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9 **BURBANK KAWASAKI**

10 **STATE OF CALIFORNIA**

11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 **BURBANK KAWASAKI, INC.,**

14 Protestant.

15 v.

16 **KAWASAKI MOTORS CORP., U.S.A., a**
17 **Corporation,**

18 Respondent.

Protest Number: PR-2328-12 and PR-2333-12

**PROTESTANT'S OPENING POST-
HEARING BRIEF**

Hearing Date: February 5, 2013

Hearing Time: 10:00 a.m.

ALJ: Hon. Jerold A. Prod

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22 Pursuant to the Order Establishing Post-Hearing Briefing Schedule, dated February 7, 2013 in
23 the above-captioned matter, Protestant BURBANK KAWASAKI, INC. (BKI or Protestant) hereby
24 submits its Opening Post-Hearing Brief as follows:
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1 **INTRODUCTION**

2 These protests involve the attempt by Respondent KAWASAKI MOTORS CORP., U.S.A.
3 (KMC or Respondent) to terminate the motorcycle and ATV franchises of BKI. The two operative
4 notices of intent to terminate (one for motorcycles and one for ATVs) were given on January 24, 2012.
5 (Respondent Exhibits 301 and 302). Timely protests were filed, and the protests were consolidated for
6 purposes of hearing and decision. The stated grounds for termination were based upon allegations of
7 BKI's failure to:
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- 9
- 10 1. maintain model inventory;
 - 11 2. meet sales requirements;
 - 12 3. provide equal representation for Kawasaki products; and
 - 13 4. maintain a wholesale financing line of credit (ie. flooring). (Exhibits 301 and 302).

14 The hearing in these matters was held on February 5, 6, and 7, 2013 before New Motor Vehicle
15 Board ALJ Jerold A. Prod. Michael M. Sieving, Esq. appeared on behalf of BKI. Maurice Sanchez,
16 Esq. appeared on behalf of KMC.

17 **ISSUE PRESENTED**

18 The sole issue in these consolidated protests is whether "good cause" exists for the termination
19 of the BKI motorcycle and ATV franchises, in consideration of the factors set forth in Vehicle Code
20 Section 3061.¹

21 **BACKGROUND**

22 BKI is a longstanding Kawasaki dealer, and has continuously been KMC's franchisee in
23 Burbank for the past 35 years. BKI is owned and has been owned and operated by Leon Bellissimo, the
24 dealer principal at BKI. Prior to 1978, when BKI took on the Kawasaki line, Mr. Bellissimo worked for
25 his brother's successful Kawasaki dealership in Hollywood, which was another long-established
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28 ¹ All Statutory references herein are to the Vehicle Code unless otherwise indicated.

1 franchisee. BKI has received many awards from KMC over the years, praising the dealership for its
2 performance.

3 During the hearing in this matter, KMC presented evidence to establish that the sales
4 performance of BMI was deficient, and that the lack of an unrestricted wholesale line of credit violated
5 the terms of the Dealer Sales and Service Agreement (Exhibit 303) which also contributed to a lack of
6 sales performance of the dealer. BKI presented evidence to establish that the decline its sales
7 performance was a result of the slowing economy, and the cancellation of its flooring line was due to
8 circumstances beyond its control -- specifically the unilateral modification of its flooring agreement
9 with Kawasaki Motors Finance Corporation (KMF) in a manner which required BKI to provide an
10 irrevocable letter of credit to KMF in the amount of \$212,000, which BKI was unable to secure prior to
11 the evidentiary hearing. BKI established that it had funds available to it to purchase units from KMC
12 for cash, (and had in fact been purchasing units from KMC for cash), but that KMC refused to deliver
13 enough units in an amount sufficient for BMI to meet its sales potential.
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17 KMC has the burden of production and persuasion in this matter. (Section 3066(b)). As
18 discussed below, KMC failed to produce evidence related to number of the "good cause" factors that
19 the Board is mandated to consider under Section 3061. After consideration of the evidence submitted
20 by the parties, as well consideration of the lack of evidence adduced by KMC to support a number of
21 the statutory good cause factors, BKI will respectfully request that this Board sustain the protests in
22 these matter.
23

24 ARGUMENT

25 In determining whether "good cause" has been established to terminate the franchises of BKI,
26 Section 3061 requires that the Board consider evidence related to the "existing circumstances",
27 including but not limited to the following factors:
28

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

18 **A. Evidence Related to the "Existing Circumstances" at BKI.**

19 The evidence presented at the hearing established that BKI has been a Kawasaki dealer at the
20 same facility in Burbank, California since 1978. (1 RT 17:18-21). The rent on the facility is currently
21 around \$3,000 to \$4,000 per month, which was lowered in recent years. (1 RT 17:22-18: 2). BKI has
22 several scooter lines, but nothing that competes with the Kawasaki motorcycle or ATV products. (1
23 RT 18:2- 9; 2 RT 27:7-10). Leon Bellissimo, the owner of BKI, purchased the dealership in 1978 for
24 approximately \$100,000, which included inventory. (2 RT 199:24-200:19).

25 BKI has, since its inception, floored its Kawasaki inventory through KMF. (2 RT 19:17-23).
26 In June of 2011, KMF reduced the flooring line for BKI from \$750,000 to \$10.00, a decision which
27 was originally based upon the contention that the dealership financial statements had not been
28 submitted in a timely manner. (Exhibit 304). Between 1978 and 2011, BKI had been late in

1 submitting financial statements on several occasions for various reasons, had received "computer-
2 generated" reminders to submit the financial statements, but the flooring line had not been suspended
3 or cancelled. (2 RT 201:16-203:15). By letter dated September 26, 2011, KMC notified BKI that the
4 dealership need to reestablish a flooring line in the amount o \$765,500, an amount determined by
5 KMC to be necessary as a "total for all product lines". At the time of this letter, BKI also had the
6 Mule, the UT, and the jet ski lines of products offered by Kawasaki and floored with KMF. (2 RT
7 12:16-19).

8
9 On or about December 7, 2011, KMF notified BKI that, in order for KMF to reinstate the
10 flooring line, it would be necessary for BKI to provide KMF with an Irrevocable Letter of Credit
11 (IROC) in the amount of \$212,000 for a flooring line of \$848,000. (Exhibit 306 at KMC00981). In
12 early 2012, KMC unilaterally terminated the Mule line, the UT line, and the jet ski line previously held
13 by BKI and whose inventory was also floored by KMF. (2 RT 12:16-19). Protests were not filed due
14 to the fact that those products are outside the jurisdiction of the Board. (2 RT 12:20-23; Vehicle Code
15 Section 3051). At the time of the hearing, BKI did not have the Kawasaki Mule, UT or jet ski lines. (2
16 RT 12:24-13:1). The termination of these lines required that BKI has flooring far less that the
17 \$765,500 amount that had been established by KMC when BMI was authorized to carry these
18 products. (2 RT 216:5:-18). There has been a further reduction in the necessary flooring limit by
19 virtue in a recent change in the vehicle ordering system at KMC which allows dealers to order units
20 more frequently (from yearly to once every two months), as compared to the system in place when the
21 original limits were established. (2 RT 216:11-217:21).

22
23 Beginning in early 2012, Leon Bellissimo, on behalf of BKI, made numerous attempts to
24 obtain an ILOC from Bank of America, Wells Fargo Bank, and at least at least one other financial
25 institution to satisfy the newly-imposed requirements of KMF. (2 RT 207:25-208:15). Mr. Bellissimo
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1 also sought to secure the flooring line with KMF with his residence, as he had previously done in the
2 1980s. (2 RT 208:11-20). Mr. Bellissimo was unsuccessful in getting KMF to accept his residence as
3 collateral (which, of course, would be in addition to the actual vehicle inventory being floored), nor
4 was he successful in obtaining an IROC. In the 35 years that BKI has been a Kawasaki dealer, it never
5 sold a unit floored by KMF and not paid for that unit. (2 RT 211:18-23).

7 Despite being unable to comply with the newly imposed requirements by KMF for the
8 \$212,000 ILOC, BKI has made alternate arrangements for the purchase of units on a "cash" basis, or
9 by payments through "K-Pay" (KMC's on-line payment system). (2 RT 201:20- 211:4). One of the
10 financial arrangements made by BKI was to secure a commitment from Anthony Bellissimo (Leon
11 Bellissimo's brother and the previous owner of Hollywood Kawasaki), in which Anthony Bellissimo
12 pledged the balance of a bank account with Boston Private Bank owned by Anthony Bellissimo to BKI
13 to allow BKI to purchase inventory from KMC for cash. (Exhibit 10). At the time of the hearing, this
14 pledged account had a balance of approximately \$187,000, which is far in excess of meeting the
15 reasonable requirements of KMC in terms of product availability, given the recent changes in the
16 vehicle ordering system and the termination of the jet ski, UT, and Mule lines which would have
17 otherwise demanded a larger financial commitment.

20 These "existing circumstances" are clearly significant as to the Board's determination of the
21 merits of these protests, and must be considered in conjunction with the evidence related to the specific
22 "good cause" factors set forth in Section 3061.
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24
25 **B. Evidence Related to "Good Cause" Factors Contained in Section 3061.**

- 26 1. Evidence Related to the Amount of Business Transacted by the Franchisee,
27 as Compared to The Business Available to the Franchisee. (Section 3061(a)).
28

1 In support of its position that BKI failed to transact an adequate amount of business, as
2 compared to the business available to it, KMC presented the testimony of Michael Palmer, senior
3 manager at Urban Science Applications, Inc. (USAI). (Generally, 2 RT 127-169³). Mr. Palmer
4 testified that he performed an analysis of the sales effectiveness of BKI, and determined that the
5 dealership was not performing at a level of expected sales. (2 RT 150: 2-8). However, upon cross-
6 examination, Mr. Palmer admitted that his analysis is based upon the ability of the dealer to receive an
7 adequate supply of vehicles from the franchisor, and that the inability of the dealer to receive inventory
8 would be a cause which would negatively affect sales performance. (2 RT 160:12 - 162:25).
9

10
11 BKI has been confronted with an obvious inability to acquire, stock and sell KMC products.
12 There are several reasons for the fact that BKI finds itself in this situation. First, the record is replete
13 with evidence to establish that there has been a significant decline in the demand for discretionary
14 vehicle spending (for motorcycles and ATVs), since at least the year 2008. Second, and perhaps most
15 significantly, the decision by KMF to continue the flooring line for KMF *only if* BKI complies with a
16 newly-imposed requirement that BKI obtain an ILOC in the amount of \$212,000 (which it was unable
17 to do as of the time of the hearing), which far exceeds any reasonable requirement, resulted in a
18 situation in which BKI could no longer floor vehicles, and interfered with its ability to sell units
19 sufficient to meet its expected sales. In January of 2013, (since BKI was unable to secure an ILOC as
20 demanded by KMF) BKI sought to reopen its flooring line with KMF in the initial amount of \$20,000,
21 and increase the credit amount over time. (Exhibit 9 at p. 1). The KMF response was to require the
22 full \$212,000 in an ILOC before it would open the line. (id). BKI explored every option with respect
23 to allowing it to obtain inventory from KMC, but was denied every opportunity by KMC and KMF.
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³ References to the Reporter's Transcript shall be to volume number "RT", followed by page and line numbers.

1 Thus, it's "business available" to BKI was severely hampered by circumstances beyond the control of
2 the dealer.

3
4 (2) Evidence Related to the Investment Necessarily Made and Obligations Incurred
by the Franchisee to Perform its Part of the Franchise. (Section 3061(b)).

5 As noted above, BKI invested approximately \$100,000 when it purchased the dealership in
6 1978. There has been no allegation made by KMC or evidence submitted by KMC to suggest that BKI
7 has not made the necessary investment nor has incurred the obligations to perform its part of the
8 franchise.
9

10 (3) Evidence Related to the Permanency of the investment. (Section 3061(c)).

11 KMC has presented no evidence to support a determination that the investments made by BKI
12 are not permanent in nature. In fact, the Board has previously addressed this factor in another Kawasaki
13 Motors case, under facts substantially similar to those present in this case, and has determined that the
14 dealer in that case in fact had a "permanent investment" by virtue of the very nature of the dealer
15 principal's dedication to the Kawasaki brand. (See In *Kon Tiki Motorcycles v. Kawasaki* (Protest No.
16 PR-179-78), of a copy of the decision is attached hereto as Exhibit A).
17
18

19 (4) Evidence Related to Whether it is Injurious or Beneficial to the Public
20 Welfare for the Franchise to be Modified or Replaced or the Business of the
21 Franchisee disrupted. (Section 3061(d)).

22 KMC presented no evidence to establish that it would be beneficial to the public welfare to
23 terminate the franchises of BKI. The only evidence submitted on this factor consisted of the testimony
24 of the KMC witnesses that the consumers of Kawasaki products in the Burbank Statistical Evaluation
25 Area (SEA) would be required to travel further for service if the BKI franchises are terminated. (2 RT
26 55:17-23). KMC has no plans to replace BKI if the Board permits the franchise terminations. (2 RT
27
28

1 54:21-55:12). There was no evidence submitted to support a determination that the public would be
2 benefited in any manner with the termination of the BKI franchises.

3
4 (5) Evidence Related to Whether the Franchisee has Adequate Motor Vehicle
5 Sales and Service Facilities, Equipment, Vehicle Parts, and Qualified Service
6 Personnel to Reasonably Provide for the Needs of the Consumers
7 for the Motor Vehicles Handled by the Franchisee and has Been
8 and is Rendering Adequate Services to the Public.

9 KMC failed to present evidence related to this factor. The evidence in the record established
10 that BKI has two to three mechanics, and that KMC has never advised BKI that they are deficient in
11 terms of the number of mechanics or training. (2 RT 190:9-18). Furthermore, there was no evidence
12 adduced to suggest that BKI lacked facilities, equipment, or parts to reasonably provide for the needs of
13 Kawasaki customers in the market, nor was it now or at any time rendering adequate services to the
14 public.

15
16 (6) Evidence Related to Whether the Franchisee Fails to Fulfill the Warranty
17 Obligations of the Franchisor to be Performed by the Franchisee.

18 KMC presented no evidence to support a determination that BKI failed to fulfill the warranty
19 obligations of KMC to be performed by BKI under the terms of the Dealer Sales and Service
20 Agreement.

21
22 (7) Evidence Related to the Extent of Franchisee's Failure to Comply with
23 the Terms of the Franchise.

24 KMC presented evidence in an attempt to establish that BKI has failed to comply with
25 paragraph 14 of the Dealer Sales and Service Agreement (Exhibit 303), which requires that the dealer
26 "maintain ... a line of credit with a financing institution satisfactory to [KMC] ... which will permit
27 [BKI] to fully carry out and perform [BMK's] duties and obligations under this Agreement".
28

1 Section 3067(a) permits the Board to conditionally sustain a termination protest, provided that
2 the "[c]onditions imposed by the [B]oard shall be for the purpose of assuring performance of binding
3 contractual agreements between franchisees or franchisors". BKI respectfully requests that, if the
4 Board were to determine that a breach of the franchise occurred with respect to the failure of BKI to
5 maintain a wholesale flooring line, the Board conditionally sustain the protest to allow BKI to
6 reestablish its flooring line in full compliance with the agreement, based upon terms and conditions
7 consistent with the provisions of California law.
8

9
10 **CONCLUSION**

11 For the reasons set forth above, Protestant BKI respectfully requests that the Board issue its
12 decision sustaining the protests in this matter or, at a minimum, conditionally sustain the protests to
13 permit BKI to obtain a flooring line sufficient to enable it to purchase a sufficient quantity of inventory
14 in order to permit it to meet its reasonably expected sales obligations.
15

16 Dated: March 18, 2013

CALLAHAN THOMPSON SHERMAN & CAUDILL LLP

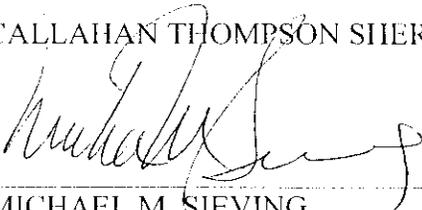
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19 _____
20 MICHAEL M. SIEVING
21 Attorney for Protestant
22 BURBANK KAWASAKI, INC.
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EXHIBIT A

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

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	1,671	

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>		<u>Purchases</u>	
	<u>10/1/76 - 9/30/77</u>	<u>Units % of County</u>	<u>10/1/77 - 6/30/78</u>	<u>Units % 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</u>	<u>Share</u>	<u>1/1/77 - 3/31/77</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</u>	<u>Share</u>	<u>1/1/77 - 3/31/77</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.

* * * * *

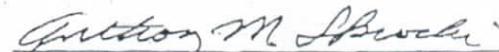
The following proposed decision is respectfully submitted:

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.


ANTHONY M. SKROCKI
Hearing Officer
New Motor Vehicle Board

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PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF SACRAMENTO)

I am employed in the County of Sacramento, State of California, I am over the age of 18 years and not a party to the within action; my business address is 1545 River Park Drive, Suite 405, Sacramento, California.

On this date, March 18, 2013, I served the foregoing document described as:

PROTESTANT'S OPENING POST-HEARING BRIEF

I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted below.

X (By United States Mail) I placed the envelope for collection and mailing, following our firm's ordinary business practices. I am familiar with our firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

____ (By messenger service) I served the documents by placing them in an envelope or package addressed to the persons at the addresses below and providing them to a professional messenger service for service.

____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

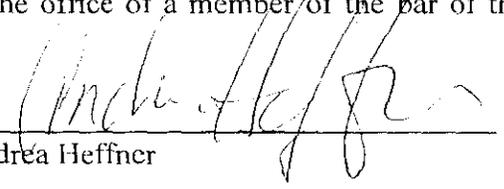
____ (By electronic service) Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below.

____ (By personal service) I served the documents by delivering the envelope, by hand, to the persons listed below.

____ (By [Insert Electronic Service Provider]) I caused the above-entitled documents to be served through [Insert Electronic Service Provider] addressed to all parties appearing on the [Insert Electronic Service Provider] electronic service list for the above-entitled case. The file transmission was reported as completed and a copy of the [Insert Name of Electronic Service Filing Receipt] pages will be maintained with the original documents in our office. Service will be deemed effective as provided for in the Electronic Case Management Order. I have complied with California Rules of Court, Rule 2.257(a) and the original, signed Proof of Service is available for review and copying at the request of the court or any party.

1 Executed on March 18, 2013, at Sacramento, California.

2 I declare under penalty of perjury under the laws of the State of California that the above is true
3 and correct. I further declare that I am employed in the office of a member of the bar of this
4 court at whose direction the service was made.

5 
6 _____
7 Andrea Heffner

8 **SERVICE LIST**

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