STATE OF CALIFORNIA

DECISION COVER SHEET

[ ] ACTION BY: Public Members Only **[X] ACTION BY**: All Members

To : BOARD MEMBERS **Date: August 14, 2012**

From : ADMINISTRATIVE LAW JUDGE: Diana Woodward Hagle

CASE: MEGA RV CORP. dba MCMAHON'S RV v. ROADTREK MOTORHOMES, INC.
Protest Nos. PR-2244-10 and PR-2245-10

TYPE: Vehicle Code section 3070(a) Protests (Termination)
Proposed Decisions
PR-2244-10 (Colton and Irvine Dealership Locations)
PR-2245-10 (Scotts Valley Dealership Location)

NOTE: On January 12, 2012, Roadtrek filed a Motion to Dismiss Protest No. PR-2245-10, which was argued before Administrative Law Judge Anthony M. Skrocki. On March 13, 2012, ALJ Skrocki issued an Order stating an intention to issue a Proposed Order granting the motion. Therefore, in regard to termination Protest No. PR-2245-10, relating to Mega RV's dealership in Scotts Valley, a Proposed Order Granting Respondent's Motion to Dismiss Protest No. PR-2245-10 will also be considered at the August meeting.

PROCEDURE SUMMARY:

- PROTESTS FILED ON CALENDAR: July 13, 2010
- MOTIONS FILED:
  - Respondent's Motion to Compel Rule CCP 2025.230 and 2025.250 Deposition of Protestant Mega RV Corp. (2011) – granted June 29, 2011
  - Joint Motion to Continue Hearing (2011) – granted July 1, 2011
  - Protestant's Motions In Limine and Requests for Conclusions of Law and Other Relief (2011) – granted in part and denied in part August 3, 2011
  - Respondent's Motion to Reserve Making Findings of Fact and Conclusions of Law on UCC Issues (2011) – ruling deferred August 3, 2011
  - Protestant's Request that Official Notice be taken of Board Decision (2011) – granted September 22, 2011
  - Roadtrek Motorhomes, Inc.'s Motion and Brief in Support of its Motion to Allow the Testimony of Expert Witness Paul Baumann (2011) – granted in part January 3, 2012
  - Respondent's Motion to Issue a Subpoena to Traveland U.S.A. (2011) – denied January 3, 2012
  - Protestant's Objection to Introduction in Evidence of James E. Hammill's Declaration Re: Warranty Reimbursement Claims [Vehicle Code Section 3075] –

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denied March 20, 2012
- Protestant's Objection to Introduction in Evidence of James E. Hammill's Declaration Re: Franchisor Incentive Program Claims [Vehicle Code Section 3076] – denied March 20, 2012
- Protestant's Motion that Official Notice be Taken of Select Federal Trade Commission Regulations (2012) – denied March 23, 2012
- Respondent's Motion to Issue Subpoenas to Traveland U.S.A. and the Irvine Company (2012) – denied April 5, 2012
- Protestant's Motion for Entry of Protective Order (2012) – granted March 23, 2012
- Respondent's Motion to Compel Production of the Westminster Lease (2012) – granted April 17, 2012
- Protestant's Motion for Entry of Protective Order (2012) – granted April 25, 2012

- **COUNSEL FOR PROTESTANT**: Law Offices of Michael J. Flanagan
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EFFECT OF PROPOSED DECISION This Proposed Decision would overrule Protest No. PR-2244-10.

SUMMARY OF PROPOSED DECISION:

Background Findings

- Brent McMahon, the owner of Mega RV, was initially an RV salesman working for his stepfather (a Roadtrek dealer) who started his own business with a small dealership selling used RV's at TraveLand, formerly a large multi-dealer RV park in Irvine, California. In 2001, he established Mega RV Corp as a new recreational vehicle dealer and eventually expanded Mega RV to additional locations throughout California (including Colton and Scotts Valley), and into Arizona. Mega RV's dealership at the TraveLand location in Irvine was its main location (and it was the last tenant at TraveLand) until March of 2012, when it relocated to Westminster, California.

- Roadtrek is a Class B motorhome manufacturer headquartered in Kitchener, Ontario, Canada. Class B motorhomes (also called "vans") are built on General Motors and Chrysler manufactured chassis. Jeff Hanemaayer, the son of the company's founder, started running the company in 1985, building up its annual production to 1,500 vans in

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mid-2006. Between 1981 or 1982 and at least 2006, it was the largest manufacturer of Class B motorhomes in North America. James Hammill was hired as Roadtrek's General Manager in April of 2005, later becoming President and CEO.

- Mega RV started selling new Roadtrek motorhomes in 2001. When Brent McMahon's stepfather went out of business, Roadtrek was left without a dealer in Southern California. Although more established RV dealers were interested, Brent McMahon was aggressive in getting the Roadtrek representation and had the personal connection through his stepfather. Roadtrek was Mega RV's "first line".

- In 2002, Brent McMahon established a Mega RV dealership at the "Colton RV Expo" in Colton, California. Frank De Gelas, owner of Mike Thompson's RV Center, was already established at the "Colton RV Expo", directly across the street. Presently, Mega RV and Mike Thompson's RV Center are the only tenants in the "Colton RV Expo".

- After James Hammill came to Roadtrek in April of 2005, he and Brent McMahon developed a close personal friendship where each looked upon the other as a "brother".

- Initially, between about 2001 and about 2005, the parties enjoyed a mutually profitable relationship which brought financial success to both. Both businesses grew significantly, fueled by a good economy and consumers with disposable money or credit to buy expensive recreational vehicles. Business relationships and deal-making were informal.

- In late 2005, with the economy on the upswing, James Hammill proposed, and Brent McMahon agreed, that Roadtrek would "flood" Mega RV's lots with Roadtrek motorhomes. Brent McMahon understood that Mega RV would not have to pay flooring interest and considered the arrangement a "win-win" situation (although Roadtrek did not share this understanding about interest). This informal, oral arrangement worked very well to sell Roadtrek RVs off the lots through 2006 and into late 2007.

- On February 22, 2006, the parties executed a Dealer Agreement (the franchise agreement) in regard to Mega RV's Colton and Irvine dealerships. Among other things, the Dealer Agreement provided for stocking levels and dealer's ordering commitments.

- The robust economy ended quickly in late 2007, and the RV industry was hit hard. The informal arrangement (whereby Roadtrek "flooded" Mega RV lots with motorhomes) that had been in place during the good times could not continue. The parties met in Kitchener at Roadtrek headquarters in March of 2008 and, in spite of resentment on the part of Brent McMahon about paying interest back to 2006 and 2007, the parties did reach agreements about their business relationship: Mega RV remained a Roadtrek franchisee, with exclusive territorial rights, and Roadtrek would continue to deliver motorhomes to Mega RV. Roadtrek also agreed to provide Mega RV with wholesale financing on the same terms as the other Roadtrek dealers. Their financial dealings were formalized and they executed a Security Agreement on April 3, 2008.

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- After the parties signed the Security Agreement on April 3, 2008, their business relationship was governed by four separate statements of their rights and responsibilities to one another: (1) their franchise agreement (the February 22, 2006 Dealer Agreement); (2) the April 3, 2008 Security Agreement; (3) the California Vehicle Code and Title 13 of the California Code of Regulations governing recreational vehicles; and (4) the Uniform Commercial Code (UCC).

- After April 3, 2008, the parties' relationship disintegrated. Starting in about mid-2008, both parties began "offsetting" payments against debts each maintained was owed by the other party or, in the case of Mega RV, "short-paying" (paying less than the invoice) Roadtrek for motorhomes. In addition to "short-paying" Roadtrek, there were instances where Mega RV would fail to pay Roadtrek in a timely manner (14 days after retail sale) for the motorhomes. In August 2008, Mega RV failed to make a $35,000 payment to Roadtrek for flooring interest dating back to 2006 and 2007. At about the same time, Mega RV stopped paying Roadtrek for parts (even though Roadtrek continued delivering parts to Mega RV until late 2009). Roadtrek stopped paying Mega RV for approved warranty claims and for franchise incentive program claims. Since each party kept the other in the dark as to what accounts they were "offsetting" and why they were "offsetting", their business relationship became a financial nightmare.

- In September 2009, Roadtrek advised Mega RV that it would be removing Mega RV from its wholesale flooring program; there were unsold Roadtrek vans on Mega RV's lots with a wholesale value of approximately $1.7 million. Mega RV was "out of trust" in payment for no fewer than two Roadtrek vans, meaning that Mega RV had sold them and received retail funding, but had not paid Roadtrek for them. On September 2, Mega RV's attorney wrote that "[Mega RV] just opened a new flooring line, and will put the Roadtrek units on within the next 30 days. The SOT's ("sold out of trust") will be taken care of at that time…". However, it was not until October 14 that Mega RV requested GE Capital to "reallocate" its credit line so that Roadtrek vehicles could be included on Mega RV's flooring line, but no part of the flooring line would have been available to Mega RV for Roadtrek vehicles until it "cleared up the Monaco line".

- At about this time, Brent McMahon decided to withhold payment to Roadtrek for four motorhomes which had been "retail sold". The "value" of the four motorhomes totaled approximately $200,000 to $220,000. Two reasons were presented for this decision: Conrad Plomin, a financial advisor hired by Brent McMahon, testified that he advised withholding payment "… in order to retain leverage in settlement talks…" (and he encouraged Brent McMahon to reach a "global settlement" with Roadtrek), while Brent McMahon stated that he felt he had no other option to protect Mega RV in the event Roadtrek became insolvent (however, there was no evidence that Roadtrek would not stay in business or would be unable to manufacture and deliver motorhomes and parts and provide support to its dealers).

- At the 2009 Pomona RV show, held in mid-October, Roadtrek repossessed Mega RV's inventory of Roadtrek vehicles.

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- After the Pomona RV show, Roadtrek did not deliver any new motorhomes to Mega RV.

- On December 1, the parties met for dinner at the Louisville RV Show and orally agreed to the terms of a settlement, which they agreed to reduce to writing to be signed by the parties. Brent McMahon designated Mike Lankford to be his representative to work with Jeff Hanemaayer to put the oral agreement in writing. Between December 2nd and December 11th, 2009 Jeff Hanemaayer produced no fewer than five versions of a Settlement Agreement. Points of difference were identified in various drafts, negotiated with success and approved by both parties. None of the settlement drafts called for the termination of Mega RV's franchise. When the fifth version of the settlement document, already signed by Jeff Hanemaayer, was presented to Brent McMahon, he refused to sign it, his sole objection was to the use of the phrase "out of trust" to describe the four vans for which payment to Roadtrek was still outstanding. His objection was not credible.

- On December 14, Jeff Hanemaayer called off the settlement talks and wrote Brent McMahon 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."

- Brent McMahon's December 14 email response to Roadtrek's demand for adequate assurances was "Good luck".

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

- 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.

- On January 29, 2010, Roadtrek signed a Dealer Agreement with Frank De Gelas of Mike Thompson's RV Center ("MTRV").

<u>Findings Regarding Mega RV's Relocation from Irvine to Westminster</u>

- There is no "written RV franchise agreement" between the parties referencing Mega RV's dealership location in Westminster, California; nothing in the 2006 Dealer Agreement supports an argument that it would encompass a relocated dealership location. Therefore, there is no franchise for Mega RV to sell Roadtrek vans from its Westminster dealership.

- As Mega RV is no longer operating a dealership at the Irvine location, there is no existing Roadtrek dealership the closure of which would be caused by the termination of the franchise for the Irvine location. This location has already been closed and the impact

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upon the public, the franchisee and the RV business has already occurred.

- Protest PR-2244-10 may proceed in regard to Mega RV's Colton dealership location.

<u>Findings Related to "Good Cause" Factors of Vehicle Code section 3071: Colton</u>

- Roadtrek Motorhomes, Inc. has met its burden of proof to establish that there is good cause to terminate the Roadtrek franchise of Mega RV Corp dba McMahon's RV at the "Colton RV Expo" in Colton, California.

- In the fall of 2009, Roadtrek elected to pursue its remedies under the UCC by repossessing motorhomes in which Roadtrek asserted that it had security interests; by demanding "adequate assurances"; and by declaring that since Mega RV had failed to provide "adequate assurances", it had therefore "repudiated" its Dealer Agreement. It is not within the Board's jurisdiction to determine the legality of Roadtrek's pursuit of its UCC remedies, but its actions and Mega RV's response to them may legitimately be considered as "existing circumstances" pursuant to Section 3071. (Note also that termination of Mega RV's Roadtrek franchise may only be done by Board action or by agreement of the parties, not by Roadtrek's pursuit of UCC remedies and not by a course of conduct constituting a "*de facto"* termination, as Mega RV argues.)

- Brent McMahon's email response to Roadtrek's request for "adequate assurances" was "Good luck". No timely assurances were made that Mega RV was financially able to meet its obligations.

- In January 2010, Roadtrek gave notice to Mega RV that it was in default and had "repudiated" the Dealer Agreement (the UCC remedy) by failing to provide "adequate assurances". As Roadtrek had determined that Mega RV had breached the Dealer Agreement, Roadtrek was entitled to advise Mega RV that it would no longer deliver inventory or parts to Mega RV.

- Mega RV, by its own actions in failing to respond to Roadtrek's request for "adequate assurances", has placed itself in the position of being without Roadtrek inventory, parts and factory support, and is therefore unable to carry out the functions of a Roadtrek franchisee. 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 established a new franchise at MTRV in Colton.

- "Existing circumstances" include the practice by both parties of "offsetting" payments against debts each maintained was owed by the other party or, in the case of Mega RV, "short-paying" Roadtrek for motorhomes. Both parties are so deeply at fault in this practice---which caused both monetary losses and the destruction of confidence in each other---that it is impossible to assign primary blame. Their failure, at almost any juncture

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after the "offsetting" started in mid-2008, to settle their accounts is inexplicable.

- "Existing circumstances" would also encompass Mega RV's withholding of payments to Roadtrek for four Roadtrek motorhomes, the value of which totals approximately $200,000 to $220,000, as well as Mega RV's delay in the application to GE Capital for wholesale flooring for Roadtrek vans.

- Finally, "existing circumstances" would include Mega RV's failure to negotiate in good faith with Roadtrek to settle their accounts after the parties reached an oral agreement on December 1, 2009. Mega RV bears responsibility for the failure of that final settlement effort.

- In regard to "existing circumstances", Roadtrek has sustained its burden of proving "good cause".

- No evidence was presented as to the business available to Mega RV; however, one may assume that there is <u>some</u> consumer demand for Roadtrek motorhomes. Mega RV is, as a result of its own acts, without Roadtrek inventory, source of parts, or factory support; it can neither sell nor service Roadtrek motorhomes. As there is <u>no</u> Roadtrek business transacted by Mega RV, Roadtrek has sustained its burden of proof in establishing "good cause" to terminate under Section 3071(a) [the amount of business transacted by the franchisee, as compared to the business available to the franchisee].

- Roadtrek has sustained its burden of proof of establishing "good cause" to terminate under Section 3071(b) [the investment necessarily made and obligations incurred by the franchisee to perform its part of the franchise]. Roadtrek does not require its dealers to renovate their dealerships, to build or create special showroom space, or to purchase signs or special tools to service Roadtrek products. In Mega RV's case, Roadtrek motorhomes represented only "a very minor percentage of sales" according to Brent McMahon, since Mega RV represented 10 different manufacturers. Therefore, any investments or obligations which Mega RV made in facilities or advertising would benefit all line-makes offered for sale, not Roadtrek products exclusively. Moreover, in the event of termination, pursuant to Section 11713.13(e)(2), Roadtrek is obligated to pay Mega RV "…for all unused and undamaged supplies, parts and accessories" and "…the fair market value of all special tools…".

- Roadtrek has not sustained its burden of proof of establishing "good cause" to terminate under Section 3071(c), as it has not established that Mega RV does not have permanency of its investment. Brent McMahon has been in the RV business for over 20 years and, in that time, has grown a small operation into a large business enterprise. He has survived the economic downturn, unlike many other RV dealers. In 2007, Mega RV's average monthly advertising budget was $140,000 and in 2008, it had a sales staff of over 100 employees. Brent McMahon established Mega RV's dealership in the "Colton RV Expo" in 2002, where it is located today.

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- Since Mega RV has not conducted <u>any</u> Roadtrek business for several years, termination of Mega RV's franchise will not cause any further disruption or loss to the public of the benefits that should have been available and provided by a Roadtrek franchisee in Colton. MTRV will provide a Roadtrek presence for sales and service in a large RV market. Moreover, even when Mega RV was selling Roadtrek motorhomes, the Roadtrek line-make represented a "minor percentage of sales", so Mega RV's business would therefore not be "disrupted" by the loss of the Roadtrek franchise. Roadtrek has therefore sustained its burden of proof of establishing "good cause" to terminate under Section 3071(d) [whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted].

- Roadtrek has not sustained its burden of proof of establishing "good cause" to terminate under Section 3071(e) [whether the franchisee has adequate new recreational vehicle sales and, if required by the franchise, service facilities, equipment, vehicle parts, and qualified service personnel, to reasonably provide for the needs of the consumers of the recreational vehicles handled by the franchisee and has been and is rendering adequate services to the public].

- Starting in 2001, Mega RV was the Roadtrek "top dealer" at least one year and was consistently selling a larger percentage of Roadtrek's production than any other RV dealer in the United States. Therefore, one may assume that during those earlier years as a Roadtrek dealer, Mega RV did have "adequate" sales and service facilities, equipment, vehicle parts and qualified personnel sufficient to render "adequate" services to the public.

- Mega RV's stellar performance in the past should not be ignored. While it is true that Mega RV is currently not rendering "adequate services to the public" as a result of its own actions, it had been doing so for many years. It presently <u>has</u> the same facility in Colton that it had when it was a successful Roadtrek dealer and, one may assume, it also presently <u>has</u> sales and service personnel who previously worked with Roadtrek RVs and retain familiarity with the Roadtrek line-make.

- Roadtrek has not sustained its burden of proof of establishing "good cause" to terminate under Section 3071(f), in that it violated Section 3075 which adversely impacted Mega RV's ability to fulfill the warranty obligations it agreed to perform in the franchise agreement. Starting in about mid-2008, Roadtrek failed to give notice to Mega RV that it was "paying" Mega RV's approved warranty reimbursement claims by "offsetting" those claims against amounts it asserted were debts owed by Mega RV, a violation of Section 3075. By "offsetting" payments on approved warranty reimbursement claims from Mega RV, Roadtrek was not only withholding money for <u>parts</u> (which Roadtrek argues that even though Mega RV was not paying for parts, it was sending them so that warranty work could be performed), but also for <u>labor</u>. Paul Schilperoort's comment that Mega RV was "…fund[ing their] own warranties…" is well taken.

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- Roadtrek has sustained its burden of proof of establishing "good cause" to terminate under Section 3071(g), as it has established that Mega RV has failed to comply with the terms of the franchise.

- The "terms of the franchise" are contained in the February 22, 2006 Dealer Agreement.

- One of the key provisions of the Dealer Agreement was Mega RV's promise to ensure that Roadtrek motorhomes would be "…stocked [at stated numbers] and prominently displayed…" at each of its dealerships. By Mega RV's own actions (discussed above) which resulted in Roadtrek curtailing deliveries of inventory, Mega RV failed to maintain the stocking levels required by the Dealer Agreement. Mega RV had therefore put itself in the position of being unable to conduct customary sales and service operations (including warranty work) at its Colton dealership and was in violation of the terms of the Dealer Agreement.

- In the fall of 2009, Mega RV obtained a floor plan financing line for Roadtrek vehicles from GE Capital. However, since it was already nearing or near above its $10 million flooring limit, the flooring line could not accommodate Roadtrek vans. Moreover, Mega RV was out of trust in regard to payment on other RV line-makes, so it could not fund additional units until it remitted those payments to GE Capital. In mid-December, Mega RV failed to provide "adequate assurances" to Roadtrek that it was able to finance the purchase of Roadtrek inventory. Mega RV therefore violated the Dealer Agreement in regard to maintenance of adequate lines of wholesale credit.

- It was only in late August of 2008, that Mega RV produced its 2007 financial statements, and then only after numerous (and eventually angry) demands by James Hammill. There is no evidence that Mega RV submitted 2008 or 2009 financial statements to Roadtrek. Mega RV therefore violated the Dealer Agreement in regard to production of financial statements.

- Roadtrek generates customer leads using marketing programs. It provides its dealers with this information and then, before an RV show, contacts prospective customers about the Roadtrek display. Since Roadtrek has invested heavily to generate the leads, it expects dealers to honor the Dealer Agreement by not using them to sell other line-makes. There are, of course, difficulties with proving non-compliance with this provision. However, in April of 2009, Mega RV received a $200,000 loan from the owner of Pleasure-Way (Roadtrek's primary Class B competitor), the repayment of which was to come from incentives generated by sales of Pleasure-Ways, thereby raising the inference that, after the loan date, potential Roadtrek buyers were diverted to Pleasure-Way.

- Although three Mega RV customers came forward with various complaints about their experience with Mega RV, their stories are isolated and anecdotal and do not sustain a finding that Mega RV failed to operate it dealership in a manner that reflected favorably on Roadtrek as required by the Dealer Agreement.

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Protestant's Request for Referral to DMV

- Protestant requested that Roadtrek's conduct in pursuing a course of conduct which resulted in the *de* facto termination of Mega RV's Roadtrek franchise in Colton, California be referred to the DMV for investigation and action pursuant to Section 3050. For the reasons stated above, Protestant's request is denied.

RELATED MATTERS:

- Related Case Law: None.

- Applicable Statutes: Vehicle Code sections 331.1, 331.2, 3070(a), 3071 and 3066(b).

- Related Board Protests: There are 11 *Mega RV Corp. dba McMahons RV v. Roadtrek Motorhomes, Inc.* protests that are pending a decision on their merits. These Proposed Decisions will be considered at the August 23, 2012, General Meeting as follows:

    - Protest Nos. PR-2199-10 (Colton) and PR-2201-10 (Irvine)
      Section 3070(b) modification.
    - Protest Nos. PR-2206-10 (Colton), PR-2208-10 (Irvine), and PR-2209-10 (Scotts Valley) Section 3075 warranty reimbursement.
    - Protest Nos. PR-2205-10 (Colton), PR-2211-10 (Scotts Valley), and PR-2212-10 (Irvine) Section 3076 franchisor incentive program reimbursement.
    - Protest No. PR-2233-10 (Colton)
      Section 3072 establishment.
    - Protest Nos. PR-2244-10 (Colton/Irvine)
      Section 3070(a) termination.
    - Protest No. PR-2245-10 (Scotts Valley) - A Proposed Order Granting Respondent's Motion to Dismiss Protest No. PR-2245-10, a Section 3070 termination protest for the Scotts Valley location, will also be considered at the August meeting.

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