

1 NEW MOTOR VEHICLE BOARD
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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD
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11 In the Matter of the Protest of)
12 POMONA VALLEY KAWASAKI/KTM,) **Protest No. PR-1978-05**
13 Protestant,)
14 v.) **PROPOSED DECISION**
15 KTM NORTH AMERICA,)
16 Respondent.)

17
18 PROCEDURAL BACKGROUND
19

20 1. Protestant, Pomona Valley Kawasaki/KTM¹ (hereinafter "PVK" or
21 "Protestant") is the franchisee of Respondent, KTM North America. PVK
22 was located at 1170 W. Holt Boulevard, Ontario, California and was
23 licensed as a new motor vehicle dealer by the California Department of
24 Motor Vehicles ("DMV").²

25
26 ¹ According to the records of the California Secretary of State, the corporate entity
27 is K.C. Motorsports, Inc. The records also indicate no problem with the standing of
K.C. Motorsports, Inc. DMV records indicate that K.C. Motorsports, Inc. is doing
business as Pomona Valley Kawasaki/KTM.

28 ² The DMV records currently indicate that, due to the lapse of its bond, Protestant's
new motor vehicle dealer's license was deemed automatically revoked by DMV in

1 2. Ken Carter and Kindra Carter are the dealer principals of
2 Protestant.

3 3. KTM North America ("KTM" or "Respondent") is headquartered
4 in Amherst, Ohio, and is licensed by the California DMV as a
5 distributor of motorcycles.

6 4. By letter dated October 3, 2005, KTM notified Protestant of
7 KTM's intent to terminate PVK's KTM Dealer Agreement. The notice
8 stated the grounds for termination as follows:

9 Please be advised that KTM wishes to terminate your dealer
10 agreement according to the provisions of California
11 franchise statutes, section 3060 (a)(1)(A), effective 60
12 days upon receipt of this written notice. KTM's specific
13 grounds for the termination are:

14 A vacant, currently non-operating dealership on W Holt
15 Avenue, Ontario in connection with an unauthorized
16 relocation to a non-approved establishment in Phelan,
17 California, 45 miles away from the original Ontario
18 location.

19 5. PVK filed its protest on November 7, 2005, pursuant to
20 Vehicle Code section 3060³.

21 6. The PVK dealer principals, Ken Carter and Kindra Carter,
22 are acting in pro per in representing PVK.

23 7. Robert E. Davies, Esq., of Caulfield, Davies & Donahue, LLP,
24 P.O. Box 277010, Sacramento, California, represents Respondent.

25 8. The following indicates what has transpired from the time of
26 the filing of the protest on November 7, 2005 to date.

27 December 2004. This was prior to the filing of this protest on November 7, 2005.
28 Respondent has not asserted that the absence of such a license precludes the filing
of a protest.

³ All statutory references are to the California Vehicle Code, unless noted
otherwise.

- 1 ▪ November 10, 2005: The New Motor Vehicle Board ("Board") issued
2 a Notice of Telephonic Pre-Hearing Conference to Protestant and
3 Respondent setting November 22, 2005, as the date for a
4 telephonic Pre-Hearing Conference.
- 5 ▪ November 22, 2005: The noticed Telephonic Pre-Hearing Conference
6 was held with Ken Carter and Robert Davies participating. Due to
7 concerns about a bankruptcy filing involving Protestant and/or
8 the dealer principals, by stipulation of the parties, the Pre-
9 Hearing Conference was set to resume December 14, 2005. The
10 Notice of Resumption of Telephonic Pre-Hearing Conference was
11 dated November 22, 2005, and sent via regular mail.
- 12 ▪ December 14, 2005: The noticed Telephonic Pre-Hearing Conference
13 resumed but, again due to concerns about a bankruptcy filing, was
14 re-set to resume January 30, 2006. Ken Carter and Robert Davies
15 stipulated to the new date and the Board issued the Notice of
16 Resumption of Telephonic Pre-Hearing Conference on December 15,
17 2005. This notice was sent via regular mail.
- 18 ▪ January 30, 2006: The Telephonic Pre-Hearing Conference was
19 initiated by the Board as scheduled but neither Ken nor Kindra
20 Carter participated so no appearance was made in behalf of
21 Protestant. Robert Davies participated on behalf of Respondent.
22 On January 30, 2006, the Board issued a Notice of Telephonic
23 Status Conference for March 30, 2006. This notice was sent via
24 regular mail.
- 25 ▪ March 30, 2006: The noticed Telephonic Status Conference was
26 held with Ken Carter and Robert Davies participating. Mr. Carter

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1 represented that the bankruptcy proceedings were "closed".⁴ By
2 stipulation of the parties, the Pre-Hearing Conference was set to
3 resume on May 3, 2006. The Notice of Resumption of Telephonic
4 Pre-Hearing Conference was dated April 3, 2006, and sent via
5 regular mail.

- 6 ▪ May 3, 2006: The Telephonic Pre-Hearing Conference was initiated
7 by the Board as scheduled but neither Ken nor Kindra Carter
8 participated so no appearance was made in behalf of Protestant.
9 Robert Davies participated on behalf of Respondent. On May 3,
10 2006, Robin Parker, Senior Staff Counsel of the Board, left Mr.
11 Carter a voicemail concerning the missed conference call. The
12 phone number on file with the Board was changed as indicated on a
13 recorded message. The Board was not notified of any changes.
14 The voice-mail message was left at the new phone number. On May
15 8, 2006, the Board issued a Notice of Telephonic Pre-Hearing
16 Conference for May 15, 2006. This notice was sent via regular
17 mail.
- 18 ▪ May 12, 2006: Ms. Parker left Mr. Carter a voicemail message
19 concerning the upcoming May 15, 2006, conference call.
- 20 ▪ May 15, 2006: The Telephonic Pre-Hearing Conference was
21 initiated by the Board as scheduled but neither Ken nor Kindra
22 Carter participated so no appearance was made in behalf of
23 Protestant. Mary Stewart, Esq. of Caulfield, Davies & Donahue,
24 LLP participated on behalf of Respondent. Ms. Parker left Mr.

25
26 ⁴ The records of the U.S. Bankruptcy Court, Central District of California
27 (Riverside), indicate that, on October 14, 2005, a Chapter 7 voluntary petition in
28 bankruptcy had been filed by Kindra Caroline Carter and Kenneth Carter, with dbas
including K.C. Motorsports, Inc., Pomona Valley KTM, Pomona Valley Kawasaki, PVK, and
K.C. Trucking. The discharge was entered on February 23, 2006 and the case was closed
as of March 9, 2006.

1 Carter another voicemail message concerning his non-appearance.

2 ▪ May 17, 2006: The Board issued an Order to Show Cause ("OSC") to
3 Protestant requiring Protestant to show cause by June 16, 2006,
4 as to why the protest should not be set for a hearing on the
5 merits. The order stated that the failure of Protestant to
6 respond to the OSC would result in the setting of a hearing on
7 the merits within 60 days from the date the response was due.
8 The OSC was sent via United States Postal Service Certified Mail,
9 Return Receipt Requested, to the address provided by Protestant
10 which is the address of the dealership (1170 West Holt Boulevard,
11 Ontario, California 91762). No response from Protestant was
12 received by the Board.

13 ▪ June 19, 2006: The Board issued an Order of Time and Place of
14 Hearing. The hearing on the merits was to commence on Tuesday,
15 August 15, 2006, at 9:00 a.m. This order was sent via United
16 States Postal Service Certified Mail, Return Receipt Requested,
17 to the above address.

18 ▪ June 23, 2006: The Order to Show Cause (the unopened envelope
19 and its contents) was returned to the Board. The envelope
20 contained a notation from the Postal Service to "notify sender of
21 new address". The new address was in Victorville, California.

22 ▪ June 27, 2006: The May 17, 2006, Order to Show Cause and the
23 June 19, 2006, Order of Time and Place of Hearing, were resent
24 via United States Postal Service Certified Mail, Return Receipt
25 Requested, to the forwarding address in Victorville, California.

26 ▪ July 27, 2006: The mailings which were re-sent on June 27, 2006
27 to the Victorville address (the Order to Show Cause and the Order
28 of Time and Place of Hearing) were received back by the Board.

1 Also on this date, the first Order of Time and Place of Hearing,
2 which had originally been sent on June 19, 2006 to the Ontario
3 address, was received back by the Board.

- 4 ▪ Between August 1, 2006 and August 7, 2006: Attorney's
5 Diversified Services, a registered California process server, at
6 the request and expense of the Board, made five unsuccessful
7 attempts to personally serve the Order of Time and Place of
8 Hearing on Ken and Kindra Carter at the address in Victorville,
9 California, which was identified on the forwarding label from the
10 United States Postal Service.
- 11 ▪ August 15, 2006: The hearing on the merits of the protest was
12 called to proceed before Jerold A. Prod, an administrative law
13 judge of the Board. No appearance was made by anyone in behalf
14 of Protestant. Respondent was represented by Robert E. Davies
15 who was ready to proceed.

16 ISSUE PRESENTED

17 WHETHER PROTESTANT HAS ABANDONED ITS PROTEST

18 9. The following California Code of Regulations sections are
19 applicable to the determination of whether or not Protestant has
20 abandoned its protest.

21 10. California Code of Regulations, Title 13, Article 5, Section
22 589, Failure to Appear, states the following:

23 Any party who fails to appear at a hearing will not be
24 entitled to a further opportunity to be heard unless good
25 cause for such failure is shown to the board or to the
26 administrative law judge within five days thereafter. The
27 lack of such showing of good cause may, in the discretion of
28 the board or the administrative law judge, be interpreted as
an abandonment of interest by such party in the subject
matter of the proceeding.

11. Protestant's failure to appear for multiple Pre-Hearing

1 Conferences, failure to appear at the hearing on the merits and
2 failure to show good cause within five days thereafter are sufficient
3 grounds to conclude that Protestant has abandoned the protest.

4 12. California Code of Regulations, Title 13, Article 1, Section
5 551.8(c), states the following:

6 The board may, at its discretion, dismiss a protest for
7 good cause shown. Good cause may include, but shall not be
8 limited to, failure by the protestant to comply with any of
the following sections of Article 5: 583, 585, 586, 589.
(Emphasis added.)

9 13. Protestant's failure to comply with Section 589 of the
10 California Code of Regulations constitutes an abandonment of its
11 protest and constitutes good cause for dismissal of the protest
12 pursuant to Section 551.8(c) of the California Code of Regulations.

13 FINDINGS OF FACT

14 14. The following findings were considered in determining
15 whether or not Protestant abandoned the protest:

- 16 a. Protestant failed to appear at three Pre-Hearing Conferences
17 on January 30, 2006, May 3, 2006, and May 15, 2006;
- 18 b. Protestant moved without providing a current mailing address
19 or telephone number to the Board;
- 20 c. Protestant failed to respond to the Order to Show Cause as
21 to why the hearing on the merits of the protest should not
22 be set;
- 23 d. Protestant failed to appear for the hearing on the merits on
24 August 15, 2006;
- 25 e. Protestant did not, within five days after the date the
26 hearing was scheduled to commence, show good cause for its
27 failure to appear at the hearing;
- 28 f. Protestant has not made any attempt to contact the Board

1 since March 30, 2006, despite the Board's numerous attempts
2 to contact Protestant.

3 DETERMINATION OF ISSUES

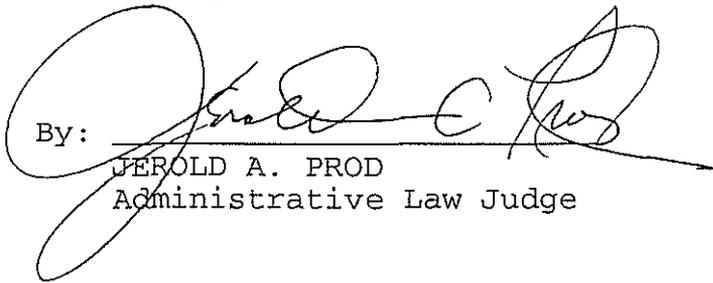
4 15. It is determined that Protestant has abandoned this protest.
5 The abandonment of the protest by PVK is cause for the Board to
6 dismiss the protest with prejudice.

7 PROPOSED DECISION

8 Due to Protestant Pomona Valley Kawasaki/KTM's abandonment of
9 Protest No. PR-1978-05, the protest is hereby dismissed with
10 prejudice.

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13 I hereby submit the foregoing which
14 constitutes my proposed decision in
15 the above-entitled matter, and I
16 recommend this proposed decision be
17 adopted as the decision of the New
18 Motor Vehicle Board.

19 DATED: August 28, 2006

20 By: 

21 JEROLD A. PROD
22 Administrative Law Judge
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27 George Valverde, Director, DMV
28 Mary Garcia, Branch Chief,
Occupational Licensing, DMV