2-3.] Protestant does not deny that  
21 this rule of law applies to render a corporation liable for damage or injury sustained, but this  
22 contention is inapposite in determining whether termination is warranted as it is subordinate to the  
23 analysis of the good cause factors under Vehicle Code Section 3061. In other words, while an  
24 evaluation of Mr. Veik's conduct may be relevant to establish breach of the dealer agreement, it is

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25  
26 <sup>3</sup> Respondent argues in its brief that Protestant violated the NRSP in an attempt to gain an unfair advantage  
27 over "honest dealerships." [Resp. Brief, p. 10.] Respondent's presumption that other dealerships are  
28 operating "honestly" is unsubstantiated since Respondent's inconsistent monitoring protocol for the NRSP  
has historically been initiated only by a "tip" of suspected non-retail sale activity. [RT Vol. III, 62:15-63:8  
(Verduyn).] Respondent has no guidelines as to when an inquiry letter is sent to a particular dealership as to  
suspected non-retail sale activity. [RT Vol. III, 62:15-63:8 (Verduyn).] Moreover, Respondent fails to show  
that Protestant's sales rankings would have changed if these violations were non-existent.

1 by no means conclusive in determining whether there is good cause to terminate the dealership, even  
2 if Mr. Veik's actions are imputed to Protestant. Again, however, Jay had no knowledge or  
3 awareness of Mr. Veik's actions since Mr. Veik actively concealed his wrongful conduct from Jay  
4 to avoid termination. Regardless of whether Mr. Veik's actions are imputed on Jay, the  
5 determination of whether good cause exists to terminate the franchise is based solely on a careful  
6 analysis of the good cause factors of Section 3061.

7           iii. *Any violation of the NRSP was discontinued and any resulting contract*  
8           *breach was cured prior to the audit with the continuing implementation of*  
9           *remedial measure.*

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

15           Second, Mr. Veik was removed as general manager of the dealership in February 2011, prior  
16 to the audit, and Skip Fordyce is now under the oversight of a new general manager, Mr. Espinoza.  
17 Since then, the management and employee structure has been reorganized so that Jay has contact  
18 with not only the general manager, but also several lower level managers so that he is no longer  
19 isolated from day-to-day operations, but instead is involved in monitoring and managing those  
20 operations. [RT Vol. VI, 53:23-54:5; 55:22-56:15 (J. Dabney); Exh. 502 (new organizational  
21 structure of dealership implemented in March 2011, prior to Respondent's audit); Vol. VIII, 132:24-  
22 134:15 (Espinoza).] Mr. Espinoza implemented new internal policies, including policies designed  
23 to ensure compliance with the NRSP in March 2011, before the audit even occurred in April 2011.  
24 [Vol. VIII, 132:24-134:15 (Espinoza).]

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

1 contract breach arising from the export violations. Other than the VIP funds, Respondent has failed  
2 to show any other damages arising from the export violations.

3 The circumstances arising to the breach in this case were reached by conduct not caused by  
4 ownership of the dealership, conduct that stopped prior to the audit (as confirmed by the audit itself)  
5 and the dealership has established additional policies and procedures to prevent any future violations  
6 by any future rogue employee. If Protestant's dealership were to be terminated for the conduct of  
7 one employee acting on the employee's own without approval from the dealer-principal, even after  
8 discontinuing the activity and ridding itself of the culpable employee, the message that would be  
9 sent to other dealers would be that there is no point in seeking to discontinue the offending activity,  
10 dismissing the offending employee, and rectifying the corporation's policies and procedures, as  
11 Protestant has done, since termination will occur in any event.

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

- 15 a. Even under Respondent's view that the NRSP is part of the dealer contract, rules of  
16 contractual interpretation require that Respondent abide by the NRSP's specific  
17 sanctions provisions and select the most reasonable sanction under the circumstances.

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

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

3 Here, Respondent’s NRSP identifies the following sanctions for violation therein: (1)  
4 placing limitations on future product allocations or shipments; (2) charging back to the dealer any  
5 incentives or allowances credited or paid with respect to the violating sale; (3) placing the dealer in  
6 Not in Good Standing status; (4) charging back any internal and external audit and legal expenses to  
7 the dealer; or (5) terminating the dealer’s contract. [Exhs. 50-52.]

8 In pursuing termination of Protestant, Respondent acted without regard to, and in a manner  
9 inconsistent with, the covenant of good faith and fair dealing by imposing the harshest sanctions  
10 possible that are beyond the reasonable contemplation and expectations of Protestant. Respondent  
11 did not impose less severe consequences to Protestant’s violations prior to issuing a termination  
12 notice, such as limiting future product allocations or placing Protestant in “Not in Good Standing”  
13 status. [RT Vol. II, 26:6-18 (Kennedy).] However, Respondent has imposed less severe sanctions  
14 on other dealerships who have violated the NRSP. [RT Vol. II, 26:24-28:17(Kennedy).]

15 Michael Kennedy, Respondent’s Vice President of North American Sales, testified that as a  
16 “rule of thumb” Respondent issues termination letters to dealerships that have more than 20  
17 violations of the NRSP. Respondent’s so-called consistent policy of terminating dealers for certain  
18 levels of NRSP is based on an irrational rule of thumb and is unreasonable. Respondent’s general  
19 rule of thumb is to terminate a dealership for 20 or more violations of the NRSP. [RT Vol. I,  
20 160:13-22 (Kennedy).] This rule of thumb is based solely on the notion that at 20 violations,  
21 Respondent deems a dealership’s conduct to be a systematic effort to violate the NRSP. [RT Vol. I  
22 160:23-161:9.] Respondent cannot articulate a cognizable difference between the 19th violation,  
23 which warrants the consequence of a dealership being placed on Not in Good Standing status, and  
24 the 20th violation, which warrants unequivocal termination [RT Vol. I, 162:2-12 (Kennedy).] Nor  
25 is this arbitrary rule of thumb disclosed to dealerships. [RT Vol. I, 161:23-25 (Kennedy).]  
26 Ultimately, Respondent’s arguable conclusion that its enforcement is consistent (though not  
27 necessarily rational) is applicable only for those dealers that are audited and caught, but  
28 Respondent’s supposed, consistent enforcement fails to account for dealers that are not audited but

1 are violating the NRSP. [RT Vol. V, 55:2-15 (Hanssens).] In other words, Respondent's inconsistent  
2 monitoring of the NRSP ultimately leads to arbitrary enforcement of the policy, which is contrary to  
3 Respondent's contention that its consistent enforcement of its undisclosed "Rule of 20" warrants  
4 termination here.

5 Indeed, Respondent's decision to terminate is based solely on the number of violations and  
6 does not account for any other factors, which is contrary to the express provisions of the NRSP.  
7 [RT Vol. III, 65:5-11 (Verduyn); Exhs. 50-51.] Though Respondent contends that a factor in  
8 terminating Protestant was its transmission of false information on the SWR forms, this is  
9 inconsistent with Respondent's general course of dealing. As an example, Respondent did not  
10 terminate the Monterey (Salinas, California) dealership in which Jay Dabney is a shareholder and  
11 dealer principal even though that dealership was found to have 15 violations of the NRSP, which  
12 Respondent contends also included the submission of false SWR information [RT Vol. III, 36:6-19;  
13 37:13-24 (Verduyn); Exh. 283.] Instead, the Monterey dealership was placed in "Not in Good  
14 Standing" status. [RT Vol. I, 163:5-164:2 (Kennedy); Vol. II, 27:21-28:3 (Kennedy).]

15 Respondent's rigid desire for enforcement for an arbitrary "Rule of 20" cannot be squared  
16 with the covenant of good faith and fair dealing. Rather than exercising the less severe and more  
17 reasonable consequences that are expressly set forth in the NRSP, Respondent has created an  
18 arbitrary and artificial cut-off rule that was: (1) never previously disclosed to Protestant, (2) not set  
19 forth in the dealer contract or the NRSP, (3) created without the consent or approval of Protestant,  
20 and (4) cannot even be inferred from the language in the dealer contract or NRSP. In imposing  
21 termination as the very first consequence to Protestant's export violations, Respondent's bad faith  
22 actions do not comply with the equitable principles of contractual interpretation which would  
23 require that Respondent abide by the NRSP's specific sanction provisions and select the most  
24 reasonable sanction under the circumstances, within the scope of both parties' expectations. By  
25 failing to exercise its discretion in imposing the less severe alternatives set forth in the NRSP,  
26 Respondent's pursuit of termination is one-sided, unreasonable and in violation of the implied  
27 covenant of good faith and fair dealing.  
28

1 **III. THE BALANCE OF FACTORS FAILS TO ESTABLISH GOOD CAUSE FOR**  
2 **TERMINATION**

- 3 a. The cases cited by Respondent are non-binding, distinguishable and unpersuasive to  
4 establish good cause for termination.

5 Respondent cites to numerous, non-binding cases for the proposition that many courts have  
6 permitted termination on facts similar to this case. [Resp. Brief, p. 15-16.] But in doing so  
7 Respondent ignores the fact that California law governing the issue of protests against termination  
8 before this Board provides for a highly factually intensive inquiry based not on a specific finding as  
9 to one issue, such as materiality of breach, but for an entire range of factors and all existing  
10 circumstances. Cases of the kind cited by Respondent are certainly not binding and, in light of the  
11 uniqueness of California law, are not sufficiently analogous or factually similar to this case to be of  
12 any value. However, the Board's recent decision in *Laidlaw's Harley-Davidson v. Harley-*  
13 *Davidson Motor Company* (PR-2299-11), concerns facts highly similar to those of this case,  
14 making it highly instructive. In *Laidlaw's*, the Board conditionally sustained a protest by a Harley-  
15 Davidson dealership that had sold 42 Harley-Davidson motorcycles in violation of the NRSP, which  
16 is 13 more motorcycles than the dealership in this case. Judge Marilyn Wong's decision in  
17 *Laidlaw's*, later adopted by the Board, was based on a careful assessment of all good cause factors,  
18 ultimately ruling that Respondent had not met its burden of proof under Vehicle Code Section  
19 3066(b) to establish that there is good cause to terminate the Harley-Davidson franchise.  
20 Specifically, Judge Wong found that Harley-Davidson had not established that the extent of  
21 *Laidlaw's* failure to comply with the terms of the franchise was sufficient to warrant termination of  
22 the franchise. As discussed above, Respondent's misleading and disingenuous attempt to  
23 distinguish the facts of this case from *Laidlaw's* is not supported by the record. Given the high  
24 factual similarities between this case and *Laidlaw's*, Judge Wong's opinion in *Laidlaw's* should  
25 guide the Board's decision in sustaining the protest in this case.

26 In contrast, the cases cited to by Respondent in its opening brief [Resp. Brief, pp. 15-16.] are  
27 distinguishable from this case. Most obviously, none of the cases cited by Respondent are  
28 California cases and therefore none of the cases are binding, legal precedent. Further, factually, the  
cases are also distinguishable. For example, in *Ford Motor Co. v. Motor Vehicle Bd. Of the Texas*

1 DOT, 21 S.W.3d 744 (Tex. App. 2000), the franchisee participated in a dealership-wide practice of  
2 submitting false warranty registration information for approximately 317 trucks, incurring  
3 approximately \$3.1 million in chargebacks to the manufacturer. In contrast, only 29 violation units  
4 compromise the basis for termination in Protestant's case and, significantly, the practice of  
5 submitting false SWR information was committed only under the direction and supervision of one  
6 rogue employee, Lester Veik, without the knowledge of the dealer operator, and was *not* a  
7 dealership-wide practice. The scope of the violations between these two cases is a significant  
8 distinction.

9 As another example, in Respondent's cited case of *Chrysler Corp. v. Lee Janssen Motor Co.*,  
10 9 Neb. App. 721 (Neb. Ct. App. 2000), an audit "resulted in 271 separate warranty charge backs for,  
11 among other things, document alterations to the mileage, service date, or VIN, making it appear to  
12 Chrysler that the vehicles were eligible for warranty service" and in the discovery of the  
13 dealership's practice of claiming sales tax exempt status on eight vehicles sold as retail sales in  
14 order to collect retail customer rebates from Chrysler. *Id.* at 723-724. Again, the scope and number  
15 of these violations exceeds the nature and number of violations in Protestant's case. Additionally, in  
16 *Janssen*, it appears that the dealership's personnel were aware that their activities were fraudulent  
17 and in violation of the manufacturer's corporate policies, whereas no such knowledge can be  
18 imputed on Protestant's employees who had limited or no understanding of the NRSP policies, with  
19 the exception, of course, of Lester Veik. This element of wrongful intent and knowledge is a  
20 significant distinction between the two cases. Moreover, the dealer-operator in *Janssen*, had  
21 invested a total of only about \$900,000 into the dealership (*Id.* at 726), whereas Protestant has made  
22 far more substantial investments in the facility, with the total investments made by the franchisee  
23 and related entity totaling up to \$12,273,000. [Exh. 140, p. 4.]

24 As a further example of the factual dissimilarities in the cases cited to by Respondent,  
25 Respondent also cites to *Ormsby Motors v. General Motors Corp.*, 842 F. Supp. 344 (N.D. Ill.  
26 1994). In *Ormsby*, an audit conducted on the dealership in that case revealed 80 fraudulent warranty  
27 repair claims in a two-week period and an additional 20 claims made to the manufacturer, General  
28 Motors, during a one-year period for paint repair work in amounts that exceeded the amounts the

1 dealership was actually billed. (*Id.* at p. 347). Again, the sheer number of violations in *Ormsby*  
2 outnumbers those found in Protestant’s case. Moreover, in contrast to *Ormsby* where the court  
3 acknowledged that the “evidence demonstrates that what occurred was more than an isolated  
4 incident and that [dealership] officials took no corrective action even after repeated reports by GM  
5 of claims problems” (*Id.* at p.351), the undisputed record in this case demonstrates that Protestant  
6 has implemented new internal dealership policies, including policies designed to ensure compliance  
7 with the NRSP in March 2011, *before* the audit even occurred in April 2011 and before Respondent  
8 made any allegations as to the violation units. [Vol. VIII, 132:24-134:15 (Espinoza).]

9 Not only are the cases that Respondent cites in its brief non-binding on this Board, they are  
10 unpersuasive. Instead, Judge Wong’s recent decision that was upheld by the Board to sustain the  
11 termination protest in *Laidlaw’s* is instructive and should serve as a guide in sustaining the protest in  
12 this case.

13 b. Protestant has adequately shown that it transacts a more than adequate amount of  
14 business compared to the business available to it.

15 Respondent contends that Protestant is an “average” performing dealership [Resp. Brief, p.  
16 18], ignoring the plethora of factual findings indicating otherwise. As discussed in more detail in  
17 Protestant’s Opening Brief, Respondent does not dispute that Protestant is properly performing in  
18 terms of its sales volume or that there are any concerns with Protestant’s sales performance, other  
19 than the allegations arising from this Protest. [RT Vol. I, 210:17-211:1 (Kennedy).] Jim Sorensen,  
20 Protestant’s District Manager, testified that he has never voiced any complaints over the three years  
21 (2011-2008) with respect to Protestant’s sales or performance within its dealer assigned territory.  
22 [RT Vol. III, 199:21-23 (Sorensen); Exh. 565 (pgs. 27-30; excerpts of Sorensen deposition).]  
23 Indeed, at no point in the last two years has Respondent contacted Protestant regarding any  
24 deficiencies in performance. [RT Vol. IV, 92:16-93:2 (Stewart).]

25 The amount of business transacted by the Protestant relative to the business available to  
26 the dealership is comparatively high. According to Respondent’s sales ranking report, as of January  
27 3, 2012, Protestant ranks 107 out of the entire Harley-Davidson national dealer network of 678  
28 nationwide dealerships, in its sale of pleasure vehicles, which are vehicles sold to the end user.  
Protestant is ranked number two in its district relative to pleasure vehicles. [RT Vol. IV, 62:1-12

1 (Stewart); Exh. 278.] According to Protestant's January 2012 Dealer Retail Excellence Report,  
2 Protestant is ranked 86th out of 678 nationwide Harley-Davidson dealership in new vehicle unit  
3 retail sales and 68th out of 681 dealerships in new vehicle net sales. [RT Vol. IV, 65:13-22  
4 (Stewart); Exh. 550.]

5 Protestant has received numerous recognitions from Respondent for meeting and exceeding  
6 performance expectations. Respondent's Bar and Shield Award Program is an awards program for  
7 dealers based on excellence in retail sales performance, representation of the brand and customer  
8 experience in the current year in a given region. A dealer that falls into the top four in the region  
9 receives a Gold award; a dealer that falls in the next eight rankings receives a Silver award; and a  
10 dealer that falls in the next twelve rankings receives a bronze award. Only 25 stores across the  
11 country receive a Gold Bar and Shield Award. Dealers are then provided a plaque of recognition  
12 and are taken on dealer incentive trips to a location pre-determined by Respondent. [RT Vol. III,  
13 189:17-190:2; 197:1-14 (Sorensen).] Protestant received Bar and Shield Awards for performance  
14 excellence in 2009, 2010 and 2011. [RT Vol. III, 19:3-11 (Sorensen).] In 2006 to 2007, Protestant  
15 sold 1,400 new and used motorcycles and had an estimated \$32 million in revenue. [RT Vol. V,  
16 171:8-10 (J. Dabney).]

17 Thus, any claim that Protestant is an "average" performing dealership is easily defeated by  
18 even a cursory review of Protestant's recent performance metrics and its long-standing history as a  
19 successful Harley-Davidson dealership.

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

22 i. *Any purported recoupment of investment by Protestant is irrelevant in*  
23 *determining the nature of investments necessarily made and obligations*  
*incurred.*

24 Respondent contends that Protestant did not prove any significant investment in the  
25 franchise, permanent or otherwise, under Vehicle Code Sections 3061(b) and (c). Specifically,  
26 Respondent contends that the Dabney family has "recouped any investment made" and therefore  
27 there is no loss if the family chose to sell the dealership [Resp. Brief, pp. 18-19.] Whether  
28 Protestant has recouped its investment is irrelevant in analyzing these factors, as the unambiguous

1 statutory language only seeks to evaluate the nature of investments made and obligations incurred,  
2 not whether such investments have since been regained. Nonetheless, any purported recoupment by  
3 the Dabneys from sales revenue only serves to show the financial success of the dealership since its  
4 establishment in 1974. As discussed at length in Protestant's Opening Brief, Protestant's  
5 investments made and obligations incurred have been substantial and Respondent's brief does not  
6 challenge this finding.

7 *ii. Protestant's goodwill estimate is relevant to the evaluation of the good cause*  
8 *factors, but it is not the only measure of loss by the dealership.*

9 Respondent also contends that Protestant's loss of \$4 million in goodwill is not relevant  
10 under the Section 3061 analysis because this goodwill figure is not an "investment made by the  
11 dealership." Respondent's contention does not hold water. The purpose of calculating goodwill is  
12 not to compensate Protestant for its termination, but instead, is to establish a good cause factor that  
13 does not require the same specificity as the calculation of damages. Goodwill is an asset of a  
14 business that may be bought and sold in connection with the business. As mentioned above, Vehicle  
15 Code § 3061 states "the board shall take into consideration the existing circumstances, including,  
16 but not limited to, all of the following..." Section 3061 mandates that all circumstances  
17 surrounding the franchise be considered and to be meaningful and to honor this statutory mandate,  
18 consideration and exploration of the totality of investments made and permanency requires  
19 assessing intangible assets of the franchise, such as potential goodwill loss if Protestant is  
20 terminated. Accordingly, the goodwill value is highly relevant to the good cause evaluation.

21 Moreover, loss of goodwill is only one component of the loss incurred by the dealership if it  
22 is terminated. Termination of Respondent's dealership will also result in a loss of 30% of the  
23 facility value of \$4,000,000, which is \$1,200,000. Combined with the complete loss of the goodwill  
24 or franchise value of \$4,000,000, the total loss by sustained by Protestant if the dealership is  
25 terminated is \$5,200,000. [RT Vol. IX, 88:24-101:12 (Woodward); Exh. 140, p. 6-7.] Accordingly,  
26 the goodwill figure of \$4,000,000 is relevant to the permanency of investment analysis, but it is not  
27 the only type of loss that Protestant will incur, contrary to Respondent's contention.

28

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

3                   Respondent contends that selling motorcycles to grey market retailers compromises several  
4 important aspects of Harley-Davidson's business practices. Specifically, Respondent argues that (1)  
5 customer safety and satisfaction with the Harley-Davidson brand are compromised if the vehicle is  
6 not properly set-up and tested pursuant to the pre-delivery inspection ("PDI") procedures; (2) failure  
7 to follow the NRSP implicates the integrity of Harley-Davidson's distribution network, specifically  
8 as to product allocation and the efforts of authorized Harley-Davidson dealers; (3) grey market  
9 resellers undermine the efforts of Harley-Davidson to ensure compliance with state, federal and  
10 foreign laws and regulations; (4) grey market activity compromises the value of the Harley-  
11 Davidson brand; and (5) the public will not be inconvenienced by a temporary closure of the  
12 Riverside point. As set forth below, Respondent's contentions require examination of several  
13 significant factors that Respondent has failed to consider.

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

15                   Respondent contends that customer safety and satisfaction are compromised when a  
16 motorcycle is disassembled, shipped overseas and then reassembled by a grey market reseller,  
17 without conducting a proper PDI pursuant to Respondent's PDI Manual, and then resold to a  
18 customer. Respondent argues that the customer's safety and satisfaction may be implicated if the  
19 motorcycle is reassembled following its export. [Resp. Brief, pp. 50-59.] This analysis, however,  
20 requires a preliminary consideration. In order to analyze the potential harm to a customer, one must  
21 consider *what the customer would have purchased instead of purchasing the exported motorcycle*.  
22 Specifically, Protestant's expert, Edward Stockton, testified that Respondent has a tendency to  
23 overstate the harm from Protestant's exports by not making this important distinction. Mr. Stockton  
24 testified:

25                   21 A.     The proper consideration of harm, if any, from  
26                   22 the violation units here is to compare the impact on the  
27                   23 relevant parties, Harley-Davidson, the buyers, potential  
28                   24 dealers in those countries, anybody who could be  
29                   25 economically affected.

30                   1         The proper way to assess harm, if any, is to  
31                   2 compare their outcomes given that they purchased an NRSP  
32                   3 bike versus if they had not. So an integral component is

4 the bike that they otherwise would have purchased. And  
5 here are some things to consider.

6 To make a finding or offer an opinion that safety  
7 is an issue, you would also have to opine not that a grey  
8 market bike is less safe than a bike bought at an  
9 authorized dealer in the United States, but it's less safe  
10 than whatever bike that the customer would have purchased  
11 in Viet Nam. That's a very different standard.

5 [RT Vol. IX, 203:19-204:11 (Stockton).] Accordingly, the potential harm to the customer is  
6 attenuated by the important consideration of what the customer *would have purchased* in a  
7 developing nation in lieu of the exported motorcycle. Since the possibility exists that the vehicle  
8 that the customer would have purchased in a developing nation is actually *less safe* than the  
9 exported motorcycle, the potential harm to the customer from the purchase of an exported vehicle  
10 must be reduced since it is highly speculative and only operates under the assumption that the  
11 exported motorcycle is *less safe* than any alternative vehicle the customer would have purchased.  
12 In short, there is no basis to conclude, as Respondent does, that a disassembled motorcycle is any  
13 safer or less safe than the alternative motorcycle.

14 Indeed, Respondent testified that there have been no customer complaints or reported  
15 injuries resulting from Protestant's violations, no notices from any government entity for export of  
16 non-homologized vehicles, no evidence of quantifiable brand damage caused by violations and no  
17 complaints from other dealers, either domestically or internationally. [RT Vol. II, 15:14-16:12  
18 (Kennedy); Vol. V, 45:13-18; 77:12-18 (Hanssens).]

19 Further, there has been no monetary loss or damage sustained by anyone (other than the  
20 Dabney family) as a result of Protestant's violations of the NRSP as reflected by Respondent's lack  
21 of evidence regarding any such loss and absence of any estimate of the possible existence or extent  
22 of any such loss. Respondent intimated, but did not prove, that motorcycles exported were  
23 disassembled and even then there is no evidence or proof of any kind that there was any injury or  
24 monetary loss. [RT Vol. V, 56:5-13 (Hanssens).] Indeed, Mr. Stockton testified that any alleged  
25 harm to authorized Harley-Davidson dealerships overseas as a result of Protestant's violation units  
26 is purely speculative and remote:

27  
28 14 So if you look at it generally you can say what  
15 grey market exports could do, that they could discourage

16 investment in an authorized facility or diminish the  
17 investment. But when you look specifically at the case  
18 here, it's quite speculative and I think very remote that  
19 these units that were exported in 2010 had any impact on  
20 2013 or later.

4 [RT Vol. IX: 205:14-19 (Stockton).]

5 In essence, Respondent has given no indication that it has suffered any direct damages,  
6 monetary or otherwise, as a result of Protestant's purported violations. The termination is  
7 disproportionate to the harm suffered by Harley-Davidson and the harm to Harley-Davidson is  
8 overstated, given that the magnitude of the export problem lacks clarity. [RT Vol. IX, 203:7-206:12  
9 (Stockton).]

10 Respondent also claims that customers may be injured if they are not notified of Harley-  
11 Davidson's open recall campaigns through the contact information submitted by Protestant on the  
12 SWR forms to Respondent. [Resp. Brief, p. 21-23.] However, this argument neglects the fact that  
13 all safety recall campaigns are reported to the National Highway Traffic Safety Administration  
14 ("NHTSA"). Therefore, even if the ultimate customer did not receive notice of the recall campaign  
15 through the customer registration information that Protestant submitted to Respondent via the SWR  
16 form, information regarding the recall campaigns is equally available to members of the public on  
17 the NHTSA website. Those recall campaigns are also reported to foreign governments in every  
18 country where Harley-Davidson markets its products. [RT Vol. III, 139:21-140:12 (Verduyn); Vol.  
19 III, 137:24-138:2 (McGowan).] Significantly, Respondent's principal engineer, David McGowan,  
20 testified that a greater number of violation units with pending recall notices are needed to have an  
21 ability to predict than an actual injury or accident would take place within the population of  
22 motorists. In other words, because the number of violation vehicles with pending recall notices are  
23 so few in this case, every assertion of accident or injury by Respondent in the population is purely  
24 hypothetical. [RT Vol. III, 136:7-138:8 (McGowan).]

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

26 Respondent argues that exporting vehicles compromises the integrity of Harley-Davidson's  
27 distribution network and product allocation. Respondent contends that by exporting motorcycles in  
28

1 violation of the NRSP, grey marketers adversely erode dealer sales and profit margins for authorized  
2 dealers in California. [Resp. Brief, p. 24.]

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

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

13 Respondent argues that the NRSP ensures compliance with state, federal and foreign laws  
14 and regulations, including compliance with laws related to exporting and importing and laws related  
15 to proper vehicle homologation, or the manufacture of a vehicle to be in compliance with the laws,  
16 regulations and standards of a particular state or country. Non-compliance with the NRSP,  
17 Respondent contends, may result in potential violations of state, federal and foreign laws and  
18 regulations [Resp. Brief, p. 23.] However, this argument is premature as there has been no  
19 monetary loss or damage sustained as a result of Protestant's violations of the NRSP as reflected by  
20 Respondent's lack of evidence regarding any such loss and absence of any estimate of the possible  
21 existence or extent of any such loss. Similarly, Respondent introduced no evidence of any fines,  
22 sanctions, or penalties imposed on Respondent by foreign governments for units sold by  
23 unauthorized sellers in foreign countries.

24 Furthermore, Respondent's contention neglects the fact that Protestant has developed and  
25 implemented a comprehensive program to ensure compliance with Respondent's NRSP. Protestant  
26 has completely cured the contract breach arising from the NRSP violations. First, and significantly,  
27 there have been no NRSP violations since Summer 2010, approximately 8 months prior to the audit  
28 of Protestant's records. Mr. Veik stopped his scheme in June 2010, well before the April 2011 audit

1 conducted by Respondent. [RT Vol. VIII, 15:20-16:7 (Veik); Exhs. 114, 4 (deal jacket showing sale  
2 of last violation unit was June 22, 2010.)]

3 Second, Mr. Veik was removed as general manager of the dealership in February 2011, prior  
4 to the audit and Skip Fordyce is now under the oversight of a new general manager, Mr. Espinoza.  
5 In addition, the management and employee structure has been reorganized so that Jay has contact  
6 with not only the general manager, but also several lower level managers so that he is involved in  
7 monitoring and managing dealer operations. [RT Vol. VI, 53:23-54:5; 55:22-56:15 (J. Dabney);  
8 Exh. 502 (new organizational structure of dealership implemented in March 2011, prior to  
9 Respondent's audit); Vol. VIII, 132:24-134:15 (Espinoza).] Mr. Espinoza implemented new  
10 internal policies, including policies designed to ensure compliance with the NRSP in March 2011,  
11 before the audit even occurred in April 2011. [Vol. VIII, 132:24-134:15 (Espinoza).]

12 *iv. Protecting the Harley-Davidson brand*

13 Throughout its brief and the hearing in this matter, Respondent has emphasized the  
14 importance of protecting the Harley-Davidson brand, which it asserts is affected by all of the  
15 concerns discussed above. Specifically, Respondent claims that in order to protect the brand,  
16 compliance with the NRSP is critical. [Resp. Brief, p. 24.] However, as discussed in Protestant's  
17 Opening Brief, Respondent has failed to establish that it has consistently enforced the NRSP as to  
18 all Harley-Davidson dealerships. Respondent contends that it has consistently enforced termination  
19 proceedings against known violators of its NRSP. [RT Vol. I, 174:1-5 (Kennedy); Vol. II, 70:1-13  
20 (Kennedy).] However, Protestant's expert, Mr. Stockton, demonstrated how inappropriate it is for  
21 Respondent to characterize its enforcement of its NRSP as consistent. This is because consistent  
22 enforcement is only levied against the dealers who are almost coincidentally caught violating the  
23 NRSP. This could mean that there may be other dealers who are violating the policy but have just  
24 not been discovered. These dealers, because they have not been caught, are not subject to  
25 enforcement of the policy. Therefore enforcement of the policy is only consistent against dealers  
26 who were discovered, but is not consistent against all other violators of the policy.

27 It is unknown if Respondent has even audited every dealership that they know is exporting,  
28 or is suspected of exporting, vehicles. [RT Vol. V, 52:10-17 (Hannsens).] Despite his proffered

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

12 *v. Closure of the dealership and the impact on the public*

13 Lastly, Respondent argues that terminating Protestant's dealer contract will not  
14 inconvenience customers because Respondent intends to fill Protestant's point with a new dealer of  
15 comparable quality. [Resp. Brief, pp. 24-25.] First, merely because Respondent intends to fill  
16 Protestant's point if the franchise is terminated does not mean that it will readily find a new dealer  
17 upon termination or that a dealer has already been identified. It is unavoidable that there will be a  
18 period wherein the facility will be vacant. The value of the property will likely decrease as a result  
19 of this vacancy because it is a single-use facility intended mainly for Harley-Davidson motorcycle  
20 sales. [RT Vol. IX, 172:12-173:10 (Stockton).]

21 Second, and significantly, Respondent ignores the many services and programs that make  
22 Protestant a unique and irreplaceable asset in the community. Respondent does not dispute that  
23 Protestant provides many significant services and charitable events to its local community, in  
24 addition to the sale of motorcycles. As discussed at length in Protestant's Opening Brief, such  
25 events and services include the "Rider's Edge" motorcycle training program; participation in  
26 Harley-Davidson's "pilot" programs; fundraisers and motorcycle rallies for important local  
27 organizations, such as the Riverside National Cemetery Support Committee; fundraisers for local  
28 humane societies and animal shelters; fundraisers and "walks" for diabetes and cancer awareness; an

1 active Harley-Davidson Owner's Group ("HOG") chapter; and the continued employment of up to  
2 70 employees, to name a few. [See Prot. Brief, pp. 18-22.] In essence, the termination of Protestant  
3 would leave a considerable void for Protestant's staff, community and clientele. Respondent's brief  
4 notably neglects to acknowledge these unique community outreach programs and organized events.

5 Losses to the customer base would be significant if Protestant was terminated. Customers  
6 would no longer have the facility and the comforts and the amenities that come with use of the  
7 facility, such as the "Rider's Edge" program, the rental opportunities, the specially-trained  
8 technicians, the HOG chapter operated by the dealership, and the loss of use of the facility for the  
9 charitable events. At the hearing, Mr. Stockton summarized the impact of the loss to the  
10 community, and staff:

11 6 If this dealership were to be closed, by way of  
12 7 example, there would be an extra loss. Mr. Woodward came  
13 8 up with five-and-a-quarter million dollars. But whatever  
14 9 number you decide is appropriate that would be the loss to  
15 10 this dealership. There would also be a windfall for  
16 11 either the successor dealer or the surrounding dealers who  
17 12 are able to benefit from the ongoing value of the Skip  
18 13 Fordyce investment that Skip Fordyce was no longer in  
19 14 place to benefit from.

20 15 In a public welfare perspective if the dealership  
21 16 were not replaced, or at least during the time that it was  
22 17 not replaced, there would be broken relationships with  
23 18 customers, those who have voted with their feet and voted  
24 19 with their wallets to choose the relationship with this  
25 20 dealership. There would be losses there.

26 21 The employees of the dealership for at least some  
27 22 period of time would be out of work. So these things,  
28 23 except in a very distant sense, are not related to what  
29 24 Harley-Davidson's business value or business perspective  
30 25 would be.

31 [RT Vol. IX, 208: 6-25 (Stockton).]

32 Each of Protestant's services and programs, including those discussed at length in  
33 Protestant's Opening Brief, were implemented and developed at Protestant's establishment and are  
34 unique to its facility. Many of these community-based services would no longer exist if Protestant's  
35 dealership was replaced by a new dealer as these services were dealer implemented and exclusive to  
36 Protestant. Moreover, one aspect that certainly cannot be replaced by a new dealer is the goodwill  
37 and loyalty of customers to the "Skip Fordyce Harley-Davidson" name, which has become a

1 significant fixture in the community. In fact, Respondent's brief states: "Riverside sells more than  
2 half of its motorcycles outside of its territory—in the most recent report, it made 61% of its sales  
3 outside its territory." [Resp. Brief, p. 25.] The fact that many of Protestant's customers originate  
4 from outside territories, rather than patronize more local dealerships, is a further testament to  
5 Protestant's ability to provide high customer satisfaction, as well as value to the brand and to the  
6 public.

7 e. Respondent does not dispute that Protestant has adequate motor vehicle sales and  
8 service facilities, equipment, vehicle parts and qualified personnel to reasonably  
9 provide for the needs of the consumers and has been and is rendering adequate  
10 services to the public

11 Respondent contends that "Riverside offered little or no evidence on factor (e)." [Resp.  
12 Brief, p. 25.]. This statement is patently false and ignores the undisputed evidence on the record,  
13 including evidence submitted by Respondent itself. Respondent does not dispute that Protestant  
14 maintains an adequate facility that is in compliance with Harley-Davidson's requirements. [RT Vol.  
15 III, 199:4-14 (Sorensen).] In fact, Respondent is not aware of any inadequacies in Protestant's staff  
16 as to their size, training or capacity to handle customer service or with regard to any deficiencies in  
17 the number of trained technicians. [RT Vol. III, 199:24-200:11 (Sorensen).] Furthermore,  
18 Respondent asserts that Protestant has maintained an adequate inventory of new vehicles at its  
19 dealership. [RT Vol. III, 200:12-18 (Sorensen).] Between 2008 and 2011, Respondent has not  
20 observed any inadequacies or substandard performance in any of Protestant's programs or services  
21 such as Rider's Edge. The only inadequacy, that was promptly addressed and remedied by  
22 Protestant, was a facility assessment as to the lighting at the dealership. [Exh. 565 (p.34-35;  
23 excerpts from Sorensen deposition).] In sum, it is indisputable that Protestant has adequate motor  
24 vehicle sales and service facilities, equipment, vehicle parts and qualified personnel to reasonably  
25 provide for the needs of consumers.

26 In a futile attempt to create a disputed fact where none exists, Respondent asserts that  
27 Protestant's most recent service satisfaction scores show that it is in decline and below the  
28 comparables in its district, region and the nation. [Resp. Brief, p. 25.] As an initial matter, the  
service satisfaction scores cited to in Respondent's brief are based on a very limited number of  
respondents. For example, scores for the second quarter of 2011 cited by Respondent are based on

1 only about 50 respondents, which does not make them very reliable indicators of satisfaction. In  
2 fact, Protestant's expert, Edward Stockton, testified that such customer service questionnaires must  
3 often be taken "with a grain of salt" because there are frequently sampling issues as customers often  
4 do not return the surveys. [Vol. IX, 184:5-187:9 (Stockton).] However, Protestant's "overall  
5 dealership ratings" from 2009 to 2011, each of which are based on a higher number of respondents  
6 (about 116) and therefore are more accurate than the metrics cited in Respondent's brief, have been  
7 comparable or consistently higher relative to its group, district, region and nationwide rankings.<sup>4</sup>

8 [See Exh. 571, Tab 8; Exhs. 569J and 569L.] Indeed, Mr. Stockton testified as follows:

9 19 Q. And the ownership experience survey, do you have  
20 an evaluation of that?

10 21 A. I do. The dealership is more often than not  
22 higher than the group averages, sometimes below, sometimes  
11 23 above. But, your Honor, I really wouldn't draw a  
12 24 distinction between the purchase experience and the  
25 ownership experience, even though the dealership is  
13 1 universally above on one and sometimes above, sometimes  
14 2 below on the other. What I would say is that there's no  
3 evidence that the customers are unhappy or that there's  
15 4 any sort of deficiency in customer handling. I would say  
5 that the truer average dealership is a pretty broad group  
16 6 in a survey like this, and my expectation is if we really  
7 knew how happy the customers were Skip Fordyce would be  
17 8 solidly in the middle, maybe a little bit towards the  
18 9 upper half.

19 [Vol. IX, 186:19-187:9 (Stockton).] Accordingly, it remains undisputed that Protestant has  
20 adequate motor vehicle sales and service facilities, equipment, vehicle parts and qualified personnel  
21 to reasonably provide for the needs of its customers and is rendering more than adequate services to  
22 the public.

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

24 Protestant has substantially fulfilled Respondent's warranty obligations and any alleged non-  
25 compliance is insufficiently material to warrant termination. Respondent claims that Protestant has  
26 failed to fulfill its warranty obligations to Harley-Davidson by submitting fraudulent SWR ["Sales

27 \_\_\_\_\_  
28 <sup>4</sup> The so-called "phony" ownership experience surveys submitted by Lester Veik on behalf of the dealership  
account for a negligible number of total surveys submitted. Only approximately 4 such surveys were  
submitted by Mr. Veik, without the Dabneys' knowledge or consent. [Exhs. 345-346.]

1 and Warranty Registration”] information. [Resp. Brief, pp. 11-15; 27-28.] Section 3061(f) of the  
2 Vehicle Code refers to the failure of the franchisee to perform “warranty obligations of the  
3 franchisor” that are to be performed by the franchisee. As Judge Wong observed in her proposed  
4 decision in *Laidlaw’s*, submitting the SWR information to Harley-Davidson is an obligation of the  
5 franchisee pursuant to Section F, Service 3. Product Warranty of the General Conditions of Sales  
6 and Service, but is not a “warranty obligation of the franchisor.” There is also no evidence that  
7 Protestant has failed to provide proper warranty services and vehicle repairs to its customers,  
8 pursuant to the statutory language of Section 3061(f).

9       Significantly, as mentioned above, these violation units comprise a negligible fraction of  
10 Protestant’s new motorcycles sold during the same period, namely only 0.80% of total gross profit  
11 earned. [See Exh. 571, Tab 12; RT Vol. IX, 190:13-192:7 (Stockton).] In total, only 35 out of a  
12 total of 966 new units sold were violation units in 2009 and 2010. [RT Vol. IX, 192:8-196:4  
13 (Stockton); Exh. 140.]

14       Furthermore, Respondent’s central concern respecting the SWR forms, which are used to  
15 provide recall information to the customer’s last known address, is that the ultimate customer may  
16 not receive safety recall campaign information. However, as discussed above, this concern is  
17 alleviated through an alternative method without reliance on the SWR form. Specifically, the safety  
18 recall campaigns that appear on the list of Protestant’s audit report (campaigns 0141, 0144 and  
19 0145) were all reported to the NHTSA. [Exh. 200.] Therefore, even if the ultimate customer did  
20 not receive notice of the recall campaign through the customer registration information that  
21 Protestant submitted to Respondent via the SWR form, information regarding the recall campaigns  
22 was equally available to members of the public on the NHTSA website. Again, Respondent has set  
23 forth no evidence that there have been any injuries arising from the violation units sold that have  
24 pending recall notices. There is also no evidence that Protestant has failed to provide proper  
25 warranty services and vehicle repairs, pursuant to the statutory language of Section 3061(f).<sup>5</sup>

26 <sup>5</sup> Respondent contends that Protestant’s conduct violates Vehicle Code Section 11713.1(u), which requires  
27 Protestant to provide Harley-Davidson with accurate warranty registration information. [Resp. Brief, p. 28.]  
28 However, any purported violation of Vehicle Code Section 11713.1(u) is inapplicable and irrelevant in the  
evaluation of the good cause factors. Specifically, Section 11713.1(u) is not a warranty obligation of the  
franchisor-Respondent and not a relevant consideration in evaluating good cause factor 3061(f).

1 Finally, Respondent contends that Protestant breached its obligation to perform pre-delivery  
2 inspections ("PDI"). [Resp. Brief, pp. 10-11.] Respondent misrepresents the facts by misleadingly  
3 stating that Protestant did not perform PDIs on the violation vehicles. In actuality, however,  
4 Protestant's employees performed the PDIs on the violation vehicles, but did not complete the PDI  
5 forms for those inspected vehicles. Jason Wilmoth, Riverside's Finance & Insurance Manager,  
6 testified to this at the hearing, stating that the dealership has also implemented procedures to ensure  
7 that all steps of the PDI process are completed accurately in accordance with corporate policies,  
8 including completion of the PDI form:

9 11 BY MR. DOLENAC:

10 12 Q. Mr. Wilmoth, have you ever delivered a motorcycle  
11 13 yourself?

12 14 A. I have.

13 15 Q. And while working at Skip Fordyce have you seen  
14 16 salesmen deliver motorcycles?

15 17 A. Yes.

16 18 Q. To the best of your knowledge have you seen, on  
17 19 those occasions where you've seen salesmen deliver the  
18 20 motorcycles, have you witnessed them performing the  
19 21 procedures specified on the right-hand side that they were  
20 22 supposed to perform?

21 23 A. Yes.

22 24 Q. And this was back in the 2009-2010 time frame?

23 25 A. Yes.

24 1 Q. Now, with respect to actually completing this PDI  
25 2 form, has the procedure changed within the dealership?

26 3 A. Yes. Now I actually have this. When I'm going  
27 4 over the break-in period with them and the owner's manual,  
28 5 I make sure they are satisfied and they don't have any  
6 questions with either of those. And then from there this  
7 sheet is -- I hand this sheet to the salesperson, and then  
8 at that point they will go over the motorcycle with them.  
9 Once the salesperson is done going over the motorcycle,  
10 they would then check these boxes and have the customer  
11 sign the PDI sheet that they accept it and they are ready  
12 to go.

13 [RT Vol. VII, 127:11-128: 12 (Wilmoth).] Accordingly, Protestant has substantially fulfilled  
14 Respondent's warranty obligations and any alleged non-compliance is insufficiently material to  
15 warrant termination.

1 **IV. CONCLUSION**

2 Respondent has failed to show any evidence of actual injury as a result of violation units.  
3 Moreover, Respondent has failed to show that Protestant's violations were the result of deliberate  
4 conduct by the dealer operator and the owners of the dealership. Protestant has successfully cured  
5 the violations by implementing and continuing to refine enforcement measures to ensure continued  
6 compliance with Respondent's corporate policies as a result of the concealment and unauthorized  
7 acts of Mr. Veik.

8 Moreover, Respondent has failed to establish that termination is contractually appropriate  
9 under the terms of the dealer agreement and the covenant of good faith and fair dealing. Under the  
10 facts of this case, any violation of the NRSP and/or the dealer agreement resulting from policy  
11 violations is not of a sufficient extent to establish good cause under Section 3061(g), as reflected by  
12 an analysis of the materiality of the alleged breach. On the other hand, the balance of all of the other  
13 good cause factors, with the demonstrated loss to be sustained by the dealership, the lack of any  
14 reason to suspect future violations will take place and the demonstrated potential for injury to the  
15 public as a result of termination, firmly establish that the protest should be sustained.

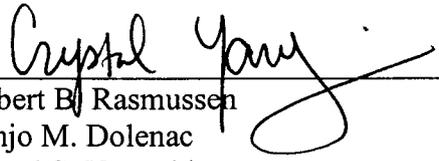
16 Based on the foregoing, Protestant respectfully requests that the Board find that Respondent  
17 failed to establish that good cause exists to terminate Protestant's franchise and that Protestant's  
18 protest be sustained unconditionally, or upon those conditions identified in Protestant's Opening  
19 Brief.<sup>6</sup>

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25 <sup>6</sup> In its Opening Brief, Protestant requested that if the Board is not inclined to sustain the protest, the protest  
26 should be overruled conditionally, with the condition being that Protestant should be provided time to sell the  
27 dealership business to a qualified third party buyer. Any argument by Respondent that Protestant has had  
28 adequate time to sell or that Protestant would be prejudiced by any delay in selling is unavailing. To  
propound such an argument means that Protestant must decide to forgo its right to protest or knowledge of  
the outcome of this protest in order to reserve its right to sell its dealership to a qualified buyer. Any  
anticipated argument that Respondent would be prejudiced is meritless in that Protestant has operated during  
the pendency of this protest for months without issue and has implemented procedures in an effort to ensure  
compliance with Respondent's policies and prevent future violations.

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DATE: July 18, 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 July 18, 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.

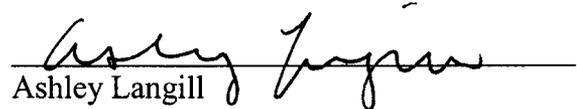
electronically sending  by email or  by fax each page of each document and this proof of service to the parties served at their last known email address or fax numbers as listed below from a email or fax system located at my business address which reported no errors and which, if by fax, produced a transmission 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 July 18, 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 REPLY 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)

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