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12 STATE OF CALIFORNIA  
13 NEW MOTOR VEHICLE BOARD

14 In the Matter of the Protest of  
15 BURBANK KAWASAKI, INC.,  
16 Protestant,

17 v.

18 KAWASAKI MOTORS CORP., U.S.A., a  
19 Corporation,  
20 Respondent.

Protest No. PR-2328-12 and PR-2333-12

**RESPONDENT KAWASAKI MOTORS  
CORP., U.S.A.'S POST-HEARING BRIEF**

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1     **I. INTRODUCTION**

2             Respondent Kawasaki Motors Corp., U.S.A. (“Kawasaki”) has good cause under Vehicle  
3 Code Section 3061 to end its business association with Protestant Burbank Kawasaki, Inc.  
4 (“Burbank” or “Protestant”). Burbank has breached the most basic obligations a dealer agrees to  
5 undertake: it has had no floor plan financing for 18 months, has failed to meet its obligation to  
6 sell Kawasaki motorcycles and ATVs, and it has a grossly inadequate inventory of only 11  
7 Kawasaki units in stock. Kawasaki proved each of these material contractual violations at the  
8 hearing, and Burbank did not refute any of them. Rather, Protestant vainly attempted to deflect  
9 blame for its contractual breaches on to Kawasaki, Kawasaki Motors Finance Company  
10 (“KMFC”), Protestant’s own accountants, two major national banks, its own employees, or just  
11 about any party but itself.

12             Protestant’s effort to blame its material breaches of its Dealer Agreement on others,  
13 however, fails. For example, Burbank claims that responsibility for its lack of floor plan  
14 financing falls on: (1) Kawasaki (because it set the credit amount too high), (2) third party banks  
15 who would not provide additional collateral in the form of an irrevocable line of credit (“ILOC”)  
16 to secure a line of credit (because they did not know what an ILOC is and had terrible customer  
17 service), or (3) KMFC (because it would not accept Burbank’s dealer principal’s house as  
18 additional collateral, it allegedly changed the terms of its financing contract, and failed to help its  
19 dealers). In addition, Protestant blames Kawasaki for Protestant’s lack of sales performance.  
20 Allegedly, Kawasaki wrongly prevented Burbank from buying Kawasaki products (because  
21 Kawasaki would not accept government purchase orders to release vehicles after Burbank lost its  
22 KMFC financing). Moreover, Burbank claims that it lacked any understanding of the sales  
23 standards that Kawasaki expected of it (because the Kawasaki representative that visited the  
24 dealership was in a hurry and unhelpful).

25             These “excuses” are not valid bases to nullify Burbank’s material breaches of the  
26 Kawasaki Dealer Agreement, as Kawasaki effectively refuted all of these claims. Moreover,  
27 none of these allegations, even if true, is sufficient to compel Kawasaki to continue to allow  
28 Protestant to represent Kawasaki products to the consuming public. As the evidence established,

1 Burbank was significantly deficient in sales (at 40% of expected) *even before it lost its financing*,  
2 and then it lost its floor plan financing for reasons completely within its control. Protestant had  
3 merely to provide additional collateral in the form of an ILOC to have its financing restored,  
4 which Protestant never did. As such, its sales plummeted even further and its Kawasaki inventory  
5 has now all but disappeared. Protestant’s attempts to “distract” the Board from its fundamental  
6 failures collapse under the weight of the facts.

7 Accordingly, good cause exists under Vehicle Code section 3061 for the termination of  
8 Burbank’s Kawasaki dealership, as Kawasaki demonstrated:

9 (a) Burbank has not, for at least the past five years, transacted an adequate amount of  
10 business compared to the business available to it (Veh.Code 3061 (a));

11 (b) Burbank has made no significant nor permanent investment to perform its part of  
12 the franchise (Veh.Code 3061 (b)(c));

13 (c) It would not be injurious, but rather would be beneficial to the public for  
14 Burbank’s franchise to be terminated, because Burbank is and has been failing to serve the public  
15 in the areas of sales (most local customers travel to another Kawasaki dealer to buy), product  
16 selection and customer satisfaction (Veh.Code 3061 (d) (e)); and

17 (d) Burbank has completely failed to comply with several material terms of its Dealer  
18 Agreement, in the areas of sales, floor plan financing, inventory, and equal representation  
19 (Veh.Code 3061 (g)).

20 For all of these reasons, Kawasaki has shown that it has good cause to terminate  
21 Protestant’s Kawasaki Dealer Sales and Service Agreement.

22 **II. FACTS**

23 Protestant is a new motor vehicle dealer selling Kawasaki motorcycles and all-terrain  
24 vehicles. (Stipulated Facts at ¶ 1). Kawasaki is the distributor of Kawasaki products in the  
25 United States. (Stipulated Facts at ¶ 2). Burbank (through its owner, Leon Bellissimo) has been a  
26 Kawasaki dealer in Burbank for approximately 34 years. (RT I, 17: 18-19). The dealership is  
27 and always has been located at 1329 North Hollywood Way, Burbank, California 91505.  
28 (Stipulated Facts at ¶ 3).

1 Burbank purchased its Kawasaki dealership from another dealer in 1978 for  
2 approximately \$100,000, most of which was paid for vehicles and parts, and not good will. (RT  
3 III, 31: 2-32: 7). Burbank leases its dealership facility, and its rent is only three to four thousand  
4 dollars per month. (Stipulated Facts at ¶ 10; RT I, 17: 20-24; RT II, 194: 9-13). Burbank also  
5 holds franchise agreements for five different motor scooter lines. (RT I, 18: 3-9). Burbank has  
6 not ever made any major renovations to the facility. (RT I, 18: 10-19: 3, RT II, 74: 23-75: 4, 83:  
7 7-16). At most, in 34 years at the same facility, Burbank has purchased two Kawasaki signs,  
8 done some painting, added a fence, fixed a broken window and cleaned. (RT II, 194: 21-195: 2).  
9 As such, the expenditures made by Burbank since its inception are either minimal, or were for  
10 non-permanent items, such as rent, vehicles and parts.

11 In June 2011, KMFC suspended Burbank's flooring line of credit for new motor vehicle  
12 purchases. KMFC accomplished the suspension by reducing the amount of available flooring  
13 credit for Burbank from \$750,000 to \$10. (Stipulated Facts at ¶ 5; RT I, 19: 4-14, Resp. Exh.  
14 304; RT III, 83: 10-21, 25-84: 2). KMFC is an independent business from Kawasaki that has its  
15 own lending rules, pursuant to which it provides flooring credit to dealers. (RT III, 78: 19-79: 3).  
16 KMFC suspended Burbank's line of credit because Burbank had failed to meet its obligation  
17 under its agreement with KMFC to provide timely annual financial statements. (Resp. Exh. 304,  
18 RT III, 82: 22-25). After Burbank supplied the required financial statements, KMFC required  
19 Burbank to provide an ILOC as additional collateral. The amount of the required ILOC was to be  
20 equal to 25% of the line of credit amount required by Kawasaki. (RT III, 91: 2-10). KMFC has,  
21 at times required other dealers to provide ILOCs representing a higher percentage of the required  
22 flooring amount - even up to 100%. (RT III, 97: 4-6). KMFC even attempted to assist Burbank  
23 by providing samples of an ILOC to it on multiple occasions. (RT I, 28: 11-24; RT III, 97: 14-21,  
24 100: 12-22). At no time has Burbank obtained the required ILOC, (RT I, 29: 19-22, 31: 1-5), or  
25 an alternative source of floor plan financing. (RT III, 84: 17-23). In fact, Burbank never even  
26 completed an application for an alternative flooring line of credit from another institution. (RT I,  
27 65: 20-23).

28

1           Moreover, *even before the loss of its floor plan financing*, Burbank was failing to make  
2 even half of the sales that were available to it. (Resp. Exh. 314). Significantly, Burbank’s  
3 performance has continued to decline over the last five years, so that for the last reporting period,  
4 it was selling less than 20% of the vehicles that it could reasonably have been expected to sell as  
5 an *average* Kawasaki dealer. (*Id.*) Over this period, Kawasaki has lost at least 895 sales of  
6 Kawasaki motorcycles and ATVs, which should have been made by Burbank. (Resp. Exh. 314).

7           KMFC did not repossess Burbank’s existing inventory of Kawasaki vehicles when its  
8 flooring line was suspended, which it could have done. Rather, KMFC allowed Burbank to retain  
9 its inventory and simply refused to extend further flooring credit. (RT III, 82: 1-21). This action  
10 indicates that KMFC believed that Burbank would act to reinstate its credit and continue in  
11 operation. (*Id.*). Burbank, however, did nothing to comply with KMFC’s reasonable requests,  
12 and has remained in business merely by maintaining its scooter business for other brands, by  
13 selling off its existing Kawasaki inventory, and by making some purchases from other Kawasaki  
14 dealers as well as a few cash purchases from Kawasaki. (Stipulated Facts at ¶ 6; RT II, 101: 1-4).  
15 As a result, Burbank has become a *de facto* scooter dealer, with only 11 Kawasaki vehicles in  
16 inventory – 7 of which were purchased from Kawasaki over 12 months ago. (RT II, 82: 1-5, 12-  
17 14).

18           In September 2011, Kawasaki sent Burbank a letter via Certified Mail, Return Receipt  
19 Requested, stating that Burbank had “failed to maintain a wholesale line of credit (flooring) ... in  
20 breach of paragraph 14 of the Dealer Agreement,” and that Burbank needed to correct this  
21 deficiency by obtaining flooring in the amount of \$765,500 as soon as possible, but in no event  
22 later than November 30, 2011. (Stipulated Facts at ¶ 7) (RT I, 111: 1-9; Resp. Exh. 305).

23           On January 24, 2012, Kawasaki sent, and Protestant subsequently received, Notices of  
24 Termination in compliance with Vehicle Code 3060. (Resp. Exhs. 301 (motorcycle), 302  
25 (ATV)). In those Notices, Kawasaki identified 4 independent reasons for the termination of  
26 Protestant’s Dealer Agreement: (1) Failure to maintain adequate model inventory, (2) Failure to  
27 meet sales requirements, (3) Failure to provide equal representation of Kawasaki Products and (4)  
28

1 Failure to maintain floor plan financing adequate to fulfill its obligations under the Dealer  
2 Agreement. (*Id.*, Stipulated Facts at ¶ 8).

3 Burbank filed a timely protest. (Stipulated Facts at ¶ 9).

4 **III. KAWASAKI HAS ESTABLISHED THAT GOOD CAUSE EXISTS FOR THE**  
5 **TERMINATION OF BURBANK'S KAWASAKI DEALER AGREEMENT.**

6 At the hearing, Kawasaki presented the testimony of Bruce Gill, Regional Sales Director  
7 for the West Region of Kawasaki, Steven Fischer, District Manager for Kawasaki, Cheryl Mottel  
8 of KMFC (Collection Action Section), and Kawasaki's expert, Michael Palmer, of Urban Science  
9 Applications, Inc., who collectively established that Burbank has failed to comply with its most  
10 fundamental obligations under the Dealer Agreement. Further, the testimony of Burbank's only  
11 witness, its President, Leon Bellissimo, confirmed that Burbank has breached the terms of its  
12 Kawasaki Dealer Agreement and that Kawasaki has met the burden of establishing good cause to  
13 terminate Burbank's Kawasaki Dealer Agreement.

14 **A. The Amount of Business Transacted by Burbank is Significantly Deficient as**  
15 **Compared to the Amount of Business Available to It. [Vehicle Code §3061(a)]**

16 Over the last five years, Protestant has not come close to capturing the Kawasaki sales that  
17 were available to it, and in fact, its sales performance continues to decline. This failure alone is  
18 sufficient to establish good cause to terminate Burbank's Kawasaki Dealer Agreement.

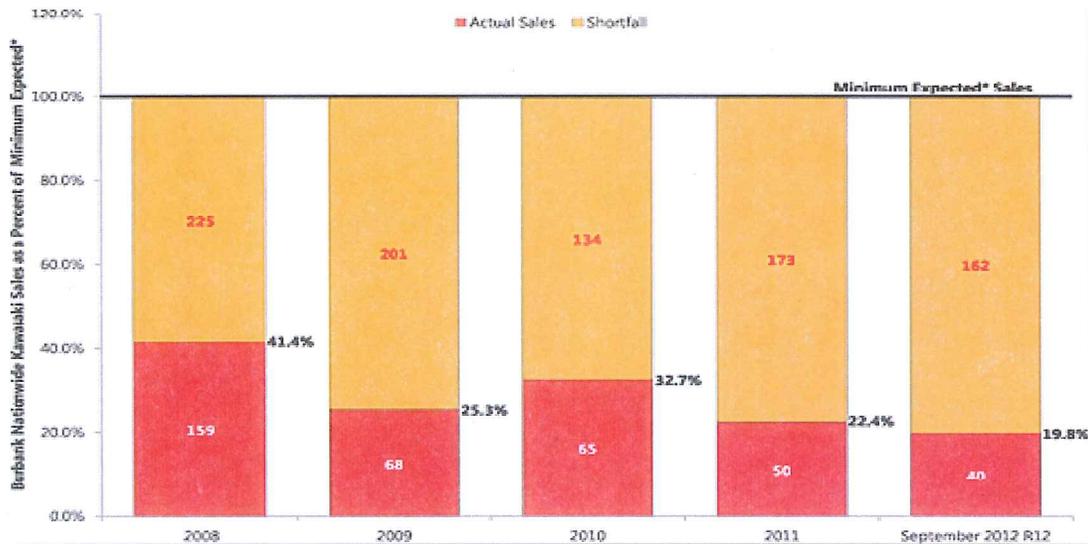
19 Kawasaki's expert, Michael Palmer, testified to Burbank's failure to capture available  
20 sales. He used the same standard Kawasaki uses in the ordinary course to assess a dealer's sales  
21 performance as compared to the sales that are available. When assessing a dealer's performance,  
22 Kawasaki does not look merely to the raw numbers of sales. Rather, Kawasaki uses a sales  
23 effectiveness calculation, which allows it to more fairly compare its dealers that operate in  
24 markets of different sizes, nationwide.

25 Kawasaki, like other motor vehicle manufacturers, evaluates a dealer's sales performance  
26 by measuring the dealer's "sales penetration" in relation to the dealer's assigned area, which  
27 Kawasaki calls a Statistical Evaluation Area ("SEA"). (Resp. Exh. 325 [SEA for Burbank], RT  
28 II, 133: 9-25). The SEA is a set of census tracts that are assigned based on their proximity to each

1 Kawasaki dealer. (RT II, 133: 24-25, 135: 20-22). Sales penetration calculates a dealer’s new  
 2 vehicle sales (regardless of where they are registered) (RT I, 140: 21-22) as a percentage of the  
 3 registrations of all competitive makes in the dealer’s SEA.

4 To gauge sales penetration effectiveness, a dealer’s sales penetration percentage is then  
 5 compared as a ratio to Kawasaki’s sales penetration throughout the nation, to determine whether  
 6 the dealer being analyzed is penetrating its SEA below, at, or above the average for all Kawasaki  
 7 dealers. (Resp. Exh. 314; RT II, 139: 15-17). Expressed as a percentage, the resulting quotient  
 8 calculates a dealer’s “sales effectiveness.” (RT II, 143: 14-20). Being 100% sales effective,  
 9 however, means only that a dealer is selling the number of new vehicles it is expected to sell,  
 10 compared to the average dealer. (RT II, 144: 23-145: 8). It is not a perfect or a maximum score,  
 11 and many dealers do achieve more than 100% sales effectiveness. (*Id.*). Because this calculation  
 12 shows how a dealer is performing in its market compared to all other Kawasaki dealers in their  
 13 respective markets, it provides strong evidence of Protestant’s sales compared to the business that  
 14 is available to it.

15 Comparing Burbank’s sales to what the average Kawasaki dealer has sold shows that  
 16 Burbank does not transact an adequate amount of business compared to the business that was  
 17 available to it. (Resp. Exh. 314) (summarizing Resp. Exhs. 319-325). Even before Burbank lost  
 18 its floor plan financing, its sales were *less than half* of what the average Kawasaki dealer was able  
 19 to sell:



1 (*Id.*). Since Protestant lost its floor plan financing, its performance has declined even further, so  
2 that it is now capturing only about 20% of the sales available it, if it performed as well as an  
3 average Kawasaki dealer. (*Id.*; *see also* RT I, 130: 1-24). In fact, Burbank's sales dropped  
4 further and faster than the industry declined during the economic downturn of 2008 and 2009.  
5 (RT II, 147: 2-7).

6 Use of national average as a comparison point for Burbank is reasonable because it is the  
7 lowest average performance of other Kawasaki dealers, as opposed to region or district average,  
8 which are both higher. (RT I, 147: 13-148: 3). Based upon a national sales effectiveness  
9 expectation, Burbank's lack of sales compared to the sales that were available to it has cost  
10 Kawasaki 895 sales from 2008 through September 2012. (Resp. Exh. 314).

11 Mr. Palmer also demonstrated that Burbank's poor performance was **not** due to: SEA  
12 assignment, product popularity, or Kawasaki's dealer network, but rather to Burbank's dealer  
13 operations. First, Mr. Palmer analyzed the SEA to determine if it had been properly drawn by  
14 Kawasaki. (RT II, 151: 20-152: 24). He then analyzed the dealer network and determined that  
15 Kawasaki has an appropriate number of dealers in the market, and that the number of dealers  
16 would not affect Burbank's sales negatively. (RT II, 153: 2-9). Local differences in product  
17 popularity were also eliminated as a potential cause. (RT II, 163: 15-23). After completing his  
18 analysis, Mr. Palmer concluded that any factors beyond these three were "really attributable to  
19 dealer operations." (RT II, 164: 3-7).

20 Notably, Burbank made no effort to dispute the accuracy of the evidence presented by  
21 Kawasaki or to provide expert testimony on the issues. Rather, Protestant argued, among other  
22 things, that its sales deficiencies were the result of its inability to purchase new Kawasaki  
23 products because its floor plan was "arbitrarily" suspended. This claim, however, does not pass  
24 scrutiny. Aside from the fact that Kawasaki was always willing to sell Burbank products for  
25 cash, the poor sales performance of Burbank pre-dates the loss of its floor plan financing in June  
26 2011. Rather, *even in 2008, 2009, and 2010*, Burbank was selling significantly less than half of  
27 the Kawasaki vehicles that were expected based on the sales penetration of an average Kawasaki  
28 dealer. Therefore, Burbank was not capturing the sales available to it long before it had issues

1 with its floor plan financing, and Burbank’s performance has only deteriorated from there.

2 As a result, the unrefuted evidence shows that Burbank is not capturing an adequate  
3 amount of Kawasaki business compared to what is available to it and Kawasaki has sustained its  
4 burden under this factor of Section 3061. While this factor alone is sufficient to support good  
5 cause for termination, Kawasaki has also established good cause in several other respects.

6 **B. Burbank Has Not Made Any Significant Investment, Permanent Or**  
7 **Otherwise In The Kawasaki Dealership. [Vehicle Code §3061(b), (c)].**

8 Burbank can make no credible argument that Kawasaki lacks good cause to terminate its  
9 Kawasaki dealer agreement because of the level or permanency of any investment that Burbank  
10 has made in its Kawasaki dealership.

11 Burbank made no significant investment when it purchased the Kawasaki dealership, as it  
12 paid only \$100,000, much of which was for the inventory of vehicles and parts. (RT III, 31: 2-32:  
13 7). Burbank has never owned the property on which its dealership sits, and is operating from the  
14 same building utilized when Burbank purchased the dealership. It leases the property for \$3,000  
15 to \$4,000 per month. (Stipulated Facts at ¶ 10; RT I, 17: 20-24; RT II, 194: 9-13).

16 Further, Burbank has not made any substantial investment in the 30+ years it has been a  
17 Kawasaki dealer. (RT I, 18: 10-19:3, RT II, 83: 7-16). Mr. Fischer testified that he has called on  
18 the dealership the last nine years, and the dealership has not changed in that time. (RT II, 74: 23-  
19 75: 4). Photographs from 1988 show the dealer’s facility is basically unchanged since then.  
20 (Resp. Exhs. 311, 312, RT II, 75: 5-78: 8). There is no evidence before the Board regarding any  
21 significant investment by Burbank, but rather only a couple of minor expenditures that were  
22 necessary to maintain minimal daily operations. (RT II, 194: 21-195: 2). Since Mr. Bellissimo is  
23 rarely present at the dealership, his claimed “sweat equity” is non-existent and cannot properly be  
24 understood as an “investment” for purposes of the statute, as it is not significant or permanent.  
25 (RT II, 72: 10-73: 19, RT III, 93: 21-94: 4).

26 Therefore, Burbank has little investment and no permanent investment in the Kawasaki  
27 dealership and it will not suffer any loss of such investment if its Kawasaki Dealer Agreement is  
28 terminated.

1           C.    **The Termination of Burbank Will Not Result in Any Injury to the Public**  
2                    **Welfare, as Burbank Fails to Provide for the Needs of Consumers and Has**  
3                    **Poor Customer Satisfaction [Vehicle Code §3061(d), (e)].**

4           Burbank's current dealership operations fail to meet the needs of consumers in the market  
5           area. Burbank fails the consuming public in terms of product selection and its treatment of the  
6           few customers that it does get.

7           Burbank also does not maintain an adequate inventory of current model Kawasaki  
8           vehicles. As a result, consumers do not have a meaningful selection of vehicles to choose from.  
9           Steven Fischer testified that Burbank should have a minimum of approximately 75 vehicles in  
10          inventory to be at an acceptable level. (RT II, 120: 17-121: 3). Burbank currently has only 11  
11          vehicles, 7 of which Burbank purchased from Kawasaki more than a year ago. (RT II, 82: 1-5,  
12          12-14). Moreover, even when Burbank had greater numbers of vehicles in inventory, it had  
13          chronic issues with aged inventory, which is also not in the public interest. (RT II, 93: 17-24). A  
14          prospective Kawasaki purchaser visiting Burbank simply is not exposed to the selection and new  
15          product that he or she seeks when entering a retail outlet.

16          In addition, consumers are traveling outside of Burbank's SEA to purchase Kawasaki  
17          vehicles. In 2012, Burbank only sold 10-15% of the Kawasaki products registered in its SEA –  
18          showing that it is not selling to the customers who are closest to its facility. (RT I, 142: 7-24,  
19          159: 25-160: 3, Resp. Exh. 323). This means the vast majority of customers are *already* driving  
20          outside their local community to purchase Kawasaki vehicles from other Kawasaki dealers, or are  
21          simply purchasing other line-makes of vehicles. Therefore, the public will not be inconvenienced  
22          when Burbank ceases to represent Kawasaki products.

23          By any measure, Burbank is abysmal in customer satisfaction. As compared to the  
24          Kawasaki dealers in its District, it ranks dead last. (RT I, 152: 16-21, 157: 4-16; Resp. Exh. 328).  
25          Furthermore, not only is it near the bottom of dealers in the Region, *Burbank is also among the*  
26          *worst dealers in the entire country* in customer satisfaction. (*Id.*). Mr. Fischer described at the  
27          hearing that two customers that sought him out to describe their dissatisfaction with Burbank's  
28          performance, the last time he was at the dealership in February 2013. (RT I, 53: 10-54: 11). Mr.  
                Fischer testified that in December of 2012, Burbank had only two sales of Kawasaki vehicles, and

1 yet also had two customer complaints. (RT II, 53: 9-16). Burbank presented no evidence at the  
2 hearing to refute these figures or to demonstrate that it maintains acceptable customer  
3 satisfaction.

4 Thus, Burbank's lack of inventory, poor customer service and lack of attention to  
5 Kawasaki products are not only having a significant negative effect on Burbank's sales  
6 performance, but also demonstrate that Burbank is not adequately serving the needs of the public  
7 within its own SEA. Therefore, the public will suffer no injury because of the termination of  
8 Burbank's Kawasaki Dealer Agreement, and Kawasaki has sustained its burden under this portion  
9 of the statute.

10 **D. Burbank Has Committed Several Material Breaches of the Kawasaki Dealer**  
11 **Agreement. [Vehicle Code §3061(g)]**

12 1. Burbank Has Failed to Comply With Its Obligation To Maintain Floor Plan  
13 Financing.

14 Protestant's floor plan financing was suspended by KMFC in June 2011 (Protestant's Exh.  
15 8), and has not been reinstated since then. KMFC achieved this suspension by reducing the  
16 amount of available flooring credit from \$750,000 to \$10. (Stipulated Facts at ¶ 5; RT I, 19: 4-  
17 14; Resp. Exh. 304; RT III, 83: 10-21, 25-84: 2).

18 Failure to maintain floor plan financing is a material breach of Paragraph 14A of the  
19 Kawasaki Dealer Agreement. This provision states:

20 DEALER shall at all times maintain and employ, in connection with its business  
21 and operations under this Agreement, such working capital and net worth *together*  
22 *with a line of credit* with a financing institution satisfactory to DISTRIBUTOR  
23 which will permit DEALER to properly and fully carry out and perform  
24 DEALER'S duties and obligations under this Agreement, including an inventory  
25 of Products . . . . Such working capital, net working capital and/or line of credit  
26 shall be of amounts not less than minimum standards established by  
27 DISTRIBUTOR from time to time for dealers similarly situated. (Emphasis  
28 added.)

1 Protestant has had approximately 18 months to cure this breach of its Dealer Agreement.  
2 Even so, Protestant failed to have its floor plan financing reinstated or to obtain alternative floor  
3 plan financing at any time, including to the current date. (RT III, 84: 17-23). Therefore, aside  
4 from a few purchases from other dealers and the occasional cash purchase from Kawasaki,  
5 Protestant has not purchased new Kawasaki vehicles in that period.

6 This breach goes to the heart of Protestant's ability to serve as a Kawasaki dealer, as the  
7 failure to maintain a line of credit means that Protestant cannot purchase, stock and then sell  
8 sufficient new Kawasaki products, as is required by Paragraphs 5 and 15 of the Dealer  
9 Agreement. As such, Protestant is not only failing to fulfill its contractual obligations to  
10 Kawasaki, but it is also not operating in the public interest, as it does not offer or tock new  
11 Kawasaki vehicles.

12 Protestant cannot blame this breach of its Dealer Agreement on Kawasaki. KMFC made  
13 the decision to suspend Burbank's floor plan financing – not Kawasaki. KMFC is an  
14 independent business from Kawasaki that operates under to its own rules, pursuant to which it  
15 provides flooring credit to dealers. (RT III, 78: 19-79: 3). Moreover, KMFC does not seek to  
16 put dealers out of business, but rather works with dealers in an attempt to rehabilitate their ability  
17 to obtain credit. (RT III, 79: 21-80: 13).

18 Furthermore, KMFC suspended Burbank's line of credit because Burbank had failed to  
19 provide timely financial statements, (Resp. Exh. 304; RT III, 82: 22-25), a circumstance that  
20 cannot be attributed to Kawasaki. Even after Burbank supplied the required financial statements,  
21 it was KMFC, not Kawasaki, that required Burbank to acquire an irrevocable line of credit  
22 ("ILOC") as additional collateral. (RT III, 91: 2-10). KMFC required this additional collateral  
23 because the dealership's recent sales performance deficiencies, problems with the timing of  
24 repayment to KMFC after vehicles were sold, and lack of cooperation during inventory checks.  
25 (*Id.*; RT III, 92: 7-12, Resp. Exh. 306 at KMC983-984). Again, Burbank is solely responsible for  
26 its poor sales performance (especially prior to the loss of financing), for Burbank's failure to  
27 repay KMFC on a timely basis, and even for the decision of KMFC to require additional  
28

1 collateral. Burbank's failure to keep its floor plan finance supplier satisfied is attributable solely  
2 to Burbank's own operational deficiencies.

3 In addition, Burbank cannot properly blame Kawasaki for its failure to obtain an ILOC.  
4 KMFC provided examples of an ILOC to Burbank on multiple occasions. (RT I, 28: 11-24; RT  
5 III, 97: 14-21, 100: 12-22). Burbank's claim that it could not get an ILOC because Bank of  
6 America and Wells Fargo do not know what an ILOC is, is simply not credible. Both of these  
7 national banks are sophisticated financial institutions that regularly deal in financial instruments  
8 that far exceed in complexity these garden-variety ILOCs. Moreover, other Kawasaki dealers  
9 have obtained ILOCs from these same institutions. (RT III, 38: 1-20; RT III, 98: 6-19 (several  
10 other Kawasaki dealers have an ILOC from Bank of America)).

11 Any allegation that KMFC should have agreed to take Protestant's dealer principal's  
12 home as collateral is not reasonable, as KMFC is not a mortgage lender and does not accept real  
13 property as collateral from any dealer. (RT III, 113: 24-114: 10). Furthermore, given that  
14 Protestant did not make the home-collateral offer until approximately 12 months after the Notice  
15 of Termination was issued (in fact on the day of Mr. Bellissimo's deposition) and is not a decision  
16 within the control of Kawasaki, the offer is not relevant to these proceedings. (Protestant's Exh.  
17 6).

18 Finally, Burbank's claim that the ILOC was imposed upon it as a "new" contractual  
19 requirement is not true. The unrefuted evidence is that KMFC did not change the terms of its  
20 financing agreement with Burbank, but always had the contractual option to maintain the  
21 suspension indefinitely until KMFC was satisfied with the credit risk. (RT III, 27: 10-28: 7, Prot.  
22 Exh. 8). The fact that KMFC needed additional collateral was within its contractual rights and  
23 justified by changes in the economic times. (RT III, 147: 2-12).

24 Even if Burbank were unsatisfied with the restrictions placed upon it by KMFC, Burbank  
25 is not and was not compelled to deal with KMFC to get credit, and could always have obtained  
26 flooring credit from another financial institution. (RT III, 30: 15-17). Burbank, however, *never*  
27 *even applied* for alternative credit. (RT I, 65: 20-23). Under all of these circumstances,  
28

1 Protestant simply cannot successfully point the finger of blame for its lack of credit at any entity  
2 other than itself.

3 Mr. Bellissimo also claims to have additional “credit” through his brother. (RT I, 64: 4-10,  
4 Protestant’s Exh. 10). Aside from the fact that Mr. Bellissimo’s brother does not qualify as a  
5 “financial institution acceptable to [Kawasaki]” as required by Paragraph 14A of the Kawasaki  
6 Dealer Agreement, *Burbank has not used those funds to purchase any Kawasaki vehicles.* (RT  
7 III, 68: 12-69:8). Moreover, this alleged offer of his brother’s “credit” did not occur (if it did, in  
8 fact, occur) until January 30, 2013, one year after the Notice of Termination was sent, and is,  
9 therefore, irrelevant. (Protestant’s Exh. 10). Indeed, Mr. Bellissimo did not even know if the  
10 letter evidencing this brother’s “credit” offer was ever delivered to Kawasaki, to Mr. Bellissimo  
11 or to Burbank’s attorney. (RT III, 49: 10-19).

12 Protestant’s final attempt to deflect blame also fails. Kawasaki is not to blame for  
13 Burbank’s credit problems because of the required flooring amount set by Kawasaki. Burbank’s  
14 assertion that it needs 80% less credit (or approximately \$50 -\$60,000) (RT II, 216: 11-217: 21),  
15 than it once did is not credible, nor supported by the evidence. (Interestingly, Mr. Bellisimo  
16 testified that 80% below the requirement was an “appropriate” financing level. In  
17 correspondence with KMFC, however, Mr. Bellisimo requested an even lower credit line of only  
18 \$20,000. (Prot. Exh. 9; RT III, 119: 17-120: 4)). A review of Burbank’s prior borrowing history  
19 shows that it regularly used credit above the amount currently required by Kawasaki (\$750,000) –  
20 [fourth column from the left in the chart below]:

<u>Date</u>	<u>Credit</u>	<u>Adj. Credit</u>	<u>Credit Used</u>	<u>Available</u>
2/7/06	1,150,000	N/A	1,121,617	28,383
5/17/06	1,200,000	N/A	986,068	213,932
7/26/06	1,200,000	N/A	939,646	260,354
8/22/06	1,200,000	N/A	863,989	336,011
12/19/06	1,200,000	N/A	911,839	288,161
1/23/07	1,200,000	N/A	953,329	246,671

1	4/17/07	1,200,000	N/A	1,179,682	20,318
2	5/29/07	1,250,000	N/A	1,149,403	100,597
3	8/17/07	1,250,000	1,250,000	1,063,714	186,286
4	12/13/07	1,250,000	1,250,000	920,466	329,534
5	1/16/08	1,250,000	1,250,000	885,769	364,231
6	3/11/08	1,250,000	1,250,000	903,635	346,365
7	8/27/08	1,250,000	1,250,000	629,490	620,510
8	1/13/09	1,250,000	1,250,000	1,104,562	145,438
9	3/3/09	1,250,000	1,250,000	730,316	519,684
10	9/5/09	1,250,000	1,563,000	797,309	765,691
11	1/13/10	1,250,000	1,250,000	773,364	476,636

14 (Exhs. 315-318, 330). Note that Burbank maintained a minimum of \$1,250,000 in flooring  
 15 credit from 2006 to 2010, as compared to the \$750,000 amount of credit currently required. It is  
 16 also significant that from 2008 to the present, Burbank sold *much fewer* than half the Kawasaki  
 17 vehicle sales available to it, despite using *much more* than the minimum flooring credit currently  
 18 required of it by Kawasaki. (Resp. Exhs. 314; 319-325). It is difficult to comprehend how  
 19 Burbank thinks it will increase its sales by 80% while at the same time slashing its flooring credit  
 20 amount by 80%.

21 Increases in the frequency that dealers may place orders with Kawasaki and Kawasaki's  
 22 decision not to sell personal watercraft or side by side vehicles to Burbank (the termination of  
 23 these product lines is not within the jurisdiction of the Board) does not mean that Burbank's  
 24 credit requirements could be cut even further, to either extremely low level suggested by  
 25 Protestant. Even with more frequent order periods and the delivery of new inventory is not  
 26 without delay, no dealer, let alone one without adequate inventory, can address the immediate,  
 27 often impulsive wishes of buyers of new motorcycles and ATVs. Protestant's own testimony  
 28

1 regarding the immediate need to respond to customer product demands undermines any such  
2 claim. (*See, e.g.*, RT II, 228: 21-229: 1). Moreover, any lower credit requirement would not be  
3 sufficient to purchase the number of vehicles that Burbank was contractually obligated to have in  
4 its inventory. (RT III, 46: 17-47: 9 (describing cost of Kawasaki products)).

5 Most significantly, the *amount* of floor plan financing required does not change the fact  
6 that Protestant has effectively had *no* financing, since June of 2011. This breach of the Dealer  
7 Agreement goes to the heart of Protestant’s ability to serve as a fully-functioning Kawasaki  
8 dealer. This breach alone is sufficient to establish good cause to terminate Protestant’s Kawasaki  
9 Dealer Agreement.

10 2. Burbank Has Failed to Comply With Its Obligations to Maintain Sufficient  
11 Sales of Kawasaki Vehicles.

12 Failure to make sufficient sales of Kawasaki products is a material breach of Paragraph 5  
13 of the Kawasaki Dealer Agreement. This provision states:

14 Dealer agrees, at its own cost and expense, to use its best efforts and due diligence  
15 to energetically and aggressively develop and promote the sale of Products,  
16 including each model and type thereof. DEALER and DISTRIBUTOR agree that  
17 DISTRIBUTOR shall evaluate DEALER’S development and promotion of the  
18 sale of Products, both as a whole and separately for each model and type based on  
19 such reasonable criteria as DISTRIBUTOR may determine from time to time,  
20 which may include but not be limited to: . . . (b) the ratio of sales of Products by  
21 DEALER to sales of other makes of similar products as compared with (i) such  
22 ratio on a local, state, and/or nationwide bases . . .

23 As demonstrated by Kawasaki at the hearing, over the last five years, Burbank has failed  
24 to actively and effectively promote and make the sales of Kawasaki products. (RT II, 149: 2-7).  
25 Since the loss of floor plan financing, Protestant’s sales levels have experienced a steep decline  
26 against expected levels. (RT II, 143: 21-24). During the last reporting period, Protestant was  
27 only selling about 20% of the sales that it should have achieved based on an average Kawasaki  
28 dealer performance. And, as a result, Kawasaki lost out on at least 895 vehicle sales. (Resp. Exh.

1 314). As the expert witness, Mr. Palmer of USAI, testified, Protestant’s sales performance is  
2 “extremely poor in terms of adequately and effectively promoting new sales of Kawasaki  
3 vehicles.” (RT II, 149: 2-7).

4 The Dealer Agreement specifically allows that Kawasaki may evaluate Burbank’s  
5 performance in comparison to national averages.<sup>1</sup> (Resp. Exh. 303 at 1, ¶5). Moreover, the  
6 expected sales comparison is an industry standard used to assess a dealer’s performance, (RT II,  
7 149: 21-23), and will change in response to fluctuation in the market as a whole. (RT I, 134: 10-  
8 21). Moreover, the evidence shows that Protestant has been making the majority of its sales from  
9 the inventory that it had prior to the loss of its floor plan financing. (RT II, 101: 1-4). As this  
10 backlog of inventory is now depleted, and Protestant still lacks the financing to buy more, these  
11 numbers will continue to decline.

12 Burbank did not present any evidence that it has made sufficient sales to meet its  
13 contractual obligations. Rather, Burbank claimed that its breach was not its fault. Initially,  
14 Burbank claims that it was unaware of Kawasaki’s expectation for vehicle sales. This claim is  
15 simply not credible. Burbank receives quarterly sales reports (RT I, 66: 19-21) that clearly set  
16 forth Burbank’s sales as compared to expected sales. (See, e.g., Resp. Exh. 321). Kawasaki  
17 employees reviewed and explained these sales reports to Burbank in the ordinary course. (RT II,  
18 88: 1-92: 8). In addition, Burbank also has access to its sales performance on the Kawasaki  
19 dealer website, from which Mr. Gill testified he can determine that Burbank has viewed this  
20 information. (RT I, 137: 23-138: 14; RT I, 138: 16-139: 4).

21 Likewise, the evidence does not support Burbank’s claim that its sales performance was  
22 not its fault because it was wrongfully prevented from purchasing Kawasaki products for resale.  
23 Kawasaki did not cause Burbank’s loss of floor plan financing, and Kawasaki has offered to sell  
24

25 \_\_\_\_\_  
26 <sup>1</sup> Administrative tribunals in other states have also made comparable findings with regard to  
27 Kawasaki’s sales effectiveness standard. E.g., *Nissan N. Am., Inc. v. Love Nissan, Inc.* (Fla. DAH  
28 July 14, 2005), No. 04-2247 at 14, adopted as final order, No. HSMV-06-379-FOF-DMV, (Fla.  
DHSMV Apr. 12, 2006) (Exh. A) (“Historically, by case law, and by expert testimony in the  
instant proceeding, it is found that Nissan’s method for evaluating its dealers’ sales performances  
is a reasonable, industry-accepted practice for evaluating new car dealers.”).

1 and has sold product to Burbank on a COD basis during the entire time that its credit has been  
2 suspended. (RT II, 100: 2-9).

3 Furthermore, Burbank cannot explain away its poor sales performance by pointing to  
4 Kawasaki's legitimate refusal to sell vehicles based on non-cash terms. Contrary to Burbank's  
5 assertions, Kawasaki has no duty to release vehicles against a government purchase order,  
6 especially when Burbank has no flooring credit even if it had, the "evidence" of a couple of  
7 allegedly lost orders would not have affected the gross deficiencies in Protestant's sales  
8 performance sufficiently to bring it into compliance with its Dealer Agreement.

9 Finally, Mr. Bellissimo's claim that he and Burbank aggressively promoted Kawasaki  
10 products is likewise not credible. Most telling, Mr. Bellissimo admitted to publicly denigrating  
11 Kawasaki and its products on the Internet. (RT III, 16: 13-15, 21; Resp. Exh. 309). In his post on  
12 ripoffreport.com, Mr. Bellissimo publicly attacked Kawasaki, its employees and its products. He  
13 stated that the Kawasaki products which he had sold for 34 years are unsafe. Specifically, he  
14 directly implored the public, "Please do not support Kawasaki products." (Resp. Exh. 309).  
15 Therefore, Mr. Bellissimo's claim that Burbank tirelessly promoted Kawasaki is effectively  
16 impeached, and should not excuse its poor sales performance. Furthermore, Burbank's  
17 "aggressive promotion" claim is undermined by the fact that Mr. Bellissimo is rarely present at the  
18 dealership. (RT II, 72: 10-73: 19; RT III, 89: 17-24, 93: 21-94:10 (absent when floor checker  
19 from GE attempted to confirm inventory)).

20 Protestant also did not contest the fact of its contractually deficient sales performance.  
21 Further, none of its efforts to claim that this performance was caused by factors outside of its  
22 control were successful. Therefore, Kawasaki has demonstrated a material breach of its Dealer  
23 Agreement based on Burbank's abysmal sales performance, and this breach is itself sufficient to  
24 establish good cause to terminate the Dealer Agreement.

25 3. Burbank Has Failed to Maintain An Adequate Inventory of Kawasaki  
26 Vehicles And to Provide Equal Representation.

27 Failure to stock a sufficient inventory of Kawasaki products is a material breach of  
28 Paragraph 15 of the Kawasaki Dealer Agreement. This provision states:

1           Subject to the ability of DISTRIBUTOR to supply, DEALER agrees to  
2           purchase from DISTRIBUTOR and at all times maintain an inventory of then  
3           available models of Products, which inventory shall at no time be less than the  
4           number of Products reasonably established by DISTRIBUTOR after consultation  
5           with DEALER.

6           Burbank has not stocked a full line of Kawasaki inventory for a significant period. (RT II,  
7           101: 8-11). Since losing its floor plan financing, Burbank's inventory of new Kawasaki products  
8           has dwindled from over 100 to 11. (RT II, 117: 7-14). Of the 11 Kawasaki products currently in  
9           stock, 7 of them are "aged inventory" in that they were sold to Burbank by Kawasaki more than  
10          12 months ago. (RT II, 82: 1-5, 12-14). For many years, Burbank has had a chronic problem  
11          with aged inventory. (RT II, 93: 17-24). Mr. Fischer testified that Kawasaki has made repeated  
12          requests that the aged inventory be displayed so that it can be sold. (RT II, 94: 17-95: 3).

13          Protestant would need to stock approximately 75 Kawasaki motorcycles and ATVs to  
14          represent the full line of products. (RT II, 120: 17-121: 3). Any claim that inventory levels were  
15          not within Burbank's control (similar to those with regard to sales levels) are not credible. (RT II,  
16          164: 5-7).

17          In addition, failure to provide Kawasaki with equal representation is a material breach of  
18          Paragraph 11 of the Kawasaki Dealer Agreement. This provision states:

19                 In the event DEALER sells other brands or lines of products which are  
20                 competitive with those Products purchased by DEALER from DISTRIBUTOR,  
21                 DEALER agrees to provide the Products with at least an equal representation to  
22                 that provided other competitive brands or lines.

23          Equal representation is based on display space, not whether the dealer sells competing  
24          brands. (RT II, 27: 14-19). As Protestant sold off its Kawasaki inventory and its display area is  
25          increasingly dominated by scooters, (RT II, 27: 24-28: 10), this is a breach of Paragraph 11 of the  
26          Dealer Agreement. As Protestant sells this aged inventory and does not replace it with new  
27          Kawasaki vehicles, Protestant's facility is by mathematical calculation, more devoted to its  
28          scooter business and less to Kawasaki Products.

1 **IV. BURBANK'S APPARENT CONTENTION THAT KAWASAKI MAY NOT**  
2 **TERMINATE ITS DEALER AGREEMENT DESPITE ITS ABYSMAL SALES**  
3 **PERFORMANCE IS INCORRECT.**

4 In its Pre-Hearing Brief, Burbank incorrectly asserted that "the Board has uniformly  
5 determined that the alleged lack of sales performance cannot, as a matter of law, constitute 'good  
6 cause' for the termination of a franchise, citing to the Board's 1978 decision in *George Arrues*  
7 *dba Kon Tiki Motorcycles v. Kawasaki Motor Corporation, U.S.A.*, Protest No, PR-1790-78.  
8 Contrary to Burbank's contentions, however, the Board has (consistent with the Vehicle Code  
9 Section 3061) found that a dealer's sales performance is directly relevant to a consideration of  
10 whether good cause exists for the termination of a dealership. Protestant cannot claim in any  
11 event that *Kon Tiki* is precedent, as the Board must designate a decision as precedent in order for  
12 it to have such effect, and it has never so designated any of its decisions. Government Code §  
13 11425.10(a)(7).

14 Most importantly, the *Kon Tiki* decision has been determined to be contrary to the intent  
15 of Vehicle Code Section 3061 by the Sacramento Superior Court in *Ford Motor Co. v. New*  
16 *Motor Vehicle Board*, Superior Court Case No. CS0247 (January 29, 1997) (Exh. B). In *Ford*,  
17 the Court reviewed on a writ of administrative mandamus, a Board decision which relied on *Kon*  
18 *Tiki*, holding that a dealer's low sales alone is insufficient in itself to establish good cause for  
19 termination. In remanding the case back to the Board, the Court specifically held that the *Kon*  
20 *Tiki* case was wrongly decided. The Court stated:

21 Petitioner is correct that the statutes do not expressly provide that poor sales  
22 alone is insufficient to establish good cause. *Section 3061 requires the Board to*  
23 *consider all the circumstances presented, including all seven which are set forth*  
24 *in the statute. However, nothing in that statute prohibits a finding that, in any*  
25 *given set of facts, one factor may be so egregious that it would outweigh any*  
26 *remaining factors as to which proof was adduced. Each case must be decided on*  
27 *its merits in light of the totality of the evidence presented, not on the basis of an*  
28 *arbitrary rule unauthorized by law which would restrict the Board's weighing*  
*process in the determination of good cause for termination.*

26 *Id.* at 5 (emphasis added).

1 In overruling the Board’s determination that sales performance could not provide the basis  
2 for a finding of good cause, the Court went expressly disapproved the *Kon Tiki* decision relied  
3 upon by Burbank:

4  
5 Under the Board’s interpretation, a franchisee could make no sales and no effort  
6 to improve sales yet be protected from termination. The purpose of including  
7 sales as a separate statutory criteria was obviously to allow the fact of poor  
8 performance to be considered to terminate a franchise, unless shown to be  
9 outweighed on the balance of other existing circumstances. *The Board acted*  
*outside the authority granted to it by establishing a per se rule that no matter how*  
*poor a dealer’s sales performance is, it will never be sufficient to constitute good*  
*cause for termination of the franchise. The Kon Tiki case is not binding*  
*precedent and was similarly wrongly decided in respect to the per se rule.*

10 *Id.* (emphasis added).

11  
12 As all but one of the other good cause factors favor termination in this case (because  
13 Kawasaki did not claim Burbank was not fulfilling warranty obligations), the Board’s decision in  
14 *Kon Tiki* provides no basis upon which to find that Kawasaki lacks good cause to terminate  
15 Burbank’s Dealer Agreement.

16 Consistent with the decision in the *Ford* case, as noted above, in recent years the Board  
17 has expressly held that a dealer’s failure to meet reasonable sales objectives is directly relevant to  
18 a finding of good cause for termination. *See Corning Truck & Radiator Serv. v. International*  
19 *Truck & Engine Corp.*, Protest No. PR-1765-01 (Cal. NMVB June 6, 2002) (Exh. C); *S & C*  
20 *Motors, Inc. dba S & C Kia v. Kia Motors America, Inc.*, Protest No. PR-1859-03 (Cal. NMVB  
21 Sept. 21, 2005) (Exh. D). In finding good cause for the termination of the dealer agreements in  
22 *Corning* and *S&C*, the Board expressly found that the dealer breached the terms of the franchise  
23 by, among other things, failing to sell a sufficient number of vehicles or maintain an adequate  
24 sales penetration rate in the market area. The Board also recognized that the dealer’s poor sales  
25 performance resulted from other breaches of the dealer agreement, including the dealer’s failure  
26 to aggressively promote sales and maintain an adequate inventory of vehicles or demonstrators.  
27 *Corning Truck*, at 23.

1 Protestant will also argue that its dealer principal's longevity in that position should  
2 somehow insulate it from termination, based again on language from *Kon-Tiki*. In that case, the  
3 Board noted the "personal commitment and dedication of the [owners'] efforts to the business....  
4 [were] totally and irrevocably committed to the dealership." Significantly, in *Kon-Tiki*, the  
5 owners were on record for working 7 hours a day, 6 days a week. *Id.* at 8-9. Here, the evidence  
6 is directly to the contrary. While Mr. Bellissimo may have held the title of dealer principal for a  
7 long time, the evidence is that he is currently often absent from the dealership, and has ceased  
8 return calls from Kawasaki employees. (RT II, 72: 10-73: 19, RT III, 93: 21-94: 4). Between  
9 these facts and the lack of a permanent monetary investment in the dealership by Burbank, this  
10 Board should not equate longevity in the titular position of dealer principal as a shield against  
11 termination.

12 In this case, Burbank cannot avoid the consequence of its failure to reach even a  
13 minimally acceptable level of sales and its failure to obtain floor plan financing by relying on  
14 outdated and incorrect statements of the law. Further, Kawasaki based its termination of  
15 Burbank's Dealer Agreement on numerous deficiencies and breaches of the Dealer Agreement,  
16 and not simply Burbank's poor sales performance. Accordingly, Kawasaki has demonstrated  
17 that good cause exists for the termination with regard to the factors set forth in Vehicle Code  
18 Section 3061.

19 This Board should not force Kawasaki, and the public, to continue to do business with a  
20 dealership that does not adequately stock product, make sales, manage its financial status, and  
21 yet insists on blaming its deficiencies on every other person or entity besides itself or its dealer  
22 principal. As Burbank has failed to present any evidence or argument sufficient to overcome its  
23 performance and contractual deficiencies, Burbank's efforts to avoid termination are unavailing.

24 **V. CONCLUSION.**

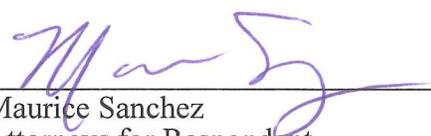
25 Kawasaki's evidence provides ample support for all but one of the good cause factors  
26 outlined in Section 3061 of the Vehicle Code. Kawasaki's evidence also convincingly  
27 demonstrated that, for several years, Burbank has been in serious breach of several provisions of  
28 the Kawasaki Dealer Agreement and has failed to provide for the needs of consumers in its

1 market. Accordingly, good cause exists for the termination of Burbank's Kawasaki Dealer  
2 Agreement.

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Dated: March 18, 2013

BAKER & HOSTETLER LLP  
MAURICE SANCHEZ  
KEVIN M. COLTON



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Maurice Sanchez  
Attorneys for Respondent  
Kawasaki Motors Corp., U.S.A.

BAKER & HOSTETLER LLP  
ATTORNEYS AT LAW  
COSTA MESA

**PROOF OF SERVICE**

I, Elly Cordero, declare:

I am employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900, Costa Mesa, California 92626-7221. On March 18, 2013, I served a copy of the within document(s):

**RESPONDENT KAWASAKI MOTORS CORP., U.S.A.'S POST-HEARING BRIEF**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Costa Mesa, California addressed as set forth below.
- by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for delivery.
- following ordinary business practices, the envelope was sealed and placed for collection by Federal Express on this date, and would, in the ordinary course of business, be retrieved by Federal Express for overnight delivery on this date.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m. and the transmission was reported as complete and without error.

Michael M. Sieving, Esq.  
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 BURBANK KAWASAKI INC.

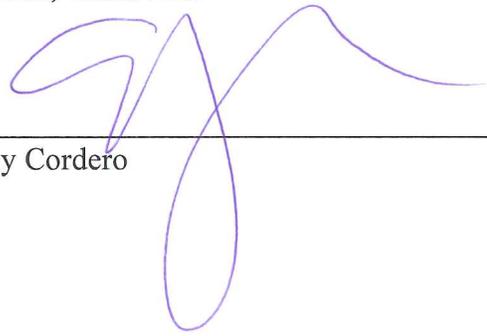
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same

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day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 18, 2013, at Costa Mesa, California.



Elly Cordero

601986013

BAKER & HOSTETLER LLP  
ATTORNEYS AT LAW  
COSTA MESA