

1 NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 BURBANK KAWASAKI, INC.,
13 Protestant,
14 v.
15 KAWASAKI MOTORS CORP., U.S.A., a
Corporation,
16 Respondent.

Protest Nos. PR-2328-12 and PR-2333-12

PROPOSED DECISION

17
18 **PROCEDURAL BACKGROUND**

19 **Statement of the Case**

20 1. By letter dated January 4, 2011 [sic], Kawasaki Motors Corp., U.S.A. (“KMC” or
21 “Respondent”), gave notice to Burbank Kawasaki, Inc. (“BKI” or “Protestant”) pursuant to California
22 Vehicle Code section 3060¹ of its intention to terminate Protestant’s motorcycle and ATV Dealer
23 Agreement.² The New Motor Vehicle Board (“Board”) received the notice on January 9, 2012.

24 2. By letters dated January 24, 2012, KMC issued two separate Notices of Termination, one
25 pertaining to BKI’s Kawasaki motorcycle franchise and one pertaining to its Kawasaki ATV franchise.

26
27 ¹ Unless otherwise indicated, all statutory references are to the California Vehicle Code.

28 ² This notice combined more than one franchise and thus was not in compliance with Section 593.1 of Title 13 of the California Code of Regulations.

1 BKI and the Board received these notices on January 26, 2012. (Stipulation and [Proposed] Order
2 Regarding Filing and Consolidation of Protests)

3 3. The notices stated identical reasons for termination, as follows:

4 This termination is based upon, but not limited to, [BKI's]: 1) failure to maintain model
5 inventory, 2) failure to meet sales requirements, 3) failure to provide equal representation
6 for Kawasaki products and 4) failure to maintain a wholesale financing line of credit
(flooring) in an amount sufficient to permit [BKI] to purchase an adequate inventory of
the full line of Kawasaki products. (Exhs. R301 and R302)³

7 The notices went on to state that "KMC reserves the right to supplement [these] notices if it becomes
8 aware of additional grounds for termination under the Sales and Service Agreement[s] and/or any
9 applicable statute." (Exhs. R301 and R302) These notices were not subsequently amended by KMC.

10 4. On February 23, 2012, BKI filed Protest No. PR-2328-12, which challenged both of the
11 intended terminations. However, as the Board requires a separate protest be filed with respect to each
12 Notice of Termination, the parties stipulated that Protest No. PR-2328-12 would apply to the motorcycle
13 franchise and that a new protest (No. PR-2333-12) would apply to the ATV franchise. The parties also
14 stipulated to the consolidation of the two protests and the Board, on May 31, 2012, issued its order of
15 consolidation. (Stipulation and [Proposed] Order Regarding Filing and Consolidation of Protests)

16 5. A three-day hearing on the merits was held February 5-7, 2013, before Administrative Law
17 Judge Jerold A. Prod ("ALJ Prod").

18 Parties and Counsel

19 6. BKI is an authorized Kawasaki dealership located at 1329 North Hollywood Way,
20 Burbank, California. (Exhs. R301 and R302) It is owned by Leon Bellissimo. (Exh. 303, Appendix B)
21 Protestant is a "franchisee" within the meaning of Sections 331.1 and 3060(a)(1).

22 7. Protestant is represented by Michael M. Sieving, Esq. of Callahan Thompson Sherman &
23 Caudill, LLP, 1545 River Park Drive, Suite 405, Sacramento, California.⁴

24 8. Respondent is a "franchisor" within the meaning of Sections 331.2 and 3060(a)(1).

25 9. Respondent is represented by Maurice Sanchez, Esq. and Kevin M. Colton, Esq. of Baker
26 & Hostetler LLP, 600 Anton Boulevard, Suite 900, Costa Mesa, California.

27
28 ³ References to "Exh." are to Exhibits.

⁴ Leon Bellissimo, in pro per, represented BKI until August 5, 2012; Mr. Sieving was substituted as counsel on August 6, 2012.

1 **ISSUES PRESENTED**

2 10. Pursuant to Section 3066(b), KMC has the burden to establish good cause for the
3 termination of BKI's Kawasaki motorcycle franchise and ATV franchise. In determining whether KMC
4 has established good cause for the terminations, Section 3061 requires that the Board consider the
5 "existing circumstances", including but not limited to all of the following:

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

20 **RESPONDENT'S CONTENTIONS**

21 11. In the notices of termination, Respondent contends that good cause exists to terminate
22 BKI's Kawasaki franchises because of 1) failure to maintain model inventory, 2) failure to meet sales
23 requirements, 3) failure to provide equal representation for Kawasaki products and 4) failure to maintain a
24 wholesale financing line of credit (flooring) in an amount sufficient to permit BKI to purchase an
25 adequate inventory of the full line of Kawasaki products. (Exhs. R301 and R302) Respondent maintains
26 that it presented convincing and largely unrefuted evidence in support of all of the good cause factors.
27 (Response of Kawasaki Motors Corp., U.S.A. to Protestant's Opening Post-Hearing Brief, p. 10)

28 12. Furthermore, Respondent maintains that BKI has breached the most basic obligations a

1 dealer agrees to undertake: BKI has had no floor plan financing for 18 months; has failed to meet its
2 obligations to sell Kawasaki motorcycles and ATVs; and has a “grossly inadequate inventory of only 11
3 Kawasaki units in stock.” (Respondent Kawasaki Motors Corp., U.S.A.’s Post-Hearing Brief, p. 1)

4 13. According to Respondent, Protestant blames its contractual breaches on others, for
5 example: KMC because it set the credit amount too high; Kawasaki Motors Finance Corporation⁵
6 (“KMFC”) because it would not accept Mr. Bellissimo’s house as additional collateral; its own
7 accountant; national banks such as Wells Fargo and Bank of America because they would not provide
8 additional collateral in the form of an irrevocable line of credit (“ILOC”) to secure BKI’s line of credit
9 with KMFC; and its own employees. (Respondent Kawasaki Motors Corp., U.S.A.’s Post-Hearing Brief,
10 p. 1) Moreover, Respondent contends that Protestant blames KMC for Protestant’s lack of sales
11 performance alleging that KMC “wrongly prevented [BKI] from buying Kawasaki products (because
12 [KMC] would not accept government purchase orders to release vehicles after [BKI] lost its KMFC
13 financing)”. (Response of Kawasaki Motors Corp., U.S.A.’s Post-Hearing Brief, p. 1)

14 14. In response to Protestant’s request that it be granted additional time to re-establish its floor
15 plan financing, rather than terminate its Dealer Agreements, Respondent alleges that Protestant has
16 already had more than 18 months to reinstate its floor plan financing with KMFC or to get alternate
17 financing but has not done so. (Response of Kawasaki Motors Corp., U.S.A. to Protestant’s Opening
18 Post-Hearing Brief, p. 8) Allowing this additional time “...will not address the remaining material
19 breaches of Protestant’s Kawasaki Dealer Agreement[s] or the fundamental failure of protestant to
20 represent Kawasaki products and serve the needs of the consuming public.” (Response of Kawasaki
21 Motors Corp., U.S.A. to Protestant’s Opening Post-Hearing Brief, p. 10)

22 PROTESTANT’S CONTENTIONS

23 15. Protestant contends that any deficiencies and/or claimed operational problems it may have
24 are directly due to actions or inactions of KMC, and that therefore no good cause exists to terminate the
25 franchises. Protestant also contends that KMC and KMFC wrongfully denied Protestant access to credit
26

27 ⁵ The Board’s jurisdiction under Section 3050(c) extends over any person applying for or holding a license as a new motor
28 vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative. Therefore, a finance
company such as KMFC is not within the Board’s jurisdiction or a party to these protests.

1 and inventory.

2 16. In addition, Protestant maintains that it established "...that the decline in its sales
3 performance was a result of the economy and the cancellation of its flooring line was due to
4 circumstances beyond its control – specifically the unilateral modification of its flooring agreement with
5 [KMFC] in a manner which required BKI to provide an [ILOC] to [KMFC] in the amount of \$212,000,
6 which BKI was unable to secure prior to the evidentiary hearing." (Protestant's Opening Brief, p.3)
7 Furthermore, BKI alleges that it had cash available to purchase units from KMC but "...KMC refused to
8 deliver enough units in an amount sufficient for [BKI] to meet its sales potential." (Protestant's Opening
9 Brief, p.3)

10 17. Protestant alleges that the termination of its Kawasaki Mule, Jet Ski, and UT (utility
11 terrain) lines, which were not protestable, adversely affected its operations. It also reduced the necessary
12 flooring limit established by KMC and is "...far less than the \$765,000 amount that had been established
13 by KMC when BKI was authorized to carry these products." (Protestant's Proposed Findings of Facts, p.
14 5) A further reduction in the flooring amount was necessary due to a recent change in the vehicle
15 ordering system at KMC that allows dealers to order vehicles more frequently. (Protestant's Proposed
16 Findings of Facts, pp. 5-6)

17 18. Protestant requests that the Board conditionally sustain the protests if it determines that a
18 breach of the franchises occurred with respect to the failure of BKI to maintain a wholesale flooring line
19 to allow BKI to reestablish its flooring in compliance with the Dealer Agreements. (Protestant's
20 Opening Brief, p. 10)

21 19. Lastly, Protestant maintains that KMC failed to produce evidence related to a number of
22 good cause factors that the Board is mandated to consider and requests that the protests be sustained.
23 (Protestant's Opening Brief, p. 3)

24 **SUMMARY OF WITNESSES' TESTIMONY**⁶

25 20. Protestant called Leon Bellissimo, dealer principal of BKI.

26 21. Respondent called Leon Bellissimo as an adverse witness pursuant to Evidence Code
27

28 ⁶ The section is a summary only. Detailed testimony with citations to the record is found in the Findings of Fact section.

1 section 776.

2 22. Respondent called the following KMC employees as witnesses: Bruce Gill, Regional
3 Sales Director for the Western Region, and Steven Fischer, District Manager.

4 23. Michael Palmer, Senior Manager at Urban Science Applications, Inc. was called by
5 Respondent as an expert witness.

6 24. Cheryl Mottel, Senior Collections Supervisor at KMFC, was called by Respondent as a
7 rebuttal witness.

8 **LEON BELLISSIMO**

9 25. Mr. Bellissimo has been a Kawasaki dealer and owner of Protestant since 1978. He
10 purchased the dealership in that year for about \$100,000. Prior to that, Mr. Bellissimo and his brother
11 operated a motorcycle repair shop in the Hollywood area. He had also worked for his brother's successful
12 Kawasaki dealership in Hollywood.

13 26. In the early years as a Kawasaki franchisee, Mr. Bellissimo enjoyed success and had good
14 relations with Respondent. Mr. Bellissimo stated he was one of the largest police motorcycle dealers in
15 the country, with police department customers from Bakersfield to San Diego. He also promoted
16 Respondent and its products to the movie industry and became, in his words, a dealer to the stars. Mr.
17 Bellissimo did business with governmental agencies and movie studios.

18 27. In the early years, Mr. Bellissimo also had good relationships with employees of
19 Respondent. They would all go to lunch, have drinks, and they would have dinners together. Protestant
20 would be given an extra allocation of bikes and Respondent would do other favors such as providing
21 Protestant with additional jet skis for its inventory.

22 28. According to Mr. Bellissimo, there were good people at KMC in those days. When BKI
23 would get out of trust, behind in payments due Respondent, or fail to send in required financial statements
24 on time, he was told to ignore warning letters about those things and just take care of them later when he
25 could. Respondent would accept purchase orders from government agencies and ship units based thereon
26 in lieu of normal financing and credit arrangements.

27 29. In later years, particularly in the last few years, things changed. According to Mr.
28 Bellissimo, Respondent would not accept purchase orders as a basis for shipment and would insist on

1 normal flooring and credit arrangements or payment in cash for inventory purchases.

2 30. In June of 2011, Protestant's credit line was suspended by KMFC for failure to provide
3 financial statements. Mr. Bellissimo was informed by KMFC that he needed to obtain an irrevocable line
4 of credit (ILOC) for \$212,000 to establish a credit line of \$848,000. Since that time he has been unable to
5 purchase inventory through KMFC due to inability to provide an ILOC. He has been told on several
6 occasions he can purchase product from Respondent only on a COD (cash) basis. According to Mr.
7 Bellissimo, these requirements have caused BKI to lose sales for which it had been awarded bids.

8 31. Although Ms. Mottel of KMFC provided BKI with sample forms and applications, Mr.
9 Bellissimo has been unable to obtain and provide the required ILOC. He stated that Bank of America
10 (four branches) and Wells Fargo have terrible customer relations and did not know what an ILOC was.
11 He also testified that now and in the last few years, as opposed to earlier times when there were "good
12 people at Kawasaki", the people there and at KMFC cannot do their jobs properly and they work against
13 their dealers. Mr. Bellissimo contends that the KMC district manager was never able to explain the
14 reports periodically provided by Respondent. Mr. Bellissimo asserted that the reason for Protestant's
15 poor sales performance (which was not denied) is Respondent's refusal to provide inventory.

16 32. Mr. Bellissimo testified that on occasions since June 27, 2011, someone at KMFC told him
17 orally that his line of credit could be partially opened to obtain vehicles for particular sales.

18 STEVEN FISCHER

19 33. Steven Fischer is a district manager for Respondent, and has been for about nine years.
20 District managers act as liaisons between KMC and its dealers. There are 45 dealers in Mr. Fischer's
21 district, including Protestant. He makes visits to dealerships and also maintains contact with dealerships
22 in his district by telephone to answer questions and discuss concerns. When he visits a dealership he
23 prepares a call report which is explained and made available to the dealer.

24 34. Mr. Fischer tries to talk with the dealer principal when he makes a visit. If that person is
25 not available he talks with the sales manager. In the last couple of years Mr. Bellissimo has not been at
26 the dealership when Mr. Fischer has come by for a visit. If there was a need to talk directly to Mr.
27 Bellissimo a specific appointment needed to be made. In the last year and a half there has been no
28 telephone contact between Messrs. Bellissimo and Fischer. Despite leaving numerous messages, Mr.

1 Fischer has not gotten any return calls from Mr. Bellissimo.

2 35. Call reports are made regarding every visit to every dealer. These include handwritten
3 notes prepared by Mr. Fischer at the time of the visit, and also a number of documents generated by
4 KMC. Among these documents is a sales performance report covering the past 12-month period. This
5 report is discussed with every dealership falling below 100% of expected sales.

6 36. The call report for the January 13, 2010 visit to Protestant contained a sales performance
7 report reflecting sales of only 26.3% of what was expected. Mr. Bellissimo's explanation for the sub-par
8 performance was that he was having trouble finding and keeping employees. He seemed to understand
9 the reports and what was in them. During this and other visits at which he was present Mr. Bellissimo
10 never told Mr. Fischer that the reports were not sufficiently explained. Mr. Fischer never raised his voice
11 or acted irritable, and believed his relationship over time with Mr. Bellissimo was cordial.

12 37. Protestant, for many years has had, and continues to have, significantly more issues with
13 aged inventory⁷ than other dealers. KMC offered help regarding the problem including assistance in
14 transactions with other dealers. This became increasingly difficult or almost impossible, as Mr.
15 Bellissimo tried to charge other dealers more than dealer cost for his aged units.

16 38. Protestant's credit line was suspended in June of 2011, at which time KMC placed
17 Protestant on a COD basis for the purchase of inventory. Since that time BKI has not purchased adequate
18 inventory, either in terms of a representative sample of the full line of Kawasaki products, or an adequate
19 supply of vehicles to meet expected demand.

20 39. Steven Fischer visited Protestant on February 5, 2013, a day before commencement of this
21 hearing. At that time, BKI's inventory consisted of 8 bikes and 3 ATVs, 7 of which were aged. Even an
22 inventory of 25 bikes and 10 ATVs would not be adequate to represent the full line of Kawasaki products
23 or to meet expected demand. A more reasonable inventory would be 75 to 100 bikes and 10 ATVs,
24 although these numbers are subject to variance due to seasonality and location.

25 **BRUCE GILL**

26 40. Since 2004, Mr. Gill has been the Regional Sales Director for KMC's Western Region.

27 _____
28 ⁷ An aged unit is one that had been invoiced to the dealership more than 12 months prior and is still in inventory. (RT II, p. 82)

1 His duties include supervising seven district managers assigned to the 13 states which comprise the
2 Western Region.

3 41. In addition to visiting dealerships, district managers provide dealers with (among other
4 things) explanations of call reports, sales performance reports, and other data. These reports and data are
5 distributed through a network entitled K Dealer. Protestant has received and reviewed the reports with
6 Kawasaki employees. District managers explain and discuss them with dealer principals or other
7 responsible individuals at dealerships.

8 42. Mr. Gill testified that there is no measure by which Protestant could be said to be
9 performing adequately in terms of sales. Mr. Gill believes that the public would benefit by the
10 termination of Protestant's franchises. He sees no way to turn around Burbank's attitude and treatment of
11 customers.

12 43. Protestant's line of credit for flooring was suspended by KMFC as of June 2011, and
13 remained suspended as of the date of the commencement of the hearing in February 2013. Protestant can
14 purchase products from Respondent only on a COD basis.

15 44. Protestant was informed on September 26, 2011, that it needed to obtain a line of credit for
16 flooring by November 30, 2011, sufficient to purchase an adequate inventory of Kawasaki products. An
17 adequate inventory consists not only of raw numbers of vehicles but a reasonable representation of
18 product types and models. For example, 100 vehicles of the same make and model would not satisfy the
19 requirement. Protestant has not obtained satisfactory credit. Mr. Bellissimo has on one or more occasions
20 asked to have vehicles delivered to Protestant based on purchase orders from the State of California
21 and/or other government agencies. He has also asked to have his credit line opened up based on the offer
22 of his home as collateral. Both of these requests were denied by KMFC.

23 45. Mr. Gill testified that the only way for Protestant, or for that matter any dealer, to purchase
24 product is through an approved line of credit (flooring) or payment in cash. Neither Respondent nor
25 KMFC will accept other forms of collateral.

26 ///

27 ///

28 ///

1 is nowhere near expectations.

2 CHERYL MOTTEL

3 52. Cheryl Mottel, Respondent's rebuttal witness, has been employed by KMFC for about 17
4 years, the last 3-4 years as a senior supervisor in the collection section. KMFC has two sections that deal
5 with floor plans. One is the active section for dealers that are trouble-free and the other is the collection
6 section for dealers that are not trouble-free. When a dealership is switched from the trouble-free active
7 section to the collection section, Ms. Mottel's first step is to explain why the dealership was switched and
8 what steps are needed to facilitate a return to the active section. The goal of the collection section is to
9 have the dealer returned to the active section (become trouble-free).

10 53. BKI was first switched to the collection section because required financial statements had
11 not been submitted (they were finally forthcoming at the close of 2012). As indicated above, BKI's
12 flooring line of credit was suspended on June 27, 2011. Being switched to the collection section is
13 standard practice when required financial statements are not on file.

14 54. All dealerships on collection status are comprehensively reviewed on an annual basis. The
15 annual review is not limited to the original reason for assignment to the collection section such as failure
16 to timely file financial statements. It is a comprehensive examination of all aspects of the dealership's
17 operation.

18 55. The first annual review of BKI subsequent to the June 27, 2011 suspension was performed
19 in late November or early December of 2011. Included in BKI's review were its level of performance,
20 timeliness of payments, number of units not paid for or paid late, and the history of dealings with KMC.
21 The goal of the review was the assessment of risk to Respondent and KMFC flowing from the overall
22 condition of the dealership. BKI was found to be a very poor sales performer. Mr. Bellissimo was not
23 present during floor checks and the location of many vehicles could not be ascertained without his help.

24 56. The decision to suspend BKI's flooring credit was made by Ms. Mottel after review of an
25 analysis and recommendation from a staff person. The report and Ms. Mottel's decision were reviewed by
26 the collections manager and then the general manager of KMFC, both of whom concurred.

27 57. KMC set the amount of flooring needed at \$828,000. KMFC determined that for it to
28 extend that amount of credit for a flooring line that collateral of 25%, or \$212,000, was required in the

1 form of an irrevocable letter of credit (ILOC) from another bank. The requirement of 25% as collateral is
2 fairly standard. Ms. Mottel knows of multiple instances where the collateral requirement is higher than
3 25% of the flooring line. BKI has been unable to obtain the \$212,000 ILOC so as of the hearing its
4 flooring is suspended and it remains on a COD basis with KMC. Mr. Bellissimo's request to open a line
5 of credit for \$20,000 was denied as KMFC does not grant a line of credit at that low of a figure.

6 58. Ms. Mottel does not find credible Mr. Bellissimo's assertion that neither Bank of America
7 or Wells Fargo Bank knew what an ILOC was. She knows of several dealerships that have ILOCs with
8 Bank of America. ILOCs are common.

9 59. KMFC does not accept purchase orders from governmental agencies as collateral. It also
10 does not accept a mortgage on a home as collateral. KMFC is not a mortgage lender. Ms. Mottel knows
11 of no instance where BKI or any other dealer on a COD basis is refused inventory if the dealership can
12 pay cash.

13 **SPECIAL NOTATION REGARDING EXHIBIT R309**

14 60. During direct testimony of Mr. Bellissimo on February 5 (called by Respondent as an
15 adverse witness), Respondent sought to have Exhibit R309 admitted into evidence. Exhibit R309, which
16 at that point contained more than what presently appears in the record, is evidence of Mr. Bellissimo's
17 public denigration of the character of Respondent, its employees, and its products. Exhibit R309 was
18 offered in support of, and as a ground for, termination of BKI's two Kawasaki franchises.

19 61. Protestant's counsel objected, contending that the allegations in Exhibit R309 were not
20 separately stated as a ground for termination in the January 24, 2012 notices, which were never
21 supplemented. Respondent's counsel argued that the subject matter of Exhibit R309 was admissible in
22 support of termination under the umbrella of the four grounds that were set forth in the notices. ALJ Prod
23 sustained Protestant's objection, and on that day (February 5) excluded Exhibit R309 in its entirety. (RT
24 I, pp. 46-63)

25 62. On February 6 and 7, Mr. Bellissimo testified further, as Protestant's only witness. During
26 his direct testimony on February 6, Mr. Bellissimo was asked what he had done to promote Respondent
27 and its products. He answered at length and in detail. On February 7, before commencing cross-
28 examination, Respondent's counsel once again sought to introduce Exhibit R309, arguing that it was now

1 admissible as impeachment of Mr. Bellissimo's testimony regarding promotion of Respondent and its
2 products. Protestant's counsel once again objected.

3 63. ALJ Prod ruled that use of Exhibit R309 for impeachment of Mr. Bellissimo was not
4 precluded by the February 5 ruling, and allowed the two pages now constituting Exhibit R309 into
5 evidence, as Mr. Bellissimo had addressed the subject matter of promotion of Respondent and its products
6 in his February 6 direct testimony. Other material in Exhibit R309 as offered on February 5 remained
7 excluded per the February 5 ruling, as going beyond what constituted impeachment alone. (RT III, pp. 5-
8 22)

9 64. The point of this special notation is to make clear that Exhibit R309 as admitted does not
10 constitute a ground for termination of the franchises in this proceeding. It is considered only as
11 impeachment of Mr. Bellissimo's testimony regarding promotion of Respondent and its products.

12 FINDINGS OF FACT⁹

13 Stipulated Facts

14 65. On February 1, 2013, counsel for the parties stipulated to the following undisputed facts:

15 1. Protestant Burbank Kawasaki, Inc. ("Protestant" or "Burbank") is a new
16 motor vehicle dealer selling Kawasaki motorcycles, all-terrain vehicles and related Products.

17 2. Respondent, Kawasaki Motor Corporation, U.S.A. ("Respondent or
18 "Kawasaki") is the distributor of Kawasaki Products in the United States.

19 3. Burbank (through its owner, Leon Bellissimo) has been a Kawasaki dealer in
20 Burbank for approximately 33 years. The dealership is and has, since its inception, been
21 located at 1329 North Hollywood Way, Burbank, California, 91505.

22 4. Burbank is a Kawasaki dealer pursuant to a Kawasaki Authorized Sales and
23 Service Agreement ("Dealer Agreement") with Kawasaki. The basic terms of the Dealer
24 Agreement have not changed during Burbank's tenure as a Kawasaki dealer.

25 5. On or about June, 2011, Burbank's flooring line of credit for new motor
26 vehicle purchases was suspended by Kawasaki Motors Finance Company ("KMFC").
27 KMFC accomplished this suspension by reducing the amount of available flooring credit
28 from \$750,000 to \$10.

⁹ References to testimony, exhibits or other parts of the record are intended to be examples of evidence relied upon to reach a finding, and not to be exhaustive. Findings of Fact are organized under topical headings for readability only, and not to indicate an exclusive relationship to an issue denoted by the topic heading. The Board may apply a particular finding to any "existing circumstance" or "good cause" factor under Section 3061.

Citations to the record are for convenience of the Board. The absence of a citation generally signifies that the underlying facts are foundational or uncontested, or that the finding is an ultimate fact finding of the Board based upon other facts in the record and reasonable inferences therefrom.

1 and obligations under this Agreement, including an inventory of Products
2 commensurate with annually set objectives established by DISTRIBUTOR and
3 DEALER. Such working capital, net worth and/or line of credit shall be of amounts
4 not less than minimum standards established by DISTRIBUTOR from time to time for
5 dealers similarly situated.

6 15. MODEL INVENTORY

7 Subject to the ability of DISTRIBUTOR to supply, DEALER agrees to purchase from
8 DISTRIBUTOR and at all times maintain an inventory of then available models of
9 Products, which inventory shall at no time be less than the number of Products
10 reasonably established by Distributor after consultation with DEALER.

11 18. REPORTS AND FINANCIAL INFORMATION

12 DEALER will provide DISTRIBUTOR, by the 30th day of the month following the
13 end of DEALER'S calendar or fiscal business year, a complete and accurate financial
14 and operating statement covering DEALER'S preceding calendar or fiscal year
15 operations and showing the true and accurate conditions of DEALER'S business.
16 DEALER further agrees to furnish to DISTRIBUTOR, at the time and on the forms
17 prescribed by DISTRIBUTOR, such other complete, accurate and true statements of
18 the financial condition and operating results of DEALER'S business as
19 DISTRIBUTOR may request. DEALER will also furnish to DISTRIBUTOR, on
20 such forms and at such times as DISTRIBUTOR reasonably may require complete and
21 accurate reports of DEALER'S sales activity and stock of Products then being held by
22 DEALER.

23 (Exh. R303)

24 **Findings Relating to the Existing Circumstances Surrounding Protestant's**
25 **Loss of Flooring Line of Credit**

26 67. Mr. Bellissimo has been a Kawasaki dealer for about 33 years starting in 1978. On June
27 27, 2011, KMFC reduced the credit line for BKI from \$750,000 to \$10. The action was taken because
28 financial information was long overdue in violation of paragraph 18 of the franchise agreements. (Exhs.
R303 and R304) The KMFC standard is to suspend a dealership's flooring if yearly financial statements
are not on file (they were eventually provided only at the end of 2012). BKI's flooring remains
suspended as of the date of this hearing. (RT III, pp. 84, 90)

68. KMFC is a totally separate entity from KMC and not a licensee subject to the Board's
jurisdiction. KMFC places dealers to which it has extended credit into one of two relevant sections; the
active section (trouble-free) and the collection section. When a dealership is referred from the active
section, the goal of the collection section is to assist the dealer in returning to the active section. (RT III,
pp. 78-80)

69. When the BKI file was referred from the active section to the collection section, Ms.
Mottel noted problems other than the lack of financial information. Prominent among them was that Mr.

1 Bellissimo was never available to reconcile audits and assist in verifying what Kawasaki products
2 financed by KMFC were still in inventory and physically present at the dealership and what were not.
3 (RT III, pp. 83, 88-89, 93-94)

4 70. Every dealership on collection status undergoes a thorough annual review, which is
5 comprehensive and covers all aspects of the dealership; not only the original factor causing referral to
6 collection status. (RT III, p. 90)

7 71. After BKI's flooring line of credit was reduced, a KMFC analyst thoroughly reviewed
8 BKI. The review was sent to Ms. Mottel, and then to the collection manager and the general manager of
9 KMFC. All agreed on a decision that, based on poor performance among other things, additional
10 collateral was needed to continue the flooring plan with BKI. (RT III, pp. 90-91) To support a credit line
11 of \$848,000, an amount set by KMC,¹⁰ KMFC determined that it required additional collateral of 25%, or
12 \$212,000. This is standard. In many instances, the collateral percentage requirement is much higher,
13 even up to 100% of the line in some cases. The requirement is based on overall circumstances,
14 performance, and the general assessment of risk to KMFC. (RT III, pp. 96-97) Collateral was to be in the
15 form of an ILOC from a financial institution. (Exhs. R305 and R307, p. KMC01025)

16 72. Mr. Bellissimo testified that in his early years as a Kawasaki franchisee things were
17 friendly and informal. There were good people at Kawasaki. BKI was a strong dealer, selling to
18 government, the movie industry and celebrities. (R II, pp. 180-182) If things got bad he was often told
19 "...I trust you, good guy...pay as soon as you can ..." (RT II, p. 186) A lien on his house was taken as
20 collateral once in the 1980's. (RT II, p. 208) BKI's accountant travels the world, so financials are always
21 late. Regarding the letters to that effect he would be told "Well, the computer generates a letter. Don't
22 worry. They know my brother, we are family." (RT II, p. 186) BKI's flooring was suspended eight or
23 10 times in 30 years, maybe more. KMFC would suspend BKI's flooring and then restore it. (RT II, 185-
24 187)

25 73. Mr. Bellissimo testified that BKI did not need and now does not need a credit line of
26 \$848,000, or \$765,000. (Exhs. R305 and R307) The most BKI needs would be \$50,000-\$60,000. Mr.

27
28 ¹⁰ This at some point was designated \$765,000 (see Exh. R305). Collateral required would be lowered to 25% of that figure if agreed between BKI and KMC.

1 Bellissimo did try to open a line of credit for \$20,000, or other low amount, possibly with some cash as
 2 collateral. BKI's claim that it needs far less credit than KMC is requiring is based on the loss of some
 3 product lines, and changes in the frequency of vehicle order acceptance by KMC. However, Mr.
 4 Bellissimo's own testimony belies this contention. He notes instances of business lost due to not having
 5 inventory to fill purchase orders. (RT II, pp. 214-217)

6 74. A review of BKI's borrowing history shows that it regularly has used credit above the
 7 amount required by Kawasaki:

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

18 (Exhs R315-R318, R330)

19 75. As these numbers reflect, Burbank's flooring credit, and use thereof, from 2006 to 2010
 20 was much higher than Kawasaki sought in 2011.

21 76. Mr. Bellissimo testified that since BKI's credit line was suspended he has nevertheless
 22 been able to buy bikes using the flooring line. He would call KMFC regarding a unit, and be told he was
 23 on COD. Then a man would ask "You got a buyer", Mr. Bellissimo would say "sure", and the bike would
 24 be released to him. According to Mr. Bellissimo, a nice guy at KMFC would sometimes do this, one bike
 25 at a time, to help out. BKI's credit would be opened up. (RT II, p. 220) KMC in the past would give
 26 BKI free flooring and send units based on purchase orders from good customers. (RT II, pp. 225-229)

27 77. Ms. Mottel testified that BKI's flooring credit line has not, and could not without her
 28 knowledge, have been opened at any time since June 27, 2011 (RT III, 84-86). KMFC would not accept

1 purchase orders from the state of California or the J. Paul Getty Museum as collateral. (RT I, pp. 35-38;
2 RT, II, pp. 227-228; Exh. 307)

3 78. KMC was not unreasonable in setting the required flooring at \$765,000-\$848,000.
4 Protestant had maintained, and used, flooring line credit above those levels for quite some time prior to
5 the suspension. KMFC was not unreasonable in requiring the standard 25% collateral given the financial
6 condition of BKI and its recent sales performance along with the inability to locate the floored vehicles
7 during a floor check.

8 79. KMC and/or KMFC are not mortgage lenders and do not have to accept a residence as
9 collateral and ship inventory based thereon. The same is true of purchase orders, which are between the
10 customer and the dealer, and do not guarantee payment to KMFC. (RT III, pp. 113-114, RT II, pp. 45-48,
11 67)

12 80. Mr. Bellissimo's testimony that the financial institutions he contacted did not know what
13 an ILOC was, is not credible. His testimony regarding whether BKI's credit line subsequent to June 27,
14 2011 was opened without collateral in small amounts was, at the very least, confusing. Mr. Bellissimo
15 was consistently told BKI could, after June 2011, purchase inventory only through a flooring line of credit
16 or with cash. (RT II, pp. 47-49, 102) Alleged lenient practices well in the past, even if accurately
17 remembered and interpreted, do not dictate current credit arrangements in this economy. Circumstances
18 change. (RT III, pp. 147-148)

19 **Findings Relating to the Amount of Business Transacted by the Franchisee,**
20 **as Compared to the Business Available to the Franchisee [§ 3061(a)]**

21 81. KMC, like other motor vehicle manufacturers and distributors, evaluates a dealer's sales
22 performance by measuring the dealer's sales in relation to the dealer's assigned area, which KMC calls an
23 SEA. (Exh. R325; RT II, pp. 133-134) The SEA is a set of census tracts that are assigned based on
24 proximity to each Kawasaki dealer. (RT II, pp. 133-135) Sales performance calculates a dealer's actual
25 new vehicle sales as a percentage of the registrations of all competitive makes in the dealer's SEA. (RT I,
26 p. 140) To gauge sales penetration effectiveness, a dealer's sales penetration is then compared as a ratio
27 to Kawasaki's actual sales penetration throughout the nation, to determine whether the dealer being
28 analyzed is penetrating its SEA below, at, or above the national average for all Kawasaki dealers. (Exh.

1 R314; RT II, pp. 138-139) Expressed as a percentage, the resulting quotient calculates a dealer's sales
2 effectiveness. (RT II, p. 143) Using raw actual data avoids penalizing a particular dealer for downturns
3 (or upturns) in the economy. (RT I, p. 131; RT II, pp. 145-147)

4 82. Being 100% sales effective only means that a dealership is selling the number of new
5 vehicles it is expected to sell. It is not a perfect or a maximum score. (RT II, p. 144) Because this
6 calculation shows how a dealer is performing compared to all other Kawasaki dealers, it provides strong
7 evidence of Protestant's sales compared to the business that is available to it.

8 83. From 2008 through 2012, sales performance reports indicate that Protestant has slipped
9 from 41.4% of expected sales to 19.8% (100% is average, not superior). Protestant's sales have gone
10 from less than half to less than one-fifth of expectations, and are trending down. Expectations on the sales
11 performance reports are measured against national data, which reflect lower expectations than regional
12 expectations, which are in turn lower than district expectations. If Protestant's sales were measured
13 against expectations in its district, the percentages would be even lower.

14 84. Other reports show the locations where sales were being made. Other dealers are selling
15 more Kawasaki vehicles in Protestant's SEA.¹¹ The information obtained from the data shows that buyers
16 want Kawasaki products and are willing to go to a more distant dealership to obtain them. As indicated in
17 BKI's "Dealer Performance Scorecard Report", 119 out of 140 Kawasaki purchasers inside Protestant's
18 SEA bought Kawasaki vehicles from other dealers. Only 15% of all the Kawasaki vehicles registered in
19 BKI's SEA were sold by BKI.

20 85. For the 12-month period ending in September of 2012, total sales for motorcycles and
21 ATVs of all brands in Protestant's SEA were 1,220. (Exh. R325, pp. 5-6) Minimum expected Kawasaki
22 sales in Protestant's SEA were 202, of which 197 were expected to be motorcycles and 5 were expected
23 to be ATVs. (Exh. R325) Actual sales by Protestant for this period were 40 (38 motorcycles and 2
24 ATVs) for a shortfall of 162 vehicles (159 motorcycles and 3 ATVs). Dealership performance for the
25 period was 19.8% of expectations.

26 ///

27 _____
28 ¹¹ According to Respondent's expert, Mr. Palmer, an SEA determines how much opportunity is available to the dealer. The SEA is where the dealer has an advantage in terms of distance to consumers. (RT, II, p. 135)

1 86. For the twelve month period ending December 2008, BKI's sales performance was 41.4%
2 of expectations. As indicated below, since 2008, Protestant's sales performance has never reached half of
3 expectations and is now below one-fifth of expectations. The following are the percentages based upon
4 the actual sales performance by Protestant for the years 2008 through September 2012:

5 Calendar Year	6 Percentage of Expectations Achieved by BKI	7 Actual Sales by BKI	8 Shortfall
9 2008	41.4%	159	225
10 2009	25.3%	68	201
11 2010	32.7%	65	134
12 2011	22.4%	50	173
13 September 2012	19.8%	40	162

14 (Exhs. R314, R319-R325)

15 87. Kawasaki brand penetration in BKI's district is among the highest in the nation. Kawasaki
16 sales performance in Protestant's district outperforms that of the western region, which in turn
17 outperforms the nation. Computation of Protestant's sales performance is based on national data, and
18 therefore renders the sales figures noted above more generous than they actually are. (RT I, pp. 147-148)

19 88. During the hearing there was no serious contention that expectations were improperly set
20 too high, or that Protestant's sales were anywhere near adequate. As long as BKI fails to obtain adequate
21 floor plan financing there is no way sales performance can improve. Since losing adequate floor plan
22 financing, BKI's inventory has decreased from 100-plus Kawasaki vehicles to 11. (RT II, p. 117) Relying
23 on sporadic purchases from other dealers and spot cash purchases of individual vehicles cannot substitute
24 for having an adequate inventory on hand. BKI's current practice dooms it to grossly deficient sales
25 performance. If a Kawasaki dealer cannot obtain inventory it cannot make sales. If a Kawasaki dealer
26 cannot make sales it cannot maintain a viable franchised dealership.

27 **Findings Relating to the Investment Necessarily Made and Obligations Incurred
by the Franchisee to Perform its Part of the Franchise [§ 3061(b)]**

28 89. Inadequate investment in Protestant's facility was not specifically alleged as a ground for
29 termination of the franchises. The limited testimony regarding signage and facility repairs do not
30 establish facts regarding this good cause factor.

31 **Findings Relating to Permanency of the Investment [§ 3061(c)]**

32 90. Lack of permanency of investment in Protestant's facility was not alleged as a ground for

1 termination of the franchises. Insufficient facts were established regarding this good cause factor.

2 **Findings Relating to Whether it is Injurious or Beneficial to the Public Welfare**
3 **for the Franchise to be Modified or Replaced or the Business of the**
4 **Franchisee Disrupted [§ 3061(d)]**

5 91. About 15% of Kawasaki sales are made by BKI in its SEA. (Exh. 323) Customers in the
6 SEA are interested in buying Kawasaki products, but most are traveling to more distant dealers to buy
7 them. (RT I, pp. 139-142, 159) Protestant is ranked last in sales satisfaction (SSI) in the district. (Exh.
8 326) In terms of SSI, BKI ranks 39th out of 39 in the district, 241st out of 242 in the region, and 1,197th
9 out of 1,206 in the nation. (RT I, p. 152; Exh. 326) In December 2012, BKI sold two new Kawasaki
10 vehicles, and two customers complained to KMC about BKI. The two complainants may or may not have
11 been the December 2012 customers. (RT I, pp. 152-154)

12 92. BKI does not maintain an inventory even remotely adequate to represent the Kawasaki line
13 of products or to meet expected demand. On the day before commencement of this hearing, Protestant's
14 inventory consisted of 11 vehicles; eight of which were motorcycles and three of which were ATVs. (RT
15 II, p. 118) Of these 11 vehicles, seven were aged, i.e., not current year models. (RT II, pp. 81-82) An
16 aged unit is one that had been invoiced to the dealership more than 12 months in the past. (R II, p. 82) In
17 earlier times, BKI had stocked over 100 Kawasaki vehicles. (RT II, p. 117) For an inventory to be
18 adequate, there must be on hand both a product mix representing the Kawasaki product line, and a
19 sufficient number of vehicles in the mix represented on hand to meet reasonably expected demand. (RT
20 II, pp. 25-26, pp. 109-110) Protestant would need at least 75 Kawasaki vehicles in inventory to meet
21 these requirements.

22 93. BKI has always had a significant problem with excess aged inventory. (RT II, pp. 93-95)
23 Having a very small inventory, and/or an inventory with an abnormally high proportion of aged vehicles
24 presents two problems in terms of sales. Generally, people will not buy what they cannot see, and they
25 tend to want an option to see and buy current vehicles. (RT I, pp. 125-126; RT II, p. 94)

26 94. Despite KMC's attempts to work with Protestant, nothing can be done to improve BKI's
27 sales performance and secure adequate flooring. The termination of the franchises must be consummated.
28 Even though KMC has not decided to replace the Kawasaki franchises in Burbank, the state of the BKI
dealership is such that its closure will not be injurious to the public. It is as though BKI is already closed

1 as it has not been and is not now adequately serving the public. KMC will continue to serve its customers
2 in BKI's SEA. (RT I, pp. 159-160) If BKI is terminated KMC will evaluate the market and determine
3 whether to replace BKI or not. (RT I, pp. 159-160) Since consumers have been purchasing outside BKI's
4 SEA, they will continue to do so in the event BKI's Kawasaki franchises are terminated. (Exh. R323)

5 **Findings Relating to Whether the Franchisee has Adequate Motor Vehicle**
6 **Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service**
7 **Personnel to Reasonably Provide for the Needs of the Consumers for the Motor**
8 **Vehicles Handled by the Franchisee and has been and is Rendering**
9 **Adequate Services to the Public [§ 3061(e)]**

10 95. It is not disputed that BKI is doing business on a dramatically reduced scale. There has
11 been no articulated contention that Protestant's facilities and equipment are not adequate to support the
12 current level of activity. The reduced level of business activity itself, however, raises the question of
13 whether BKI is rendering adequate services to the public. No findings are made here separate and apart
14 from those in other sections.

15 **Findings Relating to Whether to Franchisee Fails to Fulfill the Warranty Obligations of the**
16 **Franchisor to be Performed by the Franchisee [§3061(f)]**

17 96. Failure to fulfill warranty obligations was not alleged as a ground for termination of the
18 franchises. No facts were established regarding this good cause factor.

19 **Findings Relating to the Extent of the Franchisee's Failure to Comply with**
20 **the Terms of the Franchise [§ 3061(g)]**

21 97. Protestant has failed and is failing to comply with paragraphs 5, 14A, and 15 (Sales
22 Performance, Financial Responsibility, and Model Inventory). Protestant has in the past failed to comply
23 with paragraph 18 (Reports and Financial Information), but now may be in compliance.

24 **DETERMINATION OF ISSUES**

25 98. KMC has established that BKI's loss of flooring is due to BKI's poor performance and
26 financial condition, and not KMC's actions in response thereto.

27 99. KMC has established that BKI is not conducting an adequate amount of business as
28 compared to the business available to it. [Section 3061(a)]

100. KMC has not established that BKI has not made the investment necessary and incurred the
obligations necessary to perform its part of the Kawasaki franchises. [Section 3061(b)]

1 101. KMC has not established that BKI investment is not permanent. [Section 3061(c)]

2 102. KMC has established that it would not be injurious to the public welfare for the franchises
3 to be replaced. [Section 3061(d)]

4 103. KMC has not established that BKI does not have adequate motor vehicle sales and service
5 facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of
6 the consumers for the motor vehicles handled by the franchisee. KMC has established that BKI is not
7 rendering adequate services to the public. [Section 3061(e)]

8 104. KMC has not established that BKI failed to fulfill the warranty obligations of KMC to be
9 performed by BKI. [Section 3061(f)]

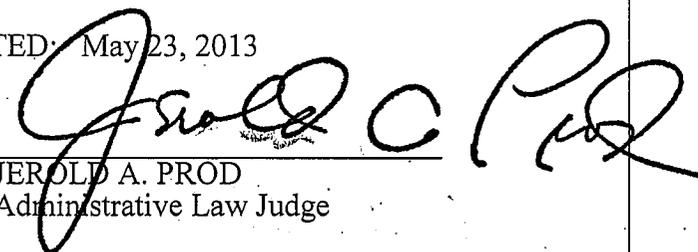
10 105. KMC has established that BKI failed to comply with some important terms of the
11 franchises. [Section 3061(g)]

12 **PROPOSED DECISION**

13 Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the
14 Protests in *Burbank Kawasaki, Inc. v. Kawasaki Motors Corp., U.S.A.*, Protest Nos. PR-2328-12 and PR-
15 2333-12 are overruled. Respondent has met its burden of proof under Vehicle Code Section 3066(b) to
16 establish that there is good cause to terminate BKI's Kawasaki franchises for motorcycles and ATVs.

17
18 I hereby submit the foregoing which constitutes my
19 Proposed Decision in the above-entitled matter, as
20 the result of a hearing before me, and I recommend
21 this Proposed Decision be adopted as the decision of
22 the New Motor Vehicle Board.

23 DATED: May 23, 2013

24 By: 
25 JEROLD A. PROD
26 Administrative Law Judge

27 Jean Shiomoto, Chief Deputy Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV