

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

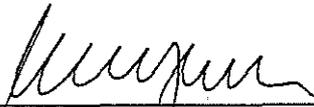
In the Matter of the Protest of)
)
SABA A. SABA, SPD PARTNERS, INC.,) Protest No. PR-1633-98
and HONDA KAWASAKI SPORTCENTER,)
)
Protestant,)
)
vs.)
)
KAWASAKI MOTORS CORP., U.S.A.,)
)
Respondent.)
_____)

DECISION

In accordance with the Orange County Superior Court's Order, at its regularly scheduled meeting of June 26, 2001, the Public members of the Board vacated the Proposed Decision of Administrative Law Judge Merilyn Wong dated May 17, 1999, and reinstated the Board Decision dated August 12, 1999, as its final Decision in the above-entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF JUNE 2001.



ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

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11 In the Matter of the Protest of)
12 SABA A. SABA, SPD PARTNERS, INC.,) Protest No. PR-1633-98
and HONDA KAWASAKI SPORTCENTER,)
13 Protestant,)
14 vs.) DECISION
15 KAWASAKI MOTOR CORP., U.S.A.,)
16 Respondent.)
17

18
19 PROCEDURAL BACKGROUND

20 1. By letter dated May 27, 1998, Kawasaki Motors Corporation,
21 U.S.A. (hereinafter referred to as "Kawasaki") gave notice to Saba A.
22 Saba, SPD Partners, Inc., dba Honda Kawasaki Sports Center (hereinafter
23 collectively referred to as "Saba") pursuant to California Vehicle Code
24 section 3060¹, of Kawasaki's intention to terminate the Kawasaki
25 franchise held by Saba. The notice of termination was received by the
26

27
28 ¹ All statutory references contained herein are to the
California Vehicle Code unless otherwise indicated.

1 Board on June 1, 1998.

2 2. The letter of May 27, 1998, sets forth the following as
3 Kawasaki's reasons for terminating the franchise:

4 a. Unauthorized relocation in breach of Paragraph 3(B) of
5 the Dealer Agreement which prohibits moving from an authorized Kawasaki
6 location.

7 b. Failure to comply with applicable laws in breach of
8 Paragraph 29 of the Dealer Agreement by failing to maintain in good
9 standing the appropriate dealer's license from the State of California
10 to operate from its current location in violation of section 11713(r).

11 c. Failure to maintain an adequate line of credit in breach
12 of Paragraph 14 of the Dealer Agreement.

13 3. By way of a subsequent letter dated August 17, 1998, and
14 received by the Board on August 20, 1998, Kawasaki amended its initial
15 termination notice of May 27, 1998, setting forth the following
16 additional grounds for termination:

17 a. Inadequate dealer business facilities in breach of
18 Paragraph 12 of the Dealer Agreement.

19 b. Inadequate sales performance in breach of Paragraph 5 of
20 the Dealer Agreement.

21 c. Inadequate dealer identification in breach of Paragraph
22 13 of the Dealer Agreement.

23 d. Excessive consumer complaints in breach of Paragraph 19
24 of the Dealer Agreement.

25 e. Failure to provide equal representation in breach of
26 Paragraph 11 of the Dealer Agreement.

27 f. Failure to maintain model inventory in breach of
28 Paragraph 16 of the Dealer Agreement.

1 4. On May 27, 1998, Kawasaki also noticed the termination of
2 certain other Kawasaki products: utility vehicles; personal watercraft;
3 and generators. The termination of these Kawasaki products is not at
4 issue in this Protest.

5 5. Honda Kawasaki Sports Center is licensed by the Department of
6 Motor Vehicles ("DMV") as a new motor vehicle dealer enfranchised to
7 sell Kawasaki vehicles. Saba A. Saba is the dealer principal of Honda
8 Kawasaki Sports Center. Its current location is 23646 Rockfield
9 Boulevard ("23646 Rockfield"), Lake Forest, California. It was
10 previously located at 24417 Rockfield Boulevard ("24417 Rockfield"),
11 Lake Forest, California.

12 6. Kawasaki is a manufacturer and distributor of new motor
13 vehicles in California.

14 7. On or about June 25, 1998, Saba filed a protest with the Board
15 pursuant to section 3060. Protestant filed its Protest in Response to
16 Amended Notice of Termination on or about September 21, 1998. The
17 protest was assigned Protest No. PR-1633-98.

18 8. A hearing was held on January 25, 26, and 27, 1999, before
19 Administrative Law Judge Marilyn Wong. A site visit and physical
20 inspection of the new location at 23646 Rockfield, the old location at
21 24417 Rockfield, and Kawasaki Headquarters was made on February 5, 1999.
22 Present at the site visits were counsel for Protestant J. Brian
23 Urtnowski, Saba A. Saba, counsel for Respondent Maurice Sanchez, and
24 Paul Bailey, Regional Sales Manager for Kawasaki.

25 9. Protestant presented the testimony of Saba A. Saba.

26 10. Respondent presented the testimony of four witnesses: Errol
27 Keith Klagge, licensed land surveyor; Saba A. Saba; James L. Swanson,
28 District Manager, Kawasaki; and Paul Bailey, Regional Sales Manager,

1 Western United States, Kawasaki.

2 11. The Public members of the Board considered the Administrative
3 Law Judge's Proposed Decision at its June 8, 1999, meeting. Upon
4 careful consideration of all of the briefs and evidence before them, the
5 Public members of the Board rejected the Administrative Law Judge's
6 Proposed Decision, overruled the protest, and directed staff to prepare
7 a written document embodying the Board's Decision.

8 12. Protestant was represented by J. Brian Urtnowski, of J. Brian
9 Urtnowski & Associates, 4695 MacArthur Court, Suite 590, Newport Beach,
10 California.

11 13. Respondent was represented by Maurice Sanchez, Esq., of
12 Alvarado, Smith & Sanchez, 4 Park Plaza, Suite 1200, Irvine, California.

13 MOTION TO DISMISS

14 14. On January 25, 1999, Protestant filed a motion to dismiss the
15 protest for lack of jurisdiction. Respondent filed responsive pleadings
16 on January 25, 1999. The motion to dismiss was heard on
17 January 25, 1999, before Administrative Law Judge Marilyn Wong. The
18 motion was based on the Kawasaki Authorized Dealer Sales and Service
19 Agreement (referred to as "Dealer Agreement") that provides for the
20 arbitration of disagreements arising between the parties.

21 RULING RE: PROTESTANT'S MOTION TO DISMISS

22 15. Protestant's motion to dismiss was denied because the
23 arbitration provision is not an exclusive remedy and therefore, does not
24 deprive this Board of jurisdiction to hear the pending protest.

25 CONTENTIONS OF THE PARTIES

26 16. Protestant Saba contends that it was required to move its
27 dealership after it had been evicted from its former location and that
28 Kawasaki's initial silence regarding its move was tantamount to consent

1 to the relocation.

2 17. Protestant Saba further contends that it did not breach the
3 Dealer Agreement as set forth in both of Kawasaki's termination letters
4 and that Kawasaki has failed to meet its burden of proof to the extent
5 that Kawasaki has failed to establish that good cause exists for the
6 termination of the Saba dealership.

7 18. Respondent Kawasaki contends that good cause exists and that
8 it has established good cause for terminating the Saba franchise.
9 Kawasaki contends that Saba breached the Dealer Agreement by moving to
10 an unauthorized location without the prior consent of Kawasaki.

11 19. In addition, Respondent Kawasaki contends that the Dealer
12 Agreement was breached in the following manner: Saba failed to maintain
13 an appropriate dealer's license from the State of California; Saba
14 failed to maintain adequate wholesale financing; Saba's new facilities
15 are inadequate; Saba's sales performance is poor and inadequate; Saba
16 failed to maintain an illuminated Kawasaki sign; the Saba dealership has
17 had excessive consumer complaints; and, Saba has failed to provide
18 Kawasaki with equal representation of its motorcycle products.

19 ISSUES PRESENTED

20 20. Whether Protestant Saba breached the Dealer Agreement in the
21 following respects:

22 a. By failing to obtain permission to relocate its business
23 and thereby making an unauthorized relocation.

24 b. By failing to maintain an appropriate dealer's license
25 from the State of California.

26 c. By failing to maintain an adequate line of credit.

27 d. By moving to inadequate business facilities, which is
28 addressed under the findings of fact heading for good cause factor

1 section 3061(e).

2 e. By inadequate sales performance, which is addressed under
3 the findings of fact heading for good cause factor section 3061(a).

4 f. By inadequate dealer identification.

5 g. By excessive consumer complaints, which is addressed
6 under the findings of fact heading for good cause factor section
7 3061(e).

8 h. By failing to provide equal representation.

9 i. By failing to maintain model inventory.

10 21. Section 3066(b) imposes upon Respondent Kawasaki the burden of
11 establishing the existence of good cause to terminate or refuse to
12 continue the franchise of Saba.

13 22. In determining whether good cause has been established for
14 terminating or refusing to continue a franchise, section 3061 requires
15 the Board to take into consideration the existing circumstances,
16 including, but not limited to:

17 (a) Amount of business transacted by the franchisee, as compared
18 to the business available to the franchisee.

19 (b) Investment necessarily made and obligations incurred by the
20 franchisee to perform its part of the franchise.

21 (c) Permanency of the investment.

22 (d) Whether it is injurious or beneficial to the public welfare
23 for the franchise to be modified or replaced or the business
24 of the franchisee disrupted.

25 (e) Whether the franchisee has adequate motor vehicle sales and
26 service facilities, equipment, vehicle parts, and qualified
27 service personnel to reasonably provide for the needs of the
28 consumers for the motor vehicles handled by the franchisee and

1 has been and is rendering adequate services to the public.

2 (f) Whether the franchisee fails to fulfill the warranty
3 obligations of the franchisor to be performed by the
4 franchisee.

5 (g) Extent of the franchisee's failure to comply with the terms of
6 the franchise.

7 FINDINGS OF FACT²

8 a. Facts relating to whether Saba breached the Dealer
9 Agreement which prohibits the dealer from moving from its
10 authorized location without the prior written consent of
11 Kawasaki.

12 23. A Dealer Agreement was entered into between Protestant and
13 Respondent in January 1994. Paragraph 3(B) of the Dealer Agreement
14 states: "DEALER will not move its place of business to any new or
15 different location than that specified in Paragraph 1 [24417 Rockfield
16 Boulevard], or establish any additional place or places of business for
17 the sale, servicing or display of Products without the prior written
18 consent of DISTRIBUTOR."

19 24. By way of a written lease, Saba had rented a former bank
20 building located at 24417 Rockfield, Lake Forest, California. The term
21 of the lease commenced on June 15, 1993, and expired on
22 November 30, 1997.

23 25. Upon the expiration of the term of the lease, Saba attempted
24 to exercise a ten (10) year option to renew the lease and negotiate new

25
26 ² The findings herein are presented in the order deemed most
27 appropriate for the reader and not necessarily in the order presented at
28 the hearing. Additionally, Findings of Facts are grouped in the most
logical category and have been considered for each of the good cause
factors and the "existing circumstances."

1 terms for the premises at 24417 Rockfield. Mr. Saba was unsuccessful in
2 exercising the renewal option because he was involved in other
3 litigation against the landlord. The landlord would have required
4 Mr. Saba to dismiss his action in exchange for a new lease.

5 26. The landlord brought an unlawful detainer action against Saba
6 in December 1997. The resulting judgment allowed Saba to remain in
7 possession of the premises until April 30, 1998, an additional five (5)
8 month period. Saba was then evicted and moved to the current location
9 at 23646 Rockfield on May 12 or 13, 1998.

10 27. In March 1998, while Saba was negotiating with his former
11 landlord he also signed a lease for the new location at 23646 Rockfield
12 for a term of ten (10) years, with a 10-year renewal option. He did
13 this in order to "hedge his bets" in the event that the negotiations
14 with his former landlord fell through. Had matters worked out with his
15 former landlord, Saba would have only lost a deposit of approximately
16 \$1,800 on the new location. Kawasaki was not apprised of any of these
17 developments nor were they informed of the eviction.

18 28. Paragraph 33 of the Dealer Agreements states: "Any notice
19 which may be required to be served by DEALER on DISTRIBUTOR, or by
20 DISTRIBUTOR on DEALER, shall be in writing and may be made by personal
21 delivery or sent by certified or registered mail, return-receipt
22 requested . . ."

23 29. On April 15, 1998, approximately one month prior to the actual
24 move, Saba advised Kawasaki via facsimile of his intention to relocate
25 to 23646 Rockfield. On May 12, 1998, Saba sent another fax to Kawasaki
26 which included a site proposal and layout, and a written request to
27 relocate.

28 30. On May 15, 1998, Saba's relocation request was submitted to

1 Kawasaki regional offices. On May 15, 1998, the proposed relocation of
2 the Saba dealership was disapproved. Paul Bailey, Regional Sales
3 Manager of Kawasaki, made the following points in disapproving the
4 relocation: "1. dealer must qualify for KMFC credit line; 2. remodeling
5 of facility to meet requirements; 3. dealer assure (sic) we are not
6 within 10 mile (sic)."

7 31. With respect to the unauthorized relocation, Saba attempted to
8 avail the dealership to the provision of section 3062(b)(1) which
9 states: "Subdivision (a) does not apply to either of the following: (1)
10 the relocation of an existing dealership to any location that is both
11 within the same city as, and is within one mile from, the existing
12 dealership location."

13 32. Saba testified that a licensing officer from the DMV measured
14 the distance by car between the old location at 24417 Rockfield and
15 23646 Rockfield, and advised Saba that a temporary permit could be
16 issued because the new location was within one mile of the existing
17 location. Likewise, when Saba measured the distance by car he had come
18 to a similar conclusion, that the new location was less than one mile
19 from his old location.

20 33. Kawasaki had advised Saba on April 29, 1998, that it had
21 calculated the new facility to be 1.14 miles from the old facility.
22 Again on May 12, 1998, Kawasaki's District Manager, James Swanson,
23 determined the distance between the proposed relocation at 23646
24 Rockfield and the existing location at 24417 Rockfield to be in excess
25 of one mile (1.18 miles).

26 34. Swanson further determined that the proposed new site was 9.80
27 miles from an existing Kawasaki dealer, Santa Ana Kawasaki.

28 35. In January 1999, Kawasaki's expert E. Keith Klage, a

1 surveying consultant, through measurements taken by Global Positioning
2 System (GPS) Satellite method verified Swanson's findings and determined
3 that the straight-line distance between the current location at 23646
4 Rockfield and the former location at 24417 Rockfield was 1.141 miles.
5 Mr. Klagge likewise determined that the straight-line distance between
6 the current location of the Saba dealership and the Santa Ana Kawasaki
7 dealership is 9.736 miles.

8 36. The owner of Santa Ana Kawasaki has no objection to Mr. Saba's
9 relocation. The letter solicited by Mr. Saba states: "I, John
10 Schroeder, owner of Santa Ana Kawasaki Suzuki, agree as follows: Santa
11 Ana Kawasaki/Suzuki and John Schroeder do not object to the relocation
12 of Honda Kawasaki Sports Center from 24417 Rockfield, Lake Forest,
13 California 92630 (corner of Rockfield and El Toro) to 23646 Rockfield,
14 Lake Forest, California (corner of Rockfield and Lake Forest) even
15 though such relocation may encroach within ten miles of the current
16 location of Santa Ana, Kawasaki." Dated 1/21/99 and signed by John
17 Schroeder.

18 37. In determining whether to approve a request for relocation,
19 Kawasaki considers the proximity of the proposed location to existing
20 dealers, the requesting dealer's sales performance, the proposed
21 facilities, whether the relocation will enhance Kawasaki's position in
22 the marketplace, and whether the relocation requires notice pursuant to
23 section 3062.

24 38. In the instant case, Kawasaki was not willing to permit a
25 relocation which would require the statutory notice thereby allowing

26 ///

27 ///

28 ///

1 dealer within the relevant market area³ an opportunity to protest the
2 proposed relocation.

3 39. Furthermore, Kawasaki objects to the new location because of
4 its proximity to an adult entertainment establishment, called "Captain
5 Cream," which is next door to the dealership. Kawasaki contends that
6 the neighboring adult entertainment business violates Paragraph 19,
7 subsection(C) of the Dealer Agreement which states: "DEALER agrees to at
8 all times conduct its business in a manner that will reflect favorably
9 on the good name and reputation of the Products and DISTRIBUTOR."

10 40. Mr. Saba had previously tried to relocate to another location
11 on Research Boulevard at the Irvine Spectrum but was turned down by
12 Kawasaki because the move would have placed Saba's dealership within 10
13 miles of two existing Kawasaki dealers. Mr. Saba had also made
14 inquiries at other locations but none were pursued or approved.

15 b. Facts relating to whether Saba breached the Dealer
16 Agreement by failing to maintain in good standing the
17 appropriate dealer's license from the State of California
to operate from its current location in violation of
section 11713(r).

18 41. According to DMV licensing records, Saba, under SPD Partners,
19 Inc., holds license number 12836 for both Orange County Suzuki, 1601
20 Newport Boulevard, Costa Mesa, operated by Saba's brother, Nasr A. Saba
21 (known as Vic Saba), and Honda Kawasaki Sports Center, 24417 Rockfield,
22 Lake Forest, operated by Saba. The initial application for occupational
23 license with the DMV was taken in January 1983. In June 1998, Saba
24 filed an Application for Modification to the Occupational License
25 listing 23646 Rockfield as a change of address.

26
27
28 ³ Section 507 defines "relevant market area" as any area within
a radius of 10 miles from the site of a potential new dealership.

1 42. Saba testified that a licensing officer from the DMV measured
2 the distance by car between the old location at 24417 Rockfield and
3 23646 Rockfield and advised him that she would issue a temporary permit
4 because the new location was within one mile of the existing location.
5 Saba produced copies of its DMV dealer's license.

6 c. Facts relating to whether Saba breached the Dealer
7 Agreement through its failure to maintain an adequate
8 line of credit.

9 43. The Dealer Agreement at Paragraph 14, subparagraph (A) states:
10 "DEALER shall at all times maintain and employ, in connection with its
11 business and operations under this Agreement, such working capital and
12 net worth, together with a line of credit with a financing institution
13 satisfactory to DISTRIBUTOR which will permit DEALER to properly and
14 fully carry out and perform DEALER'S duties and obligations under this
15 Agreement, including an inventory of Products commensurate with annually
16 set objectives established by DISTRIBUTOR. Such working capital, net
17 worth and/or line of credit shall be of amounts not less than minimum
18 standards established by DISTRIBUTOR and DEALER from time to time for
19 dealers similarly situated."

20 44. Kawasaki's policy on flooring was reiterated to Mr. Saba on
21 February 5, 1998, in a Dealer Call Report. District Manager James
22 Swanson stated that "KMC shall have the right to cancel all or part of
23 any order if a dealer does not have a sufficient credit limit from KMFC
24 (or other source) for payment of product when it is available for
25 shipment. In such event, KMC shall have the right to reallocate such
26 product to other dealers."

27 45. Inadequate flooring can affect sales performance to the extent
28 that a dealership does not have the product available on a timely basis
or enough quantity of the product on the showroom floor to meet demand.

1 46. At the time of Saba's buyout of its predecessor, Action
2 Cycles, Saba was required to have a minimum line of credit of \$330,000
3 for motorcycles. Saba's original line of credit was around \$600,000
4 which included the jet ski product line. Saba's present line of credit
5 with ITT/Deutsche Bank for Kawasaki motorcycles is between
6 \$200,000-\$400,000, which Mr. Saba occasionally supplements with his own
7 funds. Saba's present line of credit for Honda motorcycles is \$750,000.

8 47. Saba has never been told the amount of flooring the dealership
9 should have, however, for the purchase of Kawasaki motorcycles and All
10 Terrain Vehicles ("ATVs") the minimum line of credit should be \$500,000.

11 48. Initially, Saba had a flooring line with Kawasaki Motor
12 Finance Corporation ("KMFC"). KMFC terminated the flooring in 1994 when
13 it learned that Mr. Saba had filed for personal bankruptcy.⁴
14 Post-bankruptcy, Mr. Saba has unsuccessfully attempted to reinstate his
15 credit line with KMFC.

16 49. Although a dealer can order Kawasaki product 365 days a year,
17 there are two specific ordering times a year when the majority of
18 ordering takes place: in July or August after the new model year product
19 has been released and again in October or November.

20 50. Kawasaki advises its dealers of their vehicle allocation based
21 upon Kawasaki's production plan and the dealer's percentage of sales.
22 Dealers are always able to order more product than Kawasaki has
23 allocated. Once the dealer places its order, Kawasaki then produces the
24

25 ⁴ Mr. Saba owned property in Yorba Linda, California. He leased
26 the property for horse stables. A woman was injured on Saba's property
27 while horseback riding. She sued for personal injuries. Due to the
28 inaction of Saba's attorney at that time, a default judgment was entered
against him. In order to forestall attachment of the property, Saba
filed for bankruptcy.

1 vehicles and releases them to the dealer over the production cycle.

2 51. Usually, a dealer places an order which is paid for by KMFC or
3 other lending institution. The dealer has some flexibility in either
4 accelerating or deferring delivery once the order has been confirmed by
5 Kawasaki. In some instances, product can even be released prior to
6 actual receipt of payment to Kawasaki. Ordinarily, the flooring source
7 is contacted by Kawasaki and when the dealer's credit is confirmed,
8 Kawasaki then releases the vehicles to the dealer.

9 52. Unlike the method used for all other dealers, Saba authorizes
10 payment when the product is released. If he does not have immediate use
11 for the inventory, he will not authorize its release. This creates
12 "sleeping inventory"⁵ and denies potential product to other dealers. In
13 Saba's case, Kawasaki is unable to regulate distribution of its product.

14 53. In one instance, Kawasaki received a verbal release from
15 Saba's financing source Deutsche Bank and Saba received the inventory
16 but then advised Deutsche Bank not to pay Kawasaki. This situation was
17 explained by Saba as an error made by Kawasaki wherein they had shipped
18 an order which was paid for and then sent a duplicate order which Saba
19 both refused delivery of and payment of.

20 54. Other dealers who have financing sources outside of KMFC
21 verbally provide Kawasaki with a release number; the product is then
22 paid for and shipped to the dealer. Because of either inadequate
23 flooring on Saba's part or his refusal to pay for ordered product,
24 Kawasaki has been required to set up a special manual system for Saba,
25 whereby Kawasaki will not automatically release product unless Kawasaki

26
27 ⁵ Product which is built and waiting in the Kawasaki warehouse
28 to be released to the dealer is called "sleeping inventory."

1 receives full payment within 10 days of notification of availability.

2 If Kawasaki fails to receive payment then Saba's order is canceled.

3 d. Facts relating to whether Saba breached the Dealer
4 Agreement by failing to provide adequate dealer
5 identification for the facilities.

6 55. The new facility has an illuminated Kawasaki sign which was
7 installed on the building in January of 1999. Mr. Saba testified that
8 he had only recently obtained a permit for the sign from the city of
9 Lake Forest. From the time of his move in May 1998 until January 1999,
10 Saba hung banners with the Kawasaki brand name on the building.

11 e. Facts relating to whether Saba breached the Dealer
12 Agreement by failing to provide Kawasaki with equal
13 representation.

14 56. The Dealer Agreement at Paragraph 11 states: "In the event
15 DEALER sells other brands or lines of products which are competitive
16 with those Products purchased by DEALER from DISTRIBUTOR, DEALER agrees
17 to provide the Products with at least an equal representation to that
18 provided other competitive brands or lines."

19 57. The Dealer Agreement does not specify a square footage
20 requirement for the Kawasaki dealership in sales or service, however, it
21 does provide that the dealer agrees to give Kawasaki equal
22 representation.

23 58. Saba stated that after the expansion and renovation at the new
24 location, he would devote 3,000 square feet to Kawasaki.

25 f. Facts relating to whether Saba breached the Dealer
26 Agreement by failing to maintain model inventory.

27 59. A full line of Kawasaki motorcycle inventory including each
28 model available and each color would consist of 40-50 motorcycles and
12-15 ATVs.

60. Saba currently has less than a full line of inventory of

1 Kawasaki motorcycles which he states is because he has been unable to
2 obtain all motorcycles which Kawasaki has available. Saba also
3 testified that in visiting other dealerships similar to his that those
4 dealers carry less than a full line of models and colors.

5 g. Facts relating to the amount of business transacted by
6 the franchisee, as compared to the business available
7 to the franchise. (section 3061(a))

8 61. Within a 14-mile radius of the new location, projected
9 demographic data indicates that it will be a slow growth area over the
10 next few years. In terms of product propensity for motorcycles for the
11 area, a score of 99 is assigned with 100 representing average. This
12 means the area is slightly below average in motorcycle propensity. The
13 propensity for ATV's is 32 out of an average score of 100.

14 62. The sales in Orange County are four market share points below
15 Kawasaki's national average and other metropolitan markets. There are
16 six Kawasaki dealers within Orange County: Honda Kawasaki Sports Center;
17 Champion Kawasaki; Santa Ana Kawasaki; Anaheim Kawasaki; V.I.P.
18 Kawasaki; and, Beach Kawasaki.

19 63. From 1995 to 1996, Saba's sales of Kawasaki motorcycles show
20 an increase. In 1997, Kawasaki sales increased overall, however, Saba's
21 sales decreased in 1997 and further decreased in 1998.

22 64. In 1995, Saba's penetration rate within a 5-mile radius of its
23 old location was 55%, in 1996 it was 62%, in 1997 it was 40%, and by
24 1998 it had further declined to 36%.

25 65. In terms of sales into Orange County, Saba as compared to the
26 six existing dealers in Orange county ranked as follows for each of the
27 following years: 1995, number 2; 1996, number 1; 1997, number 2; and
28 1998, number 4.

66. In June 1998, Saba placed his full allocation order of 23

1 motorcycles with Kawasaki. He only received one KX 250, a popular
2 motorcycle, and had to wait more than 6 months after placing his order
3 to receive the remaining six KX 250's.

4 67. Saba testified that he has had difficulty in obtaining
5 Kawasaki product since it issued the termination letters in May 1998 and
6 August 1998.

7 68. Saba has also heard from his customers that Kawasaki has been
8 telling customers that Saba has been terminated as a dealer. Saba was
9 even approached to see if his business was for sale.

10 69. Saba has below average sales of Kawasaki's Good Times
11 Protection Program (GTTP) which is an after sales extended warranty
12 program. Saba contends that it sells a competitor's product at a
13 slightly lower cost and with additional towing services. The District
14 Manager was not aware of any dealer who had been terminated as a result
15 of inadequate GTTP sales.

16 h. Facts relating to investment necessarily made and
17 obligations incurred by the franchisee to perform its
part of the franchise. (section 3061(b))

18 70. Facts and findings of fact under subheading (c), paragraphs 43
19 through 54, relating to the line of credit and financing are
20 incorporated herein.

21 i. Facts relating to the permanency of the investment.
22 (section 3061(c))

23 71. Mr. Saba, principal of SPD Partners, Inc., has been in the
24 retail motorcycle business since 1970 where he first sold dirt bikes and
25 then established a Suzuki dealership in 1973. He became a Kawasaki
26 dealer in December 1993; at about the same time he also became a Honda
27 dealer.

28 72. Mr. Saba paid \$110,000 for Action Cycles, a Kawasaki

1 dealership located in Mission Viejo which he bought out in 1993.
2 (III:157) The purchase price included approximately \$17,000 in
3 inventory, retiring the former owner's debt to Kawasaki and Honda, and
4 an unspecified amount of goodwill.

5 73. Mr. Saba moved the dealership to 24417 Rockfield. The
6 location was formerly a Bank of America building which had been vacant
7 for about one year. Mr. Saba spent an additional \$126,000 to make
8 repairs and modifications to the facilities.

9 74. Mr. Saba leased the premises for a term commencing on
10 June 15, 1993, until November 30, 1997. The lease contained a 10-year
11 option to renew.

12 75. The rent was initially \$10,500 per month with increases. By
13 the time Saba moved out he was paying \$13,300 per month.

14 76. Saba has a 10-year lease at its present location with a 10-
15 year renewal option. The current rent is around \$9,000 per month.
16 Mr. Saba intends to expand and renovate the premises which will require
17 an additional \$120,000 to \$150,000 investment.

18 j. Facts relating to whether it is injurious or beneficial
19 to the public welfare for the franchise to be modified or
20 replaced or the business of the franchisee disrupted.
(section 3061(d))

21 77. The Saba dealership is the southern-most Kawasaki dealer in
22 Orange County. The nearest Kawasaki dealership to the south of Saba's
23 is located in Oceanside, San Diego County, about 35 miles away.
24 Although straight-line distances are shorter, the driving distances to
25 both Santa Ana Kawasaki and Champion Kawasaki in Costa Mesa are about 20
26 miles to the north of Saba's dealership.

27 78. Saba has been in business for almost 6 years. The dealership
28 employs between 9 and 10 full-time workers.

1 79. The Saba dealership has received a variety of consumer
2 complaints over its existence. Consumer complaint personnel at Kawasaki
3 receive a disproportionate amount of dealer complaints on Saba's
4 dealership based on its volume of sales.

5 80. In the sample complaints presented at the hearing it was not
6 entirely clear in some instances whether the complaint related to the
7 product or to the dealer's treatment of the customers. Mr. Saba
8 produced several testimonials indicating that his customers were
9 satisfied.

10 k. Facts relating to whether the franchisee has been and
11 is rendering adequate service to the public. (section
12 3061(e))

13 81. The current facility totals 5,000 square feet. Saba intends
14 to expand its current facility, but as of the hearing date Saba had not
15 obtained permits for construction. Saba has represented to Kawasaki
16 that he will expand his new facility by adding an additional 2,600
17 square feet.

18 82. When completed the facility should total approximately 7,600
19 square feet, of which Saba plans to dedicate approximately 3,000 square
20 feet to Kawasaki. Saba is currently awaiting approval from the city of
21 Lake Forest for the expansion and renovation. Once approval is
22 obtained, construction should take two to three months.

23 83. The new location is near freeway access for both the 405 and 5
24 freeways. It is on the corner of Lake Forest and Rockfield which are
25 two of the largest streets within the city of Lake Forest. The building
26 sits atop of a hill which makes it highly visible in all directions.
27 The location is about one mile from the Irvine Spectrum and at the edge
28 of the Irvine Auto Mall. There is high traffic in this area because of
its proximity to the Irvine Auto Mall.

1 84. Upon a visual inspection, the Administrative Law Judge
2 observed two negative factors at the new location, the unsightly chain
3 link fence surrounding the front of the dealership and the lack of an
4 enclosure for the service area.

5 85. Kawasaki contends that Saba has had a high turnover in
6 personnel. Saba's service manger has been with the dealership since its
7 beginning with the exception of some time off for family reasons.
8 Likewise, Saba's parts manager has been there since the beginning,
9 although he left at one point and has now returned.

10 1. Facts relating to whether the franchisee has fulfilled
11 the warranty obligations of the franchisor to be
12 performed by the franchisee. (section 3061(f))

13 86. Kawasaki requires that a dealer send a completed warranty
14 registration to Kawasaki after sale and delivery to a purchaser.
15 Kawasaki presented evidence of Saba's failure to submit warranty
16 registrations on a timely basis. However, it was not clear whether the
17 warranty registrations were for jet skis, motorcycles or ATVs, making it
18 unclear what, if any, motorcycles were unregistered. There were also
19 other valid reasons why an item may not be in inventory and also may not
20 be registered including: sales or exchanges with other dealers; recent
21 sale of the unit; or personal payment of the unit by the dealer.

22 m. Facts relating to the extent of the franchisee's failure
23 to comply with the terms of the franchise. (section
24 3061(g))

25 87. Facts and findings of fact in subheadings (a) relating to the
26 unauthorized relocation; (b) relating to maintaining a valid dealer's
27 license; (c) relating to line of credit and financing; (d) relating to
28 adequate dealer identification; (e) relating to equal representation;
and (f) relating to model inventory, are incorporated herein.

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1 DETERMINATION OF ISSUES

2 88. Respondent Kawasaki has established the existence of good
3 cause to terminate the franchise of Saba in that:

4 (a) Kawasaki failed to establish that the franchisee is not
5 transacting an adequate amount of business as compared to the business
6 available to it.

7 (b) Kawasaki established that the investment necessarily made and
8 the obligations incurred by the franchisee were insufficient to enable
9 it to perform its part of the franchise.

10 (c) Kawasaki failed to establish that Saba's investment was not
11 permanent.

12 (d) Kawasaki failed to establish that it would be injurious to the
13 public welfare nor did it establish that it would benefit the public
14 welfare for the franchise to be modified or replaced or the business of
15 the franchisee disrupted.

16 (e) Kawasaki established that Saba did not have adequate motor
17 vehicle sales and service facilities. There is a failure of proof that
18 the franchisee did not have adequate equipment, vehicle parts, and
19 qualified service personnel to reasonably provide for the needs of the
20 consumers for the motor vehicles handled by the franchisee. Kawasaki
21 failed to establish that the franchisee has not been rendering adequate
22 services to the public. With respect to service facilities, paragraph
23 (g) (4) *infra*, is incorporated by reference herein.

24 (f) Kawasaki failed to establish that the franchisee failed to
25 fulfill the warranty obligations of the franchisor to be performed by
26 the franchisee.

27 (g) As to the extent the franchisee failed to comply with the terms
28 of the franchise:

1 (1) Kawasaki established that the franchisee's relocation was
2 unauthorized. In violation of Paragraph 3(B) of the Dealer Agreement,
3 Saba had already relocated to 23646 Rockfield when its relocation
4 request was submitted to Kawasaki. The only written notice provided to
5 Kawasaki concerning the proposed relocation was sent via facsimile and
6 not by personal delivery, registered or certified mail, as required by
7 Paragraph 33 of the Dealer Agreement.

8 (2) Kawasaki failed to establish that the franchisee did not
9 have a valid dealer's license.

10 (3) Kawasaki established that the franchisee did not maintain
11 an adequate line of credit.

12 (4) Kawasaki established that the franchisee's business
13 facilities are inadequate to the extent that the temporary service
14 facility is not enclosed.

15 (5) Kawasaki failed to establish that the franchisee's sales
16 performance is inadequate.

17 (6) Kawasaki failed to establish that the franchisee did not
18 provide adequate dealer identification.

19 (7) Kawasaki failed to establish that the franchisee had
20 excessive consumer complaints.

21 (8) Kawasaki failed to establish that the franchisee did not
22 provide equal representation.

23 (9) Kawasaki established that the franchisee did not maintain
24 model inventory.

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