

1 **CALLAHAN THOMPSON SHERMAN & CAUDILL, LLP**

2 MICHAEL M. SIEVING, Esq. (SBN 119406)

3 1545 River Park Drive, Suite 405

4 Sacramento, CA 95815

5 Tel: (916) 649-3500

6 Fax: (916) 999-8560

7 E-mail: msieving@sievinglaw.com

8 Attorneys for Protestant
9 BURBANK KAWASAKI

10 **STATE OF CALIFORNIA**
11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 BURBANK KAWASAKI, INC.,

14 Protestant,

15 v.

16 KAWASAKI MOTORS CORP., U.S.A., a
17 Corporation,

18 Respondent.

Protest Number: PR-2328-12 and PR-2333-12

**PROTESTANT'S CLOSING POST-
HEARING BRIEF**

Hearing Date: February 5, 2013

Hearing Time: 10:00 a.m.

ALJ: Hon. Jerold A. Prod

19
20
21
22 Protestant BURBANK KAWASAKI, INC. (BKI or Protestant) hereby submits its Closing Post-
23 Hearing Brief as follows:
24
25
26
27

28 //

1 Throughout the Opening Brief filed by Respondent KAWASAKAI MOTORS CORP. U.S.A.
2 (KMC or Respondent), Respondent asserts that BKI breached numerous provisions of the KMC Sales
3 and Service Agreement by (1) the suspension of its flooring line by Kawasaki Motors Finance
4 Corporation (KMFC) (Respondent's Opening Brief at p. 10), (2) the failure of BKI to sell sufficient
5 Kawasaki vehicles (id at p. 15), and (3) the failure of BKI to stock sufficient Kawasaki inventory (id at
6 p. 17). In addition, Respondent suggests that BKI has not made any significant investment in the
7 dealership (permanent or otherwise) (id at p. 8), and that the consuming public and the public welfare
8 will not be injured by the termination of this longstanding dealer in Burbank. (id at p. 9).

9
10
11 The hearing testimony and exhibit evidence was replete with evidence to support a
12 determination that any perceived operations deficiencies at BKI were beyond the control of the dealer.
13 For example, the economic downturn in 2008, which affected all motorcycle (as well as automobile and
14 recreational vehicle) dealers across the country, had an enormous adverse impact on sales projections
15 for the dealers. The unilateral imposition by KMFC of additional requirements on BKI, in terms of
16 securing an Irrevocable Letter of Credit (IROC) in the amount of \$212,000 as a condition of continued
17 flooring drastically affected the dealership's operations. The termination by KMC of the Mule, Jet Ski,
18 and UT lines of products (which were not protestable) adversely affected operations. There was no
19 evidence presented by KMC to suggest that the "sweat equity" of this dealer, which has been in
20 business and devoted to the Kawasaki brand for approximately 35 years, should not be considered by
21 this Board in determining whether good cause exists for termination.
22
23

24 BKI does not dispute that it is a small dealer in a competitive market. However, it has devoted
25 its motorcycle operations exclusively to the Kawasaki brand for more that three decades. There was no
26 evidence presented to suggest support a determination that BKI did not make the necessary investment
27 in the business to represent the Kawasaki product. In fact, the evidence showed that prior to the
28

1 hearing, there had never been a complaint or indication by KMC that BKI did not have adequate capital
2 or facilities to represent Kawasaki. There was no mention of either of those issues in the notices of
3 termination sent to BKI on January 24, 2012. (Respondent's Exhibits 301 and 302).

4
5 KMC refers to Exhibit 329 to support its contention that "Burbank is abysmal in customer
6 satisfaction". (KMC Opening Brief at p. 9). A close examination of Exhibit 329 reveals, at least
7 generally, that the customer satisfaction scores of dealers decline in direct relationship to a decline in
8 the Survey Count (column 2 of Exhibit 239), which is the number of consumers that respond to the CSI
9 survey. Exhibit 329 clearly shows that the customer satisfaction scores of BKI for the 12-month period
10 ending October 15, 2012 were based on a total of *five* consumer surveys, one of the lowest reporting
11 number of surveys in the study. As such, it is no surprise that the CSI scores for BKI were lower than
12 expected, and represent a distorted summary of the actual customer satisfaction index for the dealer.
13 There was no evidence presented of any individual customer complaints directed against BKI, nor was
14 there any evidence presented to suggest that BMI was not fulfilling its obligation to adequately service
15 the consuming public.
16
17

18 KMC references two previous Board decision in support of its contention that the Board has, in
19 the past, allowed termination based solely upon sales performance. (*Corning Truck and Radiator Serv.*
20 (PR-1765-01), and *S&C Kia* (PR-1859-03) (id at p. 20). Initially, it is significant to note that both of
21 these Board decision, which did address the issue of sale performance, were heard and decided before
22 the financial crisis that occurred in 2008, prior to the time that the lack of a desire by the consuming
23 public to spend discretionary income for items such as cars, trucks, and more importantly motorcycles,
24 was a significant issue. Furthermore, in both the *Corning Truck* and *S&C* cases, the sales performance
25 was far below what was expected, given the economic circumstances that existed at the time. In the
26 case of *S&C*, the dealer was found to have only sold 1 to 2 Kia units a year, and instead focused most of
27
28

1 its attention on the sale of Ford products. Neither of those cases provide the Board with guidance as to
2 how to approach the current situation, particularly given the 2008 economic downturn and the
3 imposition by the flooring lender of additional security requirements, neither of which were present in
4 the cases cited by KMC.
5

6 Historically, guidance as to the Board's determination in the present case should come from the
7 *Kon-Tiki* case, cited in and attached to Protestant's Opening Post-Hearing Brief. Admittedly, this case
8 was decided before the financial collapse of 2008, but the facts are remarkably similar to the case at
9 issue. In both *Kon-Tiki* and the present case, the Board was confronted with a proposed franchise
10 termination where the evidence established that (1) the dealer was a longstanding representative of the
11 brand, (2) the dealer had spend substantial time representing that brand, and that brand alone in the
12 market, and (3) although, to the extent that the Board determines that there are lost brand sales in the
13 market, the facts may justify the establishment of an additional dealer, but not the termination of the
14 long-established franchisee in the market. In the present case, the evidence established that there are a
15 number of "open" or unfilled points in the surrounding markets, which have not been filled by KMC.
16 Termination of BKI is not the answer to KMC's perceived market share problems. If KMC wants to
17 increase its market share, it should proceed like every other manufacturer or distributor, and fill the
18 open points in the area. The termination of BKI's franchise will not achieve that objective, will be
19 detrimental to the consuming public in that they will have to travel further to find a sales and service
20 facility, will result in a decline in the tax base for the City of Burbank, and will result in a loss of jobs.
21
22
23

24 KMC suggests that the 35-year tenure of BKI not be considered by the Board under the required
25 consideration of existing circumstances because, in its analysis of the evidence, the dealer principal
26 (Leon Bellissimo) was not a "hands on" operator. (KMC Opening Brief at p. 21). However, there was
27 no evidence admitted to support this contention. KMC relies on testimony from KMC representatives
28

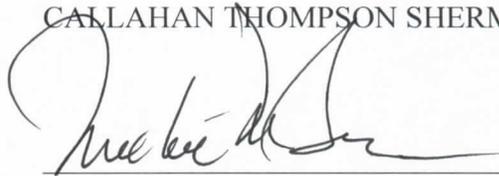
1 that, when the visited the dealership, Mr. Bellissimo was absent, and there were instances where he
2 allegedly didn't return calls from KMC representatives. Mr. Bellissimo testified as to his experience in
3 the business, representing only Kawasaki for 35 years at Burbank and many more years in Hollywood
4 at his brother's dealership. The evidence established that Mr. Bellissimo has the requisite experience
5 and dedication to the Kawasaki product to enable him to continue to represent that product in Burbank.
6

7 **CONCLUSION**

8 For the reasons set forth above, and in Protestant's Opening Post Hearing Brief, BKI
9 respectfully requests that the Board issue its decision sustaining the protests in this matter or, at a
10 minimum, conditionally sustain the protests to permit BKI to obtain a flooring line sufficient to enable
11 it to purchase a sufficient quantity of inventory in order to permit it to meet its reasonably expected
12 sales obligations.
13

14
15 Dated: April 23, 2013

CALLAHAN THOMPSON SHERMAN & CAUDILL LLP

16
17 

18 MICHAEL M. SIEVING
19 Attorney for Protestant
20 BURBANK KAWASAKI, INC.
21
22
23
24
25
26
27
28

PROOF OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

STATE OF CALIFORNIA)

COUNTY OF SACRAMENTO)

I am employed in the County of Sacramento, State of California, I am over the age of 18 years and not a party to the within action; my business address is 1545 River Park Drive, Suite 405, Sacramento, California.

On this date, April 23, 2013, I served the foregoing document described as:

PROTESTANT’S CLOSING POST-HEARING BRIEF

I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted below.

 X (By United States Mail) I placed the envelope for collection and mailing, following our firm’s ordinary business practices. I am familiar with our firm’s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

 (By overnight delivery) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

 (By messenger service) I served the documents by placing them in an envelope or package addressed to the persons at the addresses below and providing them to a professional messenger service for service.

 (By fax transmission) Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

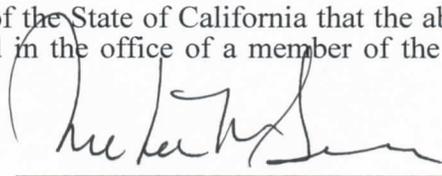
 X (By electronic service) Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below.

 (By personal service) I served the documents by delivering the envelope, by hand, to the persons listed below.

 (By [Insert Electronic Service Provider]) I caused the above-entitled documents to be served through [Insert Electronic Service Provider]) addressed to all parties appearing on the [Insert Electronic Service Provider]) electronic service list for the above-entitled case. The file transmission was reported as completed and a copy of the [Insert Name of Electronic Service Filing Receipt]) pages will be maintained with the original documents in our office. Service will be deemed effective as provided for in the Electronic Case Management Order. I have complied with California Rules of Court, Rule 2.257(a) and the original, signed Proof of Service is available for review and copying at the request of the court or any party.

1 Executed on April 23, 2013, at Sacramento, California.

2 I declare under penalty of perjury under the laws of the State of California that the above is true
3 and correct. I further declare that I am employed in the office of a member of the bar of this
4 court at whose direction the service was made.



5 Michael Sieving

6
7 **SERVICE LIST**

8
9 Maurice Sanchez, Esq.
10 Kevin Colton, Esq.
11 BAKER & HOSTETLER LLP
12 600 Anton Boulevard, Suite 900
13 Costa Mesa, CA 92626-7221
14 msanchez@bakerlaw.com
15 kcolton@bakerlaw.com

16 Attorneys for Respondent Kawasaki Motors
17 Corp., U.S.A.