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LAW OFFICES OF MICHAEL J. FLANAGAN
MICHAEL J. FLANAGAN State Bar #093772
GAVIN M. HUGHES State Bar #242119
DANIELLE R. VARE State Bar #277844
ERIN R. HEGEDUS McINTOSH State Bar #266849
2277 Fair Oaks Boulevard, Suite 450
Sacramento, California 95825
Telephone: (916) 646-9100
Facsimile: (916) 646-9138
Email: lawmjf@msn.com

ATTORNEYS FOR PROTESTANT

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of:

MEGA RV CORP dba
MCMAHON'S RV,

Protestant,

v.

ROADTREK MOTORHOMES, INC.,

Respondent.

**Protest Nos: 2199-10, 2201-01, 2205-10,
2206-10, 2208-10, 2209-10, 2211-10,
2212-10, 2233-10, 2244-10 and 2245-10.**

**PROTESTANT'S REPLY TO
RESPONDENT'S POST-HEARING
BRIEF**

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20 Serpa Automotive Group v. Volkswagen of America, PR-1977-0515

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1 INTRODUCTION

2 Respondent opens its Post-Hearing Brief (“Respondent’s Brief”) with almost 15 pages
3 of disconnected allegations and arguments organized in a manner that is difficult to respond to,
4 and further complicates its presentation by including incorrect and incomplete citations,
5 contradictions to the record and inaccurate statements of fact.¹ For example, on page 2, lines
6 22-23 of Respondent’s Opening Brief, Roadtrek claims that “Mega’s deliberate failure to pay
7 Roadtrek caused Roadtrek significant financial problems.” This statement is cited to hearing
8 transcript dated 9/23/11 at 192:15-193:16. In this portion of the hearing transcript, Mr. James
9 Hammill testified that the Bank of Nova Scotia wanted Roadtrek out because “[t]hey didn’t
10 want to lend to people that had, as they described, that had four wheels and rolled. They didn’t
11 want to have anything associated with automotive.” (Hammill, R.T. 9/23/11, 192:18-193:1.)
12 Although Mr. Hammill testified that the Bank of Nova Scotia mentioned it was “concerned
13 about McMahon’s payment situation,” it is clear from the testimony that the Bank of Nova
14 Scotia wanted to remove itself from financing involving the automotive industry entirely.
15 Therefore, to indicate that McMahon’s payment situation with Roadtrek is the sole reason for
16 Roadtrek’s financial problems is very misleading. (*Id.* at 193:9-16.)

17 In Respondent’s Brief on page 4, lines 19-22, Roadtrek writes that Mega’s interest
18 arrangement with Roadtrek, where interest was only to be charged for the time between the sale
19 of a motorhome to a customer and the date Mega paid Roadtrek, was “...a significant benefit to
20 Mega because GE and Bank of America charge Mega interest as soon as a motorhome is
21 delivered to Mega.” Respondent cites hearing transcript dated 11/15/11 at 20:15-20:20. This
22 citation is completely irrelevant and begins and ends in the middle of an unrelated paragraph
23 regarding the witness turning to page 006300 of Exhibit 674.

24 Another example of Respondent’s misleading citations includes a citation for the
25 statement, “Roadtrek later agreed that Mega could pay it upon the retail funding for each unit,”
26 which Roadtrek cites in the transcript on 8/18/11 at 183:21-183:25. However, this citation
27 explains that Roadtrek expected Mega to pay for units *within 14 days of retail funding*, not at

28 ¹ In fact, the inattention to the accuracy of citations appears throughout Respondent’s Opening Brief. Attached is an appendix which sets forth Respondent’s inaccurate, misleading and errant citations.

1 the time of retail funding to Mega. (emphasis added) (*See also* Schilperoort, 8/18/11 at 184:13-
2 16.)

3 Respondent also argues that “Roadtrek was entitled to suspend its performance under
4 Cal. U. Comm. Code § 2-609(1).” (Respondent’s Brief 12:17-18.) Roadtrek goes on to claim
5 that “...Roadtrek was entitled to withhold the delivery of units to Mega under Cal. U. Comm.
6 Code § 2-703.” (Respondent’s Brief 12:20-21.) These claims are contradictory to the arguments
7 set forth in Respondent’s own Motion to Reserve Making Findings of Fact and Conclusions of
8 Law on UCC Issues (“Respondent’s UCC Motion”), dated July 7, 2011. Respondent wrote,

9 “Roadtrek recognizes that Hanemaayer and McMahon’s communications may be
10 relevant to Mega RV’s protests, particularly with respect to whether Roadtrek was
11 justified in modifying the Dealer Agreements, terminating the Dealer Agreements
12 and withholding payments from Mega RV. Though the Board may need to
13 consider those communications, Roadtrek requests that the Board withhold any
14 formal findings of fact or conclusions of law on whether Mega RV repudiated the
15 Dealer Agreements until the federal court decides the issue.”

16 (Respondent’s UCC Motion 5:9-15.) In fact, Roadtrek argued, “...the question of
17 whether Mega RV’s refusal to provide adequate assurances to Roadtrek constitutes a
18 repudiation is addressed in Cal. U. Comm. Code § 2-609, and has no relation to any
19 administrative regulation or administrative question.” (Respondent’s UCC Motion 4:23-
20 25.) Considering Respondent’s adamant previous argument that this Board not make
21 findings related to the Cal. U. Comm. Code, any related arguments set forth in
22 Respondent’s Post-Hearing Brief should be disregarded.

23 In summary, and as the arguments below will demonstrate, Roadtrek’s characterization
24 of the history between the parties is inaccurate, incomplete and misleadingly suggests Roadtrek
25 has support for arguments which are not supported by evidence in the record.

26 ARGUMENT

27 **I. THE NEW MOTOR VEHICLE BOARD HAS JURISDICTION OVER THE 28 MODIFICATION PROTESTS: PR-2199-10 (COLTON) AND PR-2201-10 (IRVINE) AND SHOULD SUSTAIN THE PROTESTS**

Pursuant to Judge Skrocki’s Order Granting in Part and Denying in Part Protestant’s
Motions in Limine (“ALJ Skrocki’s Order”), dated August 3, 2011, Judge Skrocki

1 acknowledges the Board has jurisdiction over these protests.² In paragraph 30 of ALJ Skrocki's
2 Order, he explains, "...the issue is still limited to whether there was or was not a modification of
3 the franchise *which is within the jurisdiction of the Board* as the only relief being sought is
4 pursuant to Section 3070." (emphasis added)

5 Respondent's claim that it could use its own discretion in determining whether Mega
6 was in "good standing" and therefore was entitled to modify the exclusive territory provisions in
7 its Dealer Agreement with Protestant without regard for the requirements of the California
8 Vehicle Code makes a mockery of the rights granted to dealers under California law.
9 According to Roadtrek's contention, it should be permitted to impose upon its dealers a
10 franchise agreement that contravenes rights granted to RV dealers under the California Vehicle
11 Code. However, Cal. Veh. Code § 3070(b)(1) provides specifically, "[n]otwithstanding...the
12 terms of any franchise, a franchisor of a dealer of recreational vehicles may not modify or
13 replace a franchise with a succeeding franchise if the modification or replacement would
14 substantially affect the franchisee's sales or service obligations or investment, unless the
15 franchise has first given the board and each affected franchisee written notice thereof..."
16 (emphasis added) Respondent cites this requirement of the Vehicle Code, conspicuously
17 leaving out the need for application of the law regardless of the terms of any franchise. (See
18 Respondent's Brief 15:18-24.)

19 Respondent cites case law in an attempt to support its argument that there is no
20 modification in this situation. (See Respondent's Brief 18:3.) However, both cases cited by
21 Respondent, *Ri-Joyce Inc. v. New Motor Vehicle Bd.*, 3 Cal. Rptr. 2d 546 (Cal. Ct. App. 1992)
22 and *BMW of North Am., Inc. v. New Motor Vehicle Bd.*, 209 Cal. Rptr. 50 (Cal. Ct. App. 1984)
23 are easily distinguishable from the current case and, in fact, support Protestant's arguments that
24 placement of Roadtrek franchises within Protestant's exclusive territory, as defined under the
25 franchise agreement, is a modification of Protestant's franchise.

26 Specifically, both cases cited by Respondent involve franchise agreements which did not
27 include exclusive territory provisions, unlike this case. In the case of *BMW of North Am., Inc. v.*

28 ² Respondent repeatedly and incorrectly refers to this Order as dated August 31, 2011. See appendix for further discussion.

1 *New Motor Vehicle Bd.*, the court held that the written terms of the contract [franchise
2 agreement] between the parties clearly provided that the dealer was “not granted the exclusive
3 right to deal in BMW products in any particular geographic area...” (emphasis added) 209 Cal.
4 Rptr. at 57. In fact, “BMW expressly reserved the right to appoint other dealers in BMW
5 products, whether located in [dealer’s] geographic area or not.” *Id.* The court ultimately stated
6 that “the appointment of a new dealer does not change a single provision of [dealer’s] franchise
7 and consequently cannot constitute a modification.” *Id.* at 59. All of these relevant factors are
8 not applicable in this case.

9 In the case of *Ri-Joyce Inc. v. New Motor Vehicle Bd.*, the court reiterated that, “[i]f a
10 franchise agreement does grant a dealer an exclusive, unmodifiable trading area then
11 encroachment upon that area may constitute a modification of the franchise which is subject to
12 protest under section 3060 [of the Vehicle Code].” 3 Cal.Rptr.2d at 552. The facts in the two
13 cases mentioned above and cited by Respondent did not include an exclusive territory provision
14 in the franchise agreements between the dealer and the manufacturer. The facts relevant to
15 these protests are exactly the opposite.

16 Paragraph 107 of Exhibit 600 states that,

17 Dealer shall have the exclusive right to purchase, display and resell
18 Roadtreks, parts and accessories in the Territory as mutually agreed to by
19 Dealer and Home & Park, including lease & fleet sales, but excluding
20 factory sales to rental companies and at national and state/provincial
shows. This agreement shall remain in full force and effect for a period of
three (3) years unless it is terminated for cause as indicated in clause 375
or it is terminated as indicated in clauses 111, 501, and 520.

21 Respondent is no more entitled to modify Protestant’s franchise without first complying
22 with the provisions of Cal. Veh. Code § 3070, than it is to terminate Protestant’s franchise
23 without compliance, whether or not the franchise agreement expressly states grounds for
24 termination, e.g. clauses 375, 111, 501 and 520. Obviously, the mere fact that Respondent has
25 delineated grounds for termination in the Dealer Agreement doesn’t excuse it from complying
26 with the notice provisions of § 3070. Neither is it excused from compliance in regard to
27 franchise modification, regardless of the terms of the franchise.

28

1 Pursuant to paragraph 108 of Exhibit 600, the applicable franchise agreement between
2 the parties, "Dealer territory shall be limited to an area within 60 mile radii of Irvine, California,
3 Colton, California, and Stanton, California. So long as dealer remains in good standing during
4 the terms of this Agreement, Home & Park [Roadtrek] will not locate another dealer within
5 Dealer's territory." This paragraph of the franchise agreement clearly sets forth a territory in
6 which Protestant was granted exclusivity of the Roadtrek market. The appointment of a new
7 dealer in Protestant's territory changed this agreement in a way that substantially affects
8 Protestant's sales and service obligations and investment, resulting in a modification of the
9 franchise agreement. (McMahon, R.T. 8/9/11, 130:6-14, 133:1-5, 133:13-19.)

10 Respondent also cites two previous New Motor Vehicle Board decisions in violation of
11 the California Administrative Procedure Act. (See Respondent's Brief pp. 19-20.) Respondent
12 cites *Novato Toyota v. Toyota Mot. Dist., Inc.*, PR-13-75 and *Champion Motorcycles, Inc. dba*
13 *Champion Honda Yamaha v. Yamaha Motor Corp. USA*, PR-498-83, which are not cases
14 designated as precedent by the New Motor Vehicle Board.³ Pursuant to the California
15 Administrative Procedure Act, "[a] decision may not be expressly relied on as precedent unless
16 it is designated as a precedent decision by the agency." Cal. Gov. Code § 11425.60. The
17 California New Motor Vehicle Board has not designated any cases as precedent to date.
18 Therefore, Respondent's attempt to support its arguments with previous Board decisions is
19 inappropriate and cannot be considered authority in this matter.

20 In conclusion, Respondent's claim that the issue of good standing is not within the
21 Board's jurisdiction is completely false. In actuality, once the modification substantially
22 affecting Protestant's sales and service obligations and investment occurred, and a Protest was
23 filed, Respondent had the burden of proving that Protestant was no longer in good standing, and
24 that there was good cause to modify Protestant's franchises. (ALJ Skrocki's Order, ¶¶ 29-30.) It
25 has not done so.

26 //

27 //

28 ³ In any case, neither of these decisions provides support for Respondent's position. The facts of these cases are not applicable to this situation and are easily distinguishable from the present case.

1 **II. ROADTREK WAS REQUIRED TO GIVE NOTICE OF APPOINTMENT OF**
2 **MIKE THOMPSON'S RV AT COLTON AND DID NOT GIVE SUCH NOTICE**
3 **IN VIOLATION OF CALIFORNIA VEHICLE CODE § 3072 [PR-2233-10]**

4 Respondent was required to give notice to Protestant and the Board before establishing a
5 Roadtrek franchise at Mike Thompson's RV ("MTRV") within 10 miles (actually a few
6 hundred feet) of Protestant's existing franchise in Colton, California, pursuant to Cal. Veh.
7 Code § 3072(a). Respondent argues that the exception to the notice requirement in Cal. Veh.
8 Code § 3072(b)(5) applies in this case because the MTRV dealership location was established
9 before January 1, 2004. This is not a proper reading of the notice exception. The exception
10 specifically states it applies to a "dealership protesting the *location* of another dealership *with*
11 *the same recreational vehicle line-make within its relevant market area*, if the dealership
12 location *subject to the protest* was established on or before January 1, 2004." Cal. Veh. Code §
13 3072(b)(5) (emphasis added). Thus, the exception does not apply to the location of a *new*
14 dealership *of the same line-make* as the existing dealer(s) within the relevant market area. The
15 dealership location at issue in this case is the location of the new Roadtrek franchise, not the
16 MTRV dealership location as a whole. As stated previously in Protestant's Post-Hearing
17 Opening Brief, the exception to the notice provision of Cal. Veh. Code § 3072(a) does not apply
18 to Roadtrek in this case and therefore Roadtrek should be found in violation of Cal. Veh. Code §
19 3072 and Protestant's protest should be upheld.

20 Furthermore, Roadtrek cannot credibly claim that it genuinely thought this exception
21 applied to the establishment of MTRV within Protestant's exclusive territory. As addressed in
22 Protestant's Post-Hearing Opening Brief, Respondent was aware of the notice procedures
23 required under Cal. Veh. Code § 3072 as early as 2006 and most certainly during late 2009 and
24 early 2010 when the establishment of MTRV occurred. (ALJ Hagle, R.T. 9/21/11, 7:15-18.)
25 Roadtrek was made aware of the notice requirements when it was party to the cases of *Manteca*
26 *Trailer and Camper Inc. dba RVs of Sacramento v. Home and Park Motorhomes Roadtrek* and
27 *Manteca Trailer and Camper, Inc., dba Brawley's RV v. Home and Park Motorhomes Roadtrek*,
28 PR-2036-07, which ALJ Hagle has taken official notice of in this hearing.

1 In addition, both Roadtrek and MTRV's owner, Frank DeGelas, knew there would likely
2 be legal repercussions to Roadtrek's establishment of MTRV in Protestant's exclusive territory
3 because Mr. DeGelas requested, and Roadtrek, via Mr. Hammill, agreed, to put an
4 indemnification clause in its Dealer Agreement stating that it will defend any legal claims or
5 protests by Protestant relating to the granting of the Roadtrek franchise to MTRV. (Ex. 685 ¶
6 802; Martinelli, R.T. 1/19/12, 46:6-11; Hammill, R.T. 11/10/11, 124:8-13.)

7 Since the facts clearly demonstrate that Roadtrek knew about the notice requirements
8 under Cal. Veh. Code § 3072 before establishing MTRV, the prudent and most reasonable
9 course of action would have been for Roadtrek to issue the notice required under the law.
10 However, in pursuit of its own hostile agenda regarding Mega, and in defiance of the law,
11 Respondent took the most irresponsible course of action and chose to proceed with the
12 establishment of MTRV without notice to Protestant or the Board.

13 **III. ROADTREK DOES NOT HAVE GOOD CAUSE TO TERMINATE MEGA RV'S**
14 **COLTON, IRVINE AND SCOTTS VALLEY LOCATIONS AND THESE**
15 **PROTESTS SHOULD BE SUSTAINED [PR-2244-10, PR-2245-10]**

16 Respondent argues that Mega's Scotts Valley location is no longer in operation and
17 therefore its related termination protest is moot, Mega's Irvine location is no longer in operation
18 and therefore the Board does not have jurisdiction to hear a protest regarding its new
19 Westminster location⁴ and, lastly, that regardless of the above allegations, Roadtrek has proven
20 it has good cause to terminate all of Protestant's franchises. All three of these assertions are
21 without merit.

22 **1. Mega's Scotts Valley Termination Protest is Not Moot and Should Be**
23 **Sustained. [PR-2245-10]**

24 As cited in Respondent's Brief, "[a] case becomes moot when a court ruling can have no
25 practical impact or cannot provide the parties with effective relief." *Simi Corp. v. Garamendi*, 1
26 Cal. Rptr. 3d 207, 212 (2003). In regard to Protestant's claims against Roadtrek for its Scotts
27 Valley location, any findings of the New Motor Vehicle Board *will* have practical impact and

28 ⁴ Ironically, no Protest has been filed regarding the Westminster location because no Notice of Termination has
been issued regarding the relocation to Westminster. Hence, as Protestant has argued repeatedly, that matter is not
before the Board.

1 will subsequently provide the parties with effective relief. In order for Protestant to be awarded
2 money damages in the related Federal Court case, it must first exhaust its administrative
3 remedies. This requires the New Motor Vehicle Board to make findings under Cal. Veh. Code
4 § 3070 and the good cause factors pertaining thereto, before any further action can occur in the
5 Federal Court related to these matters. A finding that Protestant's Scotts Valley franchise was
6 wrongfully terminated, and/or that good cause has not been established to terminate the
7 franchise, will form the basis for a damages claim in the Federal Court action.

8 According to long-standing California law, "if an administrative remedy is provided by
9 statute, relief must be sought from the administrative body and such remedy exhausted" before a
10 party can seek judicial relief on such claim from the court. *Ralph's Chrysler-Plymouth v. New*
11 *Car Dealers Policy & Appeals Board*, 8 Cal.3d 792, 794 (1973). Pursuant to the doctrine of
12 exhaustion of administrative remedies, relief must be sought by exhausting the remedy before
13 the courts will act, if there is a remedy available before an administrative agency by statute,
14 regulation or ordinance. *E.g.*, *California Correctional Peace Officers Assn. v. State Personnel*
15 *Bd.*, 10 Cal. 4th 1133 (1995); *Rojo v. Kliger*, 52 Cal. 3d 65 (1990). In addition, "[t]he
16 requirement of exhaustion of administrative remedies before pursuing judicial remedies is a
17 jurisdictional prerequisite, not a matter of judicial discretion." *Anthony v. Snyder*, 116 Cal. App.
18 4th 643 (4th Dist. 2004); *Marquez v. Gourley*, 102 Cal. App. 4th 710 (2d Dist. 2002).

19 In this case, the Federal Court needs findings from the New Motor Vehicle Board to
20 determine "...whether sufficient good cause has been established for modifying, replacing,
21 terminating, or refusing to continue a franchise of a dealer of new recreational vehicles..."
22 (Cal. Veh. Code § 3071.) Once the Board has made these findings, the Federal Court can then
23 address the claims before it and award damages if it determines they are appropriate.

24 **2. Mega's Protest Against the Termination of Its Franchise Related to the**
25 **Irvine Location is Not Moot and Protestant is Not Trying to Maintain a**
26 **Protest for its Westminster Location, as Respondent Alleges. [PR-2244-10]**

27 Mega's Protest against the termination of its franchise related to the Irvine location is
28 not moot because, although Protestant does not, as of March 31, 2012, operate at the address

1 mentioned in the Dealer Agreement, Protestant can and still does serve the Southern California,
2 Irvine County area from its new Westminster location. (Schilperoort, R.T. 4/26/12, 30:18-21;
3 31:7-12.) Pursuant to Exhibit 600, the Dealer Agreement is made between Home & Park
4 Motorhomes, having its head office at 100 Shirley Avenue, Ontario, Canada, N2B 2E1 and
5 Mega RV corporation, doing business as McMahon's RV, having its head office at 1312 RV
6 Center Dr. #16, Colton, CA, USA 92324 and doing business at 1312 RV Center Dr. #16,
7 Colton, CA 92324 and at 6441 Burt Road #10, Irvine, CA 92818. (Ex. 600.) As is clearly
8 indicated on the exhibit, the Dealer Agreement simply recites addresses at which the parties do
9 business. Nowhere in the recital of addresses, nor in any other paragraph of the Dealer
10 Agreement, does it require that the parties solely do business from the listed locations or that the
11 parties are restricted from doing business from any other location. (See Ex. 600.) In fact, the
12 actual agreement between the parties does not begin until Section 100, "Sales to Dealers,"
13 following the language "...it is agreed by and between the parties hereto as follows:" (*Id.*)
14 Further, Section 301, titled "Facility and Location," (emphasis added) does not state any
15 specific location or address where Protestant must establish a dealership, just that "Dealer shall
16 establish...a...facility capable of meeting the sales and service potential of Dealer's Territory."
17 (Ex. 600, ¶ 301.) There is no limitation of the dealership location to the address listed in the
18 introduction paragraphs, nor any other specific address, for that matter. Nor is there a shred of
19 evidence that the Westminster location fails to meet the minimal and broadly stated
20 requirements of Section 301 of the Dealer Agreement.

21 In addition, Respondent admits that "...there are no specific provisions in the Vehicle
22 Code requiring a dealer to give notice of the relocation of its dealership..." (Respondent's Brief
23 24:21-22.) Since the beginning paragraphs of the Dealer Agreement between the parties is
24 simply a recital of addresses, rather than a restriction of location, Protestant should not be
25 punished for doing business from another address (i.e. Westminster).

26 In fact, pursuant to paragraph 111 of Exhibit 600, titled "Dealer Commitment", there is
27 evidence that the parties considered expansion of Protestant's locations when signing the Dealer
28 Agreement. Paragraph 111 states, "Additionally, Home & Park will work with Dealer to

1 expand his operation effectively, subject to our normal conditions, as long as that expansion
2 does not encroach on other dealers' territories." (Ex. 600.) Further, "[i]f Dealer expands his
3 operation to *new locations*, Roadtrek will be the number one selling Class B motorhome at
4 those locations." (emphasis added) Although the paragraph does state, "[t]hese expansions will
5 be negotiated at the time of the expansion," this lack of negotiation before Protestant's move
6 from Irvine to Westminster does not result in good cause to terminate the entire franchise. The
7 Irvine Company, Protestant's landlord, was evicted from the Traveland property in Irvine, while
8 Protestant was already engaged in litigation with Respondent before the New Motor Vehicle
9 Board and the Federal Court pertaining to, among other things, Respondent's wrongful
10 termination of Protestant's franchises. Protestant dealt with the circumstances to the best of its
11 ability and was forced to find a new location. Protestant, having effected a seamless transition
12 of its business to a new location, now has a superior facility in Westminster (Schilperoort, R.T.
13 4/26/12, 36:21-37:5; 37:18-25.), which easily exceeds the facility requirements of Roadtrek
14 under the Dealer Agreement, namely that it be "capable of meeting the sales and service
15 potential of Dealer's Territory." (Ex. 600, ¶ 301.) There is no evidence that Roadtrek was ever
16 uniquely dependent upon the Traveland facility, or that the Irvine address listed in the Dealer
17 Agreement was the only authorized address from which Protestant could operate. In fact, there
18 is evidence that the parties to the agreement anticipated the possibility of Protestant changing its
19 dealership location. (Ex. 600, ¶ 111.)

20 Mega's termination protest related to the Irvine location is not moot because Mega is
21 able to resume Roadtrek operations and serve Irvine County and the Southern California market
22 from its new location in Westminster. (Schilperoort, R.T. 4/26/12, 94:3-95:5.) Though
23 Respondent argues the Board lacks jurisdiction, the Board has presided over a number of
24 "unauthorized relocation" protests and Protestant's relocation does not mean it isn't entitled to
25 relief under the Vehicle Code, even if the franchise agreement required it to operate only at the
26 Irvine location, which it does not, as discussed above.

27 In the case of *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.*, 186 Cal.App.3d
28 464 (1986), the California Court of Appeals found that the dealership agreement in question did

1 not have any express standards for the dealership facility or limit the dealership to the address of
2 one location. Therefore the manufacturer was not permitted to attempt to enforce provisions not
3 expressly set forth in the agreement. Similarly, in this case there are no terms in the Dealer
4 Agreement that limit Protestant's location to its previous Irvine location or provide that
5 relocation of the dealership is good cause for termination. In fact, Exhibit 600, the agreement
6 in question, at paragraphs 520 and 530, expressly set forth grounds for termination by Roadtrek,
7 and none of those grounds include relocating its dealership facility. Therefore, Respondent has
8 not met its burden of proof to establish that good cause exists to terminate Protestant's
9 franchise.

10 **3. The Relocation of Protestant's Irvine dealership to Westminster is Not**
11 **Properly Before the Board in These Protest Proceedings and Cannot be**
12 **Considered Grounds for Termination**

13 Despite the claims of Respondent, it is clear the facts and circumstances related to
14 Protestant's relocation of its Irvine facility to Westminster, CA, are not before the Board in
15 these Protest proceedings and cannot constitute grounds for termination of Protestant's
16 franchises. First, pursuant to long-standing statutory and case law, a franchisor cannot raise
17 additional unspecified grounds for termination at a hearing if those grounds were not
18 specifically stated in the franchisor's Notice of Termination. (Cal. Veh. Code § 3070(a);
19 *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.*, 186 Cal.App.3d 464, 476-477 (1986);
20 *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd.*, 194 Cal.App.3d 81, 90-91
21 (1987).) Specifically, the *American Isuzu* court held that, "[t]he Vehicle Code unambiguously
22 requires that notice be given of the *specific grounds* for termination of a franchise..." and "to
23 permit a franchisor to later raise additional unspecified grounds at the hearing would be to deny
24 the franchisee the notice prior to hearing guaranteed under the statute; such denial infringes on
25 the franchisee's right to procedural due process and cannot be allowed." (emphasis in original)
26 (186 Cal.App.3d at 477.) The *British Motor Car* court further clarified that, "[a] franchisor may
27 not assert 'good cause' for a franchise termination at the hearing on any ground not asserted in
28 its notice of termination." (194 Cal.App.3d at 91.)

1 In this case, Respondent did not specify the relocation of Protestant's Irvine facility as
2 grounds for termination in its notices of termination, nor did it undertake to amend its notices of
3 termination to include these specified grounds. Therefore, Roadtrek is not permitted to assert
4 Protestant's relocation of its dealership from Irvine to Westminster as grounds for termination.
5 Since the relocation cannot be considered good cause for termination and such relocation
6 occurred long after the hearing in this matter commenced, Respondent must send a new Notice
7 of Termination or amend the Notice of Termination it sent in June of 2010, if it wishes to pursue
8 franchise termination because of the relocation. Moreover, Protestant must be afforded the
9 opportunity to file a Protest, request a hearing and prepare and present its case regarding this
10 matter. Anything else amounts to a clear denial of due process, as the *American Isuzu* case
11 held.

12 In any case, and as noted above, Roadtrek did not limit Protestant to a specific address
13 from which it could operate and did not have any specific requirements Protestant needed to
14 follow before relocating its dealership. (*See* Section (III)(2) above.) Moreover, even if the
15 relocation had any relevance to these proceedings, during the re-opened hearing testimony of
16 Mr. Paul Schilperoort, held on April 26, 2012, he testified that Protestant's new facility in
17 Westminster is state-of-the-art and is located at the intersection of the 405 and 22 freeways with
18 high traffic volume and visibility. (Schilperoort, R.T. 4/26/12, 92:18-93:14; 94:3-95:5.) In fact,
19 if Roadtrek were to fulfill its obligations under its Dealer Agreements with Protestant, it would
20 be better served at the new Westminster location than it was at Irvine. For example, the new
21 Westminster dealership has a three-and-a-half to four-acre facility, a three-story parking
22 structure, 52 vehicle service bays, 12 to 13 motor home service bays, employee parking, a
23 24,000 square foot showroom with business offices, and a parts department and warehouse.
24 (Schilperoort, R.T. 4/26/12, 36:21-37:5.) The new facility clearly and unequivocally meets the
25 minimal facility requirements set forth in Protestant's Dealer Agreement with Roadtrek (Ex.
26 600, ¶301) and is an improvement over the Irvine facilities. Mr. Schilperoort testified that the
27 new Westminster dealership is located in the northern part of Orange County, which is more of
28 an RV community. (Schilperoort, R.T. 4/26/12, 94:3-95:5.) Therefore the relocation benefits

1 the public welfare and the consumers of recreational vehicles in the relevant market area. (Cal.
2 Veh. Code § 3071(d) and (e).) Clearly, Roadtrek has not been harmed in any way by
3 Protestant's relocation of its Irvine dealership.

4 Respondent is expected to argue that because the Westminster location is currently
5 occupied by Mega under a lease which provides for a one-year term, commencing April 1,
6 2012, with a 14-year option, an additional 5-year option and a subsequent 5-year option, Mega's
7 continued operation at that location is uncertain beyond one year. (Ex. 539, ¶ 1.5.) This
8 argument ignores the fact that the Irvine location, too, was of uncertain duration beyond the end
9 of 2011. (McMahon, R.T. 8/15/11, 114:5-23.) Moreover, all of the options are at Mega's
10 election, meaning, if anything, Mega's continued operation at that location beyond one year is
11 more likely and more secure than was its continued operation at the Irvine facility. Finally,
12 unless and until Mega fails or refuses to exercise its options, Roadtrek has no grounds to argue
13 that the one year term of the lease constitutes good cause for franchise termination.

14
15 **4. Roadtrek Has Not Met Its Burden of Proof and Therefore Does Not Have**
16 **Good Cause to Terminate Protestant's Colton, Irvine and Scotts Valley**
Roadtrek Franchises Pursuant to the Good Cause Factors Set Forth in Cal.
Veh. Code § 3071.

17 **a. Mega has conducted an ample amount of business as compared to the**
18 **business available to it. [Cal. Veh. Code § 3071(a)]**

19 Roadtrek claims Mega has voluntarily ceased operations as a Roadtrek franchise since
20 October 2009, that Mega has failed to maintain any Roadtrek inventory and that Mega has not
21 created space on its existing credit lines or attempted to settle its accounts with Roadtrek in
22 order to resume operation as a Roadtrek dealer. (Respondent's Brief 28:4-5, 28:15-16, 28: 20-
23 23.) All of these contentions are untrue. Protestant did *not voluntarily* cease operations of its
24 Roadtrek franchise in October 2009. Respondent unlawfully absconded with Protestant's units
25 and refused to fulfill any orders for units or parts. (See Protestant's Post-Hearing Opening Brief
26 section (III)(G)(2).) Respondent's claim that it absconded with the units pursuant to the
27 Security Agreement entered into by the parties is not supported by case law, as previously
28 explained in Protestant's Post-Hearing Opening Brief. (*Id.*) In addition, Protestant is clearly

1 able to floor Roadtrek units on its flooring line with GE. (John Print Dep. 19:1-21, 33:22-34:2;
2 Ex. 704.) Finally, Roadtrek has conceded it owes Protestant moneys and has not attempted to
3 settle any of its accounts with Mega RV. (See Ex. 496.) Therefore, Protestant should not be
4 punished for the same behavior of which Roadtrek itself has been guilty in its relationship with
5 Protestant.

6 **b. Mega has made substantial and permanent investments and incurred**
7 **significant obligations in its efforts to perform as a Roadtrek dealer.**
8 **[Cal. Veh. Code § 3071(b) and (c)]**

9 Respondent claims that Mr. Brent McMahon identified only three investments Mega
10 made in its efforts to perform as a Roadtrek dealer: Mega leased property, Mega ordered parts
11 and Mega purchased equipment. (Respondent's Brief 29:14-17.) Respondent claims these
12 investments are "short-term" and "low-risk" and apparently gives them little weight.
13 (Respondent's Brief 29:17-18.) Roadtrek, however, has not and cannot explain how any RV
14 dealer, Roadtrek or otherwise, could possibly operate a successful franchise without leasing or
15 owning property, ordering parts and purchasing equipment. Respondent claims that parts and
16 equipment are not long-term investments because Cal. Veh. Code § 11713.13(d) requires
17 Roadtrek to repurchase parts, signs, special tools and inventory from Mega within 90 days
18 following the termination of Mega's franchises. (Respondent's Brief 30:6-9.) Regardless of this
19 Vehicle Code section, Mega is still required to invest in Roadtrek parts and equipment up front.
20 These obligations involve hundreds of thousands of dollars and years of investment.
21 Respondent's dismissal of Protestant's investments as "short-term" and "low-risk" is
22 disingenuous at best. That Respondent would also dismiss the dealer's more than a decade long
23 devotion to, promotion of and cultivation of the market for, the Roadtrek product is
24 unfathomable. As noted in Protestant's Post-Hearing Opening Brief on page 25 at lines 13-19,
25 investment also includes time, effort, dedication to the brand, risk, etc. (McMahon, R.T. 8/9/11,
26 133:24-134:3; 141:21-142:2; 8/10/11, 48:21-22; 99:22-100:2.) Protestant unquestionably has
27 made a substantial investment in its Roadtrek franchises.

28 Respondent also claims Protestant's investment in its facilities is inadequate while
arguing at the same time that Respondent does not require its dealers to make special

1 investments. (Respondent's Brief 29:9-10, 30:11; Hammill, R.T. 11/9/11, 155:2-16.)
2 Respondent cannot be permitted to argue that Protestant's investments are inadequate, or do not
3 meet its standards, when Roadtrek clearly admits it has set virtually *no standards* for dealership
4 facilities in its Dealer Agreements.

5 Finally, as noted above, and in contravention of the California Administrative Procedure
6 Act, Respondent again cites a New Motor Vehicle Board protest decision, *Serpa Automotive*
7 *Group v. Volkswagen of America*, PR-1977-05, that has not been designated by the Board as
8 precedent (Respondent's Brief 29:22-27), and therefore cannot be relied upon as authority in
9 these proceedings, even if it were relevant, which it is not.⁵

10 **c. Mega's termination will be injurious to the public [Cal. Veh. Code §**
11 **3071(d).]**

12 Respondent argues, without sufficient evidence or factual basis, that the termination of
13 Mega's franchises would not be injurious to the public because Mega has not provided services
14 to the public in over two years and the service Mega did provide the public was poor.
15 (Respondent's Brief 31:16-19.) These allegations are not supported by the evidence in the
16 record.

17 Respondent cites unsupported hearsay testimony from Mr. Hammill which appears to
18 suggest that, because Roadtrek offset warranty payments to Mega rather than cut a check, Mega
19 was not paying its warranty service writers and therefore was serving the public inadequately.
20 (Hammill, R.T. 9/23/11, 171:20-172:11.) Roadtrek and Mr. Hammill provided no support for
21 this baseless statement except for only two customer letters (Exs. 682-683), both of which were
22 written in January 2010. One was from a customer complaining no one from Mega attended a
23 scheduled meeting. The other concerned a complaint about the non-receipt of a cash incentive
24 payment. Obviously, two letters cannot form the basis for the contention that Mega was not
25 serving the public adequately, and these exhibits cannot, and do not, establish grounds for
26 termination of Protestant's franchises.

27 //

28 ⁵ Once again, the decision provides no support for Respondent, in any case, and its facts are easily distinguishable
from those established in these Protest proceedings.

1 Roadtrek also claims, "The termination of Mega's franchises would not be injurious to
2 the public because (1) Mega has not provided any services to the public in over two years, and
3 (2) the service that Mega provided to the public was poor." This statement is cited to the
4 9/23/11 hearing transcript at 171-172 and Exhibits 682-683. However, page 171 contains
5 merely a discussion of interest and warranty payments; there is absolutely no mention of
6 services to the public. Page 172 contains more of the same, with only lines 6-11 actually being
7 arguably applicable to the issue of Mega serving the public. However, even these lines are
8 misleadingly cited, as they do not support Roadtrek's allegation that Mega was providing poor
9 service. Instead, lines 6-11 speak to the domino effect caused by Roadtrek not paying Mega for
10 warranty work: Roadtrek did not pay Mega, causing Mega to not pay its service writers, which
11 allegedly caused the *service writers* to give poor service to Roadtrek customers. Further, the
12 exhibits are merely 2 isolated customer complaints and do not serve as proof of poor public
13 service.

14 In addition, Respondent also alleges that Protestant was falsifying signatures on
15 consumer cashback forms. (Respondent's Brief 31:22-23.) This allegation, however, has not
16 been substantiated. In fact, Respondent could point to only three signatures ever even
17 questioned by Roadtrek. Exhibits 691-693, which Respondent attempted to enter into the record
18 as evidence of false signatures on consumer cash back forms, were denied admission for that
19 purpose because of numerous flaws affecting their reliability. (ALJ Hagle, R.T. 2/1/12, 163:22-
20 23, 165:8-21, 166:13-23, 168:24-170:23.) Nothing more was offered, so it is clear Respondent
21 failed to prove even a single instance of falsified signatures over the entire course of
22 Protestant's enfranchisement as a Roadtrek dealer.

23 In addition, Roadtrek cited a string of deposition testimony containing various errors and
24 misrepresentations, to support the above customer complaint allegation. As to the Kurt Brittain
25 deposition at 9:1-7, Mega has posed a standing objection to its designation as being unnecessary
26 and irrelevant. Roadtrek thus did not represent the admissibility of this portion of the deposition
27 accurately. Further, in the Robin Hays deposition at 7:24-8:4, Ms. Hays states Mega did, in fact,
28 tell her she was eligible for a \$5,000 rebate; she just thought it was a government rebate rather

1 than a manufacturer incentive. Ms. Hays went on to say that she did received a \$5,000 rebate off
2 of the price of the vehicle she purchased. (Robin Hays Deposition at 8:11-17.)

3 Contrary to Roadtrek's empty assertions, Protestant has been serving motorhome
4 customers in the Southern California area continuously and successfully since 2001.
5 (McMahon, R.T. 8/9/11, 77:3-16, 87:15-88:20.) Consequently, Roadtrek has failed to prove
6 Mega provided poor or nonexistent service to the public, as it claims.

7 **d. Mega has maintained adequate sales and service facilities,
8 equipment, vehicle parts and qualified personnel to provide adequate
9 services to the public. [Cal. Veh. Code § 3071(e)]**

10 Respondent claims that, since October 2009, Protestant has not conducted any Roadtrek
11 sales or service activity and has essentially failed to maintain its Roadtrek dealerships.
12 However, as discussed in Protestant's Pre-Hearing Opening Brief throughout Argument III, any
13 inability of Protestant to maintain sales and service equipment or stock sufficient vehicle parts is
14 the result of Roadtrek's unlawful acts, lack of cooperation and failure to fulfill its obligations
15 under the Dealer Agreement. As stated above and as admitted by Respondent in its Opening
16 Brief (Respondent's Brief 29:9-10, 30:11), Respondent does not have any special sales and
17 service facility requirements in its Dealer Agreements. Obviously, it is impossible for Mega to
18 meet requirements that do not exist.

19 Finally, Respondent again cites a Board decision not designated as precedent under the
20 California Administrative Procedure Act (*Thompson's Auto & Truck Center, Inc. v.*
21 *DaimlerChrysler Motors Co.*, PR-1965-05). The decision therefore cannot be given any weight
22 in these proceedings and must be disregarded. (Respondent's Brief, 32:27-33:2.)

23 As a result of the absence of evidence to support its contentions concerning this good
24 cause factor, Roadtrek has failed to meet its burden of proof under Cal. Veh. Code § 3071(e).

25 **e. Mega has complied with the terms of its franchise agreement. [Cal.
26 Veh. Code § 3071(g)]**

27 Respondent continues to make baseless allegations in its attempt to prove Protestant has
28 not complied with the terms of its franchise agreement. These unfounded allegations include:
claims that Protestant used customer leads developed by Roadtrek to sell vehicles to Roadtrek's

1 competitors, failed to maintain sufficient working capital and wholesale financing, failed to
2 submit annual financial reports and failed to operate a dealership in a way that reflects favorably
3 on it and Roadtrek. (Respondent's Brief 33:11-16.) None of these allegations are supported by
4 the record.

5 **1. Mega showed customers Pleasure Way vehicles at the customers'**
6 **request which Roadtrek's witness acknowledged was permissible and**
7 **appropriate.**

8 Respondent boldly claims Mega "used leads developed and maintained by Roadtrek to
9 sell Pleasure-Way vehicles." (Respondent's Brief 34:13-14.) Respondent cites testimony at
10 Hammill, R.T. 9/22/11, 110:8-24 in support of this argument. However, a large part of this
11 citation (Hammill, R.T. 9/22/11, 110:8-20) is completely unrelated to the issue of Roadtrek
12 leads and the portion that is relevant (Hammill, R.T. 9/22/11, 110:21-24) does not support
13 Respondent's claims. The relevant testimony clearly states, "...we had been sitting watching
14 McMahan's RV salespeople take Roadtrek customers out of our booth and move them over and
15 sell them a Pleasure-Way van." *Id.* This vague testimony by Mr. Hammill does not prove that
16 Mega sold Pleasure-Way vans to Roadtrek leads who did not ask to see different brands or
17 models of motorhomes other than Roadtrek. Mr. Hammill himself acknowledged that he never
18 actually observed any customers being persuaded from buying a Roadtrek unit into buying a
19 Pleasure-Way unit. (Hammill, R.T. 11/9/11, 160:2-9; 9/22/11, 138:12-17.)

20 In addition, Respondent claims Mega's Director of Sales, Mike Lankford, testified Mega
21 allegedly engaged in this practice "[b]ecause I have 20 [Pleasure-Way's] on my lot as well and
22 they're just as pretty." (Lankford, R.T. 1/12/12, 22:24-23:6.) This out-of-context reference by
23 Respondent is a mischaracterization of Mr. Lankford's testimony. Mr. Lankford's statement
24 above was in response to Mr. Chronowski's question about whether there was ever a time when
25 he sold a Roadtrek lead a Pleasure-Way unit. (Lankford, R.T. 1/12/12, 22:24-23:3.) Mr.
26 Lankford went on to testify that he would "...send them a brochure. I would call and invite
27 them up and let them know that I have 20 to 30 Roadtreks to look at, invite them to my lot."
28 (Lankford, R.T. 1/12/12, 22:17-19.) There is no testimony regarding whether these customers
requested to see other brands of motorhomes.

1 Further, Roadtrek claims, "Since as early as 2005, Mega has used leads developed and
2 maintained by Roadtrek to sell Pleasure-Way vehicles." This statement is cited to the 9/22/11
3 hearing transcript at 110:8-24. However, a large portion of this transcript segment was stricken
4 from the record. The cited portion begins with many disparaging, stricken remarks about Mr.
5 McMahan, which Roadtrek gratuitously included in its citation even though the testimony bore
6 no relation to the usage of leads. In addition, Roadtrek presents the citation as evidencing lead
7 stealing 'since as early as 2005,' but the cited transcript only mentions Mr. Hammill observing
8 such behavior *in* 2005. In fact, he later stated that he never saw such behavior again. (Hammill,
9 R.T. 9/22/11, 138:12-17.)

10 In the absence of evidence that customers did not request to be shown non-Roadtrek
11 units, to suggest that Protestant improperly took customers to see Pleasure-Way units is
12 misleading and inappropriate. This is especially so in view of the clear proviso in the Dealer
13 Agreement that, "No consumer lead provided by Roadtrek shall be taken to see another
14 manufacturer's class B motorhome *unless such consumer specifically requests to see other*
15 *manufacturers' class B motorhomes.*" (emphasis added) (Exs. 701 and 702 at ¶ 140.)

16 **2. Mega has always maintained adequate capital and wholesale**
17 **financing as required under its Dealer Agreement.**

18 Roadtrek contends that Mega "failed to maintain adequate capital and wholesale
19 financing." (Respondent's Brief 34:18.) However, Respondent never cites any evidence in
20 support of its contention that Mega did not maintain adequate capital. In fact, there is no
21 evidence in the record demonstrating either Roadtrek's required working capital or its actual
22 working capital.

23 Protestant also has consistently had wholesale financing available through GE. (John
24 Print Dep. 19:1-21, 33:22-34:2; Ex. 704.) Despite deposition testimony and an exhibit in
25 support of this fact, Respondent erroneously continues to claim that this does not mean Mega
26 has sufficient flooring for Roadtreks or is able to meet its requirements under the Dealer
27 Agreements. In fact, Mr. John Print from GE specifically stated that "there is no way that
28 McMahan's can actually accomplish the flooring without the manufacturer's cooperation..."

1 (John Print Dep. 34:19-24.) Thus, if Roadtrek would fulfill its own obligations of providing
2 units and cooperating with GE, Protestant is clearly able to meet its own obligations.

3 **3. Mega has provided Roadtrek with annual financial statements.**

4 Respondent claims there was no evidence that Mega submitted financial statements for
5 2008 and 2009 for Roadtrek. (Respondent's Brief 36:19-22.) However, this statement is untrue
6 and, as demonstrated by testimony of Mr. Paul Schilperoort, Mega annually provided requested
7 financial statements to Roadtrek. (Schilperoort, R.T. 8/19/11, 8:19-9:19.) Mega has no reason
8 not to produce its financial statements, as evidenced by their production in this case. (Exs. 064-
9 066.)

10 **4. Protestant has always operated its dealership in a manner that**
11 **reflects favorably on itself and Roadtrek.**

12 Respondent cites only vague testimony of Mr. Hammill in support of its argument that
13 Mega did not operate its dealership in a manner that reflects favorably on Roadtrek.
14 (Respondent's Brief 37:3-8.) Mr. Hammill's testimony amounts to unsupported hearsay and
15 does not support Roadtrek's contention, in any case. (Hammill, R.T. 11/8/11, 150:5-151:3.)
16 Roadtrek has presented no evidence other than Mr. Hammill's testimony, which contains
17 multiple hearsay allegations, in support of its allegations that there were numerous customer
18 complaints, alleged poor condition of vehicles, or that Mr. McMahon told anyone Roadtrek was
19 bankrupt. These claims find absolutely no reliable support in the record and should be
20 disregarded.

21 **5. Other existing circumstances do not establish good cause for**
22 **termination of Protestant's franchise.**

23 Respondent claims that other existing circumstances establish good cause for the
24 termination of Protestant's franchise. (Respondent's Brief 37:11-12.) Respondent argues that
25 Mega "repudiated" its Dealer Agreements with Roadtrek, pursuant to the UCC, and withheld
26 payment or short-paid Roadtrek invoices. All of Mega's actions, however, were justified given
27 Roadtrek's precarious financial situation.

28 //

1 Respondent claims Mega “repudiated” its Dealer Agreements with Roadtrek. However,
2 as noted above in the Introduction, Respondent has already admitted in its previous UCC
3 Motion that “...the question of whether Mega RV’s refusal to provide adequate assurances to
4 Roadtrek constitutes a repudiation is addressed in Cal. U. Comm. Code § 2-609, and has no
5 relation to any administrative regulation or administrative question.” (Respondent’s UCC
6 Motion 4:23-25.) Roadtrek cannot ask the Board to make a determination that UCC issues are
7 relevant to the existing circumstances in this case after previously arguing this issue is
8 completely unrelated to any administrative question. Therefore, the Board should refuse to
9 consider any arguments regarding repudiation of Dealer Agreements in determining these
10 protests.

11 Further, Protestant did short-pay and/or withhold payment on certain units, but did so in
12 direct response to Roadtrek’s actions. (McMahon, R.T. 8/11/11, 138:3-140:7; Schilperoort, R.T.
13 8/19/11, 91:19-92:19; Ex. 658.) Mega became increasingly concerned with Roadtrek’s
14 financial situation and was justifiably worried when Roadtrek began paying for warranty claims
15 late and withholding payment to Mega for incentives and customer warranty claims. (Exs. 639,
16 645, 774.) Protestant offset moneys and withheld payment on four units in order to protect its
17 own investment in Roadtrek. (McMahon, R.T. 8/11/11, 138:3-140:7; Schilperoort, R.T. 8/19/11,
18 91:19-92:19.) These actions were necessary and reasonable responses to Roadtrek’s dire
19 financial circumstances, and consequent conduct, and cannot be held against Protestant as
20 grounds for termination.

21 Finally, Roadtrek alleges, “From at least late 2007, Mega wrongfully withheld payments
22 from Roadtrek and forced Roadtrek to expend its time and resources to collect amounts owed.”
23 Roadtrek cites numerous exhibits as support (Exs. 617, 623, 632, 637, and 641), but none of
24 them support its contention. Exhibit 617 describes only 4 outstanding payments on units, which
25 were the 4 units Mega withheld as insurance; the rest of the units listed in the exhibit weren’t
26 even due yet. Exhibit 623 discusses possible short payments, which were actually Mega
27 deducting the amount owed to it for incentives on each unit. Exhibit 632 does not address
28 amounts owed at all. Instead, it contains vague references to units and scheduling discussions

1 between the parties. The only mildly relevant reference is to the fact that *both* companies were
2 not paying each other. Exhibit 637 involves multiple emails listing units that have been sold and
3 represents the normal day-to-day attempts between the parties to keep a clear record of unit
4 sales. The emails do not represent excessive time or resources Roadtrek had to expand to collect
5 money, but, rather, the day-to-day communications needed between a manufacturer and dealer
6 to see what units are being sold and what incentives applied to each. Exhibit 641 simply
7 contains a table of units without any identification as to what it represents or if payments are
8 even due on them. It is unclear why this exhibit was cited for Roadtrek's propositions.

9 **IV. PROTESTANT IS ENTITLED TO RELIEF ON ITS INCENTIVE CLAIMS**
10 **PURSUANT TO VEHICLE CODE § 3076 [PR-2205-10, PR-2211-10 AND PR-**
11 **2212-10]**

12 Protestant has proven that Roadtrek violated Cal. Veh. Code §3076 by failing to state
13 specific grounds for disapproval of Protestant's incentive claims and by failing to pay Protestant
14 for its incentive claims within 30 days.

15 Respondent argues Protestant did not establish when it submitted its incentive claims
16 and that the only evidence in support of Mega's incentive claims is Exhibit 706. (Respondent's
17 Brief 39:19-24.) Respondent's assertions are inaccurate. Protestant submitted Exhibit 5, the
18 basis for Exhibit 706, which includes the number of days Roadtrek incentive claims were left
19 unpaid to Mega. Respondent argues Mega provided no evidence to prove Roadtrek waited over
20 30 days to pay or disapprove Mega's incentive claims. However, if Roadtrek argues the claims
21 were paid by offset, it is incumbent upon Roadtrek to establish the dates of the offsets if it is to
22 meet the requirements of the statute.⁶ Likewise, if Roadtrek argues it disapproved the claims
23 within 30 days, despite the fact that Mega received no written disapproval notice, it must
24 establish the dates of disapproval. It has not done so.

25 Both parties' conduct regarding incentive claims was very informal. As a matter of
26 course, Mega submitted claims informally and Roadtrek approved and paid those claims. There
27 are no requirements under the California Vehicle Code that Protestant submit incentive claims

28 ⁶ Where, as here, Protestant asserts late, if any, disapproval and late payment or non-payment, it cannot be expected to prove a negative. Respondent's reliance upon its internal records regarding offsetting makes it incumbent upon Respondent to establish the facts of payment by offset, including the relevant dates.

1 pursuant to any prescribed procedure. Roadtrek, however, is bound by Cal. Veh. Code § 3076
2 to approve or disapprove a claim in writing, with specific detail, within 30 days of submission,
3 which it did not do.

4 Roadtrek argues it offset any moneys due to Mega for incentive claims. However,
5 Respondent has provided no authority establishing that offsetting incentive claim amounts
6 satisfies the requirements of Vehicle Code Section 3076. Roadtrek's alleged proof of offsetting,
7 the Declaration of James Hammill Submitted in Response to Protestant's Incentive Claims
8 ("Incentive Declaration"), does not provide adequate proof that Roadtrek satisfied the
9 requirements of Cal. Veh. Code § 3076. In her Order Overruling Protestant's Objection to
10 Introduction in Evidence of James E. Hammill's Declarations Re: Franchisor Incentive Program
11 Claims ("Incentive Declaration Order"), ALJ Hagle explicitly stated that determining if
12 Roadtrek's procedure of "crediting" amounts owed to Mega "comports with section 3076 is not
13 within the scope of this objection, which is merely to rule on the admissibility of the
14 declaration." (Incentive Declaration Order at 5:4-9.) As mentioned above, Respondent has
15 provided no authority establishing that offsetting warranty claim amounts satisfies the
16 requirements of Vehicle Code Section 3076. If the requirements of § 3076 cannot be met by
17 offsetting, then it must be concluded that § 3076 does not permit offsetting as a means of
18 payment.

19 In addition, ALJ Hagle found that, for the VIN #85318287, "Roadtrek neither paid to
20 Mega RV the \$2,000 cash incentive for the sale of the 2010 RoadTrek AD (Serial/VIN
21 #xxxx85318287), nor did RoadTrek offset the amount against obligations it contended were
22 owed by Mega RV to RoadTrek." (Incentive Declaration Order at 20:1-3.) Therefore, Roadtrek
23 failed to pay Mega for an incentive it was owed. (*Id.*) This failure, in and of itself, is a violation
24 of Cal. Veh. Code § 3076, which required Protestant be paid within 30 days of approval of the
25 incentive claim.

26 ALJ Hagle also stated, "...no review of the record has been made... for relevant dates
27 relating to each incentive claim to determine if the statutory guidelines have been met; or for
28 notices, communications or agreements between the parties relative to submission and

1 processing of franchisor incentive claims.” (Incentive Declaration Order at 5:9-13.) Therefore,
2 the Incentive Declaration does not establish Roadtrek provided notice stating the specific
3 grounds for disapproval, or that payment, in whatever form it took, occurred within 30 days of
4 approval, as required by Cal. Veh. Code § 3076.

5 While it is true Protestant has the burden of proof, where Protestant claims it was not
6 paid and Respondent alleges it paid through offset, the burden shifts to Respondent to prove
7 they actually paid and paid in a manner that meets the requirements of Cal. Veh. Code § 3076.
8 This is especially true when, as here, Protestant does not have access to Respondent’s internal
9 records documenting such offsetting and no notice of the practice was provided to Protestant.

10 **V. PROTESTANT IS ENTITLED TO RELIEF ON ITS WARRANTY CLAIMS**
11 **PURSUANT TO VEHICLE CODE § 3075 [PR-2206-10, PR-2208-10, PR-2209-10]**

12 Protestant has proven that Roadtrek violated Cal. Veh. Code §3075 by failing to state the
13 specific grounds for disapproval of Protestant’s warranty claims and by failing to pay Protestant
14 for its claims within 30 days. Roadtrek argues it offset any moneys due to Mega for warranty
15 claims. However, Respondent has provided no authority establishing that offsetting warranty
16 claim amounts satisfies the requirements of Vehicle Code § 3075.

17 Roadtrek’s alleged proof of offsetting, the Declaration of James Hammill Submitted in
18 Response to Protestant Mega RV Corp’s Warranty Claims (“Warranty Declaration”), does not
19 provide adequate proof that Roadtrek satisfied the requirements of Cal. Veh. Code § 3075. In
20 her Order Overruling Protestant’s Objection to Introduction in Evidence of James E. Hammill’s
21 Declarations Re: Warrant Reimbursement Claims (“Warranty Declaration Order”), ALJ Hagle
22 explicitly stated that determining if Roadtrek’s procedure of “crediting” amounts owed to Mega
23 “comports with section 3075 is not within the scope of this objection, which is merely to rule on
24 the admissibility of the declaration.” (Warranty Declaration Order at 5:11-15.) As mentioned
25 above, Respondent has provided no authority establishing that offsetting warranty claim
26 amounts satisfies the requirements of Vehicle Code Section 3075. If the requirements of § 3075
27 cannot be met by offsetting, then it must be concluded that § 3075 does not permit offsetting as
28 a means of payment.

1 ALJ Hagle also stated, “no review of the record has been made... for relevant dates
2 relating to each warranty claim to determine if the statutory guidelines have been met; or for
3 notices, communications or agreements between the parties relative to submission and
4 processing of warranty claims.” (Warranty Declaration Order at 5:15-19.) As such, the
5 Warranty Declaration does not establish Roadtrek approved or disapproved Mega’s warranty
6 claims within 30 days, provided notice stating the specific grounds for disapproval, or that
7 payment, in whatever form it took, occurred within 30 days of approval, as required by Cal.
8 Veh. Code § 3075.

9 Curiously, Respondent completely fails to address Exhibit 774, which the parties
10 painstakingly took months to agree upon. This exhibit sets forth the dates of submission of each
11 warranty claim and the dates of payment checks paid by Roadtrek. Claims highlighted in
12 yellow demonstrate warranty claims not paid by Roadtrek within 30 days of submission. Using
13 the “check date” and the “status changed to authorized” date, 124 warranty claims were not paid
14 by Roadtrek within 30 days of approval. Using the “sign off date” and the “status changed to
15 authorized” date, 129 warranty claims were not paid by Roadtrek within 30 days of approval.
16 (Ex. 774.) Whatever combination of dates are used, Exhibit 774 clearly demonstrates there are
17 warranty claims Respondent did not pay within 30 days in violation of Cal. Veh. Code §3075.

18 CONCLUSION

19 The evidence in this case demonstrates Respondent engaged in a course of conduct
20 almost certainly unprecedented in the history of dealer versus manufacturer disputes before the
21 Board. This course of conduct included deliberate and defiant non-compliance with California
22 laws and a malicious disregard for the rights afforded its franchised dealer, Mega, under those
23 laws.

24 Respondent, concerned about its weakened financial condition, attempted to urge its
25 dealer to forgo holdback payments it had earned and when the dealer respectfully refused to do
26 so, Respondent, over the next two years, disregarded the prior course of conduct between the
27 parties and took a series of steps to undermine and eventually destroy Mega’s Roadtrek
28 franchises. It unlawfully absconded with Mega’s inventory, refused to deliver Roadtrek units

1 and parts and refused to pay for warranty and incentive claims in the manner required by Cal.
2 Veh. Code §§ 3075 and 3076. In addition, it conspired with Mega's competitor, MTRV, to
3 eliminate Mega's Roadtrek franchises and to establish MTRV as a replacement franchise. The
4 evidence is clear that all of this conduct was prompted by hostility toward its franchised dealer
5 concerning allegations of monies past due and owing on both sides. The evidence is also clear
6 that prior to the dispute between the parties, and Respondent's unlawful conduct, Mega
7 indisputably had been Respondent's best and most successful dealer. Respondent must not be
8 permitted to disregard the provisions of Cal. Veh. Code §§ 3070, 3072, 3075 and 3076 in
9 pursuit of its goal to eliminate Mega's Roadtrek franchises and replace them with another.

10 In view of all of the foregoing, Protestant respectfully submits that the record in these
11 Protest proceedings firmly establishes that each and all of Mega's Protests must be sustained
12 and Respondent's unlawful disregard for the notice and hearing requirements of Cal. Veh. Code
13 §§ 3070 and 3072 must be referred to the DMV for investigation and appropriate action.

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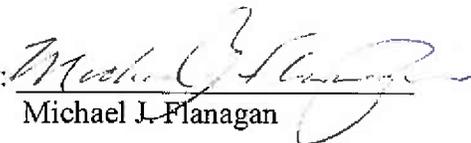
15 Dated: May 3, 2012

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LAW OFFICES OF MICHAEL J. FLANAGAN

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By: 
Michael J. Flanagan

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