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SENATE BILL NO. 1040

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee for Courts of Justice
on February 2, 1997)

(Patron Prior to Substitute—Senator Waddell)

A BILL to amend and reenact §§ 46.2-1993.3 and 46.2-1993.67 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 46.2-1993.67:1, relating to motorcycle dealers.

Be it enacted by the General Assembly of Virginia:

1. That §§ 46.2-1993.3 and 46.2-1993.67 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 46.2-1993.67:1 as follows:

§ 46.2-1993.3. Suit to enjoin violations; manufacturer, factory branch, distributor, distributor branch, factory or distributor representative subject to jurisdiction of courts of the Commonwealth; recovery of damages costs, and attorney's fees.

A. The Commissioner, whenever he believes from evidence submitted to him that any person has been violating, is violating or is about to violate any provision of this chapter, in addition to any other remedy, may bring an action in the name of the Commonwealth to enjoin any violation of this chapter. *In addition, a motorcycle dealer may bring an action to enjoin a violation of §§ 46.2-1993.31, 46.2-1993.67 or 46.2-1993.67:1.*

B. Any manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative who obtains a license under this chapter, is engaged in business in the Commonwealth and is subject to the jurisdiction of the courts of the Commonwealth. Any manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative of motorcycles of a recognized line-make that are sold or leased in the Commonwealth pursuant to a plan, system, or channel of distribution established, approved, authorized, or known to the manufacturer, shall be subject to the jurisdiction of the courts of the Commonwealth in any action seeking relief under or to enforce any of the remedies or penalties provided for in this chapter.

C. In any action by a motorcycle dealer against a manufacturer, factory branch, distributor, distributor branch, or factory or distributor representative for a violation of this chapter or unfair practice, if the motorcycle dealer prevails, in addition to any damages awarded, the court shall award the dealer reasonable attorney's fees and costs.

D. No provision of any franchise agreement shall prohibit a motorcycle dealer from exercising his right to a trial by jury on any action brought under this chapter.

§ 46.2-1993.67. Other coercion of dealers; transfer, grant, succession to and cancellation of dealer franchises; delivery of motorcycles, parts, and accessories.

It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or their representatives:

1. To coerce or attempt to coerce any dealer to accept delivery of any motorcycle or motorcycles, parts or accessories therefor, or any other commodities, which have not been ordered by the dealer.

2. To coerce or attempt to coerce any dealer to enter into an agreement with the manufacturer, factory branch, distributor, or distributor branch, or representative thereof, or do any other act unfair to the dealer, by threatening to cancel any franchise existing between the manufacturer, factory branch, distributor, distributor branch, or representative thereof and the dealer.

3. To coerce or attempt to coerce any dealer to join, contribute to, or affiliate with any advertising association.

4. To prevent or refuse to approve the sale or transfer of the ownership of a dealership by the sale of the business, stock transfer, or otherwise, or the transfer, sale, or assignment of a dealer franchise, or a change in the executive management or principal operator of the dealership, unless the franchisor provides written notice to the dealer of its objection and the reasons therefor at least thirty days prior to the proposed effective date of the transfer, sale, assignment, or change. No such objection shall be effective to prevent the sale, transfer, assignment, or change if the Commissioner has determined, if requested in writing by the dealer within thirty days after receipt of an objection to the proposed sale, transfer, or change, and after a hearing on the matter, that the failure to permit or honor the sale, transfer, assignment, or change is unreasonable under the circumstances. No franchise may be sold, assigned, or transferred unless (i) the franchisor has been given at least ninety days' prior written notice by the dealer as to the identity, financial ability, and qualifications of the proposed transferee, and (ii) the sale or transfer of the franchise and business will not involve, without the franchisor's consent, a relocation of the business.

5. To grant an additional franchise for a particular line-make of motorcycle in a relevant market area in which a dealer or dealers in that line-make are already located unless the franchisor has first advised

60 in writing all other dealers in the line-make in the relevant market area. No such additional franchise
61 may be established at the proposed site unless the Commissioner has determined, if requested by a
62 dealer of the same line-make in the relevant market area within thirty days after receipt of the
63 franchisor's notice of intention to establish the additional franchise, and after a hearing on the matter,
64 that there is reasonable evidence that after the grant of the new franchise, the market will support all of
65 the dealers in that line-make in the relevant market area. Establishing a franchised dealer in a relevant
66 market area to replace a franchised dealer that has not been in operation for more than two years shall
67 constitute the establishment of a new franchise subject to the terms of this subdivision. The two-year
68 period for replacing a franchised dealer shall begin on the day the franchise was terminated, or, if a
69 termination hearing was held, on the day the franchisor was legally permitted finally to terminate the
70 franchise. This subdivision shall not apply to (i) the relocation of an existing dealer within that dealer's
71 relevant market area if the relocation site is to be more than ten miles distant from any other dealer for
72 the same line-make; (ii) the relocation of an existing dealer within that dealer's relevant market area if
73 the relocation site is to be more distant than the existing site from all other dealers of the same
74 line-make in that relevant market area; or (iii) the relocation of an existing new motorcycle dealer within
75 two miles of the existing site of the relocating dealer.

76 *No new or additional motorcycle dealer franchise shall be established in any county, city or town*
77 *when (i) a timely protest is filed by an existing franchised motorcycle dealer and (ii) the manufacturer,*
78 *factory branch, distributor, distributor branch, or factory or distributor representative fails to show that*
79 *the existing franchised dealer or dealers who register new motorcycle retail sales or retail leases of the*
80 *same line-make in the community or territory of the proposed franchise are not providing adequate*
81 *representation of such line-make motorcycles in such county, city or town. The burden of proof in*
82 *establishing inadequate representation shall be on the manufacturer, factory branch, distributor,*
83 *distributor branch, or factory or distributor representative.*

84 6. Except as otherwise provided in this subdivision and notwithstanding the terms of any franchise,
85 to terminate, cancel, or refuse to renew the franchise of any dealer without good cause and unless (i) the
86 dealer and the Commissioner have received written notice of the franchisor's intentions at least sixty
87 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise,
88 setting forth the specific grounds for the action, and (ii) the Commissioner has determined, if requested
89 in writing by the dealer within the sixty-day period, and, after a hearing on the matter, that there is good
90 cause for the termination, cancellation, or nonrenewal of the franchise. In any case where a petition is
91 made to the Commissioner for a determination as to good cause for the termination, cancellation, or
92 nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's
93 decision or, if that decision is appealed to the circuit court, pending the decision of the circuit court. In
94 any case in which a franchisor neither advises a dealer that it does not intend to renew a franchise nor
95 takes any action to renew a franchise beyond its expiration date, the franchise in question shall continue
96 in effect on the terms last agreed to by the parties. Notwithstanding the other provisions of this
97 subdivision, notice of termination, cancellation, or nonrenewal may be provided to a dealer by a
98 franchisor not less than fifteen days prior to the effective date of such termination, cancellation, or
99 nonrenewal when the grounds for such action are any of the following:

100 a. Insolvency of the franchised motorcycle dealer or filing of any petition by or against the
101 franchised motorcycle dealer, under any bankruptcy or receivership law, leading to liquidation or which
102 is intended to lead to liquidation of the franchisee's business;

103 b. Failure of the franchised motorcycle dealer to conduct its customary sales and service operations
104 during its posted business hours for seven consecutive business days, except where the failure results
105 from acts of God or circumstances beyond the direct control of the franchised motorcycle dealer;

106 c. Revocation of any license which the franchised motorcycle dealer is required to have to operate a
107 dealership;

108 d. Conviction of the dealer or any principal of the dealer of a felony.

109 The change or discontinuance of a marketing or distribution system of a particular line-make product
110 by a manufacturer or distributor, while the name identification of the product is continued in substantial
111 form by the same or different manufacturer or distributor, may be considered to be a franchise
112 termination, cancellation, or nonrenewal. The provisions of this paragraph shall apply to changes and
113 discontinuances made after January 1, 1989, but they shall not be considered by any court in any case in
114 which such a change or discontinuance occurring prior to that date has been challenged as constituting a
115 termination, cancellation or nonrenewal.

116 7. To fail to provide continued parts and service support to a dealer which holds a franchise in a
117 discontinued line-make for at least five years from the date of such discontinuance. This requirement
118 shall not apply to a line-make which was discontinued prior to January 1, 1989.

119 8. To fail to allow a dealer the right at any time to designate a member of his family as a successor
120 to the dealership in the event of the death or incapacity of the dealer. It shall be unlawful to prevent or
121 refuse to honor the succession to a dealership by a member of the family of a deceased or incapacitated

dealer if the franchisor has not provided to the member of the family previously designated by the dealer as his successor written notice of its objections to the succession and of such person's right to seek a hearing on the matter before the Commissioner pursuant to this article, and the Commissioner determines, if requested in writing by such member of the family within thirty days of receipt of such notice from the franchisor, and after a hearing on the matter before the Commissioner pursuant to this article, that the failure to permit or honor the succession is unreasonable under the circumstances. No member of the family may succeed to a franchise unless (i) the franchisor has been given written notice as to the identity, financial ability, and qualifications of the member of the family in question and (ii) the succession to the franchise will not involve, without the franchisor's consent, a relocation of the business.

9. To fail to ship monthly to any dealer, if ordered by the dealer, the number of new motorcycles of each make, series, and model needed by the dealer to receive a percentage of total new motorcycle sales of each make, series, and model equitably related to the total new motorcycle production or importation currently being achieved nationally by each make, series, and model covered under the franchise. Upon the written request of any dealer holding its sales or sales and service franchise, the manufacturer or distributor shall disclose to the dealer in writing the basis upon which new motorcycles are allocated, scheduled, and delivered to the dealers of the same line-make. If allocation is at issue in a request for a hearing, the dealer may demand the Commissioner to direct that the manufacturer or distributor provide to the dealer, within thirty days of such demand, all records of sales and all records of distribution of all motorcycles to the same line-make dealers who compete with the dealer requesting the hearing.

10. To require or otherwise coerce a dealer to underutilize the dealer's facilities.

11. To include in any franchise with a motorcycle dealer terms that are contrary to, prohibited by, or otherwise inconsistent with the requirements of this chapter.

12. For any franchise agreement to require a motorcycle dealer to pay the attorney's fees of the manufacturer or distributor related to hearings and appeals brought under this article.

13. To fail to include in any franchise with a motorcycle dealer the following language: "If any provision herein contravenes the laws or regulations of any state or other jurisdiction wherein this agreement is to be performed, or denies access to the procedures, forums, or remedies provided for by such laws or regulations, such provision shall be deemed to be modified to conform to such laws or regulations, and all other terms and provisions shall remain in full force," or words to that effect.

§ 46.2-1993.67:1. When discontinuation, cancellation, or nonrenewal of franchise unfair.

A discontinuation, cancellation, or nonrenewal of a franchise agreement is unfair if it is not clearly permitted by the franchise agreement, is not undertaken in good faith, is not undertaken for good cause, or is based on an alleged breach of the franchise agreement that is not in fact a material and substantial breach.

2. That the provisions of this act shall apply only to franchise agreements entered into or renewed on or after July 1, 1997.