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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
PROPOSED FINDINGS OF FACT**

Protestant Riverside Motorcycle, Inc. dba Skip Fordyce Harley-Davidson ("Protestant") hereby submits the proposed findings of fact in the above-entitled matter. References to the administrative record are abbreviated.¹ The *Vehicle Code*² section 3060 protest concerns the proposed termination of Protestant's franchise pursuant to Respondent Harley-Davidson Motor Company, Inc.'s ("Respondent") notice of termination.

¹ RT refers to Reporter's Transcript.

² All statutory references are to the California *Vehicle Code*, unless otherwise indicated.

1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

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

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

8 2. The dealership sold many brands over the years, but by the 1970s, only Harley-Davidson
9 and Honda remained. [RT Vol. V, 109: 23-110:1 (J. Dabney).]

10 3. 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).]

13 4. The new facility was approximately 14,000 square feet, which was substantially large for
14 that time. [RT Vol. V, 110:25-111:9 (J. Dabney).]

15 5. In September 1991, however, Jud was diagnosed with Parkinson’s disease and a very
16 aggressive form of brain cancer. He died in July 1992. [RT Vol. V, 105:13-20 (J. Dabney).]

17 6. Soon after his father’s death, Jud’s son, Judson (“Jay”) Dabney, II, took over the
18 business as general manager and each of Jud’s children, Ty, Marshall and Susan, assumed
19 operational duties, including Jay, who assumed dealer principal and interim general manager, a
20 position which was subsequently assumed by Jay’s brother, Ty. [RT Vol. V, 118:7-120:11.]

21 7. In 1993, as part of their decision to make Harley-Davidson the premier brand to sell at
22 the dealership, Protestant invested \$250,000 in remodeling the store to convert its retail space into a
23 “designer store” through a program that Harley-Davidson offered with a design firm. The newly
24 remodeled store won many awards for excellence in design and was very successful. [RT Vol. V,
25 121:7-24 (J. Dabney).]

26 8. In or around 1997, Jay focused solely on his role as dealer principal, and his brother Ty
27 was appointed interim general manager. Jay’s brother Marshall served as sales manager for the
28 dealership. [RT Vol. V, 105:21-25 (J. Dabney).]

1 9. Jay's sister Susan managed the general merchandise department. [RT Vol. V, 119:24-
2 120:11 (J. Dabney).]

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

8 11. In 2000, the Dabney family changed the dealership's corporate and organizational
9 structure. The dealer contract was amended so that Jay, Ty, Marshall and Susan became members
10 of the dealership's Board of Directors, and each assumed at 12.5% ownership interest in the
11 dealership, with the remaining 50% being owned by the trust of Jay Dabney's mother, Ida Dabney.
12 The trust is a 50% shareholder of Riverside Motorcycle, Inc. and Ida's children are the beneficiaries
13 of that trust. Jay Dabney is the trustee of the trust. [RT Vol. VI, 77:25-79:6; 82:7-24 (J. Dabney);
14 Vol. VII, 40:25-43:3 (M. Dabney); Exh. 34.]

15 12. Notwithstanding these changes, Protestant's business is, and has always been, family
16 owned. [Exh. 501.]

17 13. 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 14. 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).]

25 15. Jay is a member of the Southern California Harley-Davidson Dealers Association and
26 was vice president of the organization from 1995 to 1996. He is also a member of the California
27 Motorcycle Dealers Association. [RT Vol. V, 146:17-23 (J. Dabney).]

28

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

2 16. Lester Veik has been a childhood family friend of the Dabney family for over 40 years
3 and was appointed as general manager of Skip Fordyce by the Dabney family. Prior to his
4 appointment as a general manager, in 1996, Mr. Veik began working part-time in retail sales to
5 assist the Dabney family. [RT Vol. VII, 183:24-184:15; 186:21-187:12 (Veik).]

6 17. In 1998, the Dabney family asked Mr. Veik to manage the dealership’s service
7 department. [RT Vol. VII, 185:17-186:3 (Veik).]

8 18. Impressed with his performance, the family asked Mr. Veik to become general manager
9 of the dealership in 2000. [RT Vol. VII, 187:8-12 (Veik).]

10 19. Mr. Veik managed the dealership from 2000 to February 2011. [RT Vol. VIII, 123:17-25
11 (Espinoza).]

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

13 20. Protestant’s Dealer Contract incorporates the General Conditions of Sales and Service
14 agreement and the General Conditions of Sales and Service agreement incorporates the Non-Retail
15 Sales Policy. [Exhs. 34-35.]

16 21. The General Conditions of Sales and Service includes a “Non-Retail Sales” provision
17 which states that “Dealer shall not sell Harley-Davidson Products for resale to non-retail customers,
18 except to other United States authorized dealers in accordance with Seller’s written policies.” [Exh.
19 35, pg. 2.]

20 22. In contrast to the “Non-Retail Sales” provision found within the Dealer Agreement, the
21 Non-Retail Sales Policy (“NRSP”) is a separate, very detailed set of rules issued by Respondent
22 prohibiting the sale of new or previously unregistered motorcycles to a customer who intends to
23 resell the vehicle or who intends to ship the motorcycle outside the United States. The NRSP does
24 not prohibit the export of, or otherwise apply to, used motorcycles. [Exhs. 47-52.]

25 23. Vehicle Code Section 655 defines a used motorcycle as a vehicle that has been: (1) sold
26 or registered with the DMV; (2) sold and operated on the highways of any other state or country; (3)
27 registered with the DMV of any other state or country; or (4) has been operated as an unregistered
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1 demonstrator vehicle in the sales work of a dealer or used by a manufacturer in his or her sales or
2 distribution work.

3 24. In order to boost sales during an extreme downturn in the economic cycle, maintain his
4 job and to continue his rise within the Harley-Davidson dealer network, Mr. Veik began to condone
5 the occasional sales of new Harley-Davidson vehicles for export in violation of the NRSP. [RT Vol.
6 VI, 17:17-19:24; 32:6-19 (J. Dabney); Vol. VIII, 12:24-13:4 (Veik).]

7 25. Specifically, he began directing various sales employees who had no or limited
8 knowledge of Respondent's NRSP to complete motorcycle sales he knew were non-retail sales
9 under the policy. Mr. Veik, for example, directed the F&I Manager, Jason Wilmoth, to leave Safety
10 and Warranty Registration ("SWR") forms blank so that Mr. Veik could obtain names and addresses
11 from dealership employees. [RT Vol. VII, 202:25-204:12 (Veik).]

12 26. Mr. Veik obtained random names and addresses from various dealership employees,
13 including information from those in the business office who had no knowledge of the sales process.
14 [RT Vol. VII, 205:23-208:4 (Veik); Vol. VII, 11:9-21 (Veik).] Mr. Veik would then have those
15 names transferred to the SWR forms to conceal the fact that motorcycles were sold to individuals
16 who intended to export the vehicles, or he would change the customers' names in internal sales logs
17 to conceal the transactions. [RT Vol. VII, 205:23-208:4 (Veik); Vol. III, 4-9 (Veik).]

18 27. Mr. Veik directed Ms. Palmer to input certain names and addresses to be electronically
19 submitted to Respondent as the purchasers of motorcycles, which names Mr. Veik used to conceal
20 his activities in violation of the NRSP. [RT Vol. VII, 95:2-27 (Palmer).]

21 28. Mr. Veik created illusory internal policies to shift blame to lower level dealership
22 employees if violations were ever discovered. [RT Vol. 86:8-87:13 (Veik); Exh. 305 (pgs. 71-72;
23 excerpt from deposition of Darin Goodrich).]

24 29. Mr. Veik actively concealed the violations from Harley-Davidson, Jay Dabney (the
25 dealer principal), and the Dabney family (sole owners of the Protestant). Jay's business philosophy
26 is, and always has been, to fully comply with all of Respondent's policies. [RT Vol. VII 190:3-
27 190:21; 213:8-22 (Veik).]

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1 30. If Jay discovered the violations, Mr. Veik knew that he would be terminated. [RT
2 Vol.VII 213:24-214:8 (Veik).]

3 31. To further assist in masking his indiscretions, Mr. Veik created a work environment
4 whereby any concerns by dealership employees were to be addressed exclusively and handled by
5 Veik personally, thus creating a barrier between the lower level employees and Jay Dabney [Vol.
6 VI, 35:15-40:1 (J. Dabney).]

7 32. Mr. Veik instructed others to transmit false information to Respondent, so that
8 Respondent would not discover violations and in turn inform Jay. [Vol.VII 190:3-190:21; 213:8-22
9 (Veik).]

10 33. Jay was being deliberately shielded and isolated from knowing the truth about the NRSP
11 violations by this environment, as well as by Mr. Veik's alteration of certain internal dealership
12 documents to reflect false information so that Jay would not discovery the violations. [RT Vol. VII,
13 202:25-204:12; 205:23-208:4 (Veik); Vol. VIII, 4-9 (Veik).]

14 34. Mr. Veik does not dispute that he performed these prohibited actions without Jay's
15 knowledge and by intimidating employees to comply, or face possible termination. In fact, he
16 documented his indiscretions in numerous writings, and acknowledged that Jay had no knowledge
17 of the violation units. [Exhs. 46, 64, 69-70.]

18 35. Whether as a matter of conscious or fear of being eventually detected, Mr. Veik stopped
19 his scheme in July 2010, well before the April 2011 audit. [RT Vol. VIII, 15:20-16:7 (Veik); Exh.
20 114.]

21 D. Protestant's Remedial Measures

22 36. Mr. Veik left the dealership in February 2011 to assume a general manager position at an
23 authorized Harley-Davidson dealership in Monterey County in which he had a 25% stake. [Vol.
24 VIII, 82:13-83:7 (Veik); Vol. V, 6:3-7:9).]

25 37. At that time, Glen Espinoza was promoted to general manager at Skip Fordyce. [RT
26 Vol. VIII, 116:9-11 (Espinoza); RT Vol. VI, 10:10-12 (J. Dabney)]

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1 38. Jay discovered that Mr. Veik's management style created an unfavorable and disjointed
2 work environment that was not in line with Jay's vision of the dealership [RT Vol. VI, 7:10-10:9;
3 35:15-40:1 (J. Dabney); Vol. VIII, 132:8-23 (Espinoza).]

4 39. Since then, the management and employee structure was reorganized so that Jay has
5 contact with not only the general manager, but also several lower level managers so that he is no
6 longer isolated from day-to-day operations, but instead is involved in monitoring and managing
7 those operations. [RT Vol. VI, 53:23-54:5; 55:22-56:15 (J. Dabney); Exh. 502 (new organizational
8 structure of dealership implemented in March 2011, prior to Respondent's audit); Vol. VIII, 132:24-
9 134:15 (Espinoza).]

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

13 41. Protestant's District Manager, Jim Sorensen, and Harley-Davidson's lead of its
14 Performance Consulting Group, Ryan Farage, were asked to come to the dealership to spend time
15 with Mr. Espinoza, and Michael Slagle, the assistant sales manager at the time, to train them on the
16 priorities and essential functions of their positions. [RT Vol. VI, 10:21-11:21 (J. Dabney).]

17 42. As part of these internal policies to ensure compliance with the NRSP, Protestant
18 developed a new sales process incorporating each level of management, which was implemented
19 with the help of an experienced outside consultant. [RT Vol. VI, 40:2-47:14 (J. Dabney); Exhs. 74-
20 75.]

21 43. Each of the employees who provided a name that was improperly used on the SWR
22 reports under Veik's leadership, were coached and trained on the SWR reports and NRSP, as well as
23 the new policies implemented by Protestant to ensure compliance with the NRSP. [RT Vol. VI,
24 53:12-22 (J. Dabney).]

25 44. Protestant also developed an audit process that takes place after all the documentation is
26 put together for each transaction. The audit process includes an electronic sign-off indicating that
27 the deal jacket has been reviewed. [RT Vol. VI, 44:4-45:25 (J. Dabney).]

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1 45. Each deal jacket includes a deal jacket checklist that breaks down all documents that
2 needs to be included in the jacket, including the purchase agreement, the completed SWR form, and
3 a purchase receipt. No vehicle is registered via the SWR form until the SWR form is accurately
4 completed and printed and included within the deal jacket. Protestant now also creates a sales log
5 that lists every unit sold and when a vehicle is registered via the SWR process, Protestant ensures
6 that the vehicle is on that sales log list. [RT Vol. VII, 96:24-98:2 (Palmer).]

7 46. Megan Palmer, Protestant's general ledger accountant, testified that she now has far
8 more interaction with Jay Dabney since these policies and procedures were implemented. [RT Vol.
9 105:20-106:4 (Palmer).]

10 47. Protestant also analyzes dealer profitability reports to ensure that the dealership is in
11 compliance with the NRSP. Specifically, Protestant looks for recurring customer names in the
12 reports every month for all finalized deals for that month. Protestant also runs a monthly variable
13 report to retroactively determine whether sales tax has been paid for each particular deal. Since
14 implementing this monitoring process after receipt of the Notice of Termination, there have been no
15 instances where the dealership has violated the non-retail sales policy. [RT Vol. VII, 65:3-68:9 (M.
16 Dabney); Exh. 73.]

17 48. Respondent has never given or provided Protestant with any information as to how to
18 monitor for violations of the non-retail sales policy. [RT Vol. VII, 71:20-72:14 (M. Dabney).]

19 49. Since Mr. Veik's departure and Mr. Espinoza's transition as general manager, there is
20 greater communication between the upper and lower level employees, as well as between
21 departments. The dealership practices an open door policy. The paperwork process has become
22 more efficient and Jay Dabney has an increased presence at the dealership, including at weekly
23 manager meetings. The employees are encouraged to consult with Jay if they have any issues,
24 questions or concerns. [RT Vol. VII18-153:13 (Wilmoth).]

25 E. Audit, Termination and Legal Proceedings

26 50. On or about April 18, 2011, Protestant received a letter from Steve Verduyn, Manager of
27 Dealer Credit and Compliance for Harley-Davidson, which stated that a representative from Harley-

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1 Davidson will arrive at the dealership on April 20, 2011 to “review, copy, and/or obtain the new
2 vehicle sales records of the dealership for the 2009-2011 model years.” [Exhs.62, 71.]

3 51. Protestant fully cooperated with Mr. Verduyn during the course of the on-site audit.
4 [Vol. VI, 13:1-10 (J. Dabney); Exh. 564 (pgs. 27, 32; excerpts from Brian Martin deposition).]

5 52. Once the audit results were provided to Protestant, the dealership increased its
6 monitoring and enforcement efforts. [RT Vol. VIII, 154:8-15 (Espinoza).]

7 53. On June 23, 2011, based on the results of the audit, Protestant received the Notice of
8 Termination of its franchise agreement from Respondent. The Notice identifies 25 violations of the
9 Non-Retail Sales Policy since July 2009.³ [Exh. 63.]

10 54. Mr. Verduyn had obtained this list of vehicles shipped overseas using database
11 information from the National Insurance Crime Bureau. [RT Vol. I, 159:7-25 (Kennedy); Vol. II, 2-
12 18 (Kennedy).]

13 55. In the Notice of Termination, Respondent charged back \$28,285.75 of VIP money from
14 Protestant in relation to violations in the Notice which have been paid back in full by the
15 dealership.⁴ [RT Vol. I, 173:13-18 (Kennedy); Vol. VI, 61:4-5 (J. Dabney); Exh. 63.]

16 56. Protestant did not challenge the chargebacks. [RT Vol. VI, 30:20-23 (J. Dabney).]

17 57. Respondent maintains a so-called incentive program called VIP. This program was
18 formerly known as a holdback, but the terminology changed years ago to VIP. Like a holdback,
19 VIP is earned at the time a dealer purchases a motorcycle. The dealer gets paid whether or not the
20 motorcycle is sold. The VIP program terms do, however, state that “non-retail sales” (with the only
21 defining document for that term being other Harley-Davidson policies) are not eligible for the
22 incentive. [RT Vol. I, 121:8-14; 136:2 (Kennedy); see, e.g., Exh. 52.]

23 58. On July 22, 2011, in response to the Notice of Termination, Protestant timely filed the
24 within protest with the New Motor Vehicle Board challenging Respondent’s termination notice and
25

26 ³ 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 ⁴ Protestant was charged back \$5,285.75 for the Harley-Davidson sales and \$23,000 for the Buell motorcycle
sales. [Exh 63.]

1 threat to terminate Protestant's franchise agreement until such time that the Board held a hearing
2 and made a determination as to whether good cause existed for termination.

3 59. A hearing was held from March 5 to March 19, 2012 before J. Victor Ryerson,
4 Administrative Law Judge for the Board, in Sacramento, California. Respondent was represented
5 by Robert Ebe and Scott McLeod of Cooper White & Cooper, 201 California Street, 17th Floor, San
6 Francisco, California. Protestant was represented by Halbert Rasmussen and Franjo Dolenac of
7 Manning, Leaver, Bruder & Berberich, 5750 Wilshire Blvd., Suite 655, Los Angeles, California.
8 [RT Vols. I-X.]
9

10 **II. STATUTORY STANDARD**

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

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

16 62. Pursuant to Vehicle Code Section 3061, Protestant contends that good cause does not
17 exist to terminate Protestant's franchise for the following reasons, among others:

- 18 (a) The amount of business transacted by the Protestant is substantial, as compared to the
19 business available to it [section 3061(a)];
- 20 (b) The investments necessarily made and obligations incurred by the Protestant to perform
21 its part of the franchise have been substantial and termination will result in a significant
22 loss to Protestant as to these investments [section 3061(b)];
- 23 (c) The investment in Protestant's Harley-Davidson business is substantial, has significant
24 permanency and will be significantly adversely affected by termination [section
25 3061(c)];
- 26 (d) Protestant's permanent investment will be significantly adversely affected by the
27 termination of its franchise [section 3061(c)];
28

- 1 (e) Termination of Protestant's franchise will be injurious to the public welfare [section
2 3061(d)];
- 3 (f) The current franchisees are providing more than adequate motor vehicle sales and service
4 facilities, equipment, vehicle parts and qualified service personnel to reasonably provide
5 for the needs of the consumers for the motor vehicles handled by the Protestant and has
6 been and is rendering adequate services to the public [section 3061(e)];
- 7 (g) The Protestant has fulfilled the warranty obligations of the Respondent [section 3061(f)];
- 8 (h) The extent of Protestant's failure to comply with the terms of the franchise agreement is
9 insufficiently material to warrant termination [section 3061(g).]

10
11 **III. PROTESTANT TRANSACTS A MORE THAN ADEQUATE AMOUNT OF
BUSINESS COMPARED TO THE BUSINESS AVAILABLE TO IT.**

12 63. Respondent has failed to meet its burden to show that Protestant has not transacted an
13 adequate amount of business compared to the business available to it. As an initial matter,
14 Respondent does not dispute that Protestant is properly performing in terms of its sales volume or
15 that there are any concerns with Protestant's sales performance, other than the allegations arising
16 from this Protest. [RT Vol. I, 210:17-211:1 (Kennedy).]

17 64. Jim Sorensen, Protestant's District Manager, testified that he has never voiced any
18 complaints over the three years (2011-2008) with respect to Protestant's sales or performance within
19 its dealer assigned territory. [RT Vol. III, 199:21-23 (Sorensen); Exh. 565 (pgs. 27-30; excerpts of
20 Sorensen deposition).]

21 65. At no point in the last two years has Respondent contacted Protestant regarding any
22 deficiencies in performance. [RT Vol. IV, 92:16-93:2 (Stewart).]

23 66. The amount of business transacted by the Protestant relative to the business available to
24 the dealership is comparatively high. According to Respondent's sales ranking report, as of January
25 3, 2012, Protestant ranks 107 out of the entire Harley-Davidson national dealer network of 678
26 nationwide dealerships, in its sale of pleasure vehicles, which are vehicles sold to the end user.
27 Protestant is ranked number two in its district relative to pleasure vehicles. [RT Vol. IV, 62:1-12
28 (Stewart); Exh. 278.]

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

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

15 69. Only 25 stores across the country receive a Gold Bar and Shield Award. Dealers are
16 then provided a plaque of recognition and are taken on dealer incentive trips to a location pre-
17 determined by Respondent. [RT Vol. III, 189:17-190:2; 197:1-14 (Sorensen).]

18 70. Protestant received Bar and Shield Awards for performance excellence in 2009, 2010
19 and 2011. [RT Vol. III, 19:3-11 (Sorensen).]

20 71. In 2006 to 2007, Protestant sold 1,400 new and used motorcycles and had an estimated
21 \$32 million in revenue. [RT Vol. V, 171:8-10 (J. Dabney).]

22 72. Protestant's rankings were similarly high in 2010 and November 2011 year-to-date
23 across multiple financial metrics. Protestant's expert, Edward Stockton, found data showing that
24 Protestant's numbers are quite high when looking at absolute sales volume. These numbers confirm
25 that Protestant's sales are high relative to the amount of business available. The sale of new
26 vehicles was the most significant factor considered by Mr. Stockton as new vehicles sales generate
27 service and parts revenues. The second most important factor is the volume of service, as this
28 amount will have the largest impact on the consuming public. [Exh. 571, Tab 9.]

1 beneficiaries of that trust. Jay Dabney is the trustee of the trust. [RT Vol. VI, 77:25-79:6; 82:7-24
2 (J. Dabney); Vol. VII, 40:25-43:3 (M. Dabney); Exh. 34.]

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

9 79. Protestant also incurred substantial costs to establish its current, 35,000 square foot state-
10 of-the-art facility in August 2002. [RT Vol. V, 121:25-122:7 (J. Dabney).]

11 80. The total acquisition costs for the expansion of the dealership to its current Riverside
12 facility was approximately \$4 million. The property is currently valued at approximately \$4
13 million. [RT Vol. VI, 78:11-79:6 (J. Dabney).]

14 81. In Fall 2006, Protestant opened a secondary retail location (“SRL”) in Corona,
15 California, which was designed to extend their reach within their defined territory. Protestant
16 opened their SRL after Respondent indicated that Harley-Davidson may relocate a Los Angeles-
17 based dealer into the market next to their Riverside location. Protestant prepared a proposal to build
18 an SRL in Corona, believing that the SRL could service that market adequately without the need to
19 relocate a dealer into the area. [Exh. 96.]

20 82. Respondent accepted Protestant’s proposal for the Corona SRL. The SRL sold Harley-
21 Davidson products, as well as new and used Harley-Davidson motorcycles, parts, accessories,
22 services and general merchandise. The SRL operated under Fall 2010 when Protestant decided to
23 wind it down. [RT Vol. V, 148:10-151:21 (J. Dabney).]

24 83. The development of the SRL demonstrates the scope of Protestant’s substantial financial
25 investment and loyalty to the Harley-Davidson brand. It also demonstrates Protestant’s strong
26 performance as a dealership as only dealers in good standing can obtain SRLs. [RT Vol. II, 35:2-12
27 (Kennedy).]

28

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

7 85. The chart below shows Protestant and its related entity Dabney Properties, LLC's total
 8 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.]

15 86. The chart below shows Protestant and its related entity Dabney Properties, LLC's total
 16 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.]

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

25 87. As Protestant's expert, Carl Woodward, stated in his expert report, permanency of
 26 investment is not a term of art used in or otherwise defined by the accounting profession or
 27 automobile dealer industry. Analysis therefore requires an exploration of all investments made in
 28 the business, which in turn requires a review of all aspects of permanency, not merely the degree of

1 liquidity. While nothing is permanent from a business perspective, permanency would be
2 considered a relative term with certain assets being less permanent while other assets would be
3 comparatively more permanent. The long term assets which are more permanent in nature include
4 furniture, fixtures, equipment, land, buildings and facilities, goodwill-blue sky, and customer lists
5 and other assets necessary to honor contingent future liabilities. [RT Vol. IX, 56:24-57:4
6 (Woodward); Exh. 140, p. 3, 5.]

7 88. As discussed above, to disregard the investments made and their permanency as not
8 being relevant would be putting form over substance. The same family members made investments
9 in both the realty and in the dealership for the sole purpose of selling and servicing Harley-Davidson
10 motorcycles. The Dealer Contract that the franchisor is relying upon is based on the “personal
11 qualifications, experience, skill and commitment” of the person identified as the “Dealer Operator
12 and Owner(s).” The Dealer Contract then identifies “Judson V. Dabney, II” as “Dealer Operator”
13 and it lists as owners: Ty Dabney, Marshall Dabney and Susan Dabney, as well as the trustees of the
14 Living Trust of Judson Dabney and Ida Dabney. [Exhs. 34 and 35.]

15 89. It is common for family-owned dealerships operated in California to have similar
16 arrangements in regards to ownership and leasing of the realty needed for compliance with the
17 dealer contract and operation of the business.

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

22 91. The guarantees (obligations of loans) to the dealer-licensee, Riverside Motorcycle, Inc.,
23 which include the debt of the dealer-licensee and real estate mortgages exceeds \$4 million and
24 varies monthly. [Exh. 140, p. 5.]

25 92. Dabney Properties, LLC, the entity that owns the property and facility of Riverside
26 Motorcycle, Inc. loaned \$2,204,000 to the dealer-licensee. The original investment of the dealer-
27 licensee was \$113,000. [Exh. 140, p. 5.]

28

1 93. Long term (more permanent) non-current assets at cost and current value which include
2 furniture, fixtures, equipment, leasehold improvements, bluesky/goodwill are other intangible assets
3 are substantial.⁵ Riverside Motorcycle, Inc.'s cost value for equipment at its current facility is
4 \$1,472,000 and the current value of that equipment is \$458,000. Protestant's expert, Mr.
5 Woodward, estimates that the bluesky/goodwill value of the dealer-licensee is \$4 million. The cost
6 value of the facilities owned by the Dabney Properties, LLC is \$4,049,000 and the current value is
7 \$4,000,000. As a summary, the investments made and obligations incurred range from a low of
8 \$113,000 (initial investment) to a high of \$12,273,000 (assets valued as current values). The
9 permanency of investment made can range from \$113,000 on an original investment basis to
10 \$5,521,000 for the most permanent assets at original cost to a high of \$8,458,000 for the most
11 permanent assets at current values. The property is a single purpose facility which makes the
12 investment therein more permanent. [RT Vol. IX, 56:17-59:18 (Woodward); Exh. 140, p. 5-7.]

13 94. Particularly for a brand like Harley-Davidson, the brand's identity is etched into the
14 dealership, therefore Protestant's dealership has been very specifically invested and specially
15 organized to be a Harley-Davidson dealership. This makes the permanency of its investment much
16 more permanent than the average dealership in the retail automotive industry. As Mr. Stockton
17 testified during the hearing: [RT Vol. IX, 172:12-173:10 (Stockton) (emphasis added).]

18 12 Now, one thing that Harley-Davidson and other
19 13 manufacturers -- Harley does do some very specific
20 14 investments. So when you go to a Harley-Davidson
21 15 dealership it's extremely noteworthy just how deeply the
22 16 brand's identity is etched into the stone. And Harley-
23 17 Davidson has an objective that each encounter that a
24 18 customer has at a dealership is a holistic experience with
25 19 Harley-Davidson. So what you see are more, much more so
26 20 than other brands, even the color of paint, the types of
27 21 shelves, the way that the merchandise are displayed, the
28 22 emblems, the organization, the dealership has been very
29 23 specifically invested and specifically organized to be a
30 24 Harley-Davidson dealership.
31 25 *Now, for an operational dealership they get in*

27 ⁵ 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 1 competition in terms of being able to earn good margins,
2 2 which Skip Fordyce has been able to do. The down side of
3 3 this is if they lose the Harley-Davidson operation it's
4 4 going to be much more difficult for a Harley-Davidson
5 5 dealer to unbrand their facility and return the facility
6 6 to a general use facility. So what you see is what, for
7 7 this dealership in particular and Harley-Davidsons in
8 8 general, the investment is much more permanent than you
9 9 would see if you looked at an average of dealerships
10 10 across the retail automotive industry.

7 95. The current goodwill or franchise value of Skip Fordyce is \$4 million. [RT Vol. IX,
8 56:17-59:18 (Woodward); Exh. 140, p. 6.]

9 96. Termination of Respondent's dealership will result in a loss of 30% of the facility value
10 of \$4,000,000 which is \$1,200,000. Combined with the complete loss of the goodwill or franchise
11 value of \$4,000,000, the total loss by sustained by Protestant if the dealership is terminated is
12 \$5,200,000. [RT Vol. IX, 88:24-101:12 (Woodward); Exh. 140, p. 6-7.]

13
14 **VI. TERMINATION WOULD BE INJURIOUS TO THE PUBLIC WELFARE**

15 97. If Protestant was terminated as a Harley-Davidson dealership, its business would be
16 forced to close down which would negatively impact its clientele and Protestant's community.
17 Indeed, if Protestant was terminated, the surrounding dealers would not be able to provide the same
18 level of adequate customer care since Protestant's closest dealership, located in Loma Linda,
19 California, is relatively smaller than Protestant's dealership. [RT Vol. IV, 89:7-24 (Stewart); RT
20 Vol. VI, 83: 20-84:4 (J. Dabney); Exh. 280B.]

21 98. Though there are dealers that are geographically close to Protestant's dealership, the
22 evidence shows that customers prefer, and therefore travel to, Skip Fordyce over other dealerships.
23 [Exh. 280B.]

24 99. Indeed, market penetration data shows that not only does Protestant adequately meet the
25 demands of its dealer assigned territory, but that overall demand of Protestant's sales and service is
26 not limited to its assigned territory. [Exh. 571, Tab 9.]

27 100. Market studies further show that Protestant is located within the highest density of
28 registrations within that geographic area, which indicates that there is substantial demand for new

1 and used motorcycles sales within the Riverside metropolitan area. It also indicates the importance
2 of Protestant's service facilities to service the motorcycles in operation. [Exhs. 119, 297.]

3 101. Based on Respondent's Purchase Experience Survey, the data shows that Protestant
4 exceeds the average for the District, Region and nationwide for every quarter from Q2 2009 through
5 Q2 2011.

6 102. Based on the results of the Ownership Experience Survey, Protestant either exceeds
7 or is roughly on par with the averages for the District, Region and nationwide for the same time
8 period. [Exh. 571, Tab 8.]

9 103. Overall, on the purchase experience metric, Protestant's scores on the purchase
10 experience surveys are generally higher than all of the benchmarks against which it is compared.
11 [RT Vol. IX: 185:20-186:18; 186:19-187:9 (Stockton).]

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

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

24 106. Protestant has frequently been asked by Harley-Davidson to participate in "pilot"
25 programs, which are newly-created programs being tested by Respondent wherein only a select
26 group of dealerships are chosen to participate. Protestant has participated in at least 15 pilots over
27 the last six or seven years for Harley-Davidson. [RT Vol. V, 140:16-22 (J. Dabney).]

28

1 107. Examples of pilot programs that Protestant has participated in include the “Connect
2 System” which is the customer relations management system that guides the customer through the
3 pre and post-vehicle purchase process. Protestant also recently participated in an Apple iPad pilot
4 that assists dealerships in monitoring how customers ride their vehicles. [RT Vol. V, 140:24-
5 142:13 (J. Dabney).]

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

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

24 110. Another event hosted by Protestant is called Karen’s Ride of Hope which is designed
25 to raise money for research in mitochondrial disease. [RT Vol. VI, 89:19-90:2 (J. Dabney).]

26 111. Other events include Bikers Against Diabetes, Bikers Against Cancer, and Ronald
27 McDonald House Poker runs. Moreover, Harley-Davidson selected Protestant’s dealership as the
28 location to film its documentary “Harlistas,” a film created to reach out to the Latino market. In

1 essence, Protestant is constantly in the process of hosting, planning or marketing new community
2 events, promoting a minimum of two or three events each month. [RT Vol. VI, 90:3-7; 92:4-11 (J.
3 Dabney).]

4 112. In fact, Protestant's district manager, Jim Sorensen, testified that Protestant holds "an
5 adequate number of special events over the past two or three-year period" and that Protestant is in
6 the "top half" as one of the more prominent dealers in holding Harley-Davidson events." [RT Vol.
7 III, 201:1-14 (Sorensen); Exh. 565 (pg. 79; excerpts from Sorensen deposition) ("the dealer is a big
8 special events dealer"; "they hold more events than some other dealers within the district").]

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

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

26

27

28

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

1 A. Because it would, it would just be a devastation
2 to me, my family, the legacy, history of the dealership

3 going back would be obliterated.

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

20 115. Possibly the most immediate injurious impact of termination would be to Protestant's
21 staff. There are approximately 65 to 70 employees who would lose their jobs if Protestant was
22 terminated, the majority of who are full-time employees. Most of these employees are specifically
23 trained to work with Harley-Davidsons. The employees would also lose their health benefits and
24 other exclusive employment benefits. [RT Vol. VI, 93:14-19 (J. Dabney); RT Vol. IX, 208:15-25
25 (Stockton.)]

26 116. In essence, the termination of Protestant would leave a void for Protestant's staff,
27 community and clientele. The significance of this factor was overlooked by Respondent in issuing
28 the Notice of Termination. Respondent did not account at all for the public welfare prior to issuing

1 the Notice of Termination, and only after the issue was raised in Mr. Kennedy's deposition did
2 Respondent even remotely consider it. [RT Vol. I, 174:24-176:6 (Kennedy).]

3 **VII. PROTESTANT HAS ADEQUATE MOTOR VEHICLE SALES AND SERVICES**
4 **FACILITIES, EQUIPMENT, VEHICLE PARTS AND QUALIFIED SERVICE**
5 **PERSONNEL TO REASONABLY PROVIDE FOR THE NEEDS OF CUSTOMERS**
6 **AND IT HAS BEEN RENDERING MORE THAN ADEQUATE SERVICES TO THE**
7 **PUBLIC**

8 117. As an initial matter, Respondent does not dispute that Protestant maintains an
9 adequate facility that is in compliance with Harley-Davidson's requirements. [RT Vol. III, 199:4-14
10 (Sorensen).]

11 118. Respondent is not aware of any inadequacies in Protestant's staff as to their size,
12 training or capacity to handle customer service or with regard to any deficiencies in the number of
13 trained technicians. [RT Vol. III, 199:24-200:11 (Sorensen).]

14 119. Respondent asserts that Protestant has maintained an adequate inventory of new
15 vehicles at its dealership. [RT Vol. III, 200:12-18 (Sorensen).]

16 120. Between 2008 and 2011, Respondent has not observed any inadequacies or
17 substandard performance in any of Protestant's programs or services, such as Rider's Edge. The
18 only inadequacy that was promptly addressed and remedied by Protestant was a facility assessment
19 as to the lighting at the dealership. [Exh. 565 (p.34-35; excerpts from Sorensen deposition).]

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

24 122. The dealership is also well-equipped to handle heavy consumer service demands, if
25 necessary. The dealership has a full finance and insurance department, parts and accessories
26 department, and service department, carrying a full array of all products, services and motorcycle
27 sales. [RT Vol. V, 138:1-5 (J. Dabney).]

28 123. Protestant's service department includes numerous repair lifts and specially-skilled
service technicians. [Exh. 500 (photographs of facility).]

1 124. The technicians are factory-trained through Harley-Davidson and receive various
 2 levels of recognition through their training coursework. Such training is not unique to the service
 3 department. Each of Protestant's other departments, including Motorclothes (Harley-Davidson
 4 merchandise department), finance and insurance, and the sales departments comply with the
 5 managerial training programs offered through Harley-Davidson which train employees on various
 6 department-specific areas, including selling and customer service skills. Protestant strongly believes
 7 and mandates that its employees be fully trained through Respondent's managerial training program.
 8 [RT Vol. V, 147:2-25 (J. Dabney).]

9 125. The dealership employs approximately 65 to 70 employees and the physical
 10 dealership measures 35,000 square feet, including the showroom and service department. This
 11 brand new, state-of-the-art building was opened and designed under Respondent's specifications in
 12 2002. [RT Vol. V, 121:25-122:7; 153:25 (J. Dabney); Exh. 500 (photographs of facility); RT Vol.
 13 III, 199:4-14 (Sorensen).]

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

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

21 127. Mr. Sorensen, Protestant's district manager agrees that Protestant's dealership is
 22 "what a great workplace looks like and keeps employees loyal." [Exh. 565 (pgs. 64-65; excerpts of
 23 Sorensen deposition).]
 24
 25

26 **VIII. PROTESTANT HAS FULFILLED RESPONDENT'S WARRANTY OBLIGATIONS**

27 128. Respondent is not aware of any customer complaints, issues, problems or injuries
 28 resulting from Protestant's violations of the non-retail sales policy or any complaints from other

1 dealers, either domestically or internationally, regarding the violation vehicles. [RT Vol. II, 15:23-
2 16:5 (Kennedy); Vol. III, 199:2-5 (Sorensen).]

3 129. Respondent contends that Protestant has significantly failed to fulfill its warranty
4 obligations to Harley-Davidson by submitting false and inaccurate Sales Warranty Registration
5 information in violation of paragraph F.3 Protestant's Dealer Contract. [Exh. 35.]

6 130. However, significantly, Section 3060(f) of the Vehicle Code refers to the failure of
7 the franchisee to perform "warranty obligations *of the franchisor*" that are to be performed by the
8 franchisee. Submitting the SWR information to Harley-Davidson is an obligation of the franchisee
9 pursuant to Section F, Service 3. Product Warranty of the General Conditions of Sales and Service,
10 but is not a "warranty obligation of the franchisor." [Exh. 35.]

11 131. There is no allegation that Protestant has failed to provide proper warranty services
12 and vehicle repairs, pursuant to the statutory language of Section 3060(f).

13
14 **IX. PROTESTANT HAS SUBSTANTIALLY COMPLIED WITH THE TERMS OF THE
FRANCHISE**

15 A. The Dealer Contract and the NRSP

16 132. Respondent's only basis for termination is non-compliance with Respondent's Non-
17 Retail Sales Policy, as set forth in the Notice of Termination. [Exh. 63.]

18 133. The NRSP does not amend or modify the Dealer Contract or the General Conditions
19 of Sales and Service nor are its specific terms incorporated into the Dealer Contract. However, the
20 Dealer Contract does provide that dealers shall comply with the policies and position statements
21 issued by Respondent regarding the requirement that sales not be "for resale." [Exh. 35, pg. 2.]

22 134. The Dealer contract (Section 2. General Conditions), and the General Conditions of
23 Sales and Service (Section P. Miscellaneous 8. Entire Contract) require that any supplement,
24 modification, or amendment be in writing and executed by the parties. [Exhs. 34 and 35.]

25 135. Respondent complied with the writing and execution requirements in the 2010
26 Addendum to the Dealer Contract and the Amendment to the Dealer Contract [Exhs. 36 and 37.]

27 136. The NRSP, while in writing, does not require execution by the parties. [See Exhs.
28 47-52.]

1 B. Respondent Does Not Consistently Monitor the NRSP

2 137. Respondent does not perform regular audits on its dealer network for violation of the
3 NRSP unlike the monitoring of its other policies. For example, Respondent admits it performs
4 regular audits for the NRSP's companion Minimum Advertised Price ("MAP") policy.⁶ [RT Vol. II,
5 13:21-14:2 (Kennedy).]

6 138. As a testament to Respondent's inconsistent monitoring protocol for the NRSP,
7 monitoring of a dealership's records has historically been initiated only by a "tip" of suspected non-
8 retail sale activity. [RT Vol. III, 62:15-63:8 (Verduyn).]

9 139. Respondent has no guidelines as to when an inquiry letter is sent to a particular
10 dealership as to suspected non-retail sale activity. [RT Vol. III, 62:15-63:8 (Verduyn).]

11 140. Respondent's expert, Dr. Dominique Hanssens, testified that there is no sampling
12 process or any other methodology used by Respondent to monitor the NRSP. [RT Vol. V, 55:16-
13 56:4 (Hanssens).]

14 141. Mr. Verduyn also exaggerates the stringency of Harley-Davidson's languid audit and
15 monitoring of NRSP by claiming that he monitors potential violations of the NRSP through
16 "different sources of information." [RT Vol. II, 52:11-57:3 (Verduyn).]

17 142. However, each of these identified "sources" is essentially based on random tips he
18 receives from Harley-Davidson employees, such as field salespeople and district managers, and other
19 dealers. Indeed, Mr. Verduyn only began reviewing reports from the National Insurance Crime
20 Bureau beginning in 2010, the same year that Mr. Veik stopped all export activity. [RT Vol. II,
21 54:13-14 (Verduyn).]

22 143. Enforcement of the NRSP by Respondent is inconsistent at best. Respondent
23 contends that it has consistently enforced termination proceedings against known violators of its
24 NRSP. [RT Vol. I, 174:1-5 (Kennedy); Vol. II, 70:1-13 (Kennedy).]

25 144. However, Protestant's expert, Edward Stockton, disagreed with Respondent's
26 characterization of consistent enforcement of its NRSP. This is because consistent enforcement is
27

28 ⁶ 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 only levied against the dealers who are almost coincidentally caught violating the NRSP. This
2 could mean that there may be other dealers who are violating the policy but have just not been
3 discovered. These dealers, because they have not been caught, are not subject to enforcement of the
4 policy. Therefore enforcement of the policy is only consistent against dealers who were discovered,
5 but is not consistent against all other violators of the policy. Respondent will perform an on-site
6 audit based either on the unsatisfactory response to the inquiry letter, or if no inquiry letter is sent,
7 on the decision of Mr. Verduyn. [RT Vol. II, 57:4-58:13; 63:7-13; 64:6-18 (Verduyn).]

8 145. On-site audits consist of only a document review with no investigation as to the facts
9 or circumstances surrounding the violations as required by the NRSP. [Exh. 564 (pg. 34; excerpts
10 from Brian Martin deposition).]

11 146. It is unknown if Respondent has even audited every dealership that they know is
12 exporting, or is suspected of exporting, vehicles. [RT Vol. V, 52:10-17 (Hanssens).]

13 147. Despite his proffered comprehensive review and analysis of the policy and its
14 enforcement, Dr. Hanssens cannot opine on the number of violations that other dealerships may
15 have had for dealerships that have not been audited. [RT Vol. V, 52:14-17 (Hanssens).]

16 148. According to Mr. Stockton, although Dr. Hanssens testified about frequent
17 enforcement of the NRSP, he only identified 140 inquiry letters over a 6 year period. [RT Vol. II,
18 64:21-65:12 (Verduyn).]

19 149. Harley-Davidson has had about 700 dealerships nationwide. This indicates very light
20 enforcement of the NRSP; statistically, the probability of receiving an inquiry letter is very low. If
21 the fears of exportation and harm to the Harley-Davidson brand are as significant a concern as
22 Respondent claims they are, Respondent's failure to perform regular audits of dealerships is
23 inconsistent with and undermines the credibility of Respondent's allegations of harm and the
24 necessity of terminating Protestant's franchise. [RT Vol. IX, 211:4-212:1 (Stockton); Exh. 571, Tab
25 12.]

26 150. The MAP policy specifically discourages dealers from reporting alleged violations.
27 [See Exh. 174.]

28

1 151. Unlike the NRSP, Respondent sends an email of its MAP policy to both the dealer
2 principal and general manager, because of the severe financial consequences associated with
3 violation of that policy. [Exh. 565 (pgs. 49-50; excerpts from Sorensen deposition); Vol. III, 202:3-
4 15 (Sorensen); Ex 174.]

5 152. Both the MAP and the Parts, Accessories, Motorclothes (PAM) policy (collectively,
6 the PAM MAP) provide adequate warnings to dealers and clearly set forth the graduated penalties
7 for initial and subsequent violations of the policies. The PAM MAP policies require the dealer
8 principal's signature acknowledging that any violation of that policy is material whether or not the
9 dealer principal is aware of the violation and that the dealer principal has read and understands the
10 policy. [RT Vol. I, 217:6-14 (Kennedy).]

11 153. In addition, the PAM MAP policies advise the dealers that an independent company
12 will monitor sales and report its findings to Harley-Davidson. [Ex 174.]

13 154. The NRSP, which allows Respondent to terminate the franchise, lacks all of the
14 features that give clarity to the MAP policy, which does not provide for termination. [Compare Exh.
15 174 with Exh. 52]

16 155. Respondent's general rule of thumb is to terminate a dealership for 20 or more
17 violations of the NRSP. [RT Vol. I, 160:13-22 (Kennedy).]

18 156. This rule of thumb is based solely on the notion that at 20 violations, Respondent
19 deems a dealership's conduct to be a systematic effort to violate the NRSP. [RT Vol. I 160:23-
20 161:9.]

21 157. Respondent cannot articulate a cognizable difference between the 19th violation,
22 which warrants the consequence of a dealership being placed on not in good standing status, and the
23 20th violation, which warrants unequivocal termination [RT Vol. I, 162:2-12 (Kennedy).]

24 158. Nor is this arbitrary rule of thumb disclosed to dealerships. [RT Vol. I, 161:23-25
25 (Kennedy).]

26 159. Respondent's decision to terminate is based solely on the number of violations and
27 does not account for any other factors, which is contrary to the express provisions of the NRSP.
28 [RT Vol. III, 65:5-11 (Verduyn); Exhs. 50-51.]

1 160. Though Respondent contends that a factor in terminating Skip Fordyce was its
2 transmission of false information on the SWR forms, this is inconsistent with Respondent's general
3 course of dealing. As an example, Respondent did not terminate Protestant's Monterey dealership
4 for 15 violations, which Respondent contends also included false SWR information [RT Vol. III,
5 36:6-19 (Verduyn); Exh. 283.]

6 161. Unlike the MAP policy, the NRSP does not provide for termination if the dealer
7 principal does not know of the violations (Hanssens Testimony). The only conclusion arguably
8 supported by Respondent's enforcement is consistent (but not necessarily rational) only for those
9 dealers that are audited and caught, but Respondent does not account for dealers which are not
10 audited and caught but are violating the NRSP. [RT Vol. V, 55:2-15 (Hanssens).]

11 162. Furthermore, Mr. Sorensen's failure to report to Respondent that at least 18
12 violations occurred at the dealership indicates no materiality. Mr. Sorensen knew of the potential
13 for violations prior to the audit. Notably, he had two conversations with Mr. Veik wherein Mr. Veik
14 soft-sold the number of violations, but did disclose that violations had occurred. [RT Vol. VIII,
15 17:8-19:2 (Veik).]

16 163. Mr. Sorensen informed Mr. Veik that if violations were discovered, the penalty was
17 chargebacks. Termination was *never* mentioned as a possible consequence for violation of the
18 NRSP. (RT Vol. VII, 191:7-193:5 (Veik).]

19 164. Mr. Sorensen discovered the possible exports when an exporter was at an authorized
20 San Diego dealership and informed him that Skip Fordyce had sold exporters motorcycles. [RT
21 Vol. VIII, 10:3-11:6 (Veik).]

22 165. Mr. Veik called Mr. Sorensen in mid-March 2011 informing him that the dealership
23 had engaged in activity that violated NRSP. [RT Vol. III, 161:3-9 (Sorensen).]

24 166. Mr. Sorensen had not spoken to anyone at Harley-Davidson prior to the company
25 deciding to perform an audit. [Exh. 565 (pg. 41; excerpts from deposition of Sorensen); Vol. III,
26 193:5-18; Stewart Testimony; Verduyn Testimony).]

27 167. Mr. Sorensen never spoke to Mr. Verduyn about the violations. [RT Vol. III, 193:19-
28 25 (Sorensen).]

1 168. Mr. Sorensen informed Ms. Stewart about the conversation only after Ms. Stewart
2 informed Mr. Sorensen of the audit several weeks after the conversation with Mr. Veik. [RT Vol.
3 III, 192: 22-25 (Sorensen).]

4
5 C. The Dealer Principal's Lack of Knowledge of the Violations Should Presumptively
6 Favor Protestant Respecting this Factor.

6 169. Dr. Hanssens claims that the NRSP is clear, and opines that dealer principal is
7 responsible for enforcing the policy, but nowhere in the NRSP is that specified. [RT Vol. V, 20:22-
8 21:8; 78:14-79:7 (Hanssens).]

9 170. The evidence concretely shows that Jay Dabney had no knowledge of the
10 wrongdoing by his rogue general manager, Lester Veik, and Mr. Veik instructed his employees not
11 to reveal these transgressions to Jay. [RT Vol.VII 190:3-190:21; 213:8-22 (Veik).]

12 171. Other than Mr. Veik, none of the employees accurately understood or, in most cases,
13 even knew that Respondent had a policy against selling to exporters. [RT Vol. VII, 145:1-6
14 (Wilmoth); Vol. VII, 96:6-17 (Palmer); Exhs. 304-313).]

15 172. Employees that were involved were instructed to follow through with the transaction
16 violations by Mr. Veik. Mr. Veik actively concealed the transactions from Jay Dabney and from
17 Respondent, because he knew he would have been terminated if he was caught. [RT Vol.VII
18 213:24-214:8 (Veik).]

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

21 173. The gross profits generated by Protestant's violation units in 2009 and 2010
22 are only a small fraction as compared to the total dealership gross profits for the same periods. [See
23 Exh. 571, Tab 11).]

24 174. In 2009, the total violation unit gross profit as a percentage of total dealership gross
25 profit was only 1.03% (\$56,008 gross violation profit; \$5,417,741 total gross profit). That same
26 calculation for 2010 was 0.53% (\$23,392 gross violation profit; \$4,448,751 total gross profit). In
27 total for both years, the profit on the violation units account for only 0.80% of the total gross profit
28 (\$79,400 gross violation profit; \$9,866,492 total gross profit). The analysis of the gross margin for

1 each new unit sold indicates that violation units are scattered within non-violation units. [See Exh.
2 571, Tab 12; RT Vol. IX, 190:13-192:7 (Stockton).]

3 175. The scatter graph of Tab 12 indicates that there was no added financial incentive to
4 engage in violation transactions. In other words, the dealership's incentives were not served by
5 making these sales; the sales were counter to the dealership's interest. In total, only 31 out of a total
6 of 966 new units sold were violation units in 2009 and 2010. [RT Vol. IX, 192:8-196:4 (Stockton).]

7 E. Respondent Provides No Evidence of Any Material Harm or Damage Resulting from the
8 Violations

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

14 177. Mr. Stockton testified, any evidence of potential harm to customers is purely
15 speculative. In order to analyze the potential harm to a customer, one must consider what the
16 customer would have purchased instead of purchasing the exported motorcycle in the gray market.
17 The potential harm to the customer is attenuated by the important consideration of what the
18 customer would have purchased in a developing nation in lieu of the exported motorcycle. Since the
19 possibility exists that the vehicle that the customer would have purchased in a developing nation is
20 actually less safe than the exported motorcycle, the potential harm to the customer from the
21 purchase of an exported vehicle must be reduced since it is highly speculative and only operates
22 under the assumption that the exported motorcycle is less safe than any alternative vehicle the
23 customer would have purchased. [RT Vol. IX, 203:7-206:12 (Stockton).]

24 178. There has been no monetary loss or damage sustained as a result of Protestant's
25 violations of the NRSP as reflected by Respondent's lack of evidence regarding any such loss and
26 absence of any estimate of the possible existence or extent of any such loss. Respondent intimated,
27 but did not prove, that motorcycles exported were disassembled and even then there is no evidence
28 or proof of any kind that there was any injury or monetary loss. [RT Vol. V, 56:5-13 (Hanssens).]

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

5 180. Mr. Stockton identified other factors that Dr. Hanssens neglected to include in his
6 report in concluding that termination was warranted. Such factors include the effects of the
7 termination, such as the harm to Protestant's employees who would be out of work, the harm to
8 Protestant's investments, the windfall for either the successor dealer or the surrounding dealers who
9 are able to benefit from the ongoing value of Protestant's investment that Protestant can no longer
10 benefit from, and the harm to the consuming public if Protestant was terminated and the broken
11 relationships with customers. [RT Vol. IX, 207:23-209:2 (Stockton).]

12 181. Respondent has failed to take all relevant factors into account in justifying their
13 decision to terminate the franchise. Mr. Stockton ultimately opined that from an economic theory of
14 enforcement, it would not be appropriate or justified to terminate the dealer. Indeed, Dr. Hanssens
15 is not aware of any other motor vehicle manufacturers who have terminated a dealership for
16 violation of their non-retail sales policy. [RT Vol. V, 50:12-16. (Hanssens).]

17 182. Dr. Hanssens' report does not opine whether termination is appropriate or justified
18 under Section 3061 "good cause" factors. [RT Vol. V, 51:20-24 (Hanssens).]

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

28

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

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

9 185. Mr. Veik was removed as general manager of the dealership in February 2011, prior
10 to the audit and Skip Fordyce is now under the oversight of a new general manager, Mr. Espinoza.
11 Since then, the management and employee structure has been reorganized so that Jay has contact
12 with not only the general manager, but also several lower level managers so that he is no longer
13 isolated from day-to-day operations, but instead is involved in monitoring and managing those
14 operations. [RT Vol. VI, 53:23-54:5; 55:22-56:15 (J. Dabney); Exh. 502 (new organizational
15 structure of dealership implemented in March 2011, prior to Respondent's audit); Vol. VIII, 132:24-
16 134:15 (Espinoza).]

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

20 187. In the Notice of Termination, Respondent charged back \$28,285.75 of VIP money
21 from Protestant in relation to violations in the Notice. The chargebacks for this VIP money has
22 been paid in full by the dealership. [RT Vol. I, 173:13-18 (Kennedy); Vol. VI, 61:4-5 (J. Dabney);
23 Exh. 63.]

24 188. Protestant did not challenge the chargebacks. [RT Vol. VI, 30:20-23 (J.Dabney).]

25 G. Protestant has Implemented Extensive Policies and Procedures to Ensure Compliance
26 With the NRSP

27 189. As part of these internal policies to ensure compliance with the NRSP, Protestant
28 developed a new sales process incorporating each level of management, which was implemented

1 with the help of an experienced outside consultant. [RT Vol. VI, 40:2-47-14 (J. Dabney); Exhs. 74-
2 75.]

3 190. Each of the employees who provided a name that was improperly used on the SWR
4 reports were coached and trained on the SWR report and NRSP policies, as well as the new policies
5 implemented by Protestant to ensure compliance with the NRSP. [RT Vol. VI, 53:12-22 (J.
6 Dabney).]

7 191. Protestant also developed an audit process once all the documentation is put together
8 for each vehicle purchase. The audit process includes an electronic sign-off indicating that the deal
9 jacket has been reviewed. [RT Vol. VI, 44:4-45:25 (J. Dabney).]

10 192. Each deal jacket includes a deal jacket checklist that breaks down all documents that
11 needs to be included in the jacket, including the purchase agreement, the completed SWR form, and
12 a purchase receipt. [RT Vol. VIII, 161:3-9 (Espinoza).]

13 193. No vehicle is registered via the SWR form until the SWR form is properly completed
14 and printed and included within the deal jacket. Protestant also compiles a sales log that lists every
15 unit sold and when a vehicle is registered via the SWR process, Protestant ensures that the vehicle is
16 on that sales log list. [RT Vol. VII, 96:24-98:2 (Palmer).]

17 194. Megan Palmer, Protestant's general ledger accountant, testified that she now has far
18 more interaction with Jay Dabney since these policies and procedures were implemented. [RT Vol.
19 105:20-106:4 (Palmer).]

20 195. Protestant also analyzes dealer profitability reports to ensure that the dealership is in
21 compliance with the NRSP. Specifically, Protestant looks for recurring customer names in the
22 reports every month for all finalized deals for that month. As a further precautionary measure,
23 Protestant also runs a monthly variable report to retroactively determine whether sales tax has been
24 paid for each particular deal. Since implementing this monitoring process after receipt of the Notice
25 of Termination, there have been no instances where the dealership has violated the NRSP. [RT Vol.
26 VII, 65:3-68:9 (M. Dabney); Exh. 73.]

27 196. Respondent has never given or provided Protestant with any information as to how to
28 monitor for violations of the non-retail sales policy. [RT Vol. VII, 71:20-72:14 (M. Dabney).]

1 197. Since Mr. Veik's departure and Mr. Espinoza's transition as general manager, there
2 is greater communication between the upper and lower level employees, as well as between
3 departments. The dealership practices an open door policy. The paperwork process has become
4 more efficient and Jay Dabney has an increased presence at the dealership, including at weekly
5 manager meetings. The employees are encouraged to consult with Jay if they have any issues,
6 questions or concerns. [RT Vol. VII18-153:13 (Wilmoth).]

7
8 H. Under the Facts of the Case, Any Violation of the Policy and/or Dealer Agreement
9 Resulting from Policy Violations Was Not of a Sufficient Extent to Establish Good
10 Cause, As Reflected By an Analysis of the Materiality of the Alleged Contractual
11 Breach.

12 198. The U.S. Supreme Court in *New Motor Vehicle Board v. Orrin W. Fox Co.* (1978)
13 439 U.S. 96, recognized that the franchise is an agreement drafted by the party with the superior
14 bargaining power. State franchise laws, recognizing the disparity in power between the parties, are
15 attempts to create a level playing field, particularly where the franchisor has the power to inflict
16 such grievous losses upon a franchisee. The U.S. Supreme Court also recognized that the franchisor
17 can survive with one less franchisee but the franchisee is more likely to depend entirely upon the
18 franchisor for its continued existence.

19 199. Section 241 of the Restatement, Second of Contracts, Circumstances Significant in
20 Determining Whether a Failure is Material, reads:

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

- 23 (a) the extent to which the injured party will be deprived of the benefit which he reasonably
24 expected;
- 25 (b) the extent to which the injured party can be adequately compensated for the part of that
26 benefit of which he will be deprived;
- 27 (c) the extent to which the party failing to perform will suffer forfeiture;
- 28 (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;
- (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.

///

///

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

2 200. Vehicle Code Section 3067(a) provides: “The decision of the board shall be in
3 writing and shall contain findings of fact and a determination of the issues presented. The decision
4 shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions
5 imposed by the board shall be for the purpose of assuring performance of binding contractual
6 agreements between franchisees and franchisors or otherwise serving the purposes of this article.”

7 **A. The Board Should Sustain the Protest Unconditionally**

8 201. In its notable, 38 year history, the amount of business transacted by the Protestant has
9 been substantial and the amount of business transacted by the Protestant relative to the business
10 available to the dealership is comparatively high. Protestant’s recent dealership sales were above
11 the average sales and registrations in the nation and in Protestant’s dealer assigned territory. In
12 2010, the national average number of vehicle registrations by dealerships was 353. Protestant’s
13 average number was 391. Protestant had a 93.8% effectiveness/penetration within its dealer
14 assigned territory and a 110.8% effectiveness/penetration nationally. For the rolling 12-month
15 period as of August 2011, Protestant had an 81.4% effectiveness/penetration within the dealer
16 assigned territory and 105% effectiveness/penetration rate nationally. [RT Vol. IX, 175:3-176:20
17 (Stockton); Exh. 571, Tab 6.]

18 202. The investments necessarily made and obligations incurred by the Protestant to
19 perform its part of the franchise have been significant and termination will result in a significant loss
20 to Protestant as to these investments. The current goodwill or franchise value of Protestant is \$4
21 million. [RT Vol. IX, 56:17-59:18 (Woodward); Exh. 140, p. 6.]

22 203. The investment in Protestant’s Harley-Davidson has significant permanency and will
23 be adversely affected by termination. Protestant has made substantial investments in the facility and
24 the total investments of the franchisee and related entity total up to \$12,273,000. [Exh. 140, p. 4.]

25 204. While the franchise agreement between the parties states that Respondent may
26 exercise its right to terminate the franchise if the Dealer fails to perform its sales, service or facility
27 responsibilities [Exh. 35, p. 17.]

28

1 205. Vehicle Code Section 3060 mandates specific conditions that must be met before a
2 contract can be terminated. Section 3060(a) states, in relevant part:

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

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

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

10 206. Vehicle Code Section 3060 remains unaltered by the terms of the franchise
11 agreement between the parties. This is particularly true in light of the showing that there was no
12 specific harm to Respondent . [RT Vol. V, 45:13-18; 56:5-13; 77:12-18 (Hannsens); Vol. II, 15:14-
13 16:12 (Kennedy).]

14 207. Protestant's current general manger, Glen Espinoza, implemented new internal
15 policies, including policies designed to ensure compliance with the NRSP, before the audit even
16 occurred. Once the audit results were provided to Protestant, the dealership increased its monitoring
17 and enforcement efforts. [RT Vol. VIII, 154:8-15 (Espinoza).]

18 208. Under Respondent's own NRSP under which Respondent is seeking to terminate the
19 franchise, there is a series of progressively severe consequences for violation of the policy.
20 Respondent's NRSP identifies the following consequences for violation therein: (1) placing
21 limitations on future product allocations or shipments; (2) charging back to the dealer any incentives
22 or allowances credited or paid with respect to the violating sale; (3) placing the dealer in Not in
23 Good standing status; (4) charging back any internal and external audit and legal expenses to the
24 dealer..." [Exh. 52.]

25 B. If the Board is Not Inclined to Sustain the Protest Unconditionally, It should Sustain the
26 Protest Conditionally

27 209. The language of Section 3067(a) clearly states that the purpose of any conditions
28 imposed by the board is to fulfill any contractual obligations between the parties: "Conditions
imposed by the board shall be for the purpose of assuring performance of binding contractual
agreements between 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

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

4 210. Protestant also proposes, as another condition of sustaining the protest, that the Board
5 require Protestant to provide full reimbursement of expenses to Respondent in accordance with the
6 NRSP (“charge back any internal and external audit and legal expenses to the dealer...”). [Exhs. 51-
7 52.]

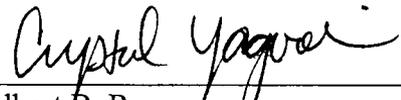
8 C. If the Board is Not Inclined to Sustain the Protest, Then It Should be Overruled Only
9 Conditionally

10 210. Vehicle Code Section 3067(a) states that the board may issue a decision to
11 “conditionally overrule” the protest.

12 **XI. CONCLUSION**

13
14 DATE: June 8, 2012

MANNING, LEAVER, BRUDER & BERBERICH

15
16 BY 
17 Halbert B. Rasmussen
18 Franjo M. Dolenac
19 Crystal S. Yagoobian
20 Attorneys for Protestant Riverside Motorcycle,
21 Inc. dba Skip Fordyce Harley-Davidson
22
23
24
25
26
27
28

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.

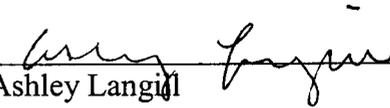
electronically sending [x] by email or [] by fax each page of each document and this proof of service to the parties served at their last known email address or fax numbers as listed below from a email or fax system located at my business address which reported no errors and which, if by fax, produced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

10 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 PROPOSED FINDINGS OF FACT**

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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