

1 **CALLAHAN THOMPSON SHERMAN & CAUDILL, LLP**
2 MICHAEL M. SIEVING, Esq. (SBN 119406)
3 1545 River Park Drive, Suite 405
4 Sacramento, CA 95815
5 Tel: (916) 649-3500
6 Fax: (916) 999-8560
7 E-mail: msieving@ctsclaw.com

8 Attorneys for Protestant
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 Number: PR-2328-12 and PR-2333-12

PROTESTANT'S POST-REMAND BRIEF

Hearing Date: September 17, 2013

Hearing Time: 10:00 a.m.

ALJ: Hon. Lonnie M. Carlson

19 Pursuant to the Board Order Establishing Post-Hearing Briefing Schedule After Remand Hearing
20 dated September 17, 2013, Protestant BURBANK KAWASAKI, INC. ("BKI" or "Protestant") hereby
21 submits its Post-Remand Brief, as follows:
22

23 **INTRODUCTION**

24 These protests involve the attempt by Respondent KAWASAKI MOTORS CORP., U.S.A.
25 ("KMC" or "Respondent") to terminate the motorcycle and ATV franchises of BKI. An evidentiary
26 hearing was held on the merits of these protests was held before Board ALJ Jerald A. Prod, who
27
28

1 submitted a proposed decision overruling the protests.¹ On July 25, 2013, the public members of the
2 Board met and considered the proposed decision, rejected the proposed decision, and issued an order
3 remanding the matters for (1) a further settlement conference, and (2) further evidentiary proceedings.

4 The scope of the remand proceedings is to hear and consider further evidence on the following issues:

- 5 a. “[T]he reasonable amount of flooring required for Protestant to perform its contractual
6 obligations”. (Remand Order at p. 3, para. b);
7
8 b. “[A] reasonable timeframe to secure such flooring”.² (*id*);
9
10 c. “[W]hat will be needed for Protestant to meet its franchise obligations to stock a
11 complete line of Kawasaki products as well as the extent of Protestant’s future sales
12 penetration into its SEA (Statistical Evaluation Area), (*id* at p. 3, para. c), and
13
14 d. “recommendations as to conditions that would be appropriately within [Vehicle Code]
15 Section 3067”. (*id* at p. 3, para. c).

16 Pursuant to the Board’s Remand Order, the parties participated in a Remand Hearing on
17 September 17th and 18th, 2013, before Board Administrative Law Judge Lonnie M. Carlson.

18 **PRELIMINARY STATEMENT OF FACTS**

19 The evidence presented at the both the initial and remand hearings on these protests established
20 that BKI has continuously been a Kawasaki franchisee in Burbank for the past 35 years. BKI has been
21 owned and operated by Leon Bellissimo, the dealer principal at BKI, since 1978. For the ten years prior
22 to 1978 when Mr. Bellissimo purchased BKI, Mr. Bellissimo worked for his brother’s successful
23 Kawasaki dealership in Hollywood, which was another long-established franchisee. BKI has received
24 many awards from KMC over the years, praising the dealership for its performance.
25

26 ¹ For purposes of this brief, the first evidentiary hearing before ALJ Prod shall be referred to as the “Initial Hearing”, whereas
27 the second hearing before ALJ Carlson shall be referred to as the “Remand Hearing”.

28 ² 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 During the hearings in these matters (primarily during the initial hearing), KMC presented
2 evidence to establish that the sales performance of BMI had recently become deficient, according to the
3 manner in which KMC measures performance. KMC also sought to establish that the lack of an
4 unrestricted wholesale line of credit violated the terms of the Dealer Sales and Service Agreement,
5 which also contributed to a lack of sales performance of the dealer. BKI presented evidence to establish
6 that the decline its sales performance was a result of the slowing economy, and the cancellation of its
7 flooring line was due to circumstances beyond its control – specifically the unilateral modification of its
8 flooring agreement with Kawasaki Motors Finance Corporation (KMFC) in a manner which required
9 BKI to provide an irrevocable letter of credit to KMFC in the amount of \$212,000, which BKI was
10 unable to secure prior to the Initial Hearing. BKI also presented evidence to establish that the minimum
11 flooring line required by BKI (which, at the time of the Initial Hearing, was set at \$765,000) was
12 unreasonable, in light of the “existing circumstances” which the Board is mandated to consider pursuant
13 to Section 3061.
14
15

16 BKI has floored its Kawasaki inventory through KMFC since 1978.³ In June of 2011,
17 KMFC effectively suspended BKI’s flooring line, a decision which was originally based upon the
18 contention that the dealership financial statements had not been submitted in a timely manner. By
19 letter dated September 26, 2011, KMC notified BKI that the dealership needed to reestablish a flooring
20 line in the amount of \$765,500, an amount determined by KMC to be necessary as a “total for all
21 product lines”. At the time of this letter, BKI also had the Mule (UT), and the jet ski lines of products
22 offered by Kawasaki and floored with KMF.
23
24
25
26

27 ³ At the Remand Hearing, Mr. Gill testified that KMFC was not incorporated as a separate entity until January 18, 1988.
28 [RT Vol 2:449:3-4]. However, Mr. Bellissimo testified that he has always floored with “Kawasaki”, since 1978. [RT Vol 2;
322:20-323:1]. Mr. Gill could not refute the assertion that, prior to 1988, KMC (not KMFC) *directly* floored the vehicles
sold to its dealers. [RT Vol 2:450:2-12].

1 On or about December 7, 2011, KMFC notified BKI that, in order for KMFC to reinstate the
2 flooring line, it would be necessary for BKI to provide KMFC with an Irrevocable Letter of Credit
3 (IROC) in the amount of \$212,000 for a flooring line, the amount of which had by this time been
4 increased by KMC to \$848,000.⁴ In early 2012, KMC unilaterally terminated the Mule line (UT) and
5 the jet ski line previously held by BKI and whose inventory was also floored by KMFC. Protests were
6 not filed due to the fact that those products are outside the jurisdiction of the Board. At the time of the
7 Initial Hearing, BKI no longer had the Kawasaki Mule or jet ski lines. The termination of these lines
8 resulted in a situation in which BKI should have no longer been required to have as much flooring,
9 certainly not the newly-established requirement of \$848,000 (which was increased to \$885,219 at the
10 Initial Hearing [Exhibit RR9 at p. 1]), or even the previous amount of \$765,500 that had been
11 established by KMC when BMI was authorized to carry these additional products. There has been a
12 further reduction in the necessary flooring limit by virtue in a recent change in the vehicle ordering
13 system at KMC, pursuant to which allows dealers to order units more frequently (from yearly to once
14 every two months), as compared to the system in place when the original limits were established.
15 Furthermore, Mr. Bellissimo testified that, "ninety percent" of the time, he has the ability to obtain a
16 new motorcycle directly from KMC or from another dealer on the *same day he orders it*, thus
17 eliminating the requirement for extensive stocking of inventory. [RT Vol 2:345:17-346:7].

21 ISSUE PRESENTED

22 Pursuant to Section 3066(6), KMC has the burden to establish good cause for the
23 termination of BKI's Kawasaki motorcycle franchise and ATV franchise. In determining whether
24 KMC has established good cause for the terminations, Section 3061 requires that the Board consider the
25 "existing circumstances", including but not limited to all of the following:
26
27

28 ⁴ The \$212,000 required ILOC was determined by simply taking 25% of the *minimum flooring requirement* that had been determined by KMC, which at the time was \$848,000.

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

15
16
17
18
19
20 The issues at this Remand Hearing are set forth in the Board's Remand Order, and are
21 enumerated. Specifically, the Board has ordered a hearing to take additional evidence on the following
22 issues:

- 23 1. The reasonable amount of flooring required for Protestant to perform its contractual
24 obligations,
25
26 2. A reasonable timeframe to secure such flooring,
27
28

1 ALJ Prod's Proposed Decision to overrule these protests was based upon his determination as to
2 the remaining three "good cause" factors contained in Section 3061, specifically that BKI was not
3 conducting an adequate amount of business as compared to the business available to it (Section
4 3061(a)), that it would not be injurious to the public welfare for the franchises of BKI to be terminated
5 (Section 3061(d)), and that BKI failed to comply with "some important terms of the franchises".
6 (Section 3061(g); Proposed Decision at paras. 97 and 105). BKI contends that these findings and
7 determinations are erroneous, and not supported by the law and evidence adduced at either the Initial
8 Hearing or the Remand Hearing. A discussion of the evidence related to these contested factors will
9 follow *infra*, after a discussion of the evidence presented at the Remand Hearing.
10

11 2. Evidence Related to the Remand Hearing.

12 a. *Evidence related to contested "good cause" factors.*

- 13
14 i. The amount of business transacted by BKI as compared to the business available
15 to it. (Section 3061(a)).

16 At both hearings, KMC alleged that BMI has recently conducted inadequate business as
17 compared to the amount of business available to it. ALJ Prod adopted KMC's arguments in this
18 regard in his Proposed Decision. However, KMC's arguments, and ALJ Prod's findings, do not take
19 into consideration the undisputed facts established by Protestant.
20

21 The evidence clearly established that BKI is a small dealer (both in terms of physical size and
22 volume), and has been since its inception when Leon Bellissimo purchased the dealership in 1978. At
23 no time did KMC suggest that the dealership move to a larger facility, or otherwise expand its
24 operations. KMC has and will suggest that, at one time, it was a larger-volume dealer and, as such,
25 there is no reason why it can't be again. That contention ignores the current realities of the market.
26

27 KMC presented evidence at both hearings to establish that BKI was not sales effective. In doing
28 so, KMC relied solely upon the standard Urban Science Applications, Inc. (USAI) analysis, which

1 measures the dealer's sales performance against a "standard". (See entire Michael Palmer testimony
2 from Initial Hearing). The problem with this analysis is that in it is inherently dependent upon (1) BKI
3 being provided with an unfettered, "free-flowing" of allocation of vehicles, and (2) the geographic
4 boundaries of the Statistical Evaluation Area ("SEA") of BKI, which is used to determine the
5 "expected sales" of the dealership, is reasonable.

6
7 The SEA of BKI is the area established by calculating the centerpoint of surrounding census
8 tracts, and assigning those tracts to the dealer who is physically located in the closest proximity to
9 those census tracts. The combination of those census tracts constitutes a dealer's SEA. USAI then
10 calculates the sales of all units nationally in each competing segment, and determines what percentage
11 of those sales are of the Kawasaki brand. USAI then takes this percentage, and superimposes it on the
12 individual dealer's SEA to determine that dealer's expected sales. For example, if in the "motorcross"
13 segment Kawasaki achieves a 5% market share nationally, and 10,000 total motorcross units of all
14 brands are sold within BKI's SEA, Protestant's "expected sales" of Kawasaki motorcross units would
15 be 500 in a given year. Any sales that fall short of the "expected sales" are considered "lost sales
16 opportunities", for which the dealer is held accountable.

17
18
19 The determination as to the size of the SEA assigned to BKI (and any dealer) is solely within the
20 discretion and control of KMC, not Protestant. KMC has argued that BKI has one of the largest SEA's
21 in California, and is located in the most populous county in the country. Although this may be true, it
22 is of KMC's doing, not BKI. KMC has argued that Protestant is a "small fish in a big pond". BKI
23 agrees. However, BKI has no input in this regard. BKI controls neither the size of the pond nor the
24 number of fish in it. Those determinations are within the exclusive control of KMC.

25
26 KMC has argued that this Board cannot order KMC to establish additional Kawasaki dealer
27 representation to resolve KMC's stated concerns about its sales performance issues. Protestant also
28

1 agrees. However, KMC suggest that the way to resolve its sales performance issues is to terminate the
2 only dealer in the market, with a 35-year track record devoting itself to the Kawasaki brand, with no
3 plans to back-fill. Such a business decision makes no sense.

4 ii. Whether it would be injurious to the public welfare for the franchises of BKI to
5 be "replaced" or the business of the franchisee disrupted. (Section 3061(d)).

6 KMC has no intention of "replacing" BKI. The stated sole goal (based upon the testimony of
7 Bruce Gill) is to terminate its only dealer in the market, with no plans on replacing that dealer. These
8 desires, on the part of KMC, cannot be determined to be in the public interests.

9 The public welfare in the Burbank market would be best served as follows: This Board
10 determines a reasonable amount of flooring for BKI, and a reasonable time within which to obtain that
11 flooring. BKI complies with the conditions established by this Board, obtains the requisite flooring,
12 and continues to serve its client base, as it has for well over a quarter century. KMC is free to monitor
13 the sales performance in the market and, if it perceived deficiencies similar to those complained of in
14 these protests, can establish additional dealers in the market to "make up" for the shortfalls it perceives
15 to exist.
16

17 Respondent has presented no evidence to establish that it would be advantageous to the public
18 welfare for the business of a long-standing dealer to be replaced or disrupted.
19

20 iii. Whether KMC established that BKI failed to comply with important terms of the
21 franchise. (Section 3061(d)).

22 KMC has argued that BKI breached the franchise provisions. In this regard, Respondent asserts
23 that Protestant (1) failed to continue to maintain a flooring account in an amount established by KMC,
24 (2) was not sales effective, and (3) did not maintain a model inventory. These issues will be addressed
25 separately.
26
27
28

1 With respect to the contention that BKI failed to maintain a flooring account, the evidence
2 established that the suspension of the flooring line was based upon the actions of KMFC in requiring an
3 ILOC, which it had not required before. KMFC is not a party to this action and beyond the jurisdiction
4 of this Board. However, the ILOC was based upon a unilateral requirement that BKI post a 25% "cash"
5 collateral for security, in addition to the physical inventory. This figure was based upon the KMC
6 imposed requirement that BKI maintain (during the peak season) a six-month supply of vehicles, even
7 though the evidence clearly established that such an inventory was neither feasible (based upon the
8 space limitations of the dealership) nor necessary (based upon the easy and timely availability of
9 product). Furthermore, the "six-month" inventory level was determined by an oversized assigned SEA,
10 the geographic perimeters of which were within the exclusive control of Respondent. The evidence
11 further established that a number of other Kawasaki dealers did not meet the minimum flooring
12 requirements imposed by KMC.
13
14

15 The issue of sales-effectiveness was discussed above. BKI's available sales (against which its
16 actual performance was measured) were based upon a SEA which was one of the largest in what KMC
17 admitted was the largest county in the country (Los Angeles County). The standard by which BKI was
18 measured was, by all reasonable analysis, unfair, given BKI's stature as a small, family-owned
19 dealership.
20

21 Perhaps more importantly, it is significant to note what the franchise requires in terms of sales
22 performance. Under paragraph 5 of the Dealer Sales and Service Agreement (quoted above), BKI
23 agreed to use its "best efforts and due diligence" to promote and sell Kawasaki vehicles. There were no
24 minimum unit sales required under the contract. This is clearly understandable, given the fact that no
25 dealer can be held to a specific number of unit sales when a number of factors (demographics, income
26 levels, product demand, and economic considerations) are beyond the control of the dealer. Although
27
28

1 Paragraph 5 allows KMC to measure the performance based upon "reasonable criteria" determined by
2 the factory, those provisions do not contractually require BKI to sell at a particular level, nor do they
3 allow KMC to seek termination based upon a purported failure by the dealer to sell units at that level.
4 Under the franchise, they are measuring standards alone, with no contractual consequences for a failure
5 to meet those sales levels. As noted above, the primary reason that BKI is not sales effective (based
6 upon KMC's analysis) is the extensive SEA area assigned to BKI, and the lack of available flooring due
7 to the overreaching minimum flooring requirements imposed by KMC, which were due in part to the
8 size of the BKI SEA.
9

10 KMC complains that BKI did not maintain a sufficient "model inventory", as required by the
11 franchises. The evidence established that a large number of dealers "specialized" in either street
12 motorcycles (or particular models), or "dirt" or off-road motorcycles, and did not carry the "full-line" of
13 inventory. KMC now seeks to selectively impose contractual requirements against BKI (in the context
14 of a termination protest) when it simply ignores the very same requirements imposed of similarly
15 situation dealers in California. The stated motives of Mr. Gill to single out BKI for termination are
16 clear from this conduct.
17

18
19 *b. Evidence related to the "Remand" Issues.*

20 On remand, the Board directed evidence be presented on the issues of:

- 21 1. The reasonable amount of flooring required for Protestant to perform its contractual
22 obligations;
- 23 2. A reasonable timeframe to secure such flooring,
- 24 3. What will be needed for Protestant to meet its franchise obligations to stock a complete
25 line of Kawasaki products as well as the extent of Protestant's future sales penetration into its SEA, and
26
27
28

1 4. Recommendations as to conditions that would be appropriately within Vehicle Code
2 Section 3067.

3 At the Remand Hearing, KMC presented evidence that a “reasonable” amount of flooring for
4 BKI would be \$885,219. (Exhibit RR8 at p. 1). The evidence established that this figure was derived,
5 once again, on the expected sales of BKI (considering an inventory requirement of six-months’ sales at
6 peak season) based upon forecasts based upon the enormous SEA that KMC unilaterally assigned to
7 BKI. Many of the other California Kawasaki dealers had minimum flooring requirements of much less.

8 By contrast, BMI presented evidence that its flooring requirements were far less. Mr.
9 Bellissimo testified that a flooring line between \$80,000 and \$100,000 would be sufficient for him to
10 keep his showroom full of current inventory. This conclusion was supported by his further testimony
11 that the revised vehicle ordering system allowed him to obtain inventory much more readily (ordering
12 once every two months as opposed to once a year) and the availability of units on a same-day basis to
13 fulfill customer demands.

14 With respect to the timeframe to acquire flooring, Mr. Bellissimo testified that he could obtain
15 flooring (in a reasonable amount) within a short period of time, once the Board were to establish such
16 an amount. In that regard, Protestant would suggest a period of 60 days following the effective date of
17 the Board decision.

18 Paragraph 15 of the franchise between KMC and BKI provides that BKI (and all dealers
19 subject to the agreement):

20 . . . agree to purchase from [KMC] and at all times maintain an inventory of then available
21 models of Products, which inventory shall at no time be less than the number of Products
22 reasonably established by Distributor after consultation with DEALER.

23 KMC asserts that the inventory level which was “reasonably established”, pursuant to the
24 franchise, as a six-month supply of vehicles, at peak season. BKI asserts, as supported by the
25 testimony of Mr. Bellissimo, that a six-months supply is an unreasonably excessive inventory level.

1 This contention is based upon (a) the limited showroom space at BKI, (b) the overbroad SEA
2 assigned to BKI, which overinflates the sales potential and therefore substantially overstates the “six-
3 months” supply, and ignores the easy and timely availability of product when the need arises.
4 Furthermore, there was no evidence presented that KMC engaged in a “consultation with DEALER”
5 to determine the stocking levels, as required by the franchise.
6

7 Paragraph 5 of the franchise (quoted above), requires that BKI “use its best efforts and due
8 diligence to energetically and aggressively develop and promote the sale of [Kawasaki] Products”.
9 There was no evidence to suggest that BKI breached this provision of the franchise. Any future sales
10 requirements imposed upon BKI under the terms of the franchise must keep this limitation in mind –
11 specifically that there are no requirement for specific unit or market-share sales under the agreement
12 (nor should there be), but simply that the dealer used its best efforts. BKI has done so, and will
13 continue to do so. The only impediment to successful sales operations at BKI is the lack of available
14 flooring, which will be resolved once a reasonable level of flooring is established based upon the
15 existing circumstances that exist with respect to this dealer.
16

17 **CONCLUSION**
18

19 Based upon the foregoing, Protestant BKI requests that the ALJ prepare and issue his proposed
20 decision addressing the good cause factors contained in Section 3061, as the issues contained in the
21 Board’s Remand Order, and render a proposed decision conditionally sustaining the protests on file
22 herein, based upon Protestant obtaining a reasonable amount of flooring within a reasonable time.
23

24 Dated: October 15, 2013

CALLAHAN THOMPSON SHERMAN & CAUDILL LLP



25
26
27 MICHAEL M. SIEVING
Attorney for Protestant
28 BURBANK KAWASAKI, INC.