NEW MOTOR VEHICLE BOARD
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CERTIFIED MAIL

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. PR-2205-10, PR-2211-10, and PR-2212-10** **PROPOSED DECISION** **Vehicle Code section 3076)** **[Franchisor Incentive Program]**

PROCEDURAL BACKGROUND

Parties and Counsel

1. Protestant Mega RV Corp doing business as McMahon's RV (herein "Mega RV" or "Protestant") is a recreational vehicle dealership, with several California and Arizona locations. Until early 2012, its primary dealership location was in Irvine, California at 6441 Burt Road, #10; on or about March 31, 2012, Protestant relocated that dealership to 5400 Garden Grove Boulevard, Westminster, California.

2. Mega RV is a California corporation owned by Brent McMahon. Mega RV is a

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"franchisee" within the meaning of Vehicle Code section 331.1.[1]

3. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J. Flanagan, Esquire; Gavin M. Hughes, Esquire; Erin R. Hegedus McIntosh, Esquire; and Danielle R. Vare, Esquire (as of 11/21/11), 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.

4. Respondent Roadtrek Motorhomes, Inc. (herein "Roadtrek" or "Respondent") manufactures Class B motorhomes. It is located in Kitchener, Ontario, Canada.

5. Roadtrek is a Canadian corporation. Roadtrek is a "franchisor" within the meaning of Section 331.2.

6. Respondent is represented by Seyfarth Shaw, LLP, by Louis S. Chronowski, Esquire; and Kavitha Janardhan, Esquire (until 5/1/12), 131 South Dearborn Street, Suite 2400, Chicago, Illinois.

Preliminary Procedural Note

7. Between January and July of 2010, Mega RV filed with the New Motor Vehicle Board ("Board") 18 protests alleging violations of the Vehicle Code by Respondent Roadtrek involving Mega RV's dealership locations in Irvine, Colton, Scotts Valley and Palm Desert. By the first day of the hearing in August 2011, 12 protests had been consolidated for hearing, and six protests had been dismissed.[2]

8. Also in 2010, Mega RV filed with the Board two petitions (Petition Nos. P-456-10 and P-457-10) against Roadtrek. Both petitions were rejected upon first consideration and the portions of the petitions that sought adjudication of the dispute pursuant to Section 3050(c)(2) were dismissed by the Board at the June 15, 2010, and December 3, 2010, General Meetings, respectively. The petitions also requested that the Board direct the Department of Motor Vehicles (hereinafter "DMV") to conduct an investigation of the allegations contained in the petitions and to order DMV to exercise any and all authority over Respondent's Occupational License. These requests were also denied at the meetings noted above.

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[1] Hereinafter, unless otherwise indicated, all section references are to the Vehicle Code. The statutory references are subject to some qualification: although the parties are properly identified as "franchisee" and "franchisor" under Sections 331.1 and 331.2, it was only as of January 1, 2009 that Section 331.3 ("recreational vehicle franchise") was enacted. Section 11713.22 ("written [RV] franchise agreement") was effective January 1, 2008, and amended effective January 1, 2009; Section 11713.23 ("sale of new [RV]") was effective January 1, 2009. Section 3072 ("establishing or relocating RV dealerships") became effective January 1, 2004.

[2] In the 19 months between the first filing and the first day of hearing, several pre-hearing matters were heard and decided by Presiding Administrative Law Judge ("ALJ") Anthony M. Skrocki.

9. On January 31, 2012, the September 20, 2010 order of consolidation for purposes of the merits hearing was amended for preparation of the Proposed Decisions and Decision by the Board; the new order consolidated the 12 protests into five groups, as follows:

Vehicle Code	Type of Protest	Filed	Protest Nos.
Section 3070(b)	Modification	January 29, 2010 January 29, 2010 January 29, 2010	PR-2198-10 (Scotts Valley)[3] PR-2199-10 (Colton) PR-2201-10 (Irvine)
Section 3075	Warranty reimbursement violations	February 9, 2010 February 18, 2010 February 18, 2010	PR-2206-10 (Colton) PR-2208-10 (Irvine) PR-2209-10 (Scotts Valley)
Section 3076	Franchisor incentive program violations	February 9, 2010 February 18, 2010 February 18, 2010	PR-2205-10 (Colton) PR-2211-10 (Scotts Valley) PR-2212-10 (Irvine)
Section 3072(a)	Establishment violations	May 11, 2010	PR-2233-10 (Colton)
Section 3070(a)	"*De facto* termination"	July 13, 2010 July 13, 2010	PR-2244-10 (Colton/Irvine) PR-2245-10 (Scotts Valley)

10. A hearing on the merits of the 12 protests was held before Administrative Law Judge Diana Woodward Hagle on the following dates in 2011: August 9 through 12, inclusive; August 15 through 19, inclusive; September 21 through 23, inclusive; September 30; November 7 through 11, inclusive; November 14 and 15; November 17 and 18; and November 28 through December 2, inclusive. Hearing dates in 2012 were the following: January 9 and 10; January 12 and 13; January 18 and 19; January 31; and February 1.

11. The hearing was re-opened for a telephonic hearing on April 26, 2012 to provide evidence of the relocation of Mega RV's primary dealership location from Irvine to Westminster.

12. The matters were submitted on May 3, 2012.[4]

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[3] Subsequently, Protestant requested dismissal of Protest PR-2198-10, which was ordered on March 6, 2012.

[4] In October 2010, counsel for the parties stipulated to extend the time the ALJ has to render the proposed decisions from 30 to 60 days after the matters were deemed submitted; the time for the Board to consider the proposed decisions was also extended from 30 to 60 days from the date the ALJ submits the proposed decisions. On May 29, 2012, counsel stipulated to extend the ALJ's time to final and sign the proposed decisions from 60 days to 90 days, or August 1, 2012.

Pendant Federal Case

13. The parties to these protests are also parties to an action for money damages currently pending in United States District Court in the Central District of California, Case No. CV 09-09466 SJO. The federal proceeding is stayed pending the Board's Decision in these protests. (RT 9/21: 36-37)[5]

Statement of the Case

(Franchisor Incentive Program Protest Nos. PR-2205-10, 2211-10 and 2212-10)

14. On February 9, 2010, Mega RV filed Protest No. PR-2205-10 with the Board; an amended protest was filed on February 18, 2010. The protest alleged that Roadtrek had violated Section 3076 by failing to pay franchisor incentive program claims for Roadtrek recreational vehicles sold from Mega RV's Colton, California dealership location.

15. On February 18, 2010, Mega RV filed Protest No. PR-2211-10 with the Board. The protest alleged that Roadtrek had violated Section 3076 by failing to pay franchisor incentive program claims for Roadtrek recreational vehicles sold from Mega RV's Scotts Valley, California dealership location.

16. On February 18, 2010, Mega RV filed Protest No. PR-2212-10 with the Board. The protest alleged that Roadtrek had violated Section 3076 by failing to pay franchise incentive program claims for Roadtrek recreational vehicles sold from Mega RV's Irvine, California dealership location.

17. On March 20, 2012, Administrative Law Judge Diana Woodward Hagle issued an Order Overruling Protestant's Objection to Introduction in Evidence of James E. Hammill's Declaration Re: Franchisor Incentive Program Claims; Findings Related Thereto (herein referred to as "Order"). The Order is attached hereto as Exhibit A and is incorporated by reference as though set forth at length herein.

ISSUES PRESENTED

18. Did Mega RV sustain its burden of proof of establishing that Roadtrek violated Section 3076, in that Roadtrek failed to fulfill obligations to Mega RV for franchisor incentive program claims?

19. Did Roadtrek sustain its burden of proof of showing that it paid approved claims in a

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[5] References herein to "RT" followed by a date (excluding the year) are to the transcripts of the proceedings. References to "Exh" are to Exhibits.

manner meeting the requirements of Section 3076?[6]

PROTESTANT'S CONTENTION

20. Roadtrek failed to fulfill an agreement to pay Mega RV's claims under the terms of Roadtrek's franchisor incentive program.

RESPONDENT'S CONTENTION

21. Roadtrek satisfied all obligations to Mega RV for franchisor incentive program claims by either paying Mega RV for the claims or by offsetting amounts owed to Mega RV for the claims against debts which Mega RV owed to Roadtrek.

IDENTIFICATION OF WITNESSES

Protestant's Witnesses

22. Brent McMahon is the president and CEO of Mega RV Corp, doing business as McMahon's RV. (RT 8/9:76-173; 8/10:14-244; 8/11:6-267; 8/12:7-249; 8/15:6-205; 8/16:6-124)

23. Paul Schilperoort is the Director of Operations at Mega RV, a position he has held since mid-2008. His duties include overseeing the "...daily operations of the entire company...". He initially was hired in November 2005 as service and parts director. (RT 8/16:127-220; 8/17:117-218; 8/18:6-215; 8/19:8-211; 9/21:9-190; 9/22:6-71; 1/31:207-226; 2/1:6-144; 4/26:30-100)

24. Laurie Fosdick was initially hired by Mega RV in September of 2006 (during a "growing phase") as Controller for all Mega RV locations. Since January 2011, she has been the Office Manager of Mega RV's Colton and Palm Desert dealerships. (RT 8/10:82; 1/9:6-86)

25. Marshall Maresh is Mega RV's Sales Manager - Motorhomes. He started in sales with Brent McMahon in early 2001, having previously worked for Brent McMahon's stepfather's RV dealership. In late 2009 or early 2010, he was promoted to his current position. (RT 1/12:7-44)

Respondent's Witnesses

26. Jeff Hanemaayer is the son of the founder of Roadtrek. Until 2009, he was Chairman of the company, handling marketing, finance and accounting. He described himself and James Hammill "...more as co-CEO's...", each involved in different areas of the company. (Exh 601; RT 11/14:11-249;

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[6] Here, the burden of proof is allocated to Respondent because it is in a better position to have knowledge of the facts regarding these issues.

11/15:6-166)

27. James Hammill is President and CEO of Roadtrek. He was initially hired as General Manager in April 2005. He was appointed President around the beginning of 2007 and was named a Director of the company in 2008. He oversees "...all operations, everything tangible about the company, reporting to the board of directors... sales, manufacturing, engineering, quality, materials, purchasing... [e]ssentially all departments." (RT 9/22:73-242; 9/23:6-220; 11/7:8-217; 11/8:9-187; 11/9:6-225; 11/10: 6-208; 11/11:6-93)

28. Paul A. Baumann, CPA, is a principal with Baumann Moreau Consulting Group in Tampa, Florida. He testified as Roadtrek's expert witness. (RT 1/31:7-206)

VEHICLE CODE SECTION 3076 GOVERNS THE SUBMISSION AND PAYMENT OF FRANCHISOR INCENTIVE PROGRAM CLAIMS

29. Section 3076, effective on January 1, 2004, provides a framework for the submission, payment and audits of claims made by franchisees pursuant to recreational vehicle "franchisor incentive programs". "Franchisor incentive program" is not defined in Section 3076, and there may be other "terms of the franchisor incentive program" which are operative in areas where the statute is silent.

30. For example, no time requirement or manner of making a claim is statutorily imposed on the franchisee. The franchisor, however, must approve or disapprove a franchisee's claim "within 30 days after receipt". (Section 3076(a))

31. The 30-day period is critical for the franchisor: "[a] claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day." (Section 3076(a))

32. Additionally, and within the 30-day period, if the franchisor wishes to disapprove a claim: "...the franchisee ... shall be notified in writing of its disapproval within the required period,[7] and each notice shall state the specific grounds upon which the disapproval is based." (Section 3076(a))

33. Furthermore, in regard to disapproved claims, "[f]ranchisee claims for incentive program compensation shall not be disapproved except for good cause, such as ineligibility under the terms of the incentive program, lack of material documentation, or fraud." (Section 3076(b))

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[7] The phrase, "...within the required period..." refers to the 30 days after receipt of the claim.

34. Approved claims (no specific notice is required) must be paid "within 30 days following approval"; therefore, under the statute, the latest date an approved claim may be paid is 60 days following receipt by the franchisor.

35. A franchisor's failure to pay or approve a claim within permissible time limits may be excused "...in individual instances for reasons beyond the reasonable control of the franchisor...". (Section 3076(a))

FINDINGS OF FACT[8]

Preliminary Findings

Respondent Roadtrek Motorhomes, Inc. (formerly Home & Park Motorhomes)

36. Roadtrek is a Class B motorhome manufacturer headquartered in Kitchener, Ontario, Canada. (RT 11/14:12-13)

37. Between 1981 or 1982 and at least 2006, Roadtrek was the largest manufacturer of Class B motorhomes in North America.[9]

38. Class B motorhomes (also called "vans") are built on General Motors and Chrysler manufactured chassis. (RT 9/23:212)

39. Roadtrek maintains a website, a part of which is dedicated for use by Roadtrek dealers. (RT 8/12:31)

Protestant Mega RV Corp doing business as McMahon's RV

40. Brent McMahon, the owner of Mega RV, started in the recreational vehicle[10] business at "TraveLand", a large multi-dealer RV park in Irvine, California. He then owned a small dealership selling used RVs; on April 9, 2001, he established Mega RV Corp as a new recreational vehicle dealer. (Exh 1; RT 8/9:83-88)

41. Brent McMahon eventually expanded Mega RV to other locations throughout California,

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[8] References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive.

Findings of Fact are organized under topical headings for readability only and are not to be considered relative to only the particular topic under which they appear.

[9] Official notice was taken of the Board's Decision in Manteca Trailer and Camper Inc. v. Home and Park Motorhomes Roadtrek (PR-2036-07 and 2074-07). The reference is at page 6.

[10] Hereinafter, recreational vehicles will sometimes be referred to as "RVs".

and into Arizona. In addition to the Irvine dealership located at "TraveLand" (which was the main location), Mega RV had dealerships in Colton, California and Scotts Valley, California. (RT 8/9:106, 109, 139)

Roadtrek's "Franchisor Incentive Program"

42. Roadtrek called its "franchisor incentive program" the Consumer Cash Back Incentive Program ("CCB").[11] Each week, on Fridays, CCB incentives were announced on the dealer-only portion of Roadtrek's website called "Dealer Notes". "Dealer Notes" stated that if certain listed van models and model years were "retail delivered" within "effective dates", consumers would receive amounts which ranged between $500 and $7,000.[12] (Exhs 516, 642; RT 9/23:41, 54, 83)

43. To qualify for the CCB incentive, dealers were required to submit to Roadtrek a CCB Incentive Claim Form signed by the customer, together with the retail sales contract and other sales documents. Roadtrek would then send the incentive check directly to the dealer. Roadtrek took the position that it was up to the dealer and the customer how to apply the cashback. (RT 1/10:113-114, 118) Marshall Maresh (Mega RV's Sales Manager – Motorhomes) recalled several ways that the CCB would be applied: "[s]ometimes we would take it off the price of the MSRP. Sometimes we would put it and use it as down payment." (Exhs 382, 385, 497, 516, 642; RT 8/19:46-47; 60-64; 1/12:17-18)

44. Mega RV was one of the Roadtrek RV dealers participating in the CCB Incentive Program. Mega RV submitted claims to Roadtrek pursuant to the program. (Exhs 335, 382, 695; RT 9/23:55, 87; 1/10:58-59)

Roadtrek's "Offsetting" or "Crediting"[13] of Mega RV's Approved CCB Incentive Program Claims

45. Roadtrek received CCB Incentive Program claims from Mega RV and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved some claims. (Exh A, p. 5)

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[11] Neither SPIFFs (cash incentives paid directly to the salesperson by the manufacturer) nor informal price concessions made over the phone or by email to clinch a sale are "franchisor incentive programs" under Section 3076. (RT 1/12:13)

[12] Several of the "Dealer Notes" website pages show that Roadtrek would also offer a "Dealer Cash Incentive" program. (Exh 516, pp. RMI 007455, 007457) This separate program is not part of this protest.

[13] James E. Hammill, in his declaration, uses "offset" and "credit" interchangeably. (Declaration of James E. Hammill Submitted in Response to Protestant Mega RV Corp's Incentive Claims, dated January 18, 2012)

46. Beginning at an unknown time, but at least as early as September 12, 2008, Roadtrek would "offset" or "credit" approved CCB Incentive Program claims submitted by Mega RV against amounts it contended were owed to it by Mega RV.[14] (Exhibit A, pp. 5-21)

47. According to Paul A. Baumann, CPA, "offsetting" is "...[w]hen a ... business has monies that are owed to them and they're also doing business with that entity, ...that instead of actually rendering a physical check back to that particular customer, they simply take that amount and they deduct it from the amount that's due and don't actually physically send them a check." (RT 1/31:129)

48. Roadtrek did not advise Mega RV that it was "offsetting" or "crediting" approved CCB Incentive Program claims against amounts it contended were owed to it by Mega RV for "units" (vans). Roadtrek did not advise Mega RV of the dates that it was "offsetting" or "crediting" the claims, nor did Roadtrek identify to Mega RV the vans against which the claims were "offset" or "credited". (Exh 496, p. RMI 009154; RT 8/19:61, 85; 11/9:81-84; 1/10:31-34)[15]

49. Roadtrek did not advise Mega RV that it was "offsetting" or "crediting" approved CCB Incentive Program claims against amounts it contended were owed to it by Mega RV for "parts". Roadtrek did not advise Mega RV of the dates that it was "offsetting" or "crediting" the claims, nor did Roadtrek identify to Mega RV the parts invoice numbers against which the claims were "offset" or "credited". (Exh 496, pp. RMI 009155-009158; RT 8/19:61, 85; 11/9:81-84; 1/10:31-34)

50. Roadtrek did not advise Mega RV that it was "offsetting" or "crediting" approved CCB Incentive Program claims against amounts it contended were owed to it by Mega RV for "shows". Roadtrek did not advise Mega RV of the dates that it was "offsetting" or "crediting" the claims, nor did Roadtrek identify to Mega RV the shows against which the claims were "offset" or "credited". (Exh 496, p. RMI 009159; RT 8/19:61, 85; 11/9:81-84; 1/10:31-34)

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[14] Paul A. Baumann, Respondent's expert witness, did not make an inquiry into whether or not an accounting of "offsets" was ever sent to Mega RV. (RT 1/31:130)

[15] There is no evidence that, at the time of each Roadtrek offset, Mega RV received notice and information about it. (RT 11/9:81-84; 1/10:31-34)

James Hammill testified that Exhibit 496 is a summary of Roadtrek's position on selected financial transactions between the parties (information with which Mega RV may not necessarily agree); he stated that Exhibit 496 is "...an account[s] receivable summary from [Roadtrek's] business records that tries to show all the actions taken by Roadtrek financially ... into one document to set off the monies owed by McMahon's to Roadtrek by applying the monies that Roadtrek owed to McMahon's." (RT 11/8:28)

51. Roadtrek did not advise Mega RV that it was "offsetting" or "crediting" approved CCB Incentive Program claims against amounts it contended were owed to it by Mega RV for "interest". Roadtrek did not advise Mega RV of the dates that it was "offsetting" or "crediting" the claims, nor did Roadtrek identify to Mega RV the interest against which the claims were "offset" or "credited". (Exh 496, p. RMI 009160; RT 8/19:61, 85; 11/9:81-84; 1/10:31-34)

52. Although he was aware that offsets were going back and forth between the parties in 2008 and 2009, James Hammill gave no direction to anyone at Roadtrek to make sure that offsets as to any given sales incentive claim were notified to the dealer within a given period of time. He stated that "I don't see offsets as part of the incentive process. I see the initial incentive claim, and when we disagree with it, we would definitely contact the dealer immediately, but not the offset. So I didn't think about that." (RT 11/9:81-84)

FINDINGS CONTAINED IN EXHIBIT A (ATTACHED HERETO) REGARDING 14 FRANCHISOR INCENTIVE CLAIMS APPROVED BY ROADTREK[16]

53. "In lieu of sending payment checks directly to Mega RV for no fewer than 14 franchisor incentive claims which it had approved, Roadtrek offset these claims against amounts Roadtrek contends were owed, but unpaid by Mega RV, to Roadtrek for vans, shows, parts, and interest." (Exhibit A, p. 5)

54. All 14 claims were approved by Roadtrek since it agreed to "pay" Mega RV for each claim.[17] Roadtrek "paid" each claim by "issuing" a check, but it did not mail the checks to Mega RV, nor did it appear that Roadtrek intended to mail the checks to Mega RV. Roadtrek's bookkeeping system required it to "issue" checks even though the checks were not going to be transmitted to the payee.[18] Instead, Roadtrek "credited" the amounts it acknowledged were "Roadtrek obligations to Mega RV" by "offsetting" them against amounts which Roadtrek contended were "Mega RV obligations to Roadtrek" for "units" (vans), "parts", "shows" and "interest".[19] (Exhibit A, pp. 4-5)

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[16] References in quotes are from the declaration of James E. Hammill.

[17] One claim, and possibly two, appear to be approved only in part. Where Roadtrek "paid" an amount less than the approved Mega RV claim, it was obligated, under Section 3076, to notify Mega RV in writing of its disapproval, stating the specific grounds on which the disapproval was based.

[18] It is unknown whether Roadtrek completed writing the checks and, if so, the identities of the payees.

[19] When the credits were made is unknown. See footnote 18 above.

55. James Hammill stated that Exhibit 496 is "...an account[s] receivable summary from [Roadtrek's] business records...[showing] all the actions taken by Roadtrek ...to set off the monies owed by McMahon's to Roadtrek by applying the monies that Roadtrek owed to McMahon's." (RT 11/8:28) The implication is that the exhibit reflects accounting entries on the dates stated, but this may not be so.[20]

56. Assuming *arguendo* that Roadtrek's "offsetting" or "crediting" of accounts was a proper manner to "pay" franchisor incentive program claims, there were two instances where Roadtrek "paid" Mega RV beyond the 30 days permitted by Section 3076(a):

A. In regard to the sale of a 2009 Roadtrek AG, Roadtrek vouchered check #56857 on 12/18/08, but offset $375 which Roadtrek contended that Mega RV owed for parts purchased on or about 4/17/09, four months later (Exhibit A, p. 7); and

B. In regard to the sale of a 2008 Roadtrek AD, Roadtrek vouchered check #56857 on 12/18/08, but offset $375 which Roadtrek contended that Mega RV owed for parts purchased on or about 4/17/09, four months later (Exhibit A, pp. 8-9).

57. The failure of Roadtrek to provide notice to Mega RV is compounded by the complexity of some of its "offsets". Examples are the following:

A. In regard to the sale of a 2010 Roadtrek AG, Roadtrek grouped the $5,000 incentive with other "offsets" totaling $25,000, then "offset" the $25,000 against nine separate line-items which Roadtrek contended that Mega RV owed it for vans, although none of the vans was the 2010 Roadtrek AG (Exhibit A, pp. 18-19); and

B. In regard to the sale of a 2008 Roadtrek AD, Roadtrek grouped the $1,500 incentive with other "offsets" totaling $4,874.98, then "offset" the $4,874.98 against six separate line-items which Roadtrek contended that Mega RV owed it for one van, two shows, and three parts invoices, asserted debts ranging from 9/21/07 to 12/19/08. (Exhibit A, pp. 8-9)

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[20] For example, in one case, the date of the "offset" preceded the date the asserted debt arose. (Exhibit A, pp. 8-9) If Exhibit 496 does not reflect contemporaneous accounting entries, then the implication is that Roadtrek withheld approved incentive payments from Mega RV, presumably because it felt that Mega RV owed it money, and did not make "offset" entries in its ledgers when it withheld the payments. This, of course, is a matter for the federal court to resolve.

58. On one occasion, in regard to the sale of a 2010 Roadtrek AD, Roadtrek neither paid to Mega RV the $2,000 incentive nor did it "offset" the amount against obligations it contended were owed by Mega RV to Roadtrek. (Exhibit A, pp. 19-20)

ANALYSIS

59. The requirement in Section 3076(a) that approved franchisor incentive program claims must be "paid" within 30 days of approval assumes that the franchisee will receive a meaningful statement identifying with particularity the franchise incentive claim being paid, the exact amount of the claim being paid, the date the claim is being paid (or "credited" or "offset"), and the account or debt against which the "offset" or "credit" is made. Moreover, if the franchisor elects to "pay" by way of a "credit" or an "offset", both parties must be in agreement not only that the franchisee approves of this manner of "payment", but also that there is an agreed-upon debt the franchisee owes against which the "credit" or "offset" is made.

60. None of the above conditions of payment were present in Roadtrek's processing of Mega RV's approved CCB Incentive Program claims.

61. Finally, there is a fundamental problem with a franchisor "offsetting" payments to a franchisee for incentive claims which it has expressly---or by not disapproving within 30 days of receipt---approved. The dollar amounts of a manufacturer's incentives are designed to motivate customers to buy, and dealers to sell, particular models chosen by the manufacturer. Under Roadtrek's CCB Incentive Program, the customer must sign the claim form so the customer is well aware of the incentive and its amount. The customer, the targeted beneficiary of the program, expects a commensurate reduction in price or application to a down payment, as Marshall Maresh stated. (This is true even though under Roadtrek's program the incentive check is sent to the dealership.) To remove this immediate benefit by "offsetting" would defeat the dealer's incentive to make the sale, since it would be paying the customer out of its own pocket (or cut its profit margin) the amount of the franchisor's incentive.[21] (RT 1/12:17-18)

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[21] And, since the franchisor's incentive is available to all its franchisees, customers would likely buy elsewhere if the franchisee is unwilling to offer an incentive knowing it would be "offset".

CONCLUSIONS

62. Mega RV has sustained its burden of proof of establishing that Roadtrek violated Section 3076, in that Roadtrek failed to fulfill obligations to Mega RV in regard to "franchisor incentive program" claims.

63. Roadtrek has not sustained its burden of proof of showing that it paid approved claims in a manner meeting the requirements of Section 3076, as follows:

A. Roadtrek did not "pay" approved incentive claims within the meaning of the statute when it "offset" or "credited" the claims without notice to Mega RV; and

B. Even assuming *arguendo* that Roadtrek's "offsetting" or "crediting" approved incentive claims is proper, Roadtrek failed to "pay" approved claims within the statutory time stated in Section 3076.

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the Protests in *Mega RV Corp., dba McMahon's RV v. Roadtrek Motorhomes, Inc.*, Protest Nos. PR-2205-10, PR-2211-10, and PR-2212-10, are sustained.

I hereby submit the foregoing which constitutes my Proposed Decision in the above-entitled matter, as the result of a hearing before me, and I recommend this Proposed Decision be adopted as the decision of the New Motor Vehicle Board.

DATED: July 26, 2012

By: _____
DIANA WOODWARD HAGLE
Administrative Law Judge

George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV

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In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2199-10, and PR-2201-10** **ORDER OVERRULING PROTESTANT'S OBJECTION TO INTRODUCTION IN EVIDENCE OF JAMES E. HAMMILL'S DECLARATION RE: FRANCHISOR INCENTIVE PROGRAM CLAIMS; FINDINGS RELATED THERETO** **[Vehicle Code section 3076]**
In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2206-10, PR-2208-10, and PR-2209-10**
In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2205-10, PR-2211-10, and PR-2212-10**

EXHIBIT A

In the Matter of the Protest of MEGA RV CORP. dba MCMAHON'S RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest No. PR-2233-10**
In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2244-10 and PR-2245-10**

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PROCEDURAL BACKGROUND

1. During the testimony of James E. Hammill (President of respondent RoadTrek) on November 10, 2011, the parties stipulated and Administrative Law Judge Diana Woodward Hagle ordered the following:

"... counsel for respondent shall prepare Mr. Hammill's declaration under penalty of perjury which shall take the relevant information in Exhibit 706 that counsel wishes to put into evidence and match it to information contained in Exhibit 496. That information will be not only dollar amounts but will be check numbers. And to the extent that there are references in the declaration to check numbers, copies of the checks will be attached to the declaration...[T]he purpose of this exercise is to seek the truth but also to avoid wandering into the area of damages, which are the exclusive purview of the federal court." (11/10/11 Transcript, pp. 182:10-185:23)

2. The Order also stated protestant's right to object to the introduction in evidence of the declaration.

3. On March 16, 2012, a telephonic conference was held pursuant to written notice before Administrative Law Judge Diana Woodward Hagle to hear protestant's objection to the Declaration of James Hammill Submitted in Response to Protestant's Incentive Claims. Protestant and objector was represented by the Law Offices of Michael J. Flanagan by Michael J. Flanagan, Esquire, and Danielle R. Vare, Esquire; Seyfarth Shaw LLP, by Louis S. Chronowski, Esquire, and Kavitha Janardhan, Esquire appeared for respondent RoadTrek.

ORDER

4. The objection is overruled and the declaration may be admitted into evidence. The declaration comports with the Order and, to the extent recited in the Findings *infra*, the declaration appears to accurately state evidence in the case. The intent of the Order was to match the line-item information appearing in two Exhibits[1] already in evidence, as follows:

(1) Exhibit 706, a two-page document prepared by Mega RV identifying each "incentive" claim that Mega RV states it has made to RoadTrek which Mega RV argues remains unpaid; and

(2) Exhibit 496,[2] a multi-page document prepared by RoadTrek which addresses many, if not all, of Mega RV's claims in Exhibit 706. In regard to no fewer than 14 claims, the declaration and Exhibit 496 show that RoadTrek has "offset" amounts which RoadTrek owes to Mega RV for "incentive" claims against amounts that it argues that Mega RV owes it for "units" [vans], "parts", "shows" and "interest".

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[1] Both Exhibits were prepared for negotiation or lititgation; neither are records kept in the ordinary course of business.

[2] Exhibit 496 is attached to declaration as Exhibit A: "units" are listed on page RMI 009154, "parts" on pages RMI 009155-9158, "shows" on page RMI 009159, and "interest" on page RMI 009160.

5. The Order requires the production of checks. Two checks only were produced.[3] Respondent explains that "...[a]s Hammill and other witnesses have testified, RoadTrek's accounting system required it to issue checks even when[4] RoadTrek offset amounts." Further, "...because RoadTrek did not mail checks to Mega [RV] for offsets, most of the checks that were originally issued for the offsets are no longer available." In lieu of checks, respondent has produced "check memo[s], which note the date the check was issued and the invoices associated with the check". (Respondent's Response to Objections, pp. 2:17-3:3)

ANALYSIS

6. Vehicle Code section 3076, which became effective on January 1, 2004, provides a framework for the submission, payment and audits of claims made by franchisees pursuant to recreational vehicle "franchisor incentive programs". The statute acknowledges that there may be "terms of the franchisor incentive program" which are operative in areas where the statute is silent.

7. For example, no time requirement or manner of making a claim is statutorily imposed on the franchisee. The franchisor, however, must approve or disapprove a franchisee's claim "within 30 days after receipt".

8. The 30-day period is critical for the franchisor: "[a] claim not specifically disapproved in writing within 30 days from receipt shall be deemed approved on the 30th day". Approved claims (no specific notice is required) must be paid "within 30 days following approval"; therefore, under the statute, the latest date an approved claim may be paid is 60 days following receipt by the franchisor. Additionally, and within the 30-day period,[5] if the franchisor wishes to disapprove a claim: "...the franchisee ... shall be notified in writing of its disapproval within the required period, and each notice shall state the specific grounds upon which the disapproval is based." A violation by the franchisor may be excused "...in individual instances for reasons beyond the reasonable control of the franchisor...".

9. All 14 claims addressed in the Findings *infra* were approved by RoadTrek since it agreed

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[3] Exhibits 7 and 10; the payee on both is "McMahons RV - Mega RV Corporation" but neither check appears to have been negotiated.

[4] As in the case here.

[5] The phrase, "...within the required period..." refers to the 30 days after submission of the claim.

to "pay" Mega RV for each claim.[6] RoadTrek "paid" each claim by "issuing" a check, but it did not mail the checks to Mega RV,[7] nor did it appear that RoadTrek intended to mail the checks to Mega RV. As noted above, RoadTrek's bookkeeping system required it to "issue" checks even though the checks were not going to be transmitted to the payee.[8] Instead, RoadTrek "credited" the amounts it acknowledged were "RoadTrek obligations to Mega RV" by "offsetting" them against amounts which RoadTrek contended were "Mega RV obligations to RoadTrek" for "units" (vans), "parts", "shows" and "interest".

10. Determining whether this procedure comports with section 3076 is not within the scope of this objection, which is merely to rule on the admissibility of the declaration. Therefore, for example, no review of the record has been made for an agreed-to franchisor incentive program (or "terms" of such an agreement); or for relevant dates relating to each incentive claim to determine if the statutory guidelines have been met; or for notices, communications or agreements between the parties relative to submission and processing of franchisor incentive claims.

FINDINGS[9]

1. An agreement existed between the parties, express or implied, that Mega RV would receive cash incentives for selling RoadTrek vans. This was a "franchisor incentive program" under Vehicle Code section 3076.

2. In lieu of sending payment checks directly to Mega RV for no fewer than 14 franchisor incentive claims which it had approved, RoadTrek offset these claims against amounts RoadTrek contends were owed, but unpaid by Mega RV, to RoadTrek for vans, shows, parts, and interest.

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[6] Actually, one claim, and possibly two, appear to be approved only in part, thus "disapproving" part of the claims (see Paras 9 and 10 *infra*). Where RoadTrek "paid" an amount less than the approved Mega RV claim, it was obligated, under the statute, to notify Mega RV in writing of its disapproval, stating the specific grounds on which the disapproval was based.

[7] Protestant's brief states, "...only four checks were attached and both [sic] of them were for payments made to Protestant and cashed by Protestant, rather than through the offsetting method these declarations were supposed to address." (Brief, p. 2:12-14) In fact, in this matter (incentive claims), two checks were attached to the declaration (Exhs. 7 and 10), both of which Mr. Hammill attests were not mailed to Mega RV, but which were "credited" on debts RoadTrek contends were owed by Mega RV. (Declaration, pp. 6:22-26, 8:21-26)

[8] It is unknown whether RoadTrek completed writing the checks and, if so, the identities of the payees.

[9] Findings herein are based upon the Declaration of James E. Hammill, and on inferences to be drawn from the declaration, and on Exhibits 496 and 706. The findings do not reflect a close examination of the record of the lengthy hearing; therefore, where a finding is preceded by the phrase "it is unknown", the parties in their post-hearing briefs may point to evidence already in the record which will dispel the unknown. Additionally, there is a citation to the record and to respondent's brief; the latter, of course, is not evidence.

3. 2008 RoadTrek POP (Serial/VIN #xxxx71233131)[10]

A. Mega RV sold a 2008 RoadTrek POP (Serial/VIN #xxxx71233131) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $1,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $1,000 cash incentive.

C. RoadTrek received the claim and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $1,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek "vouchered"[11] check #56079 reflecting the Mega RV claim for $1,000; it listed a total "net amount" of $1,000, stated the date to be 09/12/08, and referenced "Invoice 71233131".

F. RoadTrek did not mail check #56079 to Mega RV. It is unknown if check #56079 was negotiated.

G. RoadTrek entered a line-item "credit" of $1,000 to Mega RV, referencing check #56079, as an offset to amounts which RoadTrek contends Mega RV owed for a "show" on or about 10/21/07. (Exh. 496, p. RMI 009159)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $1,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $1,000 on obligations it contended were owed by Mega RV to RoadTrek, and that the offset was credited against asserted obligations arising from a show occurring in or about October 2007.

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[10] This finding relies on the Hammill declaration. (p. 2:5-23; Exh. 1)

[11] "When [RoadTrek vouchers] a check, [RoadTrek assigns] it a number. So it's printed or created in the system to be printed", and "voucher as it's commonly known in RoadTrek is when a check is printed, [it's] assigned a check number, not necessarily signed off. But when [RoadTrek vouchers] one, it actually creates a check." (Testimony of Dawn Crowe, 01/10/12, pp. 134:14-135:5) Although Ms. Crowe's testimony was in reference to warranty claims, it is applicable here.

4. 2009 RoadTrek AG (Serial/VIN # xxxx85272992)[12]

A. Mega RV sold a 2009 RoadTrek AG (Serial/VIN # xxxx85272992) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $3,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $3,000 cash incentive.

C. RoadTrek received the claim and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $3,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #56857 reflecting the Mega RV claim for $3,000; it listed a total "net amount" of $4,874.98, stated the date to be 12/18/08, and referenced one of the three items listed as $3,000 for "Invoice 85272992".

F. RoadTrek did not mail check #56857 to Mega RV. It is unknown if check #56857 was negotiated.

G. RoadTrek entered several line-item "credits" to Mega RV, all referencing check #56857, as follows: $570 as an offset to amounts which RoadTrek contends Mega RV owed for a van (VIN xxxx71219724) which RoadTrek sold to Mega RV on or about 9/21/07; $1,134.46 as an offset to amounts which RoadTrek contends Mega RV owed for a "show" on or about 10/21/07; $2,444.65 as an offset to amounts which RoadTrek contends Mega RV owed for a "show" on or about 3/19/2008; $241.93 as an offset to amounts which RoadTrek contends Mega RV owed for "parts" purchased on or about 2/3/09; $375 as an offset to amounts which RoadTrek contends Mega RV owed for "parts" purchased on or about 4/17/09; and $108.94 as an offset to amounts which RoadTrek contends Mega RV owed for "parts" purchased on or about 12/19/08. The six amounts total $4,874.98. (Exh. 496, pp. RMI 009154, 009157, and 009159)

[12] This finding relies on the Hammill declaration. (pp. 2:5-17, 3:8-15; Exh. 2)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $3,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $3,000 on obligations it contended were owed by Mega RV to RoadTrek; and that the offset was credited against asserted obligations arising from the sale of a van, against asserted obligations arising from Mega RV's purchase of parts, and against asserted obligations arising from shows occurring in or about October 2007 and in or about March 2008.

5. 2008 RoadTrek AD (Serial/VIN # xxxx75178058)[13]

A. Mega RV sold a 2008 RoadTrek AD (Serial/VIN # xxxx75178058) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $1,500 cash incentive.

B. Mega RV made a claim to RoadTrek for the $1,500 cash incentive.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $1,500 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #56857 reflecting the Mega RV claim for $1,500 (several vouchers were grouped together with the check memo "net amount" totaling $4,874.98); it stated the date to be 12/18/08, and referenced one of the three items listed as $1,500 for "Invoice 75178058".

F. RoadTrek did not mail check # 56857 to Mega RV. It is unknown if check #56857 was negotiated.

G. RoadTrek entered several line-item "credits" to Mega RV, all referencing check #56857, as follows: $570 as an offset to amounts which RoadTrek contends Mega RV owed for a van (VIN xxxx71219724) which RoadTrek sold to Mega RV on or about 9/21/07;

[13] This finding relies on the Hammill declaration. (pp. 2:5-17; 3:21-26 to 4;1-2; Exh. 2)

$1,134.46 as an offset to amounts which RoadTrek contends Mega RV owed for a "show" on or about 10/21/07; $2,444.65 as an offset to amounts which RoadTrek contends Mega RV owed for a "show" on or about 3/19/2008; $241.93 as an offset to amounts which RoadTrek contends Mega RV owed for "parts" purchased on or about 2/3/09; $375 as an offset to amounts which RoadTrek contends Mega RV owed for "parts" purchased on or about 4/17/09; and $108.94 as an offset to amounts which RoadTrek contends Mega RV owed for "parts" purchased on or about 12/19/08. The six amounts total $4,874.98. (Exh. 496, pp. RMI 009154, 009157, and 009159)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $1,500 cash incentive, as well as the form of the notice, if given; that it was offsetting the $1,500 on obligations it contended were owed by Mega RV to RoadTrek; and that the offset was credited against asserted obligations arising from the sale of a van, against asserted obligations arising from Mega RV's purchase of parts, and against asserted obligations arising from shows occurring in or about October 2007 and in or about March 2008.

6. 2008 RoadTrek 190 (Serial/VIN # xxxx71217743)[14]

A. Mega RV sold a 2008 RoadTrek 190 (Serial/VIN # xxxx71217743) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $5,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $5,000 cash incentive.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $5,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #57051 reflecting the Mega RV

[14] This finding relies on the Hammill declaration. (pp. 2:5-17, 4:13-17; Exh.3)

claim for $5,000; it listed a total "net amount" of $5,000, stated the date to be 02/03/09, and referenced "Invoice 71217743".

F. RoadTrek did not mail check #57051 to Mega RV. It is unknown if check #57051 was negotiated.

G. RoadTrek entered a line-item "credit" of $5,000 to Mega RV, referencing check #57051, as an offset to amounts which RoadTrek contends Mega RV owed for "interest", which obligation RoadTrek contends arose on or about 04/07/08. (Exh. 496, p. RMI 009160)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $5,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $5,000 on an obligation it contended was owed by Mega RV to RoadTrek, and that the offset was credited against an asserted obligation for interest, which obligation RoadTrek contends arose on or about 04/07/08.

7. 2008 RoadTrek 190 (Serial/VIN # xxxx071218496)[15]

A. Mega RV sold a 2008 RoadTrek 190 (Serial/VIN # xxxx071218496) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a cash incentive. The amount of the cash incentive is not established, nor is the reason for the discrepancy between the following two amounts: Mega RV claims that it is owed a $1,000 cash incentive from RoadTrek; RoadTrek has offset $5,000, thus raising the inference that it believes that the proper amount of the cash incentive owed to Mega RV is $5,000.[16]

B. Mega RV made a claim to RoadTrek for a cash incentive relative to the sale of the above-referenced van in an unknown amount.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

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[15] This finding relies on the Hammill declaration. (pp. 2:5-17, 4:18-24; Exh. 4)

[16] Another scenario is that the amount of the cash incentive was $5,000 and RoadTrek paid $4,000, leaving Mega RV with a $1,000 claim. This, however, is unlikely because RoadTrek prepared a check memo for the entire $5,000 amount and offset that amount.

D. RoadTrek determined that this "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #57383 reflecting the Mega RV claim, which RoadTrek stated to be $5,000 (several voucher numbers were grouped together with the check memo "net amount" totaling $10,500); it stated the date to be 04/21/09, and referenced one of the five items listed as $5,000 for "Invoice 71218496".

F. RoadTrek did not mail check # 57383 to Mega RV. It is unknown if check #57383 was negotiated.

G. RoadTrek entered several line-item "credits" to Mega RV, all referencing check #57383. The following were recorded as offsets to amounts which RoadTrek contends Mega RV owed for vans: $2,500 for a van with VIN xxxx75222728, $1,000 for a van with VIN xxxx71216355, $1,000 for a van with VIN xxxx81120781, and $1,000 for a van with VIN xxxx81120781. Also, $300 was offset to amounts which RoadTrek contends Mega RV owed for "parts" it asserted were purchased on or about 12/19/08. The five amounts total $5,800. (Exh. 496, pp. RMI 009154, RMI 009157)

H. In addition, RoadTrek offset $4,700 for the 2008 RoadTrek 190 (Serial/VIN # xxxx071218496) which was the subject of this transaction, since it contended that on or about 04/02/09, Mega RV "short-paid" the invoice amount by $4,700. (Exh. 496, p. RMI 009154)

I. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the cash incentive, as well as the form of the notice, if given; that it was offsetting the cash incentive on obligations it contended were owed by Mega RV to RoadTrek; and that the offset was credited against asserted obligations arising from sales of four vans, against an asserted obligation which RoadTrek contends arose from a "short-payment" by Mega RV for the van, and against asserted obligations arising from Mega RV's purchase of parts.

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8. 2008 RoadTrek 190 (Serial/VIN # xxxx171217325)[17]

A. Mega RV sold a 2008 RoadTrek 190 (Serial/VIN # xxxx171217325) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $7,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $7,000 cash incentive.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $7,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #59323 reflecting the Mega RV claim for $7,000 (several voucher numbers were grouped together with the check memo "net amount" totaling $23,726.33); it stated the date to be 11/09/09, and referenced one of the five items listed as $7,000 for "Invoice 71217325".

F. RoadTrek did not mail check #59323 to Mega RV. It is unknown if check #59323 was negotiated.

G. RoadTrek entered several line-item "credits" to Mega RV, all referencing check #59323. The following were recorded as offsets to amounts which RoadTrek contends Mega RV owed for vans: $1,000 for a van with VIN xxxx81196125[18], $16,625 for a van with VIN xxxx71168492, $5,200 for a van with VIN xxxx85246770, and $901.33 for a van with VIN xxxx811288016. The four amounts total $23,726.33. (Exh. 496, p. RMI 009154)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $7,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $7,000 on obligations it contended were owed by Mega RV to RoadTrek; and that the offset was credited against asserted obligations arising from sales of four vans.

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[17] This finding relies on the Hammill declaration. (pp. 2:5-17, 5:8-14; Exh. 5)

[18] The declaration identifies the line-item in Exhibit 496, p. RMI 009154 as line 9, when the entry in fact is on line 19.

9. 2008 RoadTrek POP (Serial/VIN # xxxx81128016)[19]

A. Mega RV sold a 2008 RoadTrek POP (Serial/VIN # xxxx81128016) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a cash incentive. The amount of the cash incentive is not established, nor is the reason for the discrepancy between the following two amounts: Mega RV claims that it is owed a $2,500 cash incentive from RoadTrek; RoadTrek has offset only $1,000, thus raising the inference that it believes that the proper amount of the cash incentive owed to Mega RV is $1,000.[20]

B. Mega RV made a claim to RoadTrek for a cash incentive relative to the sale of the above-referenced van in an unknown amount.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #59323 reflecting the Mega RV claim, which RoadTrek stated to be $1,000 (several voucher numbers were grouped together with the check memo "net amount" totaling $23,726.33); it stated the date to be 11/09/09, and referenced one of the five items listed as $1,000 for "Invoice 81128016".

F. RoadTrek did not mail check #59323 to Mega RV. It is unknown whether check #59323 was negotiated.

G. RoadTrek entered several line-item "credits" to Mega RV, all referencing check # 59323. The following were recorded as offsets to amounts which RoadTrek contends Mega RV owed for vans: $1,000 for a van with VIN xxxx81196125, $16,625 for a van with VIN xxxx71168492, $5,200 for a van with VIN xxxx85246770, and $901.33 for a van with VIN xxxx811288016. The five amounts total $23,726.33. (Exh. 496, p. RMI 009154)

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[19] This finding relies on the Hammill declaration. (pp. 2:5-17, 5:15-21; Exh. 5)
[20] See footnote 6, *supra*.

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the cash incentive, as well as the form of the notice, if given; that it was offsetting the cash incentive on obligations it contended were owed by Mega RV to RoadTrek; and that the offset was credited against asserted obligations arising from sales of five vans.

10. 2008 RoadTrek VER (Serial/VIN #xxxx81120371)[21]

A. Mega RV sold a 2008 RoadTrek VER (Serial/VIN #xxxx81120371) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a cash incentive. The amount of the cash incentive is not established, nor is the reason for the discrepancy between the following two amounts: Mega RV claims that it is owed a $10,000 cash incentive from RoadTrek; RoadTrek states that "...[it] does not offer a $10,000 incentive on any of its vehicles" and has offset $1,000, thus raising the inference that it believes that the proper amount of the cash incentive owed to Mega RV is $1,000.[22]

B. Mega RV made a claim to RoadTrek for a cash incentive relative to the sale of the above-referenced van in an unknown amount.

C. RoadTrek received the claim and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved a $1,000 claim.

D. RoadTrek determined that this "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #59322 reflecting a Mega RV claim for $1,000; it listed a total "net amount" of $1,000, stated the date to be 11/09/09, and referenced "Invoice 81120371".

F. RoadTrek did not mail check #59322 to Mega RV. It is unknown whether check #59322 was negotiated.

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[21] This finding relies on the Hammill declaration. (pp. 2:5-17, 6:10-16; Exh. 6)
[22] See footnote 6, *supra*.

G. RoadTrek entered a line-item "credit" of $1,000 to Mega RV, referencing check #59322, as an offset to amounts which RoadTrek contends Mega RV owed for the 2008 RoadTrek VER van (VIN xxxx81120371), which was the subject of this transaction, since it contended that on or about 10/14/09, Mega RV "short-paid" the invoice amount by $8,870. (Exh. 496, p. RMI 009154)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $1,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $1,000 on an obligation it contended was owed by Mega RV to RoadTrek, and that the offset was credited against an asserted obligation arising from the sale of the van.

11. 2009 RoadTrek AG (Serial/VIN #xxxx85266077)[23]

A. Mega RV sold a 2009 RoadTrek AG (Serial/VIN #xxxx85266077) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $5,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $5,000 cash incentive.

C. RoadTrek received the claim and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $5,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. RoadTrek wrote check #0734 with Mega RV ("McMahons RV - Mega RV Corporation") as payee in the amount of $5,000, which stated the date to be 04/08/10, with a check memo which referenced "Invoice 85266077".

F. RoadTrek did not mail check #0734 to Mega RV. Instead, RoadTrek entered a line-item "credit" of $5,000 to Mega RV, referencing check #734, as an offset to an amount which RoadTrek contends Mega RV owed for the 2009 RoadTrek AG van

[23] This finding relies on the Hammill declaration. (pp. 2:5-17, 6:22-27; Exh. 7)

(VIN xxxx85266077) on or about 09/26/08. (Exh. 496, p. RMI 009154)

G. It is unknown whether check #0734 was negotiated.

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $5,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $5,000 on an obligation it contended was owed by Mega RV to RoadTrek, and that the offset was credited against an asserted obligation arising from the sale of the van.

12. 2010 RoadTrek AG (Serial/VIN #xxxx85268791)[24]

A. Mega RV sold a 2010 RoadTrek AG (Serial/VIN #xxxx85268791) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $4,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $4,000 cash incentive.

C. RoadTrek received the claim and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $4,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #58874 reflecting the Mega RV claim for $4,000; it listed a total "net amount" of $4,000, stated the date to be 10/01/09, and referenced "Invoice 85268791".

F. RoadTrek did not mail check #58874 to Mega RV. It is unknown whether check #58874 was negotiated.

G. RoadTrek entered two line-item "credits" to Mega RV, both referencing check #58874 and both referencing sales of vans, as follows: $2,000, as an offset to an amount which RoadTrek contends Mega RV owed for VIN xxxx85234968 on or about 08/26/09; and $2,000, as an offset to an amount which RoadTrek contends Mega RV owed for

[24] This finding relies on the Hammill declaration. (pp. 2:5-17, 7:10-15; Exh. 8)

VIN xxxx81126744 on or about 06/06/09. (Exh. 496, p. RMI 009154)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $4,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $4,000 on obligations it contended were owed by Mega RV to RoadTrek, and that the offset was credited against asserted obligations arising from the sale of two vans.

13. 2009 RoadTrek POP (Serial/VIN #xxxx81198486) [25]

A. Mega RV sold a 2009 RoadTrek POP (Serial/VIN #xxxx81198486) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a cash incentive. The amount of the cash incentive is not established, nor is the reason for the discrepancy between the following two amounts: Mega RV claims that it is owed a $1,000 cash incentive from RoadTrek; RoadTrek has offset $5,000, thus raising the inference that it believes that the proper amount of the cash incentive owed to Mega RV is $5,000.[26]

B. Mega RV made a claim for a cash incentive relative to the sale of the above-referenced van in an unknown amount.

C. RoadTrek received the claim and---either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #59319 reflecting Mega RV claims (several vouchers were grouped together with the check memo "net amount" totaling $25,000); it stated the date to be 11/09/09, and referenced one of the five items listed as $5,000 for "Invoice 81198486".

F. RoadTrek did not mail check #59319 to Mega RV. It is unknown whether check #59319 was negotiated.

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[25] This finding relies on the Hammill declaration. (pp. 2:5-17, 7:16-22; Exh. 9)
[26] See Para. 7, *supra*.

G. RoadTrek entered nine line-item "credits" to Mega RV, all referencing check #59319 and all arising out of transactions where RoadTrek claims that Mega RV owes it for vans. The nine amounts total $25,000. (Exh. 496, p. RMI 009154)

H. One of the nine line-item "credits" to Mega RV was an offset of $3,000 which RoadTrek asserts arose on or about 10/05/09 out of the sale of the 2009 RoadTrek POP (Serial/VIN #xxxx81198486) which was the subject of this transaction, since RoadTrek contends that on or about 10/05/09, Mega RV "short-paid" the invoice amount by $3,000. (Exh. 496, p. RMI 09154)

I. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the cash incentive, as well as the form of the notice, if given; that it was offsetting the cash incentive on obligations it contended were owed by Mega RV to RoadTrek; and that the offset was credited against asserted obligations arising from sales of eight vans; and from the asserted obligation which arose from the "short-payment" by Mega RV for the van which was the subject of this transaction.

14. 2010 RoadTrek AG (Serial/VIN #xxxx85274418)[27]

A. Mega RV sold a 2010 RoadTrek AG (Serial/VIN #xxxx85274418) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $5,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $5,000 cash incentive.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $5,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. A check memo shows that RoadTrek vouchered check #59319 reflecting Mega RV claims (several vouchers were grouped together with the check memo "net amount" totaling

[27] This finding relies on the Hammill declaration. (pp. 2:5-17, 8:1-7; Exh. 9)

$25,000); it stated the date to be 11/09/09, and referenced one of the five items listed as $5,000 for "Invoice 85274418".

F. RoadTrek did not mail check #59319 to Mega RV. It is unknown whether check # 59319 was negotiated.

G. RoadTrek entered nine line-item "credits" to Mega RV, all referencing check #59319. All were recorded as "offsets" to amounts which RoadTrek contends Mega RV owed for the vans. None of the nine offsets related to the sale of the 2010 RoadTrek AG (Serial/VIN #xxxx85274418), which was the subject of this transaction. The nine amounts total $25,000. (Exh. 496, p. RMI 009154)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $5,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $5,000 claim on obligations it contended were owed by Mega RV to RoadTrek, and that the offset was credited against asserted obligations arising from the sales of nine vans (not including the van which was the subject of this transaction).

15. <u>2010 RoadTrek AD (Serial/VIN #xxxx85318287)</u>[28]

A. Mega RV sold a 2010 RoadTrek AD (Serial/VIN #xxxx85318287) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $2,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $2,000 cash incentive.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $2,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek" and, although RoadTrek states it vouchered check #58874 reflecting the Mega RV claim for $2,000, the voucher did not reference Serial/VIN #xxxx85318287. Moreover, the voucher related to an entirely separate transaction.[29]

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[28] This finding relies on the Hammill declaration. (pp. 2:5-17, 8:8-12; Exh. 8)

E. RoadTrek neither paid to Mega RV the $2,000 cash incentive for the sale of the 2010 RoadTrek AD (Serial/VIN #xxxx85318287), nor did RoadTrek offset the amount against obligations it contended were owed by Mega RV to RoadTrek.

16. 2010 RoadTrek AG (Serial/VIN #xxxx85261120)[30]

A. Mega RV sold a 2010 RoadTrek AG (Serial/VIN #xxxx85261120) and, pursuant to RoadTrek's "franchisor incentive program", Mega RV was entitled to receive a $5,000 cash incentive.

B. Mega RV made a claim to RoadTrek for the $5,000.

C. RoadTrek received the claim and----either expressly or by failing to disapprove the claim within 30 days of receipt---approved the claim.

D. RoadTrek determined that this $5,000 "RoadTrek obligation to Mega RV" would be used to "offset" amounts which RoadTrek contended were "Mega RV obligations to RoadTrek".

E. RoadTrek wrote check #0735 with Mega RV ("McMahons RV - Mega RV Corporation") as payee in the amount of $5,000, which stated the date to be 04/08/10, with a check memo which referenced "Invoice 85261120".

F. RoadTrek did not mail check #0735 to Mega RV. It is unknown whether check #0735 was negotiated.

G. RoadTrek entered several line-item "credits" to Mega RV, all referencing check #0735. The following were recorded as offsets to amounts which RoadTrek contends Mega RV owed for vans: $1,260 for a van with VIN xxxx91115903, $1,500 for a van with VIN xxxx91116788, $1,800 for a van with VIN xxxx85312668, and $440 for a van with VINxxxx75157060. None of the offsets related to the van which is the subject of this transaction. These amounts total $5,000. (Exh. 496, p. RMI 009154)

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[29] See Paragraph 12 *supra*, and Exhibit 8 attached to the Hammill declaration.
[30] This finding relies on the Hammill declaration. (pp. 2:5-17, 8:21-26; Exh. 10)

H. It is unknown whether RoadTrek gave notice to Mega RV that it was withholding direct payment of the $5,000 cash incentive, as well as the form of the notice, if given; that it was offsetting the $5,000 claim on obligations it contended were owed by Mega RV to RoadTrek, and that the offset was credited against asserted obligations arising from the sale of four vans (not including the van which was the subject of this transaction).

SO ORDERED.

DATED: March 20, 2012

NEW MOTOR VEHICLE BOARD

Diana Woodward Hagle

By_____
DIANA WOODWARD HAGLE
Administrative Law Judge

George Valverde, Director, DMV
Mary Garcia, Branch Chief,
Occupational Licensing, DMV