NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

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 No. PR-2233-10

PROPOSED DECISION
Vehicle Code section 3072
[Establishment – Colton]

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

///

///

///

"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.

---

[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"), as well as Sections 11713.22 and 11713.23 ("written [RV] franchise agreement" and "sale of new [RV]") were enacted. 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]

---

[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 (Establishment Protest No. PR-2233-10)

14. On May 11, 2010, Mega RV filed Protest No. PR-2233-10 with the Board. The protest alleged that Roadtrek violated Section 3072(a)(1) by failing to give Mega RV notice of its intent to establish an additional Roadtrek dealer, Mike Thompson's Recreational Vehicles, dba Mike Thompsons RV Superstores ("MTRV"), at a location which would put Mega RV within the new dealership's relevant market area.

15. No notice letter to Mega RV or the Board pursuant to Section 3072(a) was given by Roadtrek.[6]

16. On June 2, 2010, the Board received Roadtrek's Motion to Dismiss Protest. On July 26, 2010, ALJ Skrocki issued an Order Denying Respondent's Motion to Dismiss Protest [PR-2233-10]. The Order analyzes Section 3072 and is attached hereto as Exhibit A and is incorporated by reference as though set forth at length herein.

Pre-Hearing Order Relative to Adjudication of Issues

17. On August 3, 2011, ALJ Skrocki issued an Order Granting in Part and Denying in Part Protestant's Motions in Limine.

18. Among other things, the order discussed Mega RV's two motions relative to the instant protest:

A. Protestant's Motion No. 1 asked for a determination that Roadtrek's failure to give "...notice of its intent to establish a Roadtrek franchise within 10 miles of Protestant's existing Colton location is a violation of [Section] 3072 as a matter of law". As a result, Protestant requested "...the

---

[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.

[6] Such notice is required whenever a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within the relevant market area where the same line-make is then represented. (Section 3072(a)(1)) However, no notice is required "...if the dealership location subject to the protest was established on or before January 1, 2004", which exception Respondent contends is applicable. (Section 3072(b)(5))

Board issue an order that evidence need not be taken concerning the good cause factors set forth in [Section] 3073, because the proposed dealer has in fact already been established, reserving the issue of damages to be determined in the federal court proceeding".

B. Protestant's Motion No. 2 asked for a ruling that "[u]pon making a determination that Roadtrek violated the requirements of Section 3072, ... the Board refer the unlawful establishment of Mike Thompson Recreational Vehicles ("MTRV") in Colton, California, to the California Department of Motor Vehicles ("DMV") for investigation and to take appropriate action regarding Roadtrek's distributor's license and the license of the unlawfully established dealership".

19. In regard to Motion No. 1, ALJ Skrocki did rule that no Section 3073 hearing be held. In regard to Motion No. 2, ALJ Skrocki ruled that referral to the DMV be deferred until the merits hearing was concluded.

20. The Order regarding Motion No. 1 is the following:

Ruling on Motion No. 1

The only issue to be determined regarding the establishment of the additional dealership as a Roadtrek franchisee in Colton, California is whether the language in Section 3072(b)(5) is applicable to the facts of this establishment.

The statutory language at issue is as follows:

> 3072. (a)(1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same recreational vehicle line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. ...
> (b) Subdivision (a) does not apply to any of the following:
> ...
> (5) A motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established on or before January 1, 2004.
> ...

If the exception stated in Section 3072(b)(5) is applicable, then no notice was required to be given by Respondent to Protestant or the Board and there would be no right in Protestant to challenge the establishment pursuant to Section 3072(a). If there is no right to challenge the establishment by way of a protest, then there is no need for an evidentiary hearing pursuant to Section 3073.

If the exception stated in Section 3072(b)(5) is not applicable, the provisions of Section 3072(a) would require that Respondent provide notice to Protestant and the Board.

If Section 3072(a) was not or is not applicable, the failure of Respondent to comply with its provisions would mean that the establishment of the Roadtrek franchise in Colton was done illegally. If so, Protestant should not be required to prove there is good cause pursuant to Section 3073 that the already established additional Roadtrek franchisee in Colton should not be established.

As to the establishment of the additional franchise in Colton - there is no need for an evidentiary hearing pursuant to Section 3073 regardless of the outcome of the above issue as to whether Section 3072(b)(5) is applicable.

If Section 3072(b)(5) is applicable, Respondent was not required to give notice of its intended establishment and there is no right to file a protest pursuant to Section 3072.

If Section 3072(b)(5) is not applicable, the establishment of the dealership in Colton would be illegal, should be deemed legally ineffective (void), and Protestant should not be required to prove there was no good cause for the occurrence of the illegal act.

To require a hearing pursuant to Section 3073 even though a franchisor has failed to comply with Section 3072(a) could result in other franchisors likewise violating Section 3072(a) (and other Vehicle Code sections) and proceeding with an establishment in derogation of the legislatively-created mandates. Under these circumstances, existing franchisees in the relevant market area should not be required to establish good cause not to allow an establishment pursuant to Section 3073. The Board should not be required to decide the merits of a protest under Section 3073 challenging whether there is good cause not to allow an establishment if the law already precludes such establishment under Section 3072.

If Section 3072(a) has not been complied with and the exception in Section 3072(b)(5) is not applicable the establishment of the additional franchise would be illegal and void.

If a hearing on the merits were held pursuant to Section 3073, any order the Board may issue would likely be "a useless act" and without significance.

The legislature created the Board and gave it the power to administer the legislative scheme This legislatively-created scheme imposes a temporary statutory stay upon the right of a franchisor to establish an additional dealership if there is already an existing franchisee of the same-line make within a ten-mile radius of the proposed location. (This ten-mile area is the "relevant market area" as defined in Section 507.) This stay is not created by the filing of a protest but is imposed by the statute. It exists regardless of whether a protest is filed and will continue until the notice requirements of Section 3072 have been met plus at least an additional 20 days. If the notice requirements are met and a timely protest is not filed, the stay will be lifted by operation of law. If a timely protest is filed, the statutory stay already in existence prior to the filing of the protest will continue until the protest is resolved. The franchisor's preclusion from exercising its right to add another franchise is stayed by operation of law due to the language of Section 3072.

Here, as Section 3072 imposed a statutory stay upon the right of the franchisor to establish the additional dealership in Colton, if there was no compliance with the notice requirements of Section 3072, the statutory stay remains in existence and Respondent is barred by the statute from legally establishing the additional franchisee in Colton.

The Board should not be asked to administer the provisions of Section 3073 to prevent what the law already precludes by the provisions of Section 3072. Nor should the Board be asked to administer the provisions of Section 3073 to allow the establishment of

the additional franchise if the establishment is barred due to the lack of compliance with Section 3072."

21. The Order regarding Motion No. 2 is the following:

Ruling on Motion No. 2

Other than as stated in the Ruling on Motion No. 1, no further ruling is made at this time. The decision on this motion is left to the administrative law judge who will be hearing these consolidated matters as to whether there will be a recommendation to the Board that any violations found to have occurred or found likely to have occurred be referred to the Department of Motor Vehicles for appropriate action.

ISSUES PRESENTED

22. Was Roadtrek exempt from giving notice to Mega RV or the Board under Section 3072(b)(5) of its intention to establish an additional Roadtrek franchise at a location which would put Mega RV's dealership in Colton, California within the new dealer's relevant market area?

23. If Roadtrek was not exempt from giving notice, should it be referred to the Department of Motor Vehicles ("DMV") for investigation and other appropriate action?

PROTESTANT'S CONTENTION

24. Roadtrek violated Section 3072 by failing to give Mega RV and the Board notice of Roadtrek's intention to establish an additional Roadtrek dealer in the relevant market area in which Mega RV, a franchisee of the same line-make, is located. The exception in Section 3072(b)(5) is not applicable since MTRV was not a Roadtrek dealership on or before January 1, 2004.

RESPONDENT'S CONTENTION

25. No notice to Mega RV or the Board was required when Roadtrek entered into a franchise establishing an additional Roadtrek dealership in the relevant market area in which Mega RV was already located. Since the additional dealership location, MTRV was established as an RV dealership (even though not a Roadtrek dealership) on or before January 1, 2004, Section 3072(b)(5) exempts Roadtrek from the notice requirement and Mega RV therefore has no right to protest the establishment.

IDENTIFICATION OF WITNESSES

Protestant's Witnesses

26. 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)

27. 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, which entail service and parts, the sales operations, and the accounting office". 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)

28. Mike Lankford, since October 1, 2009, has been vice president for California sales for Mega RV. He previously worked for Frank De Gelas as sales manager at Mike Thompson's RV Super Stores in Colton, California. (RT 11/15:167-228; 11/17:7-196; 11/18:7-105; 11/28:7-129)

29. Frank De Gelas[7] is the President of Mike Thompson's RV Super Stores, which operates RV dealerships in five locations in Southern California, including Colton, California. (RT 1/13:7-77)

Respondent's Witnesses

30. 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; 11/15:6-166)

31. 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)

///

///

///

///

///

---

[7] Frank De Gelas was called as an adverse witness under Evidence Code section 776.

FINDINGS OF FACT[8]

Preliminary Findings

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

32. Roadtrek is a Class B motorhome manufacturer headquartered in Kitchener, Ontario, Canada. (RT 11/14:12-13). The company, founded by Jacques Hanemaayer, was previously known as Home & Park Motorhomes. (RT 11/14:12-15; 1/10:148-149)

33. Jacques Hanemaayer's son, Jeff Hanemaayer, started running the company in 1985, building it up from an annual production of 250-300 vans in 1985 to 1,500 vans in mid-2006. Until 2009, Jeff Hanemaayer was Chairman of the company, handling marketing, finance and accounting. (Exh 601; RT 11/14:24)

34. James Hammill was hired as General Manager by Jeff Hanemaayer in April of 2005. He became President and CEO in early 2007 and a director of the company in 2008. (RT 9/22:73)

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

Protestant Mega RV Corp doing business as McMahon's RV

36. Brent McMahon, the owner of Mega RV, started in the recreational vehicle[10] business working with his stepfather, who owned a dealership (and who also sold Roadtrek vans) at TraveLand, which once was a large multi-dealer RV park in Irvine, California.

37. Brent McMahon started his own small dealership selling used RVs on one of the TraveLand lots, incorporating Mega RV Corp on December 1, 2000. On April 9, 2001, he established Mega RV Corp as a new recreational vehicle dealer. (Exh 1; RT 11/15:177; 1/13:66-67)

38. In mid-March of 2002, Brent McMahon opened Mega RV's Colton dealership in the "Colton RV Expo" (presently, MTRV and Mega RV are the only two tenants in the "Colton RV Expo" and are located directly across the street from one another). MTRV has been one of Mega RV's

---

[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.

[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 references are at page 6.

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

"significant competitors". (RT 8/10:180; 11/15:177; 1/13:66-67)

39. Mega RV sells over 60 different RV brands from 10 different manufacturers. (RT 8/9:77)

Mike Thompson's RV Centers (MTRV)

40. One of the RV dealers that early-on was located on a portion of the TraveLand property was Frank De Gelas, the owner of MTRV. MTRV, in about 1996, moved out of TraveLand to its main dealership, then in Fountain Valley and, at least by July 1, 1999, had established a dealership in the "Colton RV Expo" in Colton, California. (RT 11/15:177)

41. MTRV "...sell[s] and service[s] many types of recreational vehicles..." including several models manufactured by Fleetwood and Four Winds, diesel motorhomes manufactured by Tiffin, and several brands of trailers. (RT 1/13:7-9; 11/15:179)

42. On January 29, 2010, Roadtrek signed a Dealer Agreement with Frank De Gelas of MTRV, which established a Roadtrek franchise. The Dealer Agreement covered all five MTRV locations,[11] including the RV dealership in the "Colton RV Expo", directly across the street from Mega RV. (Exh 685; RT 11/7:211-212) MTRV was not a Roadtrek franchisee nor was it a Roadtrek dealer prior to January 29, 2010.

The Relationship of RoadTrek & Mega RV

43. Mega RV started selling new Roadtrek motorhomes in 2001.[12]

44. On February 22, 2006, the parties entered into a Dealer Agreement establishing Mega RV's Roadtrek franchise at Mega RV's Irvine, Colton and Stanton dealership locations. (Exh 600) The agreement was for a three-year period, and the parties contemplated that the agreement would be renewed. (Exh 600, Section 520)

45. The Dealer Agreement required Mega RV to "stock" and "prominently display" a minimum number and selected models of Roadtrek vans at each of Mega RV's three dealerships in order to remain in "good standing". (Exh 600, Section 109) As long as Mega RV maintained its "good standing" status, Roadtrek guaranteed that it would not locate another dealer within a "...60 mile radii..."

---

[11] MTRV has three year-round locations in Southern California and one temporary location. The Fountain Valley location has an address on both sides of the freeway and is counted as two locations. (RT 1/13: 8)

[12] The terms of the parties' agreements between 2001 and 2006 are not known. (RT 11/14:54-56) Statutes requiring "written" RV franchises became effective much later, on January 1, 2008 and 2009. (Sections 11713.22, 11713.23)

of each dealership location and that Mega RV would "...have the exclusive right to purchase, display and resell Roadtreks, parts and accessories in the [Dealer's] Territory...". (Exh 600, Sections 107 and 108)

46. In late 2007, the formerly robust economy ended quickly and the RV industry was hit hard. On April 3, 2008, the parties executed a Security Agreement which formalized their financial dealings. The Security Agreement did not replace or modify the Dealer Agreement, still in effect: Mega RV remained a Roadtrek franchisee, with exclusive territorial dealer rights, and Roadtrek would continue to deliver motorhomes to Mega RV. (Exh 614; RT 8/19:67; 11/14:170-173; 1/12:38-40; 1/19:113-115)

47. The Security Agreement set out the parties' agreements regarding the financial terms of the wholesale purchase of vans and included references to security interests and the passing of title upon payment. It required Mega RV to hold in trust monies received from a sale and to pay Roadtrek immediately the purchase price. It obligated Mega RV to protect inventory in its possession by maintaining insurance coverage. It contained an "acceleration clause" that "...all [of Mega RV's] indebtedness [would] become immediately due and payable" if certain financial "defaults" occurred; moreover, upon "default" by Mega RV, Roadtrek could assert "all rights and remedies of [a] secured party under the Uniform Commercial Code", including taking possession of "collateral". (Exh 614, Sections 2 - 14) It provided that Roadtrek would have "...all rights and remedies of [a] secured party under the Uniform Commercial Code...". (Exh 614, Section 14.b.)

48. In mid-2008, financial disputes between the parties began and thereafter intensified. At the 2009 Pomona RV show, held in mid-October, Roadtrek repossessed Mega RV's inventory of Roadtrek vehicles.[13] Roadtrek hired Quality Drive-Away to take the motorhomes to a storage location. (Exh 619; RT 9/22:33, 100)

49. After the Pomona RV show, Roadtrek did not deliver any new motorhomes to Mega RV. (RT 1/12: 37)

50. Thereafter, until mid-December 2009, the parties attempted to resolve their financial disputes, with no success. (Exhs 27, 664; RT 8/15:64)

///

---

[13] Remedies asserted by parties under the Uniform Commercial Code (UCC) are not within the Board's jurisdiction.

51. In a December 14, 2009, email to Brent McMahon, Jeff Hanemaayer called off the settlement talks. He wrote that "[w]e will need adequate assurances as defined under the UCC before completing any further transactions. Those adequate assurances must take the form of: (1) payment of out-of-trust units; (2) and for future deliveries, an irrevocable letter of credit OR a 25% deposit before production and payment by cashiers check before delivery." The email also stated that the "adequate assurances as defined under the UCC" from Mega RV must be received before Roadtrek "... [completes] any further transactions...", presumably referring to delivery of motorhomes and parts.[14] (Exh 674)

52. Brent McMahon's December 14, 2009 email response to Roadtrek's demand for adequate assurances was "Good luck". (Exh 674)

53. Mega RV did not provide adequate assurances to Roadtrek, either in the form requested or otherwise.

54. Under the UCC, Roadtrek's position is that it may consider that Mega RV's failure to provide adequate assurances of performance a repudiation of the Dealer Agreement after the passage of 30 days from the request.

55. The consequence of Mega RV's failure to provide "adequate assurances" to Roadtrek under the UCC is that Roadtrek will not deliver inventory to Mega RV. Therefore, since Mega RV was not able to order Roadtrek inventory, it failed to meet the stocking levels required by the Dealer Agreement. It was therefore not in "good standing" under the terms of the Dealer Agreement, which resulted in loss of its "exclusive territories" as a Roadtrek dealer. Mega RV no longer had "exclusive" territorial rights as a Roadtrek dealer on January 29, 2010 when Roadtrek executed a Dealer Agreement with MTRV.

The Relationship of Roadtrek & Mike Thompson's RV Centers

56. MTRV had been established as an RV dealer since at least July 1, 1999 in the "Colton RV Expo" in Colton, California. There is no evidence that MTRV had been a Roadtrek franchisee, Roadtrek dealer or otherwise authorized to sell or service Roadtrek vehicles at its Colton dealership location before January 29, 2010.

---

[14] However, between 12/16/09 and 4/6/10, Roadtrek stated that it did fill sixteen invoice requests from Mega RV for parts. There is no evidence that Mega RV paid for the parts. Roadtrek's last shipment of parts to Mega RV was on 4/6/10. (Exh 496, RMI 009158)

57. On January 29, 2010, Roadtrek signed a Dealer Agreement[15] with Frank De Gelas of MTRV. (Exh 685; RT 11/7:11-212)

58. Roadtrek did not give notice to Mega RV or the Board of its intended establishment of the Roadtrek franchise at MTRV in Colton, California. (RT 11/8:24)

59. James Hammill read Vehicle Code section 3072 and decided that "[t]he plain face of the language..." of Section 3072(b)(5) "...meant that [Roadtrek] could establish a dealership within ... the relevant market area of another dealership as long as the dealership we were establishing was --- the location was originally established before January 1st, 2004". (RT 11/8:24-27)

60. James Hammill considered Mega RV to not be in "good standing" under the parties' 2006 Dealer Agreement, since "...[Mega RV] had no inventory [and] they weren't attempting to buy any inventory." He concluded that no notice to Mega RV was required. (RT 11/8:24-27; 11/9:55)

61. Mega RV's dealership location in the "Colton RV Expo" in Colton, California is directly across the street from MTRV. It is within the "relevant market area"[16] of MTRV. (Sections 507 and 3072(a)(1))

62. Among other things, the Roadtrek-MTRV Dealer Agreement (Exh 685) provided the following:

A. Roadtrek gave MTRV "exclusive" Roadtrek dealership rights in the counties of Los Angeles, Ventura, Orange, Riverside and San Bernardino for the next five years, with automatic renewals for successive five-year periods ("Purpose of Agreement" and "Selling Agreement" - Section 106);

B. The agreement covered MTRV's dealership locations in Fountain Valley (two addresses), Santa Fe Springs, and Colton (in the "Colton RV Expo", directly across the street from Mega RV) ("Dealer Locations and Territory" - Section 107);

C. Roadtrek promised to defend MTRV in "...any actions, protests or other legal claims..." that Mega RV might file and to indemnify MTRV for any expenses arising out of such controversies ("Indemnification" - Section 802); and

---

[15] This would be the first written agreement that may constitute a franchise, as defined in Section 331.3, between Roadtrek and MTRV.

[16] "Relevant market area" is an area within 10 miles of the proposed franchise. (Section 507)

D. That "[i]f any condition herein contravenes the valid laws of any state or province or other jurisdiction wherein the Agreement is to be performed, or denies access to the procedures provided by such laws, such condition shall be deemed modified to conform to such laws, and all other terms and conditions shall remain in force and effect. ("Compliance with Laws, Rules and Regulations" - Section 375)

63. After signing the Dealer Agreement, MTRV staff received training from Roadtrek and MTRV received delivery its first shipment of Roadtrek motorhomes at the end of February 2009. (RT 11/7:216)

OVERVIEW OF VEHICLE CODE SECTION 3072 AND THE APPLICATION OF SECTION 3072(b)(5) TO THE FACTS OF THE ESTABLISHMENT OF THE ADDITIONAL ROADTREK FRANCHISE AT THE MTRV DEALERSHIP IN COLTON, CALIFORNIA

64. Section 3072 ("Establishing or Relocating Recreational Vehicle Dealerships") was enacted effective January 1, 2004. It generally incorporated the language of Section 3062 ("Establishing or Relocating [Motor Vehicle] Dealerships")[17], but it added three additional exemptions, including Section 3072(b)(5).

65. Section 3072(a)(1) states that "...[I]f a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same recreational vehicle line-make is then represented, ... the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle line-make[18] in the relevant market area of the franchisor's intention to establish an additional dealership ... within or into that market area."

66. Section 3072(b)(5) states that "...Subdivision (a) does not apply to any of the following: (5) A motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established on or before January 1, 2004."

67. Exhibit A, ALJ Skrocki's 25-page Order, describes Section 3072(b)(5)'s definitional problems, reviews its legislative history and discusses implications and policy issues arising from

---

[17] Both Mega RV and MTRV are multi line-make dealerships, a business model typical in the RV industry. The word "establishment" connotes a single line-make dealership, more typical in passenger cars or trucks cases.

[18] "[A] 'recreational vehicle line-make' is a group or groups of recreational vehicles defined by the terms of a written agreement that complies with Section 331 [defining "franchise"]." (Sections 331.3 and 3072.5)

different interpretations of the statute. ALJ Skrocki's conclusion was that "[a]lthough no conclusive interpretation of the meaning and scope of Section 3072(b)(5) has been made, neither can it be determined that Section 3072(b)(5) has a plain meaning that mandates dismissal of the protest under the facts as presented to the Board."

68. In ALJ Skrocki's August 3, 2011 ruling,[19] also containing an excellent analysis of the implications arising from different interpretations of the statute, he determined that "[a]s to the establishment of the additional franchise in Colton - there is no need for an evidentiary hearing pursuant to Section 3073 regardless of the outcome of the above issue as to whether Section 3072(b)(5) is applicable".

69. After re-reading Exhibit A and the August 3, 2011 ruling regarding the application of Section 3072(b)(5), it appears that the prior orders have stated at least implicitly how Section 3072(b)(5) should be interpreted. Recognizing that the prior orders could have been, and perhaps should have been, more specific, it is determined that Section 3072(b)(5) must be explicitly interpreted now, as follows: A franchisor is required to give notice to an existing franchisee of the same line-make of its intention to establish an additional franchise if the existing franchisee is within the relevant market area of the additional dealership location, unless the additional franchise location was established as a dealer or authorized to sell and service the franchisor's same line-make on or before January 1, 2004.

70. The legislative history confirms this interpretation.[20]

A. Senate Bill 248, Chaptered October 9, 2003, added recreational vehicles to the list of licensees within the Board's jurisdiction and added Article 5 (Sections 3070-3079) pertaining to recreational vehicle protests. Section 3072(b)(5) was not included until the September 5, 2003 amendments. The Assembly Floor Analysis dated September 5, 2003, indicated that the bill "provides that the Board shall not have jurisdiction over RV dealership disputes where one dealership protests the location of another dealership <u>offering the same line-make</u> within its market area if the second dealership was established on or before January 1, 2004." [Emphasis added.]

///

---

[19] ALJ Skrocki's ruling is set forth above in paragraphs 18-22.
[20] This analysis is contained in Exhibit A.

B. The language of Section 3072(b)(5) is interpreted to mean that for the exception contained therein to be applicable, and thus dispense with the notices required and preclude the right of an existing franchisee to protest, the additional dealership intended to be established:

(1) Must have been in operation on or before January 1, 2004 at that location; and

(2) Must have been selling the same line-make of RVs at that location as the other existing dealership(s) that would have a right to protest but for this subsection.

C. Unless both of these requirements are met, the existing dealers of the same line-make, if they are in the relevant market area of the proposed dealership, would have a right to protest pursuant to Section 3072(a).

D. Applying these requirements to the facts here: As to (a) - The additional dealership was in operation as an RV dealership at that location on or before January 1, 2004. However, as to (b) - The additional dealership had not been selling Roadtrek RVs from that location.

E. Therefore, the exception in Section 3072(b)(5) is not applicable and Roadtrek was required to give the notices required by Section 3072(a) and Mega RV was permitted to protest the establishment.[21]

F. If the additional dealership had been established at that location on or before January 1, 2004, and if it had been selling Roadtrek RVs, Section 3072(b)(5) would apply as the Board would not have "jurisdiction over RV dealership disputes where one dealership (Mega RV) protests the location of another dealership (the proposed dealership) offering the same line-make… if the second dealership (the proposed dealership) was established (and offering the same line-make) on or before January 1, 2004.

G. But, as the "second dealership" under the facts here was not "offering the same line-make" at that location on or before January 1, 2004, the exception provided by Section 3072(b)(5) is not applicable.

Referral to the Department of Motor Vehicles is Not Appropriate Here

71. Protestant requested that Roadtrek's conduct in failing to give Mega RV written notice that it intended to establish an additional Roadtrek franchisee in Colton, California, in a location which would

---

[21] As noted earlier, in the later ruling on August 3, 2011, ALJ Skrocki ruled that no "good cause" hearing would be held.

put Mega RV within the new franchisee's relevant market area be referred to the DMV for investigation and action pursuant to Section 3050.

72. Roadtrek's interpretation of the statute, that it "grandfathers" in to the exception those RV dealerships in business at a particular location on January 1, 2004, without reference as to whether they were franchisees of a particular line-make on that date or before, is not unreasonable under the circumstances even though, upon analysis of the legislative history, it is not the proper interpretation.

73. James Hammill testified that he had looked at the wording of Section 3072(b)(5) to determine its application to Roadtrek's intended appointment of MTRV as its franchised dealer. A layperson would not be reasonably expected to conduct the kind of extensive analysis contained in ALJ Skrocki's Order and later ruling. The section is unique to the RV industry; no similar exemption appears in the "establishment" section (3062) relative to passenger cars and trucks.

74. According to James Hammill, "[Mega RV was] not in good standing under the agreement... [t]hey had no inventory, they weren't attempting to buy any inventory..." (RT 11/8:24-25) In late December of 2009, James Hammill was of the opinion that Roadtrek "... didn't have a relationship (with Mega RV)"..."[n]obody" was selling Roadtreks in the Los Angeles and Orange County areas. (RT 11/7:210-211)

75. For the reasons stated above, Protestant's request is denied.

CONCLUSION

76. Notice to Mega RV was required of Roadtrek's intention to enter into a franchise agreement establishing an additional Roadtrek dealership at a location which would put Mega RV's Colton, California dealership within the new dealer's relevant market area. Since the additional dealership location, Mike Thompson's RV Center, was not established as an either a Roadtrek dealership, a Roadtrek franchisee, or was authorized to sell and service Roadtrek motorhomes on or before January 1, 2004, Roadtrek was required to give notice and was not entitled to the exemption stated in Section 3072(b)(5).

///

///

///

///

PROPOSED DECISION

Based on the evidence presented and the findings herein, IT IS HEREBY ORDERED THAT the Protest in *Mega RV Corp., dba McMahon's RV v. Roadtrek Motorhomes, Inc.*, Protest No. PR-2233-10, is 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 30, 2012

By: Diana Woodward Hagle
DIANA WOODWARD HAGLE
Administrative Law Judge

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

NEW MOTOR VEHICLE BOARD
1507 – 21ST Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

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-2233-10

ORDER DENYING RESPONDENT'S MOTION TO DISMISS PROTEST

To: Michael M. Sieving, Esq.
Tina Hopper, Esq.
Attorneys for Protestant
LAW OFFICES OF MICHAEL M. SIEVING
1801 Park Court Place, Suite F-101
Santa Ana, California 92701

James D. McNairy, Esq.
Attorney for Respondent
SEYFARTH SHAW LLP
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428

Louis S. Chronowski, Esq.
Kavitha Janardhan, Esq.
Attorneys for Respondent
SEYFARTH SHAW LLP
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603

///

///

EXHIBIT A

IDENTITY AND STATUS OF THE PARTIES

1. Protestant, Mega RV Corp., dba McMahon's RV ("McMahon's"), is a new motor vehicle dealer as defined in Vehicle Code section 426,[1] and is licensed as such by the Department of Motor Vehicles ("DMV"). Protestant is located at 1313 RV Center Drive, #12, Colton, California.

2. In addition to the Colton location, McMahon's operates recreational vehicle (RV)[2] dealerships at the following locations:

- 5060 Scotts Valley Road, Scotts Valley, California 95066 ("McMahon's Scotts Valley");
- 77850 Varner Road, Palm Desert, California 92211 ("McMahon's Palm Desert"); and,
- 6441 Burt Road, #10, Irvine, California 92618 ("McMahon's Irvine").

3. Respondent, Roadtrek Motorhomes, Inc. ("Roadtrek"), with its head office at 100 Shirley Avenue, Kitchener, Ontario, Canada N2B 2E1, is a division of Hanmar Motor Corporation, a company incorporated under the laws of the Province of Ontario. Roadtrek is licensed by the DMV as a manufacturer.[3]

PROCEDURAL BACKGROUND

4. On June 2, 2010, the Board received via e-mail "Respondent's Motion to Dismiss Protest".[4]

5. On June 17, 2010, after the submission of briefs by each side, a hearing on the motion to dismiss was held before Administrative Law Judge Anthony M. Skrocki.

///

///

---

[1] Unless otherwise indicated, all later statutory references shall be to the California Vehicle Code.

[2] Section 415(c) provides: "For purposes of Chapter 6 (commencing with Section 3000) of Division 2, 'motor vehicle' includes a recreational vehicle as that term is defined in subdivision (a) of Section 18010 of the Health and Safety Code, but does not include a truck camper."

[3] Section 672 defines "vehicle manufacturer" as follows:

> (a) "Vehicle manufacturer" is any person who produces from raw materials or new basic components a vehicle of a type subject to registration under this code, off-highway motorcycles or all-terrain vehicles subject to identification under this code...

[4] A consolidated Motion to Dismiss Protests was also filed by Roadtrek seeking to dismiss PR-2234-10, PR-2235-10, and PR-2236-10. As to these, a separate proposed order will be issued to be considered by the Board at its August 24, 2010, Special Meeting. This proposed order will recommend that Respondent's motion to dismiss be granted as to these three protests.

PRELIMINARY STATEMENT OF ISSUES

THE ALLEGATIONS OF THE PROTEST FILED BY MCMAHON'S

6. On May 11, 2010, McMahon's filed this protest pursuant to Section 3072 contending among other things that:

> Roadtrek has failed to give notice of its intent to establish an additional Roadtrek dealer at a location which would put McMahon's Roadtrek franchise, Colton, within the new dealership's relevant market area.[5] This failure to give notice is in violation of V.C. Section 3072. Roadtrek did in fact establish a Roadtrek dealer at 902 RV Center Drive, Colton, CA 92324 ("Mike Thompson's RV Superstores"). (Protest, page 2, lines 4-8)

THE MOTION TO DISMISS FILED BY ROADTREK

Clarification

7. Roadtrek's Motion to Dismiss includes the following language which requires clarification:

- "One of those 74 dealers [of Roadtrek] is **Mike Thompson's RV Superstores**, located at 902 RV Center Drive, Colton, CA 92334, **which was established as a franchise on February 1, 2003."** (Motion, page 2, lines 4-7; emphasis added);
- "The protest must be dismissed because **the new dealer**, Mike Thompson's RV, **was established on or before January 1, 2004**, and therefore the notice and protest requirements of... [Section] 3072 do not apply." (Motion, page 1, lines 23-25; emphasis added);
- "**The Roadtrek franchise** at Mike Thompson's RV Superstores, **which was established in February, 2003**, is clearly subject to the exception found in subdivision (b)." (Motion, page 3, lines 8-9; emphasis added); and,
- "**The franchise was established prior to January 1, 2004**, and is exempt under Code § 3072(b)(5) from bringing this Protest." (Motion, page 3, lines 11-12; emphasis added.)

8. All four of these statements are ambiguous. They can be interpreted to be referring to the Roadtrek franchise as they expressly say:

- "Mike Thompson's RV Superstores [the new Roadtrek franchisee] was established as a franchise on February 1, 2003";

---

[5] "Relevant market area" is "any area within a radius of 10 miles from the site of a potential new dealership". (Section 507)

- "the new dealer…was established on or before January 1, 2004"
- "The Roadtrek franchise …was established in February, 2003" and
- "The franchise was established prior to January 1, 2004."

9. However, none of these are correct as relating to the Mike Thompson's Roadtrek franchise. Although Roadtrek submitted a copy of a Vehicle Dealer License indicating that "MIKE THOMPSONS RV CENTERS" held a license as a Vehicle Dealer from February 1, 2003 through January 31, 2004, with the address shown as "902 RV CENTER DR 6/7/8/9, COLTON CA 92324", this document does not reflect which franchises were held by Mike Thompsons RV Centers at that location at that time. During the hearing, counsel for the parties agreed that the Roadtrek franchise at that location was not established until late 2009 or early 2010.

10. Therefore the contentions of Roadtrek as quoted above are interpreted to mean that: "Mike Thompson's RV Centers (as shown on the dealer license) was established as a dealership selling some line-makes (but was not a Roadtrek dealership or Roadtrek franchisee) at 902 RV Center Drive, Colton, on February 1, 2003." As stated above, it is undisputed that Mike Thompson's RV Superstores[6] was not established as a Roadtrek franchisee or Roadtrek dealership until late 2009 or early 2010.

Some of the Applicable Statutory Provisions

11. Section 3072 provides in pertinent part as follows:

> (a) (1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same recreational vehicle line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving the notice, satisfying the requirements of this section, or within 20 days after the end of any appeal procedure provided by the franchisor, any franchisee required to be given the notice may file with the board a protest to establishing or relocating the dealership…

---

[6] It is noted that the license submitted by Roadtrek in support of the motion to dismiss indicates the name on the license issued on February 1, 2003 is "Mike Thompsons RV Centers" whereas Roadtrek's motion refers to the new Roadtrek franchisee established by Roadtrek in 2009 or 2010 as "Mike Thompson's RV Superstores" (for example, see Motion, page 2, line 27 and page 3, lines 8-9). It is unknown if these are one entity or two entities. Roadtrek asserts that "Mike Thompson's RV Centers" was established prior to January 1, 2004, but there is nothing to indicate if this is the same entity as "Mike Thompson's RV Superstores" and if not, whether "Mike Thompson's RV Superstores" was established as an RV dealership, without the Roadtrek franchise, prior to January 1, 2004. The issue of whether Mike Thompson's RV Centers (which is alleged to have been established in February 2003) is the same "dealership" as Mike Thompson's RV Superstores was not raised.

(b) Subdivision (a) does not apply to any of the following:

...

(5) A motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established on or before January 1, 2004.

...

12. The Board's statues pertaining to RV franchises, including Section 3072, are contained in Article 5 which became effective on January 1, 2004.

13. However, Section 3079 states: "This article [Article 5] applies only to a franchise entered into or renewed on or after January 1, 2004. Therefore, the Board's statutes can only apply to franchises which were entered into or renewed on of after the effective date of the statute, January 1, 2004. The mere fact that the statute became effective on January 1, 2004, does not mean that it applies to all franchises then in existence. Any franchises entered into prior to January 1, 2004, and not "renewed on or after January 1, 2004" would not come within the purview of Article 5.

Roadtrek's Contentions in Support of its Motion to Dismiss

14. Roadtrek contends that because of Section 3072(b)(5), it is not required to give notice of its intention to establish Mike Thompson's[7] as a Roadtrek franchisee and that McMahon's has no right to file a protest.

15. Roadtrek maintains that "Subdivision (b) of Section 3072 states that the requirements of subdivision (a) do not apply to 'a motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established *on or before January 1, 2004*.'" (Motion, page 3, lines 4-7; italics in original).

16. Roadtrek states that "The Roadtrek franchise at Mike Thompson's RV Superstores, which was established in February, 2003, is clearly subject to the exception found in subdivision (b)."[8]

---

[7] Because of the uncertainty as to the name of the new franchisee, unless there is a reason to do otherwise, this order from here on will use the name "Mike Thompson's".

[8] As stated above, the Roadtrek franchise was not established at Mike Thompson's in February 2003. Counsel for the parties agreed that the Roadtrek franchise at Mike Thompson's was not established until late 2009 or early 2010. The motion at page 3, line 12, also states that "The franchise was established prior to January 1, 2004, and is exempt under Code § 3072(b)(5) from bringing this Protest." The reference to "The franchise" here does not mean the Roadtrek franchise of Mike Thompson's but rather refers to some other franchise or franchises that Mike Thompson's may hold.

(Motion, page 3, lines 8-10) As explained in paragraph 10, this statement should read something like: "As Mike Thompson's RV Superstores was established as a franchisee for some other line-make in February 2003, the establishment of the Roadtrek franchise at Mike Thompson's RV Superstores is within the exception found in subdivision (b)."

MCMAHON'S OPPOSITION TO THE MOTION TO DISMISS

17. McMahon's quotes the language contained in Section 3072(b)(5) upon which McMahon's says Roadtrek is relying, then McMahon's asserts that "While this code section uses the comprehensive term 'dealership' it is directed to the individual franchises that are protestable, not the dealership as a whole. This is apparent from V.C. Section 3079 '**Application of Article** 3079. This Article applies only to a franchise entered into or renewed on or after January 1, 2004.'" (Opposition, page 2, lines 20-24; bold in original.)

18. Without further analysis, McMahon's Opposition brief asserts only that: all of McMahon's Roadtrek franchises and all of Mike Thompson's Roadtrek franchises were entered into or renewed on or after January 1, 2004; that Mike Thompson's "new Roadtrek franchise in Colton is within 10 miles from McMahon's Colton franchise location"; states the conclusions sought in regard to this motion; and lists some of the remedies that McMahon's claims may be available to it if Roadtrek has violated the generally stated sections of the Vehicle Code. (Opposition, page 3, lines 1-25)

ROADTREK'S REPLY BRIEF

19. Roadtrek states that:

a. McMahon's ignores what Roadtrek claims to be the "plain language of Section 3072 of the Code…" (Reply, page 1, lines 22-24)

b. "Mike Thompson's RV was established as a dealership location prior to January 1, 2004 and therefore …[the protest] must be dismissed." (Reply, page 1, lines 24-27; underline in original)

c. "There is no ambiguity in the Code and there is no reason for the Board to do anything but enforce the plain meaning of the statute." (Reply, page 1, lines 26-27);

d. "Had the legislature intended the exception found in Section 3072 to apply to the establishment of individual franchises -- rather than dealership locations -- it would have used the

defined franchise in the statute." (Reply, page 2, lines 10-13)

e. "The exception found in Section 3072(b)(5) would have no significance if it applied only to franchises established prior to 2004." (Reply, page 2, lines 15-18)

ANALYSIS

20. The statutory language at issue includes the following:

> 3072. (a) (1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same recreational vehicle line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving the notice, satisfying the requirements of this section, or within 20 days after the end of any appeal procedure provided by the franchisor, any franchisee required to be given the notice may file with the board a protest to establishing or relocating the dealership.
>
> ...
>
> (b) Subdivision (a) does not apply to any of the following:
>
> ...
>
> (5) A motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established on or before January 1, 2004.

21. Section 3072(a) will be discussed first as it is the "granting" provision. Section 3072(b) is the "excepting" provision that limits what is created by Section 3072(a). Section 3072(b)(5) will be addressed later. It is necessary first to determine the meaning of the language contained in Section 3072(a) before attempting to determine how that language is impacted by Section 3072(b)(5).

THE TERMS CONTAINED IN SECTION 3072(a) THAT ARE DEFINED BY STATUTE

22. The following are a list of the terms contained in Section 3072(a) and the statutes in which those terms are fully or partially defined.

WORDS USED IN SECTION 3072(a)	WHERE DEFINED
"franchise"	Section 331(a)
"franchisee"	Section 331.1
"franchisor"	Section 331.2
"recreational vehicle franchise"	Section 331.3
"relevant market area"	Section 507
"motor vehicle dealership"	Section 3072(d)
"recreational vehicle line-make"	Section 3072.5
"recreational vehicle"	Health and Safety Code Section 18010

///

Other defined terms not contained in Section 3072(a)

23. The following are additional terms that apply to the Board's statutes but which are not terms expressly contained in Section 3072(a).

WORDS NOT CONTAINED IN SECTION 3072(a)	WHERE DEFINED
"motor vehicle"	Section 415
"new motor vehicle dealer"	Section 426

24. What follows are the statutory definitions of all the terms listed above.

25. Section 331 defines a franchise as follows:

> (a) A "franchise" is a written agreement between two or more persons having all of the following conditions:
> (1) A commercial relationship of definite duration or continuing indefinite duration.
> (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail new motor vehicles or new trailers subject to identification pursuant to Section 5014.1 manufactured or distributed by the franchisor or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.
> (3) The franchisee constitutes a component of the franchisor's distribution system.
> (4) The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor.
> (5) The operation of a portion of the franchisee's business is substantially reliant on the franchisor for a continued supply of new vehicles, parts, or accessories.
> (b) The term "franchise" does not include an agreement entered into by a manufacturer or distributor and a person where all the following apply:
> (1) The person is authorized to perform warranty repairs and service on vehicles manufactured or distributed by the manufacturer or distributor.
> (2) The person is not a new motor vehicle dealer franchisee of the manufacturer or distributor.
> (3) The person's repair and service facility is not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor.

26. There is no dispute that there is a franchise in existence between McMahon's and Roadtrek.

27. Section 331.1 defines a franchisee as follows:

> A "franchisee" is any person who, pursuant to a franchise, receives new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers subject to identification pursuant to Section 5014.1 from the franchisor and who offers for sale or lease, or sells or leases the vehicles at retail or is granted the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

There is no dispute that McMahon's is a franchisee of Roadtrek and that Roadtrek has established Mike Thompson's as a Roadtrek franchisee.

28. Section 331.2 defines a franchisor as follows:

> A "franchisor" is any person who manufactures, assembles, or distributes new motor vehicles subject to registration under this code, new off-highway motorcycles, as defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers subject to identification pursuant to Section 5014.1 and who grants a franchise.

There is no dispute that Roadtrek is the franchisor of McMahon's and of Mike Thompson's.

29. Section 331.3 defines a recreational vehicle franchise as follows:

> A "recreational vehicle franchise" is a written agreement between two or more persons having both of the following conditions:
> (a) A commercial relationship of definite duration or continuing indefinite duration.
> (b) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail, new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, that are manufactured or distributed by the franchisor, or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

There is no dispute that the franchises between McMahon's RV and Roadtrek and between Roadtrek and Mike Thompson's are recreational vehicle franchises.

30. Section 415 defines a motor vehicle as follows:

> (a) A "motor vehicle" is a vehicle that is self-propelled.
> (b) "Motor vehicle" does not include a self-propelled wheelchair, motorized tricycle, or motorized quadricycle, if operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian.
> (c) **For purposes of Chapter 6 (commencing with Section 3000) of Division 2,[9] "motor vehicle" includes a recreational vehicle as that term is defined in subdivision (a) of Section 18010 of the Health and Safety Code, but does not include a truck camper.** (Emphasis added.)

31. The term "motor vehicle" is not contained in Section 3072(b)(5) but this language of Section 415(c) is what converts even a non-self-propelled RV into a "motor vehicle" for the limited purposes of the Board's statutes.

32. Section 3072.5 defines recreational vehicle line-make as follows:

> For the purposes of this article, a "recreational vehicle line-make" is a group or groups of recreational vehicles defined by the terms of a written agreement that complies with Section 331.

---

[9] These are the statutes that are applicable to the Board.

33. There is no issue that both McMahon's and Mike Thompson's are franchisees of Roadtrek for the same "recreational vehicle line-make".

34. Section 426 defines a new motor vehicle dealer as follows:

> "New motor vehicle dealer" is a dealer, as defined in Section 285, who, in addition to the requirements of that section, either acquires for resale new and unregistered motor vehicles from manufacturers or distributors of those motor vehicles or acquires for resale new off-highway motorcycles, or all-terrain vehicles from manufacturers or distributors of the vehicles. A distinction shall not be made, nor any different construction be given to the definition of "new motor vehicle dealer" and "dealer" except for the application of the provisions of Chapter 6 (commencing with Section 3000) of Division 2 and Section 11704.5. Sections 3001 and 3003 do not, however, apply to a dealer who deals exclusively in motorcycles, all-terrain vehicles, or recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code.

35. "New motor vehicle dealer" is not a term contained in Section 3072(b)(5) but this section also refers to the application of the Board's statutes to RV "new motor vehicle dealers" and "dealers". Because the expanded definition of "motor vehicle" includes RVs, McMahon's and Mike Thompson's are each a "new motor vehicle dealer" within this definition and within the Board's statutes as "new motor vehicle dealers" and "dealers".

36. Section 507 defines relevant market area as follows:

> The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

37. This term is contained in both Section 3072(a) and Section 3072(b)(5). There is no dispute that the relevant market area as defined must be determined using the location of the "new dealership" as the center point of a circle with a radius of 10 miles and there is no dispute that McMahon's is located within the relevant market area of Mike Thompson's, which is the "potential new dealership". Further discussion of the use of this language in Section 3072(b)(5) will follow. Suffice it to say at this time, that the use of "potential new dealership" here can only be interpreted under these facts to mean "potential new RV franchisee of the same line-make" with "dealership" being synonymous with "franchisee of the same line-make".

38. Section 3072(d) defines a motor vehicle dealership or dealership for purposes of Sections 3072 and 3073 as follows:

///

> For the purposes of this section and Section 3073, a "motor vehicle dealership" or "dealership" is any authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code. A "motor vehicle dealership" or "dealership" does not include a dealer who deals exclusively in truck campers.

39. Neither side referred to this definition in their pleadings. As can be seen, this section does not apply to any other sections in the Vehicle Code other than Sections 3072 and 3073. It contains a specific definition for a "motor vehicle dealership" or "dealership" as those terms are used in Sections 3072 and 3073.

40. Section 3072(d) brings into play a combination of requirements for there to be a "motor vehicle dealership" or "dealership". These requirements are that there be a "facility" which must be "authorized", and that it be the facility of a "franchisee" that offers, displays, or sells or leases new RVs.

41. The term "facility" is not defined in the Vehicle Code, but it is generally understood in the trade to mean the real property and the improvements thereon at a specific address or location. However, for that facility to be a "motor vehicle dealership" or "dealership" that "facility" must be "authorized", which is another term not defined in the Vehicle Code. Although Section 3072(d) does not state by whom the facility must be "authorized", the two entities that first come to mind for there to be an "authorized" "facility" operated by a "franchisee" (terms also contained in Section 3072(b)(5)) are the franchisor and the DMV. This is because there can not be a "franchisee" offering, displaying or selling new RVs at that location unless there is a "franchise" by which the franchisor "authorized" such activity at that location. And there can be no "franchisee" operating as a "dealership" at that location for the sale of RVs unless there has been a license issued by DMV which "authorized" such activity at that location. Lastly, because Section 3072(b)(5) is in the present tense ("at which a franchisee offers…"), the "authorized facility" must be one that is in fact utilized by that franchisee (of that franchisor) for display, offer, or sale or lease of RVs of the line-make authorized by the franchise and by the DMV.

42. Based upon the undisputed facts before the Board, McMahon's and Mike Thompson's are each currently a "motor vehicle dealership" or "dealership" for Roadtrek RVs at the locations alleged. McMahon's was established as a Roadtrek franchisee in February 2006. Mike Thompson's was an RV

///

///

dealer at the address alleged as of February 1, 2003,[10] but Mike Thompson's was not a Roadtrek franchisee at that location until late 2009 or early 2010.

43. Recognizing the definitions above, Section 3072(a) in summary states that: A "franchisor" that desires to enter into a new "franchise" that would result in the establishment of an additional motor vehicle "dealership" must first give notice to the Board and each "franchisee" of the same line-make in the "relevant market area" of the "franchisor's" intent to establish an additional "dealership". Any "franchisee" required to be given notice may file a protest "to establishing" the additional "dealership".

44. There is no difficulty in applying the language in Section 3072(a) together with the definitions to conclude that, if McMahon's is within the relevant market area (which is that area within a 10-mile radius measured "from the site of [the] potential new dealership" per Section 507), Roadtrek, the franchisor, must give notice to the Board and McMahon's of Roadtrek's intent to establish Mike Thompson's as an additional Roadtrek dealer.

45. If only Section 3072(a) applied, there would be no question that Roadtrek must provide notice of its intention to establish Mike Thompson's as a Roadtrek franchisee; that McMahon's (which is within the relevant market area of the proposed location) would have a right to file a protest with the Board; and that Roadtrek could not establish Mike Thompson's at the intended location until there had been a hearing before the Board, nor thereafter if McMahon's established good cause not to allow the establishment.

46. However, Roadtrek asserts that the establishment of Mike Thompson's as a Roadtrek franchisee comes within the language of Section 3072(b)(5) which, if applicable, would operate as an exception to the provisions of Section 3072(a). If Roadtrek is correct, Roadtrek could establish Mike Thompson's as a Roadtrek franchisee without regard to Section 3072. Roadtrek would not be required to

---

[10] It is noted that Roadtrek's motion to dismiss included an exhibit purported to be a copy of the "Vehicle Dealer" license issued to "Mike Thompsons RV Center" indicating "Date Issued February 1, 2003" and "Expiration Date January 31, 2004." It also states that "License must be renewed annually pursuant to California Vehicle Code Sections ...." Although this supports the claim that Mike Thompson's was established as an RV dealer on February 1, 2003, nothing was submitted to indicate that the named licensee "Mike Thompson's RV Centers" remained "established" from February 1, 2003 until late 2009 or early 2010, which is the time that Roadtrek claims "Mike Thompson's RV Superstores" became a Roadtrek franchisee. In addition, as previously stated, it is unknown if there is a distinction between "Mike Thompson's RV Centers" shown as the licensee and "Mike Thompson's RV Superstores" referred to as the new Roadtrek franchisee. The uncertainty about the identity of the new franchisee and the uncertainty of the continuity of the license, also weigh against granting the motion to dismiss.

give notice to the Board or McMahon's and McMahon's would have no right to file a protest or have a hearing before the Board. If all of this is so, the motion to dismiss should be granted.

ANALYSIS OF THE STATUTORY DEFINITIONS OF THE TERMS CONTAINED IN SECTIONS 3072(a) AND 3072(b)(5) AND THEIR INTERRELATIONSHIP

47. The difficulties arise when one attempts to apply the language in Section 3072(b)(5) together with the definitions listed and discussed above and in conformity with Section 3072(a).

48. The issue becomes: To what extent does Section 3072(b)(5) trump or modify Section 3072(a)? Does 3072(b)(5) operate to "grandfather" out of the application of Section 3072(a) every dealership regardless of line-make so long as it was established by any other franchisor on or before January 1, 2004? If so, those dealerships' locations, even though not "RV franchisees of the same line-make", could be used by any other franchisor to establish another franchisee without regard to Section 3072(a) (See paragraph 37 regarding discussion of Section 507, where it was concluded that the reference to a "potential new dealership" had to mean "potential new RV franchisee of the same line-make" which made "dealership" synonymous with "franchisee of the same line-make". See also, Section 3072(a) where the use of "dealership" has to mean "dealership of the same line-make" and "franchisee of the same line-make" with all three of these terms being synonymous as used in that section.)

49. Again, Section 3072(b)(5) states:

> (b) Subdivision (a) does not apply to any of the following:
> ...
> (5) A motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established on or before January 1, 2004.

50. The language used here includes:

"motor vehicle dealership";
"dealership";
"recreational vehicle line-make";
"relevant market area";
"dealership location";
"subject to the protest";
"established"; and,
"on or before January 1, 2004".

51. Roadtrek claims that: The statute is plain in its meaning and as there is no ambiguity in the Code the Board should enforce the plain meaning. (Reply, page 1, lines 26-27)

Whether Section 3072(b)(5) is plain in its meaning?

52. Section 3072(b) begins with, "Subdivision (a) does not apply to… (5) A motor vehicle dealership protesting the location of …".

53. As stated above, the term "motor vehicle dealership" is defined in Section 3072(d) as:

> For the purposes of this section and Section 3073, a "motor vehicle dealership" or "dealership" is any authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code. A "motor vehicle dealership" or "dealership" does not include a dealer who deals exclusively in truck campers.

54. Roadtrek in its reply brief is correct that Section 3072(b)(5) does not use the term "franchise" or "franchisee" in carving out the exception to Section 3072(a). (Reply, page 2, lines 10-13) However, Section 3072(b)(5) does use the term "motor vehicle dealership" which is defined in Section 3072(d) to require that the "motor vehicle dealership" be a "recreational vehicle" "franchisee" operating out of an "authorized facility". (See discussion of these terms above.)

55. In addition, under Section 3072(a), the only "motor vehicle dealership" that must receive a notice is a "franchisee in that recreational vehicle line-make" and it is only a "franchisee required to be given the notice [that] may file with the board a protest…."

56. Therefore, to be consistent, the language in Section 3072(b)(5) of "motor vehicle dealership" must mean a "motor vehicle dealership which is a franchisee in that recreational vehicle line-make". This is also consistent with the conclusion that only a "motor vehicle dealership" that is a "franchisee in that recreational vehicle line-make" is granted the right to file a protest of "the location of another dealership with the same recreational vehicle line-make."

The legislative history with regard to these sections

57. Senate Bill 248, Chaptered October 9, 2003, added recreational vehicles to the list of licensees within the Board's jurisdiction and added Article 5 (Sections 3070-3079) pertaining to recreational vehicle protests. Section 3072(b)(5) was not included until the September 5, 2003 amendments. The Assembly Floor Analysis dated September 5, 2003, indicated that the bill "provides that the Board shall not have jurisdiction over RV dealership disputes where one dealership protests the location of another dealership offering the same line-make within its market area if the second dealership

was established on or before January 1, 2004." (Underline added.) Note the absence of "relevant" when referring to "its market area" in the last underlined terms.

Additional analysis re: Interpretation of Section 3072(b)(5)

58. First, it is noted that Section 3072(a) applies to both establishment of "an additional motor vehicle dealership" as well as to the relocation of "an existing motor vehicle dealership". It reads in part:

> (a) (1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same recreational vehicle line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area.... (Underline added.)

59. And, it is noted that the language in Section 3072(b)(5) creates an exception to Section 3072(a) for "... protesting the location of another dealership with the same recreational vehicle line-make...if the dealership location subject to the protest, was established on or before January 1, 2004." (Underline added.) There is much mystery in the other parts of Section 3072(b)(5). In addition to the use of "relevant market area", these include: the use of the term "protesting the location" rather than protesting the establishment of an additional franchisee/dealership of the same RV line-make or protesting the relocating of an existing franchisee of the same RV line-make; the use of the language "of another dealership with the same recreational vehicle line-make", rather than the use somewhere of a word like "proposed", which could mean the language must be read in the present tense, that is it means the exception applies only if the other dealer already is a "dealership with the same recreational vehicle line-make" that had been established as such on or before January 1, 2004.

60. Roadtrek also contends that "The exception found in Section 3072(b)(5) would have no significance if it applied only to franchises[11] established prior to 2004."[12] (Reply, page 2, lines 15-18)

---

[11] This sentence is interpreted to mean "The exception found in Section 3072(b)(5) would have no significance if it applied only to franchises of the same line-make established prior to 2004."

[12] As to the substance of this contention, in addition to the above discussion relating to "relocations" vs. "establishments", as was said in Footnote 7 of the April 19, 2010, proposed order and order on Roadtrek's motions to dismiss in the McMahon's modification protests (PR-2198-10 through PR-2201-10) "...it is likely that Section 3072(b)(5) was intended to apply as a transitional section applicable to those dealerships established [as franchisees of the same line-make] after the bill was enacted but before it became effective. The language of the section is less than artful in its reference to the 'relevant market area' and if applied as suggested by Roadtrek would lead to results that could not have been intended by the legislature considering the intent of Section 3072(a)." Further discussion follows.

However, if Roadtrek's interpretation is accepted, then Section 3072(b)(5) would have the effect of rendering all of Section 3072 ineffective for some indeterminate time period as explained below, with the result being that the tail would be wagging the dog. Section 3072(b)(5) would be controlling Section 3072(a) rather than operating as a limited exception to it.

61. First it is necessary to revisit Section 3072(a)(1) to examine thoroughly the language used as follows:

- "Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership…"
  - "Dealership" here clearly meaning "franchisee" and "franchisee in that recreational vehicle line-make".
- "…within a relevant market area[13] where the same recreational vehicle line-make is then represented, or seeks to relocate an existing motor vehicle dealership…"
  - "Dealership" here clearly meaning "franchisee" and "franchisee in that recreational vehicle line-make"; not a dealership of some other line-make.
- "…the franchisor shall, in writing, first notify the board and each franchisee in that recreational vehicle line-make…"
  - This language needs no interpretation and is consistent with the prior interpretations.
- "…in the relevant market area of the franchisor's intention to establish an additional dealership…"
  - "Dealership" here clearly means "franchisee" and "franchisee in that recreational vehicle line-make".
- "…or to relocate an existing dealership…"
  - Clearly meaning "franchisee" and "franchisee in that recreational vehicle line-make".
- "…within or into that market area. Within 20 days of receiving the notice, satisfying the requirements of this section, or within 20 days after the end of any appeal procedure provided by the franchisor, any franchisee
  - "Franchisee" used here and meaning "franchisee in that recreational vehicle line-make".
- "…required to be given the notice may file with the board a protest to establishing or relocating the dealership.
  - Clearly this means "establishing" the additional "franchisee" and "franchisee in that recreational vehicle line-make". And, "relocating the dealership' means "relocating the franchisee" and "the franchisee in that recreational vehicle line-make".

---

[13] The term "relevant market area" is used here in conformity with its statutory definition: Section 507. The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

62. As can be seen, this "granting" statute uses the following words listed in the order of their appearance.

"additional motor vehicle dealership"
"existing motor vehicle dealership"
"franchisee in that recreational vehicle line-make"
"additional dealership"
"existing dealership"
"franchisee"
"dealership"

63. All of these terms can only mean "franchisee" and more specifically "franchisee in that recreational vehicle line-make".

64. It is noted that Section 3072(a) uses the terms "franchisee", "dealership", "motor vehicle dealership", and "franchisee in that recreational vehicle line-make" to have as a base requirement that these be a "franchisee" and as stated more specifically, a "franchisee in the same line-make".

65. As stated, Section 3072(a) contains the "granting" language, and is expressly subject to the exceptions in Section 3072(b) including Section 3072(b)(5), which reads:

> (b) Subdivision (a) does not apply to any of the following:
> ...
> (5) A motor vehicle dealership protesting the location of another dealership with the same recreational vehicle line-make within its relevant market area, if the dealership location subject to the protest was established on or before January 1, 2004. (Underline added).
> ...

66. The language "motor vehicle dealership protesting the location" can only be interpreted to mean "a franchisee" and more specifically "a franchisee of the same recreational vehicle line-make" as it is only such an entity that is given the right to the notice required under Section 3072(a) and the right to protest under Section 3072(a).

67. The language "dealership with the same recreational vehicle line-make" can also only be interpreted to mean the additional "franchisee with the same recreational vehicle line-make" sought to be established or the existing "franchisee with the same recreational vehicle line-make" sought to be relocated.

68. Therefore, Section 3072(b)(5) excepts from Section 3072(a) "a franchisee of the same recreational vehicle-line-make" seeking to protest the establishment of an additional "franchisee of the

same recreational vehicle line-make" and also excepts from Section 3072(a) "a franchisee of the same recreational vehicle line-make" seeking to protest the relocation of an existing "franchisee of the same recreational vehicle line-make", but only if the additional or relocating franchisee had been established as a franchisee for that RV line-make on or before January 1, 2004.

The problem with the language "relevant market area" as used in Section 3072(b)(5)

69. Although some of the terms in Section 3072(a) and Section 3072(b)(5) can be interpreted and reconciled in conformity with the definitions as discussed above so that there is a consistent (even if not a "plain meaning" as urged by Roadtrek) it is more difficult (if not impossible) to do so as to the remainder of the language in Section 3072(b)(5).

70. The difficulty begins with the language "relevant market area".

71. The only definition of "relevant market area" in the Vehicle Code is that in Section 507 which states:

> The "relevant market area" is any area within a radius of 10 miles from the site of a potential new dealership.

72. This term as used in Section 3072(a) comports with the above definition as Section 3072(a) refers to "establishing an additional motor vehicle within a relevant market area where the same recreational vehicle line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall notify…each franchisee in that recreational vehicle line-make in the relevant market area…"

73. As can be seen, the "relevant market area" under Section 3072(a) would be "any area within a radius of 10 miles from the site of [the] potential new dealership" which is in accord with Section 507.

74. This interpretation is not possible with regard to "relevant market area" as used in Section 3072(b)(5), a section which is intended to operate to except certain situations from the application of Section 3072(a).

75. The language of Section 3072(b)(5), "A motor vehicle dealership protesting the location of another dealership…within its relevant market area…" is incorrectly referring to the "relevant market area" of the motor vehicle dealership required to be given notice and permitted to file a protest under

Section 3072(a). This would mean the "relevant market area" of the protesting dealer.

76. There is no "relevant market area" for the protesting dealer. As discussed above, the relevant market area, per Section 507, is measured from the location of the new dealer with that dealer's new location being the center point of a circle with a 10-mile radius. Although the straight-line distance will be the same whether measured from McMahon's (the existing/protesting dealer) to Mike Thompson's (the new dealer) or from Mike Thompson's to McMahon's, the area within a 10-mile circle from each of them will be significantly different when measured from the site of each of the two dealers. This would be critical if there is a third dealer that is within 10 miles of the existing franchisee but 18 miles from the proposed new franchisee. The third dealer, although within 10 miles of the protesting dealer, is not within the relevant market area as established by Section 507, which is 10 miles from the site of the "potential new dealership". This distinction is also critical when analyzing the relevant market area for addressing the good cause factors mandated by the Vehicle Code (for example, see Section 3073(d)).

77. Although there may be two or three or more dealers within 10 miles of the proposed new location, there will be only one relevant market area and that will be the circle within a radius of "10 miles from the site of a potential new dealership."

78. Section 3072(a), although it uses several different terms, can be reconciled as to its meaning and therefore may arguably be found to have a "plain meaning" (at least if one agrees with those interpretations and then agrees that they are consistent). However, there is not even an arguable "plain meaning" of section 3072(b)(5) as urged by Roadtrek. It is impossible to reconcile the use of "relevant market area" as used in Section 3072(b)(5) with the statutory definition contained in Section 507, or Section 3072(a).

Some alternative interpretations as to the application of Section 3072(b)(5)

79. It is quite possible that, by the use of the terms "protesting the location" (rather than protesting the establishment of an additional franchisee or protesting the relocating of an existing franchisee) that the legislature intended Section 3072(b)(5) to apply only if there was going to be a "relocation" of an existing recreational vehicle dealership to a location within the existing dealer's relevant market area (recognizing the in-artful use of "relevant market area"), but would not apply to an

establishment. The focus appears to be upon the "location" of the dealership subject to the protest, not the "additional dealership" subject to the protest. This interpretation would make sense for two reasons. First, it would enable any existing pre-2004 RV franchisee to relocate "within its (relevant) market area" without being subject to a possible protest even if there was another RV franchisee of the same line-make in that market. The relocation of an existing dealership of the same line-make is not as apt to have as significant an effect upon an existing dealership of that same line-make as would adding an additional dealership of the same line-make. And second, the reference to the "location" as being "within its relevant market area" could be interpreted to mean that the exiting pre-2004 dealer could relocate to a location within 10 miles of its existing location without any other franchisees of the same line-make having a right to protest. This interpretation is at least close to the statutory definition of "relevant market area".

80. This interpretation would have the effect of carving out from Section 3072(a) the relocation of any pre-2004 RV dealership to a location within 10 miles of its existing location even though there is a dealership of the "same recreational vehicle line-make within its relevant market area." It would also give some meaning to the language of Section 3072(b)(5) which states: "A motor vehicle dealership protesting the location [not the establishment] of another dealership... within its relevant market area..."

81. Perhaps the most likely purpose of Section 3072(b)(5) would be to address the situation in which there are RV dealers that have been "established" as such prior to 2004 but were not and are not operating under a "franchise" or "recreational vehicle franchise" as defined in Sections 331 or 331.3. As stated above, the Board's statutes became effective on January 1, 2004 and are applicable only to those franchises which were entered into or renewed after January 1, 2004.

82. It is possible that the language of Section 3072(b)(5) was intended to exempt from a 3072(a) protest only those RV dealerships that had been established as RV dealerships for an RV line-make at a specific location prior to January 1, 2004, but whose documents might not satisfy the definition of a "franchise" or "RV franchise", akin to the difference between a "de facto franchisee" and a "de jure franchisee". Any new "enfranchisement" of such dealers subsequent to January 1, 2004, although subject to Article 5 generally because of Section 3079, would not be subject to a protest under Section

3072(a) because of the exception contained in Section 3072(b)(5).

83. Such an exception may be particularly meaningful considering the enactment of Sections 11713.22 and 11713.23 (effective January 1, 2009).

84. Thus, it is possible for Section 3072(b)(5) to be interpreted to mean that if Mike Thompson's had been established as a Roadtrek dealership, but without a "franchise", prior to January 1, 2004, Roadtrek could, after January 1, 2004, enter into a true "franchise" with Mike Thompson's without complying with Section 3072(a). However, these are not the facts as presented.

Additional discussion as to whether Section 3072(b)(5) has a plain meaning as urged by Roadtrek

85. In addition one cannot say that there is a "plain meaning" to what is meant by the other language in Section 3072(b)(5) which states "if the dealership location subject to the protest was established on or before January 1, 2004."

86. In addition to the possible meaning of "established" but not "franchised" as discussed above, there are at least two other possible meanings of "established".

- Alternative (a) urged by Roadtrek: Does this mean that the "dealership location subject to the protest" was an RV dealer that was established as a franchisee of any franchisor for any line-make of recreational vehicle? or,
- Alternative (b): Does this mean that the "dealership location subject to the protest" was an RV dealer that was established as a franchisee by the same franchisor for the same recreational vehicle line-make as that of the existing dealer?

87. As can be seen, there is a need for interpretation of the language of "dealership location subject to the protest".

88. The problems include what is meant by "dealership location"; and the meaning of "was established". The language "was established" is doubly uncertain as it could involve "was established as what" and "was established by whom".

89. First it is noted that the language in Section 3072(b)(5) is "dealership location" not just "location" and that "dealership" is defined in Section 3072 itself.

90. Section 3072(d) states:

> For the purposes of this section and Section 3073, a "motor vehicle dealership" or "dealership" is any authorized facility at which a franchisee offers for sale or lease, displays for sale or lease, or sells or leases new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code. A "motor vehicle dealership" or "dealership" does not include a dealer who deals exclusively in truck campers. (Underline added.)

91. Because of this definition, the term "dealership location" in Section 3072(b)(5) applies only if there is a "franchisee" at that "location". And, as discussed above, for there to be an "authorized facility" for a "franchisee" to engage in these activities would require there be a "franchisor", a "franchisee", a "franchise", and a license from the DMV for these activities.

92. This could be interpreted to mean that the only "dealership location" that could be "subject to the protest" would be that at which there was a dealership, operating as a franchisee of the same line-make as the protesting dealer, which is alternative (b) above. This is so as "dealership" requires there be a franchisee at that location and it is only when there is a "franchisee of the same recreational vehicle line-make" that the location would be "subject to the protest".

Effect if Section 3072(b)(5) is interpreted as Roadtrek desires

93. It is highly unlikely that the legislature when it enacted Section 3072(b)(5) intended it to be interpreted under alternative (a) above, that the "dealership location" "subject to the protest" could be that of any franchisee for any line-make. This interpretation would significantly weaken the protection intended by the legislature and prevent the statute from taking effect for many years (as demonstrated by the facts present here). All that any franchisor would need do to establish an additional franchisee of the same line-make in that market in which the line-make was already represented would be to find an RV dealership (of any line-make) established on or before January 1, 2004, and appoint that dealership as an additional franchisee without regard to its proximity to other franchisees of that franchisor. This could be done without consideration of its effect upon existing franchisees or the need or effect on the consumers in the relevant market area, and without complying with Section 3072(a).

94. One of the impacts of this interpretation would be to deny a large percentage of both present and future RV franchisees the right to protest under Section 3072(a) as the statute would not take effect until some indeterminate time in the future. This is so because if there is an RV dealership (of any line-make) that had been established on or before January 1, 2004, there would be no protection for any

existing or future RV franchisee of any RV line-make within 10 miles of any "pre-2004" franchisee until all pre-2004 franchisees of any line-makes had ceased operations. The protection intended to be afforded by Section 3072 would not become operative until all of those dealerships, "previously established" on or before January 1, 2004, had ceased operations at some time in the future.

95. The pervasiveness of using Roadtrek's interpretation of the statute is illustrated by the following. Assume that Dealers A, B, and C had been established as franchisees of Franchisors A, B, and C respectively at the same RV mall. Assume there are also Dealers X, Y, and Z, franchisees of Franchisors X, Y, and Z respectively at an RV "strip" about 9 miles from the RV mall. All six of these dealers were established on or before January 1, 2004 and all six of these dealers also have franchises for three or four other line-makes but none of them represents the same line-make.

96. Under Roadtrek's interpretation, Franchisor X, could, AT ANY TIME, appoint Dealers A and B and C (in the RV mall 9 miles from Dealer X) as franchisees and could also appoint Dealers Y and Z (who are in the same strip as Dealer X) without any of the dealers having a right to protest.[14] Likewise, all the other franchisors of A, B, C, and X, Y, and Z, could appoint any or all of the other existing dealers as additional franchisees as all of them had been established as RV dealerships (franchisees of some other franchisor) on or before January 1, 2004. Because of this interpretation, any market that has one or more RV franchisees (of any line-make) that had been established on or before January 1, 2004 would be free of the application of Section 3072, as to those pre-2004 dealerships, into the indefinite future. From a franchisor's perspective, the "pre-2004 dealership locations", wherever they would be, would tend to become preferred locations for establishment of additional franchises. The result could be "over-dealerization" of any area containing any pre-2004 dealerships and "under-dealerization" of any area containing only post-2004 dealerships.

97. At first glance, the interpretation as urged by Roadtrek appears to be a benefit to a franchisor in that the franchisor would not have to be concerned with a protest by any existing franchisees in the relevant market area.

---

[14] The appointments could all be done at once or "serially", for example, one new appointment every six months or one per year. None of the dealers would have any right to protest no matter which of the others were appointed as additional franchisees of the same line-make or when they were appointed.

98. However, such an interpretation could also work against the interests of the franchisor. Again, assume a market in which there are several pre-2004 RV dealers representing many line-makes but Franchisor F is not represented. Franchisor F may have difficulty finding a franchisee willing to build a new facility or upgrade an existing facility if Franchisor F is free to appoint any of the pre-2004 dealerships as additional franchisees without application of Section 3072. As RV dealers become aware of this interpretation, a franchisor may find it difficult to obtain new representation in any market in which any of their competitors are represented by a pre-2004 dealership.

99. Just one existing RV dealer (of any line-make), that had been established on or before January 1, 2004, would make it more difficult for any RV franchisor, not already represented in that market, to establish a franchisee in that market or, if it is already represented, to convince its existing dealer to commit to an investment that may be desired or needed. Neither a prospective new dealer or an existing dealer may be willing to commit the resources needed for the franchise if the franchisor can appoint any other pre-2004 dealership (or dealerships) of any line-make as an additional franchisee merely because of that other dealer's "age" without regard to the fact that the dealerships are less than 10 miles apart.

100. The effect of such an interpretation could be to reduce competition among the line-makes by making it more difficult to obtain new franchisees in any market in which there was an RV dealership of any line-make if that RV dealership had been established on or before January 1, 2004. Not only would this diminish the ability of other franchisors to compete but it would also deprive the public of the opportunity to choose which RV to purchase as well as impact the availability of service and parts for that unrepresented line-make.

101. In addition to being unfair to franchisors and the consuming public, such an interpretation would also operate unfairly as among the existing franchisees.

102. In summary, the interpretation sought by Roadtrek would permit any franchisor to establish unlimited new franchisees at any locations so long as those locations had been established as RV dealers for any line-make on or before January 1, 2004.

///

///

CONCLUSION

103. Although no conclusive interpretation of the meaning and scope of Section 3072(b)(5) has been made, neither can it be determined that Section 3072(b)(5) has a plain meaning that mandates dismissal of the protest under the facts as presented to the Board.

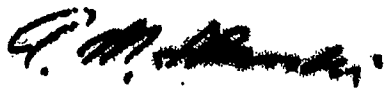
ORDER

IT IS HEREBY ORDERED THAT Respondent's motion to dismiss *Mega RV Corp. dba McMahon's RV v. Roadtrek Motorhomes, Inc.*, Protest No. PR-2233-10 is denied and the protest shall proceed to a merits hearing. The Board staff shall expeditiously set a telephonic Pre-Hearing Conference.

SO ORDERED.

DATED: July 26, 2010

NEW MOTOR VEHICLE BOARD



By_____
ANTHONY M. SKROCKI
Administrative Law Judge

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