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9 BURBANK KAWASAKI

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

12 In the Matter of the Protests of:

13 BURBANK KAWASAKI, INC.,

14 Protestant,

15 v.

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

18 Respondent.

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

**PROTESTANT'S PROPOSED FINDINGS OF
FACT AFTER HEARING ON REMAND**

19
20 Pursuant to the Board's Order Establishing Post-Hearing Briefing Schedule After Remand
21 Hearing, dated September 17, 2013 in the above-captioned matters, Protestant BURBANK
22 KAWASAKI, INC. ("BKI" or "Protestant") hereby submits its Proposed Findings of Fact After Remand
23 Hearing as follows:
24

25 //

26 //

PROCEDURAL BACKGROUND

Statement of the Case

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3 1. These protests involve the attempt by Respondent KAWASAKI MOTORS CORP.,
4 U.S.A. ("KMC" or "Respondent") to terminate the motorcycle and ATV franchise of BKI. The
5 operative notices of intent to terminate were given on January 24, 2012.¹
6

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

8
9 This termination is based upon, but not limited to, [BKI's]: 1) failure to maintain model
10 inventory, 2) failure to meet sales requirements, 3) failure to provide equal
11 representation for Kawasaki products and 4) failure to maintain a wholesale financing
12 line of credit (flooring) in an amount sufficient to permit [BKI] to purchase an
adequate inventory of the full line of Kawasaki products. (Exhibits. R301 and R302)³

13 3. The notices went on to state that "KMC reserves the right to supplement [these]
14 notices if it becomes aware of additional grounds for termination under the Sales and Service
15 Agreement[s] and/or any applicable statute." (Exhibits R301 and R302). These notices were not
16 subsequently amended by KMC.
17

18 4. On February 23, 2012, BKI filed Protest No. PR-2328-12, which challenged both of
19 the intended terminations. However, as the Board requires a separate protest be filed with respect to
20 each Notice of Termination, the parties stipulated that Protest No. PR-2328-12 would apply to the
21 motorcycle franchise and that a new protest (No. PR-2333-12) would apply to the ATV franchise. The
22 parties also stipulated to the consolidation of the two protests and the Board, on May 31, 2012, issued its
23 order of consolidation. (Stipulation and [Proposed] Order Regarding Filing and Consolidation of
24 Protests).
25

26
27 ¹ There had been previous notices of termination given to BKI earlier in January 2012 (erroneously dated January 4, 2011),
28 which did not comply with the requirements of the Vehicle Code. Protests were filed in response to these notices. The
January 24, 2012 letters represent amended notices which were purportedly statutorily-compliant. The parties have stipulated
that the January 24th letters are the operative notice for the purposes of these protests, even though the protests were filed
prior to receipt by BKI of the January 24th letters.

1 5. A three-day hearing on the merits was held February 5-7, 2013, before Administrative
2 Law Judge Jerold A. Prod ("ALJ Prod") on the merits of these protests.

3 6. On May 23, 2013, ALJ Prod issued his proposed decision overruling both protests. On
4 June 26, 2013, the public members of the Board met, heard oral arguments of the parties, and considered
5 the proposed decision of ALJ Prod. After such consideration, the Board rejected the proposed decision
6 and remanded the matter back for further settlement proceedings and for a remand hearing to take
7 additional evidence to determine:

8 a. The reasonable amount of flooring required for Protestant to perform its
9 contractual obligations (Remand Order at para. 6(b)).
10

11 b. A reasonable timeframe to secure such flooring (id.).
12

13 c. What will be needed for Protestant to meet its franchise obligations to stock a
14 complete line of Kawasaki products as well as the extent of Protestant's future sales penetration into its
15 SEA (Statistical Evaluation Area), (Remand Order at para. 6(c)), and
16

17 d. Recommendations at to conditions that would be appropriately within Vehicle
18 Code Section 3067.² (Remand Order at para. 6(d)).
19

20 7. The Remand Hearing was held on September 17th and 18th, 2013, before Administrative
21 Law Judge Lonnie Carlson (ALJ Carlson).
22

23 **The Parties and Counsel**

24 8. BKI is an authorized Kawasaki dealership located at 1329 North Hollywood Way,
25 Burbank, California. (Exhibits R301 and R302). The dealership is owned by Leon Bellissimo.
26

27
28

² All statutory references herein are to the Vehicle Code unless otherwise indicated.

1 (Exhibits 303, Appendix B). Protestant is a "franchisee" within the meaning of Sections 331.1 and
2 3060(a)(1).

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

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

6 11. Respondent is represented by Maurice Sanchez, Esq. and Kevin M. Colton, Esq. of
7 Baker & Hostetler LLP, 600 Anton Boulevard, Suite 900, Costa Mesa, California.
8

9 **Summary of Witnesses' Testimony and Exhibits Introduced**

10 a. Witnesses called at Initial Hearing.

11 12. Protestant called Leon Bellissimo, dealer principal of BKI.

12 13. Respondent called Leon Bellissimo as an adverse witness pursuant to Evidence
13 Code Section 776.
14

15 14. Respondent called the following KMC employees as witnesses: Bruce Gill, Regional
16 Sales Director for the Western Region, and Steven Fischer, District Manager.
17

18 15. Respondent called Michael Palmer, Senior Manager at Urban Science
19 Applications, Inc. as an expert witness.
20

21 16. Respondent called Cheryl Mottel, Senior Collections Supervisor at KMFC, as a
22 rebuttal witness.
23

24 b. Witnesses Called at Remand Hearing.

25 17. Respondent called Leon Bellissimo pursuant to Evidence Code Section 776.

26 18. Respondent called Bruce Gill.

27 19. Respondent called Martin Keller, Senior Regional Credit Supervisor of KMFC for
28 the Southern Region.

1 26. In later years, particularly in the last few years, things changed. According to Mr.
2 Bellissimo, Respondent would not accept purchase orders as a basis for shipment and would
3 insist on normal flooring and credit arrangements or payment in cash for inventory purchases.

4 27. In June of 2011, Protestant's credit line was suspended by KMFC for failure to
5 provide financial statements. Mr. Bellissimo was informed by KMFC that he needed to obtain an
6 irrevocable line of credit (ILOC) for \$212,000 to establish a credit line of \$848,000. Since that time he
7 has been unable to purchase inventory through KMFC due to inability to provide an ILOC. He has
8 been told on several occasions he can purchase product from Respondent only on a COD (cash)
9 basis. According to Mr. Bellissimo, these requirements have caused BKI to lose sales for which it
10 had been awarded bids.
11

12 28. As of the date of the initial hearing, Mr. Bellissimo has been unable to obtain and
13 provide the ILOC required by KMFC. As such, his flooring line with KMFC remained
14 suspended. Mr. Bellissimo asserted that the reason for Protestant's poor sales performance is
15 Respondent's refusal to provide inventory.
16

17 29. Mr. Bellissimo testified that on occasions since June 27, 2011, someone at KMFC told
18 him orally that his line of credit could be partially opened to obtain vehicles for particular sales.
19

20 At the Remand Hearing, Mr. Bellissimo testified as follows:
21

22 30. Mr. Bellissimo has had no motorcycle franchises other than Kawasaki since he
23 purchased BKI in 1978, and that he has always paid his bills to both KMC and KMFC.
24

25 31. Mr. Bellissimo testified that the amount of flooring currently required by KMC of
26 \$885,219 is far in excess of what he needs to reasonably stock a sufficient number of units to
27 comply with his franchise obligations. This was due to both a change in the ordering system (from
28 once a year to once every two months), as well as the ability of BKI of obtain units either the same

1 day or the next day from ordering.

2 32. Mr. Bellissimo testified that it was unreasonable to require that BKI stock a six-
3 month supply of motorcycles, nor does BKI have the room to store such a large inventory. He
4 testified that his showroom has room for ten to twelve motorcycles, and that a flooring line of
5 approximately \$80,000 to \$100,000 would allow BKI to keep the showroom stocked with current
6 inventory.
7

8 **STEVEN FISHER**

9 At the Initial Hearing, Mr. Fisher testified as follows:

10
11 33. Steven Fischer is a district manager for Respondent, and has been for about nine
12 years. District managers act as liaisons between KMC and its dealers. There are 45 dealers in Mr.
13 Fischer's district, including Protestant. He makes visits to dealerships and also maintains contact
14 with dealerships in his district by telephone to answer questions and discuss concerns. When he
15 visits a dealership he prepares a call report which is explained and made available to the
16 dealer.
17

18 34. Mr. Fischer tries to talk with the dealer principal when he makes a visit. If that person
19 is not available he talks with the sales manager. If there was a need to talk directly to Mr.
20 Bellissimo, Mr. Fisher would need to make an appointment.
21

22 35. Call reports are made regarding every visit to every dealer. These include
23 handwritten notes prepared by Mr. Fischer at the time of the visit, and also a number of
24 documents generated by KMC. Among these documents is a sales performance report covering
25 the past 12-month period. This report is discussed with every dealership falling below 100%
26 of expected sales.
27
28

1 would not satisfy the requirement. Protestant has not obtained satisfactory credit. Mr. Bellissimo has
2 on one or more occasion asked to have vehicles delivered to Protestant based on purchase orders
3 from the State of California and/or other government agencies. He has also asked to have his credit
4 line opened up based on the offer of his home as collateral. Both of these requests were denied by
5 KMFC.

6
7 41. Mr. Gill testified that the only way for Protestant, or for that matter any dealer, to
8 purchase product is through an approved line of credit (flooring) or payment in cash. Neither
9 Respondent nor KMFC will accept other forms of collateral. As indicated previously,
10 Respondent KMC and KMFC⁸ are two separate entities. KMFC decides whether or not a
11 dealer's credit or flooring line is adequate or must be suspended, and whether collateral is required.
12 KMC is free to accept cash as payment for shipment of product, and to decide for how long it will
13 do so.
14

15
16 At the Remand Hearing, Mr. Gill reiterated a large percentage of his testimony in the
17 Initial Hearing, and further testified as follows:

18 42. Mr. Gill was solely responsible for the decision to terminate the franchises of BKI.
19

20 43. Mr. Gill's decision was based upon the (1) lack of sales effectiveness of BKI, and
21 (2) the loss of flooring for BKI.
22

23 **MICHAEL PALMER**

24 At the Initial Hearing, Mr. Palmer testified as follows:

25
26 44. Michael Palmer, Respondent's expert witness from Urban Science
27 Applications, performed analyses of Protestant's sales performance over various periods of time.
28 They were based on the SEA (Statistical Evaluation Area) assigned to SKI. SEAs are based on

1 assignments of census tracts to dealers based on comparative proximity. Census tracts whose centers
2 are closer to BK1 than to any other dealer are assigned to BKI's SEA based on a presumed sales
3 advantage growing out of closer proximity to the dealership.

4
5 45. Expected sales of Kawasaki products for any given SEA for any given time period
6 are derived from a base of total sales of similar products in the SEA. This figure is then reduced
7 to Kawasaki's share of the total market for similar products. There is a separate calculation for each
8 product segment of the total line of Kawasaki products.

9
10 46. The methodology employed uses two sources of data. One is national sales of the
11 product segments in which Kawasaki competes. The other is actual Kawasaki sales in those product
12 segments. This methodology allows for depressed conditions in the marketplace to be reflected in
13 lower dealership expectations, and vice versa.

14
15 47. According to Mr. Palmer, Protestant's sales performance has been and is extremely
16 poor. Mr. Palmer admitted that his analysis was based upon an assumption that BKI had in place
17 adequate flooring to purchase all inventory necessary to meet what he determined expected sales to
18 be.

19
20 Mr. Palmer did not testify at the Remand Hearing.

21 **CHERYL MOTTEL**

22 At the Initial Hearing, Ms. Mottel testified as follows:

23
24 48. Cheryl Mottel, Respondent's rebuttal witness, has been employed by KMFC for about
25 17 years, the last 3-4 years as a senior supervisor in the collection section. KMFC has two sections
26 that deal with floor plans. One is the active section for dealers that are trouble-free and the other is the
27 collection section for dealers that are not trouble-free. When a dealership is switched from the
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1 trouble-free active section to the collection section, Ms. Mottel's first step is to explain why the
2 dealership was switched and what steps are needed to facilitate a return to the active section. The
3 goal of the collection section is to have the dealer returned to the active section (become trouble-
4 free).

5
6 49. BKI was first switched to the collection section because required financial statements
7 had not been submitted (they were finally forthcoming at the close of 2012). As indicated above,
8 BKI's flooring line of credit was suspended on June 27, 2011.

9
10 50. All dealerships on collection status are comprehensively reviewed on an annual basis.
11 The annual review is not limited to the original reason for assignment to the collection section such
12 as failure to timely file financial statements. It is a comprehensive examination of all aspects of the
13 dealership's operation.

14
15 51. The first annual review of BKI subsequent to the June 27, 2011 suspension was
16 performed in late November or early December of 2011. Included in BKI's review were its level of
17 performance, timeliness of payments, number of units not paid for or paid late, and the history of
18 dealings with KMC. The goal of the review was the assessment of risk to Respondent and KMFC
19 flowing from the overall condition of the dealership. BKI was found to be a very poor sales
20 performer. Mr. Bellissimo was not present during floor checks and the location of many vehicles
21 could not be ascertained without his help.

22
23 52. The decision to suspend BKI's flooring credit was made by Ms. Mottel after review of
24 an analysis and recommendation from a staff person. The report and Ms. Mottel's decision were
25 reviewed by the collections manager and then the general manager of KMFC, both of whom
26 concurred.
27
28

1 KMC set the amount of flooring needed at \$828,000. KMFC determined that for it to extend
2 that amount of credit for a flooring line that collateral of 25%, or \$212,000, was required in the
3 form of an irrevocable letter of credit (ILOC) from another bank. Ms. Mottel does not find credible
4 Mr. Bellissimo's assertion that neither Bank of America or Wells Fargo Bank knew what an ILOC
5 was. She knows of several dealerships that have ILOCs with Bank of America. ILOCs are common.
6

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

12 Ms. Mottel did not testify at the Remand Hearing.

13 **MARTIN KELLER**
14

15 Mr. Keller did not testify at the Initial Hearing. Mr. Keller's testimony at the Remand Hearing
16 was as follows:

17 54. Mr. Keller is employed as a Senior Regional Credit Supervisor for the Southern Region
18 for KMFC. Mr. Keller does not work with California dealers (including BKI), who are located in the
19 Western Region.
20

21 55. Mr. Keller is familiar, generally, with KMFC's requirement that some dealers are
22 required to supply an ILOC as a condition of obtaining new or continued funding from KMFC.
23

24 56. Mr. Keller further testified that he was not familiar with the BKI account with KMFC.
25

26 **ISSUES PRESENTED**

27 57. Pursuant to Section 3066(6), KMC has the burden to establish good cause for the
28

1 termination of BKI's Kawasaki motorcycle franchise and ATV franchise. In determining whether
2 KMC has established good cause for the terminations, Section 3061 requires that the Board consider
3 the "existing circumstances", including but not limited to all of the following:

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

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24 58. Pursuant to the Board's Remand Order dated August 6, 2013, the following additional
25 issues were presented upon remand:

- 26 a. "[T]he reasonable amount of flooring required for Protestant to perform its contractual
27 obligations". (Remand Order at p. 3, para. b);
28

1 b. “[A] reasonable timeframe to secure such flooring”.³ (id); and

2 c. “[W]hat will be needed for Protestant to meet its franchise obligations to stock a
3 complete line of Kawasaki products as well as the extent of Protestant’s future sales penetration into its
4 SEA (Statistical Evaluation Area), and recommendations as to conditions that would be appropriately
5 within [Vehicle Code] Section 3067”. (id at p. 3, para. c).

6 PROTESTANT’S CONTENTIONS

7
8 59. Protestant contends that “good cause” has not been established for the termination of its
9 franchises, based upon the fact that the evidence presented at the initial hearing, as well as the remand
10 hearing, established that (1) BKI has maintained a model inventory consistent with the requirements
11 imposed upon it and other dealers and, in many occasions, has exceeded the inventory requirements of
12 other similarly-sized and larger dealers, (2) BKI has complied with its contractual obligations to “use its
13 best efforts and due diligence to energetically and aggressively develop and promote the sale of
14 [Kawasaki] Products, (3) that the method by which KMC measures the sales performance of BKI is
15 unreasonable in consideration of the facts that BMI is, and always has been, a family-owned, small-
16 volume dealer, and the size of SEA (the geographic perimeters of which are established exclusively by
17 Respondent) that is used to evaluate the sales performance of BKI is disproportionately large, to the
18 distinct disadvantage of BKI, (4) BKI provides “equal representation” of products in that it does not,
19 nor ever has, carried a product that competes with Kawasaki, and (5) the flooring line requirements
20 unilaterally imposed by KMC are unreasonable, inconsistent with the requirements imposed upon other
21 dealers, and once this Board establishes a reasonable level of flooring, BKI will reestablish flooring at
22 the reasonable level within a reasonable period of time following the final decision of this Board.
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28 ³ Under the terms of the Remand Order, the ALJ “determine both the amount of the flooring required and the timeframe for
obtaining the flooring [based upon agreement, otherwise] based upon the record and any additional evidence and arguments
submitted”. Remand Order, at footnote 2.

RESPONDENT'S CONTENTIONS

1
2 60. Respondent contends that "good cause" exists under Section 3061 to terminate the BKI
3 franchises, based upon evidence that (1) BKI has failed to maintain model inventory, (2) BKI has not
4 met the minimum sales performance levels established by KMC, (3) BKI does not provide "equal
5 representation" for Kawasaki products, and (4) BKI does not have an active wholesale flooring line in
6 an amount established by KMC. Respondent further contends that the Board acted beyond its
7 jurisdiction in issuing its Remand Order, and that the imposition of conditions under Section 3067
8 would be improper.
9

FINDINGS OF FACT

Stipulated Facts from First Hearing

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13 On February 1, 2013, counsel for the parties stipulated to the following undisputed facts:

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

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

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

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

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

28 6. Burbank's existing inventory of Kawasaki vehicles was not repossessed by KMFC
when the flooring line was suspended. Burbank has remained in business by maintaining its
scooter business for other brands, and by selling off its existing Kawasaki inventory, and by
purchases from other Kawasaki dealers and cash purchases from Kawasaki.

7. On or about September 26, 2011, Kawasaki sent Burbank a letter via Certified
Mail, Return Receipt Requested, stating that Burbank had "failed to maintain a wholesale

1 line of credit (flooring) ... in breach of paragraph 14 of the Dealer Agreement," and that
2 Burbank needed to correct this deficiency by obtaining flooring in the amount of \$765,500 as
3 soon as possible, but in no event later than November 30, 2011.

4 8. On or about January 24, 2012, Kawasaki sent, and Protestant received, a Notice
5 of Termination in compliance with Vehicle Code 3060. In that Notice, Kawasaki identified 4
6 independent reasons for the termination of Protestant's Dealer Agreement: (1) Failure to
7 maintain adequate model inventory, (2) Failure to meet sales requirements, (3) Failure to
8 provide equal representation of Kawasaki Products and (4) Failure to maintain floor plan
9 financing adequate to fulfill its obligations under the Dealer Agreement.

10 9. Burbank filed a timely protest.

11 10. Burbank leases the facility from which it conducts Kawasaki operations.
12 Burbank's rent payment for the facility is approximately three to four thousand dollars per
13 month.

14 Stipulated Facts from Remand Hearing

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

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

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

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

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

6. Burbank's existing inventory of Kawasaki vehicles was not
repossessed by KMFC when the flooring line was suspended. Burbank has remained
in business by selling off its existing Kawasaki inventory, and by purchases from
other Kawasaki dealers and cash purchases from Kawasaki.

1 7. On or about September 26, 2011, Kawasaki sent Burbank a letter via
2 Certified Mail, Return Receipt Requested, stating that Burbank had "failed to
3 maintain a wholesale line of credit (flooring) ... in breach of paragraph 14 of the
4 Dealer Agreement," and that Burbank needed to correct this deficiency by obtaining
5 flooring in the amount of \$765,500 as soon as possible, but in no event later than
6 November 30, 2011. Burbank has not had flooring since then.

7 8. On or about January 24, 2012, Kawasaki sent, and Protestant received,
8 two Notices of Termination (one for motorcycle and one for ATV) in compliance
9 with Vehicle Code 3060. In those Notices, Kawasaki identified 4 independent
10 reasons for the termination of Protestant's Dealer Agreement: (1) Failure to maintain
11 adequate model inventory, (2) Failure to meet sales requirements, (3) Failure to
12 provide equal representation of Kawasaki Products and (4) Failure to maintain floor
13 plan financing adequate to fulfill its obligations under the Dealer Agreement.

14 9. Burbank filed a timely protest.

15 10. Burbank leases the facility from which it conducts Kawasaki
16 operations. Burbank's rent payment for the facility is approximately three to four
17 thousand dollars per month.

18 11. The New Motor Vehicle Board's jurisdiction in this matter extends to
19 motorcycle and all-terrain vehicle units only, and not to any other Kawasaki Products.

20 12. Burbank is contractually permitted to obtain floor plan financing with
21 any financial institution acceptable to Kawasaki; it has no obligation to secure its
22 financing with Kawasaki Motors Finance Company (KMFC).

23 Dealer Sales and Service Agreements

24 61. The relevant terms of the BKI/KMC franchise (Dealer Sales and Service Agreement) are
25 contained in paragraphs 5, 14A, 15, and 18. They are set forth here as follows:

26 5. SALES PERFORMANCE

27 DEALER agrees, at its own cost and expense, to use its best efforts and due
28 diligence to energetically and aggressively develop and promote the sale of
Products, including each model and type thereof. DEALER and
DISTRIBUTOR agree that DISTRIBUTOR shall evaluate DEALER'S
development and promotion of the sale of Products, both as a whole and separately
for each model and type based on such reasonable criteria as DISTRIBUTOR may
determine from time to time, which may include but not be limited to: (a) fair and
reasonable sales objectives which may be established from time to time by
DISTRIBUTOR for DEALER after review with DEALER; (b) the ratio of sales
of Products by DEALER to sales of other makes of similar products as
compared with (i) such ratio on a local, state, and/or nationwide bases, (ii) the
average ratio for all Kawasaki dealers appointed by DISTRIBUTOR, and (iii)
such ratios for at least two other comparable Kawasaki dealers; (c) the

1 development of DEALER'S sales and performance over a reasonable period of
2 time; and (d) particular conditions in DEALER'S area of primary responsibility,
3 if any, affecting such performance or potential sales performance.

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14. FINANCIAL RESPONSIBILITY

A. DEALER shall at all times maintain and employ, in connection with its business and operations under this Agreement, such working capital and net worth together with a line of credit with a financing institution satisfactory to DISTRIBUTOR which will permit DEALER to properly and fully carry out and perform DEALER'S duties and obligations under this Agreement, including an inventory of Products commensurate with annually set objectives established by DISTRIBUTOR and DEALER. Such working capital, net worth and/or line of credit shall be of amounts not less than minimum standards established by DISTRIBUTOR from time to time for dealers similarly situated.

15. MODEL INVENTORY

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

18. REPORTS AND FINANCIAL INFORMATION

DEALER will provide DISTRIBUTOR, by the 30th day of the month following the end of DEALER'S calendar or fiscal business year, a complete and accurate financial and operating statement covering DEALER'S preceding calendar or fiscal year operations and showing the true and accurate conditions of DEALER'S business. DEALER further agrees to furnish to DISTRIBUTOR, at the time and on the forms prescribed by DISTRIBUTOR, such other complete, accurate and true statements of the financial condition and operating results of DEALER'S business as DISTRIBUTOR may request. DEALER will also furnish to DISTRIBUTOR, on such forms and at such times as DISTRIBUTOR reasonably may require complete and accurate reports of DEALER'S sales activity and stock of Products then being held by DEALER.
(Exhibit R-303)

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

62. Mr. Bellissimo has been a Kawasaki dealer for about 33 years starting in 1978. On June 27, 2011, KMFC reduced the credit line for BK1 from \$750,000 to \$10. The action was taken because 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

1 2012). BKI's flooring remains suspended as of both hearings. (RT 111, pp. 84, 90)⁴

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

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

10 65. After BKI's flooring line of credit was reduced, a KMFC analyst thoroughly
11 reviewed BKI. The review was sent to Ms. Mottel, and then to the collection manager and the
12 general manager of KMFC. All agreed on a decision that, based on poor performance among
13 other things, additional collateral was needed to continue the flooring plan with BKI. (RT III, pp.
14 90-91) To support a credit line of \$848,000, an amount set by KMC, KMFC determined that it
15 required additional collateral of 25%, or \$212,000. The requirement is based on overall
16 circumstances, performance, and the general assessment of risk to KMFC. (RT 111, pp. 96-97)
17 Collateral was to be in the form of an ILOC from a financial institution. (Exhs. R305 and R307, p.
18 KMC01025)

19 66. Mr. Bellissimo testified that in his early years as a Kawasaki franchisee things
20 were friendly and informal. There were good people at Kawasaki. BKI was a strong dealer,
21 selling to government, the movie industry and celebrities. (RT 11, pp. 180-182) If things got bad
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28 ⁴ Reporter's Transcript references of RT III (pages and lines) are to the *Initial Hearing transcripts*. References to the Remand
Hearing Transcript are in the form RT Vol #; (pages and lines).

1 he was often told "...I trust you, good guy...pay as soon as you can ..." (RT II, p. 186) A lien on his
2 house was taken as collateral once in the 1980's. (RT II, p.208) BKI's accountant travels the world,
3 so financials are always late. Regarding the letters to that effect he would be told "Well, the
4 computer generates a letter. Don't worry. They know my brother, we are family." (RT 11, p. 186)
5 BKI's flooring was suspended eight or 10 times in 30 years, maybe more. KMFC would suspend
6 BKI's flooring and then restore it. (RT II, 185-187).
7

8 67. Mr. Bellissimo testified that BKI did not need and now does not need a credit line of
9 \$848,000, or \$765,000. (Exhs. R305 and R307) The most BKI needs would be \$50,000-\$100,000.
10 Mr. Bellissimo did try to open a line of credit for \$20,000, or other low amount, possibly with some
11 cash as collateral, which would be increased over time. BKI's claim that it needs far less credit than
12 KMC is requiring is based on the loss of some product lines, and changes in the frequency of
13 vehicle order acceptance by KMC. (RT II, pp. 214-217).
14

15 68. Mr. Bellissimo testified that since BKI's credit line was suspended he has
16 nevertheless been able to buy bikes using the flooring line. He would call KMFC regarding a unit,
17 and be told he was on COD. Then a man would ask "You got a buyer", Mr. Bellissimo would say
18 "sure", and the bike would be released to him. According to Mr. Bellissimo, a nice guy at KMFC
19 would sometimes do this, one bike at a time, to help out. BKI's credit would be opened up. (RT
20 11, p. 220) KMC in the past would give BKI free flooring and send units based on purchase orders
21 from good customers. (RT 11, pp. 225-229)
22

23 69. Ms. Mottel testified that BKI's flooring credit line has not, and could not without her
24 knowledge, have been opened at any time since June 27, 2011 (RT 111, 84-86). KMFC would not
25 accept purchase orders from the state of California or the J. Paul Getty Museum as collateral. (RT 1,
26 pp. 35-38; RT, II, pp. 227-228; Exh. 307)
27
28

1 A. Facts related to the amount of business transacted by the franchisee, as compared to the
2 business available to the franchisee. [Section 3061(a)].

3 70. KMC evaluates a dealer's sales performance by measuring the dealer's sales in relation
4 to the dealer's assigned area, which KMC calls an SEA. (Exh. R325; RT II pp. 133-134) The SEA is
5 a set of census tracts that are assigned based on proximity to each Kawasaki dealer. (RT II, pp. 133-
6 135) Sales performance calculates a dealer's actual new vehicle sales as a percentage of the
7 registrations of all competitive makes in the dealer's SEA. (RT I, p. 140) To gauge sales penetration
8 effectiveness, a dealer's sales penetration is then compared as a ratio to Kawasaki's actual sales
9 penetration throughout the nation, to determine whether the dealer being analyzed is penetrating its
10 SEA below, at, or above the national average for all Kawasaki dealers. (Exh. R314; RT II, pp. 138-
11 139) Expressed as a percentage, the resulting quotient calculates a dealer's sales effectiveness. (RT
12 11, p. 143) Using raw actual data avoids penalizing a particular dealer for downturns (or upturns)
13 in the economy. (RT I, p. 131; RT II, pp. 145-147).
14

15 71. Being 100% sales effective means that a dealership is selling the number of new
16 vehicles it is expected to sell, given the size of its assigned SEA. It is not a perfect or a maximum
17 score. (RT II, p. 144).
18

19 72. From 2008 through 2012, sales performance reports indicate that Protestant has slipped
20 from 41.4% of expected sales to 19.8%. Protestant's sales have gone from less than half to less than
21 one-fifth of expectations, and are trending down. KMC evaluated BKI's performance against a
22 national average.
23
24

25 73. Other reports show the locations where sales were being made. Other dealers are
26 selling more Kawasaki vehicles in Protestant's SEA. The information obtained from the data
27 shows that buyers want Kawasaki products and are willing to go to a more distant dealership to
28

1 obtain them.

2
3 74. For the 12-month period ending in September of 2012, total sales for motorcycles
4 and ATVs of all brands in Protestant's SEA were 1,220. (Exh. R325, pp. 5-6) Minimum
5 expected Kawasaki sales in Protestant's SEA were 202, of which 197 were expected to be
6 motorcycles and 5 were expected to be ATVs. (Exh. R325) Actual sales by Protestant for this
7 period were 40 (38 motorcycles and 2 ATVs) for a shortfall of 162 vehicles (159 motorcycles
8 and 3 ATVs). Based upon KMC's analysis *using the SEA assigned to BKI*, the dealership's
9 performance for the period was 19.8% of expectations.
10
11

12
13 B. Facts related to the investment necessarily made and obligations incurred by the
14 franchisee to perform its part of the franchise. [Section 3061(b)].

15 75. Inadequate investment in Protestant's facility was not specifically alleged as a ground for
16 termination of the franchises. The limited testimony regarding signage and facility repairs do not
17 establish facts regarding this good cause factor.
18

19
20 C. Facts related to the permanency of the franchisee's investment. [Section 3061(c)].
21

22
23 76. Lack of permanency of investment in Protestant's facility was not alleged as a ground
24 for termination of the franchises. Insufficient facts were established regarding this good cause factor.
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1 D. Facts related to whether it is injurious or beneficial to the public welfare for the
2 franchise to be modified or replaced or the business of the franchisee disrupted.
3 [Section 3061(d)].

4 77. About 15% of Kawasaki sales are made by BKI in its SEA. (Exh. 323) Customers
5 in the SEA are interested in buying Kawasaki products, but most are traveling to more distant
6 dealers to buy them. (RT I, pp. 139-142, 159).

7 78. BKI is and has always been in a small facility, with limited showroom space, which
8 fits approximately ten to twelve motorcycles. (RT Vol. 2, 335:21-336:7). KMC approved the
9 facility, and at no time has any KMC representative requested that BKI expand or relocate to a
10 larger facility. (RT Vol. 2, 336:8-16). There is no room for expansion. (*id.*) BKI does not carry
11 the full offering of Kawasaki products, based upon limited space. (*id.*)

12 79. BKI had a significant problem with excess aged inventory in the past. (RT II, pp.
13 93-95). These aged units were stored in a warehouse previously rented by BKI, and created
14 significant financial problems for the dealership. (RT Vol. 2, 342:8-343:11). These financial
15 problems at BKI were corrected when the dealership ceased to rent the warehouse and stock
16 significantly aged units. (RT Vol. 2, 344:10-345:5)

17 E. Facts related to whether the franchisee has adequate motor vehicle sales and service
18 facilities, equipment, vehicle parts, and qualified service personnel to reasonably
19 provide for the needs of the consumers for the motor vehicles handled by the franchisee
20 and has been and is rendering adequate services to the public. [Section 3061(f)].

21 80. It is not disputed that BKI is doing business on a dramatically reduced scale. There
22 has been no articulated contention that Protestant's facilities and equipment are not adequate to
23 support the current level of activity. No findings are made here separate and apart from those in
24 other sections.

25 F. Facts related to whether the franchisee fails to fulfill the warranty obligations
26 of the franchisor to be performed by the franchisee. [Section 3061(f)].

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

///

1 G. Facts related to the extent of franchisee's failure to comply with the terms of the
2 franchise. [Section 3061(f)].

3 82. Under the franchise agreement, the dealer need only use his best efforts to comply with
4 the terms of the franchise. The provision for measuring of performance in the franchise agreement does
5 not create a contractual requirement for sales at a specific level. BKI's recent sales performance does
6 not constitute a breach of the franchise agreement.

7 83. With respect to stocking requirements, the contract requires that the dealer "maintain an
8 inventory of then available models of Products, which inventory shall at no time be less than the number
9 of Products *reasonably* established by Distributor after consultation with DEALER." (Exh. R-303, para
10 15, emphasis added). There was no evidence adduced that KMC consulted with BKI regarding the
11 stocking requirements. There was ample evidence that KMC imposed requirement of a 6-month supply
12 was unreasonably, particularly in light of the fact that BKI (1) recently chose to give up its warehouse
13 and ceased to stock an overabundance of aged units (which resulted in a financial turn-around for the
14 company), (2) the new ordering system and ready availability of product no longer required that dealers
15 stock an overabundance of units, and (3) many of the Kawasaki dealers in the market chose (for various
16 marketing and financial reasons) not to stock a full line of products. KMC appears to impose its
17 contractual stocking requirements in only those situations where it seems fit to KMC.
18

19
20 84. In his testimony at the hearing on September 18, 2013, Bruce Gill stated that "most
21 dealers do not have every model in stock." (RT Vol 2, 424:1).
22

23 85. Protestant has in the past failed to comply with paragraph 18 (Reports and Financial
24 Information), but now may be in compliance. With respect to the contention by KMC that BKI has
25 failed to comply with the stocking and sales requirements
26
27
28

FINDINGS OF FACT RELATED TO REMAND ISSUES

1
2 In its Remand Order, the Board required the parties to address the following additional issues:

- 3 a. “[T]he reasonable amount of flooring required for Protestant to perform its contractual
4 obligations”. (Remand Order at p. 3, para. b);
- 5 b. “[A] reasonable timeframe to secure such flooring”.⁵ (id); and
- 6
7 c. “[W]hat will be needed for Protestant to meet its franchise obligations to stock a
8 complete line of Kawasaki products as well as the extent of Protestant’s future sales penetration into its
9 SEA (Statistical Evaluation Area), and recommendations as to conditions that would be appropriately
10 within [Vehicle Code] Section 3067”. (id at p. 3, para. c).
- 11

12

13 A. Facts Related to a Determination as to a Reasonable Amount of Flooring Required for
Protestant to Perform its Contractual Obligations.

14
15 86. At the Remand Hearing, KMC presented evidence that a “reasonable” amount of
16 flooring for BKI would be \$885,219. (Exhibit RR8 at p. 1). The evidence established that this figure
17 was derived, once again, on the expected sales of BKI (considering an inventory requirement of six-
18 months’ sales at peak season) based upon forecasts based upon the disproportionately large SEA that
19 KMC unilaterally assigned to BKI.

20
21 87. By contrast, BKI presented evidence that its flooring requirements were far less than
22 established by KMC. Mr. Bellissimo testified that a flooring line between \$80,000 and \$100,000 would
23 be sufficient for him to keep his showroom full of current inventory. (RT Vol 2:358:3-358:18).

24
25 88. This finding was supported by Mr. Bellissimo’s further testimony that the revised
26 vehicle ordering system allowed him to obtain inventory much more readily (ordering once every two

27
28 ⁵ Under the terms of the Remand Order, the ALJ “determine both the amount of the flooring required and the timeframe for
obtaining the flooring [based upon agreement, otherwise] based upon the record and any additional evidence and arguments
submitted”. Remand Order, at footnote 2.

1 months as opposed to once a year) and the availability of units on a same-day basis to fulfill customer
2 demands. (RT Vol 2:349:12-149:16)

3 B. Facts Related to a Determination as to a Reasonable Timeframe to Secure Flooring

4 89. With respect to the timeframe to acquire flooring, Mr. Bellissimo testified that he could
5 obtain flooring (in a reasonable amount) within a short period of time, once the Board established such
6 an amount. In that regard, Protestant would suggest a period of 60 days following the effective date of
7 the Board decision.
8

9 C. Facts Related to a Determination as to What Will be Needed for Protestant to Meet its
10 Franchise Obligations to Stock a Complete Line of Kawasaki Products as well as the
11 Extent of Protestant's Future Sales Penetration into its SEA

12 89. KMC asserts that the inventory level which was "reasonably established", pursuant to
13 the franchise, as a six-month supply of vehicles, at peak season.

14 90. BKI asserts, as supported by the testimony of Mr. Bellissimo, that a six-month supply
15 is an unreasonably excessive inventory level. This contention is based upon (a) the limited showroom
16 space at BKI, (b) the overbroad SEA assigned to BKI, which overinflates the sales potential and
17 therefore substantially overstates the "six-month" supply, and ignores the easy and timely availability
18 of product when the need arises. (RT Vol. 2:336:3-336:6)

19 91. Mr. Bellissimo testified that, "ninety percent" of the time, he has the ability to obtain a
20 new motorcycle directly from KMC or from another dealer on the *same day he orders it*, thus
21 eliminating the requirement for extensive stocking of inventory. [RT Vol. 2:345:17-346:7].
22

23 92. Furthermore, there was no evidence presented that KMC engaged in a "consultation
24 with DEALER" to determine the stocking levels, as required by the franchise.
25

26 93. With regard to the obligation to stock a complete line, Bruce Gill stated that "most
27 dealers do not have every model in stock." (RT Vol. 2, 424:1).
28

1 94. Paragraph 5 of the franchise requires that BKI "use its best efforts and due diligence to
2 energetically and aggressively develop and promote the sale of [Kawasaki] Products". There was no
3 evidence to suggest that BKI breached this provision of the franchise.

4 95. Any future sales requirements imposed upon BKI under the terms of the franchise must
5 keep this limitation in mind – specifically that there are no requirement for specific unit or market-share
6 sales under the agreement (nor should there be), but simply that the dealer used its best efforts. BKI has
7 done so, and will continue to do so.

8 96. The most significant impediment to recent successful sales operations at BKI is the lack
9 of available flooring, which will be resolved once a reasonable level of flooring is established based
10 upon the existing circumstances that exist with respect to this dealer.
11

12 DETERMINATION OF ISSUES

13
14 Based upon the foregoing, it is hereby determined that KMC failed to establish that:

- 15 1. BKI did not conduct an adequate amount of business transacted by the franchisee, as
16 compared to the business available to the franchisee, in consideration of the SEA
17 unilaterally assigned to BKI. [Section 3061(a)].
- 18 2. BKI did not make the investment necessarily made and obligations incurred by the
19 franchisee to perform its part of the franchise. [Section 3061(b)].
- 20 3. BKI's investment was not permanent. [Section 3061(c)].
- 21 4. That is was injurious and not beneficial to the public welfare for the franchise to be
22 modified or replaced or the business of the franchisee disrupted. [Section 3061(d)].
- 23 5. BKI does not have adequate motor vehicle sales and service facilities, equipment, vehicle
24 parts, and qualified service personnel to reasonably provide for the needs of the consumers
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1 for the motor vehicles handled by the franchisee and has been and is rendering adequate
2 services to the public. [Section 3061(e)].

3 6. BKI failed to fulfill the warranty obligations of the franchisor to be performed by the
4 franchisee. [Section 3061 (f)], and

5
6 7. BKI did not breach the franchise in any significant manner. [Section 3061(g)].

7
8 **PROPOSED DECISION**

9 It is hereby proposed that the protests of BKI against the proposed termination of its
10 Kawasaki franchises are *conditional sustained*, pursuant to Section 3067. The conditions imposed
11 are as follows:

12
13 1. BKI obtains a flooring line in the amount of \$100,000, within 60 days of effective date
14 of this decision. It is determined that both the amount of \$100,000 and the time-frame of 60 days is
15 reasonable under the circumstances of this case. The flooring line shall be from KMFC, or another
16 lender reasonably acceptable to KMC. In the event KMC rejects a lender (whether it be KMC or a
17 third-party flooring source), the Board retains jurisdiction to review this matter.

18
19 2. Pursuant to the franchise between KMC and BKI, BKI shall use its "best efforts" to
20 promote and sell KMC products. If a dispute arises about whether BKI is using its best efforts to
21 promote and sell KMC products, the Board shall retain jurisdiction over that dispute.

22
23
24 Dated: October 15, 2013

CALLAHAN THOMPSON SHERMAN & CAUDILL, LLP

25  for

26 Michael M. Sieving
27 Attorney for Protestant
28 BURBANK KAWASAKI, INC