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10 Attorneys for Respondent  
ROADTREK MOTORHOMES, INC.

11 THE STATE OF CALIFORNIA

12 NEW MOTOR VEHICLE BOARD

13 MEGA RV CORP dba )  
14 MCMAHONS RV, ) Protest Nos. 2199-10, 2201-10, 2205-10,  
 ) 2206-10, 2208-10, 2209-10, 2211-10, 2212-  
 ) 10, 2233-10, 2244-10, 2245-10  
15 Protestant, )  
 )  
16 v. ) **RESPONDENT ROADTREK**  
 ) **MOTORHOMES, INC.'S REPLY TO**  
17 ROADTREK MOTORHOMES, INC. ) **PROTESTANT'S POST-HEARING**  
 ) **BRIEF**  
 )  
18 Respondent. )

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21 Mega blames every indignity that it suffers in these protests at the feet of Roadtrek.  
22 However, Mega's problems started with its deliberate decision not to pay Roadtrek for  
23 motorhomes, parts and interest. Mega has not paid for Roadtrek \$303,348.67 for four  
24 motorhomes that it sold at retail. (Ex. 496). Mega still uses those four units in its daily business.  
25 Mega has not paid a parts invoice to Roadtrek prior to September 2008. (Ex. 496 at RMI 9155).  
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1 Mega attempts to exonerate its conduct by claiming that it “eventually” paid Roadtrek. (Mega  
2 PH Brief at 4:5). But, this statement is manifestly false given Mega’s payment record.

3 In its purported “Statement of Facts,” Mega does not let the truth get in the way of a good  
4 story. Mega’s “Statement” is rife with misstatements, factual inaccuracies, gross exaggerations  
5 and its timing with respect to certain events is way off. The following chart illustrates the  
6 problems with Mega’s entire statement of facts.  
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<b>MEGA “STATEMENT OF FACT” (Cite To Mega Brief - page:lines)</b>	<b>CORRECTION/ROADTREK’S RESPONSE</b>
In fact, Mega has been the number one dealer from a multiple-location standpoint since 2005, when it sold 54 units in a year. (2:18-20)	Mega was the number one dealer from 2004-2006. (Ex. 68). Mega’s sales performance from 2008 onwards was deficient. (Exs. 508 and 509).
In fact, Mega was selling close to 30% of Roadtrek’s manufactured inventory. (2:22-23)	This purported “fact” relates to testimony given by Schilperoort on August 16, 2011. (8/16/11 Schilperoort-Tr at 193-194). Judge Hagle struck Schilperoort’s testimony regarding this purported fact because it was not within the “scope” of his knowledge. ( <i>Id.</i> at 194:21-195:4). Moreover, Schilperoort had no foundation for testifying about what amount of Roadtrek’s inventory was sold by Mega.
Mega’s owner, Mr. McMahon, has always been passionate about the Roadtrek franchise and his knowledge has always led the dealership to serve the public in the best way possible. (3:7-8)	Mega cites Hammill’s testimony for this supposed fact. Hammill said nothing about McMahon’s passion or his service to the public. (11/9/11 Hammill-Tr. at 172:21-173:2).
Mega has infomercials advertising itself and its products, has had contract negotiations with all the major radio and television stations, and is generally more aggressive in its advertising strategies than other RV dealers. (3:10-12)	These advertisements are for the Mega dealership as a whole, not specifically Roadtrek. (8/10/11 McMahon-Tr. at 48-49).

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<p>Mega's aggressive techniques and commitment to the Roadtrek product led to many productive years for Roadtrek. (3:13-14)</p>	<p>Mega makes no record cite for this supposed fact. Roadtrek does not dispute that the parties had a very successful relationship between 2005 and 2008. However, this changed when Mega decided to stop paying Roadtrek for units.</p>
<p>At the Kitchener meeting, Mega met with Roadtrek representatives who explained Roadtrek's financial difficulties to Mr. McMahon and proceeded to request that he forgive the approximately \$166,000 holdback owed to him. (3:20-23)</p>	<p>By the end of the meeting, Roadtrek committed to paying the \$166,000 to McMahon and made the payment within days after the meeting. (Ex. 615).</p>
<p>According to the holdback program agreed to between Mega and Roadtrek, Roadtrek owed Mr. McMahon \$1,000 per Roadtrek unit that was delivered to Mega within a given year. (3:23-25)</p>	<p>For 2007-2008, Roadtrek agreed to pay \$1,000 per unit holdback for units sold by Mega. (9/22/11 Hammill-Tr. at 235:7 - 235:15). It makes no sense to pay a holdback merely on a unit delivered that is never sold by Mega. (11/10/11 Hammill-Tr. at 203:25 -204:17)</p>
<p>As a result of this economic downturn and the difficulties in getting approvals from customers' banks, Mega had been paying late for Roadtrek units. (4:3-4)</p>	<p>Mega did not pay Roadtrek late as a result of the economic downturn. Mega withheld payment to Roadtrek even after retail funding. (8/18/11 Schilperoort-Tr. at 198:4-198:22).</p>
<p>However, Mega always made the payments eventually. (4:5)</p>	<p>Mega never paid for the last four Roadtrek motorhomes it sold and Roadtrek had to sue Mega in federal court to be paid for those units. (1/10/12 Fosdick-Tr. at 21:15-21:17). Even though Mega claims that it "eventually" paid, Mega was required to pay Roadtrek within 14 days of retail funding and it seldom did. (Ex. 614 at §7(b), Ex. 765).</p>

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<p>Prior to the Kitchener meeting, Roadtrek had provided interest-free units to Mega through a very informal "on-the-arm" program under which Roadtrek would select and ship to Mega the inventory Roadtrek chose and Mega would provide payment to Roadtrek after the units were sold. (4:10-13)</p>	<p>Schilperoort communicated with Cassidy regarding "day-to-day" operations, including "primarily inventory." (8/16/11 Schilperoort-Tr. at 168:1-8). Schilperoort was in charge of inventory at Mega locations and was not aware, after 2007, of any Roadtrek units that were delivered to Mega that was not a custom order or to replace a previously sold unit in inventory. (8/18/11 Schilperoort-Tr. 146).</p>
<p>However, at the Kitchener meeting, after Mr. McMahon refused to forgive the \$166,000 holdback owed, Roadtrek advised Mega it would immediately begin charging Mega interest on units shipped. (4:16-18)</p>	<p>Hanemaayer advised McMahon in December 2007 about past due interest. (11/14/11 Tr., at 30:11 - 30:23). For past due interest, Roadtrek only charged Mega interest for the time between retail funding to Mega and when Mega "eventually" paid. Pursuant to the Security Agreement, Roadtrek would charge Mega interest after the first 90 days from delivery. (Ex. 614 at §6).</p>
<p>Taken aback by this demand, after Roadtrek's surprising attempt to refuse to pay the holdback Mr. McMahon had earned, Mega agreed to make two \$35,000 payments for the alleged 'past interest' in an effort to keep the relationship moving forward amicably. (4:21-24)</p>	<p>Of course, Mega's "effort to keep the relationship moving forward amicably" did not include Mega complying with its agreement to make two \$35,000 payments -- it only made one. (1/10/2012 Fosdick-Tr. at 6).</p>
<p>This feeling that interest should not be owed to Roadtrek was legitimized by discussions Mega had with Mr. Hammill, Roadtrek's President and CEO, who continually stated Mega did not need to "worry about interest." (4:28 - 5:2)</p>	<p>After the Security Agreement was signed, Hammill never told anyone at Mega not to worry about interest. (11/7/11 Hammill-Tr. at 67:2-5).</p>

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<p>Even when Roadtrek told Mega it needed to sign a "Security Agreement and Power of Attorney" ("the Security Agreement"), which detailed interest Mega would owe on units floored by Roadtrek, Mr. Hammill insisted the Security Agreement's "only purpose was for his bank" and Mega would still not need to "worry about interest." (5:3-7)</p>	<p>Mega is a multi-million dollar dealer. (Ex. 66 at McMahan 699). It had more twice in annual sales in 2009 than Roadtrek. (Ex. 66 at McMahan 699, Ex. 606 at RMI 10875). Mega had other options for floor plan financing.</p>
<p>Based upon these assertions by Roadtrek's President and CEO, Mega signed the Security Agreement with the belief it would not owe Roadtrek any payments for interest in the future or for the past. (5:7-9)</p>	<p>Schilperoort witnessed the signing of the Security Agreement. He understood that Mega would be obligated to pay interest under the Security Agreement. (8/18/11 Schilperoort-Tr. at 180:8-11; 9/22/11 Schilperoort-Tr. at 50:13-17). Mega expressed no issue with signing the Security Agreement and said that its attorney would review it. (9/22/11 Hammill-Tr. at 234:1-6).</p>
<p>Roadtrek would always ship Mega the number and composition of units Roadtrek desired on a regular basis. (5:11-12)</p>	<p>According to Schilperoort, RV manufacturers would commonly ship units to Mega for stock inventory. (8/18/11 Schilperoort-Tr. at 151:23). These units would not be ordered by Mega. (<i>Id.</i>).</p>
<p>These shipments were always made without obtaining prior approval from Mega, let alone getting actual <i>orders</i> from Mega. (5:13-14)</p>	<p>According to Schilperoort, RV manufacturers would commonly ship units to Mega for stock inventory. (8/18/11 Schilperoort-Tr. at 151:23). These units would not be ordered by Mega. (<i>Id.</i>). Mega placed orders with Roadtrek for custom units. (Ex. 699).</p>
<p>Despite these alterations to the prior course of conduct between the parties, Roadtrek continued to ship a large volume of inventory to Mega at will. (5:20-21)</p>	<p>In 2009, Roadtrek shipped 19 units to Mega. Of those, all but 5 were sold to customers. (8/18/11 Schilperoort-Tr. at 159; Ex. 767).</p>

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<p>Mega continually communicated to Roadtrek this was unacceptable and that it wanted to be consulted prior to units being shipped. (5:23-24)</p>	<p>In 2009, Roadtrek shipped 19 units to Mega. Of those, all but 5 were sold to customers. (8/18/11 Schilperoort-Tr. at 159; Ex. 767).</p>
<p>However, Roadtrek "continued to do what they wanted to do." ( 5:25)</p>	<p>In 2009, Roadtrek shipped 19 units to Mega. Of those, all but 5 were sold to customers. (8/18/11 Schilperoort-Tr. at 159; Ex. 767).</p>
<p>Mr. McMahon sought advice regarding how best to limit his potential losses in the event of a Roadtrek bankruptcy and was informed by his advisors and lenders he should always leave a running balance owed to Roadtrek approximately equivalent to the amount Roadtrek owed Mega. (6:9-12)</p>	<p>McMahon did not meet Conrad Plomin until late September or early October 2009. (8/17/11 Plomin-Tr. at 14:9-11).</p> <p>Plomin advised Mega "that until [it] was able to reach a satisfactory agreement with Roadtrek, that [it] not pay them the money that was purportedly owed to them, and encouraged [it] to attempt to reach an agreement." (<i>Id.</i> at 47:3-7).</p>
<p>In implementing this practice of leaving a small running balance, Mega continued to receive Roadtrek product and it continued to make payments for vehicles sold. However, Mega continuously withheld payment for the most recent three (3) to four (4) vehicles sold. (6:16-18)</p>	<p>Mega implemented this practice no earlier than late September or October 2009. (8/17/11 Plomin-Tr. at 14:9-11; 8/19/11 Schilperoort-Tr., at 92:4-92:17). Mega did not pay for four units. (Ex. 496 at RMI 9154). Mega never told Roadtrek about this practice. (8/12/11 McMahon-Tr. at 228:4-229:15).</p>
<p>At no time did Protestant ever cease any and all payment to Roadtrek. (6:20-21)</p>	<p>Of course, Mega did not pay for four Roadtrek units. (Ex. 496 at RMI 9154). Mega did not pay any Roadtrek parts invoices after September 5, 2008. (<i>Id.</i> at RMI 9155).</p>

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<p>Roadtrek was not pleased with Mega's decision to take the protective measures it did and embarked upon a campaign to terminate its relationship with Protestant through a series of unlawful acts under the Vehicle Code. (6:23-25)</p>	<p>Mega never disclosed its "decision" to take so-called protective measures. (8/12/11 McMahon-Tr. at 228:4-229:15, Ex. 651).</p>
<p>First, Roadtrek began paying for warranty claims late. Next, Roadtrek began withholding payment to Mega for incentives and customer warranty work reimbursement altogether. The last check Mega received from Roadtrek was in July or August of 2008. (6:25-7:2)</p>	<p>Mega's timeline here is seriously flawed. As discussed above, Mega did not decide to withhold payment for three or four units until late 2009 and it did not tell Roadtrek about its decision. If the last check was received in July or August 2008, how is it possible that it was the result of Mega's decisions to withhold payment in September 2009.</p>
<p>Roadtrek alleges it offset payments for warranty claims and incentives. (7:3)</p>	<p>Pursuant to the parties' practice of offsetting liabilities, Roadtrek offset every payment it owed Mega. (Ex. 496). After all offsets, Mega still owes Roadtrek \$599,569.91. (<i>Id.</i>). Roadtrek is pursuing this unpaid balance in the federal court case.</p>
<p>However, there is insufficient evidence showing payments through offset for approved claims, suggesting this "payment" defense was thought up only after litigation became imminent between the parties. (7:4-6)</p>	<p>Mega started offsetting in 2008. (Exs. 623; 637). Roadtrek started offsetting in early 2009 because Mega had made short paid or failed to pay a large number of Roadtrek invoices. (9/23/11 Hammill-Tr. 169:14-170:2). Roadtrek's evidence of a offsets and a complete accounting for them is overwhelming. (Ex. 496). Mega offered no comprehensive accounting of its offsets.</p>

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<p>At the time of the alleged offsetting, Mega was never made aware of the practice. (7:6-7)</p>	<p>Schilperoort testified that Mega always felt free to offset against Roadtrek. (9/22/11 Schilperoort-Tr. at 34:15-21). Further, Cassidy reviewed a statement of offsets with Fosdick in November 2008 and again with Schilperoort in January 2009. (Ex. 532, 1/18/12 Cassidy-Tr. at 79:18-86:10).</p>
<p>When Mega's other franchisors pay Mega for warranty or parts through offsetting, Mega receives a statement to that effect so it is able to clear such claims from its records as having been paid. However, Roadtrek never sent such offsetting accountings to Mega. (7:8-11)</p>	<p>Mega received such a statement in November 2008 and January 2009. (Ex. 532 at 4). Mega never sent such offsetting accountings to Roadtrek. Jennifer Fresh accessed the Roadtrek system for information about the status of Mega's warranty claims. (1/9/12 Fresh-Tr. at 69:8-18).</p>
<p>For those claims that were disapproved, Mega did not consistently receive specific written notice of the grounds for disapproval. (7:13-14)</p>	<p>Fresh testified that Roadtrek's system, like other RV manufacturers' systems, provides immediate information about the status of each claim. (1/9/12 Fresh-Tr. at 73:23-74:12).</p>
<p>For those claims that were approved, written approval often came late. (7:14-15)</p>	<p>Of the over 200 warranty claims on Exhibit 708, <u>only 3</u> were not approved within 30 days after receipt of Mega's final warranty claim. (Ex. 774, Mega Control Nos. 70227, 70439, 80264). As below, two of these claims (Mega Control Nos. 70227, 70439) was approved after 30 days because of sublet delays. (Ex. 517 at RMI 10043, 10000, ). The third claim (Mega Control No. 80264) was delayed because Mega failed to submit pictures as requested. (Id. at RMI 10677).</p>

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<p>Roadtrek claims no approval or disapproval of many incentive claims was required because such claims were often made to Roadtrek orally. (7:15-17)</p>	<p>Mega offered no evidence that any of the purported incentive claims were made orally. (Ex. 706). Mega offered no evidence as to when any of the incentive claims on Exhibit 706 were made to Roadtrek.</p>
<p>However, oral requests and approval had always been the course of conduct between the parties. (7:17-18)</p>	<p>Roadtrek had programs that it offered to Mega and all dealers. Consumer cash back incentives required the submission of a form. (9/23/11 Hammill-Tr. at 46:22 - 47:19). Mega witnesses agreed that it was a better practice to make sure approvals were in writing. (<i>See e.g.</i>, 11/18/11 Lankford-Tr. at 66:25-67:6).</p>
<p>Roadtrek also stopped selling warranty parts to Mega. (8:3)</p>	<p>Roadtrek sent countless parts to Mega through 2009 and as late as April 6, 2010. (Ex. 496 at RMI 9158). Mega paid for none of these parts. (<i>Id.</i> at RMI 9155-9158). Roadtrek stopped sending parts to Mega after Mega failed to provide adequate assurances to Roadtrek. (Ex. 674).</p>
<p>Two exceptions to this are found in Exhibit 76 at RMI 2018 and RMI 2356-2357. However, these were very specific exceptions regarding Mega having to beg Roadtrek to provide parts for two specific customers. (8:footnote 9)</p>	<p>There are many examples of Roadtrek sending parts to Mega into 2010. (Ex. 496 at RMI 9158). To the extent that Mega used parts for warranty repairs, Roadtrek reimbursed Mega for those parts pursuant to the warranty policy. (Ex. 703 at RMI 7191).</p>
<p>As a result, Mega was prevented from fulfilling its obligations as a Roadtrek franchisee. From that point forward Mega could not do warranty work on Roadtreks because it lacked the necessary parts. Mega tried to take care of the customers as best as it could, sometimes even resorting to pulling a part off a Roadtrek stock unit so the service department could conduct repairs. Mega found itself funding its own warranty work for Roadtrek, which became financially draining for Mega. (8:4-9)</p>	<p>Roadtrek sent countless parts to Mega through 2009 and as late as April 6, 2010. (Ex. 496 at RMI 9158). Mega paid for none of these parts. (<i>Id.</i> at RMI 9155-9158). Roadtrek stopped sending parts to Mega after Mega failed to provide adequate assurances to Roadtrek. (Ex. 674).</p>

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<p>Not surprisingly, the customer satisfaction level dropped and customers began assuming Mega was not a Roadtrek dealer because it could not do warranty work on customers' vehicles. (8:14-16)</p>	<p>Mega offered no evidence of customer satisfaction levels.</p>
<p>As the parties moved forward with their relationship, Mega continued to receive assurances from Mr. Hammill that interest was not due. (8:17-18)</p>	<p>Presumably, Mega is now referring to the time period after the March 2008 meeting in Kitchener. After the Security Agreement was signed, Hammill never told anyone at Mega not to worry about interest. (11/7/11 Hammill-Tr. at 67:2-5).</p>
<p>In May 2009, Mega met with Mr. Hammill in Mega's Millhouse meeting room to discuss the money owed between both parties and the difficulties Roadtrek's actions were causing Mega. During that meeting, each of the parties wrote down the amounts they felt were owed between the parties on a large grease board mounted on the wall. After both parties wrote their figures, Mr. Hammill went up to the board and erased figures on both sides, illustrating the amounts owed between the parties were "pretty much a wash" and the parties could resolve the amounts owed by essentially writing check-for-check. After both parties wrote their figures, Mr. Hammill went up to the board and erased figures on both sides, illustrating the amounts owed between the parties were "pretty much a wash" and the parties could resolve the amounts owed by essentially writing check-for-check. The very first thing Mr. Hammill erased from the board was interest. As with every other time interest was brought up during one-on-one conversations between Mr. Hammill and Mega, Mr. Hammill stated, "don't worry about interest. Interest isn't something that we're concerned with." (8:18-9:4)</p>	<p>This was the start of on-and-off discussions between Mega and Roadtrek to resolve issues about Mega's late payments to Roadtrek. Hammill testified that he "asked Brent McMahon for a meeting to discuss the monetary issues between the companies because for the first three or four months of 2009, things had deteriorated and both companies had engaged in setting off monies against each other. And I wanted to sit down and hash out that arrangement." (9/23/11 Hammill-Tr. at 143:18-24). At the end of the meeting, the parties agreed to review each their records and meet in another month. (<i>Id.</i> at 179:18-180:9).</p>

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<p>In the months that followed, Mega waited for Roadtrek to hold up its end of the bargain and exchange check-for-check as the parties had agreed during the Millhouse meeting. But, Roadtrek never sent a check. (9:5-7)</p>	<p>Mega committed to paying Roadtrek's unit invoices more promptly. (11/14/11 Hanemaayer-Tr. at 72:14-72:21). By the time the parties met in June 2009, Mega's out-of-trust situation amount with Roadtrek ballooned to \$1.3 million. (9/23/11 Hammill-Tr. at 180:10-16). Of course, as of June 2009, Mega owed Roadtrek far more than vice versa. (Ex. 502).</p>
<p>Instead, Roadtrek began contemplating ways to effectively terminate Mega as a Roadtrek franchisee without having to follow the rules outlined in the California Vehicle Code. (9:7-9)</p>	<p>Mega offers no record cite for this assertion.</p>
<p>In the months preceding the October 2009 Pomona RVIA Show ("the 2009 Pomona Show"), a manufacturer show for which Mega provided its own units for display as Roadtrek's official Roadtrek dealer, Roadtrek had discussions among its management employees and its counsel regarding plans to abscond with Mega's units at the 2009 Pomona Show. (9:9-13)</p>	<p>The Security Agreement granted Roadtrek the right to repossess Mega's inventory. (Ex. 614 at §14(a)).</p>
<p>In preparation for the planned repossession, in the weeks preceding the 2009 Pomona Show, Roadtrek representatives made every effort to see that Mega delivered the entirety of its inventory to the 2009 Pomona Show as well as all documentation concerning such inventory. (9:13-16)</p>	<p>Similar to other shows, the 2009 Pomona Show included a combination of dealer and manufacturer inventory. (8/18/11 Schilperoort-Tr. at 104:2-6).</p>
<p>During the two-week event, Mega sold a record number of units, which would ordinarily be considered very successful. (9:16-18)</p>	<p>Mega might have been selling units, but they certainly were not paying for them.</p>

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<p>Nonetheless, without prior notice, at the close of the show Roadtrek informed Mega it would be taking possession of the unsold units and delivering them to Quality Drive Away to be stored. (9:18-20)</p>	<p>Roadtrek told Schilperoort, Lankford and Shawn McMahon that the Roadtrek units would be repossessed at the end of the show if the parties did not work out an agreement regarding payment. (1/18/12 Cassidy-Tr. at 105:25-106:13; 11/7/11 Hammill-Tr. at 130:11-135:18). Hammill attempted to notify Brent McMahon but he told Hammill to talk to Schilperoort and Lankford. (11/7/11 Hammill-Tr. at 129:12 - 129:21).</p>
<p>This action by Roadtrek effectively terminated Mega as a Roadtrek franchisee, rather than just depriving it of resources, as it had done previously. At that point, Mega's ability to continue functioning as a Roadtrek franchisee was not only severely hindered, it was completely obliterated. (9:21-24)</p>	<p>Mega terminated its relationship with Roadtrek by failing to provide adequate assurances. (Ex. 676 at RMI 6289-6292).</p>
<p>After the 2009 Pomona Show, in complete disregard of the prior course of conduct between the parties, Roadtrek ceased unit shipments to Mega. (9:24-26)</p>	<p>The prior course of conduct was shipping units pursuant to the Security Agreement. (Ex. 614). Roadtrek withdrew its floor plan financing in September 2009. (Ex. 654). Mega failed to floor any units through third-party lenders and failed to provide adequate assurances. (Ex. 676; 11/7/11 Hammill-Tr. at 137:3-137:20).</p>
<p>Further, it refused to accept Mega's orders for new units or parts, in addition to continuing to refuse to reimburse Mega for warranty work. (9:26-28)</p>	<p>Roadtrek sent countless parts to Mega through 2009 and as late as April 6, 2010. (Ex. 496 at RMI 9158). Mega paid for none of these parts. (<i>Id.</i> at RMI 9155-9158). Roadtrek stopped sending parts to Mega after Mega failed to provide adequate assurances to Roadtrek. (Ex. 674).</p>

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<p align="center"><b>MEGA "STATEMENT OF FACT"</b> <b>(Cite To Mega Brief - page:lines)</b></p>	<p align="center"><b>CORRECTION/ROADTREK'S RESPONSE</b></p>
<p>Although Roadtrek claimed to have absconded with the units at Pomona to protect its financial interests pursuant to the Security Agreement, Roadtrek's discussions with other dealers about establishing an additional franchise within the exclusive territories already assigned Mega reveals this was a mere pretense. (10:3-6)</p>	<p>There is nothing the Vehicle Code preventing Roadtrek from talking to other dealers as part of its duty to protect its dealer network. As Hammill testified, he always talked to non-Roadtrek dealers to be aware of what is going on in the marketplace. (9/22/11 Hammill-Tr. at 95:17 - 95:24).</p>
<p>Mr. Phil Martinelli, a prior employee of Mike Thompson's RV ("MTRV"), recalls Roadtrek soliciting MTRV as a potential dealer to replace Mega as early as August or September of 2009. (10:6-8)</p>	<p>Martinelli was soliciting Roadtrek for Mike Thompson's RV. Hammill testified that Martinelli "was a general sales manager for Mike Thompson's RV had been calling us for probably a year, and calling me personally for a year, to talk about how Roadtrek would be a good fit at Thompson's. And I had gone in to see Phil as a friend, we had been friends for a couple years, and I had already had a relationship with Frank De Galas, so those meetings happened, Phil would talk about Roadtrek, yes." (11/8/11 Hammill-Tr. at 180:25-181:11).</p>
<p>Mr. Martinelli clearly recalls Roadtrek brought one of its units to MTRV to educate MTRV on the product during that time period. (10:9-10)</p>	<p>Martinelli is wrong. While Mitchell was a Pleasure-Way sales representative, he took at Pleasure-Way to Mike Thompson's RV, at the request of Martinelli. (9/30/11 Mitchell-Tr. at 102:2-103:14). Mitchell took a Pleasure-Way there because of concerns about Mega's financial condition. (<i>Id.</i>).</p>
<p>At the 2009 Pomona Show, Roadtrek took additional action to find a new dealer to replace Mega and began speaking to Giant RV in addition to MTRV about the possibility. (10:11-13)</p>	<p>There is nothing the Vehicle Code preventing Roadtrek from talking to other dealers as part of its duty to protect its dealer network. As Hammill testified, he always talked to non-Roadtrek dealers to be aware of what is going on in the marketplace. (9/22/11 Hammill-Tr. at 95:17-95:24).</p>

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<p align="center"><b>MEGA "STATEMENT OF FACT" (Cite To Mega Brief - page:lines)</b></p>	<p align="center"><b>CORRECTION/ROADTREK'S RESPONSE</b></p>
<p>However, after the 2009 Pomona Show, from October 2009 to January 2010, Roadtrek's discussions with MTRV went from merely speculative solicitations to true negotiations. (10:14-15)</p>	<p>Hammill did not discuss a dealer agreement with Mike Thompson's until the second week of January 2010. (11/7/11 Hammill-Tr. at 212:9-12).</p>
<p>Despite these plans to steal Mega's franchises, Roadtrek continued to maintain the pretense that it still wanted "to work things out" with Mega. (10:16-18)</p>	<p>Hammill did not discuss a dealer agreement with Mike Thompson's until the second week of January 2010. (11/7/11 Hammill-Tr. at 212:9-12).</p>
<p>On December 1, 2009, Mega made a final attempt to resolve the parties' differences and set up a dinner meeting in Louisville, Kentucky during a trade show both parties were attending. Mega worked diligently with Mr. Jeff Hanemaayer, Roadtrek's Vice President, to complete a written document that would embody the oral agreement reached at the dinner. (10:19-25)</p>	<p>Hanemaayer spend hours and countless drafts trying to get a settlement agreement. (Ex. 27). Mega would not sign the agreement because of semantics. (11/17/11 Lankford-Tr., at 58:19 - 60:2, 78:10-79:7; 107:13-107:21).</p>
<p>Roadtrek, however, abruptly pulled out of the negotiations before the negotiated agreement was executed. (10:25-26)</p>	<p>Roadtrek demanded adequate assurances after it was clear that Mega would never sign the settlement agreement. (Ex. 676).</p>
<p>In direct contradiction to Roadtrek's claims that Protestant's franchises were still active after October 2009, Mr. Hanemaayer spoke with Mr. Mike Lankford, Mega's Vice President of Sales, on or about December 14, 2009, after lengthy attempts t settlement, and said it was "too late," he was "gonna go play with someone else." (10:26-11:1)</p>	<p>Roadtrek demanded adequate assurances pursuant to the California UCC and Mega had 30 days to provide them.</p>
<p>Roadtrek communicated to Mega that it no longer wanted to do business with Mega. (11:2-3)</p>	<p>Roadtrek demanded adequate assurances pursuant to the UCC and Mega had 30 days to provide them.</p>
<p>While it was not immediately clear to Mega why</p>	<p>Hammill did not discuss a dealer</p>

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<p>Roadtrek would suddenly refuse to enter into a written settlement agreement, it was later discovered Roadtrek found a dealer to replace Mega, despite the fact that, under the Cal. Veh. Code, Mega remained a Roadtrek franchisee. (11:4-7)</p>	<p>agreement with Mike Thompson's until the second week of January 2010. (11/7/11 Hammill-Tr. at 212:9-12).</p>
<p>On January 29, 2010, shortly after Roadtrek backed away from the unexecuted settlement agreement with Mega. Roadtrek entered into franchise agreements with MTRV at several California locations, without providing Mega or the New Motor Vehicle Board any prior notice. (11:7-10)</p>	<p>Roadtrek entered the agreement with MTRV after Mega repudiated its agreements with Roadtrek pursuant to the UCC. (11/9/11 Hammill-Tr. at 52:24-53:12).</p>
<p>According to Mr. Hammill, Mr. DeGelas specifically negotiated Section 802 titled "Indemnification" in the dealer agreement because "he was worried about getting sued by McMahan's RV" and Mr. DeGelas would not sign a dealer agreement with Roadtrek without an indemnity clause specifically shielding MTRV from legal action, including the filing of a protest, by McMahan's RV. (11:27 - 12:3)</p>	<p>And, Mega filed a ridiculous lawsuit against Mike Thompson's RV that has been dismissed. (Ex. 534). Mike Thompson's RV's concern was well-founded.</p>
<p>Due to Roadtrek's precarious financial condition, it was compelled to seek the investment of a private equity company in order to sustain enough capital to reduce its debt load and continue to grow the company. (12:21-23)</p>	<p>Roadtrek did not receive an equity investment until March 2011, well after January 2010. (9/22/11 Hammill-Tr. at 77:21-78:2).</p>
<p>Despite Roadtrek itself going through tough economic times and losing its financing from banks, Roadtrek did not take any of this into consideration before effectively terminating Protestant. (12:25-27)</p>	<p>Roadtrek suffered late payment and no payment from Mega for years. The relationship was stopped by Mega because it failed to provide adequate assurances.</p>

Because Mega's so-called facts are wrong, and for the reasons discussed below, all of Mega's protests should be denied and it should receive no relief from the Board.

1 **I. MEGA’S INTERPRETATION OF 3072 IS FLAWED [PROTEST**  
2 **NO. PR-2233-10]**

3 Mega argues that the establishment of Mike Thompson’s RV in Colton is “illegal and  
4 void” because Roadtrek did not give Mega notice pursuant to 3072(a). Mega’s argument fails  
5 because the plain language of Section 3072(b)(5) exempts Roadtrek from the notice requirement.

6 **A. The Board Is Required to Follow the Plain Language of the**  
7 **Statute**

8 Under Mega’s strained interpretation of Section 3072, the 3072(b)(5) exemption applies  
9 only where a recreational vehicle dealership of the same line-make was established prior to  
10 January 1, 2004. That interpretation is contrary to the plain language of the statute. *Wells v.*  
11 *One2One Learning Found.*, 141 P.3d 225, 236 (Cal. 2006) (“If the words themselves are not  
12 ambiguous, we presume the Legislature meant what it said, and the statute’s plain meaning  
13 governs”). As Mega itself points out, Cal. Veh. Code Section 3072(a) requires notice when a  
14 franchise is “establishing an additional motor vehicle dealership within a relevant market area  
15 where the same recreational vehicle line-make is then represented...” Section 3072(b)(5),  
16 however, contains no reference to a “same recreational vehicle line-make” and instead states that  
17 notice is not required “if the *dealership location* subject to the protest was established on or  
18 before January 1, 2004.” Had the legislature intended to limit the Section 3072(b)(5) exemption  
19 to dealership locations of *the same line-make* established prior to January 1, 2004, it would have  
20 simply stated so. It did not. The term “dealership location” was clearly intended by the  
21 legislature to mean a competing dealer’s location, regardless of whether that dealer held a  
22 franchise for the same line-make as the protesting dealer.  
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1           **B. Mega's Interpretation Would Render the 3072(b)(5)**  
2           **Exemption Moot**

3           The interpretation of Section 3072(b)(5) advanced by Mega is circular, nonsensical and  
4 would render the exemption to the notice provision entirely moot. Assuming, hypothetically,  
5 Roadtrek granted a franchise to Mike Thompson's RV prior to January 1, 2004 – and therefore  
6 the Mike Thompson's RV franchise pre-dated Mega's franchise -- Roadtrek would not be  
7 "establishing an additional motor vehicle dealership" by appointing Mike Thompson's RV as a  
8 dealer. Mega would have no need for notification, given that Mike Thompson's already existed  
9 as a Roadtrek dealership prior to the enactment of Section 3072.

10           Why would a franchisor such as Roadtrek establish an additional dealer and be subject to  
11 3072(a) if – as Mega suggests – it had already established a dealership at the same location?  
12 Even if Mike Thompson's RV had been established without a written franchise agreement prior  
13 to January 1, 2004, there would be no need for Roadtrek to notify an existing dealer because the  
14 two dealerships would have already operated in the same relevant market area for several years.  
15 Moreover, if the legislature had intended to apply the exception in 3072(b)(5) only to "de facto"  
16 or "de jure" franchises existing prior to 2004, it would have stated that in the language of the  
17 statute. There is no such language and therefore the limitation does not exist.

18           **C. There is No Evidence Supporting Mega's Claim that Roadtrek**  
19           **Believed it Was Subject to the 3072 Notice Requirement**

20           Finally, Mega's arguments relating to any purported "knowledge" by Roadtrek that it was  
21 required to provide notice of the establishment of Mike Thompson's RV misstates testimony and  
22 is contrary to the evidence presented at the hearings. Further, Roadtrek's or Mike Thompson  
23 RV's knowledge or lack of knowledge has no bearing on the proper legal interpretation of the  
24 statute. Mega's argument rests on the supposed legal acumen of Frank DeGalas, who in fact  
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1 testified that he had no knowledge of any legal issues relating to exclusive territories and he  
2 sought advice from his attorney on all legal matters. (1/13/12 DeGelas-Tr. at 21:19 - 22:10).  
3 When questioned repeatedly if he “had some concerns about McMahan’s RV Super Store’s  
4 rights in connection with [Mike Thompson’s] obtaining the Roadtrek franchise,” DeGalas  
5 testified, “I had no concern about McMahan’s rights. I was told that I could have the  
6 dealership.” (1/13/12 DeGelas-Tr. at 24:6 - 20). Mega attempts to discredit DeGalas’ first-hand  
7 testimony regarding his knowledge of McMahan’s rights with self-serving statements by Mike  
8 Lankford and Phil Martinelli. Mega’s citations to its employees’ testimony are unconvincing, as  
9 Lankford and Martinelli lack any foundation to testify regarding DeGalas’ knowledge and  
10 beliefs. Moreover, as Judge Hagle aptly acknowledged during the hearings, the indemnification  
11 clause was nothing more than an intelligent lawyer’s way of protecting his client. (1/13/12  
12 DeGelas-Tr. at 33:20-34:7). Mega’s attempt to draw additional sweeping conclusions from the  
13 indemnification clause is fatally flawed.

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16 Equally unpersuasive is Mega’s attempt to use prior board decisions, *Manteca Trailer*  
17 *and Camper Inc. dba RVs of Sacramento v. Home and Park Motorhomes Roadtrek* (PR-2036-07)  
18 and *Manteca Trailer and Camper, Inc. dba Brawley’s RV v. Home and Park Motorhomes*  
19 *Roadtrek*, (PR-2074-07) as evidence that Roadtrek believed that it was obligated to provide  
20 notice under 3072(a). The *Manteca* decisions were judicially noticed by Judge Hagle for the  
21 limited purpose of showing that Roadtrek had knowledge of *termination* notice requirements as  
22 of 2006. The decisions have no relation whatsoever to Roadtrek’s interpretation of the notice  
23 requirements for establishing a new franchise or the exemption found in Section 3072(b)(5).  
24 There was no issue about notice under Section 3072(b)(5) in the *Manteca* matter. Moreover, as  
25 Hammill testified, Roadtrek reviewed Section 3072 for the first time prior to appointing Mike  
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1 Thompson as a dealer and found that the language of Section 3072(b)(5) exempted it from the  
2 notice requirement. (11/8/11 Hammill-Tr. at 24:20-27:5; 11/15/11 Hanemaayer-Tr. at 177-178).

3 Thus, Protest No. PR-2233-10, brought under Section 3072 of the Vehicle Code, should  
4 be overruled and dismissed.

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6 **II. ROADTREK WAS NOT REQUIRED TO GIVE NOTICE TO**  
7 **MEGA UNDER 3070(B) [PROTEST NOS. PR-2199-10 AND PR-**  
8 **2201-10]**

9 Mega alone carried the burden in these proceedings whether the Board even has  
10 jurisdiction of Protest Nos. PR-2199-10 and 2201-10. Without sustaining its burden of proof that  
11 Roadtrek's appointment of Mike Thompson's was a "modification" of the terms of the Dealer  
12 Agreement, Mega argues that Roadtrek was required to provide notice to Mega under Section  
13 3070(b)(1) of the Vehicle Code. Mega's arguments fail because (1) Mega has not sustained its  
14 burden that Roadtrek modified Mega's franchise, and (2) even if Mega had proven a  
15 modification, the modification would have no effect on any sales and service obligation or  
16 investment by Mega. Mega solely bore the burden of proving that the Board has jurisdiction of  
17 the modification protests. It failed to meet that burden.

18 **A. Roadtrek's Appointment of Mike Thompson Was Not a**  
19 **Modification**

20 Mega cannot escape the bargained-for terms of the parties' Dealer Agreements. Despite  
21 its claim that it is entitled to an exclusive territory regardless of its failure to meet its contractual  
22 obligations, the terms of the agreement provide that Mega is only entitled to an exclusive  
23 territory so long as it remains in "good standing." (Exs. 600, § 108; 604, § 108). Based on those  
24 terms, Roadtrek's appointment of Mike Thompson's within Mega's formerly exclusive  
25 territories is not a modification of the Dealer Agreement, and Roadtrek was not required to  
26 provide notice to Mega.  
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1 Mega once again distorts the language of Vehicle Code by arguing that the preface to  
2 Section 3070(b), which reads “notwithstanding...the terms of any franchise,” means that a  
3 manufacturer must provide notice to a dealer regardless of whether there is a modification of the  
4 franchise. This argument is circular and it does not constitute a modification. The words  
5 “notwithstanding...the terms of any franchise” mean that the notice and protest requirements,  
6 when triggered by a modification, cannot be waived by a dealer agreement. Here, the notice and  
7 protest requirements of Section 3070(b) have not been triggered by a modification.  
8

9 In *BMW of North Am. v. New Mot. Veh. Bd.*, 209 Cal. Rptr. 50, 51 (Cal. App. 1984), the  
10 California Court of Appeals emphasized that, in determining whether a modification has  
11 occurred and whether Section 3060 has been triggered, “*the first reference must be to the written*  
12 *terms of the contract.*” (emphasis added). Where a franchise clearly and unequivocally limits a  
13 dealer’s exclusive right to sell a manufacturer’s products, the manufacturer’s appointment of a  
14 new dealer is pursuant to, rather than in derogation of, the franchise agreement. *Id.* Although  
15 the Vehicle Code is intended to protect dealers in cases of a modification, the Board may not  
16 disregard the terms of the franchise and impose contractual obligations upon a manufacturer to  
17 which it did not consent. *Id.* As the Court in *BMW* held, the Vehicle Code “in no manner  
18 dictates what must be included in a franchise agreement, and it does not state or imply that a  
19 franchisor may not reserve the power to appoint new dealers or that a franchise must provide an  
20 exclusive trading area to a dealer.” *Id.* Accordingly, Section 108 of the Dealer Agreement  
21 provides that Mega’s dealer territory is limited to an area of 60 miles and so long as Dealer  
22 remains in good standing during the terms of this Agreement, Home and Park will not locate  
23 another dealer within Dealer’s territory. (Ex. 600). Those terms clearly mean that Mega must  
24 remain in good standing to maintain its exclusive territory.  
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1 In yet another attempt to avoid meeting its burden, Mega argues that Roadtrek is required  
2 under Paragraph 520 of the Dealer Agreement to give Mega 365 days notice of a “substantial  
3 change in the material terms” of the Dealer Agreement. As an initial matter, the notice  
4 requirement in Paragraph 520 does not take effect here because there was no “substantial change  
5 in the material terms” of the Dealer Agreement. Roadtrek simply exercised its right under the  
6 existing terms of the Agreement to appoint a new dealer. Moreover, Mega fails to cite the  
7 complete language of Paragraph 520, which provides that notice is not required “in instances of  
8 the insolvency or bankruptcy of Dealer, or assignment for the benefit of creditors by Dealer, or  
9 failure to meet sales commitments in Section 111.” Under Section 111 of the Colton/Irvine  
10 Agreement, Mega was required to sell a minimum of one hundred (100) new Roadtreks per  
11 calendar year. (Ex. 600, § 111). Mega sold 55 Roadtreks in 2008 and 49 Roadtreks in 2009.  
12 (Ex. 508). Under Section 111 of the Scotts Valley Agreement, Mega was required to sell a  
13 minimum of sixty (60) Roadtreks per calendar year. (Ex. 604, at § 109). Mega sold only 30  
14 Roadtreks in 2008 and 20 Roadtreks in 2009. (Ex. 509). Mega failed to meet sales  
15 commitments in Section 111. Thus, for all of these reasons, Mega was not entitled to any notice  
16 under Paragraph 520.

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19 **B. In Any Event, Mega Had No Sales or Service Investment in its**  
20 **Roadtrek Line at the Time of Mike Thompson’s Appointment**

21 Roadtrek was also not required to give notice to Mega because, even if the appointment  
22 of Mike Thompson’s constituted a “modification,” the modification had no effect on any sales or  
23 service obligations or investments made by Mega. At the time Mike Thompson was appointed  
24 as a Roadtrek dealer, Mega had no financing or working capital for its Roadtrek franchise, no  
25 staff that was solely dedicated to selling Roadtreks, and no sales or service facilities exclusively  
26 dedicated to the Roadtrek product. As Jim Hammill testified, Roadtrek did not at any time

1 require Mega to make any renovations to its facilities or create special showroom space, or to  
2 purchase any signs or special tools to service Roadtrek products. (11/11/11 Hammill-Tr. at 63:9  
3 - 63:19). Hammill testified, “[t]here’s a number of programs essentially where we provide  
4 everything we can to a dealer to ensure that their investment is limited to their general  
5 overhead.” (9/22/11 Hammill-Tr. at 92:7 - 92:17). Similarly, Jeff Hanemaayer testified that  
6 Roadtrek does not require its dealers to make any special investments in their facilities. (11/9/11  
7 Hanemaayer-Tr. at 153:20 - 155:8).

9 Mega failed to prove that it made any investments beyond the general overhead costs  
10 related to selling all of its line-makes. Again, the burden here was on Mega. Where was the  
11 proof that its investment changed as a result of the appointment of Mike Thompson’s RV?  
12 When asked to explain inflated figures (including a monthly cost of \$574,000 for sales staff) set  
13 forth in a March 28, 2008 letter from Mega to Roadtrek, McMahon testified, “I would be honest  
14 and say that’s probably a bit of an exaggeration.” (Ex. 609; 8/12/11 McMahon-Tr. at 67:14-  
15 68:5). McMahon clarified through his testimony that the sales staff at Mega “varied” and, most  
16 importantly, the figures set forth in the letter applied to all of Mega’s brands, not just Roadtrek.  
17 However, despite McMahon coming clean through his testimony, Mega stands by its prior  
18 unsubstantiated assertions in its post-hearing brief. In addition, Mega asserts that it “spent  
19 money and time repairing its service facility in *Mesa, CA.*” (Prot. Post-Hearing Br., at 19). Mega  
20 does not even have a Roadtrek franchise agreement for a location in Mesa, CA, and its repairs to  
21 that facility have no relevance whatsoever to these protests.  
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24 For these reasons, Protest Nos. PR-2199-10 and PR-2201-10, filed pursuant to Vehicle  
25 Code Section 3070(b)(1), should be overruled and dismissed.

1 **III. ROADTREK HAS GOOD CAUSE TO TERMINATE MEGA**

2 Mega clings to two primary arguments to support its contention that Roadtrek lacks good  
3 cause to terminate its franchises. First, Mega argues repeatedly that its failure to maintain  
4 business operations following the repossession of its units in October, 2009 was “the direct result  
5 of Roadtrek’s unlawful actions.” Rather, it was Mega that engaged in unlawful conduct by  
6 withholding payments for units, parts and interest from Roadtrek and by assuring Roadtrek that it  
7 would make payments on out of trust units when it had no intention of doing so. In addition,  
8 Mega repudiated the Dealer Agreements in December of 2009 and refused to provide adequate  
9 assurances to Roadtrek for the shipment of additional units and parts.  
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11 Second, Mega argues that Roadtrek lacks good cause because Mega “shattered every new  
12 unit sales record Roadtrek ever had.” Mega’s sales performance prior to the years immediately  
13 preceding its termination has no relevance to Section 3071. The relevant inquiry for the Board is  
14 whether the “*existing circumstances*” of the franchise warrant a termination. *See* March 13, 2012  
15 Order Deferring Proposed Order Granting Respondent’s Motion to Dismiss Protest No. PR-  
16 2245-10 (“The statute clearly makes ‘existing circumstances’ the primary focus of what must be  
17 considered by the Board”). Under the existing circumstances, Mega has (1) failed to maintain  
18 sales and stocking levels for the past three years, (2) closed two of the three dealership locations  
19 where it had Roadtrek franchise agreements, (3) intentionally withheld payments for sold units,  
20 (4) engaged in a pattern of dishonest practices that injured both Roadtrek and its customers, and  
21 (5) lacked sufficient credit to carry a Roadtrek franchise. Those circumstances are highly  
22 relevant to these protests and constitute good cause for termination.  
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1 Mega's failure to conduct Roadtrek business was of its own doing. From mid-2008 to the  
2 end of 2009, Roadtrek attempted to work with Mega to obtain payments on sold Roadtrek  
3 motorhomes. (Exs. 617, 637). Throughout that period, Mega was using funds that were owed to  
4 Roadtrek to operate its business. (8/18/11 Schilperoort-Tr. at 187:2-6). In October 2009,  
5 Roadtrek repossessed units from Mega because Mega refused to pay Roadtrek for units that it  
6 sold, due in part to the advice of its "advisors and lenders." (Prot. Post-Hearing Br., at 6).  
7 Roadtrek then sought adequate assurances under the California UCC from Mega in the form of a  
8 letter of credit and payment for out-of-trust units. Mega responded with a two word email:  
9 "good luck." In taking these actions, Mega repudiated the Dealer Agreements and was not  
10 entitled to additional shipments from Roadtrek. *See* Cal. U. Comm. Code § 2-609 ("Where a  
11 buyer ... fails to make a payment due on or before delivery or repudiates with respect to a part or  
12 the whole, then with respect to any goods directly affected ... the aggrieved seller may (a)  
13 withhold delivery of such goods; ... (e) recover damages for nonacceptance ... or in a proper  
14 case the price ...; (f) Cancel"). Roadtrek did not voluntarily forgo representation of its product  
15 in the Southern California market -- it had no choice given Mega's failure to uphold its  
16 commitments. Everyone understood the importance of the Southern California market to  
17 Roadtrek.

20 Finally, any reference to, or argument about, Mike Thompson's dealer agreement with  
21 Roadtrek is entirely irrelevant for the purpose of determining these protests. It is Mega's Dealer  
22 Agreement -- not Mike Thompson's -- that is at issue.

24 **B. Mega Had No Substantial or Permanent Investments in its**  
25 **Roadtrek Dealerships (Sec. 3071(b) and (c))**

26 While referencing (but not citing to) "previous Board decisions," Mega argues that the  
27 Board's decision with respect to Cal. Veh. Code §3071(b) and (c) should include such items as

1 (1) “dedication of land/buildings to the line-make in questions,” (2) “the number of years  
2 Protestant has represented the line-make,” (3) “the part of Protestant’s business represented by  
3 Respondent’s brand,” and (4) “Protestant’s dedications and devotion to Respondent’s brand as  
4 well as Protestant’s performance in representing the brand.” Mega states that “[p]ermanency of  
5 investment has long been understood to mean the level of commitment, financial or otherwise,  
6 that Protestant has demonstrated to the brand.” There is no legal support of any of these  
7 propositions -- Mega cites no caselaw or legislative history in support of this expansion of the  
8 plain language of the Vehicle Code. *See e.g., Curry v. Superior Court*, 20 Cal. App. 4th 180,  
9 184, 24 Cal. Rptr. 2d 495, 497 (Cal. App. 1993) (“[S]tatutes which increase liability, or provide  
10 a remedy against a person who is not liable at common law are to be narrowly construed in favor  
11 of those sought to be subjected to them”).  
12

13  
14 Even under Mega’s recitation of the legal standard for Sections (b) and (c), Roadtrek has  
15 met its burden of proving that Mega has made only minimal investments, and no permanent  
16 investment, in its Roadtrek franchise. Specifically:

17 (1) Roadtrek has proven that Mega has made no investment in land or buildings  
18 dedicated to the sale of Roadtrek products. Mega sells 60 other brands from all of these  
19 locations. Mega’s contention that it has “three established and successful locations from which it  
20 is able to sell and service Roadtrek units” is simply false. Mega does not even have dealership  
21 locations at Scotts Valley or Irvine any longer. Mega’s new Westminster location cannot be  
22 considered a Roadtrek dealership location because Mega never entered into a franchise with  
23 Roadtrek for that location. *See Serpa Automotive Group v. Volkswagen of America*, PR-1977-  
24 05, at ¶ 86 (new dealer site was not an investment because the location “was never approved as  
25 an authorized site for the VWoA franchise”). Finally, Mega uses its Colton location to sell  
26  
27

1 several line makes. As the Judge and counsel observed at the Colton site visit, the Colton  
2 location is fully used and there was no vacant space formerly used to sell Roadtreks. Indeed,  
3 Roadtrek does not require dealers to make any investment in their facilities to sell the Roadtrek  
4 line. (9/22/11 Hammill-Tr. at 94, 11/9/11 Hammill-Tr. at 155:2 - 155:16). McMahon agreed  
5 that no specific investments were made to Mega's facilities to sell Roadtreks. (8/12/11  
6 McMahon-Tr. at 205:15-207:6; 8/15/11 McMahon-Tr. at 94:23-95:5).

8 (2) Roadtrek has proven that Mega has little actual devotion to the Roadtrek brand.  
9 In its brief, Mega cites the exact same "investment" figures from Exhibit 609 that McMahon  
10 later characterized as "a bit of an exaggeration." McMahon's testimony made clear that the  
11 figures cited in the March, 2008 letter applied to *all* of Mega's brands, not just Roadtrek.  
12 (8/10/11 McMahon-Tr. at 96:5-96:14, 98:11-99:12). Moreover, Mega's continuous pattern of  
13 dishonest conduct, which includes falsifying incentive claim forms and using Roadtrek customer  
14 leads to sell a competitor's products, shows that its sole focus is on turning profits, rather than  
15 representing the Roadtrek brand with integrity. If Mega was truly devoted to the Roadtrek  
16 brand, it would have paid Roadtrek on time and this litigation would not have commenced.

18 (3) Roadtrek has proven that Mega failed to commit adequate working capital and  
19 credit to the Roadtrek brand. To date, Mega has not provided Roadtrek with adequate  
20 assurances. As GE's John Print testified, Paul Schilperoort called him to request documentation  
21 which states that Mega is allowed to floor plan Roadtrek units. (Print Dep. 17:9 - 18:8). Print  
22 testified that Mega's ability to floor Roadtrek units on its GE line does not necessarily mean that  
23 Mega has availability on its line to floor Roadtreks. (Print Dep., 18:4 - 18:23). In fact,  
24 McMahon himself testified that Mega has ten different manufacturers fighting for the GE line  
25 and "they were all on you to floor their stuff because they're trying to survive, meet their quotas,  
26  
27

1 meet their goals. So you're basically at some point trying to squeeze \$12 million worth of stuff  
2 down a \$10 million barrel." (8/11/11 McMahon-Tr. at 79:13-79:22). There is no evidence in the  
3 record, only conclusory unsupported statements, that Mega has sufficient flooring to perform its  
4 obligations as a Roadtrek dealer.

5  
6 Roadtrek has met its burden of proving that it has good cause to terminate Mega because  
7 Mega has made no substantial and permanent investment in its Roadtrek franchise under  
8 Sections 3071 (b) and (c).

9 **C. Terminating Mega as a Roadtrek Dealer Would Not be**  
10 **Injurious To The Public (Sec. 3071(d))**

11 In support of its claim that terminating Mega as a Roadtrek dealer would be injurious to  
12 the public, Mega attempts to rely on its sales performance prior to 2008, and the awards and  
13 praise that Mega received due to that performance, to prove that Roadtrek does not have good  
14 cause under §3071(d) to terminate its dealership. Nonetheless, the record evidence proves that  
15 Mega has failed to serve the public in an honest manner since 2008.

16  
17 Mega's brief entirely ignores the record evidence that Mega falsified signatures on  
18 consumer cash back forms. (1/10/12 Crowe-Tr. at 94:22-95:12). Customers confirmed in  
19 writing and in depositions that they did not sign consumer cash back forms, and that Mega did  
20 not even notify them that cash back incentives were available on their units. (Exs. 691, 692, 693;  
21 Kurt Brittain Dep. at 9:1-9:7, 10:8-10:20; Robin Hays Dep. at 7:24-8:4; 11:6-11:19; Tom  
22 DeRossett Dep. at 13:23-14:5, 14:8-15:5). In addition, Tom DeRossett, a customer deposed  
23 during these protests, testified that dealing with Mega was "very difficult" and stated that he  
24 "wouldn't even want to drive by the place." (DeRossett Dep. at 13:13-13:21). Based on this  
25 testimony, it would be accurate to conclude that it is *more* injurious for the public to be forced to  
26

1 use Mega as a dealer, than for the public to have another, more trustworthy dealer representing  
2 the Roadtrek brand.

3 In addition, as discussed more fully above, Mega's sales record prior to 2008 does not  
4 change the fact that it has not maintained any business operations for over two years, due to its  
5 failure to maintain sufficient credit to support its franchise and its refusal to pay for out of trust  
6 units. Roadtrek has met its burden of proving that terminating Mega's franchise would not be  
7 injurious to the public.  
8

9 **D. Mega Does Not Have the Facilities, Funding or Resources to**  
10 **Provide Adequate Services to the Public (Sec. 3071(e))**

11 Again, Mega's repeated attempt to cloak "any present or future inability of Protestant to  
12 sell or market Roadtrek vehicles" as the result of Roadtrek's actions is both misleading and  
13 inaccurate. Roadtrek did not sell parts and units to Mega because Mega refused to pay Roadtrek  
14 for out-of-trust units and refused to provide any proof to Roadtrek that it had sufficient financing  
15 to floor Roadtrek units. In addition to those two failures, Mega purposely misled Roadtrek by  
16 representing through its counsel, Michael Sieving, on September 2, 2009 that Mega had opened a  
17 new flooring line, and "will put the Roadtrek units on within the next 30 days." Sieving also  
18 assured Roadtrek's counsel that "the SOTs will be taken care of at that time." (Ex. 651).  
19 Despite those representations, Mega had no intention of paying Roadtrek for amounts owed due  
20 to the advice of Conrad Plomin. (Prot. Post-Hearing Br., at 6). Roadtrek ceased shipments of  
21 units and parts to Mega because Mega refused to repay Roadtrek for sold units, parts and  
22 interest, and then engaged in dishonest practices to avoid paying Roadtrek.  
23

24 Due to its own actions, Mega does not have the facilities, equipment or personnel  
25 necessary to serve Roadtrek's customers. Contrary to its repeated assertions, Mega does not  
26 have three well-equipped facilities -- it has only one facility in Colton and it lacks the financing  
27

1 to stock that facility. *Thompson's Auto & Truck Center, Inc. v. DaimlerChrysler Motors Co.*,  
2 PR-1965-05, ¶ 78 (good cause for termination existed where dealer did not maintain sales or  
3 service facilities for more than a year prior to the date of the notice of termination). Thus,  
4 Roadtrek has met its burden with respect to Section 3071(e).

5  
6 **E. Mega Failed to Fulfill Warranty Obligations (Sec. 3071(f))**

7 Mega's attempt to blame Roadtrek for its inability to perform warranty work after the  
8 summer of 2009 is entirely misplaced. Roadtrek stopped shipping Mega parts because Mega  
9 stopped paying for them. Roadtrek did not have a continuing obligation to ship parts and units to  
10 Mega after Mega defaulted on its payments. As Schilperoort testified, Roadtrek's decision to  
11 stop selling parts to Mega "was in regards to our disputes about monies owed." (9/21/11  
12 Schilperoort-Tr. at 134:2 - 134:3).

13  
14 With regard to payments for warranty claims, Ms. Fresh's testimony did nothing more  
15 than demonstrate the lack of consistency in Mega's warranty claim accounting. Fresh testified  
16 that she maintained schedules in which she handwrote amounts that were authorized and due for  
17 payment by Roadtrek to Mega on printed versions of Mega's warranty schedules. (Ex. 697).  
18 However, Fresh's testimony revealed that the amounts that she hand-wrote onto the schedules  
19 never made it into Mega's online accounting system, and therefore were never factored into the  
20 amounts that Mega claimed for warranty repairs. (1/9/12 Fresh-Tr. at 77-86). Moreover, Fresh  
21 maintained weekly updates to her notes that updated the status of each claims. (1/19/12 Fresh-  
22 Tr. at 75:7-10). Only a few examples of those charts were produced so we do not have the  
23 complete picture of Mega's treatment of each claim. (Ex. 697).

24  
25 Fresh joined Mega in March of 2009 and could not testify as to the practices of the  
26 parties before that time. (1/9/2012 Fresh-Tr. at 7-8). Any argument by Mega that Roadtrek  
27

1 failed to offset warranty claim amounts is undercut by the declaration of Jim Hammill and the  
2 checks attached thereto, which evidence that Roadtrek issued checks for payments on warranty  
3 claims, and then credited Mega for those amounts. The declaration and Roadtrek's offsetting  
4 practices are discussed more fully in Section IV below.

5  
6 **F. Mega Failed to Comply with the Terms of its Franchise (Sec. 3071(g))**

7 Once again, Mega attempts to place the blame on Roadtrek for all its failure to comply  
8 with the terms of the Dealer Agreements. However, Mega was in breach of the Dealer  
9 Agreement well before October of 2009, when Roadtrek allegedly "absconded" with its  
10 inventory. Beginning in 2008, Mega failed to meet sales and stocking requirements, failed to  
11 provide financial statements in a timely manner, used Roadtrek leads to sell Pleasure-Way  
12 vehicles, and engaged in fraudulent and dishonest activity that reflected poorly on the Roadtrek  
13 brand.  
14

15 ***Mega Has Failed to Meet Stocking Requirements Under the Dealer Agreements***

16 With respect to stocking, Mega was required to stock a minimum of 22 Roadtrek  
17 motorhomes at the Colton and Irvine locations. (Ex. 600, at § 109). Mega has failed to meet that  
18 requirement from November 2008 through the present. (Ex. 506). Mega was required to stock  
19 20 motorhomes at its Scotts Valley location. (Ex. 604, at § 110). Mega has failed to meet that  
20 requirement from October of 2008 through the present. (Ex. 57).  
21

22 ***Mega Has Failed to Meet Sales Requirements Under the Dealer Agreements***

23 With respect to sales, Mega was required to sell a minimum of one hundred (100) new  
24 Roadtreks per calendar year from the Colton and Irvine locations, combined. (Ex. 600, at §111).  
25 Mega sold 55 Roadtreks in 2008 and 49 Roadtreks in 2009. (Ex. 508). Mega was required to  
26 sell a minimum of sixty (60) Roadtreks per calendar year from the Scotts Valley location. Mega  
27

1 sold only 30 Roadtrek in 2008, 20 Roadtreks in 2009 and then closed its Scotts Valley facility in  
2 2010. (Ex. 509).

3 ***Mega Failed to Submit Financial Reports to Roadtrek***

4 Under the Dealer Agreements, Mega was required to furnish to Roadtrek its financial  
5 reports on an annual basis. (Exs. 600 and 604, § 350). Paul Schilperoort's self-serving  
6 testimony does not change the fact that, despite repeated requests, Mega failed to submit its 2007  
7 financial statements to Roadtrek until October, 2008. (Exs. 619 and 629). Mega never submitted  
8 its 2008 or 2009 financial statements.

10 ***Mega Used Roadtrek Leads to Sell Pleasure-Way Motorhomes***

11 Roadtrek's proof that Mega used leads received from Roadtrek to sell other brands comes  
12 from the testimony of Marshall Maresh. As Maresh testified:

13 Q. During the time that you had Roadtrek on the lot to sell at Mega, when a  
14 Roadtrek lead customer came to the McMahon's dealership, was there ever a time when  
15 you sold that customer a Pleasure-Way?  
16

17 A. Absolutely.

18 Q. Why is that?

19 A. Because I have 20 on my lot as well and they're just as pretty. (1/12/12  
20 Maresh Tr. at 22:24 - 23:6).

22 ***Mega Conducted its Dealership in a Manner that Reflected Poorly on Roadtrek***

23 Section 370 of the Dealer Agreements requires Mega to "operate its dealership in a way  
24 that reflects favorably on it and Roadtrek." As discussed more fully above, there is a wealth of  
25 evidence proving that Mega breached this requirement by making false statements to customers  
26 regarding Roadtrek's brand, failing to provide customers with adequate service, falsifying  
27

1 incentive claim forms submitted to Roadtrek and keeping Roadtrek vehicles in poor condition on  
2 its lots. (Exs. 691, 692, 693; 11/8/11 Hammill-Tr. at 150:5-151:3; Kurt Brittain Dep. at 9:1-9:7,  
3 10:8-10:20; Robin Hays Dep. at 7:24-8:4; 11:6-11:19; Tom DeRossett Dep. at 13:13 - 13:21;  
4 13:23-14:5, 14:8-15:5).

5  
6 **G. The Existing Circumstances Warrant Termination**

7 Mega currently has only one dealership facility that is covered by a Roadtrek franchise, at  
8 Colton. That facility has not conducted any business on behalf of Roadtrek for over a year due  
9 to Mega's failure to secure adequate financing and to pay Roadtrek for sold units, parts and  
10 interest. Mega has provided no proof that it has sufficient financing to sustain a Roadtrek  
11 franchise. In addition, Mega repudiated its Dealer Agreements with Roadtrek by refusing to  
12 provide adequate assurances. Mega continues its practice of withholding payment on four units  
13 to this day. (1/10/12 Fosdick-Tr. at 21:15-21:17). Mega currently owes Roadtrek at least  
14 \$599,569.91. (Ex. 496). It is Mega's contention that, despite the fact that Mega deliberately  
15 failed to pay Roadtrek for its sold units, Roadtrek should simply send Mega products and  
16 inventory and Mega should be permitted to holding additional amounts out of trust. The law  
17 does not support that position. Cal. U. Comm. Code §2703 gives Roadtrek the right to cancel its  
18 performance under the Dealer Agreements because Mega failed to make payments due and  
19 repudiated the Agreements. That section provides, "Where a buyer ... fails to make a payment  
20 due on or before delivery or repudiates with respect to a part or the whole, then with respect to  
21 any goods directly affected ... the aggrieved seller may (a) withhold delivery of such goods; ...  
22 (e) recover damages for nonacceptance ... or in a proper case the price ...; (f) Cancel." In  
23 addition, California case law states that a lender is entitled to enforce the terms of the Security  
24 Agreement. *Hartford Finan. Corp. v. Burns*, 96 Cal. App. 3d 591 (Cal. App. 1979); *Chrysler*  
25  
26  
27  
28

1 *Credit Corp. v. Ostly*, 117 Cal. Rptr. 167 (Cal. App. 1974). To the extent that Mega claims that  
2 its non-payment is justified by amounts that Roadtrek owes it, Mega's remedies are in the courts,  
3 not this Board. Of course, Mega has monetary damages claims against Roadtrek in the pending  
4 federal court action. (Ex. 97).

5  
6 Mega admits that its payment record was "less than ideal" and that Roadtrek "continued  
7 to provide written and oral demands to Mega for payment." Nonetheless, Mega attempts to  
8 argue, based on a 1978 case from Nevada, that Roadtrek was obligated to provide even more  
9 notice than it already did that Mega was in default due to a "course of conduct" by which  
10 Roadtrek accepted late payments from Mega. This argument has no evidentiary basis. In fact,  
11 Paul Schilperoort testified that what Roadtrek expected and what Mega RV attempted to do was  
12 to pay each one of its units off within 14 days of retail funding, per the terms of the Security  
13 Agreement. (8/18/11-Schilperoort Test.- Tr., at 183:21-183:25).

14  
15 Not only does this argument stem from an admission of bad faith by Mega, it also has no  
16 basis in law. There are no statutes or cases in the state of California that require a secured party  
17 to issue a "notice of repossession" before enforcing its rights under a security agreement.  
18 Moreover, the case cited by Mega is distinguishable on its facts from the current situation,  
19 because the creditor in that case repossessed inventory without informing the debtor that strict  
20 compliance with the terms of the contract would be required. Roadtrek informed Mega  
21 repeatedly that it was in breach of the Security Agreement and demanded compliance on several  
22 occasions prior to repossessing inventory. (Exs. 617, 623, 632, 637, 641, 654, 664).

23  
24 Moreover, the law is clear that a written contract cannot be modified by a "course of  
25 conduct." Section 1698 of the Civil Code provides, "A contract in writing may be altered by a  
26 contract in writing, or by an executed oral agreement, and not otherwise." "To come within the  
27

1 provision permitting modification by an executed oral agreement the plaintiffs' evidence must be  
2 sufficient to establish all the elements of a contract and a contract which is capable of execution,  
3 at least unilaterally." *Goodman v. Citizens Life & Casualty Ins. Co.*, 61 Cal. Rptr. 682 (Cal.  
4 App. 1967). There is no evidence in the record to establish any elements of a contract permitting  
5 Mega to make short-payments, late payments or no payments to Roadtrek. Thus, Mega cannot  
6 prove that a "course of conduct" somehow modified the parties' Security and Dealer  
7 Agreements.

9 Mega ceased business operations on behalf of Roadtrek in October of 2009 due to its own  
10 bad faith conduct, failure to pay and its failure to maintain adequate working capital to operate  
11 its business. Because Mega has not -- and cannot -- fulfill its obligations under the Dealer  
12 Agreements, Roadtrek has good cause to terminate its franchises.

13 \* \* \*

14  
15 Therefore, for the reasons set forth above, the Board should overrule Mega's termination  
16 protests, PR-2244-10 and PR-2245-10, and allow the termination of Mega's Roadtrek franchises  
17 for Colton and Irvine.

18 **IV. MEGA HAS PRODUCED NO EVIDENCE IN SUPPORT OF ITS**  
19 **WARRANTY PROTESTS: PROTEST NOS. PR-2206-10; PR-2208-**  
20 **10 AND PR-2209-10**

21 Mega's warranty protests -- as well as the incentive protests discussed below -- were filed  
22 in an attempt to gain leverage over Roadtrek in litigation. Prior to Roadtrek's decision to enforce  
23 its rights under the Security Agreement and the Dealer Agreements, Mega was content to allow  
24 Roadtrek to offset warranty and incentive payments against amounts that Mega owed to  
25 Roadtrek for units and parts. It was only after Roadtrek appointed a new dealer in Southern  
26

1 California and attempted to terminate Mega's franchises that Mega suddenly sought to enforce  
2 its purported rights. These protests are the proverbial tail wagging the dog.

3 Given that Mega conceded to an offsetting arrangement for several months, it is no  
4 surprise that Mega could not come forward with any evidence that Roadtrek violated its right to  
5 payment for its warranty claims under Section 3075. *See* Nov. 29, 2010 Order on the Proposed  
6 Sequence of Presenting Evidence. The only document that Mega introduced in support of its  
7 warranty protests is a summary chart, Exhibit 708, which it produced in response to Roadtrek's  
8 motion to compel and the Order of Judge Skrocki. (11/8/11 Hammill-Tr. at 114). The only  
9 testimony that Mega offered in support of these protests was the testimony of Jen Fresh,  
10 warranty claim administrator for Mega. Fresh's knowledge was limited to the period following  
11 March, 2009 when she was hired, and she had no knowledge that Roadtrek paid Mega for  
12 warranty claims by offsetting amounts owed by Mega to Roadtrek. (1/9/2012 Fresh-Tr. at 7-8;  
13 115:4-115:16).

14  
15  
16 The first argument that Mega raises in support of its warranty protests is that claims  
17 submitted by Mega were not specifically approved or disapproved within 30 days of submission.  
18 As Mega recognizes, the parties debate whether the applicable date for determining when a claim  
19 is actually "submitted" is the date *first* submitted to warranty personnel or the date *last* submitted  
20 to warranty personnel. Mega's position with respect to the date submitted to warranty personnel  
21 is absurd for two reasons. First, Mega can point to no evidence that the parties considered a  
22 claim "submitted" when it first entered Roadtrek's system. As Chris Deakins testified, many of  
23 the claims that Mega entered into Roadtrek's system were never even completed by Mega and  
24 were inactive and canceled. (11/29/11 Deakins-Tr. at 68:15-69:1, 70:9-70:16). Those claims  
25 lacked the requisite documentation and information to be considered "submitted." Second,  
26  
27

1 Deakins testified that he engaged in conversations with Mega's service department regarding the  
2 use of incorrect codes, lack of supporting documentation or the submission of duplicative claims  
3 prior to the parties agreeing that a claim could be submitted for payment. These conversations  
4 gave Mega the opportunity to correct claims that were improperly submitted and would have  
5 otherwise been summarily denied. (11/29/11 Deakins-Tr. at 69:2 - 69:9). Mega's assertion that  
6 the date first submitted is the applicable submission date is nonsensical in light of the warranty  
7 claim process described by Deakins.

9 Only three claims submitted by Mega were approved over 30 days after the date that they  
10 were last submitted through Roadtrek's warranty system. Two of those claims, R08-1166 and  
11 R08-1376, were sublet repairs for which Roadtrek was awaiting complete documentation from  
12 Mega prior to approving the claims on its online system. In the case of R08-1166 (Mega Control  
13 Number 70227), Mega requested a sublet repair but also claimed 2.5 hours in labor time.  
14 Roadtrek requested the sublet documentation so that it would not pay twice for the same repair.  
15 (Ex. 517 at 10042-10045; 12/1/11 Deakins-Tr. at 47:4-47:8). In the case of R08-1376 (Mega  
16 Control No. 70715), Mega requested a sublet repair and Roadtrek waited for a final invoice to  
17 come in for the repairs from the third-party body shop. (Ex. 517 at 9999-10002; 12/1/11  
18 Deakins-Tr. at 77:13-78:10). Chris Deakins testified that he only changes the status of a claim to  
19 "authorized" after he receives a copy of the sublet invoice from the third-party contractor.  
20 (11/29/11 Deakins-Tr. at 62:20-63:11). The third claim (R09-1243, Mega Control No. 80264)  
21 was delayed because Mega failed to submit pictures as requested. (Ex. 517 at RMI 10677).

24 Mega also argues in its brief that "although all cancellations at issue were in writing and  
25 sent through Roadtrek's warranty system, they did not state the specific grounds upon which the  
26 disapproval is based." This argument contradicts the undisputed testimony of Mega's witness,  
27

1 Jen Fresh who, when explaining the denial of a warranty claim, testified, “If I remember  
2 correctly, it was just claim by claim, and you’d go into it and it would have “denied,” and *it*  
3 *would give an explanation of why it was -- why they were denying that line.*” (1/9/12 Fresh-Tr. at  
4 43:5-43:9). As Fresh testified, Roadtrek’s online system gave her an explanation of why a  
5 particular claim is denied. Fresh then conveyed that information to Mega’s service manager,  
6 who worked with Roadtrek’s service department to rectify the issue. (1/9/12 Fresh-Tr. at 43:25-  
7 44:3).

9           Even if, as Mega contends, warranty claims were deemed approved because they were  
10 not approved or disapproved in writing within 30 days, Roadtrek “paid” Mega for any amounts  
11 that were owed for those claims because, at all times, Mega owed Roadtrek more money than  
12 Roadtrek owed Mega. Citing no authority for limiting the Board’s jurisdiction on determining  
13 whether claims were “paid” through these offsets, Mega argues that “it is not even necessary to  
14 get into the issue of offsetting with regard to timely payment of warranty claims because, as  
15 discussed in detail above, no matter what dates are used, Roadtrek violated Cal. Veh. Code §  
16 3075(d) by repeatedly not paying for warranty claims...” In making this argument, Mega  
17 ignored the August 3, 2011 Order issued by Judge Skrocki, in which he stated that the Board’s  
18 jurisdiction with respect to the warranty protests includes “whether the claims ‘were paid’ within  
19 30 days of approval, including whether ‘paid’ includes reducing any debt Protestant owed to  
20 Respondent by way of a ‘set off’ for the amounts of the warranty claims that were specifically  
21 approved by Respondent or deemed approved by virtue of Section 3075.” (August 3, 2011  
22 Order Granting in Part and Denying in Part Protestant’s Motions in Limine). The declaration of  
23 Jim Hammill establishes that Roadtrek credited Mega RV for warranty work by offsetting  
24  
25  
26  
27  
28

1 amounts owed for warranty claims against amounts which Roadtrek contends Mega owes to  
2 Roadtrek for parts. Mega did not produce any evidence that contradicts Hammill's declaration.

3 Mega has failed to meet its burden of proving that Roadtrek violated Section 3075 of the  
4 Vehicle Code because it has come forward with no evidence (1) that any of the claims listed in  
5 Exhibit 706 were even submitted, (2) that Roadtrek failed to disapprove submitted claims within  
6 30 days, and (3) that the claims were not "paid" through the parties' offsetting arrangement. For  
7 the reasons set forth above, protests PR-2206-10, PR-2208-10, and PR-2209-10 should be  
8 overruled.

9  
10 **V. MEGA HAS PRODUCED NO EVIDENCE IN SUPPORT OF ITS**  
11 **INCENTIVE PROTESTS**

12 In the introduction to its discussion of the incentive claim protests, Mega asserts that it is  
13 "forced to rely upon tables created by the parties" because "Roadtrek has not produced the same  
14 type of detailed records regarding claim approval and disapproval dates for incentive claims as it  
15 did for warranty claims." (Protestant's Post-Hearing Opening Brief, at 48). Mega apparently  
16 neglected to review Judge Skrocki's November 29, 2010 Order on the Proposed Sequence of  
17 Presenting Evidence, which provides that it is *Mega's* burden -- not Roadtrek's -- to come  
18 forward with evidence that Roadtrek failed to approve or disapprove incentive claims within 30  
19 days after receipt. *See* Cal. Veh. Code § 3076. The only "evidence" that Mega produced  
20 regarding the incentive protests is Exhibit 706, a summary document prepared during the course  
21 of these protests pursuant to an order by Judge Skrocki. Mega failed to meet its burden and, for  
22 that reason, these protests should be denied.  
23  
24  
25  
26  
27  
28

1           **A. The Only Incentives At Issue in These Protests Are The**  
2           **Incentive Listed in Exhibit 706**

3           In its post-hearing brief, Mega asserts -- for the first time -- that the “incentives” that it is  
4 claiming under these protests include “dealer cash” and “spiffs.” Mega is precluded from  
5 seeking to recover any incentives that are not listed in Exhibit 706, which was ordered by Judge  
6 Skrocki to be an exhaustive list of the incentive claims covered under these protests. Judge  
7 Skrocki ordered Mega to produce the list because there was no pleading or other record  
8 identifying which incentives Mega claims are unpaid. Roadtrek’s defense of these protests was  
9 limited to the incentives claimed in Exhibit 706. If Mega intended to claim dealer cash and  
10 spiffs under these protests, it was required to include those incentives in Exhibit 706. All of the  
11 incentives identified on Exhibit 706 are purportedly consumer cash back incentives.  
12

13           **B. Even if Mega Could Seek Dealer Cash and Spiffs, it Has**  
14           **Presented No Evidence That it is Entitled to Those Incentives**

15           Even if Mega could seek incentives that are not listed on Exhibit 706, Mega cannot  
16 request the Board for an undocumented, unspecified amount of “incentives” in the form of dealer  
17 cash and spiffs. Pursuant to Roadtrek’s policies, all of these requests were to be submitted in  
18 writing. There is simply no evidence in the record that Mega submitted claims for dealer cash or  
19 spiffs to Roadtrek, or that those claims were not approved or disapproved within 30 days.  
20 Without any evidence concerning *what* claims for dealer cash or spiffs were submitted, *when* the  
21 claims were submitted, and *when* they were approved or disapproved, Mega has failed to meet its  
22 burden with respect to any dealer cash or spiff incentives it now claims.  
23

24           **C. Roadtrek Either Paid or Credited Mega for the Incentives**  
25           **Listed in Exhibit 706**

26           Although Mega failed to produce evidence supporting its own protests, Roadtrek  
27 affirmatively proved that it either paid or credited all of the incentives that Mega was entitled to.  
28

1 Of course, Mega was not entitled to some of the incentives identified on Exhibit 706. As Jim  
2 Hammill testified, the claims that were listed on Exhibit 706 fell into three categories: (1) claims  
3 for which Mega did not submit a Consumer Cash Back (CCB) form; (2) claims for vehicles that  
4 were out of trust or were sold by dealers other than Mega; and (3) claims that were credited to  
5 amounts that Mega owed to Roadtrek for parts, units or interest. (11/8/11 Hammill Tr. at 105;  
6 Ex. 706A).

8 Mega failed to submit CCB forms for several of the incentive claims listed in Exhibit  
9 706. The claims for which Mega did not submit CCB forms were: R686; R659; R660; R714;  
10 R695; R663; R693; R748; R757; R713; R730; R715; R754 and R779. (See Declaration of J.  
11 Hammill In Response to Protestant Mega RV Corp's Incentive Claims). Those claims cannot be  
12 considered as "submitted" because they did not contain complete documentation. (Ex 516). To  
13 the extent that Mega claims that Roadtrek was incorrect in determining that these claims were  
14 incomplete, it was required to come forth with evidence showing that it properly submitted CCB  
15 forms to Roadtrek. Mega produced no such evidence.

17 Exhibit 706 also includes incentive claims for vehicles that Mega did not even sell and  
18 for vehicles that are currently out of trust. Claim Numbers R707 and R654 relate to vehicles that  
19 were sold out of trust by Mega. Claim number R703 relates to a vehicle that was traded by Mega  
20 to Holland Motorhomes and subsequently sold by Holland. (See Declaration of J. Hammill In  
21 Response to Protestant Mega RV Corp's Incentive Claims). Mega cannot receive incentive  
22 payments for units that it did not even sell or sold out of trust.

24 The remaining claims in Exhibit 706 were either paid or offset by Roadtrek pursuant to  
25 the parties' practices. (See Declaration of J. Hammill In Response to Protestant Mega RV  
26 Corp's Incentive Claims). Mega's contention that it was unaware that Roadtrek was offsetting

1 incentive amounts is undercut by the testimony of Mega's own witnesses. Paul Schilperoort  
2 testified that he felt free at all times to offset obligations of McMahon's to Roadtrek. (9/22/11  
3 Schilperoort-Tr. at 34:15-34:18). McMahon testified that Mega would short pay invoices to  
4 recoup certain incentives that Mega believed it was owed Roadtrek. (8/18/11 McMahon-Tr., at  
5 200:25 - 201:4).  
6

7 In order to meet its burden under these protests, Mega was required to show (1) that it  
8 submitted incentive claims to Roadtrek in a complete manner, (2) that Roadtrek failed to approve  
9 or disapprove those claims within 30 days of their submission, and (3) Roadtrek failed to pay  
10 Mega for properly submitted claims. Mega has failed to prove any of these three elements. For  
11 that reason, its protests with respect to Cal. Veh. Code § 3076, Protests PR-2205-10, PR-2212-  
12 10, and PR-2211-10 should be overruled.  
13

14 **VI. CONCLUSION**

15 For all of the reasons above, and those set forth in Roadtrek's post-hearing brief, the  
16 Board should overrule each remaining Protest and deny Mega any relief.

17 Respectfully submitted,

18 ROADTREK MOTORHOMES, INC.

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20 \_\_\_\_\_  
21 One of Its Attorneys

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**PROOF OF SERVICE**

STATE OF CALIFORNIA            )  
  ) ss  
COUNTY OF SACRAMENTO        )

I, Louis S. Chronowski, am employed in the County of Cook, State of Illinois. I am over the age of eighteen (18) years and not a party to the within action. My business address is Seyfarth Shaw, LLP, 131 South Dearborn Street, Suite 2400, Chicago, Illinois 60603.

On May 3, 2012, I served a true and correct copy of the foregoing document(s) described as **RESPONDENT'S REPLY TO PROTESTANT'S POST-HEARING BRIEF** on the interested parties in this action as follows:

Law Offices of Michael J. Flanagan, 2277 Fair Oaks Boulevard, Suite 450, Sacramento, CA 95825 (lawmjf@msn.com) **via email and U.S. Mail**

New Motor Vehicle Board, 1501 21<sup>st</sup> Street, Suite 330, Sacramento, CA 95811 (nmvb@nmvb.ca.gov) **via email and U.S. Mail**

- by hand delivery.
- by placing the document(s) listed above, together with an unsigned copy of this declaration, in a sealed envelope with postage paid on account and deposited with the U.S. Mail at Chicago, Illinois, addressed as set forth above.
- by transmitting the document(s) listed above, electronically, via the e-mail addresses set forth above.

I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice, the document(s) listed above would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing an affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and executed on May 3, 2012 at Chicago, Illinois.

  
\_\_\_\_\_  
Louis S. Chronowski