

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

WALKER MANAGEMENT, INC., dba GOOD
TIMES KAWASAKI SUZUKI DUCATI,

Protestant,

v.

DUCATI NORTH AMERICA, INC.,

Respondent.

Protest No. PR-2048-07

DECISION

At its regularly scheduled meeting of June 26, 2008, the Public Members of the Board met and considered the administrative record and Proposed Decision Following Remand in the above-entitled matter. After such consideration, the Board adopted the Proposed Decision Following Remand as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 26th DAY OF JUNE 2008



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

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11 In the Matter of the Protest of

12 WALKER MANAGEMENT, INC., dba
13 GOOD TIMES KAWASAKI SUZUKI DUCATI,

14 Protestant,

15 v.

16 DUCATI NORTH AMERICA, INC.,

17 Respondent.

Protest No. PR-2048-07

**PROPOSED DECISION
FOLLOWING REMAND**

18 **PROCEDURAL BACKGROUND**

19 **Statement of the Case**

20
21 1. By letter dated April 18, 2007, Ducati North America, Inc., gave notice to Walker
22 Management, Inc., dba Good Times Kawasaki Suzuki Ducati, pursuant to Vehicle Code section 3062¹, of
23 its intention to appoint an additional Ducati franchisee in Roseville, at a location within 10 miles of
24 Walker Management's dealership in Sacramento.² The New Motor Vehicle Board received the notice on
25 April 19, 2007.
26

27 ¹ All statutory references are to the California Vehicle Code unless noted otherwise.

28 ² Such notice is required whenever a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within the relevant market area where the same line-make is then represented. [Section 3062(a)(1)] "Relevant market area" is "any area within a radius of 10 miles from the site of a potential new dealership". (Section 507)

1 10. Respondent Ducati North America, Inc. (hereinafter sometimes referred to as “Ducati” or
2 “Respondent”) is a business entity which is a “distributor” as defined by section 296 and a “franchisor”
3 within the meaning of sections 331.2 and 3062(a)(1).

4 11. Respondent is represented by Sutherland Asbill & Brennan LLP, by Dean Bunch, Esquire,
5 and Melissa Fletcher Allaman, Esquire, 3600 Maclay Boulevard South, Suite 202, Tallahassee, Florida;
6 and by Baker & Hostetler LLP, by Maurice Sanchez, Esquire, and Kevin M. Colton, Esquire, 600 Anton
7 Boulevard, Suite 900, Costa Mesa, California.

8 12. The proposed Ducati franchisee (not a party to this proceeding) is A & S Motorcycle
9 Parts, Inc. (hereinafter sometimes referred to as “A & S” or “Roseville open point”). It is a business
10 entity located at 1125 Orlando Avenue, Suites F & G, Roseville, California.

11 **Witnesses Presented at Hearing and Remand Hearing**

12 13. Protestant called as witnesses at the hearing Jeffrey Walker (protestant’s Operating
13 Officer), Thomas C. Taliani (the senior sales person at Good Times), and Sherman Walker (protestant’s
14 semi-retired Chief Executive Officer). Protestant also called as a witness an employee of Ducati, Kristi
15 Blanchard (respondent’s Network Development Manager).⁴

16 14. At the remand hearing, protestant called as an expert witness Brian M. Boone. (RT
17 Remand: 17-69; PR-27)⁵ Mr. Boone, a Certified Public Accountant and Certified Valuation Analyst,
18 works “in the field of litigation support, primarily in business valuations and financial analysis and
19 accountings in the litigation area”. (RT Remand: 17) Mr. Boone was offered as “an expert in the impact
20 on a business by the establishment of a competing brand...” (RT Remand: 21)

21 15. Respondent called the following witnesses at the hearing: Jason Chinnock (respondent’s
22 National Sales Manager) and Randy Felice (President and Sales Manager of A & S Motorcycle Parts, the
23 proposed franchisee). Respondent’s expert witness was Steven Radt (Sales Planning and Operations
24 Director for Ducati North America), who also testified as a percipient witness.

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27 ⁴ Evidence Code section 776 permits a party to call as a witness an employee of an adverse party and to examine the witness
as if under cross-examination, i.e., to ask leading questions in its examination.

28 ⁵ References herein to Roman numerals I through IV are to the Reporter’s Transcript of the September 17-20, 2007, hearing.
References to “RT Remand” are to the Reporter’s Transcript of the remand hearing on May 7, 2008. References to “PR” are
to Exhibits, introduced both at the hearing and at the remand hearing.

1 16. At the remand hearing, respondent called as an expert witness Joshua M. Pope. Mr. Pope,
2 who has an undergraduate degree in mathematics and a Master's in Business Administration, is employed
3 by Urban Science Applications, Inc. The company specializes in market analyses in both the automotive
4 and motorcycle industries. Mr. Pope was offered as "an expert in dealer network analysis as it relates to
5 the motorcycle business"---he defined "dealer network analysis" to "include measuring the impact of a
6 proposed dealership upon an existing dealer in a market". (RT Remand: 70-202; PR-603-637, PR-640
7 pp. APP-8 and APP-32-55)

8 **Summary of Witnesses' Testimony and Exhibits Introduced at Hearing and Remand Hearing**⁶

9 Protestant's Witnesses' Testimony and Exhibits at the Hearing

10 17. Jeffrey Walker, protestant's Operating Officer, runs the dealership's day-to-day
11 operations. Good Times has been a Ducati franchisee since 1995. It sells and services six brands of
12 motorcycles in addition to Ducati. When he heard of Ducati's proposal to grant a franchise to A & S, a
13 motorcycle dealership seven and a half miles away from the Good Times store, Mr. Walker protested to
14 Ducati that this would be "devastating" to his business. In his opinion, "customers tend to migrate where
15 the newness is, the excitement might be" and that establishing a new franchise such a short distance away
16 would have an adverse impact on both the sales and the service operations of Good Times, since
17 "[t]ypically people get their vehicles serviced where they buy them." He testified that his dealership had
18 experienced difficulty in getting an inventory of popular Ducati models from respondent. (IV: 30-70)

19 18. Thomas C. Taliani, protestant's senior sales representative, testified that Good Times sold
20 ATV's (all-terrain vehicles) and watercraft as well as seven brands of motorcycles. He called Ducati the
21 "Ferrari of motorcycles" which appealed to a unique customer: older, with a higher income---a "Euro"
22 type of person. Younger buyers aged 19 to 26 were more interested in sport model brands like Kawasaki
23 and Suzuki. (I:26-44)

24 ///

25 ///

26 _____
27 ⁶ Since exhibits were marked for identification by the parties prior to both hearings, they were not offered or introduced in
28 numerical order; also, some pre-marked items may not have been used in the hearings at all, so there may be numerical gaps in
the final Exhibit List, which begins with PR-1 and ends with PR-640. Finally, because of the large number of exhibits, several
single exhibit numbers may contain many different, but related, documents.

This Summary does not refer to all exhibits in the record, nor does it include all matters testified to by the witnesses.

1 19. Sherman Walker, protestant's semi-retired⁷ Chief Executive, testified about staffing and
2 financial reports he had prepared concerning Good Times' operations. (IV:71-139; PR-1) In 1987, he
3 bought "Good Times Kawasaki Suzuki" and added the Ducati franchise in 1995. He calculated that, in
4 recent years, sales of Ducati motorcycles have accounted for roughly 7% to 9% of the dealership's total
5 "gross sales of new units", so that, in his opinion, establishing a second Ducati franchise in the same area
6 would be "devastating" to his Ducati business. (IV:88-101; PR-1, pp. 013, 060, 052, 069)

7 20. Kristi Blanchard, Ducati North America's Network Development Manager, testified that
8 since A & S had not yet been approved as a Ducati dealer, it had not incurred any costs or expenses to set
9 up a new Ducati dealership. (I:45-74)

10 Protestant's Expert Witness' Testimony and Exhibits at Remand Hearing

11 21. Brian M. Boone testified that the "net effect" of the placement of another Ducati
12 dealership 7.5 miles from protestant's location "would likely be a significant decrease in the sales and
13 service opportunities at the Good Times dealership in the Ducati [line-make]." (PR-27) He made two
14 assumptions: (1) that Ducati motorcycle sales would increase overall by 10%; and (2) that sales of
15 Ducati motorcycles would be divided evenly between the two dealerships. He therefore calculated that
16 protestant would experience an approximate 40% to 45% reduction in Ducati sales "as well as
17 approximately the same loss in the service [business] of Good Times associated exclusively with the
18 Ducati [I]ine." (RT Remand: 33-34, 62; PR-27)

19 Respondent's Witnesses' Testimony and Exhibits at the Hearing

20 22. Steven Radt, Sales Planning and Operations Director for Ducati North America, testified
21 both as a percipient witness and as an expert witness. He described the market segments for motorcycles,
22 the data gathered by the Motorcycle Industry Council (hereinafter referred to as "MIC"), Ducati market
23 areas in California and elsewhere, and the methods by which respondent evaluates the performance of
24 areas in which Ducati motorcycles are sold. Mr. Radt described Good Times as an "underperformer" and
25 "way behind in sales", with "lost sales opportunities", according to Ducati's market data. He opined that
26 Good Times "[does] not do a good job at selling motorcycles in the Roseville and north market area" and
27

28 ⁷ Sherman Walker testified that he is "Chief Executive of...Walker Management doing business as Good Times Motor Sports, and semi-retired." (Emphasis added.) (IV:71)

1 concluded that the “Sacramento market” needed another Ducati dealer. (I:75 to III:177, III:47-48;
2 IV:140-144; PR-507-PR-518)

3 23. Jason Chinnock testified that when he became Ducati North America’s National Sales
4 Manager in January 2007, Good Times was “underperforming” and that A & S was already being
5 considered for a Ducati dealership. When he visited Good Times in January 2007, he found the store
6 dirty and disorganized, although he observed that its appearance had improved at the time of a site visit
7 during the merits hearing. (III:178-250)

8 24. Randy Felice is President and Sales Manager of A & S Motorcycle Parts, the proposed
9 franchisee, and the company’s sole shareholder. His dealership currently sells BMW motorcycles, which
10 he hopes to compliment with the addition of the Ducati line-make. A & S moved to a modern and
11 spacious new location in 2000, and it has a separate space to devote to retailing Ducati motorcycles, as
12 well as technicians and sales staff. Mr. Felice has made no investment in the Ducati franchise, although
13 he has been interested in acquiring a Ducati franchise for the last three years. (III:250-IV:28)

14 Respondent’s Expert Witness’ Testimony and Exhibits at Remand Hearing

15 25. Joshua M. Pope testified that his analysis of the market showed that a “there is more than
16 enough incremental untapped opportunity available for [a new Ducati dealer] to open” and make “[a]
17 projected number of sales without negatively affecting the Good Times dealership...” (RT Remand: 151,
18 165) Mr. Pope relied on statistical data, demographic information and population trends to support his
19 opinion that additional sales opportunities for Ducati motorcycles exist in the Sacramento market and that
20 the future demand for this line-make will increase. (RT Remand: 119-134; PR:603-637) Since much of
21 the Ducati sales opportunity has not been captured in the Sacramento market and because of anticipated
22 growth of the Ducati line-make, Mr. Pope opines that “there’s nothing inherently incorrect about a certain
23 distance [between the two Ducati stores].” (RT Remand: 191-193)

24 ISSUE PRESENTED

25 26. The following issue is presented in this Protest:

26 Did Protestant Walker Management sustain its burden of proof of showing “good cause”
27 to preclude Respondent from establishing an additional Ducati dealership at the proposed
28 location?

1 45%. Not only would the addition of a new dealer be “devastating to [Good Times’] Ducati business”,
2 protestant argues, but it would also produce a larger “significant effect” on protestant’s revenues
3 “because [Ducati] represents a niche market, which draws people in who may not necessarily be able to
4 afford to purchase a Ducati motorcycle”.

5 30. Good Times contends that it has established the “good cause” factors of Vehicle Code
6 section 3063. It cites the permanency of its investment “for the Ducati business, including parts,
7 inventories, equipment, supplies, working capital, [and] facilities” and argues that “the proposed new
8 dealer, A & S...has absolutely no investment in the Ducati line”. The public welfare, protestant argues,
9 would be harmed by its closure of part of its business because of lower tax revenue and loss of jobs.

10 31. Good Times asserts that it is providing adequate competition and convenient consumer
11 care for the Ducati brand. It disputes the conclusion of Ducati’s market analysis (that there would be
12 increased sales as a result of a new dealer establishment), calling it “fundamentally flawed”. It argues
13 that Ducati is unfamiliar with the “demographics, income levels, [and] customer preferences” of the
14 Roseville market; in reality, protestant asserts, the “typical Ducati customer is affluent, knowledgeable,
15 and more product educated [than buyers of other motorcycles]” and there is therefore a “limited demand”
16 for Ducati products in the Roseville market. The effect of establishing an additional Ducati dealership in
17 this market, protestant contends, would not be to create competition, but would simply be to replace one
18 Ducati dealer for another.

19 **RESPONDENT’S CONTENTIONS⁹**

20 32. Respondent Ducati contends that protestant Good Times has failed to meet its burden of
21 proof in establishing “good cause” to preclude the establishment of an additional Ducati franchise at the
22 proposed location.

23 33. Respondent argues that the opinion of protestant’s expert that Good Times’ Ducati sales
24 and service business will experience a 40% to 45% percent decline if an additional Ducati franchise is
25 established has no evidentiary support and fails to consider the expanding market potential for Ducati
26 motorcycles. In fact, according to respondent, “Sacramento is a fast-growing market and Ducati is a fast-

27 ⁹ Quotes appearing in this section are found in Prehearing Brief by Respondent Ducati North America, Inc.; Respondent
28 Ducati North America, Inc.’s Brief in Support of its Proposed Findings; Proposed Findings of Respondent Ducati North
America, Inc., and Proposed Findings After Remand and Supporting Memorandum of Law.

1 growing brand” and an additional Ducati dealer may be established in the area without having a “negative
2 impact” on Good Times’ Ducati business.

3 34. Good Times’ market performance has been “unacceptable”, according to respondent, and
4 the dealership has failed to provide adequate competition. Since 2003, Good Times has been shown to be
5 “underperforming” in Ducati sales. Nationally, respondent notes, Ducati has experienced “phenomenal
6 growth”, doubling its sales in the last four years, while Good Times’ market share has remained stagnant.
7 In addition to lost sales, Good Times fails to provide adequate competition for Ducati products,
8 describing the store as a “haphazard and intermingled display of Ducati motorcycles, apparel, accessories
9 and fixtures with other brands”.

10 35. There is a need for a second Ducati dealer in the “Sacramento market”, according to
11 Ducati. Its market data shows that there are currently untapped opportunities for sales of Ducati
12 motorcycles in this market. Moreover, the demand for Ducati motorcycles will continue to grow, as
13 shown by population and housing projections for the area. Because of these opportunities, Good Times
14 will experience no negative impact on its Ducati business, even though the two dealerships would be
15 located 7.5 miles apart.

16 36. Ducati urges that A & S would be an ideal showcase for Ducati motorcycles, with its
17 anticipated separate showroom and salesperson devoted exclusively to Ducati bikes and accessories.
18 Moreover, since protestant is not doing a good job selling Ducati motorcycles “in the Roseville and north
19 market area”, Ducati contends that the prospective franchisee, A & S, would be well-positioned to
20 capture this underserved market.

21 37. Finally, respondent contends that Good Times has failed to establish the permanency of its
22 investment.

23 FINDINGS OF FACT¹⁰

24 Preliminary Findings

25 38. A motorcycle is a motor vehicle which has a seat or saddle for the use of the rider,
26 designed to travel on not more than three wheels in contact with the ground and weighing less than 1,500
27

28 ¹⁰ References herein to testimony, exhibits, or other parts of the record are examples of evidence relied upon to reach a finding, and are not intended to be all-inclusive.

1 pounds. [Vehicle Code section 400(a)] Ducati motorcycles are “on-highway” motor vehicles. (I:92)

2 39. Ducati motorcycles are manufactured in Bologna, Italy. Ducati is a “small manufacturer”.
3 It anticipates selling around 10,000 motorcycles in the United States in 2007, which is less than one
4 percent of total United States motorcycle sales. Although this is a “low market share overall compared to
5 the industry”, the popularity of Ducati motorcycles is growing fast: between 2005 and 2007, Ducati
6 registrations jumped 41.8% in California and 40.2% nationwide. Ducati has representation (dealerships)
7 in only 40 states and has a larger market share in states (such as California) where Ducati motorcycles are
8 sold. (I:109-110; RT Remand: 135; PR-624)

9 40. In California and in the United States, retail sales of Ducati motorcycles have been the
10 following: (II:8, 29, 30; PR-534)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
All Models – Ducati Sales in California	1159	1413	1611	1734	1174
All Models – Ducati Sales in the United States (including California)	4645	5278	6566	7459	5050

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16 41. Ducati motorcycles are considered the “Ferrari of motorcycles”, a “prestigious product”
17 appealing to a “niche” market: an older, more knowledgeable male buyer willing to pay a higher price for
18 the Ducati brand than for other brands. (I:34; IV:105)

19 42. The “typical Ducati customer” is usually older, upper middle class and interested in
20 European motorcycles---a “Euro [kind of] guy”. (I:27-28) This aficionado is “definitely different from
21 your average motorcycle buyer”, which is a “younger demographic” of males between the ages of 19
22 and 26, attracted by the sport bike market represented by “Kawasaki, Suzuki, [and] Japanese bikes in
23 general”. (I:27-28)

24 43. There are 144 Ducati dealers in the United States (in 40 states) and approximately 20
25 Ducati dealers in California. Currently, Ducati has three open points positioned in California for new
26 dealers. Most, but not all, Ducati dealers offer for sale other brands of motorcycles as well; the Ducati
27 store in Modesto, California, is one of eight dealerships nationwide selling Ducati motorcycles
28 exclusively from a “freestanding” location. (I:112; II:26; RT Remand: 189-190; PR-640)

1 44. In 1997, a venture capital company acquired the assets of Ducati Motorcycles and set up
2 respondent Ducati North America, Inc., as a distributor of Ducati motorcycles in the United States and
3 Canada; its predecessor was a company called Cagiva. Respondent assumed existing dealer contracts
4 from Cagiva, one of which was Cagiva's 1995 dealer agreement with protestant. (I:78-79; PR-592)

5 45. Ducati competes in three segments¹¹ of the motorcycle market: sport, touring, and
6 traditional bikes. Ducati defines these three segments as the "Ducati Relevant Market" ("DRM"). (PR-
7 505) Generally, the rider of a sport bike bears more weight on his wrists for more "performance
8 orientation" and enjoys wind protection; two persons may ride a touring bike, which has a capacity for
9 storage or luggage in the rear; and the rider of a traditional bike sits upright and has minimal wind
10 protection. (I:125-128; II:48)

11 46. Start-up costs for new Ducati dealers are currently the following: a "fixture package",
12 which includes a display totem, for between \$8,000 and \$12,000; a start-up investment in tools for
13 approximately \$17,000; a start-up investment in parts ranging between \$7,000 and \$20,000, which varies
14 depending on "the level of dealership [and] the bike order that they're expected to sell"; software
15 licensing information for about \$12,000; exterior signage, which can range from \$900 to \$1,500; and
16 apparel and accessories for a minimum purchase of around \$10,000. (I:49-50)

17 47. The proposed new franchisee, A & S Motorcycle Parts, is located seven and one-half (7.5)
18 miles from protestant Good Times Kawasaki Suzuki Ducati.

19 **Findings Relating to Permanency of Investment [Section 3063(a)]**

20 **Protestant Walker Management, Inc., dba Good Times Kawasaki Suzuki Ducati**

21 48. The Good Times motorcycle dealership (at that time called "Good Times Kawasaki
22 Suzuki") was purchased by Sherman Walker in January 1988. (IV:77)

23 49. In December of 1995, Good Times purchased the Ducati motorcycle business for
24 approximately \$17,000 "through a buy/sell with Mega Cycles". No evidence was presented showing any
25 other investment or outlay by protestant in regard to purchasing or setting up its Ducati franchise. (I:135,
26 138-140; II:90; IV:114; PR-592) At that time, Good Times was located in a leased space at 5000 B
27

28 ¹¹ Ducati does not compete in the fourth segment, cruisers; many Harley Davidson models are considered cruisers. (I:126-128)

1 Madison Avenue in Sacramento. (IV:84)

2 50. In about 1998, the dealership moved to its present location at 4727 Auburn Boulevard in
3 Sacramento, which (at approximately 14,000 to 14,500 square feet) is smaller by about 2,000 square feet
4 than its prior location. (IV:116-117) The real estate where Good Times is now located was purchased
5 for \$1.2 million in about 1999 by the Sherman and Adelle Walker Family Trust. The Family Trust leases
6 the premise to the dealership (a family corporation) on “a five year renewable lease” for “roughly
7 \$10,000.00 a month”. Day-to-day operations of the business are run by Jeffrey Walker; his father,
8 Sherman Walker, is semi-retired. (I:42; IV:83-84, 85, 88-101,132-133)

9 51. In addition to Ducati motorcycles, the Good Times dealership represents the following
10 line-makes and products:

11 Motorcycles: Kawasaki, Suzuki, Husquvarna, Aprilia, Moto Guzzi, and Hyosung.

12 All Terrain Vehicles: Iton ATV’s.

13 Watercraft: Hydrospace Personal Watercraft, Kawasaki Jet Skis. (I:43)

14 52. Kawasaki and Suzuki are the two most important franchises that protestant has---“by a
15 factor of several multiples”---with “Kawasaki” and “Suzuki” logos appearing to the right and left of the
16 Good Times sign which is on the front facia of the dealership building. (IV:118-119)

17 53. The premises are used exclusively as a dealership and service facility for seven line-makes
18 of motorcycles, as well as ATV’s and personal watercraft. Therefore, any investments in the business
19 (unless specifically shown to be related to selling or servicing the Ducati brand) would benefit all line-
20 makes and products offered by protestant.

21 54. During 2004, Good Times made no investments in “building and tenant improvements”,
22 “machinery and equipment”, “furniture and fixtures” or “vehicles”. (IV:85-87; PR-1, pp. 059, 062)
23 During 2005, Good Times made no investments in “building and tenant improvements”, “machinery and
24 equipment”, or “furniture and fixtures”, but invested \$27,250.70 in “shop vehicles”. (IV:86; PR-1, pp.
25 062, 064)

26 55. Good Times’ balance sheet for 2006 describes “assets”, which include \$407.00 in
27 “furniture and fixtures” and \$28,160.00 in “leasehold improvements”, but no information as to whether
28 these were outlays made during 2006 or simply assets accounted for in 2006. (PR-1, p. 067) Good

1 Times' balance sheet for 2007 shows \$22,247.00 in "leasehold improvements" as an "asset", but there is
2 no information as to whether this was an investment made during 2007 or simply an asset accounted for
3 in 2007; the 2007 "asset" in "furniture and fixtures" was \$0. (PR-1, p. 071)

4 56. Good Times has recently ordered approximately \$36,000 in Ducati accessories, and it has
5 roughly \$65,000 in Ducati parts and accessories. No further evidence was offered by protestant
6 regarding inventories of Ducati parts and accessories. (IV:39, 57; PR-1)

7 57. No evidence was offered by protestant of any advertising specific to Ducati motorcycles;
8 rather, all advertising placed by Good Times (print ads, TV, radio, magazines) was for all brands and
9 products offered by protestant. (IV:87-88)

10 *A & S Motorcycle Parts, Inc. ("Roseville Open Point")*

11 58. The prospective franchisee, A & S Motorcycle Parts, Inc., was established in 1983 by the
12 parents of Randy Felice. Mr. Felice runs the company's day-to-day operations as President and Sales
13 Manager. It moved to its present location at 1125 Orlando Avenue in Roseville in 2000; Randy Felice
14 owns the business and his parents own the real estate.

15 59. A & S sells BMW Motorcycles (as well as Vespa and Peugeot scooters). It is the only
16 BMW motorcycle dealer in the Sacramento market, and its sales performance for the last three years has
17 exceeded the "California represented" standard. BMW and Ducati are "comparable brands" and
18 represent "inter-brand competition". (RT Remand: 117-118, 138, 176; PR-615)

19 60. Randy Felice has been interested in acquiring a Ducati franchise for approximately three
20 years and, to this end, has contacted both Sherman Walker (CEO of Good Times) and Michael Lock
21 (CEO of Ducati) and he or an employee have attended the annual Ducati dealer meetings in 2005, 2006
22 and 2007. He anticipates that the addition of the Ducati brand to his dealership would be a good fit for
23 his business, since BMW emphasizes touring bikes while Ducati emphasizes sport bikes. He has made no
24 investment in the Ducati franchise, since he has not been appointed as a Ducati dealer. (III:250-IV:28)

25 61. The dealership moved to a modern and spacious new location in 2000 from a 6,500 square
26 foot store. The new facility, with 27,000 square feet, boasts fifteen (15) service lifts, currently
27 "underutilized", with seven technicians "either certified or on track to be certified"; a showroom for
28 BMW's and scooters and brand-related accessories; a parts area; a lounge room for the public with a

1 “clubhouse atmosphere”; and offices. There is a spacious parking lot, available for test-drives of
2 motorcycles. Randy Felice envisions devoting a separate showroom suite, closest to the freeway, to
3 retailing Ducati motorcycles, an area formerly occupied by ArcticCat and now vacant. He plans to have
4 a salesperson devoted exclusively to the Ducati line-make. (III:260-261)

5 62. A & S anticipates a substantial permanent investment in the Ducati franchise if it is
6 allowed to be established as such. The dealership evidences a willingness to assume the start-up costs
7 imposed by respondent on all new Ducati dealers, and it has the facilities available to establish a Ducati
8 dealership in the manner envisioned by its owner, Randy Felice.

9 **Findings Relating to Effect on the Retail Motor Vehicle Business and**
10 **The Consuming Public in the Relevant Market Area [Section 3063(b)]¹²**

11 *Expert Opinion Offered by Protestant and Findings Related Thereto*

12 63. If a new Ducati dealership is opened, protestant’s expert (Brian M. Boone) assumes a 10%
13 increase in Ducati sales; this increase, he further assumes, would be split equally between the two
14 dealerships (Good Times and A & S). Therefore, he calculated, the “X”¹³ number of Good Times’ sales
15 (100%) would become “X” plus 10% (110%) divided by two (each dealer selling 55%), with Good
16 Times’ Ducati sales reduced by 40% to 45% percent (100% minus 55%). He opined that protestant’s
17 service business would suffer “approximately the same loss...associated exclusively with the Ducati
18 [line-make]”. (RT Remand: 17-69; PR-27)

19 64. Mr. Boone’s calculation in regard to diminished Ducati sales is entitled to little or no
20 weight for several reasons. It uses as a starting point Good Times’ actual sales of Ducati motorcycles
21 without further analysis of dealer performance, the current and prospective market for Ducati
22 motorcycles (including untapped sales opportunities), and other competitive issues. In other words, the
23 expert’s unstated assumption is that the “X” number of Ducati sales is the best and highest number that
24

25 ¹² The Board’s remand order---concerned solely with this factor---directed inquiry as to whether the establishment of an
26 additional Ducati franchise would have a “significant impact” on protestant’s Ducati sales and service business. At the
27 remand hearing, the testimony of two expert witnesses and documentary evidence were added to the record. This additional
28 evidence may create some minor inconsistencies in the findings (for example, sales data was extended to the end of 2007 at
the remand hearing; and demographic evidence was offered at the remand hearing, but not at the hearing), but the
inconsistencies are inconsequential.

¹³ Protestant’s expert did not testify as to specific numbers of sales.

1 can be achieved by a single Ducati dealer in the area when, in fact, such is not the case. (RT Remand:
2 161-162)

3 65. Mr. Boone's opinion in regard to diminished service opportunities is entitled to no weight
4 because there is no evidentiary support for it. Good Times presented little evidence in regard to its
5 Ducati service business---only the size and location of its service department and cursory information
6 about its mechanics. Although Jeffrey Walker "[felt] that there will be an impact on both [his] sales
7 operations as well as [his] service operations...[since] [t]ypically people get their vehicles serviced where
8 they buy them...not always but typically", no further evidence was offered establishing either
9 protestant's current Ducati service business or substantiating Jeffrey Walker's feeling that his service
10 business would be "impacted" by a new dealership. (I: 36-37, 41; IV: 55-56, 63, 75-76, 84-85)
11 Moreover, protestant's expert made critical assumptions not based on evidence: in reliance on Jeffrey
12 Walker's testimony that Good Times employed a "dedicated" Ducati mechanic, he appeared to assume
13 that "dedicated" meant that the mechanic had been hired specifically to service Ducati motorcycles
14 and/or that the mechanic's labor was devoted exclusively to servicing of Ducati motorcycles. (RT
15 Remand:32, 68; PR-27) No evidence supported either of these assumptions.

16 Expert Opinion Offered by Respondent and Findings Relating Thereto

17 66. Respondent's expert (Joshua M. Pope) followed three steps in analyzing the "impact [of a
18 new Ducati dealership] exclusively on the Ducati portion of protestant's business." (RT Remand: 79, 81,
19 86) In step one, he identified the best area for conducting the impact analysis as "the Sacramento market
20 and the ten-mile relevant market area primarily". (RT Remand: 79, 101, 166; PR-604) In step two, he
21 determined "the actual Ducati sales opportunity ... in the [Sacramento] market". In step three, he
22 "compared [the sales] being captured currently by the existing Ducati dealers in the market, then
23 projected sales for the proposed location and compared those sales "to any incremental lost opportunity
24 that exists in the market". (RT Remand: 79-80, 86-87, 118)

25 67. Mr. Pope concluded, as a result of his three-step analysis, that since the projected sales of
26 a new Ducati dealership would be less than the opportunity available, "a new dealer could go into
27 business without taking any sales away from the existing dealer". (RT Remand: 80, 87-88) Moreover,
28 the fact that the two dealerships are 7.5 miles apart "was considered in the analysis" and did not change

1 his opinion that “there should be no adverse impact to Good Times’ dealership”. (RT Remand: 166-167)
2 Also, he considered the jump in Good Times’ Ducati sales from 51 in 2006 to 77 in 2007 and this did not
3 change his opinion that there is a lost sales gap, or incremental opportunity, available for Ducati
4 motorcycles in the Sacramento market, since the “fast-growing” Ducati brand increased nationwide about
5 26 percent, and Good Times’ sales just kept up with last year’s increase in sales. (RT Remand: 200-202)

6 68. In step two of his analysis, respondent’s expert calculated that there are “lost [Ducati
7 sales] opportunities” in the Sacramento market. He looked at two different “components” in his “lost
8 sales analysis”: interbrand competition and intrabrand competition. (RT Remand: 142, 177, 182-183)

9 69. “Interbrand competition” is competition between different brands. As an example, BMW
10 and Ducati represent interbrand competition---each would like to capture the others’ sales, since both
11 line-makes generally appeal to the same demographic slice of the population. Good Times has
12 “interbrand opportunities” to capture business from competing brands, not only from BMW, but other
13 line-makes as well. (RT Remand: 138)

14 70. “Intrabrand competition” is competition within a brand, i.e., competition between Ducati
15 dealers. When there is substantial inselling to a market where a dealer in the market has the competitive
16 advantage of proximity to those customers, and those customers are choosing to leave the market to go to
17 less convenient dealers, this presents very good opportunities for a dealer to enhance sales by capturing
18 that business. (RT Remand: 138-139)

19 71. Respondent’s expert determined that Ducati’s current penetration rate (market share) in
20 the “California represented” market (only those areas where Ducati has “representation”) is 5.9 percent.
21 He used the “California represented” market because, in his opinion, it “represents an average level of
22 performance that [he] would expect the Sacramento market to be able to achieve for Ducati.” (RT
23 Remand: 104-105, 113-117, 119; PR-607, 613-615).

24 72. Respondent’s expert then adjusted downward this figure to 4.9 percent expected
25 penetration for the Sacramento market after taking into account its unique characteristics. If a penetration
26 rate of 4.9 percent were to be achieved in 2007, 160 Ducati motorcycles would be registered, which
27 figure is a reasonable and conservative “opportunity number that is available for Ducati at a minimum in
28 the Sacramento market”. (RT Remand: 105-106, 112; PR-607, PR-612) Respondent’s expert considered

1 the “opportunity level” of 160 units to be a conservative estimate---“a C average level of opportunity”---
2 and expected the Sacramento market to achieve or exceed 160 sales, since “Sacramento is a fast-growing
3 market and Ducati is a fast-growing brand”. (RT Remand: 112-113, 134, 135-136; PR:612)

4 73. However, the actual number of Ducati registrations in the Sacramento market for most of
5 calendar year 2007 was 107 units, and Ducati’s actual market share in 2007 in the Sacramento market
6 was 3.3 percent. Therefore, “lost sales opportunities” were 53 sales. (RT Remand: 105-106, 113; PR-
7 607, 612)

8 74. According to respondent’s expert, no aspect of the demographics (gender, education level,
9 median income) of the Sacramento market would preclude it from achieving sales commensurate with the
10 “California represented” standard of 4.9% market penetration.¹⁴ Moreover, population and household
11 trends show the Sacramento market to be growing through 2012. (RT Remand: 119-131, 134; PR-616,
12 619-623)

13 75. The third step of Mr. Pope’s analysis (regarding “projected” sales for the new dealership)
14 is entitled to little weight, for two reasons: his reliance on apparently erroneous or ambiguous data that
15 Good Times 2007 Ducati sales were 55 units (RT Remand: 139; PR-626) when, in fact, sales totaled 77
16 units; and his failure to consider “operational characteristics” of Ducati dealers (exclusive vs. multi-line,
17 larger vs. smaller) in comparing the Sacramento market with other markets. However, even discounting
18 or disregarding Mr. Pope’s analytical third step, his opinions and analyses in regard to steps one and two
19 support the findings herein that no “significant impact” on protestant’s Ducati business would result from
20 the addition of a new Ducati dealer in the relevant market area.

21 Findings Relating to “Significant Impact” on Protestant’s Ducati Business

22 76. The “effect” of the establishment of an additional Ducati dealer 7.5 miles from
23 protestant’s dealership will not have a significant impact on Good Times’ Ducati motorcycle sales and
24 service. As used herein, “significant impact” means the likelihood that the existing dealer will lose
25 substantial Ducati business or be forced out of carrying the Ducati line-make. This definition allows the
26 Board to exercise its judgment to assess “the individual and varying local conditions” by balancing

27 _____
28 ¹⁴ Surprisingly, the median age of Ducati buyers was 43, younger than expected.

1 protestant's interest in maintaining a viable business, respondent's interest in promoting sales, and the
 2 public's interest in adequate competition and convenient service. Piano v. State of California ex rel.
 3 Nissan Motor Corporation, etc. (1980) 103 Cal.App.3d 412.

4 77. Good Times' gross receipts attributable to Ducati from "major unit sales" and parts and
 5 accessories (excluding all costs and expenses as well as freight, setup and overhead) were the following:
 6 (IV:77-82, 98, 108; PR-1)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Ducati "Major Unit Sales"	\$ 489,646	\$ 515,441	\$ 821,619	\$ 596,352	\$ 379,758
Ducati Parts & Accessories	+\$ 47,333	+\$ 77,611	+\$ 87,813	+\$ 129,021	+\$ 62,327
Total Ducati Sales	\$ 536,979	\$ 593,052	\$ 909,432	\$ 725,373	\$ 442,085

11
 12 78. Good Times' gross profits (gross sales less cost of goods only) attributable to Ducati
 13 bikes, parts and accessories was \$127,162 in 2006, \$51,964 in the first six months of 2007, and "the data
 14 indicates that the gross profit on Ducati was [\$]145,000 for Good Times in 2007". (RT Remand: 67) Net
 15 profits are lower, since these figures do not have "any expenses extracted" from them. (IV:81; PR-1,
 16 pp.038, 052)

17 79. Good Times' total sales of Ducati motorcycles are the following: (II:28; III:44, 60;
 18 IV:100; PR-534, PR-550, PR-561, PR-627)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>	<u>2007</u>
All Models - Sold To Customers Living Anywhere in California	45	38	64	51	35	77 ¹⁵

22
 23 80. Good Times also presumably makes money servicing Ducati motorcycles, although no
 24 evidence was presented as to protestant's income (gross or net) derived from servicing Ducati
 25 motorcycles, overhead and other expenses, and mechanics' salaries.

26 81. Additionally, there are financial benefits to the dealership from offering the Ducati line-

27
 28 ¹⁵ References in the record to "55" sales are in error. (RT Remand: 139; PR-626)

1 make which cannot be quantified precisely: the high-end appeal of the Ducati brand attracts customers
2 through its doors who cannot afford a Ducati, but who may be persuaded to purchase another brand.
3 (IV:104, 106) An “intangible value” accrues to Good Times simply by carrying the Ducati line-make.
4 (RT Remand: 67)

5 82. Sherman Walker’s estimate that sales of Ducati motorcycles have accounted for roughly
6 7% (in 2003) to 9% (for the first six months of 2007) of the Good Times’ dealership’s total “gross sales
7 of new units” is reasonable. (IV:94-108)

8 83. Protestant offered no evidence of any advertising or marketing designed to bring
9 prospective Ducati customers into the Good Times’ store. Ducati motorcycles are not featured on the
10 showroom floor. Signs on the front of the store proclaim the offering for sale of “Kawasaki” and
11 “Suzuki” motorcycles, but not Ducati motorcycles (although there are Ducati banners, posters and a
12 welcome sign inside the store). (I:34-35) Since Good Times has made little or no effort to market or
13 feature Ducati motorcycles; it has therefore lost potential sales opportunities.

14 84. An unknown percentage of protestant’s expenses and overhead were incurred due to Good
15 Times having a Ducati franchise.¹⁶ However, other than costs of goods sold, protestant has presented no
16 expenses, outlays or investments incurred in operating the Ducati franchise; in fact, the only investment
17 was the original purchase of the Ducati business for about \$17,000 in 1995, and that amount has long ago
18 been recovered by protestant. (IV:113, 114)

19 85. If an additional Ducati dealership is established, consumer interest in the Ducati line-make
20 will be heightened by the opening of the new Ducati store, by potential buyers seeing its signage from the
21 roadway. Prospective customers will be attracted to the area by the Ducati motorcycles showcased in a
22 modern spacious facility. Therefore, Ducati sales in the area will be enhanced simply by the
23 establishment of a new Ducati franchise. (RT Remand: 195)

24 86. Even after the addition of the proposed dealer to the Sacramento market, Good Times’
25 sales opportunities in the Sacramento market will not suffer a “significant impact” and will, in fact, be
26 enhanced. Substantial sales opportunities exist in the Sacramento market for Ducati dealers to capture

27
28 ¹⁶ Sherman Walker testified that, in 2003, the following outlays were made, at least in part, because of his Ducati franchise:
building and tenant improvements of \$59,354, and machinery and equipment (“...tools and special equipment for the service
department, and ... office equipment, computers, etcetera”) expenses of \$75,917. (IV:85-86; PR-1, p. 059)

1 additional sales of Ducati motorcycles, lost either to dealers of competing brands (“interbrand
2 competition”) or to Ducati dealers located outside the Sacramento market (“intra-brand competition”).
3 Moreover, there is incremental opportunity for additional sales created by consumer interest and
4 competitive forces (escalating sales of Ducati motorcycles, more energy and a sharper focus by protestant
5 in marketing the Ducati line-make, and the “buzz” of a new dealership).

6 87. There is an untapped consumer interest for Ducati motorcycles in the Sacramento market
7 that is demonstrated by Good Times’ improvement in Ducati sales in 2007. This was due, at least in part,
8 to the dealership hosting “Ducati weekends” to introduce the new Ducati model, the Super Motard
9 (although this advertising program had been suggested by Ducati, not initiated by protestant). (IV:124)

10 **Findings Relating to Whether it is Injurious to the Public Welfare for an**
11 **Additional Franchise to be Established [Section 3063(c)]**

12 88. The owner of A & S has the present intention and ability to establish a Ducati franchise at
13 his motorcycle dealership in Roseville; to acquire an inventory of Ducati bikes, parts and accessories; to
14 dedicate currently unused showroom space to Ducati products; and to offer currently “underutilized”
15 service areas to Ducati customers. These acts are beneficial to the public welfare, not injurious.

16 **Findings Relating to Whether Good Times is**
17 **Providing Adequate Competition and Convenient Consumer Care for**
18 **Ducati Motorcycles in the Market Area, Including Adequate Sales and**
19 **Service Facilities, Equipment, Supply of Parts, and**
20 **Qualified Service Personnel [Section 3063(d)]**

21 **Adequacy of Good Times’ Facility and Personnel**

22 89. The Good Times dealership is situated in two freestanding buildings on the same real
23 estate parcel. The front building, containing the sales floor, the parts department and general offices, is
24 10,000 square feet. The service department, located in the back building, is 4,500 square feet. (IV:84-
25 85) The total square footage for the facility is approximately 14,000 square feet or more. (IV:117)

26 90. Protestant employs a total of 28 people. There are five people in the sales department,
27 seven in the service department (service managers, service writers, and technicians), six in the parts
28 department (“primarily parts counter people”), two in the office (an office manager and one with clerical
and accounting duties), and four in the corporate office. Good Times also has an Internet department
which employs two people who sell accessories from the company’s website. (IV:75-76)

1 91. Good Times sells and services six brands of motorcycles in addition to Ducati. Two of the
 2 dealership's five mechanics have Ducati training and one is a factory certified Ducati mechanic (although
 3 his certificate may not be current). (I:37, 41; IV:55) The service department can be organized, "under
 4 more control", but, on one occasion, it "was dirty, it didn't look like a cleaned, well organized service
 5 department."¹⁷ (III:181-182)

6 92. Ducati models are typically showcased in the front showroom, to the left of the front door,
 7 where there is a small area dedicated to Ducati bikes, apparel and accessories. However, some Ducati
 8 models were "intermingled" between "some of the Japanese bikes" and others were tightly lined up
 9 against each other in the showroom. (III:184-185)

10 *The Adequacy of Good Times' Competitiveness in Marketing and Servicing Ducati Motorcycles*

11 *Good Times' Ducati Sales*

12 93. Good Times' total sales of Ducati motorcycles, both within the "Sacramento CBSA"
 13 (Core Based Statistical Area) and in areas outside it,¹⁸ are the following: (II:28; III:44, 60; IV:100; PR-
 14 534, PR-550, PR-561)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
All Models – Good Times' Sales To Customers Living In The Sacramento CBSA	31	30	44	41	27
All Models – Good Times' Sales To Customers Living Outside The Sacramento CBSA	<u>+ 14</u>	<u>+ 8</u>	<u>+ 20</u>	<u>+ 10</u>	<u>+ 8</u>
All Models - Sold To Customers Living Anywhere in California (Total Good Times' Sales)	45	38	64	51	35

24 94. For each of the years 2003 to 2006 and through June 30, 2007, customers buying
 25 motorcycles from Good Times typically lived in the immediate vicinity of Sacramento, with the greatest
 26

27 ¹⁷ No evidence was presented showing adequacy of equipment. No evidence established the value or extent of protestant's
 supply of vehicle parts . (IV:57)

28 ¹⁸ These are "pump-outs" or "out-sells." (III:60)

1 concentration of its customers generally living south of the dealership. “[T]he sales of Good Times tend
 2 to be clustered closer to the dealership but with a large concentration south of their current location.”
 3 (III:44, 47-48; IV:137, 141; PR-507 to PR-518)¹⁹ “[Good Times’ Ducati] sales made to the northern part
 4 are actually Roseville or north, are not as prevalent as the sales that [Good Times is] making in the
 5 southern part of the Sacramento market.” (I:154; PR-507 and PR-508) “[There is] a strong propensity
 6 for the dealership to sell to the southern part of their marketplace, with a lower penetration to the northern
 7 part of their market.” (I:156; PR-507 to PR-518)

8 “Intrabrand” Competition

9 95. Since Good Times is the only Ducati dealer in the “Sacramento CBSA” and therefore has
 10 a geographic monopoly in the area, it is relevant to compare its sales of Ducati motorcycles in that market
 11 with other Ducati dealers located outside the “Sacramento CBSA”²⁰ (i.e., “intrabrand competition”): (PR-
 12 561)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
All Models – Good Times’ Sales To Custome Living in The Sacramento CBSA	31	30	44	41	27
All Models – Sales By Ducat Dealers Other Than Good Tim Customers Living in The Sacramento CBSA ²¹	+ 24	+ 36	+ 31	+ 27	+ 23
Total Ducati Sales in The Sacramento CBSA	55	66	75	68	50

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20 96. Protestant made an average of approximately 55% of the above sales and, in the first six
 21 months of 2007, its sales percentage in the “Sacramento CBSA” was 54%. (PR-562)

22 97. Geographical competitors to protestant are the following Ducati franchisees: the closest is
 23 in Modesto (the “freestanding” Ducati dealership); the next closest is in Contra Costa County in the East
 24 Bay of the San Francisco area; and the Reno, Nevada, Ducati dealer is the closest toward the east. There
 25

26 ¹⁹ Exhibits 507 to 518, inclusive, 12 exhibits in all, are “dot maps” showing Good Times’ Ducati sales (exclusively), for
 27 different years and different geographical areas. (III:44)

²⁰ These are “pump-ins” or “in-sells”.

28 ²¹ There is no evidence of where---either within the “Sacramento CBSA” or within the immediate vicinity of Sacramento---
 customers lived who purchased Ducati motorcycles from other than Good Times, or the identities of the Ducati dealers (other
 than protestant) making such sales. (III:46-47)

1 are no Ducati dealerships north of Sacramento to the border. (II:78-79; PR-512, PR-514, and PR-518)

2 *“Interbrand Competition”*

3 98. In its assessments, Ducati uses data from the Motorcycle Industry Council (“MIC”). MIC
4 is a non-profit organization funded by a trade organization whose membership is mainly large motorcycle
5 manufacturers (including Ducati). (I:114-115)

6 99. The MIC database is composed exclusively of information from warranty registrations
7 from new motorcycle sales, not from state or local registrations. A warranty registration is “when the
8 dealer informs the manufacturer that they have sold a motorcycle...the manufacturer then activates the
9 warranty for the customer”. There are incentives to encourage dealers to submit warranty registrations in
10 a timely manner. (I:115-117, 120)

11 100. Each manufacturer-member of MIC, including Ducati, submits its sales data, generated
12 from the information in the warranty registrations received from its dealers, to MIC each month.

13 101. Each manufacturer also designates the market segment (sport bike, touring, traditional, or
14 cruiser) into which each of its models is to be placed in the MIC database. Since motorcycle models do
15 not necessarily fit squarely into the general descriptions of the four segments, manufacturers have
16 discretion in reporting that a particular model falls into one segment as opposed to another; this
17 discretion, in turn, will affect statistical analyses of competitive segments. (I:115-117, 120, 165-167)

18 102. MIC “geocodes” the sales data it receives by organizing the information from the warranty
19 registrations in usable arrangements so that each manufacturer may assess its own (and its dealers) sales
20 performance. Each manufacturer has “full visibility” over its own data, including the customer’s name,
21 address, ZIP Code, price paid, the model and displacement of the motorcycle, and market segmentation.
22 (I:117-120, 132)

23 103. Manufacturers may also access the MIC database for limited information about
24 competitors’ sales: only the manufacturer’s name, the model of the motorcycle sold, and the customer’s
25 ZIP Code are available. (I:117, 121) Using the MIC database, manufacturers may compare their sales
26 performance with that of other manufacturers. (PR-505)

27 104. A company’s market share (or “penetration” of a market) is expressed as a percentage,
28 calculated by using the company’s sales as a numerator and competitor sales as a denominator.

1 Companies use market share percentages, among other things, to evaluate the performance of products,
2 market areas and dealers. In Ducati's market share calculations, the number of its sales and those of its
3 competitors are based on the number of motorcycle warranty registrations transmitted to MIC.

4 105. For purposes of market analysis, Ducati uses for some metropolitan areas the United
5 States Census Bureau's geographical area designation of "CBSA" (Core Based Statistical Area) or,
6 where no CBSA is "defined", the county in which the Ducati dealership is located. (I:108; II:11)

7 106. The "Sacramento CBSA" is composed of four counties: Sacramento, El Dorado, Placer
8 and Yolo Counties. Good Times, located in the far northern part of Sacramento County, is the only
9 dealership selling Ducati motorcycles in the "Sacramento CBSA". (III:22, 43) A & S Motorcycle Parts
10 is located north-east of Good Times, in Roseville, on the border of Sacramento and Placer Counties.
11 (I:108-110, 152; II:74, 76; PR-501, PR-502)

12 107. Ducati's designation of the "Sacramento CBSA" geographical area (the 4-county area
13 composed of Sacramento, its suburbs and environs) to evaluate the market potential of Ducati
14 motorcycles is reasonable. The area of the "Sacramento CBSA" may also be referred to as the
15 "Sacramento market".

16 108. To customers living in the "Sacramento CBSA", the following numbers of new Ducati
17 motorcycles were sold by all Ducati dealers: (I:162-168 to II:1-2; PR-521 to PR-525, PR-561)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Sportbike	28	28	22	24	22
Touring	5	8	8	6	1
Traditional	22	30	45	38	27
TOTALS	55	66	75	68	50

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109. The following numbers represent “competitive group registrations”, i.e., warranty registrations by all motorcycle manufacturers (including Ducati) to customers living in the “Sacramento CBSA” for the three segments of the “Ducati Relevant Market” (“DRM”): (I:162; PR-521 to PR-525)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Sportbike	1159	1402	1842	2191	1053
Touring	1063	1161	1165	1235	562
Traditional	199	166	169	127	74
TOTALS	2421	2729	3176	3553	1689

110. Ducati expresses its market share in the “Sacramento CBSA” for each of the three segments as “actual penetration” percentages, which are measures of interbrand competition (i.e., competition between Ducati and competitive brands). Using the figures in the two charts above, Ducati calculates each percentage with the numerators being Ducati motorcycles sold by all dealers and the denominators being “competitive group registrations”: (PR-536, PR-540, PR-559)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Sportbike	2.4%	2.0%	1.2%	1.11%	2.1%
Touring	0.5%	0.7%	0.7%	0.5%	0.2%
Traditional	11.0%	18.1%	26.6%	29.9%	37.0 %

111. Each of these three market share percentages is generally accurate and each may be used as a basis for further analysis of Ducati’s sales performance in the “Sacramento CBSA”.²²

112. Ducati also calculates percentages from the figures from the “Total” columns from the two charts above in the same manner with the following results: (PR-551, PR-553, PR-563)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
TOTALS	2.27%	2.42%	2.36% or 3.05%	1.91%	2.96%

²² A factor contributing to inaccuracy is that which affects all MIC data: each manufacturer defines the segment into which it reports a particular model, which designations may be questionable or inaccurate. (I:166-167)

1 113. However, these “total” percentages are entitled to little or no weight as evidence and may
2 not be used as a basis for further analysis. The three segments are too different from one another to be
3 combined in this manner. Since Ducati has only a miniscule .18% market share of the very large touring
4 bike segment and a whopping 37.00% market share of the tiny traditional bike segment, simply adding
5 up columns of figures and calculating percentages from the totals produces misleading results.

6 Ducati’s Analysis of the “California Represented” Market

7 114. Ducati has compared the performance of the “Sacramento CBSA” with three markets: the
8 “California Represented” Market, the “California Market” and the five Bay Area counties of the “San
9 Francisco CBSA”. In each analysis, according to Ducati, the “Sacramento CBSA” has
10 “underperformed”. (II:9-13; III:20, 32; PR-559)

11 115. However, Ducati presented neither demographic nor geographic information to assist in
12 the interpretation of the numbers its analyses have produced, and the conclusions it has reached---based
13 upon the numbers---are therefore entitled to little or no weight as evidence. Ducati’s argument that
14 “demographic factors” are somehow subsumed within the sales figures is expressly rejected.²³ (II:3-5;
15 III:35-38) Similarly, Ducati’s conclusion that there were “lost sales” from the “Sacramento CBSA” for
16 which Good Times is responsible cannot be evaluated without knowing where within the “Sacramento
17 CBSA” the customers lived who bought Ducati motorcycles from dealers other than protestant, and
18 which competing Ducati dealer got those sales.

19 116. Ducati considers the “California represented” market as the “most appropriate” standard in
20 judging Ducati sales performance to customers living in the “Sacramento CBSA”. (II:12-13) The
21 following analytical steps are used by Ducati in this inquiry, which are the same or similar to its analysis
22 of the performances of the other two markets:

23 (1) Ducati defines the area to be surveyed. The “California represented” market
24 includes only those areas where Ducati has “representation”, therefore excluding all geography north of
25 Sacramento and some large Southern California counties, such as San Bernardino and Riverside, where
26 there are no dealerships selling Ducati motorcycles. (II:10-11, 13) It is the following: the Sacramento

27 ²³ As examples, there is no demographic information regarding gender, age, or marital status of the various populations;
28 population density; population growth; or average household income. Geographic information is nonexistent, so natural
barriers (such as mountains, deserts and lakes) or artificial ones (such as military bases, parks and roadways) are not
considered.

1 CBSA (four counties); the San Francisco CBSA (five counties); the San Jose CBSA (two counties); the
2 Los Angeles CBSA (two counties); and six separate CBSA's (Santa Rosa-Petaluma, Modesto, Santa
3 Cruz-Watsonville, Salinas, Fresno, and Santa Barbara-Santa Maria). (I:163; PR-536)

4 (2) Next, Ducati calculates its market shares in the total "California represented"
5 market: (III:50, 60; PR-525, PR-536, PR-540)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Sportbike	3.6%	3.9%	2.9%	2.4%	4.75%
Touring	0.7%	1.1%	0.9%	0.7%	0.67%
Traditional	21.3%	26.4%	33.1%	43.2%	44.58%

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11 (3) Ducati then applies these percentages to the "Sacramento CBSA" by multiplying
12 the competitive group sales numbers in the "Sacramento CBSA" by these percentages, obtaining
13 numbers it calls "expected registrations" (i.e., Ducati's sales performance in the "Sacramento CBSA" if it
14 had attained the same sales percentages as the collective "California represented" percentages).

15 (4) Ducati then uses these "expected registration" numbers in two ways:

16 A. Ducati fractionalizes the "expected registration" numbers with actual
17 Ducati sales in the "Sacramento CBSA" and calculates an "efficiency percentage" for each number, thus
18 comparing the "level of performance" of Ducati sales in the Sacramento CBSA "versus a set of
19 parameters" which, in this analysis, is the "California represented" market; and

20 B. Ducati adds or subtracts the "expected registration" numbers with the
21 numbers of actual Ducati warranty registrations in the "Sacramento CBSA" to get "lost sales". (III:88;
22 PR-521 to PR-525)

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1 (5) According to Ducati, the higher the “efficiency percentage” number, the better the
 2 sales performance because the numbers approximate more closely the “California represented” numbers.
 3 The “efficiency percentages” of the “Sacramento CBSA” are the following: (PR-521 to PR-525)

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Sportbike	67.67%	51.5%	40.90%	46.41%	43.98%
Touring	65.33%	61.0%	79.85%	73.61%	26.56%
Traditional	52.02%	68.4%	80.35%	69.31%	82.97%

8
 9 (6) Lastly, Ducati calculates sales “lost” in the “Sacramento CBSA” to other brands:
 10 (PR-525, PR-536)²⁴

	<u>2003</u>	<u>2004</u>	<u>2005</u>	<u>2006</u>	<u>To 6/30/07</u>
Sportbike	16	24	25	17	28
Touring	0	1	-1	0	3
Traditional	19	14	21	45	6

16 *The Convenience of Consumer Care Offered by Good Times*

17 117. Since Good Times has a “dedicated Ducati mechanic”, there is usually not a wait for a
 18 customer to get service. If, on occasion, a customer must wait, it is “usually” not more than a few days
 19 and “that is only because we want to make sure we get the Ducati mechanic to do that repair.” (IV:56)

20 **Findings Relating to Whether the Establishment of an Additional Franchise**
 21 **Would Increase Competition and Therefore be in the Public Interest [Section 3063(e)]**

22 118. Ducati’s market share is small, but sales are growing steadily and impressively. Although
 23 it is a “niche” product, therefore appealing to a certain type of buyer (older, male, more affluent and
 24 knowledgeable), there is ample room for increased competition within this expanding market.

25 119. The establishment of a second Ducati franchise in the Sacramento area would increase
 26 competition, both between protestant and A & S, and between the Ducati line-make and other brands.

27
 28 ²⁴ These figures differ from those in PR-521 to PR-525.

1 There is room for two dealerships to attempt to exploit a growing consumer interest in Ducati
2 motorcycles. Consumers will have clear choices, since each dealership offers unique approaches to the
3 public: A & S will market exclusively European products in a polished atmosphere, while Good Times
4 will continue to primarily market to its customer base of sport bike enthusiasts aged 19 to 26 in a casual,
5 masculine, atmosphere.

6 120. With increased marketing of Ducati motorcycles, consumer interest in the line-make
7 would be enhanced, and competition between Ducati and other brands would increase, which would also
8 be in the public interest.

9 ANALYSIS

10 *Permanency of the Investment [Vehicle Code section 3063(a)]*

11 121. In 1995, protestant purchased the right to sell Ducati motorcycles from another
12 Sacramento dealership, one called Mega Cycles. This was an astute investment: Good Times' Ducati
13 franchise, acquired for the minimal purchase price of \$17,000, has yielded substantial monetary returns.

14 122. However, since that initial outlay, there have been no additional contributions made by
15 protestant attributable solely to the enhancement of the Ducati line-make (as opposed to items held for
16 resale, such as parts and accessories). Even capital improvements to the dealership's real estate and other
17 expenditures (which benefit all line-makes carried by protestant) have been small.

18 123. Therefore, protestant has not sustained its burden of proof of showing permanency of its
19 investment, despite the Walker family's substantial investment in the dealership real estate, its longevity
20 in the motorcycle business, the number of its employees, and the length of its Ducati franchise.

21 *Effect on the Retail Motor Vehicle Business and the Consuming Public* 22 *in the Relevant Market Area [Vehicle Code section 3063(b)]*

23 124. Protestant has not sustained its burden of proof in this regard. No significant impact on
24 protestant's Ducati motorcycle business has been shown, despite the fact that the prospective dealership
25 would be only 7.5 miles from protestant's store.

26 125. Substantial additional and incremental sales (and service) opportunities are available in the
27 Sacramento market, which may be captured by Good Times as well as by an additional dealer in the area.

28 126. Because of protestant's 2006 to 2007 jump in Ducati sales from 51 to 77, it is reasonable

1 to conclude that Good Times has the capability to effectively compete for Ducati motorcycle sales and
2 service opportunities.

3 127. The effect on the consuming public would be salutary: consumers would benefit by the
4 attractiveness of an additional Ducati dealership with a modern spacious facility and the amenities it
5 offers.

6 **Whether it is Injurious to the Public Welfare for an**
7 **Additional Franchise to be Established [Vehicle Code section 3063(c)]**

8 128. In fact, the public welfare will be enhanced: the public's observation of the new activity
9 at A & S Motorcycle Parts (the use of the previously-vacant showroom and underutilized service
10 facilities) will increase consumer confidence and convenience.

11 **Whether Good Times is Providing Adequate Competition and Convenient Consumer**
12 **Care, Taking Into Consideration Facilities and Personnel [Vehicle Code section 3063(d)]**

13 129. Protestant has established that it is providing adequate competition and convenient
14 consumer care. This is true even though its facilities have not been upgraded, its retail showroom is
15 crowded, its salespersons may have been inefficient, and its service facilities may have been
16 disorganized.

17 130. Good Times is an "adequate" representative of the Ducati line-make. Its sales generally
18 conform to other market areas. Its service department is responsive to customers.

19 131. It is true that upward trends of Ducati sales in other areas and nationwide are not reflected
20 in Good Times' market share, which has held steady at about 54% of the sales in the "Sacramento
21 CBSA". This could be due to a number of factors, unknown in this proceeding. However, in part, it may
22 be reflective of protestant's lack of initiative or innovation in promoting the Ducati line-make.

23 **Whether the Establishment of a New Dealership would Increase**
24 **Competition and Therefore be in the Public Interest [Vehicle Code section 3063(e)]**

25 132. Since sales of Ducati motorcycles have increased steadily in recent years, establishing a
26 new dealership will create opportunities for increased competition, despite the limited appeal of the
27 brand. Protestant and the proposed franchisee present different marketing choices to consumers, which
28 will be in the public interest.

DETERMINATION OF ISSUES

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2 1. Protestant has not sustained its burden of proof of establishing the permanency of its
3 investment. [Section 3063(a)]

4 2. Protestant has not proved an adverse effect on the retail motor vehicle business and the
5 consuming public in the relevant market area and therefore has not sustained its burden of proof in this
6 respect. [Section 3063(b)]

7 3. Protestant has not proved that it would be injurious to the public welfare for an additional
8 Ducati dealership to be established and therefore has not sustained its burden of proof in this respect.
9 [Section 3063(c)]

10 4. Protestant has sustained its burden of proof of establishing that it is providing adequate
11 competition and convenient consumer care for Ducati vehicles in the relevant market area, taking into
12 consideration the adequacy of motor vehicle sales and service facilities. Protestant has not sustained its
13 burden of proof of showing its adequacy of equipment, supply of vehicle parts, and qualified service
14 personnel. [Section 3063(d)]

15 5. The establishment of a new Ducati dealership would increase competition and therefore be
16 in the public interest; Protestant has not sustained its burden of proof in this regard. [Section 3063(e)]

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1 **PROPOSED DECISION**

2 Based on the evidence presented and the findings herein, it is hereby ordered that Protest No.
3 PR-2048-07 is overruled. Protestant has not met its burden of proof under Vehicle Code section 3066(b)
4 to establish that there is good cause not to enter into a Ducati franchise establishing A&S Motorcycle
5 Parts, Inc., as a Ducati dealer at 1125 Orlando Avenue, Suites F & G, Roseville, California.

6
7 I hereby submit the foregoing which constitutes
8 my Proposed Decision Following Remand in the
9 above-entitled matter, as the result of a hearing
10 before me and I recommend this Proposed
11 Decision Following Remand be adopted as the
12 Decision of the New Motor Vehicle Board.

13 DATED: June 13, 2008

14 By: 
15 DIANA WOODWARD HAGLE
16 Administrative Law Judge
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27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV