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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of )  
GEORGE ARRUES, dba KON TIKI MOTORCYCLES, ) Protest No. PR-179-78  
Protestant, )  
vs. )  
KAWASAKI MOTORS CORPORATION, U.S.A., ) Filed: October 27, 1978  
Respondent. )

DECISION

The attached Proposed Decision of the Hearing Officer is hereby adopted as modified by the New Motor Vehicle Board as its Decision in the above entitled matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED this 27th day of October, 1978.

/s/ Florence S. Post  
FLORENCE S. POST

/s/ Lyman R. Smith  
LYMAN R. SMITH

/s/ Joseph Trejo  
JOSEPH TREJO

/s/ John B. Oakley  
JOHN B. OAKLEY

/s/ Kathleen O. Turner  
KATHLEEN O. TURNER

Public Members  
New Motor Vehicle Board

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GEORGE ARRUES, dba KON TIKI ) Protest No. PR-179-78  
MOTORCYCLES, )  
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 Protestants, )  
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 vs. )  
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KAWASAKI MOTORS CORP., U.S.A., )  
 )  
 Respondent. )  
 )

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PROPOSED DECISION

Procedural Background

1. Respondent, Kawasaki Motors Corp., U.S.A. (Kawasaki), pursuant to Vehicle Code section 3060,<sup>1/</sup> by letter dated April 14, 1978, notified George Arrues, dba Kon Tiki Motorcycles, 1335 Garnet Avenue, Pacific Beach, California (Kon Tiki), of Kawasaki's intention to terminate Kon Tiki's franchise. The notice of termination was received by Kon Tiki on April 19, 1978. Kon Tiki filed a protest with the New Motor Vehicle Board (Board) on May 9, 1978.

2. A hearing was held pursuant to section 3066 before Anthony M. Skrocki, Hearing Officer for the Board in San Diego,

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1. Unless otherwise indicated, all references are to the Vehicle Code.

California, on July 19, 20, and 21, 1978.

3. Protestant was represented by A. Albert Spar, Esq., of the law firm of Sidney I. Pilot. Respondent was represented by Robert G. Lane, Esq., of the law firm of Paul, Hastings, Janofsky & Walker.

#### Issues Presented

4. Kawasaki contends that it has good cause to terminate Kon Tiki's franchise in that:

(a) The amount of business transacted by Kon Tiki has been unsatisfactory as compared to the business available to it (§3061(1));

(b) The investment necessarily made and obligations incurred by Kon Tiki to perform its part of the franchise are not substantial (§3061(2));

(c) Kon Tiki's investment is not permanent (§3061(3));

(d) It would not be injurious to the public welfare for Kon Tiki's franchise to be terminated and replaced (§3061(4));

(e) Kon Tiki does not have adequate sales and service facilities and qualified personnel to reasonably provide for the needs of Kawasaki consumers and has not been rendering adequate services to the public (§3061(5));

(f) Kon Tiki has failed to comply with the terms of its franchise (§3061(7));

(g) Although not expressly alleged by Kawasaki, section 3061 also mandates consideration of whether Kon Tiki failed to fulfill Kawasaki's warranty obligations to be performed by Kon Tiki (§3061(6)).

Findings of Fact

Findings Relating to the Amount of Business Transacted by Kon Tiki Compared to the Business Available to It. (\$3061(1))

5. Paragraph 5 of the franchise establishes a primary area of responsibility for Kon Tiki which is defined as an area within a 5-mile radius of Kon Tiki.

6. Kon Tiki is also required by the terms of the franchise to achieve a market share within its primary area of responsibility equivalent to that achieved by Kawasaki at the national level.

7. The following figures indicate registrations of motorcycles for the calendar year 1977 (January-December) within Kon Tiki's primary area of responsibility (5-mile radius):

<u>Make</u>	<u>No. of Motor- cycles Regis.</u>	<u>Percentage of Market</u>
Kawasaki	154	9.2%
Honda	741	44.3%
Yamaha	477	28.5%
Suzuki	164	9.8%
All Others	135	8.1%
TOTAL	<u>1,671</u>	

8. Of the above Kawasaki registrations, sales by Kon Tiki accounted for the following:

	<u>No. of Motor- cycles Regis.</u>	<u>Percentage of Market</u>	<u>Percent. of Kawasakis Regis. in Primary Area of Responsibility</u>
Kon Tiki	19	1.1%	12.3%

9. In an area between a 5-mile radius and a 10-mile radius the following figures indicate registrations of motor-

cycles for the same time period (January, 1977 - December, 1977):

<u>Make</u>	<u>No. of Motor- cycles Regis.</u>	<u>Percentage of Market</u>
Kawasaki	247	15.1%
Honda	700	42.9%
Yamaha	465	28.5%
Suzuki	136	8.3%
All Others	84	5.1%
TOTAL	1,632	

10. Of the above Kawasaki registrations, sales by Kon Tiki accounted for the following:

	<u>No. of Motor- cycles Regis.</u>	<u>Percentage of Market</u>	<u>Percent. of Kawasakis Regis. in Primary Area of Responsibility</u>
Kon Tiki	2	0.1%	0.8%

11. Kon Tiki is thus responsible for a market penetration as follows in the respective areas indicated:

<u>Area</u>	<u>Percentage of Industry</u>
0-5 mile radius	1.1%
5-10 mile radius	0.1%
0-10 mile radius	0.5%

12. The following is the market penetration achieved by Kawasaki at the national and San Diego County levels for the 1977 calendar year:

National	16.78%
San Diego County	12.26%

13. The following is indicative of Kon Tiki's wholesale purchases as compared to other Kawasaki dealers in San Diego

County: 2/

<u>Dealership</u>	<u>Purchases</u> 10/1/76 - 9/30/77		<u>Purchases</u> 10/1/77 - 6/30/78	
	<u>Units</u>	<u>% of County</u>	<u>Units</u>	<u>% of County</u>
San Diego Kawasaki-West*			32	4.15%
Beach Cycle Center	203	15.96%	96	12.45%
Kon Tiki Motorcycles	45	3.54%	19	2.46%
N & M Sales Company	---	-----	---	-----
Kawasaki Escondido	97	7.62%	60	7.78%
San Diego Kawasaki**	384	30.19%	180	23.34%
Town & Country Kawasaki**	170	13.36%	93	12.06%
Honda-Kaw. Lemon Grove**	70	5.50%	30	3.89%
Quinsey Kawasaki, Inc.**	91	7.15%	83	10.76%
Fun Bike Center**	133	10.46%	65	8.43%
Kawasaki of Oceanside**	79	6.21%	113	14.65%
TOTAL PURCHASES	1,272		771	

\* New Dealership - Start Date 4/3/78

\*\* Figures for these dealers include figures from all previous dealerships at the same location.

14. The following is the retail sales analysis of the performance of the San Diego County Kawasaki dealers: 2/

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2. Figures are available for prior years back to 1973 on the charts indicated and show a similar performance by Kon Tiki.

<u>Dealership</u>	<u>Sales</u> 10/1/76 - 9/30/77		<u>Sales</u> 10/1/77 - 6/30/77	
	<u>Units</u>	<u>% of County</u>	<u>Units</u>	<u>% of County</u>
San Diego Kawasaki West*			8	1.12%
Beach Cycle Center	204	15.56%	73	10.29%
Kon Tiki Motorcycles	42	3.20%	32	4.51%
N & M Sales Company	---	-----	---	-----
Kawasaki Escondido	89	6.78%	62	8.74%
San Diego Kawasaki**	381	29.06%	152	21.44%
Town & Country Kawasaki**	173	13.19%	107	15.09%
Honda-Kaw. Lemon Grove**	71	5.41%	41	5.78%
Quinsey Kawasaki, Inc.**	120	9.15%	73	10.29%
Fun Bike Center**	156	11.90%	71	10.00%
Kawasaki of Oceanside**	75	5.72%	90	12.69%
TOTAL SALES	1,311		709	

\* New Dealership - Start Date 4/3/78

\*\* Figures for these dealers include figures from all previous dealerships at the same location.

15. The following shows a dramatic increase of Kawasaki sales in California as compared to its performance in San Diego County:

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SAN DIEGO COUNTY

<u>Brand</u>	<u>Current Y.T.D.</u>		<u>Prior Y.T.D.</u>		<u>% of Y.T.D. Change in Unit Sales</u>
	<u>1/1/78 - 3/31/78</u>	<u>Units Share</u>	<u>1/1/77 - 3/31/77</u>	<u>Units Share</u>	
Kawasaki	188	6.07%	183	10.78%	2.73%
Honda	1,564	50.48%	794	46.79%	96.98%
Yamaha	808	26.08%	419	24.69%	92.84%
Suzuki	407	13.14%	191	11.26%	113.09%
Harley	51	1.65%	49	2.89%	4.08%
Others	80	2.58%	61	3.59%	31.15%
TOTAL INDUSTRY	3,098		1,697		82.56%

CALIFORNIA

<u>Brand</u>	<u>Current Y.T.D.</u>		<u>Prior Y.T.D.</u>		<u>% of Y.T.D. Change in Unit Sales</u>
	<u>1/1/78 - 3/31/78</u>	<u>Units Share</u>	<u>1/1/77 - 3/31/77</u>	<u>Units Share</u>	
Kawasaki	2,757	9.44%	1,891	9.31%	45.80%
Honda	11,730	40.16%	11,277	55.28%	4.48%
Yamaha	8,849	30.29%	3,565	17.55%	148.22%
Suzuki	3,583	12.27%	1,921	9.46%	86.52%
Harley	1,019	3.49%	695	3.42%	46.62%
Others	1,273	4.36%	1,012	4.98%	25.79%
TOTAL INDUSTRY	29,211		20,311		43.82%

16. The last chart above shows a 45.80% increase in California, but only a 2.73% increase in San Diego County.

17. Kon Tiki attributes its low level of sales to increased competition by other dealers in the Los Angeles as well as San Diego areas and in particular to heavy discounting by such dealers.

18. Kon Tiki is now undertaking a discounting program to meet the competition.

Findings Relating to the Investment  
Necessarily Made and Obligations  
Incurred by Kon Tiki to Perform Its  
Part of the Franchise. (§3061(2))

19. Kon Tiki is a single line motorcycle dealer and operates a machine shop in connection with and as part of its motorcycle business.

20. George Arrues, owner of Kon Tiki, is 50-years old and has been in the motorcycle business for 32 years; 17 of these years in Argentina and for the last 15 years in the United States.

21. Kon Tiki was the first, and is thus the oldest, Kawasaki dealer in San Diego County, having been franchised 11 years ago. Kon Tiki has been at its present location for the last 9 years. This is in direct contrast to the average change in ownership or other circumstances which sometimes result in a longevity of 2-3 years for a franchise.

22. George Arrues and his wife devote their full time to Kon Tiki. Kon Tiki is open 6 days a week and both are there each day with Mrs. Arrues spending on an average of 7 hours

per day working in the parts department and performing paperwork. Mr. Arrues devotes all his time to selling and servicing.

23. Kon Tiki carries a \$60,000 inventory of new motorcycles and a \$34,000 inventory of used motorcycles.

24. Its parts and accessories inventory is valued at \$25,000 to \$28,000 and tools at \$15,000.

25. The premises occupied by Kon Tiki are rented from a friend on an oral month-to-month lease at a rental of \$450 per month.

26. Ads placed in the yellow pages cost Kon Tiki \$144 monthly.

Findings Relating to Whether Kon Tiki's  
Investment is Permanent. (§3061(3))

27. Mr. and Mrs. Arrues have spent their entire lives in the motorcycle business. They have operated a Kawasaki franchise for the last 11 years. (See ¶¶20 & 21, above.)

Findings Relating to Whether It Would Be  
Injurious to the Public Welfare for Kon  
Tiki's Franchise to Be Terminated and  
Replaced. (§3061(4))

28. If Kon Tiki's franchise is terminated, Kawasaki intends to establish a new franchise in the Pacific Beach area within one mile of Kon Tiki's present location if a suitable location can be found. This area is "built-up" and Kawasaki knows of no location available.

29. Kawasaki established an additional franchise, San Diego Kawasaki West, in April, 1978, approximately 4-1/2 miles

from Kon Tiki.

30. Kawasaki recognizes Kon Tiki has an excellent service reputation and serves not only the direct consuming public but also does specialized work for other motorcycle dealers including Kawasaki. On occasion Kawasaki has sent special service problems to Kon Tiki for resolution.

Findings Relating to Adequacy of Kon Tiki  
Sales and Service Facilities and Personnel.  
(\$3061(5))

31. Kon Tiki has no separate salesroom and conducts sales business from a desk on the showroom floor.

32. Kon Tiki's showroom floor is narrow and it is difficult to display the inventory so the customer has immediate access to each motorcycle.

33. The building contains 4,060 square feet including sales, parts, and service areas.

The franchise requires a minimum of 3,000 square feet.

34. The building is located in the center of the block and has only parallel street parking in front with a 50 x 29 area in the rear used for parking and deliveries.

35. All of Kawasaki's major competitors are located within one block of Kon Tiki. While desiring to retain the proximity to the other dealers, Kawasaki would prefer that Kon Tiki relocate near a freeway to improve access and visibility. Kawasaki knows of no such available location in the immediate area. Kon Tiki's present location was described as a "good average location" by Kawasaki.

36. Kon Tiki had been operated by George Arrues, his wife, one mechanic, and one machinist. In addition, one Kawasaki Jet-Ski repairman has been recently hired, as well as a salesman, Wayne Moran (as of February 15, 1978), to whom the entire sales operation has been transferred. Moran is an experienced motorcycle salesman and sales manager. Kon Tiki had been seeking such a person prior to receipt of the notice of termination.

37. In the last two years the only other salesman has been part-time; employed only during the summer and Christmas vacation seasons.

38. Kawasaki has no complaints regarding Kon Tiki's service department. Kawasaki recognizes Kon Tiki has a "good" to "excellent" reputation, and submits very few warranty claims.

39. Kawasaki has no complaint about the adequacy of the inventory in motorcycles or parts carried by Kon Tiki.

40. Mr. and Mrs. Arrues are not totally proficient in English; Spanish being their primary language. They are, however, knowledgeable in all phases (sales, financing, and servicing included) of the retail motorcycle industry.

41. Although Mr. Arrues' difficulty in communicating affects his sales ability insofar as meeting Kawasaki's goals for its franchisees, it does not effect his ability to serve the public in a very professional manner as described by his excellent reputation in the industry and Kawasaki's satisfaction with his service department and his long-time relationship with Kawasaki.

Findings Relating to Kon Tiki's Compliance  
With the Terms of Its Franchise. (§3061(7))

42. Kawasaki has been dissatisfied with Kon Tiki's sales performance for at least 2-1/2 years.

43. Most, if not all, of Kawasaki's complaints regarding Kon Tiki's compliance (or lack thereof) with the franchise terms are of more recent origin.

44. For instance, the franchise requires Kon Tiki to carry a \$35,000 credit line.

Kawasaki had, in its file, a letter dated March 8, 1977, confirming that Kon Tiki had a \$20,000 line of credit with I.T.T. Diversified Credit Corporation. It was not until March or April of 1978 that Kawasaki made inquiry with Kawasaki Credit Department to ascertain what line of credit Kon Tiki had. No contact was made with I.T.T. Diversified Credit Corporation to determine if additional credit was available or being extended to Kon Tiki. In fact, Kon Tiki's inventory of motorcycles averaged \$50,000, and Kon Tiki was receiving credit in excess of \$30,000 from its flooring institution. At present, Kon Tiki has a line of credit between \$60,000 and \$90,000. There was no evidence that Kon Tiki's line of credit was in jeopardy or inadequate to meet Kawasaki's standards.

45. One of Kawasaki's concerns was insufficient square footage in the dealership. Kawasaki questioned whether it was less than the 3,000 square foot minimum mandated by the franchise. No attempt was made to ascertain the true square footage, which is 4,060 square feet.

46. Kon Tiki could display a larger "Kawasaki" sign on the premises. This is easily correctable with a modest investment by Kon Tiki.

47. Kon Tiki did not take advantage of a co-op advertising plan offered from January to June, 1978, and commencing again in July, 1978, but did in 1977 participate in a mass Kawasaki Dealer Area Market Program in which Kon Tiki's share was assessed at \$1,675.

48. Kon Tiki personnel did not attend all training courses, service schools, and sales seminars provided by Kawasaki, but did attend and participate in a sufficient number to show desire to improve. There was no showing of any adverse impact on Kon Tiki's service capabilities in failing to attend all such programs.

49. Kon Tiki did not furnish regular financial and sales reports but this did not appear to be material to Kawasaki's determination to terminate Kon Tiki's franchise. There was no showing that Kawasaki was seriously concerned with Kon Tiki's financial stability.

Findings Relating to Kon Tiki's Performance  
of Kawasaki's Warranty Obligations to Be  
Performed by Kon Tiki. (\$3061(6))

50. Kon Tiki has fulfilled Kawasaki's warranty obligations.

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## Determination of Issues

1. The amount of (retail sales) business transacted by Kon Tiki has been low as compared to the business available to it. This, however, is not sufficient in itself to meet the burden of proof imposed upon the franchisor by section 3066 to show good cause as set forth in section 3061 to terminate the franchise.

2. The investment made and obligations incurred by Kon Tiki to perform its part of the franchise are not substantial in terms of dollars, but in terms of personal commitment and dedication of their efforts to the business, Mrs. and Mrs. Arrues are totally and irrevocably committed to the dealership.

3. The investment of 32 years in the motorcycle business and 11 years as a Kawasaki dealer is permanent.

4. It would be injurious to the public welfare for Kon Tiki's franchise to be terminated as Kon Tiki provides excellent service to the public and the motorcycle industry.

5. Replacement of the franchise, even if feasible in the immediate area, would not assure replacement of Mr. Arrues' expertise.

6. Kon Tiki has adequate sales and service facilities and qualified personnel to reasonably provide for the needs of Kawasaki consumers, and has been rendering adequate services to the public. Any deficiency in the number of sales desirable in the area of exposure to the public of Kawasaki products should be cured at least in part by the April, 1978, establishment of an additional Kawasaki franchise 4-1/2 miles from Kon

Tiki. In addition, it appears that hiring of a full-time, experienced sales manager should increase sales by Kon Tiki and enable Kon Tiki to improve its facilities.

7. Kon Tiki did not comply with certain provisions of its franchise. The lack of market penetration was Kawasaki's prime concern and this has been held to be insufficient to meet the burden of proof imposed upon the franchisor by sections 3066 and 3061. (See ¶1, above.) The remaining provisions with which Kon Tiki did not literally comply are not sufficiently material to conclude otherwise, as all pertain in some manner to whether Kon Tiki has the capability to perform its sales functions. It is determined that Kon Tiki does have this capability.

8. Kon Tiki has fulfilled Kawasaki's warranty obligations.

\* \* \* \* \*

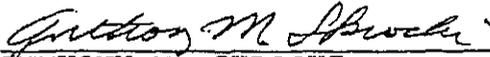
The following proposed decision is respectfully submitted:

Good cause for termination of Kon Tiki's franchise has not been established.

The protest is sustained.

I hereby submit the foregoing which constitutes my proposed decision in the above entitled matter, as a result of a hearing had before me on the above dates at San Diego, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated: September 21, 1978.

  
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ANTHONY M. SKROCKI  
Hearing Officer  
New Motor Vehicle Board