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STATE OF CALIFORNIA
NEW MOTOR VEHICLE BOARD

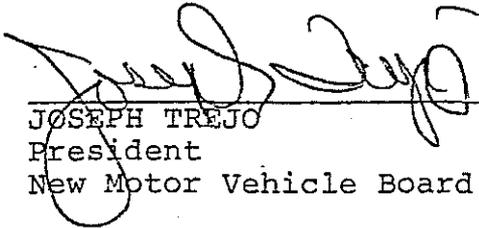
In the Matter of the Protest of)
PASADENA KAWASAKI, INC.,) Protest No. PR-260-79
Protestant,)
vs.)
KAWASAKI MOTORS CORPORATION,)
U.S.A.,)
Respondent.)

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted 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 13th day of May, 1980.



JOSEPH TREJO
President
New Motor Vehicle Board

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PASADENA KAWASAKI, INC.,) Protest No. PR-260-79
Protestant,)
vs.)
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U.S.A.,)
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PROPOSED DECISION

Procedural Background

1. Respondent, Kawasaki Motors Corporation, U.S.A. (Kawasaki), pursuant to Vehicle Code Section 3060^{1/}, by letter dated November 12, 1979, notified Pasadena Kawasaki, Inc., 2084 East Foothill Boulevard, Pasadena, California 91107 (Pasadena), of Kawasaki's intention to terminate Pasadena's franchise. The notice of termination was received by Pasadena on November 14, 1979. Termination was to be effective on January 14, 1980.

2. On December 12, 1979, Ronald L. Hagest (Hagest), General Manager of Pasadena, sent a letter by certified mail

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

to the New Motor Vehicle Board (Board) indicating his desire to file a protest against Kawasaki's termination of Pasadena's franchise. In his letter, Hagest inquired whether any further filing was necessary in order to file a protest pursuant to Section 3060. This letter was received by the Board on December 17, 1979, and accepted for filing as of December 12, 1979.

3. On December 18, 1979, the Board responded to Hagest's letter informing him his letter was accepted for filing but that it had not complied with the Board's regulations with respect to the content of a protest. The Board's letter informed Hagest that he must comply and a copy of the relevant Vehicle Code sections and the Board's regulations were enclosed. In an attempt to comply with the Board's regulations, a protest was filed on January 24, 1980.

4. A hearing was held pursuant to Section 3066 before Gloriette C. Fong, Administrative Law Judge of the Board, in Los Angeles, California, on January 25, 1980.

5. Pasadena was represented by Hagest, in pro per. Kawasaki was represented by Robert G. Lane, Esq. and John P. Howitt, Esq. of the law firm of Paul, Hastings, Janofsky and Walker.

Issues Presented

6. Kawasaki contends that good cause exists to terminate Pasadena's franchise for the following reasons:

(a) Pasadena transferred ownership or interest in the franchise without the consent of Kawasaki, which consent was not unreasonably withheld; (§3060(2)(i))

(b) Pasadena made misrepresentations in its franchise application; (§3060(2)(ii))

(c) The amount of business transacted by Pasadena has been inadequate as compared to the business available to it; (§3061(1))

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

(e) Pasadena's investment is not permanent; (§3061(3))

(f) It would not be injurious to the public welfare for Pasadena's franchise to be terminated; (§3061(4))

(g) Pasadena does not have adequate sales and service facilities, equipment, parts and qualified service personnel to reasonably provide for the needs of the consumers and has not been rendering adequate services to the public; (§3061)(5)

(h) Pasadena has failed to comply with the terms of its franchise. (§3061(7))

7. On January 24, 1980, Kawasaki filed with the Administrative Law Judge a Notice of Motion and Motion to Dismiss on the following grounds:

(a) The protest was legally deficient as to substance and form; and

(b) Hagest, the party filing the protest, had no standing to file a protest on behalf of Pasadena.

8. Kawasaki's motion to dismiss was considered a continuing one throughout the hearing.

Findings of Fact

Findings Relating to the Transfer of Ownership or Interest in the Franchise Without the Consent of Kawasaki (§3060(2)(i))

9. Paragraphs 5C and 6 of the Kawasaki Authorized Dealer Sales and Service Agreement, state there shall be no change in the ownership or management of Pasadena without the prior written consent of Kawasaki.

10. The November 1978 Sales and Service Agreement signed by Pasadena's sole owner, Larry A. Richard (Richard), lists him as President. The agreement lists Mark Mooney as Vice-President and Susan Richard as Secretary-Treasurer, and designates them "and no others" as having managerial authority.

11. Hagest and his wife own Triumph of Burbank, Inc. (Triumph).

12. Effective September 7, 1978, Pasadena entered into a written Management Services Agreement with Triumph for a term of 14 months under which full control and management of Pasadena was transferred to Triumph. This agreement expired on November 7, 1979.

13. The Management Services Agreement between Pasadena and Triumph was never submitted to Kawasaki for its approval. Both Richard and Hagest concealed the existence of the Management Services Agreement.

14. Under the Management Services Agreement, Hagest managed Pasadena without having entered into a Sales and Service Agreement with Kawasaki.

15. The Management Services Agreement which expired November 7, 1979, is the sole basis for Hagest's claim to a right to manage Pasadena.

16. Hagest had previously held a Kawasaki franchise which was terminated in 1977 when problems arose between Hagest and Kawasaki. Hagest and Kawasaki entered into a release in connection with the termination, but Hagest subsequently filed a small claims action against Kawasaki in contravention of the release agreement. As a result of the above, Hagest knew Kawasaki did not wish to do further business with him.

17. Richard has not made any appearance in this matter nor has he communicated in any manner with the Board or Kawasaki with regard to the termination.

Findings Relating to Pasadena Making
Misrepresentations in its
Franchise Application (§3060(2)(ii))

18. Pasadena did not disclose the actual management personnel and/or owners of Pasadena in the Kawasaki Sales and Service Agreement in November 1978. Pasadena did not disclose to Kawasaki the existence of the Management Services Agreement which was executed between Pasadena and Triumph in September 1978.

Findings Relating to the Amount of
Business Transacted by Pasadena as
Compared to the Business Available (§3061(1))

19. Pasadena's general market area is the northeast section of Los Angeles County. In comparison to the four nearest Kawasaki dealers in that area, Pasadena was the only dealer whose sales decreased from 1978 to 1979.

20. From January to June 1979, Pasadena accounted for 2.5 percent of the Kawasaki warranty registrations within a five mile radius of the Pasadena dealership. During this period, Kawasaki's market penetrations in Los Angeles and California were approximately 11 percent.

Findings Relating to the Extent and
Permanency of Investments Necessarily Made
and Obligations Incurred by Pasadena (§3061(2) and (3))

21. When Richard, the sole shareholder of Pasadena, was unable to sell the business at any price, he turned it over to Hagest (Triumph of Burbank) in September 1978.

22. Richard left the state without informing Kawasaki and requested that his mail not be forwarded. He has not been involved in the operation nor received income from the dealership since September 1978.

23. Since Richard did not appear at the hearing, no other information was obtained as to the extent or permanency of his investment.

Findings Relating to Whether it Would
Be Injurious to the Public Welfare for
Pasadena's Franchise to be Terminated (§3061(4))

24. Richard has abandoned Pasadena to Hagest, leaving behind incomplete business records.

25. During Hagest's prior relationship with Kawasaki (see paragraph 16 above) Kawasaki had information that Hagest engaged in the following activities:

(a) Entered into transactions which reduced the time period during which warranty claims would be honored;

(b) Sold new Kawasaki vehicles at a non-franchised location; and

(c) Imported directly from Japan Kawasaki motorcycles which did not comply with certain state and Federal regulations.

Findings Relating to Adequacy of Pasadena's Sales and Service Facilities, Equipment, Parts, and Qualified Service Personnel (§3061(5))

26. Since February 1979, the only salesperson at Pasadena has been Bradley Nevins whose sales experience is limited to a little over one year.

27. Mark Mooney, General Manager from September 1978 to February 1979, has 8 years experience in the motorcycle sales business. He testified that Pasadena was not aggressive in sales, did not have a good parts department, had an inadequately equipped service department, and had a lack of adequate help.

Findings Relating to the extent of Pasadena's Failure to Comply with the Terms of its Franchise (§3061(7))

28. Pasadena failed to disclose to Kawasaki that a change in management of the franchise had occurred. (See findings 9 through 15 above)

29. Kawasaki was informed in July of Hagest's role, but did not receive written acknowledgement that Hagest was general manager until October 1979, a year after the Management Service Agreement became effective.

30. Pasadena failed to supply Kawasaki with financial statements as required by the franchise agreement.

31. Pasadena's percentage of market penetration in its primary area of responsibility did not match Kawasaki's national market penetration percentage as expected by the franchise agreement.

Determination of Jurisdictional
and Procedural Issues

1. At the close of the hearing, the Administrative Law Judge denied Kawasaki's continuing motion to dismiss the protest. Upon reconsideration of the record in its entirety, it is determined that:

(a) Pasadena did not file a timely protest which complied with the Board's regulations as to substance and form;

(b) Hagest, the party filing the protest in behalf of Pasadena, had no authority to do so and was not authorized to represent Pasadena at the hearing.

2. Section 3066 places the burden of proving good cause to terminate the franchise on Kawasaki. Through inadvertence, Hagest, who was purportedly representing Pasadena, was permitted to present his case first contrary to the customary order of proof. It is determined that the findings of fact and following determination of issues contained within this decision would have been reached regardless of the order in which the parties presented their cases.

Determination of Issues

1. Pasadena has transferred ownership or interest in the franchise without the consent of Kawasaki, which consent was not unreasonably withheld; (§3060(2)(i))

2. Pasadena made misrepresentations in applying for its franchise; (§3060(2)(ii))

3. The amount of business transacted by Pasadena has been inadequate as compared to the business available to the franchisee; (§3061(1))

4. There has been no showing that the investments necessarily made and obligations incurred by Pasadena to perform have been substantial or permanent; (§3061(2) and (3))

5. Termination of Pasadena's franchise would not be injurious to the public welfare; (§3061(4))

6. Pasadena does not have adequate sales, service, equipment, parts and qualified service personnel to reasonably provide for the needs of the consumers and has not been rendering adequate service to the public; (§3061(5))

7. Pasadena has materially failed to comply with the terms of its franchise. (§3061(7))

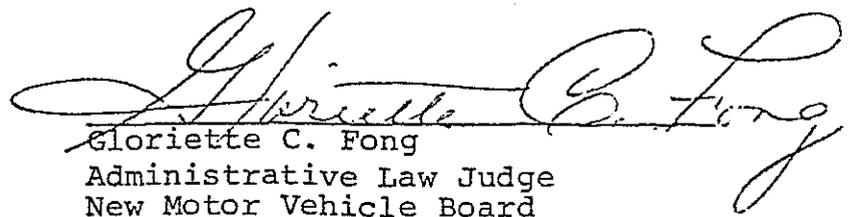
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The following proposed decision is respectfully submitted:

Good cause for termination of Pasadena's franchise has been established. The protest is overruled.

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 date at Los Angeles, California, and recommend its adoption as the decision of the New Motor Vehicle Board.

Dated: May 6, 1980


Gloriette C. Fong
Administrative Law Judge
New Motor Vehicle Board