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I. INTRODUCTION

Nissan exercised its contractual and statutory right to review MB Auto Wholesale's proposed asset sale to Bruce Titus. Mr. Titus owned two Nissan dealerships at the time of the proposed sale. He had received performance warnings from Nissan and was persistently one of the worst performing dealers in the State of Washington. Unsurprisingly, the sale of an additional dealership to Mr. Titus violated Nissan's uniformly applied standards, and was turned down.

MB Auto Wholesale filed a protest asserting that Nissan's decision was unreasonable, and moved for a summary determination that its assertion was correct. In response to the motion Nissan produced evidence to show that its exercise of its contractual and statutory right to review and approve or disapprove of the sale was reasonable and appropriate. This included declarations, performance data, and an analysis from an expert on automotive industry data and market performance.

Accordingly, the evidence before the ALJ in this administrative proceeding was that Bruce Titus already owned Nissan dealerships in two adjoining market areas, and that for many years he had performed quite poorly as measured by objective sales and customer service data. For that reason Bruce Titus did not meet Nissan's standards to acquire a third dealership. The evidence was also that the proposed sale would have

given Titus a third adjoining dealership territory in Olympia/Tacoma. This violated Nissan's contiguous ownership policy, and Nissan provided un rebutted evidence that the Nissan brand and Washington consumers would be harmed by such monopolization of a geographic marketplace. The ALJ correctly concluded that Nissan had at minimum raised questions of material fact as to the reasonableness of its decision and was entitled to a hearing on the merits under RCW 46.96.200.

In response MB Auto Wholesale devotes limited space in its brief to addressing the ALJ's decision or the actual statute that applied to its contract with Nissan. MB Auto Wholesale instead newly contends that it would have a better argument under a later version of RCW 46.96.200 that did not exist at the time of NNA's decision, the ALJ's decision, or the superior court's decision. This argument, however, is not supported by the text of the amended statute or Washington case law on retroactivity, and would also run afoul of constitutional impairment of contract restrictions.

The fact that MB Auto Wholesale is compelled to resort to this argument is telling, as it is clear under Washington law that such retroactive application is not appropriate here. Rather, the law as it existed when Nissan and MB Auto Wholesale entered their dealer agreement, when MB Auto Wholesale proposed the sale of its assets, and at the time of Nissan's decision, is what also must be applied on appeal.

Finally, as Nissan set forth in its opening brief, MB Auto Wholesale lacked jurisdiction to appeal the ALJ's decision to superior court. MB Auto Wholesale responds by arguing that its delay in filing a notice of appeal was justified because the ALJ's decision was an "Initial Order." Contrary to this assertion, the Order itself explicitly provided it was a "final order." Moreover, at the outset of the litigation the parties sought a Stipulated Order by the ALJ that any decision denying MB Auto Wholesale's anticipated summary judgment motion would be a final order subject to judicial review. As a result, the legal effect of the ALJ's final order was firmly established at the time the final order was entered.

II. ARGUMENT

A. **The ALJ's November 17, 2008 Order Was Final and Immediately Appealable.**

The thrust of MB Auto Wholesale's response regarding the untimely nature of its petition for judicial review is that the November 17, 2008 Order issued by the ALJ was simply an "initial order." *See* Resp. Br. at 13-15. This argument is not supported by the record. The Order denying MB Auto Wholesale's Motion was explicitly termed to be the "Findings of Fact, Conclusions of Law, Decision, and Final Order herein . . ." AR 383. Nowhere is there any suggest that this was an "Initial Order," as MB Auto Wholesale characterizes it to be in its Response.

To the extent that there was any possible doubt as to the immediate legal effect of the ALJ's ruling, it was removed by the parties themselves at the outset of the proceeding. The parties asked the ALJ to enter a Stipulated Order that emphasized exactly what legal effect such a ruling would have. AR 23-25. That Order, entered by the ALJ as requested, provided: "Should [MB Auto Wholesale's] Motion not be granted, the parties further stipulate that the denial shall be deemed a final decision denying the relief requested in the Petition and the Order entered a final Order subject to judicial review." AR 24 (emphasis added).

1. Appellee's Newly Asserted Judicial Estoppel Argument Is Inapplicable.

MB Auto Wholesale responds by arguing that even if its appeal was untimely, Nissan should be judicially estopped from noting the lack of jurisdiction. Resp. Br. at 15. MB Auto Wholesale never raised this argument at any point prior to this appeal, but it cites RAP 2.5(a) as a basis for raising it now. *Id.* at 16. Even if this late argument is considered, it could offer no assistance to MB Auto Wholesale, as it can point to no conduct by Nissan that could trigger the doctrine of judicial estoppel.¹ Judicial estoppel is "an equitable doctrine that precludes a party

¹ Indeed, as contemporaneous conversations with counsel disclosed, "[t]here was no question that the denial of Petitioner's Motion had set the stage for an appeal," as the parties' own Stipulated Order made clear. CP 123.

from gaining advantage by asserting one position in a court proceeding and later seeking a second advantage by taking a clearly inconsistent position . . . only if a litigant's prior inconsistent position benefited the litigant or was accepted by the court.” *Housing Authority of the City of Everett v. Kirby*, 154 Wn. App. 842, 857-58, 226 P.3d 222 (2010) (internal quotes omitted).

At no point has Nissan taken legal positions that are inconsistent with its assertion that there is no jurisdiction for this appeal. Nissan suggested clerical corrections by letter to assure that the ALJ recognized that no further dates should be scheduled. CP 122-23. This is not a legal position, let alone a position that: (1) Nissan benefited from; and that (2) is inconsistent with Nissan’s assertion that MB Auto Wholesale later missed its appeal deadline. Accordingly, this doctrine is wholly inapplicable.

2. The Amended Judgment Authority that MB Auto Wholesale Cites Is Not Applicable Here.

MB Auto Wholesale’s last timeliness argument is that its appeal would be timely if the date that the ALJ made clerical corrections to the Final Order is used. Resp. Br. at 17-20. In support MB Auto Wholesale cites to RAP 2.4(b) for the proposition that amendments to a judgment or other post-judgment rulings bring up for review prior orders. Resp. Br. at 17. This rule, however, contemplates a motion to amend or to reconsider a

judgment. Having prevailed, there was nothing for Nissan to seek reconsideration of, let alone a judgment that it moved to amend. Rather, Nissan sent a letter suggesting clerical corrections, which the ALJ was not in any way required to act upon.²

MB Auto Wholesale nonetheless argues that *Structural's Northwest, Ltd. v. Fifth Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983), provides support for its arguments because the parties agreed therein that changes to a judgment were necessary, and the appeal period was deemed to run from the amended judgment. Resp. Br. at 18. The distinction that MB Auto Wholesale overlooks is that *Structural's Northwest, Ltd.* involved substantive changes to the findings of fact, amounts due, and the judgment itself. *Id.* at 713-14. By contrast, no substantive changes of any kind were made to the ALJ's Final Order. *Wlasuik v. Whirlpool Corp.*, 76 Wn. App. 250, 258-59, 884 P.2d 13 (1994) (concluding *Structurals Northwest* was not on point where there was no need for an amended judgment). It at all times retained the exact same

² MB Auto Wholesale argues that because Nissan sent such a letter, "it was entitled to wait and appeal." Resp. Brief at 18. MB Auto Wholesale appears to recognize in a footnote that such a rule would be problematic if this extended the potential appeal period indefinitely. *Id.* at fn. 4. It argues that motions to reconsider must be acted on within 20 days, or they are deemed denied, thereby supplying the missing logical limit on how long it could wait. *Id.* As an initial matter, this ignores the fact that there was nothing for Nissan to "move to reconsider," given that it prevailed. It also ignores the fact that Nissan mailed a letter suggesting clarification, it did not submit a motion. As such, MB Auto Wholesale's argument would be unworkable in allowing for an indefinite appeal period, as no response to Nissan's letter was ever required.

operative legal effect—by its own terms and by the parties’ stipulation— as it did when issued on November 17, 2008. In such circumstances, particularly where no motion was even filed, the appeal period is not tolled until a later date.³

B. The ALJ Correctly Concluded that Questions of Fact Regarding the Reasonableness of Nissan’s Decision Existed.

1. MB Auto Wholesale’s Interpretation of the Statute Is at Best Illogical.

To the extent that MB Auto Wholesale attempts to address the statute that was actually in effect, it does so through a string of strained assertions that ignore the language of the statute. MB Auto Wholesale begins by recognizing, as it must, that under RCW 46.96.200 Nissan could not “unreasonably withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established for the appointment of a new dealer or is capable of being licensed as a new dealer.” Resp. Br. at 23.

This language is problematic for MB Auto Wholesale, as read in the affirmative it states that Nissan *could* withhold consent as long as it was reasonable. MB Auto Wholesale attempts to deal with this in the only

³ See *Federal Trade Commission v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 73 S. Ct. 245 (1952); *People ex rel. Madigan v. Illinois Commerce Comm’n*, 231 Ill. 2d 370, 899 N.E.2d 227 (Ill. App. Ct. 2008); see also *Catz v. Chalker*, 566 F.3d 839, 841 n.1 (9th Cir. 2009) (recognizing that clerical changes made without a pending motion have not tolled the federal appeals period).

fashion available to it: by seeking to read the reasonableness inquiry out of the statute entirely. It does so by contending that “unreasonably” is ambiguous, and therefore that it must be read as meaning that refusing to approve a proposed sale to a dealer who either meets the manufacturer’s standards or who is capable of being licensed is never allowed. *Id.*

As an initial matter, this reading makes no textual sense—if that was the intended result, then “unreasonably” would be simply left out of the statute entirely. As it is, under MB Auto Wholesale’s reading that term is entirely superfluous. This is not a supportable position, as it is well established as a matter of statutory interpretation that the goal is to give all words in a statute their natural meaning. *See, e.g., Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 774, 154 P.3d 189 (2007) (statute should be interpreted so as not to render any portion superfluous); *Washington State Dept. of Revenue v. Hope*, 82 Wn.2d 549, 52, 512 P.2d 1094 (1973) (words of statute should be given their usual meaning).

The remainder of the statute undermines MB Auto Wholesale’s flawed reading even further. Subsection (5) provided details on how the reasonableness of the manufacturer’s decision should be evaluated:

In determining whether the manufacturer unreasonably withheld its approval to the sale, transfer, or exchange, the manufacturer has the burden of proof that it acted reasonably. A manufacturer’s refusal to accept or approve a proposed buyer who otherwise meets the normal,

reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer in the state of Washington, is presumed to be unreasonable.

There would obviously be no reason to hold a hearing to determine “*whether* the manufacturer unreasonably withheld its approval to the sale” if, as MB Auto Wholesale argues, withholding approval was alone unreasonable as a matter of law. There would also be no reason to allocate burdens of proof or presumptions in this scenario.⁴

MB Auto Wholesale’s only attempt to respond to this point is to simply ignore all but the following last five words of RCW 46.96.200(5): “is presumed to be unreasonable.” Resp. Br. at 24. MB Auto Wholesale argument is that this language dictates that any refusal to approve a sale to someone capable of being licensed is conclusively unreasonable. *Id.* However, simply ignoring the preceding language requiring a hearing is not a tenable position, as this is not how statutes are interpreted. *See, e.g., id.* at 774 (rather than isolating individual phrases, statute should be read and understood in its entirety); *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001) (each provision should be viewed in relation to other provisions and harmonized).

⁴ As Nissan’s expert described, “the turndown of a buy-sell candidate, is not unusual in the automotive industry and occurs on a regular basis.” AR 233. Nissan’s contract with MB Auto Wholesale anticipated this review as well. It is hardly surprising that it is also provided for statutorily.

Furthermore, even the presumption language itself undermines MB Auto Wholesale's argument. Presumptions are not a conclusion, they are instead a means of allocating the burden on a particular issue. *See In re Indian Trail Trunk Sewer v. City of Spokane*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983) (sole purpose of a presumption is to establish which party has the burden of proof, "To hold otherwise would make the presumptions . . . conclusive and render the hearing and statutory appeal process" useless); *cf.* Fed. R. Evid. 301 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption"). Accordingly, the statute's reference to a presumption only serves to further emphasize the requirement for a hearing on the reasonableness of Nissan's decision. Contrary to MB Auto Wholesale's assertions, this is also in keeping with the legislative history, *See* RCW 46.96.010 (focusing on limiting *unreasonable* restrictions).

2. The Superior Court's Reading of the Statute Is Inherently Unworkable.

As the above section notes, the superior court ignored the required reasonableness inquiry, and its ruling was incorrect for this reason alone. However, this is not the only critical flaw in the superior court's decision. The superior court also ignored the statutory inquiry into whether the buyer met the manufacturer's uniformly applied standards for appointing a

new dealer,⁵ and simply held that a manufacturer was legally required to sell to anyone capable of obtaining a license. CP 381. As Nissan argued in its opening brief, this is an independently fatal flaw in the superior court's ruling, because the "or" that proceeds "otherwise capable of being licensed" in the statute must be read in the conjunctive. Br. at 29-32.

MB Auto Wholesale responds that this is "both irrelevant and wrong." Resp. Br. at 26. MB Auto Wholesale is correct that this issue is not necessarily relevant, as it was not a basis of the ALJ's ruling, and does not alter the need for a reasonableness hearing even if it is read in the disjunctive. However, as Nissan detailed in its opening brief, the statute makes little sense unless it is read as "and is otherwise capable of being licensed." *See* Opening Br. at 31. This reading is well accepted in such situations under Washington case law, and MB Auto Wholesale makes no effort whatsoever to question the supporting authority cited by Nissan.

The import of this distinction is that it provides yet another basis for overturning the superior court's ruling. That ruling necessarily determined that the statute could be read disjunctively. This is so because the superior court ignored the language about meeting a manufacturer's standards, and simply concluded that all one had to show was a capability

⁵ Failure to meet Nissan standards to be appointed as the dealer for the MB Auto Wholesale location was a basis set forth in Nissan's decision letter. CP 290-91.

of obtaining a license for any refusal to approve a proposed sale to be irrebuttably unreasonable as a matter of law. CP 381.

As a consequence, MB Auto Wholesale is forced by the superior court's ruling to argue that simply because a buyer is theoretically capable of obtaining a license, a manufacturer was never allowed to withhold consent to a sale to that buyer. MB Auto Wholesale asserts:

Where, however, the proposed buyer is "qualified" because he or she satisfies one or both criteria set forth [in] the statute, then a manufacturer's refusal is automatically "presumed to be unreasonable," former RCW 46.96.200(5), thereby violating former RCW 46.96.200(1). In such cases, the statute simply does not afford the manufacturer an opportunity to prove up some other basis—reasonable or otherwise—for blocking a sale to a qualified buyer; the manufacturer must consent or violate the auto dealership franchise law.

Resp. Br. at 24. Of course if this were true, that would mean that if someone was theoretically capable of obtaining a license, but met none of the manufacturers' uniformly applied standards for appointment of a new dealer, the manufacturer would have *still* been required to approve the sale.⁶ This would remove any ability of the manufacturer to have input on who its franchisees are in the State of Washington.

MB Auto Wholesale recognizes that this would be a highly problematic outcome. *Cf., Statewide Rent-A-Car, Inc. v. Subaru of*

⁶ Conversely, if a purchaser met the manufacturer's standards for appointment as a dealer, but was incapable of being licensed, the sale would apparently still be required.

America, 704 F. Supp. 183, 186 (D. Montana 1988) (“[t]he franchise system becomes meaningless if franchisors lose the right to review potential franchisees and are forced to accept franchisees they did not chose.”). It responds by noting that that the Department of Licensing requires applicants to have received a franchise, and to submit a sales and service agreement for each manufacturer. Resp. Br. at 26-27. Based on this MB Auto Wholesale concludes “Thus, while RCW 46.96.200(1) requires manufacturers to approve a sale to a buyer ‘capable of being licensed,’ manufacturers never lose the ultimate right to select their franchisees.” Resp. Br. at 27.

This argument is both incorrect and unworkable. The rule that MB Auto Wholesale argues for requires a sale to anyone “capable of being licensed.” As such, no actual license is required under MB Auto Wholesale’s rule; rather, only the theoretical capability to obtain a license need be shown to force a sale.

The absurdity of this argument is clear. The potential licensee is required to submit a sales and service agreement in order to obtain the license, yet the manufacturer would somehow still “retain the right to select its franchisee,” by refusing to offer the sales and service agreement. This would mean that even though the transfer must be approved, and the sale consummated, the manufacturer would not be required to issue a

dealer agreement to the purchaser. Under this reasoning, the bona fide purchaser for value of the dealership facilities would apparently not be a dealer, despite being “capable of being licensed” as one.

3. The ALJ Correctly Interpreted the Statute.

In addressing the ALJ’s decision, MB Auto Wholesale argues in its response brief that the ALJ’s finding that a question of material fact existed while applying RCW 46.96.200 is not entitled to deference, and attempts to shift focus to the decision of the superior court. Resp. Br. at 21-22. There are several flaws with MB Auto Wholesale’s argument.

The Office of Administrative Hearings conducts hearings for the Department of Licensing. *See* RCW 46.96.200(4). MB Auto Wholesale filed a motion for summary determination of its protest, which was denied by the assigned ALJ due to the existence of questions of material fact. MB Auto Wholesale then appealed pursuant to RCW 46.96.050(3), and the Administrative Procedures Act, to Pierce County Superior Court. Pursuant to the Administrative Procedures Act, the burden of demonstrating the invalidity of the ALJ’s ruling is on MB Auto Wholesale, “as the party asserting invalidity.” RCW 34.05.570.

Moreover, the ALJ issued a detailed reasoned order making findings of fact, parsing the legislative history, and drawing conclusions of law. The superior court, by contrast, simply reversed the ALJ because

“Bruce Titus was capable of being licensed as a new motor vehicle dealer.” CP 381. In this context, it is appropriate to give heightened weight to the ALJ’s reasoned decision. *A.D. v. Sumner School Dist.*, 140 Wn. App. 579, 590, 166 P.3d 837 (2007).

Unlike the superior court, the ALJ’s analysis took into account all statutory language, the legislative history, and the evidentiary record. That undisputed record showed that the proposed purchaser, Bruce Titus, owned two Nissan dealerships that had been among the poorest performing Nissan dealerships in Washington for many years. AR 213-15; AR 229-33; AR 249-250; CP 289-91. Titus also failed to meet management, customer service, and training requirements. AR 231-32. This had been communicated to Titus, with no improvement in performance. AR 214; AR 229-33; AR 249; AR 264.

Concerns over Titus’s poor performance were also heightened because both dealerships were in contiguous primary market areas—in other words, dealerships that had adjoining markets. AR 215-16; AR 240-41; AR 246, AR 250-51; CP 290-91. Titus sought to purchase a third adjoining dealership in the proposed sale. It was undisputed that this would harm Nissan and Washington consumers by reducing both intra-brand competition for sales and service, and consumers’ ability to comparison shop. *Id.* It was also undisputed that such concentrated

ownership would have increased the risk that failure of the dealer group would leave customers with few local options. *Id.*

If the sale was allowed one of the persistently worst performing dealers in the state would swallow up one of the best, and eliminate the majority of competition in the Olympia/Tacoma marketplace. AR 214-15. Under these facts the ALJ correctly concluded that a hearing on the merits would be required by RCW 46.96.200, to determine whether this evidence was sufficient for Nissan to show that its decision was reasonable.

4. Nissan Has Not Waived Its Argument That Titus Also Did Not Meet Its New Dealer Standards.

MB Auto Wholesale argues that the ALJ found that Titus met the standards for a new dealer. Resp. Br. at 28. MB Auto Wholesale then asserts that this is a “verity,” because NNA did not assign error to that finding. *Id.* at 28-29. As an initial matter, what the ALJ actually stated was “for the purpose of Nissan’s motion,” Titus was considered to meet the standards for a new dealer. AR 384. This is not that type of “finding of fact” that would trigger the requirements of RAP 10.3(g). Moreover, Division II General Order 98-2 does away with such RAP 10.3(g) requirements, and it is also well established that clear presentation of the issues in the briefs is sufficient. *See State v. Estrella*, 115 Wn.2d 350, 291, 798 P.2d 289 (1990); *Green River Community College, Dist. No. 10*

v. Higher Education Personnel Board, 107 Wn.2d 427, 431, 730 P.2d 653 (1986).

After MB Auto Wholesale's appeal to superior court, Nissan renewed its argument that Titus "could not meet NNA's written standards used to evaluate a proposed new Nissan dealer." CP 323. No objection was raised by MB Auto Wholesale. Then, when the superior court overturned the ALJ based on MB Auto Wholesale's Petition for Review, Nissan's Notice of Appeal sought review of "all decisions subsumed in both Orders." *See* Notice of Appeal. This should be more than sufficient to preserve the issue for review.

C. The Law As It Existed at the Time of Nissan's Decision Governs the Analysis.

MB Auto Wholesale argues that changes to RCW 46.96.200 may be retroactively applied for the first time on appeal. Resp. Br. at 32-36. The entirety of MB Auto Wholesale's assertion rests on its contention that changes to RCW 46.96.200 were simply remedial or "curative" in nature, and may therefore extend back in time to a decision that took place in reliance on a different statute. *Id.*

Under Washington law, "[a] new legislative enactment is presumed to be an amendment rather than a clarification of existing law." *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976). This

presumption may be rebutted where the new law simply clarifies or makes technical corrections, without changing the substance of the law. *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). In other words, a statutory amendment “is presumed to apply prospectively unless it is remedial in nature or unless the legislature provides for retroactive application.” *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997).

To determine retroactive application, the Court looks to “both the statute’s purpose and the language” of the statute. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). In the process the Court may also look to the legislative history in analyzing this question. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992). Among other things, final legislative bill reports may be reviewed by the Court in making this determination. *Young v. Snell*, 134 Wn.2d 276, 280, 948 P.2d 1291 (1997).

1. The Text of the Statute Shows That Substantive Changes Were Made.

Engrossed Substitute House Bill 2547, which amended RCW 46.96.200, made significant changes throughout Chapter 46.96 of the Revised Code, which regulates manufacturers’ and dealer’s franchise agreements. *See App., Ex. 1.* As the Act itself describes, it was

“amending RCW 46.96.030, 46.96.070, 46.96.090, 46.96.105, 46.96.110, 46.96.185, and 46.96.200, and adding [six] new sections to chapter 46.96 RCW.” *See id.* Even a cursory review shows that the changes were major, and pervasive. This was not a bill that was “clarifying” the law.

Among these changes were major revisions to RCW 46.96.200. The legislature struck the “reasonableness” inquiry previously required by RCW 46.96.200(1). *See App., Ex. 1.* This substantively changed this provision by purportedly eliminating the manufacturer’s discretion in determining who it would accept as a dealer. By extension it also purported to change the business relationship between the manufacturer and its dealer by overriding the manufacturer’s contractual right to examine the factors the parties originally agreed were appropriate in relation to a proposed sale.

Further, the new Act eliminated an entire associated subsection. Subsection (5) of RCW 46.96.200 had detailed how the reasonableness hearing should be conducted, what the manufacturer was required to show, the burden of proof, and rebuttable presumptions. It had provided:

(5) In determining whether the manufacturer unreasonably withheld its approval to the sale, transfer, or exchange, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or

who otherwise is capable of being licensed as a new motor vehicle dealer in the state of Washington, is presumed to be unreasonable.

The new Act thoroughly reworks RCW 46.96.200 by striking this subsection in its entirety. *See* App., Ex. 1.

In sum, the legislature did not include retroactivity language, made the act effective on a future date, made major changes throughout all of RCW 46.96, and reworked RCW 46.96.200. There should be no doubt under these circumstances that the changes were not merely curative or clarifying amendments. Rather, because “the change is substantive, the general rule of prospective application applies.” *Magula*, 131 Wn.2d at 181; *see also Champagne*, 163 Wn.2d at 79-80 (effects of amendments that go beyond clarification are not retroactive).

2. The Legislative History Only Further Confirms That the Statute is Prospective.

A review of the legislative history of RCW 46.96.200 only further undermines MB Auto Wholesale’s argument that it may seek retroactive application of the new law. Engrossed Substitute House Bill 2547 was passed in March of 2010 with an effective date of June 10, 2010. *See* App., Ex. 1. Not only does the new bill lack language suggesting that the Legislature intended retroactive application, it placed the effective date at a point in the future. *Id.*

Moreover, if there were any doubt as to what the legislature intended, it would be removed by the House Bill Report. The House Bill Report describes the Act as one that “modifies the provisions regarding motor vehicle manufacturer and dealer franchise agreements, including those related to terminations of franchises, warranty work, designated successors to franchise ownership, unfair practices, and transfers of dealerships.” *See* App., Ex. 2. Again there is no mention of “corrections.” Rather the focus is on substantial “modifications” to the existing law.

The Final Bill Report emphasizes the distinction even further. It describes the former version of RCW 46.96.200, as it existed at all relevant times herein, as follows:

Sale, Transfer, or Exchange of Franchise.

A manufacturer may not unreasonably withhold consent to the sale of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer. In determining whether a manufacturer unreasonably withheld its approval, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer, is presumed to be unreasonable.

See App., Ex. 3. By contrast, the new law is described quite differently. All references to a reasonableness inquiry, the burden of proof at the required hearing, or presumptions are eliminated:

Sale, Transfer, or Exchange of Franchise.

A manufacturer may not withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer who does not already hold a franchise with the manufacturer or is capable of being licensed as a dealer.

See App., Ex. 3. Simply reviewing and comparing these descriptions shows that the legislature made substantive changes to RCW 46.96.200.

3. Retroactive Application Would Alter the Agreement of the Party and Raises Serious Constitutional Issues.

Finally, in addition to all of the bars against retroactive application discussed above, retroactivity would face serious constitutional questions. Nissan, through its dealer agreement, had a contract with MB Auto Wholesale.⁷ That agreement specifically emphasized the personal services nature of the contract, and explicitly provided that Nissan had the right to evaluate any proposed purchaser. CP148. It then spelled out how such an evaluation would take place, and the factors that the parties agreed that Nissan could consider. CP 201.

⁷ Nissan also reserves the right to challenge the statute itself as unconstitutional, if it is read to remove its ability to exercise any review of buyers as potential Nissan dealers.

This included an evaluation of the prospective dealer, its owner(s), its executive manager, the location, and the dealership facilities, against the standards set forth in the dealer agreement. *Id.* It also included factors such as “the personal, business and financial qualifications, experience, reputation, integrity, experience and ability of the proposed Principal Owner(s) and Executive Manager, . . . the capitalization and financial structure of the prospective dealer, the prospective purchaser’s proposal for conducting the Dealership Operations, and [Nissan’s] interest in promoting and preserving competition.” *Id.*

The amended version of RCW 46.96.200, as read by MB Auto Wholesale, does away with any such considerations. According to MB Auto Wholesale, if a proposed purchaser looks to be theoretically capable of obtaining a dealer’s license, the manufacturer must simply approve the sale, regardless of any of the agreed contractual considerations. This would be a dramatic change to the contract between MB Auto Wholesale and Nissan at the time that Nissan relied on that contract and the prior version of RCW 46.96.200 in evaluating the proposed sale to Titus.

It is well established that such retroactive changes to contractual relations by operation of statute raise issues under both the Washington State and United States Constitutions. The United States Constitution provides that “No state shall . . . pass any . . . law impairing the obligations

of contracts.” U.S. Const. art. I, § 10, cl. 1. The Washington Constitution includes a similar restriction which prohibits the enactment of any “law impairing the obligations of contracts.” Wash. Const. art. I, § 23. Under Washington law these provisions are given the same effect. *See Tyrpak v. Daniels*, 124 Wn. 2d 146, 151, 874 P.2d 1374 (1994).

Given that dealer-manufacturer relation provisions such as RCW 46.96.200 directly affect the contract between the manufacturer and its dealer, it is well established that retroactive changes raise unconstitutional impairment of contract issues. *See Cycle Barn, Inc. v. Artic Cat Sales, Inc.*, 701 F. Supp.2d 1197, 1202-05, (W.D. Wash. 2010) (retroactive application of amendments to RCW 46.96 would be an unconstitutional impairment of the parties’ dealer agreement); *Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991) (application of the Arkansas Motor Vehicle Commission Act to a dealer agreement entered into prior to the effective date of the Act would constitute an impermissible retroactive application of the Act); *Ace Cycle World, Inc. v. American Honda Motor Co., Inc.*, 788 F.2d 1225 (7th Cir. 1986) (application of a 1983 amendment to the Illinois Motor Vehicle Franchise Act to a preexisting dealer agreement was precluded to the extent it would defeat the manufacturer's vested rights under the dealer agreement); *Dale Baker Oldsmobile, Inc. v. Fiat Motors of North America, Inc.*, 794 F.2d

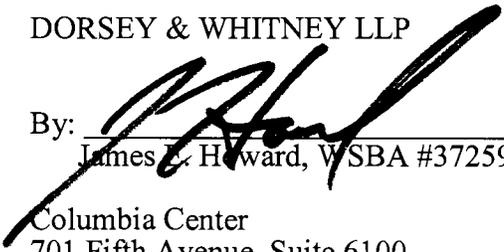
213 (6th Cir. 1986) (avoiding serious constitutional questions by concluding that Michigan's new Motor Vehicle Act should not be applied retrospectively to a contract entered into while the prior regulatory Act was in force). While MB Auto Wholesale's argument for such retroactive application first appears in its response brief on appeal, and is not well founded, such retroactive application would also be barred under the United States and Washington State Constitutions.

III. CONCLUSION

For the foregoing reasons, and the reasons set forth in Nissan's Opening Brief, this Court should conclude that MB Auto Wholesale lacked jurisdiction to appeal the ALJ's ruling. To the extent that the Court concludes that jurisdiction exists, it should affirm the ALJ's denial of summary judgment due to the existence of a question of material fact.

Respectfully submitted this 23rd day of September 2010.

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PROOF OF SERVICE

I caused a copy of the foregoing APPELLANT'S REPLY BRIEF
to be served today, by legal messenger, on:

Randall Paul Beigle
Lane Powell PC
1420 5th Ave., Ste. 4100
Seattle, WA, 98010-2338

DATED this 23rd day of September 2010.


Michelle F. Hall

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2010 SEP 23 PM 4: 23

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COURT OF APPEALS
DIVISION I
10 SEP 24 PM 12: 24
STATE OF WASHINGTON
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Appendix

Exhibit 1

CERTIFICATION OF ENROLLMENT
ENGROSSED SUBSTITUTE HOUSE BILL 2547

Chapter 178, Laws of 2010

61st Legislature
2010 Regular Session

NEW MOTOR VEHICLE DEALERS AND MANUFACTURERS--FRANCHISE AGREEMENTS

EFFECTIVE DATE: 06/10/10

Passed by the House March 10, 2010
Yeas 97 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate March 2, 2010
Yeas 46 Nays 0

BRAD OWEN

President of the Senate

Approved March 23, 2010, 2:24 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **ENGROSSED SUBSTITUTE HOUSE BILL 2547** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

March 23, 2010

**Secretary of State
State of Washington**

ENGROSSED SUBSTITUTE HOUSE BILL 2547

AS AMENDED BY THE SENATE

Passed Legislature - 2010 Regular Session

State of Washington

61st Legislature

2010 Regular Session

By House Commerce & Labor (originally sponsored by Representatives Conway, Condotta, Maxwell, Sullivan, Roach, Kessler, Sells, Kenney, Appleton, Hunter, Pedersen, Upthegrove, Hinkle, Ormsby, Herrera, Kretz, Hasegawa, Campbell, Takko, Springer, Dammeier, and Haler)

READ FIRST TIME 02/03/10.

1 AN ACT Relating to franchise agreements between new motor vehicle
2 dealers and manufacturers; amending RCW 46.96.030, 46.96.070,
3 46.96.090, 46.96.105, 46.96.110, 46.96.185, and 46.96.200; and adding
4 new sections to chapter 46.96 RCW.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 46.96.030 and 1989 c 415 s 3 are each amended to read
7 as follows:

8 Notwithstanding the terms of a franchise and notwithstanding the
9 terms of a waiver, no manufacturer may terminate, cancel, or fail to
10 renew a franchise with a new motor vehicle dealer, unless the
11 manufacturer has complied with the notice requirements of RCW 46.96.070
12 and an administrative law judge has determined, if requested in writing
13 by the new motor vehicle dealer within the applicable time period
14 specified in RCW 46.96.070 (1), (2), or (3), after hearing, that there
15 is good cause for the termination, cancellation, or nonrenewal of the
16 franchise and that the manufacturer has acted in good faith, as defined
17 in this chapter, regarding the termination, cancellation, or
18 nonrenewal. Between the time of issuance of the notice required under
19 RCW 46.96.070 and the effective termination, cancellation, or

1 nonrenewal of the franchise under this chapter, the rights, duties, and
2 obligations of the new motor vehicle dealer and the manufacturer under
3 the franchise and this chapter are unaffected, including those under
4 RCW 46.96.200.

5 **Sec. 2.** RCW 46.96.070 and 1989 c 415 s 7 are each amended to read
6 as follows:

7 Before the termination, cancellation, or nonrenewal of a franchise,
8 the manufacturer shall give written notification to both the department
9 and the new motor vehicle dealer. For the purposes of this chapter,
10 the discontinuance of the sale and distribution of a new motor vehicle
11 line, or the constructive discontinuance by material reduction in
12 selection offered, such that continuing to retail the line is no longer
13 economically viable for a dealer is, at the option of the dealer,
14 considered a termination, cancellation, or nonrenewal of a franchise.
15 The notice shall be by certified mail or personally delivered to the
16 new motor vehicle dealer and shall state the intention to terminate,
17 cancel, or not renew the franchise, the reasons for the termination,
18 cancellation, or nonrenewal, and the effective date of the termination,
19 cancellation, or nonrenewal. The notice shall be given:

20 (1) Not less than ninety days before the effective date of the
21 termination, cancellation, or nonrenewal;

22 (2) Not less than fifteen days before the effective date of the
23 termination, cancellation, or nonrenewal with respect to any of the
24 following that constitute good cause for termination, cancellation, or
25 nonrenewal:

26 (a) Insolvency of the new motor vehicle dealer or the filing of any
27 petition by or against the new motor vehicle dealer under bankruptcy or
28 receivership law;

29 (b) Failure of the new motor vehicle dealer to conduct sales and
30 service operations during customary business hours for seven
31 consecutive business days, except for acts of God or circumstances
32 beyond the direct control of the new motor vehicle dealer;

33 (c) Conviction of the new motor vehicle dealer, or principal
34 operator of the dealership, of a felony punishable by imprisonment; or

35 (d) Suspension or revocation of a license that the new motor
36 vehicle dealer is required to have to operate the new motor vehicle

1 dealership where the suspension or revocation is for a period in excess
2 of thirty days;

3 (3) Not less than one hundred eighty days before the effective date
4 of termination, cancellation, or nonrenewal, where the manufacturer
5 intends to discontinue sale and distribution of the new motor vehicle
6 line.

7 **Sec. 3.** RCW 46.96.090 and 1989 c 415 s 9 are each amended to read
8 as follows:

9 (1) In the event of a termination, cancellation, or nonrenewal
10 under this chapter, except for termination, cancellation, or nonrenewal
11 under RCW 46.96.070(2) or a voluntary termination, cancellation, or
12 nonrenewal initiated by the dealer, the manufacturer shall, at the
13 request and option of the new motor vehicle dealer, also pay to the new
14 motor vehicle dealer the dealer costs for any relocation, substantial
15 alteration, or remodeling of a dealer's facilities required by a
16 manufacturer for the continuance or renewal of a franchise agreement
17 completed within three years of the termination, cancellation, or
18 nonrenewal and:

19 (a) A sum equivalent to rent for the unexpired term of the lease or
20 one year, whichever is less, or such longer term as provided in the
21 franchise, if the new motor vehicle dealer is leasing the new motor
22 vehicle dealership facilities from a lessor other than the
23 manufacturer; or

24 (b) A sum equivalent to the reasonable rental value of the new
25 motor vehicle dealership facilities for one year or until the
26 facilities are leased or sold, whichever is less, if the new motor
27 vehicle dealer owns the new motor vehicle dealership facilities.

28 (2) The rental payment required under subsection (1) of this
29 section is only required to the extent that the facilities were used
30 for activities under the franchise and only to the extent the
31 facilities were not leased for unrelated purposes. If the rental
32 payment under subsection (1) of this section is made, the manufacturer
33 is entitled to possession and use of the new motor vehicle dealership
34 facilities for the period rent is paid.

35 **Sec. 4.** RCW 46.96.105 and 2003 c 21 s 2 are each amended to read
36 as follows:

1 (1) Each manufacturer shall specify in its franchise agreement, or
2 in a separate written agreement, with each of its dealers licensed in
3 this state, the dealer's obligation to perform warranty work or service
4 on the manufacturer's products. Each manufacturer shall provide each
5 of its dealers with a schedule of compensation to be paid to the dealer
6 for any warranty work or service, including parts, labor, and
7 diagnostic work, required of the dealer by the manufacturer in
8 connection with the manufacturer's products. The schedule of
9 compensation must not be less than the rates charged by the dealer for
10 similar service to retail customers for nonwarranty service and
11 repairs, and must not be less than the schedule of compensation for an
12 existing dealer as of the effective date of this section.

13 (a) The rates charged by the dealer for nonwarranty service or work
14 for parts means the price paid by the dealer for those parts, including
15 all shipping and other charges, increased by the franchisee's average
16 percentage markup. A dealer must establish and declare the dealer's
17 average percentage markup by submitting to the manufacturer one hundred
18 sequential customer-paid service repair orders or ninety days of
19 customer-paid service repair orders, whichever is less, covering
20 repairs made no more than one hundred eighty days before the
21 submission. A change in a dealer's established average percentage
22 markup takes effect thirty days following the submission. A
23 manufacturer may not require a dealer to establish average percentage
24 markup by another methodology. A manufacturer may not require
25 information that the dealer believes is unduly burdensome or time
26 consuming to provide, including, but not limited to, part-by-part or
27 transaction-by-transaction calculations.

28 (b) A manufacturer shall compensate a dealer for labor and
29 diagnostic work at the rates charged by the dealer to its retail
30 customers for such work. If a manufacturer can demonstrate that the
31 rates unreasonably exceed those of all other franchised motor vehicle
32 dealers in the same relevant market area offering the same or a
33 competitive motor vehicle line, the manufacturer is not required to
34 honor the rate increase proposed by the dealer. If the manufacturer is
35 not required to honor the rate increase proposed by the dealer, the
36 dealer is entitled to resubmit a new proposed rate for labor and
37 diagnostic work.

1 (c) A dealer may not be granted an increase in the average
2 percentage markup or labor and diagnostic work rate more than twice in
3 one calendar year.

4 (2) All claims for warranty work for parts and labor made by
5 dealers under this section shall be submitted to the manufacturer
6 within one year of the date the work was performed. All claims
7 submitted must be paid by the manufacturer within thirty days following
8 receipt, provided the claim has been approved by the manufacturer. The
9 manufacturer has the right to audit claims for warranty work and to
10 charge the dealer for any unsubstantiated, incorrect, or false claims
11 for a period of one year following payment. However, the manufacturer
12 may audit and charge the dealer for any fraudulent claims during any
13 period for which an action for fraud may be commenced under applicable
14 state law.

15 (3) All claims submitted by dealers on the forms and in the manner
16 specified by the manufacturer shall be either approved or disapproved
17 within thirty days following their receipt. The manufacturer shall
18 notify the dealer in writing of any disapproved claim, and shall set
19 forth the reasons why the claim was not approved. Any claim not
20 specifically disapproved in writing within thirty days following
21 receipt is approved, and the manufacturer is required to pay that claim
22 within thirty days of receipt of the claim.

23 (4) A manufacturer may not otherwise recover all or any portion of
24 its costs for compensating its dealers licensed in this state for
25 warranty parts and service either by reduction in the amount due to the
26 dealer or by separate charge, surcharge, or other imposition.

27 **Sec. 5.** RCW 46.96.110 and 1989 c 415 s 11 are each amended to read
28 as follows:

29 (1) Notwithstanding the terms of a franchise, (a) an owner may
30 appoint a designated successor to succeed to the ownership of the new
31 motor vehicle dealer franchise upon the owner's death or incapacity, or
32 (b) if an owner who has owned the franchise for not less than five
33 consecutive years, the owner may appoint a designated successor to be
34 effective on a date of the owner's choosing that is prior to the
35 owner's death or disability.

36 (2) Notwithstanding the terms of a franchise, a designated
37 successor (~~(of a deceased or incapacitated owner of a new motor vehicle~~

1 ~~dealer franchise~~) described under subsection (1) of this section may
2 succeed to the ownership interest of the owner under the existing
3 franchise, if:

4 (a) In the case of a designated successor who meets the definition
5 of a designated successor under RCW 46.96.020(5)(a), but who is not
6 experienced in the business of a new motor vehicle dealer, the person
7 will employ an individual who is qualified and experienced in the
8 business of a new motor vehicle dealer to help manage the day-to-day
9 operations of the motor vehicle dealership; or in the case of a
10 designated successor who meets the definition of a designated successor
11 under RCW 46.96.020(5)(b) or (c), the person is qualified and
12 experienced in the business of a new motor vehicle dealer and meets the
13 normal, reasonable, and uniformly applied standards for grant of an
14 application as a new motor vehicle dealer by the manufacturer; and

15 (b) The designated successor furnishes written notice to the
16 manufacturer of his or her intention to succeed to the ownership of the
17 new motor vehicle dealership within sixty days after the owner's death
18 or incapacity, or if the appointment is under subsection (1)(b) of this
19 section, at least thirty days before the designated successor's
20 proposed succession; and

21 (c) The designated successor agrees to be bound by all terms and
22 conditions of the franchise.

23 (3) The manufacturer may request, and the designated successor
24 shall promptly provide, such personal and financial information as is
25 reasonably necessary to determine whether the succession should be
26 honored.

27 (4) A manufacturer may refuse to honor the succession to the
28 ownership of a new motor vehicle dealer franchise by a designated
29 successor if the manufacturer establishes that good cause exists for
30 its refusal to honor the succession. If the designated successor (~~of~~
31 ~~a deceased or incapacitated owner~~) of a new motor vehicle dealer
32 franchise fails to meet the requirements set forth in subsections
33 (2)(a), (b), and (c) of this section, good cause for refusing to honor
34 the succession is presumed to exist. If a manufacturer believes that
35 good cause exists for refusing to honor the succession to the ownership
36 of a new motor vehicle dealer franchise by a designated successor, the
37 manufacturer shall serve written notice on the designated successor and

1 on the department of its refusal to honor the succession no earlier
2 than sixty days from the date the notice is served. The notice must be
3 served not later than sixty days after the manufacturer's receipt of:

4 (a) Notice of the designated successor's intent to succeed to the
5 ownership interest of the new motor vehicle dealer's franchise; or

6 (b) Any personal or financial information requested by the
7 manufacturer.

8 (5) The notice in subsection (4) of this section shall state the
9 specific grounds for the refusal to honor the succession. If the
10 notice of refusal is not timely and properly served, the designated
11 successor may continue the franchise in full force and effect, subject
12 to termination only as otherwise provided under this chapter.

13 (6) Within twenty days after receipt of the notice or within twenty
14 days after the end of any appeal procedure provided by the
15 manufacturer, whichever is greater, the designated successor may file
16 a petition with the department protesting the refusal to honor the
17 succession. The petition shall contain a short statement setting forth
18 the reasons for the designated successor's protest. Upon the filing of
19 a protest and the receipt of the filing fee, the department shall
20 promptly notify the manufacturer that a timely protest has been filed
21 and shall request the appointment of an administrative law judge under
22 chapter 34.12 RCW to conduct a hearing. The manufacturer shall not
23 terminate or otherwise discontinue the existing franchise until the
24 administrative law judge has held a hearing and has determined that
25 there is good cause for refusing to honor the succession. If an appeal
26 is taken, the manufacturer shall not terminate or discontinue the
27 franchise until the appeal to superior court is finally determined or
28 until the expiration of one hundred eighty days from the date of
29 issuance of the administrative law judge's written decision, whichever
30 is less. Nothing in this section precludes a manufacturer or dealer
31 from petitioning the superior court for a stay or other relief pending
32 judicial review.

33 (7) The manufacturer has the burden of proof to show that good
34 cause exists for the refusal to honor the succession.

35 (8) The administrative law judge shall conduct the hearing and
36 render a final decision as expeditiously as possible, but in any event
37 not later than one hundred eighty days after a protest is filed.

1 (9) The administrative law judge shall conduct any hearing
2 concerning the refusal to the succession as provided in RCW
3 46.96.050(2) and all hearing costs shall be borne as provided in that
4 subsection. A party to such a hearing aggrieved by the final order of
5 the administrative law judge may appeal as provided and allowed in RCW
6 46.96.050(3).

7 (10) This section does not preclude the owner of a new motor
8 vehicle dealer franchise from designating any person as his or her
9 successor by a written, notarized, and witnessed instrument filed with
10 the manufacturer. In the event of a conflict between such a written
11 instrument that has not been revoked by written notice from the owner
12 to the manufacturer and this section, the written instrument governs.

13 **Sec. 6.** RCW 46.96.185 and 2003 c 21 s 3 are each amended to read
14 as follows:

15 (1) Notwithstanding the terms of a franchise agreement, a
16 manufacturer, distributor, factory branch, or factory representative,
17 or an agent, officer, parent company, wholly or partially owned
18 subsidiary, affiliated entity, or other person controlled by or under
19 common control with a manufacturer, distributor, factory branch, or
20 factory representative, shall not:

21 (a) Discriminate between new motor vehicle dealers by selling or
22 offering to sell a like vehicle to one dealer at a lower actual price
23 than the actual price offered to another dealer for the same model
24 similarly equipped;

25 (b) Discriminate between new motor vehicle dealers by selling or
26 offering to sell parts or accessories to one dealer at a lower actual
27 price than the actual price offered to another dealer;

28 (c) Discriminate between new motor vehicle dealers by using a
29 promotion plan, marketing plan, or other similar device that results in
30 a lower actual price on vehicles, parts, or accessories being charged
31 to one dealer over another dealer;

32 (d) Discriminate between new motor vehicle dealers by adopting a
33 method, or changing an existing method, for the allocation, scheduling,
34 or delivery of new motor vehicles, parts, or accessories to its dealers
35 that is not fair, reasonable, and equitable. Upon the request of a
36 dealer, a manufacturer, distributor, factory branch, or factory
37 representative shall disclose in writing to the dealer the method by

1 which new motor vehicles, parts, and accessories are allocated,
2 scheduled, or delivered to its dealers handling the same line or make
3 of vehicles;

4 (e) Discriminate against a new motor vehicle dealer by preventing,
5 offsetting, or otherwise impairing the dealer's right to request a
6 documentary service fee on affinity or similar program purchases. This
7 prohibition applies to, but is not limited to, any promotion plan,
8 marketing plan, manufacturer or dealer employee or employee friends or
9 family purchase programs, or similar plans or programs;

10 (f) Give preferential treatment to some new motor vehicle dealers
11 over others by refusing or failing to deliver, in reasonable quantities
12 and within a reasonable time after receipt of an order, to a dealer
13 holding a franchise for a line or make of motor vehicles sold or
14 distributed by the manufacturer, distributor, factory branch, or
15 factory representative, a new vehicle, parts, or accessories, if the
16 vehicle, parts, or accessories are being delivered to other dealers, or
17 require a dealer to purchase unreasonable advertising displays or other
18 materials, or unreasonably require a dealer to remodel or renovate
19 existing facilities as a prerequisite to receiving a model or series of
20 vehicles;

21 (~~(f)~~) (g) Compete with a new motor vehicle dealer of any make or
22 line by acting in the capacity of a new motor vehicle dealer, or by
23 owning, operating, or controlling, whether directly or indirectly, a
24 motor vehicle dealership in this state. It is not, however, a
25 violation of this subsection for:

26 (i) A manufacturer, distributor, factory branch, or factory
27 representative to own or operate a dealership for a temporary period,
28 not to exceed two years, during the transition from one owner of the
29 dealership to another where the dealership was previously owned by a
30 franchised dealer and is currently for sale to any qualified
31 independent person at a fair and reasonable price. The temporary
32 operation may be extended for one twelve-month period on petition of
33 the temporary operator to the department. The matter will be handled
34 as an adjudicative proceeding under chapter 34.05 RCW. A dealer who is
35 a franchisee of the petitioning manufacturer or distributor may
36 intervene and participate in a proceeding under this subsection
37 (1)(~~(f)~~) (g)(i). The temporary operator has the burden of proof to

1 show justification for the extension and a good faith effort to sell
2 the dealership to an independent person at a fair and reasonable price;

3 (ii) A manufacturer, distributor, factory branch, or factory
4 representative to own or operate a dealership in conjunction with an
5 independent person in a bona fide business relationship for the purpose
6 of broadening the diversity of its dealer body and enhancing
7 opportunities for qualified persons who are part of a group who have
8 historically been underrepresented in its dealer body, or other
9 qualified persons who lack the resources to purchase a dealership
10 outright, and where the independent person: (A) Has made, or within a
11 period of two years from the date of commencement of operation will
12 have made, a significant, bona fide capital investment in the
13 dealership that is subject to loss; (B) has an ownership interest in
14 the dealership; and (C) operates the dealership under a bona fide
15 written agreement with the manufacturer, distributor, factory branch,
16 or factory representative under which he or she will acquire all of the
17 ownership interest in the dealership within a reasonable period of time
18 and under reasonable terms and conditions. The manufacturer,
19 distributor, factory branch, or factory representative has the burden
20 of proof of establishing that the acquisition of the dealership by the
21 independent person was made within a reasonable period of time and
22 under reasonable terms and conditions. Nothing in this subsection
23 ~~(1)((f))~~ (g)(ii) relieves a manufacturer, distributor, factory
24 branch, or factory representative from complying with ~~((RCW~~
25 ~~46.96.185(1))~~) (a) through ~~((e))~~ (f) of this subsection;

26 (iii) A manufacturer, distributor, factory branch, or factory
27 representative to own or operate a dealership in conjunction with an
28 independent person in a bona fide business relationship where the
29 independent person: (A) Has made, or within a period of two years from
30 the date of commencement of operation will have made, a significant,
31 bona fide capital investment in the dealership that is subject to loss;
32 (B) has an ownership interest in the dealership; and (C) operates the
33 dealership under a bona fide written agreement with the manufacturer,
34 distributor, factory branch, or factory representative under which he
35 or she will acquire all of the ownership interest in the dealership
36 within a reasonable period of time and under reasonable terms and
37 conditions. The manufacturer, distributor, factory branch, or factory
38 representative has the burden of proof of establishing that the

1 acquisition of the dealership by the independent person was made within
2 a reasonable period of time and under reasonable terms and conditions.
3 The number of dealerships operated under this subsection (1)(~~(f)~~)
4 (g)(iii) may not exceed four percent rounded up to the nearest whole
5 number of a manufacturer's total of new motor vehicle dealer franchises
6 in this state. Nothing in this subsection (1)(~~(f)~~) (g)(iii) relieves
7 a manufacturer, distributor, factory branch, or factory representative
8 from complying with (~~RCW 46.96.185(1)~~) (a) through (~~(e)~~) (f) of
9 this subsection;

10 (iv) A truck manufacturer to own, operate, or control a new motor
11 vehicle dealership that sells only trucks of that manufacturer's line
12 make with a gross vehicle weight rating of 12,500 pounds or more, and
13 the truck manufacturer has been continuously engaged in the retail sale
14 of the trucks at least since January 1, 1993; or

15 (v) A manufacturer to own, operate, or control a new motor vehicle
16 dealership trading exclusively in a single line make of the
17 manufacturer if (A) the manufacturer does not own, directly or
18 indirectly, in the aggregate, in excess of forty-five percent of the
19 total ownership interest in the dealership, (B) at the time the
20 manufacturer first acquires ownership or assumes operation or control
21 of any such dealership, the distance between any dealership thus owned,
22 operated, or controlled and the nearest new motor vehicle dealership
23 trading in the same line make of vehicle and in which the manufacturer
24 has no ownership or control is not less than fifteen miles and complies
25 with the applicable provisions in the relevant market area sections of
26 this chapter, (C) all of the manufacturer's franchise agreements confer
27 rights on the dealer of that line make to develop and operate within a
28 defined geographic territory or area, as many dealership facilities as
29 the dealer and the manufacturer agree are appropriate, and (D) as of
30 January 1, 2000, the manufacturer had no more than four new motor
31 vehicle dealers of that manufacturer's line make in this state, and at
32 least half of those dealers owned and operated two or more dealership
33 facilities in the geographic territory or area covered by their
34 franchise agreements with the manufacturer;

35 (~~(g)~~) (h) Compete with a new motor vehicle dealer by owning,
36 operating, or controlling, whether directly or indirectly, a service
37 facility in this state for the repair or maintenance of motor vehicles
38 under the manufacturer's new car warranty and extended warranty.

1 Nothing in this subsection ~~(1)(g)~~ (h), however, prohibits a
2 manufacturer, distributor, factory branch, or factory representative
3 from owning or operating a service facility for the purpose of
4 providing or performing maintenance, repair, or service work on motor
5 vehicles that are owned by the manufacturer, distributor, factory
6 branch, or factory representative;

7 ~~((h))~~ (i) Use confidential or proprietary information obtained
8 from a new motor vehicle dealer to unfairly compete with the dealer.
9 For purposes of this subsection ~~(1)(h)~~ (i), "confidential or
10 proprietary information" means trade secrets as defined in RCW
11 19.108.010, business plans, marketing plans or strategies, customer
12 lists, contracts, sales data, revenues, or other financial information;

13 ~~((i))~~ (j)(i) Terminate, cancel, or fail to renew a franchise with
14 a new motor vehicle dealer based upon any of the following events,
15 which do not constitute good cause for termination, cancellation, or
16 nonrenewal under RCW 46.96.060: (A) The fact that the new motor
17 vehicle dealer owns, has an investment in, participates in the
18 management of, or holds a franchise agreement for the sale or service
19 of another make or line of new motor vehicles ~~((, or))~~; (B) the fact
20 that the new motor vehicle dealer has established another make or line
21 of new motor vehicles or service in the same dealership facilities as
22 those of the manufacturer or distributor ~~((with the prior written
23 approval of the manufacturer or distributor, if the approval was
24 required under the terms of the new motor vehicle dealer's franchise
25 agreement))~~; (C) that the new motor vehicle dealer has or intends to
26 relocate the manufacturer or distributor's make or line of new motor
27 vehicles or service to an existing dealership facility that is within
28 the relevant market area, as defined in RCW 46.96.140, of the make or
29 line to be relocated, except that, in any nonemergency circumstance,
30 the dealer must give the manufacturer or distributor at least sixty
31 days' notice of his or her intent to relocate; or (D) the failure of a
32 franchisee to change the location of the dealership or to make
33 substantial alterations to the use or number of franchises on the
34 dealership premises or facilities.

35 (ii) Notwithstanding the limitations of this section, a
36 manufacturer may, for separate consideration, enter into a written
37 contract with a dealer to exclusively sell and service a single make or
38 line of new motor vehicles at a specific facility for a defined period

1 of time. The penalty for breach of the contract must not exceed the
2 amount of consideration paid by the manufacturer plus a reasonable rate
3 of interest; ((~~o~~

4 ~~(j))~~ (k) Coerce or attempt to coerce a motor vehicle dealer to
5 refrain from, or prohibit or attempt to prohibit a new motor vehicle
6 dealer from acquiring, owning, having an investment in, participating
7 in the management of, or holding a franchise agreement for the sale or
8 service of another make or line of new motor vehicles or related
9 products, or establishing another make or line of new motor vehicles or
10 service in the same dealership facilities, if the prohibition against
11 acquiring, owning, investing, managing, or holding a franchise for such
12 additional make or line of vehicles or products, or establishing
13 another make or line of new motor vehicles or service in the same
14 dealership facilities, is not supported by reasonable business
15 considerations. The burden of proving that reasonable business
16 considerations support or justify the prohibition against the
17 additional make or line of new motor vehicles or products or
18 nonexclusive facilities is on the manufacturer;

19 (l) Require, by contract or otherwise, a new motor vehicle dealer
20 to make a material alteration, expansion, or addition to any dealership
21 facility, unless the required alteration, expansion, or addition is
22 uniformly required of other similarly situated new motor vehicle
23 dealers of the same make or line of vehicles and is reasonable in light
24 of all existing circumstances, including economic conditions. In any
25 proceeding in which a required facility alteration, expansion, or
26 addition is an issue, the manufacturer or distributor has the burden of
27 proof;

28 (m) Prevent or attempt to prevent by contract or otherwise any new
29 motor vehicle dealer from changing the executive management of a new
30 motor vehicle dealer unless the manufacturer or distributor, having the
31 burden of proof, can show that a proposed change of executive
32 management will result in executive management by a person or persons
33 who are not of good moral character or who do not meet reasonable,
34 preexisting, and equitably applied standards of the manufacturer or
35 distributor. If a manufacturer or distributor rejects a proposed
36 change in the executive management, the manufacturer or distributor
37 shall give written notice of its reasons to the dealer within sixty
38 days after receiving written notice from the dealer of the proposed

1 change and all related information reasonably requested by the
2 manufacturer or distributor, or the change in executive management must
3 be considered approved; or

4 (n) Condition the sale, transfer, relocation, or renewal of a
5 franchise agreement or condition manufacturer, distributor, factory
6 branch, or factory representative sales, services, or parts incentives
7 upon the manufacturer obtaining site control, including rights to
8 purchase or lease the dealer's facility, or an agreement to make
9 improvements or substantial renovations to a facility. For purposes of
10 this section, a substantial renovation has a gross cost to the dealer
11 in excess of five thousand dollars.

12 (2) Subsection (1)(a), (b), and (c) of this section do not apply to
13 sales to a motor vehicle dealer: (a) For resale to a federal, state,
14 or local government agency; (b) where the vehicles will be sold or
15 donated for use in a program of driver's education; (c) where the sale
16 is made under a manufacturer's bona fide promotional program offering
17 sales incentives or rebates; (d) where the sale of parts or accessories
18 is under a manufacturer's bona fide quantity discount program; or (e)
19 where the sale is made under a manufacturer's bona fide fleet vehicle
20 discount program. For purposes of this subsection, "fleet" means a
21 group of fifteen or more new motor vehicles purchased or leased by a
22 dealer at one time under a single purchase or lease agreement for use
23 as part of a fleet, and where the dealer has been assigned a fleet
24 identifier code by the department of licensing.

25 (3) The following definitions apply to this section:

26 (a) "Actual price" means the price to be paid by the dealer less
27 any incentive paid by the manufacturer, distributor, factory branch, or
28 factory representative, whether paid to the dealer or the ultimate
29 purchaser of the vehicle.

30 (b) "Control" or "controlling" means (i) the possession of, title
31 to, or control of ten percent or more of the voting equity interest in
32 a person, whether directly or indirectly through a fiduciary, agent, or
33 other intermediary, or (ii) the possession, direct or indirect, of the
34 power to direct or cause the direction of the management or policies of
35 a person, whether through the ownership of voting securities, through
36 director control, by contract, or otherwise, except as expressly
37 provided under the franchise agreement.

1 (c) "Motor vehicles" does not include trucks that are 14,001 pounds
2 gross vehicle weight and above or recreational vehicles as defined in
3 RCW 43.22.335.

4 (d) "Operate" means to manage a dealership, whether directly or
5 indirectly.

6 (e) "Own" or "ownership" means to hold the beneficial ownership of
7 one percent or more of any class of equity interest in a dealership,
8 whether the interest is that of a shareholder, partner, limited
9 liability company member, or otherwise. To hold an ownership interest
10 means to have possession of, title to, or control of the ownership
11 interest, whether directly or indirectly through a fiduciary, agent, or
12 other intermediary.

13 (4) A violation of this section is deemed to affect the public
14 interest and constitutes an unlawful and unfair practice under chapter
15 19.86 RCW. A person aggrieved by an alleged violation of this section
16 may petition the department to have the matter handled as an
17 adjudicative proceeding under chapter 34.05 RCW.

18 **Sec. 7.** RCW 46.96.200 and 1994 c 274 s 7 are each amended to read
19 as follows:

20 (1) Notwithstanding the terms of a franchise, a manufacturer shall
21 not ((unreasonably)) withhold consent to the sale, transfer, or
22 exchange of a franchise to a qualified buyer who meets the normal,
23 reasonable, and uniformly applied standards established by the
24 manufacturer for the appointment of a new dealer who does not already
25 hold a franchise with the manufacturer or is capable of being licensed
26 as a new motor vehicle dealer in the state of Washington. A decision
27 or determination made by the administrative law judge as to whether a
28 qualified buyer is capable of being licensed as a new motor vehicle
29 dealer in the state of Washington is not conclusive or determinative of
30 any ultimate determination made by the department of licensing as to
31 the buyer's qualification for a motor vehicle dealer license. A
32 manufacturer's failure to respond in writing to a request for consent
33 under this subsection within sixty days after receipt of a written
34 request on the forms, if any, generally used by the manufacturer
35 containing the information and reasonable promises required by a
36 manufacturer is deemed to be consent to the request. A manufacturer
37 may request, and, if so requested, the applicant for a franchise (a)

1 shall promptly provide such personal and financial information as is
2 reasonably necessary to determine whether the sale, transfer, or
3 exchange should be approved, and (b) shall agree to be bound by all
4 reasonable terms and conditions of the franchise.

5 (2) If a manufacturer refuses to approve the sale, transfer, or
6 exchange of a franchise, the manufacturer shall serve written notice on
7 the applicant, the transferring, selling, or exchanging new motor
8 vehicle dealer, and the department of its refusal to approve the
9 transfer of the franchise no later than sixty days after the date the
10 manufacturer receives the written request from the new motor vehicle
11 dealer. If the manufacturer has requested personal or financial
12 information from the applicant under subsection (1) of this section,
13 the notice shall be served not later than sixty days after the receipt
14 of all of such documents. Service of all notices under this section
15 shall be made by personal service or by certified mail, return receipt
16 requested.

17 (3) The notice in subsection (2) of this section shall state the
18 specific grounds for the refusal to approve the sale, transfer, or
19 exchange of the franchise.

20 (4) Within twenty days after receipt of the notice of refusal to
21 approve the sale, transfer, or exchange of the franchise by the
22 transferring new motor vehicle dealer, the new motor vehicle dealer may
23 file a petition with the department to protest the refusal to approve
24 the sale, transfer, or exchange. The petition shall contain a short
25 statement setting forth the reasons for the dealer's protest. Upon the
26 filing of a protest and the receipt of the filing fee, the department
27 shall promptly notify the manufacturer that a timely protest has been
28 filed, and the department shall arrange for a hearing with an
29 administrative law judge as the presiding officer to determine if the
30 manufacturer unreasonably withheld consent to the sale, transfer, or
31 exchange of the franchise.

32 ~~(5) ((In determining whether the manufacturer unreasonably withheld~~
33 ~~its approval to the sale, transfer, or exchange, the manufacturer has~~
34 ~~the burden of proof that it acted reasonably. A manufacturer's refusal~~
35 ~~to accept or approve a proposed buyer who otherwise meets the normal,~~
36 ~~reasonable, — and — uniformly — applied — standards — established — by — the~~
37 ~~manufacturer for the appointment of a new dealer, or who otherwise is~~

1 ~~capable of being licensed as a new motor vehicle dealer in the state of~~
2 ~~Washington, is presumed to be unreasonable.~~

3 ~~(6))~~ The administrative law judge shall conduct a hearing and
4 render a final decision as expeditiously as possible, but in any event
5 not later than one hundred twenty days after a protest is filed. Only
6 the selling, transferring, or exchanging new motor vehicle dealer and
7 the manufacturer may be parties to the hearing.

8 ~~((7))~~ (6) The administrative law judge shall conduct any hearing
9 as provided in RCW 46.96.050(2), and all hearing costs shall be borne
10 as provided in that subsection. Only the manufacturer and the selling,
11 transferring, or exchanging new motor vehicle dealer may appeal the
12 final order of the administrative law judge as provided in RCW
13 46.96.050(3).

14 ~~((8))~~ (7) This section and RCW 46.96.030 through 46.96.110 apply
15 to all franchises and contracts existing on July 23, 1989, between
16 manufacturers and new motor vehicle dealers as well as to all future
17 franchises and contracts between manufacturers and new motor vehicle
18 dealers.

19 ~~((9))~~ (8) RCW 46.96.140 through 46.96.190 apply to all franchises
20 and contracts existing on October 1, 1994, between manufacturers and
21 new motor vehicle dealers as well as to all future franchises and
22 contracts between manufacturers and new motor vehicle dealers.

23 NEW SECTION. Sec. 8. A new section is added to chapter 46.96 RCW
24 to read as follows:

25 (1) In the event of a termination, cancellation, or nonrenewal
26 under this chapter, except for a termination, cancellation, or
27 nonrenewal under RCW 46.96.070(2), or a voluntary termination,
28 cancellation, or nonrenewal initiated by the dealer, the manufacturer
29 shall, at the request and option of the new motor vehicle dealer, also
30 pay to the new motor vehicle dealer the fair market value of the motor
31 vehicle dealer's goodwill for the make or line as of the date
32 immediately preceding any communication to the public or dealer
33 regarding termination. To the extent the franchise agreement provides
34 for the payment or reimbursement to the new motor vehicle dealer in
35 excess of the value specified in this section, the provisions of the
36 franchise agreement control.

1 (2) The manufacturer shall pay the new motor vehicle dealer the
2 value specified in subsection (1) of this section within ninety days
3 after the date of termination.

4 NEW SECTION. **Sec. 9.** A new section is added to chapter 46.96 RCW
5 to read as follows:

6 A manufacturer shall, upon demand, indemnify and hold harmless any
7 existing or former franchisee and the franchisee's successors and
8 assigns from any and all damages sustained and attorneys' fees and
9 other expenses reasonably incurred by the franchisee that result from
10 or relate to any claim made or asserted by a third party against the
11 franchisee to the extent the claim results from any of the following:

12 (1) The condition, characteristics, manufacture, assembly, or
13 design of any vehicle, parts, accessories, tools, or equipment, or the
14 selection or combination of parts or components manufactured or
15 distributed by the manufacturer or distributor;

16 (2) Service systems, procedures, or methods that the franchisor
17 required or recommended the franchisee to use;

18 (3) Improper use by the manufacturer, its assignees, contractors,
19 representatives, or licensees of nonpublic personal information
20 obtained from a franchisee concerning any consumer, customer, or
21 employee of the franchisee; or

22 (4) Any act or omission of the manufacturer or distributor for
23 which the franchisee would have a claim for contribution or indemnity
24 under applicable law or under the franchise, irrespective of any prior
25 termination or expiration of the franchise.

26 NEW SECTION. **Sec. 10.** A new section is added to chapter 46.96 RCW
27 to read as follows:

28 A manufacturer may not take or threaten to take any adverse action
29 against a new motor vehicle dealer, including charge backs, reducing
30 vehicle allocations, or terminating or threatening to terminate a
31 franchise, because the dealer sold or leased a vehicle to a customer
32 who exported the vehicle to a foreign country or who resold the
33 vehicle, unless the manufacturer or distributor definitively proves
34 that the dealer knew or reasonably should have known that the customer
35 intended to export or resell the vehicle. A manufacturer or
36 distributor shall, upon demand, indemnify, hold harmless, and defend

1 any existing or former franchisee or franchisee's successors or assigns
2 from any and all claims asserted, or damages sustained and attorneys'
3 fees and other expenses reasonably incurred by the franchisee that
4 result from or relate to any claim made or asserted, by a third party
5 against the franchisee for any policy, program, or other behavior
6 suggested by the manufacturer for sales of vehicles to parties that
7 intend to export a vehicle purchased from the franchisee.

8 NEW SECTION. **Sec. 11.** A new section is added to chapter 46.96 RCW
9 to read as follows:

10 A new motor vehicle dealer who is injured in his or her business or
11 property by a violation of this chapter may bring a civil action in the
12 superior court to recover the actual damages sustained by the dealer,
13 together with the costs of the suit, including reasonable attorneys'
14 fees if the new motor vehicle dealer prevails. The new motor vehicle
15 dealer may bring a civil action in district court to recover his or her
16 actual damages, except for damages that exceed the amount specified in
17 RCW 3.66.020, and the costs of the suit, including reasonable
18 attorneys' fees.

19 NEW SECTION. **Sec. 12.** A new section is added to chapter 46.96 RCW
20 to read as follows:

21 A manufacturer or distributor shall not enter into an agreement or
22 understanding with a new motor vehicle dealer that requires the dealer
23 to waive any provisions of this chapter. However, a dealer may, by
24 written contract and for valuable and reasonable separate
25 consideration, waive, limit, or disclaim a manufacturer's obligations
26 or a dealer's rights under RCW 46.96.080, 46.96.090, 46.96.105,
27 46.96.140, and 46.96.150, if the contract sets forth the specific
28 provisions of this chapter that are waived, limited, or disclaimed. A
29 manufacturer shall not coerce, threaten, intimidate, or require a new
30 motor vehicle dealer, as a condition to granting or renewing a
31 franchise, to enter into such an agreement or understanding.

32 NEW SECTION. **Sec. 13.** If any provision of this act or its
33 application to any person or circumstance is held invalid, the

1 remainder of the act or the application of the provision to other
2 persons or circumstances is not affected.

Passed by the House March 10, 2010.

Passed by the Senate March 2, 2010.

Approved by the Governor March 23, 2010.

Filed in Office of Secretary of State March 23, 2010.

Exhibit 2

HOUSE BILL REPORT

ESHB 2547

As Passed Legislature

Title: An act relating to franchise agreements between new motor vehicle dealers and manufacturers.

Brief Description: Concerning franchise agreements between new motor vehicle dealers and manufacturers.

Sponsors: House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Condotta, Maxwell, Sullivan, Roach, Kessler, Sells, Kenney, Appleton, Hunter, Pedersen, Upthegrove, Hinkle, Ormsby, Herrera, Kretz, Hasegawa, Campbell, Takko, Springer, Dammeier and Haler).

Brief History:

Committee Activity:

Commerce & Labor: 1/15/10, 2/2/10 [DPS].

Floor Activity:

Passed House: 2/13/10, 95-0.

Senate Amended.

Passed Senate: 3/2/10, 46-0.

House Concurred.

Passed House: 3/10/10, 97-0.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Modifies the provisions regarding motor vehicle manufacturer and dealer franchise agreements, including those related to terminations of franchises, warranty work, designated successors to franchise ownership, unfair practices, and transfers of dealerships.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Conway, Chair; Wood, Vice Chair; Condotta, Ranking Minority Member; Chandler, Crouse, Green, Moeller and Williams.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Staff: Alison Hellberg (786-7152).

Background:

Motor vehicle manufacturers maintain a franchise relationship with their dealers. State law and the franchise agreement outline the responsibilities of each party. The law generally dictates when a manufacturer may own a franchise, when manufacturers may terminate a dealer's franchise, and that manufacturers may not discriminate between dealerships.

Termination, Cancellation, or Nonrenewal of a Franchise.

A manufacturer's ability to terminate a franchise is restricted. A manufacturer must comply with notice requirements. A dealer may also request a hearing by an administrative law judge to determine that there is good cause for the termination of the franchise and that the manufacturer has acted in good faith.

Except in certain cases that constitute good cause for termination, cancellation, or nonrenewal of a franchise, a manufacturer must pay the dealer:

- the unexpired term of the lease or one year, whichever is less, if the dealer is leasing the dealership facilities from someone other than the manufacturer; or
- the reasonable rental value of the dealership facilities for one year or until the facilities are leased or sold, whichever is less, if the dealer owns the new motor dealership facilities.

Warranty Work.

Manufacturers must specify the dealer's obligation to perform warranty work or service on the manufacturer's products in franchise agreements. Manufacturers must provide dealers with a schedule of compensation to be paid to the dealer for warranty work or service required of the dealer by the manufacturer in connection with the manufacturer's products.

Designated Successor to Franchise Ownership.

An owner may appoint a designated successor to ownership of the franchise upon the owner's death or incapacity if the designated successor meets certain requirements.

Sale, Transfer, or Exchange of Franchise.

A manufacturer may not unreasonably withhold consent to the sale of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer. In determining whether a manufacturer unreasonably withheld its approval, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer, is presumed to be unreasonable.

Summary of Engrossed Substitute Bill:

Termination, Cancellation, or Nonrenewal of a Franchise.

During a legal dispute concerning the termination of a franchise, a dealer's franchise is maintained. For purposes of the notice requirements of the termination of a franchise, a

discontinuance of the sale and distribution of a motor vehicle line, or the constructive discontinuance by material reduction in selection offered such that continuing to retail the line is no longer economically viable for a dealer, is considered a termination of a franchise.

In addition to the other required sums that the manufacturer is required to pay in certain termination of a franchise, a manufacturer must also pay the dealer for the costs of any relocation, substantial alteration, or remodeling of a dealer's facilities required by a manufacturer that was completed within three years of the termination. A manufacturer is not required to pay the sums if the dealer voluntarily terminates the franchise. The manufacturer must also pay the dealer the fair market value of the dealer's goodwill within 90 days of the termination.

Warranty Work.

The schedule of compensation for warranty work must not be less than the rates charged by the dealer for similar service to retail customers for nonwarranty service and repairs and the schedule of compensation for any existing dealer. For parts, the rates charged by the dealer is the price paid by the dealer increased by the dealer's average percentage markup. For labor, the manufacturer must pay the dealer rates charged to retail customers.

Designated Successor to Franchise Ownership.

If an owner has owned the dealership for more than five consecutive years, the owner may appoint a designated successor to be effective on a date of the owner's choosing that is prior to the owner's death or disability. A dealer must notify the manufacturer at least 30 days before a designated successor's proposed succession.

Unfair Practices.

Several unfair practices by manufacturers are added. A manufacturer may not:

- discriminate against a dealer by preventing, offsetting, or otherwise impairing the dealer's right to request a documentary service fee on affinity or similar program purchases;
- terminate a franchise because the dealer relocates the manufacturer's or distributor's make or line of vehicles to an existing dealership facility that is within the relevant market area, except that, in any non-emergency circumstance, the dealer must give the manufacturer at least 60 days notice;
- terminate a franchise based on the failure of a franchisee to change the location of the dealership or to make substantial alterations to the use or number of franchises on the dealership premises or facilities;
- require a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is uniformly required of similarly situated dealers and is reasonable in light of all existing circumstances, including economic conditions;
- prevent any dealer from changing the executive management of a dealer unless the manufacturer can show that a proposed change will result in executive management by a person who is not of good moral character or who does not meet reasonable, preexisting, and equitably applied standards of the manufacturer; or
- condition the sale, transfer, relocation, or renewal of a franchise agreement or condition sales, services, parts, or incentives upon site control or an agreement to

make improvements or substantial renovations to a facility. A "substantial renovation" is anything that costs a dealer more than \$5,000.

A waiver of franchise law is prohibited, except that certain manufacturer obligations and dealer rights may be waived if the waiver is set forth in a written contract and separate consideration is given.

Sale, Transfer, or Exchange of Franchise.

A manufacturer may not withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer who does not already hold a franchise with the manufacturer. The qualification that the manufacturer may not "unreasonably" withhold consent is removed.

Vehicle Export.

A manufacturer may not take or threaten to take any adverse action against a dealer because the dealer sold or leased a vehicle to a customer who exported the vehicle or who resold the vehicle, unless the manufacturer definitively proves that the dealer knew or should have known of the customer's intentions. A manufacturer must indemnify, hold harmless, and defend dealers from claims against the franchisee for any policy or program of the manufacturer for sales of vehicles to parties that intend to export a vehicle purchased from the franchisee.

Manufacturer Liability.

Manufacturers are liable for claims against the dealer if the claim results from:

- the condition, characteristics, manufacture, assembly, or design of any vehicle, parts, accessories, tools, or equipment manufactured by the manufacturer;
- service systems, procedures, or methods required or recommended by the manufacturer;
- improper use by the manufacturer of nonpublic personal information obtained from a dealer; or
- any act or omission of the manufacturer for which the dealer would have a claim for contribution or indemnity.

Attorneys' Fees.

A dealer injured by a violation of the franchise provisions may bring a civil action to recover damages, together with the costs of the suit, including reasonable attorneys' fees if the dealer prevails.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) This bill updates the motor vehicle franchise laws. As the economy and the industry has changed, the relationship between dealers and manufactures has been tested. This bill will restore balance and level the playing field between dealers and manufacturers. It also allows dealers to make the best decisions regarding their businesses. A dealer understands the local business climate and it is the dealer's investment, community, and employees. Dealers provide family wage jobs, and in many communities, they collect the largest amount of sales tax. Selling cars is a tough industry, but the market should decide when a dealership fails, not the manufacturer.

This bill addresses several areas where dealers have struggled. Dealers are given very detailed instructions on how they build their dealerships and are often required to make substantial alterations. It is understandable that dealerships must meet the image of the company, but these demands should be reasonable and fair. If requiring dealers to make substantial changes, manufacturers should stand by those requirements.

Dealers and manufacturers have met and there are places where they are working on compromised language. There should be a proposed substitute bill that addresses some of the manufacturers' concerns.

(With concerns) Manufacturers and the automobile (auto) industry are facing great economic difficulties. The Legislature passed sweeping changes to the franchise law just last year. There are some changes in this bill that will hurt manufacturers, but manufacturers understand why they are necessary. There are some changes in this bill, however, that will hurt manufacturers for a great deal. The bill is flawed the way it is drafted, particularly in sections 4 and 6 of the bill, in regards to warranty work and site control. This legislation should not go too far.

The warranty work provisions would be a major change from how things currently work. The work at a dealership is more expensive than any other auto repair facility. This bill makes manufacturers pay those high costs. This is a disincentive to the entire industry. Another issue is in the area of vehicle export. The "actual knowledge" language should be replaced. Dealers should be asking questions related to whether a vehicle is for export.

Recreational vehicle (RV) manufacturers have some concerns with the warranty work provisions and would like to be exempted. It would be better to have RV-specific franchise laws like Oregon. The RV manufacturers have not been included in discussions and the bill applies to them even though the issues surrounding them are so different.

(Opposed) None.

Persons Testifying: (In support) Scott Hazlegrove and Mary Byrne, Washington State Auto Dealers Association.

(With concerns) Cliff Webster, General Motors; Stu Halsan, Recreation Vehicle Industry Association; and Ryan Spiller, Auto Alliance.

Persons Signed In To Testify But Not Testifying: None.

Exhibit 3

FINAL BILL REPORT

ESHB 2547

C 178 L 10
Synopsis as Enacted

Brief Description: Concerning franchise agreements between new motor vehicle dealers and manufacturers.

Sponsors: House Committee on Commerce & Labor (originally sponsored by Representatives Conway, Condotta, Maxwell, Sullivan, Roach, Kessler, Sells, Kenney, Appleton, Hunter, Pedersen, Upthegrove, Hinkle, Ormsby, Herrera, Kretz, Hasegawa, Campbell, Takko, Springer, Dammeier and Haler).

House Committee on Commerce & Labor
Senate Committee on Labor, Commerce & Consumer Protection

Background:

Motor vehicle manufacturers maintain a franchise relationship with their dealers. State law and the franchise agreement outline the responsibilities of each party. The law generally dictates when a manufacturer may own a franchise or terminate a dealer's franchise, and establishes prohibited practices for manufacturers.

Termination, Cancellation, or Nonrenewal of a Franchise.

A manufacturer's ability to terminate a franchise is restricted. A manufacturer must comply with notice requirements. A dealer may also request a hearing by an administrative law judge to determine that there is good cause for the termination of the franchise and that the manufacturer has acted in good faith.

Except in certain cases that constitute good cause for termination, cancellation, or nonrenewal of a franchise, a manufacturer must pay the dealer:

- the unexpired term of the lease or one year, whichever is less, if the dealer is leasing the dealership facilities from someone other than the manufacturer; or
- the reasonable rental value of the dealership facilities for one year or until the facilities are leased or sold, whichever is less, if the dealer owns the new motor dealership facilities.

Warranty Work.

Manufacturers must specify the dealer's obligation to perform warranty work or service on the manufacturer's products in franchise agreements. Manufacturers must provide dealers

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

with a schedule of compensation to be paid to the dealer for warranty work or service required of the dealer by the manufacturer in connection with the manufacturer's products.

Designated Successor to Franchise Ownership.

An owner may appoint a designated successor to ownership of the franchise upon the owner's death or incapacity if the designated successor meets certain requirements.

Sale, Transfer, or Exchange of Franchise.

A manufacturer may not unreasonably withhold consent to the sale of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer. In determining whether a manufacturer unreasonably withheld its approval, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer, is presumed to be unreasonable.

Summary:

Termination, Cancellation, or Nonrenewal of a Franchise.

During a legal dispute concerning the termination of a franchise, a dealer's franchise is maintained. For purposes of the notice requirements of the termination of a franchise, a discontinuance of the sale and distribution of a motor vehicle line, or the constructive discontinuance by material reduction in selection offered such that continuing to retail the line is no longer economically viable for a dealer, is considered a termination of a franchise.

In addition to the other required sums that the manufacturer is required to pay in certain terminations of a franchise, a manufacturer must also pay the dealer for the costs of any relocation, substantial alteration, or remodeling of a dealer's facilities required by a manufacturer that was completed within three years of the termination. A manufacturer is not required to pay the sums if the dealer voluntarily terminates the franchise. The manufacturer must also pay the dealer the fair market value of the dealer's goodwill within 90 days of the termination.

Warranty Work.

The schedule of compensation for warranty work must not be less than the rates charged by the dealer for similar service to retail customers for nonwarranty service and repairs and the schedule of compensation for any existing dealer. For parts, the rates charged by the dealer is the price paid by the dealer increased by the dealer's average percentage markup. For labor, the manufacturer must pay the dealer rates charged to retail customers.

Designated Successor to Franchise Ownership.

If an owner has owned the dealership for more than five consecutive years, the owner may appoint a designated successor to be effective on a date of the owner's choosing that is prior to the owner's death or disability. A dealer must notify the manufacturer at least 30 days before a designated successor's proposed succession.

Unfair Practices.

Several unfair practices by manufacturers are added. A manufacturer may not:

- discriminate against a dealer by preventing, offsetting, or otherwise impairing the dealer's right to request a documentary service fee on affinity or similar program purchases;
- terminate a franchise because the dealer relocates the manufacturer's or distributor's make or line of vehicles to an existing dealership facility that is within the relevant market area, except that, in any non-emergency circumstance, the dealer must give the manufacturer at least 60 days notice;
- terminate a franchise based on the failure of a franchisee to change the location of the dealership or to make substantial alterations to the use or number of franchises on the dealership premises or facilities;
- require a dealer to make a material alteration, expansion, or addition to any dealership facility, unless the required alteration, expansion, or addition is uniformly required of similarly situated dealers and is reasonable in light of all existing circumstances, including economic conditions;
- prevent any dealer from changing the executive management of a dealer unless the manufacturer can show that a proposed change will result in executive management by a person who is not of good moral character or who does not meet reasonable, preexisting, and equitably applied standards of the manufacturer; or
- condition the sale, transfer, relocation, or renewal of a franchise agreement or condition sales, services, parts, or incentives upon site control or an agreement to make improvements or substantial renovations to a facility. A "substantial renovation" is anything that costs a dealer more than \$5,000.

A waiver of franchise law is prohibited, except that certain manufacturer obligations and dealer rights may be waived if the waiver is set forth in a written contract and separate consideration is given.

Sale, Transfer, or Exchange of Franchise.

A manufacturer may not withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer who does not already hold a franchise with the manufacturer or is capable of being licensed as a dealer.

Vehicle Export.

A manufacturer may not take or threaten to take any adverse action against a dealer because the dealer sold or leased a vehicle to a customer who exported the vehicle or who resold the vehicle, unless the manufacturer definitively proves that the dealer knew or should have known of the customer's intentions. A manufacturer must indemnify, hold harmless, and defend dealers from claims against the franchisee for any policy or program of the manufacturer for sales of vehicles to parties that intend to export a vehicle purchased from the franchisee.

Manufacturer Liability.

Manufacturers are liable for claims against the dealer if the claim results from:

- the condition, characteristics, manufacture, assembly, or design of any vehicle, parts, accessories, tools, or equipment manufactured by the manufacturer;

- service systems, procedures, or methods required or recommended by the manufacturer;
- improper use by the manufacturer of nonpublic personal information obtained from a dealer; or
- any act or omission of the manufacturer for which the dealer would have a claim for contribution or indemnity.

Attorneys' Fees.

A dealer injured by a violation of the franchise provisions may bring a civil action to recover damages, together with the costs of the suit, including reasonable attorneys' fees if the dealer prevails.

Votes on Final Passage:

House	95	0	
Senate	46	0	(Senate amended)
House	97	0	(House concurred)

Effective: June 10, 2010