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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 PROPOSED FINDINGS OF  
FACT**

Hearing Date: February 5, 2013

Hearing Time: 10:00 a.m.

ALJ: Hon. Jerold A. Prod

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20  
21 Pursuant to the Order Establishing Post-Hearing Briefing Schedule, dated February 7, 2013 in  
22 the above-captioned matter, Protestant BURBANK KAWASAKI, INC. (BKI or Protestant) hereby  
23 submits its Proposed Findings of Fact as follows:  
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PROTESTANT'S PROPOSED FINDINGS OF FACT

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2  
3 **INTRODUCTION**

4 1. These protests involve the attempt by Respondent KAWASAKI MOTORS CORP.,  
5 U.S.A. (KMC or Respondent) to terminate the motorcycle and ATV franchises of BKI. The two  
6 operative notices of intent to terminate (one for motorcycles and one for ATVs) were given on January  
7 24, 2012. (Respondent Exhibits 301 and 302). Timely protests were filed, and the protests were  
8 consolidated for purposes of hearing and decision. The stated grounds for termination were based upon  
9 allegations of BKI's failure to:

- 10  
11 a. maintain model inventory;  
12 b. meet sales requirements;  
13 c. provide equal representation for Kawasaki products; and  
14 d. maintain a wholesale financing line of credit (ie. flooring). (Exhibits 301 and  
15 302).

16 2. The hearing in these matters was held on February 5, 6, and 7, 2013 before New Motor  
17 Vehicle Board ALJ Jerold A. Prod. Michael M. Sieving, Esq. appeared on behalf of BKI. Maurice  
18 Sanchez, Esq. appeared on behalf of KMC.

19 **ISSUE PRESENTED**

20 3. The only issue in these consolidated protests is whether "good cause" exists for the  
21 termination of the BKI motorcycle and ATV franchises, in consideration of the factors set forth in  
22 Vehicle Code Section 3061.<sup>1</sup>

23 **PRELIMINARY FINDINGS**

24 4. BKI is a longstanding Kawasaki dealer, and has continuously been KMC's franchisee in  
25 Burbank for the past 35 years.

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28 <sup>1</sup> All Statutory references herein are to the Vehicle Code unless otherwise indicated.

1           5.       BKI is owned and has been owned and operated by Leon Bellissimo, the dealer principal  
2 at BKI.

3           6.       Prior to 1978, when BKI took on the Kawasaki line, Mr. Bellissimo worked for his  
4 brother's successful Kawasaki dealership in Hollywood, which was another long-established franchisee.  
5 BKI has received many awards from KMC over the years, praising the dealership for its performance.  
6

7           7.       During the hearing in this matter, KMC presented evidence to establish that the sales  
8 performance of BMI was deficient, and that the lack of an unrestricted wholesale line of credit violated  
9 the terms of the Dealer Sales and Service Agreement (Exhibit 303) which also contributed to a lack of  
10 sales performance of the dealer.  
11

12           8.       BKI presented evidence to establish that the decline its sales performance was a result of  
13 the slowing economy, and the cancellation of its flooring line was due to circumstances beyond its  
14 control - specifically the unilateral modification of its flooring agreement with Kawasaki Motors  
15 Finance Corporation (KMF) in a manner which required BKI to provide an irrevocable letter of credit  
16 to KMF in the amount of \$212,000, which BKI was unable to secure prior to the evidentiary hearing.  
17

18           9.       BKI established that it had funds available to it to purchase units from KMC for cash,  
19 (and had in fact been purchasing units from KMC for cash), but that KMC refused to deliver enough  
20 units in an amount sufficient for BMI to meet its sales potential.  
21

22           10.      KMC has the burden of production and persuasion in this matter. (Section 3066(b)). As  
23 discussed below, KMC failed to produce evidence related to number of the "good cause" factors that  
24 the Board is mandated to consider under Section 3061.

25           11.      In determining whether "good cause" has been established to terminate the franchises of  
26 BKI, Section 3061 requires that the Board consider evidence related to the "existing circumstances",  
27 including but not limited to the following factors:  
28

- 1 (a) Amount of business transacted by the franchisee, as compared  
2 to the business available to the franchisee.
- 3 (b) Investment necessarily made and obligations incurred by the  
4 franchisee to perform its part of the franchise.
- 5 (c) Permanency of the investment.
- 6 (d) Whether it is injurious or beneficial to the public welfare for the  
7 franchise to be modified or replaced or the business of the  
8 franchisee disrupted.
- 9 (e) Whether the franchisee has adequate motor vehicle sales and  
10 service facilities, equipment, vehicle parts, and qualified service  
11 personnel to reasonably provide for the needs of the consumers  
12 for the motor vehicles handled by the franchisee and has been  
13 and is rendering adequate services to the public.
- 14 (f) Whether the franchisee fails to fulfill the warranty obligations of  
15 the franchisor to be performed by the franchisee.
- 16 (g) Extent of franchisee's failure to comply with the terms of the  
17 franchise.

18 **A. Evidence Related to the "Existing Circumstances" at BKI.**

19 12. BKI has been a Kawasaki dealer at the same facility in Burbank, California since  
20 1978. (1 RT 17:18-21). The rent on the facility is currently around \$3,000 to \$4,000 per month,  
21 which was lowered in recent years. (1 RT 17:22-18: 2).

22 13. BKI has several scooter lines, but nothing that competes with the Kawasaki  
23 motorcycle or ATV products. (1 RT 18:2- 9; 2 RT 27:7-10). Leon Bellissimo, the owner of BKI,  
24 purchased the dealership in 1978 for approximately \$100,000, which included inventory. (2 RT  
25 199:24-200:19).

26 14. BKI has, since its inception, floored its Kawasaki inventory through KMF. (2 RT  
27 19:17-23). In June of 2011, KMF reduced the flooring line for BKI from \$750,000 to \$10,000, a  
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1 decision which was originally based upon the contention that the dealership financial statements had  
2 not been submitted in a timely manner. (Exhibit 304).

3 15. Between 1978 and 2011, BKI had been late in submitting financial statements on  
4 several occasions for various reasons, had received "computer-generated" reminders to submit the  
5 financial statements, but the flooring line had not been suspended or cancelled. (2 RT 201:16-203:15).

7 16. By letter dated September 26, 2011, KMC notified BKI that the dealership need to  
8 reestablish a flooring line in the amount o \$765,500, an amount determined by KMC to be necessary as  
9 a "total for all product lines". At the time of this letter, BKI also had the Mule, the UT, and the jet ski  
10 lines of products offered by Kawasaki and floored with KMF. (2 RT 12:16-19).

12 17. On or about December 7, 2011, KMF notified BKI that, in order for KMF to  
13 reinstate the flooring line, it would be necessary for BKI to provide KMF with an Irrevocable Letter of  
14 Credit (IROC) in the amount of \$212,000 for a flooring line of \$848,000. (Exhibit 306 at  
15 KMC00981).

17 18. In early 2012, KMC unilaterally terminated the Mule line, the UT line, and the jet  
18 ski line previously held by BKI and whose inventory was also floored by KMF. (2 RT 12:16-19).  
19 Protests were not filed due to the fact that those products are outside the jurisdiction of the Board. (2  
20 RT 12:20-23; Vehicle Code Section 3051). At the time of the hearing, BKI did not have the Kawasaki  
21 Mule, UT or jet ski lines. (2 RT 12:24-13:1).

23 19. The termination of these lines required that BKI has flooring far less that the  
24 \$765,500 amount that had been established by KMC when BMI was authorized to carry these  
25 products. (2 RT 216:5:-18). There has been a further reduction in the necessary flooring limit by  
26 virtue in a recent change in the vehicle ordering system at KMC which allows dealers to order units  
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1 more frequently (from yearly to once every two months), as compared to the system in place when the  
2 original limits were established. (2 RT 216:11-217:21).

3           20.       Beginning in early 2012, Leon Bellissimo, on behalf of BKI, made numerous  
4 attempts to obtain an ILOC from Bank of America, Wells Fargo Bank, and at least at least one other  
5 financial institution to satisfy the newly-imposed requirements of KMF. (2 RT 207:25-208:15). Mr.  
6 Bellissimo also sought to secure the flooring line with KMF with his residence, as he had previously  
7 done in the 1980s. (2 RT 208:11-20).

8           21.       Mr. Bellissimo was unsuccessful in getting KMF to accept his residence as  
9 collateral (which, of course, would be in addition to the actual vehicle inventory being floored), nor  
10 was he successful in obtaining an IROC. In the 35 years that BKI has been a Kawasaki dealer, it never  
11 sold a unit floored by KMF and not paid for that unit. (2 RT 211:18-23).

12           22.       Despite being unable to comply with the newly imposed requirements by KMF for  
13 the \$212,000 ILOC, BKI has made alternate arrangements for the purchase of units on a "cash" basis,  
14 or by payments through "K-Pay" (KMC's on-line payment system). (2 RT 201:20- 211:4).

15           23.       One of the financial arrangements made by BKI was to secure a commitment from  
16 Anthony Bellissimo (Leon Bellissimo's brother and the previous owner of Hollywood Kawasaki), in  
17 which Anthony Bellissino pledged the balance of a bank account with Boston Private Bank owned by  
18 Anthony Bellissimo to BKI to allow BKI to purchase inventory from KMC for cash. (Exhibit 10). At  
19 the time of the hearing, this pledged account had a balance of approximately \$187,000, which is far in  
20 excess of meeting the reasonable requirements of KMC in terms of product availability, given the  
21 recent changes in the vehicle ordering system and the termination of the jet ski, UT, and Mule lines  
22 which would have otherwise demanded a larger financial commitment.  
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1           24.       These "existing circumstances" are clearly significant as to the Board's  
2 determination of the merits of these protests, and must be considered in conjunction with the evidence  
3 related to the specific "good cause" factors set forth in Section 3061.  
4

5       **B.       Evidence Related to "Good Cause" Factors Contained in Section 3061.**

6           1.       Evidence Related to the Amount of Business Transacted by the Franchisee,  
7               as Compared to The Business Available to the Franchisee. (Section 3061(a)).

8           25.       In support of its position that BKI failed to transact an adequate amount of business, as  
9 compared to the business available to it, KMC presented the testimony of Michael Palmer, senior  
10 manager at Urban Science Applications, Inc. (USAI). (Generally, 2 RT 127-169<sup>2</sup>). Mr. Palmer  
11 testified that he performed an analysis of the sales effectiveness of BKI, and determined that the  
12 dealership was not performing at a level of expected sales. (2 RT 150: 2-8). However, upon cross-  
13 examination, Mr. Palmer admitted that his analysis is based upon the ability of the dealer to receive an  
14 adequate supply of vehicles from the franchisor, and that the inability of the dealer to receive inventory  
15 would be a cause which would negatively affect sales performance. (2 RT 160:12 - 162:25).  
16

17           26.       BKI has been confronted with an obvious inability to acquire, stock and sell KMC  
18 products. There are several reasons for the fact that BKI finds itself in this situation. First, the record  
19 is replete with evidence to establish that there has been a significant decline in the demand for  
20 discretionary vehicle spending (for motorcycles and ATVs), since at least the year 2008.  
21

22           27.       Second, and perhaps most significantly, the decision by KMF to continue the flooring  
23 line for KMF *only if* BKI complies with a newly-imposed requirement that BKI obtain an ILOC in the  
24 amount of \$212,000 (which it was unable to do as of the time of the hearing), which far exceeds any  
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28       <sup>2</sup> References to the Reporter's Transcript shall be to volume number "RT", followed by page and line numbers.

1 reasonable requirement, resulted in a situation in which BKI could no longer floor vehicles, and  
2 interfered with its ability to sell units sufficient to meet its expected sales.

3 28. In January of 2013, (since BKI was unable to secure and ILOC as demanded by KMF)  
4 BKI sought to reopen its flooring line with KMF in the initial amount of \$20,000, and increase the  
5 credit amount over time. (Exhibit 9 at p. 1). The KMF response was to require the full \$212,000 in an  
6 IROC before it would open the line. (id). BKI explored every option with respect to allowing it to  
7 obtain inventory from KMC, but was denied every opportunity by KMC and KMF. Thus, it's  
8 "business available" to BKI was severely hampered by circumstances beyond the control of the dealer.  
9

10  
11 (2) Evidence Related to the Investment Necessarily Made and Obligations Incurred  
12 by the Franchisee to Perform its Part of the Franchise. (Section 3061(b)).

13 29. BKI invested approximately \$100,000 when it purchased the dealership in 1978.  
14 There has been no allegation made by KMC or evidence submitted by KMC to suggest that BKI has  
15 not made the necessary investment nor has incurred the obligations to perform its part of the franchise.

16 (3) Evidence Related to the Permanency of the investment. (Section 3061(c)).

17 30. KMC has presented no evidence to support a determination that the investments  
18 made by BKI are not permanent in nature. In fact, the Board has previously addressed this factor in  
19 another Kawasaki Motors case, under facts substantially similar to those present in this case, and has  
20 determined that the dealer in that case in fact had a "permanent investment" by virtue of the very nature  
21 of the dealer principal's dedication to the Kawasaki brand.  
22

23 (4) Evidence Related to Whether it is Injurious or Beneficial to the Public  
24 Welfare for the Franchise to be Modified or Replaced or the Business of the  
25 Franchisee disrupted. (Section 3061(d)).

26 31. KMC presented no evidence to establish that it would be beneficial to the public  
27 welfare to terminate the franchises of BKI. The only evidence submitted on this factor consisted of the  
28 testimony of the KMC witnesses that the consumers of Kawasaki products in the Burbank Statistical

1 Evaluation Area (SEA) would be required to travel further for service if the BKI franchises are  
2 terminated. (2 RT 55:17-23). KMC has no plans to replace BKI if the Board permits the franchise  
3 terminations. (2 RT 54:21-55:12). There was no evidence submitted to support a determination that the  
4 public would be benefited in any manner with the termination of the BKI franchises.  
5

6 (5) Evidence Related to Whether the Franchisee has Adequate Motor Vehicle  
7 Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service  
8 Personnel to Reasonably Provide for the Needs of the Consumers  
9 for the Motor Vehicles Handled by the Franchisee and has Been  
10 and is Rendering Adequate Services to the Public.

11 32. KMC failed to present evidence related to this factor. The evidence in the record  
12 established that BKI has two to three mechanics, and that KMC has never advised BKI that they are  
13 deficient in terms of the number of mechanics or training. (2 RT 190:9-18). Furthermore, there was no  
14 evidence adduced to suggest that BKI lacked facilities, equipment, or parts to reasonably provide for the  
15 needs of Kawasaki customers in the market, nor was it now or at any time rendering adequate services to  
16 the public.  
17

18 (6) Evidence Related to Whether the Franchisee Fails to Fulfill the Warranty  
19 Obligations of the Franchisor to be Performed by the Franchisee.

20 33. KMC presented no evidence to support a determination that BKI failed to fulfill the  
21 warranty obligations of KMC to be performed by BKI under the terms of the Dealer Sales and Service  
22 Agreement.  
23

24 (7) Evidence Related to the Extent of Franchisee's Failure to Comply with  
25 the Terms of the Franchise.

26 34. KMC presented evidence in an attempt to establish that BKI has failed to comply with  
27 paragraph 14 of the Dealer Sales and Service Agreement (Exhibit 303), which requires that the dealer  
28

1 "maintain ... a line of credit with a financing institution satisfactory to [KMC] ... which will permit  
2 [BKI] to fully carry out and perform [BMK's] duties and obligations under this Agreement".

3 35. Any failure of BKI to comply with the terms and conditions of the franchise with respect  
4 to its obligations to maintain a flooring line were due to circumstances beyond the control of BKI.  
5

6 **DETERMINATION OF ISSUES**

7 Based upon the foregoing, it is determined that:

8 1. Respondent failed to establish that the amount of business transacted by the  
9 franchisee was insufficient, as compared to the business available to the franchisee.

10 2. Respondent failed to establish that the investment necessarily made and obligations  
11 incurred by the franchisee was insufficient to perform its part of the franchise.

12 3. Respondent failed to establish that the investment of Protestant was not permanent.

13 4. Respondent failed to establish that it was not injurious or beneficial to the public  
14 welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

15 5. Respondent failed to establish that the franchisee has inadequate motor vehicle sales  
16 and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for  
17 the needs of the consumers for the motor vehicles handled by the franchisee and has been and is  
rendering adequate services to the public.

18 6. Respondent failed to establish that the franchisee failed to fulfill the warranty  
19 obligations of the franchisor to be performed by the franchisee.

20 7. Respondent failed to establish that any failure by the franchisee to comply with the  
21 terms of the franchise was material.

22  
23 \_\_\_\_\_  
24 JEROLD A. PROD  
25 Administrative Law Judge  
26 New Motor Vehicle Board  
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**PROOF OF SERVICE**

1 STATE OF CALIFORNIA)

2 COUNTY OF SACRAMENTO)

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

6 On this date, March 18, 2013, I served the foregoing document described as:

7 **PROTESTANT'S PROPOSED FINDINGS OF FACT**

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

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

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

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

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

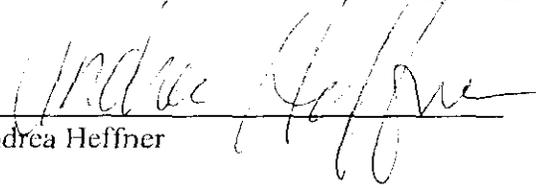
26        (By electronic service) Based on a court order or an agreement of the parties to accept  
27 service by electronic transmission, I caused the documents to be sent to the persons at the  
electronic notification addresses listed below.

       (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 March 18, 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.

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Andrea Heffner

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