

1 MAURICE SANCHEZ, Bar No. 101317  
2 KEVIN M. COLTON, Bar No. 93654  
3 BAKER & HOSTETTLER LLP  
4 600 Anton Boulevard, Suite 900  
5 Costa Mesa, California 92626-7221  
6 Telephone: 714.754.6600  
7 Facsimile: 714.754.6611  
8 Email: [msanchez@bakerlaw.com](mailto:msanchez@bakerlaw.com)  
9 [kcolton@bakerlaw.com](mailto:kcolton@bakerlaw.com)

10 Attorneys for Respondent  
11 Kawasaki Motors Corp., U.S.A.

12 STATE OF CALIFORNIA  
13 NEW MOTOR VEHICLE BOARD

14 In the Matter of the Protest of  
15 BURBANK KAWASAKI, INC.,  
16 Protestant,

17 v.

18 KAWASAKI MOTORS CORP., U.S.A., a  
19 Corporation,  
20 Respondent.

Protest No. PR-2328-12 and PR-2333-12

**RESPONDENT KAWASAKI MOTORS  
CORP., U.S.A.'S PROPOSED FINDINGS  
OF FACT ON REMAND HEARING**

***[REDACTED TO REFLECT  
INFORMATION UNDER SEAL]***

21 Respondent, Kawasaki Motor Corporation, U.S.A. ("Respondent or "Kawasaki")  
22 submitted Proposed Findings of Fact after the original merits hearing held from February 4  
23 through 6, 2013. Rather than repeat those Proposed Findings of Fact herein, Respondent attaches  
24 them hereto as Exhibit "A." Citations to the original merits hearing transcript and exhibits are  
25 designated as "RT[Reporter's Transcript][Vol.][page]:[line]" and either Prot.[Protestant]-[number]  
26 or Resp. [Respondent]-[number]. Citations to the Remand hearing transcript and exhibits are  
27 designated as "RTR[Reporter's Transcript on Remand][page]:[line] and either PR[Protestant on  
28 Remand]-[number] or RR[Respondent on Remand]-[number].

1       **I. BACKGROUND FACTS**

2           1.       Protestant Burbank Kawasaki, Inc. (“Protestant” or “Burbank”) is a new motor  
3       vehicle dealer selling Kawasaki motorcycles and all-terrain vehicles. (Stipulated Facts at ¶ 1).

4           2.       Respondent Kawasaki Motor Corp., U.S.A. (“Respondent or “Kawasaki”) is the  
5       distributor of Kawasaki Products in the United States. (Stipulated Facts at ¶ 2).

6           3.       Burbank (through its owner, Leon Bellissimo) has been a Kawasaki dealer in  
7       Burbank for approximately 34 years. (RT I, 17: 18-19). The dealership is and has, since its  
8       inception, been located at 1329 North Hollywood Way, Burbank, California 91505. (Stipulated  
9       Facts at ¶ 3).

10          4.       Burbank is a Kawasaki dealer pursuant to a Kawasaki Authorized Sales and  
11       Service Agreement (“Dealer Agreement”) with Kawasaki. (Resp. Exh. 303). The basic terms of  
12       the Dealer Agreement have not changed during Burbank’s tenure as a Kawasaki dealer.  
13       (Stipulated Facts at ¶ 4).

14          5.       On September 26, 2011, Kawasaki sent Burbank a letter via Certified Mail, Return  
15       Receipt Requested, stating that Burbank had “failed to maintain a wholesale line of credit  
16       (flooring) ... in breach of paragraph 14 of the Dealer Agreement,” and that Burbank needed to  
17       correct this deficiency by obtaining flooring in the amount of \$765,500 as soon as possible, but in  
18       no event later than November 30, 2011. (Stipulated Facts at ¶ 7) (RT I, 111: 1-9, Resp. Exh.  
19       305).

20          6.       On January 24, 2012, Kawasaki sent, and Protestant subsequently received,  
21       Notices of Termination in compliance with Vehicle Code Section 3060. (Resp. Exhs. 301  
22       (motorcycle), 302 (ATV)). In those Notices, Kawasaki identified 4 independent reasons for the  
23       termination of Protestant’s Dealer Agreement: (1) Failure to maintain adequate model inventory,  
24       (2) Failure to meet sales requirements, (3) Failure to provide equal representation of Kawasaki  
25       Products and (4) Failure to maintain floor plan financing adequate to fulfill its obligations under  
26       the Dealer Agreement. (*Id.*; Stipulated Facts at ¶ 8).

27          7.       Burbank filed a timely protest. (Stipulated Facts at ¶ 9).

28

1       **II.     BOARD’S REMAND ORDER.**

2           8.       At its meeting on July 25, 2013 the Board rejected the Proposed Decision issued  
3 by ALJ Prod. On August 6, 2013 the Board issued its Order of Remand, confirming the rejection  
4 of the Proposed Decision and remanding the matter to ALJ Carlson for further proceedings. The  
5 Board’s Order of Remand stated (referring to Respondent’s grounds for termination as stated in  
6 its Notices of Termination (R301 and R302)), “...[T]he lack of flooring makes it more difficult, if  
7 not impossible, for Protestant to ‘maintain model inventory’, ‘meet sales requirements’ and  
8 ‘provide equal representation for Kawasaki products.’” (Remand Order at ¶ 5). The Board’s  
9 Order of Remand further stated, “Obtaining the flooring needed to comply with the terms of the  
10 franchise is the key to Protestant’s ability to cure its failure to meet its other obligations stated  
11 above.” (*Id.* at ¶ 6).

12           9.       As such, the Board ordered that if the parties could not settle the matter at a  
13 subsequent Mandatory Settlement Conference, a remand hearing would be held. ALJ Carlson  
14 was selected by the Board to preside over the remand hearing. Consistent with that Order, on  
15 August 27, 2013, ALJ Carlson ordered the parties to address five issues: (1) The amount of floor  
16 plan financing that Burbank should have; (2) A time frame in which Burbank should be required  
17 to obtain that level of financing; (3) The number of Kawasaki units that Burbank should have in  
18 stock to have a complete line of products; (4) The level of sales that Burbank must achieve to  
19 meet its contractual obligations; and (5) Burbank’s contractual obligations with regard to each of  
20 these issues.

21           10.      A merits hearing on remand was held at the Board’s offices before ALJ Carlson on  
22 September 17 and 18, 2013.

23           11.      Protestant’s testimony at the hearing on remand established that the premise for  
24 the hearing was inaccurate. Protestant’s testimony was completely the opposite of its argument at  
25 the Board Meeting on July 25. Mr. Bellissimo, Protestant’s dealer principal, testified that his  
26 dealership has not lost *any* sales because of the lack of flooring (RTR, 384:12 – 18) or because of  
27 lack of inventory (RTR, 348:24 – 349:3).

28           12.      In addition, Protestant was unabashed in its position that it would never live up to

1 its contractual obligations – for the minimum required flooring amount, required inventory levels  
2 or adequate sales performance. Rather, Protestant’s position is that it is a small dealer in a large  
3 market that should be entitled to continue as it has (in material breach of its dealer agreement),  
4 and that Kawasaki’s “remedy,” if it desires to achieve national average sales in Burbank’s SEA, is  
5 simply to appoint another dealer in the market. (RTR, 8:17 – 18; 477:3 – 6).

6 **III. FINDINGS OF FACT RELATING TO THE ISSUES ORDERED BY THE BOARD**  
7 **TO BE CONSIDERED ON REMAND.**

8 **A. Burbank Must Achieve Annual Sales of 232 Motorcycles and 5 ATVs To Meet**  
9 **Its Contractual Obligations.**

10 13. In determining whether good cause has been established for terminating or  
11 refusing to continue a franchise, Section 3061 of the Vehicle Code requires the New Motor  
12 Vehicle Board (“Board”) to take into consideration the existing circumstances, including, but not  
13 limited to: (a) Amount of business transacted by the franchisee, as compared to the business  
14 available to the franchisee.

15 14. Failure to make sufficient sales of Kawasaki products is a material breach of  
16 Paragraph 5 of the Kawasaki Dealer Agreement. This provision states:

17 Dealer agrees, at its own cost and expense, to use its best efforts and due diligence  
18 to energetically and aggressively develop and promote the sale of Products,  
19 including each model and type thereof. DEALER and DISTRIBUTOR agree that  
20 DISTRIBUTOR shall evaluate DEALER’S development and promotion of the  
21 sale of Products, both as a whole and separately for each model and type based on  
22 such reasonable criteria as DISTRIBUTOR may determine from time to time,  
23 which may include but not be limited to: . . . (b) the ratio of sales of Products by  
24 DEALER to sales of other makes of similar products as compared with (i) such  
25 ratio on a local, state, and/or nationwide bases . . .

26 15. Since the 1980 Census, two years after Protestant was appointed a Kawasaki  
27 dealer, Los Angeles County has grown by over 2.5 million people, or over 33%. (Exh. RR4). In  
28 fact, at the time of the 2010 U.S. Census, the population of Los Angeles County was over 9.8

1 million – making it the most populous county in the United States and more populous than 42  
2 individual states. (Exhs. RR5 & 6). The current population of Los Angeles County is estimated  
3 to be more than 10 million. (Exh. RR 5). Not surprisingly, this is a large and important market  
4 for Kawasaki and for the motorcycle and ATV industry in general. (RTR, 91:2 - 13).

5 16. In the last five years, Protestant’s sales levels have experienced a steep decline  
6 against expected levels. (RT II, 143: 21-24; Exh. RR1 – RR3). As the expert witness Mr. Palmer  
7 of USAI testified at the first merits hearing, Protestant’s sales performance is “extremely poor in  
8 terms of adequately and effectively promoting new sales of Kawasaki vehicles.” (RT II, 149: 2-  
9 7).

10 17. The Kawasaki Dealer Agreement specifically allows that Kawasaki may evaluate  
11 Burbank’s performance in comparison to national average sales penetration achieved by its  
12 dealers. (Resp. Exh. 303 at 1, ¶5).

13 18. When assessing a dealer’s performance, Kawasaki does not look merely to the raw  
14 numbers of sales. Rather, Kawasaki uses a sales effectiveness calculation, which allows it to  
15 more fairly compare its dealers that operate in markets of all sizes, nationwide. (RT II, 136:14 –  
16 139:9).

17 19. Kawasaki, like other motor vehicle manufacturers, evaluates a dealer’s sales  
18 performance by measuring the dealer’s “sales penetration” in relation to the dealer’s assigned  
19 area, which Kawasaki calls a Statistical Evaluation Area (“SEA”). (Resp. Exh. 325 [SEA for  
20 Burbank], RT II, 133: 9-25). The SEA is a set of census tracts that are assigned based on their  
21 proximity to each Kawasaki dealer. (RT II, 133: 24-25, 135: 20-22). Sales penetration calculates  
22 a dealer’s new vehicle sales (regardless of whether they are registered at addresses in the SEA or  
23 outside of it) (RT I, 140: 21-22) as a percentage of the registrations of all competitive makes in  
24 the dealer’s SEA. To gauge sales penetration effectiveness, a dealer’s sales penetration is then  
25 compared as a ratio to Kawasaki’s sales penetration throughout the nation, to determine whether  
26 the dealer being analyzed is penetrating its SEA below, at, or above the average for all Kawasaki  
27 dealers. (Resp. Exh. 314; RT II, 139: 15-17). Expressed as a percentage, the resulting quotient  
28 calculates a dealer’s “sales effectiveness.” (RT II, 143: 14-20).

1           20.     The expected sales comparison is an industry standard to assess a dealer's  
2 performance. (RT II, 149: 21-23). Moreover, this comparison is a more accurate measure of a  
3 dealer's performance because the number of expected sales changes in response to fluctuation in  
4 the overall marketplace. (RT I, 134: 10-21).

5           21.     Use of national average as a comparison point for Burbank is reasonable because it  
6 is the lowest average performance standard of other Kawasaki dealers, as opposed to region or  
7 district average, which are both higher. (RT I, 147: 13-148: 3; RTR 107:3-21).

8           22.     Protestant's suggestions that it does not know what a Statistical Evaluation Area  
9 is, that it does not understand how Kawasaki's expectation for vehicle sales is calculated, or the  
10 number of sales the Kawasaki expects from it is not credible. Burbank receives monthly sales  
11 reports and quarterly scorecards (RT I, 66: 19-21) that show Burbank's SEA and sales as  
12 compared to expected sales. (*See, e.g.*, Resp. Exh. 321, RR – 1, 2 and 3). These reports are also  
13 available to dealers, including Protestant, on a website called "K Dealer." (RT I, 137: 23-138:  
14 14). Burbank has reviewed these reports on line. (RT I, 138: 16-139: 4; RTR, 110:6 – 111:10).

15           23.     These sales reports were also reviewed and thoroughly explained to Burbank by  
16 Kawasaki employees. (RT II, 88: 1-92: 8).

17           24.     Being 100% sales effective, however, only means that a dealer is selling the  
18 number of new vehicles it is expected to sell, on average. (RT II, 144: 23-145: 8). It is not a  
19 perfect or a maximum score. (*Id.*; RTR, 108:1 – 10).

20           25.     In the last five years, Protestant's sales levels have experienced a steep decline  
21 against expected levels. (RT II, 143: 21-24). As the expert witness Mr. Palmer of USAI testified,  
22 Protestant's sales performance is "extremely poor in terms of adequately and effectively  
23 promoting new sales of Kawasaki vehicles." (RT II, 149: 2-7).

24           26.     Since Protestant lost its floor plan financing, its performance has declined even  
25 further, so that it now captures less than 20% of the sales available it, if it performed as well as an  
26 average Kawasaki dealer. (RT II, 144:23 – 145:8); *see also* RT I, 130: 1-24: RTR, 113:12-20; *see*  
27 *also* Exhs. RR-1-3). Based upon a national sales effectiveness expectation, Burbank's lack of  
28 sales compared to the sales that were available to it has cost Kawasaki a minimum of 773 sales

1 from 2008 through September 2012. (Resp. Exh. 319-322). From September, 2012 through  
2 June, 2013 Kawasaki lost an additional 191 sales as a result of Burbank's failure to perform at a  
3 national average standard. (Exh. RR-3). Therefore, from January, 2008 through June, 2013  
4 Kawasaki has lost a total of 964 sales because of Protestant's poor sales performance.

5 27. The scorecard for a rolling 12 month average ending December, 2012 shows that  
6 Protestant's sales effectiveness was at 18.3 percent of national average. (RTR, 106:1-21; Exh.  
7 RR-1).

8 28. The scorecard for a rolling 12 month average ending March, 2013 shows that  
9 Protestant's sales effectiveness was at 15.6 percent of national average. (RTR, 112: 25 – 113:5;  
10 Exh. RR-2).

11 29. The scorecard for a rolling 12 month average ending June, 2013 shows that  
12 Protestant's sales effectiveness was at 17.3 percent of national average. (RTR, 113: 12-20; Exh.  
13 RR-3).

14 30. The scorecard for the period ending June, 2013 shows that Protestant's expected  
15 annual motorcycle sales at national average were 232. (RTR, 113: 25 – 114:4; RR-3).

16 31. Given the upward sales trend in the motorcycle industry that is currently occurring  
17 and is expected for the next year or two, Mr. Bruce Gill, Kawasaki's West Region Business  
18 Director, testified that an annual expected sales figure of 232 motorcycles and 5 ATVs for  
19 Burbank Kawasaki is reasonable. (RTR, 114:6 – 115:13).

20 32. As long as Protestant fails and refuses to obtain adequate floor plan financing,  
21 there is no possibility that its sales performance can improve.

22 33. Protestant's position that it can sell only 50 to 120 new Kawasaki products per  
23 year is not acceptable under the Kawasaki Dealer Agreement or Vehicle Code Section 3061(a).

24 **B. Burbank Must Have a Six-Month Supply of Motorcycles (116) in Inventory to**  
25 **Achieve Its Sales Obligations Under the Kawasaki Dealer Agreement.**

26 34. Failure to maintain an adequate supply of Kawasaki products is a material breach  
27 of Paragraph 15 of the Kawasaki Dealer Agreement. This provision states:  
28

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

6 35. Burbank has not stocked a full line of Kawasaki motorcycle inventory for a  
7 significant period of time. (RT II, 101: 8-11).

8 36. During peak season, Burbank should have a six month's supply of vehicles in  
9 inventory, i.e., 116 motorcycles and 3 ATVs, in order to achieve sales at national average of 232  
10 motorcycles and 5 ATVs. (RTR, 116:2 – 7; 125:2 -23).

11 37. Burbank does not maintain anything close to an adequate inventory of current  
12 model Kawasaki products and consumers do not have a meaningful selection of vehicles to  
13 choose from at the dealership. (RT I, 125: 15-126: 11).

14 38. The production cycle for motorcycles and other products mandates a six month  
15 supply. Kawasaki builds different types of motorcycles in different plants at various times of the  
16 year. In order to meet customer demand at the peak selling season, in March of each year a dealer  
17 should have a six month's supply of inventory. Mr. Bruce Gill testified that a careful dealer  
18 follows Kawasaki's recommendation and orders different types of motorcycles at different times  
19 of the year. (RTR 116:8-20; Exh. RR-10). Not every product is available from Kawasaki every  
20 two months. (RT II, 126:17 – 22).

21 39. The Bi-Monthly Ordering Chart which was introduced into evidence sets forth  
22 how Kawasaki's ordering system works. In order to have sufficient inventory in stock in by  
23 March, a dealer must place a large order in January. The Bi-Monthly Ordering Chart allows a  
24 dealer to plan its orders throughout the year so that it can meet customer demand both when new  
25 models are introduced and at peak selling season. (RTR, 117:4 – 118:25).

26 40. Though the Bi-Monthly Ordering system is a new system, it does *not* mean that a  
27 dealer can avoid stocking inventory. (*Id.*)

28 41. Despite testimony introduced by Protestant, a dealer cannot simply order any

1 motorcycle it wants and get it the next day. (RTR, 119:7 - 14). In addition, units that are in short  
2 supply cannot be obtained from another dealer, and if a dealer does not have a unit in inventory, it  
3 will lose the sale. (RTR, 119:7 – 120:13).

4 42. Motorcycles are not purchased by consumers like automobiles, which are a  
5 necessity. Motorcycles are an emotional discretionary purchase, and customers purchase them  
6 for fun and recreation, so Kawasaki competes not only with other companies in the motorcycle  
7 industry, it competes with vacations and other discretionary items, such as a big-screen  
8 televisions. (RTR, 121:21 – 122:15, 122:21 – 24).

9 43. Kawasaki makes 36 different motorcycle models, which also come in different  
10 colors, with different options and features, such as ABS. Customers often decide whether to buy  
11 a motorcycle based on the colors available, so a dealer must have an assortment of colors in order  
12 to make a sale. (RTR, 123:9 – 124:18).

13 44. Typically, a dealer that sells fewer units annually should have a higher percentage  
14 of its annual sales in inventory, so that it has a representative mix of units on hand, as opposed to  
15 a dealer that sells at a higher volume annually. (RTR, 122:25 – 123:8).

16 45. Burbank has been located in the same facility since it was appointed and has never  
17 expanded the square footage of its facility. (RT I, 18:10 – 193).

18 46. Burbank has recently *reduced* its ability to carry the appropriate inventory – as it  
19 decided to get rid of a warehouse where it can store and has stored a representative number of  
20 Kawasaki motorcycles and ATVs over the years – a warehouse that it had used for approximately  
21 20 years to supplement its limited storage space at its dealership facility. (RTR, 129:5-7; RTR,  
22 379: 23 – 380:12).

23 47. Burbank will no longer utilize any such off-site warehouse for that purpose.  
24 (RTR, 345:4 – 5). As such, Burbank has admitted that it is voluntarily and severely limiting its  
25 own ability to store an adequate inventory and to make an adequate number of sales.

26 48. Burbank admits that it can only store and maintain inventory of no more than 10 to  
27 12 motorcycles at its dealership facility showroom, which it further admits is about half the size  
28 of the Board’s hearing room. (RTR, 335:21 – 336:7).

1           49.     In California metropolitan areas, 85% of Kawasaki dealers have off-site storage, in  
2 order to supplement their dealership facility storage. (RTR, 126: 11 – 23).

3           50.     Burbank does not maintain anything close to an adequate inventory of current  
4 model Kawasaki products and consumers do not have a meaningful selection of vehicles to  
5 choose from at the dealership. (RT I, 125: 15-126: 11).

6           **C.     In Order to Be Able To Stock An Adequate Inventory Of Motorcycles And**  
7           **ATVs, Burbank Must Have Flooring of \$885,219.**

8           51.     Failure to have floor plan financing is a material breach of Paragraph 14A of the  
9 Kawasaki Dealer Agreement. (Resp. Exh. 303) This provision states:

10           DEALER shall *at all times* maintain and employ, in connection with its business  
11 and operations under this Agreement, such working capital and net worth *together*  
12 *with a line of credit* with a financing institution satisfactory to DISTRIBUTOR  
13 which will permit DEALER to properly and fully carry out and perform  
14 DEALER’S duties and obligations under this Agreement, including an inventory  
15 of Products . . . . Such working capital, net working capital and/or line of credit  
16 shall be of amounts not less than minimum standards established by  
17 DISTRIBUTOR from time to time for dealers similarly situated. (Emphasis  
18 added.)

19           52.     Burbank needs a six months’ supply, or 116 motorcycles and 3 ATVs in stock.  
20 Some dealers stock more than a six-months’ supply. (RTR, 125:2 – 23).

21           53.     Kawasaki establishes required floor plan financing levels using a standard  
22 calculation that is applied to all dealers across the nation. (RTR, 135:18 – 21). That calculation  
23 is based the Dealer’s expected sales by segment (in this case motorcycle (MC) and all-terrain  
24 vehicle (ATV)) as determined by the Dealer Score Card provided to each dealer by Kawasaki  
25 (which is based on the national average of Kawasaki’s percentage of industry sales), multiplied  
26 by the average dollar amount per unit based on the most recent 12-month sales history, times  
27 50%, or the higher of the product of that formula or a set minimum for the segment based on  
28 minimum model representation. (RTR, 134:22 – 135:9).

1           54.     For Burbank, this calculation is as follows:  
2           (2013 Expected MC sales) ---- 232 multiplied by  
3           (Avg. wholesale price/MC) ---- \$7200  
4           Subtotal ----- \$1,670,400  
5           Multiplied by 50% ----- \$835,200  
6           Set minimum ATV flooring --- \$50,000  
7           Total ----- \$885,200

8           55.     Under that calculation, Burbank’s current minimum required level of floor plan  
9 financing for MC and ATV is \$885,219. (Exh. RR 8; RTR, 141:1-3).

10           56.     Moreover, Kawasaki presented evidence of all of the floor plan financing  
11 requirements for all of its California dealers. (Exh. RR-8, RTR, 140:6 - 22). As Exhibit RR-8  
12 demonstrates, every Kawasaki dealer’s financing requirements are established under the same  
13 formula. (*Id.*) More importantly, Exhibit RR-9 also shows that the amount of financing required  
14 by Kawasaki is demonstrably reasonable, as 80 of the 94 Kawasaki dealers in California (85%)  
15 choose to obtain financing *in excess* of the minimum amount required by Kawasaki.<sup>1</sup>

16           57.     This calculation has taken into account that Burbank has lost 2 of its lines of  
17 Kawasaki products<sup>2</sup> (neither of which contributed in any significant way to the floor plan totals)  
18 and that Kawasaki has changed its ordering method. The increase in Burbank’s required floor  
19 plan reflects an increase in the wholesale purchase price of Kawasaki vehicles and the  
20 improvement in the general market for motorcycles and ATVs, which have increased the number  
21 of sales that Burbank is expected to make. (RTR, 141:12 - 24).

22           58.     Contrary to Burbank’s claim, the ability to order product more frequently does not  
23 mean that Burbank should hold fewer products in inventory, and hence a lower amount of floor  
24 plan financing. (RTR, 118:14 – 19).

25           59.     Kawasaki’s current ordering system allows for bi-monthly ordering of new  
26 \_\_\_\_\_

27 <sup>2</sup> The New Motor Vehicle Board’s jurisdiction in this matter extends to motorcycle and all-terrain  
28 vehicle units only, and not to any other Kawasaki Products. Vehicle Code §§ 331, 331.1, 331.2,  
and 426.

1 product. (RT II, 125:2 – 14). As Mr. Gill further explained, dealers cannot merely order a  
2 vehicle and expect to receive it the next day. (RTR, 119:7 - 14). Problems associated with a lack  
3 of inventory are made more acute when a vehicle is in high demand and short supply. If a dealer  
4 has not ordered those vehicles into inventory, they may not be available at all – from Kawasaki or  
5 from any other dealer. (RTR, 119:23 – 120:6).

6 60. In addition, sales of motorcycles and ATVs are still largely “impulse” purchases  
7 that require the item to be in inventory to achieve retail sales, as consumers do not want to return  
8 to a dealership to purchase a motorcycle or ATV that is not immediately available in a dealer’s  
9 inventory. (RTR, 121:21 – 122:15, 21 - 24). In fact, because the sale of Kawasaki products are  
10 more likely discretionary purchases, the competition for those sale comes from an array of  
11 potential entertainment-related items, such as vacations and big-screen televisions, not just other  
12 makes of motorcycles and ATVs. (*Id.*). Burbank admitted that it needed more inventory in order  
13 to make more sales in its arguments at the Board meeting in July. (Argument before the Board,  
14 43:2 – 17).

15 61. Protestant’s argument that a “reasonable” amount of floor plan financing is only  
16 that which *it can* obtain (\$80,000 to \$120,000) regardless of Kawasaki’s requirements, bears no  
17 relationship to its contractual obligation or its ability to protect the interests of Kawasaki or the  
18 consuming public. As Exhibit RR-9 shows, Burbank has the 7th highest floor plan requirement  
19 in the state of California. This requirement is not imposed arbitrarily, but rather because Burbank  
20 has responsibility for a very large market with tremendous available business and opportunity for  
21 sales of Kawasaki products.

22 62. Protestant’s suggestion that it could operate with a much lower floor plan and use  
23 that line of credit to sell units that it could purchase from other dealership’s inventory to meet  
24 customer demands (RT III, 72: 1-8) does not meet Protestant’s contractual obligations to  
25 Kawasaki or satisfy the public interest.

26 As a review of Exhibit RR-8 demonstrates, of the 24 Kawasaki dealers with flooring  
27 requirements less than \$150,000 (as Burbank seeks to have), only 2 of those dealers even sell  
28 motorcycles at all (the largest influence on floor plan size), and each has expected sales levels of

1 between 12 and 33, well below the 232 motorcycle sales that Burbank should be making in its  
2 market to achieve national average. [TEXT REDACTED TO REFLECT INFORMATION  
3 UNDER SEAL]

4  
5  
6 [TEXT REDACTED TO REFLECT INFORMATION UNDER SEAL]

7  
8  
9  
10  
11  
12  
13 - CONFIDENTIAL - [TEXT REDACTED TO REFLECT INFORMATION UNDER  
14 SEAL]

15  
16 63. Burbank presented Mr. Bellissimo's testimony, based solely on his opinion, that  
17 \$80,000 to \$125,000 was sufficient flooring for Burbank. (RTR, 357:2 – 10; 358:16 – 18). That  
18 such amount is sufficient is not credible, nor supported by the evidence.

19 64. A review of Burbank's prior borrowing history shows that it regularly has used  
20 credit above the amount required by Kawasaki in 2011 (\$750,000):

21

<u>Date</u>	<u>Credit</u>	<u>Adj. Credit</u>	<u>Credit Used</u>	<u>Available</u>
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

1	4/17/07	1,200,000	N/A	1,179,682	20,318
2	5/29/07	1,250,000	N/A	1,149,403	100,597
3	8/17/07	1,250,000	1,250,000	1,063,714	186,286
4	12/13/07	1,250,000	1,250,000	920,466	329,534
5	1/16/08	1,250,000	1,250,000	885,769	364,231
6	3/11/08	1,250,000	1,250,000	903,635	346,365
7	8/27/08	1,250,000	1,250,000	629,490	620,510
8	1/13/09	1,250,000	1,250,000	1,104,562	145,438
9	3/3/09	1,250,000	1,250,000	730,316	519,684
10	9/5/09	1,250,000	1,563,000	797,309	765,691
11	1/13/10	1,250,000	1,250,000	773,364	476,636

12 (Exh. 315-318, 330). As these numbers reflect, the amount of flooring credit Burbank used from  
13 2006 to 2010 was much higher than Kawasaki sought in 2011 and higher than Kawasaki requires  
14 as a minimum for Burbank now.

15 **D. Burbank Should Not Be Allowed More Than Two Weeks After the Board's**  
16 **November 12 Meeting to Obtain Flooring.**

17 65. Protestant's floor plan financing was suspended by its financial institution,  
18 Kawasaki Motors Finance Company ("KMFC") on or about June 25, 2011 (Protestant's Exh. 8),  
19 and has not been reinstated since then.

20 66. KMFC suspended Burbank's line of credit because Burbank had failed to provide  
21 timely financial statements. (Resp. Exh. 304; RT III, 82: 22-25).

22 67. Burbank is not required to obtain credit from KMFC, and could have obtained  
23 credit from another source, (RT III, 30: 15-17). Burbank, however, has presented no credible  
24 evidence that it has even completed an application for alternative flooring. (RT I, 65: 20-23). Mr.  
25 Bellissimo testified that Burbank completed and submitted an application for flooring to a  
26 company named AFC, and yet did not produce a copy of the completed application, instead  
27 moving only a blank application into evidence. (RTR, 59:3 - 13, Exh. RP - 2). It later became  
28 obvious that the AFC application was still not complete, because Burbank does not have and did

1 not submit a current financial statement. (RTR, 386:2 – 10).

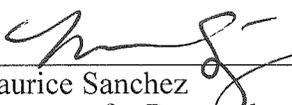
2 68. Protestant has had approximately 2 years and 4 months to cure this breach of its  
3 Dealer Agreement. Even so, Protestant failed to have its floor plan financing reinstated or to  
4 obtain alternative floor plan financing at any time, including to the current date. (RT III, 84: 17-  
5 23; RTR, 58:13 – 18). Since the Board's conditional Decision, if there one, will not be issued  
6 until the Board's meeting on November 12, 2013 and since Burbank should have been working  
7 on obtaining flooring for nearly two and one-half years, Burbank should not be given more than  
8 two weeks after November 12 to obtain the required level of flooring.

9 **IV. CONCLUSION**

10 For all of the foregoing reasons, good cause exists for the termination of Burbank's  
11 Kawasaki franchise.

12  
13 Dated: October 17, 2013

BAKER & HOSTETLER LLP  
MAURICE SANCHEZ  
KEVIN M. COLTON

14  
15  
16   
17 \_\_\_\_\_  
Maurice Sanchez  
Attorneys for Respondent  
Kawasaki Motors Corp., U.S.A.

1 **PROOF OF SERVICE**

2 I, Lorraine Moore, declare:

3 I am employed in Orange County, California. I am over the age of eighteen years and not  
4 a party to the within-entitled action. My business address is 600 Anton Boulevard, Suite 900,  
5 Costa Mesa, California 92626-7221. On October 17, 2013, I served a copy of the within  
6 document(s):

7 **RESPONDENT KAWASAKI MOTORS CORP., U.S.A.'S PROPOSED**  
8 **FINDINGS OF FACT ON REMAND HEARING [REDACTED TO REFLECT**  
9 **INFORMATION UNDER SEAL]**

- 10  by transmitting via facsimile the document(s) listed above to the fax number(s) set  
11 forth below on this date before 5:00 p.m. and the transmission was reported as  
12 complete and without error.
- 13  by placing the document(s) listed above in a sealed envelope with postage thereon  
14 fully prepaid, in the United States mail at Costa Mesa, California addressed as set  
15 forth below.
- 16  by placing the document(s) listed above in a sealed \_\_\_\_\_ envelope and  
17 affixing a pre-paid air bill, and causing the envelope to be delivered to a  
18 \_\_\_\_\_ agent for delivery.
- 19  following ordinary business practices, the envelope was sealed and placed for  
20 collection by Federal Express on this date, and would, in the ordinary course of  
21 business, be retrieved by Federal Express for overnight delivery on this date.
- 22  by personally delivering the document(s) listed above to the person(s) at the  
23 address(es) set forth below.
- 24  by transmitting via electronic mail the document(s) listed above to the e-mail  
25 address(es) set forth below on this date before 5:00 p.m. and the transmission was  
26 reported as complete and without error.

27 Michael M. Sieving, Esq.  
28 CALLAHAN THOMPSON SHERMAN &  
CAUDILL, LLP  
1545 River Park Drive, Suite 405  
Sacramento, CA 95815  
Telephone: (916) 649-3500  
Facsimile: (916) 999-8560  
E-mail: [msieving@ctsclaw.com](mailto:msieving@ctsclaw.com)

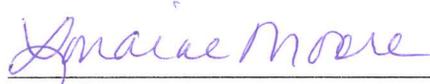
*Attorney for Protestant*  
BURBANK KAWASAKI INC.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 17, 2013, at Costa Mesa, California.



Lorraine Moore

BAKER & HOSTETTLER LLP  
ATTORNEYS AT LAW  
COSTA MESA