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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 ADRENALINE POWERSPORTS,
13 Protestant,
14 v.
15 POLARIS INDUSTRIES, INC.,
16 Respondent.

Protest No. PR-2418-15

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTEST FOR LACK OF
JURISDICTION**

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FACTUAL AND PROCEDURAL BACKGROUND

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2 1. Adrenaline Powersports (“Adrenaline” or “Protestant”) is a “franchisee” of Polaris Sales,
3 Inc. (“PSI” or “Respondent”)¹ authorized to sell Polaris Ranger vehicles (utility-terrain vehicles - UTVs)
4 and Polaris LSV vehicles (said to be recreational off-highway vehicles - ROHVs) pursuant to a Dealer
5 Agreement with PSI.²

6 2. Respondent, located at 2100 Highway 55, Medina, Minnesota, is a distributor of Polaris
7 vehicles. (Exhibit A to Declaration of Anthony Thomas (Tom) Triano)

8 3. The telephonic hearing on Respondent’s Motion to Dismiss Protest for Lack of Jurisdiction
9 was conducted on March 27, 2015, as scheduled, before Anthony M. Skrocki, an Administrative Law
10 Judge (“ALJ”) of the Board.

11 4. Protestant was represented by Michael M. Sieving, Esq.

12 5. Respondent was represented by Gregory R. Oxford, Esq. of Isaacs Clouse Crose & Oxford
13 LLP.

14 6. Adrenaline filed this protest on January 22, 2015, after discovering that PSI intended to
15 establish an additional dealership for Polaris LSV vehicles and Polaris Ranger vehicles at the existing
16 motorcycle dealership location of Granite Bay Motorcycle Partners, Inc., dba Roseville Yamaha, 2014
17 Taylor Road, Roseville, California (“GBMP”). (This dealership is also sometimes referred to as “New
18 Dealer” in the pleadings.)

19 7. Although Adrenaline is within the relevant market area³ of GBMP’s location, for reasons
20 stated below, PSI did not give notice pursuant to Section 3062(a)(1) to either Adrenaline or the Board.

21 8. PSI filed its “Motion to Dismiss Protest for Lack of Jurisdiction” on March 4, 2015.

22 9. Adrenaline filed its “Opposition to Motion to Dismiss Protest for Lack of Jurisdiction” on
23 March 16, 2015.

24 10. PSI filed its “Reply Memorandum in Support of Motion to Dismiss Protest for Lack of
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26 ¹ The Motion at issue indicates that the proper name for Respondent is “Polaris Sales, Inc.” rather than “Polaris Industries,
27 Inc.” (Motion, page 1, lines 18)

28 ² As will be discussed, Adrenaline did not become a “franchisee” of PSI until January 1, 2015. Whether the vehicles are in fact
“recreational off-highway vehicles” is unclear and will be discussed.

³ All references to statutory sections are to the Vehicle Code unless otherwise indicated. As defined in Section 507 “the
‘relevant market area’ is any area within a radius of 10 miles from the site of a potential new dealership.”

1 Jurisdiction” on March 23, 2015.

2 **MOTION TO DISMISS**

3 **Respondent’s Assertions in its Motion to Dismiss**

4 11. PSI claims that the Dealer Agreement between PSI and GBMP authorizing the sale of
5 Polaris Ranger and Polaris LSV vehicles became effective on November 26, 2014. (Motion, page 1, lines
6 23-24) At that time, because the Ranger and LSV vehicles (UTVs and ROHVs) were not included in the
7 definition of “all-terrain vehicles” (ATVs) set forth in Section 111, Dealer Agreements for the Ranger and
8 LSV vehicles were not subject to Section 3062. Thus PSI was not required to give notice to Adrenaline
9 or the Board and Adrenaline has no right to protest the establishment of GBMP as a Polaris dealer.⁴
10 (Motion, page 1, lines 25-28)

11 12. PSI explains its arguments as follows:

- 12 ▪ Polaris Ranger vehicles are “utility-terrain vehicles” within the definition of Section
13 531 and Polaris LSV vehicles are “recreational off-highway vehicles” within the
14 definition of Section 500. (Motion, page 2, lines 1-4)
- 15 ▪ However, in November 2014, when the Dealer Agreement between PSI and GBMP
16 became effective, neither of these vehicles were within the definition of “all-terrain
17 vehicles” as defined in Section 111, thus the Board’s statutes were not applicable to
18 Dealer Agreements for either Ranger or LSV vehicles. (Motion, page 2, lines 1-4)
- 19 ▪ It was not until January 1, 2015 that the definition of “all-terrain vehicles” in Section
20 111 was expanded to include UTVs and ROHVs by adding subdivision (b) to Section
21 111. (Motion, page 2, lines 5-12)

22 13. This new subdivision, effective January 1, 2015, states:

23 (b) Notwithstanding subdivision (a), for purposes of Chapter 6 (commencing with
24 Section 3000) of Division 2 and Chapter 4 (commencing with Section 11700) of
25 Division 5, “all-terrain vehicle” also means a recreational off-highway vehicle as
26 defined in Section 500 and a utility-terrain vehicle as defined in Section 531.

27 ⁴ As will be discussed, prior to the amendment of the statutes effective January 1, 2015, dealers selling UTVs and OHVs were
28 not within the definition of “franchisees” as contained in Section 331.1, and, as to those vehicles, PSI was not a “franchisor” as
defined in Section 331.2.

1 14. According to Respondent, it was only upon the effective date of this amendment, January
2 1, 2015, that Adrenaline's Dealer Agreement became a "franchise" under Section 331(a)(2) and it was not
3 until that date that future Dealer Agreements for the vehicles defined in Sections 500 and 531 (the Ranger
4 UTVs and LSV RHOVs) became subject to Section 3062.⁵ (Motion, page 2, lines 17-23)

5 15. The Dealer Agreement between PSI and GBMP was effective as of November 26, 2014, a
6 time when UTVs and ROHVs were not within the definition of "all-terrain vehicles". Respondent
7 contends that at that time there was no "franchise" between PSI and Adrenaline for these vehicles.⁶
8 Adrenaline was not a "franchisee" and PSI was not a "franchisor" under Sections 331, 331.1 and 331.2.
9 (Motion, page 3, lines 5-12)

10 16. Accordingly, Respondent argues that Section 3062(a)(1) did not obligate PSI to give
11 notice, and Adrenaline was not "required to be given" notice of the intended establishment of GBMP.
12 (Motion, page 3, lines 13-17) Because Adrenaline has no right to protest the establishment of GBMP, the
13 Board lacks jurisdiction to consider the protest. (Motion, page 3, lines 17-19)

14 17. It was only when the amendment to Section 111 became effective (January 1, 2015) that,
15 according to Respondent, Adrenaline became a "franchisee" under its Dealer Agreement for the Ranger
16 and LSV vehicles. Because GBMP's Dealer Agreement was effective in November 2014, there was no
17 action of PSI subject to Section 3062.

18 **Protestant's Assertions in its Opposition**

19 18. Adrenaline asserts that Section 3062 is applicable as more is required than the mere
20 execution of a "franchise" as "the execution of a franchise is only one step required for the establishment
21 of a new dealership." (Opposition, page 2, lines 8-12)

22 19. The documents Adrenaline obtained from PSI purported to show that prior to January 1,
23 2015, a "franchise" had been executed between GBMP and PSI and that GBMP had acquired flooring for
24 the new line-make. Adrenaline argues that it is undisputed that prior to January 1, 2015, GBMP did not
25 have an occupational license issued by DMV for the Polaris line and did not have Polaris products at its
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27 ⁵ ALJ Skrocki found that there was a "franchise" prior to January 1, 2015, but that Adrenaline was not a "franchisee" until
January 1, 2015. (See discussion below.)

28 ⁶ ALJ Skrocki determined that as of November 26, 2014, there was a "franchise" but PSI was not yet a "franchisor" required to
provide notice.

1 location. (Opposition, page 2, lines 13-21)

2 20. Adrenaline contends GBMP "...was not a 'franchisee' for the Polaris line as of January 1,
3 2015.⁷ GBMP did not 'receive new motor vehicles' from Polaris prior to that time, and did not sell or
4 lease, or offer to sell or lease, Polaris vehicles until some time after the amendments to Section 111
5 became effective." (Opposition, page 3, lines 1-5)

6 21. Adrenaline also asserts that certain Occupational Licensing forms are required to be
7 submitted to DMV; that "Section 11700 makes it unlawful to act as a new motor vehicle dealer without
8 first having procured a license from DMV as such"; and that there was no signage at GBMP as required
9 by Section 11709(a) and Section 270.06 of Title 13 of the California Code of Regulations. (Opposition,
10 page 3, lines 6-23)

11 22. In sum, Adrenaline asserts that "[w]ithout a license issued by DMV for GBMP to sell
12 Polaris vehicles, there was no dealership 'established' prior to January 1, 2015 as contemplated by
13 Section 3062(a) and (e)(1), nor was there a 'franchisee' as defined by Section 331.1." (Opposition, page
14 4, lines 4-6) Accordingly, Adrenaline contends that "GBMP was clearly not a 'franchisee' on the effective
15 date of the statute (sic) as required by the relevant Vehicle Code sections and DMV regulations, and many
16 of the substantive requirements for the establishment of a 'dealership' had not been met." (Opposition,
17 page 4, lines 12-15)

18 **Respondent's Assertions in its Reply to the Opposition**

19 23. According to Respondent, Adrenaline "conflates two separate regulatory schemes: (1)
20 regulation of dealership locations pursuant to Veh. Code § 3062 and (2) occupational licensing." (Reply
21 page 1, lines 19-20) Adrenaline "also ignores the regulatory sequencing." (Reply, page 1, line 21)

22 24. Respondent argues that, "Occupational licensing regulation does not kick in until after the
23 manufacturer certifies on the DMV's Form OL-124 that section 3062 does not apply or that its
24 requirements have been complied with. That occurred in this case when Polaris [PSI] executed the
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26 _____
27 ⁷ "Section 331.1 defines 'franchisee' as: '... any person who, pursuant to a franchise, *receives new motor vehicles* subject to
28 registration under this code, ... new all-terrain vehicles, as defined in Section 111, ... from the franchisor *and who offers for
sale or lease, or sells or leases the vehicles at retail ...*" (Opposition, page 2, lines 22-25; emphasis in original)

1 OL-124 on December 3, 2014.”⁸ (Reply, page 2, lines 3-4 and Exhibit C to Declaration of Sean Coplen)

2 25. Respondent asserts that “[i]t is the granting of the right to sell and service vehicles at a
3 specified location in the franchise agreement that is the subject of regulation under section 3062, not the
4 actual establishment of dealership operations that, of necessity, must await completed occupational
5 licensing review.” (Reply, page 2, lines 15-18) In this case, GBMP submitted its licensing application to
6 DMV in early December 2014, but as a result of a backlog of applications, DMV Occupational Licensing
7 Operations was not able to complete its review of GBMP’s application until mid-January 2015. (Reply,
8 page 2, lines 22-24)

9 26. PSI states, “[s]imply put, the delays in obtaining licensing approval to sell and service
10 Polaris Vehicles until January 16, 2015, and in obtaining municipal approval for permanent Polaris
11 signage, have nothing to do with regulation under section 3062.” (Reply, page 3, lines 15-17).

12 **APPLICABLE STATUTES**

13 27. It is important to analyze the applicable statutes and attempt to understand the definitions
14 of the terms contained therein, but first some additional explanation of the issues, facts and statutes is
15 warranted.

16 28. First, a distinction must be recognized between a “franchise” and a “franchise that is within
17 the Board’s statutes”. This is critical as not all “franchises” result in “franchisees” or “franchisors”
18 subject to the Board’s statutes. This is because the definition of a “franchise” in Section 331 is much
19 broader than are the definitions of “franchisee” and “franchisor” in Sections 331.1 and 331.2 respectively.

20 29. Section 331 defines a “franchise” as follows:

21 (a) A "franchise" is a written agreement between two or more persons having all
22 of the following conditions:

23 (1) A commercial relationship of definite duration or continuing indefinite
24 duration.

25 (2) The franchisee is granted the right to offer for sale or lease, or to sell or
26 lease at retail new motor vehicles or new trailers subject to identification pursuant
27 to Section 5014.1 manufactured or distributed by the franchisor or the right to
28 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.

⁸ The completion of and need for the OL-124 will be discussed below.

1 (4) The operation of the franchisee's business is substantially associated with
2 the franchisor's trademark, trade name, advertising, or other commercial symbol
designating the franchisor.

3 (5) The operation of a portion of the franchisee's business is substantially
4 reliant on the franchisor for a continued supply of new vehicles, parts, or
accessories.

5 (b) The term "franchise" does not include an agreement entered into by a
6 manufacturer or distributor and a person where all the following apply:

7 (1) The person is authorized to perform warranty repairs and service on vehicles
8 manufactured or distributed by the manufacturer or distributor.

9 (2) The person is not a new motor vehicle dealer franchisee of the manufacturer
or distributor.

10 (3) The person's repair and service facility is not located within the relevant
11 market area of a new motor vehicle dealer franchisee of the manufacturer or
distributor.

(Underline added.)

12 30. It is noted that all that is required as subject matter vehicles are "new motor vehicles" or
13 "new trailers subject to identification pursuant to Section 5014.1."

14 31. Section 415 defines a "motor vehicle" as follows:

15 (a) A "motor vehicle" is a vehicle that is self-propelled.

16 (b) "Motor vehicle" does not include a self-propelled wheelchair, motorized
17 tricycle, or motorized quadricycle, if operated by a person who, by reason of
18 physical disability, is otherwise unable to move about as a pedestrian.

19 32. If all that was required for the application of the Board's statutes would be a "franchise"
20 pursuant to Section 331, then the Board's jurisdiction would also extend to the franchises for the "trailers"
21 listed in Section 5014.1 which include the following: logging dolly; pole or pipe dolly; semitrailer;
22 trailer; and trailer bus.

23 33. As can be seen from the very broad definition of "franchise", the issue of the Board's
24 jurisdiction is determined not by "whether there is a franchise" but by (1) "whether there is a franchise as
25 to the vehicles that come within the Board's jurisdiction" (as limited by Section 3051); (2) whether the
26 persons are "licensees" as "new motor vehicle dealers, motor vehicle manufacturers or motor vehicle
27 distributors" (also as stated in Section 3051); and (3) "whether the parties to the franchise are
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1 'franchisors' and 'franchisees'" (as defined in Sections 331.2 and 331.1 respectively).⁹

2 **The Board's Jurisdiction as Limited by Section 3051 as to the Persons and Vehicles**

3 34. Section 3051 lists the persons and types of vehicles to which the Board's statutes apply and
4 do not apply. It provides, in part, as follows:

5 This chapter does **not apply** to any person licensed as a transporter under Article 1
6 (commencing with Section 11700) or as a salesperson under Article 2 (commencing with
7 Section 11800) of Chapter 4 of Division 5, or **to any licensee who is not a new motor
8 vehicle dealer, motor vehicle manufacturer, manufacturer branch, new motor vehicle
9 distributor, distributor branch, or representative. This chapter does not apply to
10 transactions involving "mobilehomes," as defined in Section 18008 of the Health and
11 Safety Code, "recreational vehicles," as defined in subdivision (b) of Section 18010 of the
12 Health and Safety Code, truck campers, "commercial coaches," as defined in Section
13 18001.8 of the Health and Safety Code, or off-highway motor vehicles subject to
14 identification, as defined in Section 38012, except off-highway motorcycles, as defined in
15 Section 436, and all-terrain vehicles, as defined in Section 111. ...**
16 (Bold and underline added.)

17 35. As can be seen from this section, even if there is a "franchise" within the general definition
18 contained in Section 331, the Board's statutes would not apply to that franchise unless it was a franchise
19 involving persons and vehicles that are included or not excluded by the language in Section 3051.

20 36. As to persons, the parties to be subject to the Board's statutes must be "a new motor
21 vehicle dealer, motor vehicle manufacturer, manufacturer branch, new motor vehicle distributor,
22 distributor branch." This is considerably more limited than what is needed for a "franchise" as defined in
23 Section 331.

24 37. And, Section 3051 limits the types of vehicle that would be included within a "franchise
25 subject to the Board's statutes" as compared to just a "franchise" as defined in Section 331.

26 38. Again, the two vehicles involved in the Dealer Agreements at issue here are called "utility-
27 terrain vehicles" and "recreational off-highway vehicles".

28 39. Note that Section 3051 expressly includes what are called "all-terrain vehicles as defined
in Section 111" but makes no reference to "utility-terrain vehicles" or "recreational off-highway

⁹ Not all Dealer Agreements, even if meeting the basic definition of a "franchise", are "franchises subject to the Board's jurisdiction". Likewise, not all franchises result in the relationship of "franchisor" and "franchisee" subject to the Board's statutes. The Dealer Agreements for UTVs and ROHVs could be "franchises" when first executed between the parties but would not be "franchises subject to the Board's statutes" until January 1, 2015. It was not until then that the vehicles at issue came within the Board's statutes so it was not until then that PSI became a "franchisor" and Adrenaline and GBMP became "franchisees".

1 vehicles”.

2 40. Although Section 3051 brings “all-terrain vehicles, as defined in Section 111” within the
3 Board’s statutes, it was not until January 1, 2015, that Section 111 was effectively amended to include
4 both UTVs and ROHVs within the definition of “all-terrain vehicles” for the purposes of the Board’s
5 statutes. Said another way, because of the amendment to Section 111 effective January 1, 2015, the
6 vehicles at issue here were no longer excluded by Section 3051.

7 **As to the Parties to a Franchise who would be “Franchisors” and “Franchisees”**
8 **to whom the Board’s Statutes would Apply**

9 41. Section 331.1 defines “franchisee” as follows:

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

17 42. Section 331.2 defines “franchisor” as follows:

18 A “franchisor” is any person who manufactures, assembles, or distributes new
19 motor vehicles subject to registration under this code, new off-highway motorcycles, as
20 defined in Section 436, new all-terrain vehicles, as defined in Section 111, or new trailers
21 subject to identification pursuant to Section 5014.1 and who grants a franchise.
22 (Underline added.)

23 43. Again, the mere fact there is a “franchise” as defined in Section 331, does not mean that
24 the parties to that franchise are “franchisees” and “franchisors” to whom the Board’s statutes would apply.
25 As stated above, the Board’s statutes apply to “franchisors” and “franchisees”. It is critical to apply these
26 terms because:

- 27 a. Only “franchisors” are required to provide the notices as stated in Section 3062;
- 28 b. It is only “franchisees” and the Board that must receive the notices; and,
- 29 c. The Board must hear a protest only if it is filed by a “franchisee” that is required to receive
30 the notices.

31 44. As explained, although there may be a “franchise”, it may be that the parties to it are not
32 “franchisor” or “franchisee” within the scope of the Board’s statutes. The definitions for “franchisor” and
33 “franchisee” are narrower than the definition of a “franchise”.

1 45. Just as all "franchises" are not subject to the Board's statutes, likewise not all parties to a
2 "franchise" are subject to the Board's statutes as "franchisors" or "franchisees". To come within the
3 jurisdiction of the Board's statutes, there must be a "franchise" that results in the parties being
4 "franchisor" and "franchisee" and the vehicles must be within those specified in or not excluded by
5 Section 3051, which in this case includes ATVs as defined in Section 111.

6 **Prior to January 1, 2015**

7 46. Even if the Dealer Agreement was a "franchise" in 2014 under the general definition of
8 "franchise" contained in Section 331, it was not a franchise subject to the Board's statutes as UTVs and
9 ROHVs were not within the Board's statutes. Therefore, in 2014, PSI would not be a "franchisor" (as
10 defined in 331.2) required to provide notice, Adrenaline would not be a "franchisee" (as defined in 331.1)
11 with a right to protest, and appointing GBMP as a Polaris dealer in November 2014 for the two vehicle
12 types would not be establishing GBMP as an additional "franchisee".

13 47. The Dealer Agreement between PSI and GBMP, even though a "franchise" in 2014, would
14 not have been within the Board's statutes at that time and would have been effective to appoint GBMP as
15 an authorized dealer for the PSI Ranger and LSV vehicles as of the date of its execution (November 26,
16 2014). Again, although Adrenaline and GBMP may be Polaris dealers as of 2014 with a "franchise",
17 neither of them were "franchisees" as the vehicles covered by the franchise were not subject to the
18 Board's statutes, as they were not within the definition of Section 111 until January 1, 2015.

19 48. What must be considered in addressing and resolving these issues is the unique set of facts
20 pertaining to the types of vehicles that are the subject of the Dealer Agreements. These facts are:

- 21 ■ That the Dealer Agreement for GBMP (the new dealer) was executed in November 2014.
- 22 ■ Per the statutes then in effect, neither the Ranger vehicles (UTVs) nor the LSV vehicles
23 (ROHVs) were within the statutes under which the Board operates. Thus, the Dealer
24 Agreement, even though a "franchise" per Section 331, would not be for vehicles within the
25 ATV definition in Section 111, as stated in Section 3051, and the Dealer Agreements for
26 those vehicles would not result in "franchisor" status for PSI or "franchisee" status for either
27 Adrenaline or GBMP.
- 28 ■ If Adrenaline (Protestant) was not a "franchisee" at that time PSI would not be required to give

1 notice per Section 3062 to Adrenaline because Adrenaline was not a “franchisee” in the
2 relevant market area and GBMP was not being established as an additional “franchisee”.
3 Adrenaline would not have a right to file a protest pursuant to Section 3062.

4 **As of January 1, 2015**

5 49. The statutes were modified effective January 1, 2015 to include UTVs (Rangers) and
6 ROHVs (LSVs);

7 50. As of January 1, 2015, it was possible for PSI to then be a “franchisor”, and Adrenaline
8 and GBMP to then become “franchisees”.

9 51. The effect of the amended statute to include these types of vehicles within the applicable
10 definitions would be that the Dealer Agreements (a franchise under the basic definition of Section 331)
11 would be as follows:

- 12 ■ As of January 1, 2015, Adrenaline (Protestant) for the first time became a “franchisee” of PSI
13 as to the two types of vehicles (UTVs and ROHVs);
- 14 ■ As of January 1, 2015, PSI would for the first time become a “franchisor” as to the two types
15 of vehicles;
- 16 ■ As of January 1, 2015, GBMP (New Dealer) would for the first time become a “franchisee” as
17 to the two types of vehicles.

18 52. If GBMP was empowered by the Dealer Agreement to sell the two types of vehicles as of
19 November or December 2014, then there would not be a need for PSI to comply with Section 3062 at any
20 time after January 1, 2015. GBMP by then was already authorized to sell the vehicles pursuant to the
21 franchise that was effective as of November 26, 2014.

22 53. The same is true as to Adrenaline. Adrenaline was empowered by the terms of its Dealer
23 Agreement (executed prior to January 1, 2015) to sell the two types of vehicles. Although Adrenaline’s
24 Dealer Agreement was a “franchise” when it was first executed, it was not a “franchise” subject to the
25 Board’s statutes until the effective date of the statutory amendments. Adrenaline then too became a
26 “franchisee” on January 1, 2015.

27 54. As GBMP and Adrenaline became “franchisees” simultaneously as of January 1, 2015, (by
28 operation of law upon the amendment of the statute) it would make no sense to conclude that PSI would

1 have to give any notice to either of them of the appointment of the other as a “franchisee”. It would make
2 no more sense to allow Adrenaline to protest the January 1, 2015 “establishment” of GBMP as an
3 additional “franchisee” than it would to allow GBMP to protest the establishment of Adrenaline as an
4 additional “franchisee”.

5 55. There is no doubt that, after January 1, 2015, either Adrenaline or GBMP could protest the
6 intent of PSI to establish another franchisee (if Adrenaline or GBMP were in the relevant market area of
7 the proposed additional franchisee) but until January 1, 2015, neither was a “franchisee” and PSI was not
8 a “franchisor” required to provide notice per Section 3062.

9 ANALYSIS

10 56. The following are the statutes that must be applied together with some comments as to the
11 terminology used. As will be seen, the focus is upon the existence of Adrenaline as a “franchisee”; PSI as
12 a “franchisor”; the intent of PSI to enter into an additional “franchisee”; the vehicles being of the type that
13 would bring them within the Board’s statutes as stated in Section 3051; and that the UTVs and ROHVs
14 are included within the definition of ATV as stated in Section 111. That the two types of vehicles come
15 within Section 111 is needed in order to satisfy the definitions of “franchisor” (Section 331.2) and
16 “franchisee” (Section 331.1) as well as the language of 3051 as to the jurisdiction of the Board.

17 Legislative Grant of Power to the Board

18 57. Section 3050 provides that the Board shall do all of the following:

19 ...

20 (d) **Hear and decide**, within the limitations and in accordance with the procedure
21 provided, **a protest presented by a franchisee** pursuant to Section 3060, **3062**, 3064,
22 3065, 3065.1...
(Emphasis added.)

23 58. As can be seen, Section 3050 requires that the protest must be presented by a “franchisee”
24 and in this case filed pursuant to Section 3062.

25 The Statutory Obligation of a “Franchisor” to Existing “Franchisees”

26 59. Section 3062(a)(1) reads in part as follows:

27 Except as otherwise provided in subdivision (b), if a **franchisor seeks to enter into**
28 **a franchise** establishing an additional motor vehicle dealership, or seeks to relocate an
existing motor vehicle dealership, that has a relevant market area within which the same

1 line-make is represented, the franchisor shall, in writing, first notify the board and each
2 franchisee in that line-make in the relevant market area of the franchisor's intention to
3 establish an additional dealership or to relocate an existing dealership.
(Emphasis added.)

4 60. For Section 3062 to be applicable, (1) PSI must be a "franchisor"; (2) that "seeks to enter
5 into a franchise"; and (3) Adrenaline must be an existing "franchisee" in the "relevant market area". If all
6 three of these are satisfied, then PSI must give notice to Adrenaline and the Board of PSI's "intention to
7 establish" GBMP as an additional dealership and Adrenaline would have the right to file a protest.

8 61. In Section 331 (see Paragraph 29), there is no requirement that the "franchisee" in fact be
9 in operation as a "dealer" before the written agreement will be effective as a "franchise". All of the
10 language speaks in terms of the "rights" that are granted under the "written agreement."

11 62. As indicated above in Paragraph 41, the definition of a "franchisee" requires a "franchise",
12 that the franchisee receives new "all-terrain vehicles" from the "franchisor," and the franchisee offers for
13 sale or lease, or sells or leases the vehicles at retail.

14 63. It is not possible to reconcile this requirement with the definition of either "franchise" or
15 "franchisor". To say that there is no "franchise" until the person is in fact receiving the vehicles and
16 offering them for sale or lease would in effect be allowing the tail to wag the dog. The "franchise" is the
17 written agreement that confers the rights stated in Section 331.

18 64. In this case, Adrenaline is a "franchisee" but only as of January 1, 2015. Prior to then, PSI
19 was not obligated to comply with Section 3062 as to Adrenaline.

20 65. Whether GBMP did not become a "franchisee" until some time after January 1, 2015, as
21 alleged by Adrenaline, is irrelevant for the following reasons: Section 3062 is applicable to PSI as a
22 "franchisor" and to Adrenaline as a "franchisee" only as of January 1, 2015, whereas the franchise
23 between PSI and GBMP (although not subject to the Board's statutes) was effective on November 26,
24 2014.

25 The Significance of and Need for the OL-124

26 66. There is mention by the parties of the completion of the Form OL-124 by PSI on
27 December 3, 2014. The following is not intended to imply that either the drafters of the OL-124 or the
28 representatives of PSI were at fault for any uncertainty in the language of the OL-124, as prepared or as

1 completed.¹⁰ Anyone who has suffered through the reading of this will recognize that it is unrealistic to
2 expect that even sophisticated business people will have both the time and the ability to apply the statutes
3 to the facts and evaluate not only “whether” Section 3062 is applicable, and if not, “why not”. Here, this
4 may well be a situation when no OL-124 may have been required. Or, if one should be required, the form
5 perhaps should have had more alternative reasons why notices per Section 3062 would not be required.

6 67. PSI completed the OL-124 for the “Polaris RGR (Ranger) & LSV” vehicles. (Exhibit C to
7 Declaration of Sean Coplen)

8 68. The OL-124 has two alternative boxes to check. Not checked was the second box that
9 Section 3062 has been complied with but no protests have been filed. The box that was checked (the first
10 box) certified that “Written notification to the New Motor Vehicle Board and each franchisee is not
11 required pursuant to Vehicle Code section 3062(b) or 3072(b), or there are no other franchised dealers
12 within (sic) the same line-make located within the relevant market area.” (Underline added.)

13 69. The underlined first clause of the checked box is not applicable to the facts here as these
14 are exceptions provided in subdivision (b) of Section 3062. PSI was not exempt from complying with
15 Section 3062(a) because of the exceptions contained in 3062(b) (relocations in the same city and within
16 one mile from the existing location, or establishment within the same city and within one-quarter mile of
17 a dealership of the same line-make out of operation for less than 90 days).

18 70. The second clause in the first alternative that was checked on the OL-124 may or may not
19 be accurate. It states that notices per Section 3062 are not required as “... there are no other franchised
20 dealers within (sic) the same line-make located within the relevant market area.” This would be accurate
21 in this situation only if the language “no other franchised dealers” was limited to the interpretation as
22 explained above: that it means “no other franchisees as defined in Section 331.1”, that is “no other
23 franchisees subject to the Board’s jurisdiction”. Here, under the general definition of a “franchise”
24 contained in Section 331, Adrenaline was a “franchised dealer” of Polaris vehicles, but notice to
25 Adrenaline pursuant to Section 3062 was not required as Adrenaline was not a “franchisee” as defined in
26 Section 331.1 to which notice was required to be provided per Section 3062(a). This is because, in 2014,

27
28 ¹⁰ Of course, the Board does not intend in any way to inform Occupational Licensing what their requirements or procedures
should be regarding their functions.

1 the Polaris vehicles “RGR” (UTVs) and “LSV” (ROHVs) were not within the definition of ATVs as
2 stated in Section 111.

3 **The Claim of Adrenaline that Establishing an Additional Motor Vehicle**
4 **Dealership Requires More than Just Execution of the “Franchise”**

5 71. Even if the statute requiring notice had applied, it would apply only when “the franchisor
6 seeks to enter into a franchise establishing an additional motor vehicle dealership” and that it state only
7 “the franchisor’s intention to establish an additional dealership”. (Section 3062(a); underline added)
8 There is nothing in Section 3062 that imposes an obligation on the franchisor to see that the new dealer
9 begins the actual operation of the dealership.

10 72. The “franchise” is the contract between the parties. The “dealership” is the physical
11 facility and operation of the business that is subject to control of the dealer and subject to regulation by
12 Occupational Licensing.

13 **The Extent of a Franchisor’s Obligation to comply with Section 3062 (if it is applicable)**

14 73. All that is required for a “franchise” is the written agreement which meets the “conditions”
15 contained in Section 331, one of which is the “right” to sell or lease or offer to sell or lease the vehicles
16 stated. When the dealer becomes a “franchisee” within the statutory definition as urged by Adrenaline,
17 with the right to receive notices under Section 3062 and the right to file protests, is subject to many
18 circumstances beyond the control of the manufacturer or distributor.

19 74. It is noted that, as to the notice requirements, Section 3062 does not make reference to an
20 “actual establishment” but only that the “franchisor” “seeks to enter into a franchise establishing.” It also
21 states the franchisor must “first” notify the Board and each franchisee of the “intention to establish” an
22 additional dealership. All the language is prospective. If Section 3062 is applicable, the sequence of
23 events would be: (a) Notice from the franchisor to the Board and the existing franchisee; (b) If no timely
24 protest is filed, or upon resolution of a protest if one is filed and overruled, the franchisor may then enter
25 into the “franchise”; and (c) The new dealership may be established in accordance with the procedures
26 and requirements of Occupational Licensing Division of DMV.

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28 ///

Whether PSI was Required to Provide Notice per Section 3062 Prior to Execution of the Dealer Agreement with GBMP

75. The undisputed facts before the Board are that the Dealer Agreement between PSI and GBMP was executed and intended to become effective as of November 26, 2014. As Section 3062 was not applicable, there was nothing prohibiting PSI from entering into the franchise with GBMP on November 26, 2014. As of that time, there was a "franchise", as defined by Section 331, in existence between PSI and GBMP. The fact that the amendments to the statute regarding the two vehicles included within the franchise became effective on January 1, 2015 should not have any effect upon the Dealer Agreement/franchise already in existence.

76. Likewise, there was a "franchise" in existence between PSI and Adrenaline from the time their Dealer Agreement was effective and there is no contention that Adrenaline was not receiving the products and in operation as a dealership from the time its Dealer Agreement was effective. But, as explained, it was not until January 1, 2015, that Adrenaline became a "franchisee" entitled to notice under Section 3062.

77. The "additional franchise" had already been executed between PSI and GBMP as of November 26, 2014, at a time when Adrenaline was not a "franchisee" and PSI was not a "franchisor" within the Board's statutes.

78. In addition to requiring that there be a "franchise", these two definitions, "franchisor" and "franchisee", both specify the types of vehicles that must be within the scope of the written agreement for it to be a franchise. In particular here, the types of vehicles specified include "new all-terrain vehicles, as defined in Section 111."

79. Prior to January 1, 2015, Section 111 consisted only of (a) as shown below. Section 111 was amended, effective January 1, 2015, to include (b) as shown in italics below.

(a) "All-terrain vehicle"¹¹ means a motor vehicle subject to subdivision (a) of Section 38010 that is all of the following:

(1) Designed for operation off of the highway by an operator with no more than one passenger.

¹¹ It is undisputed that UTVs and OHRVs do not come within this definition of ATVs in Section 111(a). Among other reasons, such vehicles do not have a seat that must be straddled by the operator, will seat more than one passenger, and are not steered by handle bars.

- 1 (2) Fifty inches or less in width.
2 (3) Nine hundred pounds or less unladen weight.
3 (4) Suspended on three or more low-pressure tires.
4 (5) Has a single seat designed to be straddled by the operator, or a single seat designed to
5 be straddled by the operator and a seat for no more than one passenger.
6 (6) Has handlebars for steering control.
7 (b) *Notwithstanding subdivision (a), for purposes of Chapter 6 (commencing with Section*
8 *3000) of Division 2¹² and Chapter 4 (commencing with Section 11700) of Division 5, "all-*
9 *terrain vehicle" also means a recreational off-highway vehicle as defined in Section 500*
10 *and a utility-terrain vehicle as defined in Section 531. (Italics added.)*

7 80. In November and December 2014: PSI was not a "franchisor" as to UTVs or ROHVs as
8 they were not within the definition of ATVs as stated in Section 111; for the same reasons Adrenaline was
9 not a "franchisee required" to be provided notice; and for the same reason GBMP was not a "franchisee"
10 as to these vehicles. Thus in November or December 2014, prior to execution of the Dealer Agreement
11 with GBMP, PSI was not required to provide notice pursuant to Section 3062 to the Board or to
12 Adrenaline.

13 **Facts and Law Not in Dispute**

14 81. It is undisputed that the Dealer Agreements at issue here are for only the Polaris Ranger
15 and Polaris LSV vehicles.

16 82. It is undisputed that neither the Ranger vehicles nor the LSV vehicles were within the
17 definition of "all-terrain vehicles" as defined in Section 111 as that section existed prior to January 1,
18 2015.

19 83. It is undisputed that Section 111 was amended, effective January 1, 2015, to include both
20 "utility-terrain vehicles" (UTVs) as defined in Section 531, and "recreational off-highway vehicles"
21 (ROHVs) as defined in Section 500, as being "all-terrain vehicles" for the purposes of the Board's
22 statutes.

23 84. It is undisputed that Polaris Ranger vehicles are within the definition of "utility terrain
24 vehicles" as defined in Section 531 and Dealer Agreements relating to them became subject to the
25 Board's statutes as of January 1, 2015.

26 ///

27 _____
28 ¹² These are the statutes under which the Board operates. The effect of subdivision (b) of Section 111, as of January 1, 2015, is to include ROHVs and UTVs as being within the definition of ATVs for the "purposes" of the Board's statutes.

1 Whether Polaris LSV Vehicles are ROHVs as Defined in Section 500

2 85. Although not addressed by the parties, it is unclear whether Polaris LSV vehicles are now
3 (as of January 1, 2015) within the definition of “recreational off-highway vehicles” as defined in Section
4 500. The parties’ seeming concurrence that Polaris LSVs are within the definition of “recreational off-
5 highway vehicles” is irrelevant as this would be a jurisdictional requisite and the parties cannot confer
6 jurisdiction upon the Board by their agreement or consent.

7 86. As this is a jurisdictional question, it can be raised at any time by the ALJ, the Board, or a
8 reviewing court on its own motion.

9 87. If the LSV vehicles are within the definition of “recreational off-highway vehicles”
10 (ROHVs) the findings herein and proposed order as to the Ranger UTVs and ROHVs in general would be
11 applicable as well to the LSVs and to the Dealer Agreement regarding both of them. However, as pointed
12 out by the ALJ at the hearing on the Motion to Dismiss, the Polaris LSV vehicles may not be within the
13 definition of “recreational off-highway vehicles” and, if not, the Dealer Agreements as to the LSV
14 vehicles may not be subject to the Board’s statutes.¹³ If the LSVs are not ROHVs then the LSVs would
15 not be ATVs within Section 111(b) and Adrenaline would have no right to protest any dealer agreement
16 for LSV vehicles regardless of the January 1, 2015 amendment to Section 111. If the LSVs are not
17 “recreational off-highway vehicles”, a dealer agreement for LSV vehicles would not be within Section
18 3062 as PSI would not be a “franchisor” and Adrenaline would not be a “franchisee” as to the LSV
19 vehicles.

20 88. Although it is uncertain, it appears as though the Polaris LSV¹⁴ vehicles are battery-
21 powered only. If this is in fact the situation, then the Polaris LSV vehicles may not come within the
22 definition of “recreational off-highway vehicles” as contained in Section 500.

23
24 ¹³ It may be that the LSVs may be included in some other statute that would result in the Dealer Agreement as to them coming
25 within the Board’s statutes. Neither side has provided any other information pro or con. Whatever the conclusion as to the
26 status of the LSVs, it does not impact the issues and rulings regarding the Ranger UTVs. In the event the LSV vehicles are
27 subject to the Board’s statutes the rulings on this motion will apply to them as well. If the LSV vehicles are not within the
28 Board’s statutes, the issues raised as to them are moot as the Board would have no jurisdiction as to the franchise for LSVs
either before or after January 1, 2015.

¹⁴ Polaris LSV vehicles are also known as “GEM” vehicles, a trade-name for Global Electric Motorcars, a company acquired
by Polaris Industries. LSV vehicles are also known as “low-speed vehicles” and at times “NEVs” (“neighborhood electric
vehicles”).

1 89. Section 500 defines “recreational off-highway vehicles” as follows.

2 “Recreational off-highway vehicle” means a motor vehicle meeting all of the following
3 criteria:

- 4 (a) Designed by the manufacturer for operation primarily off of the highway.
5 (b) Has a steering wheel for steering control.
6 (c) Has nonstraddle seating provided by the manufacturer for the operator and all
7 passengers.
8 (d) (1) Has a maximum speed capability of greater than 30 miles per hour.
9 (2) A vehicle designed by the manufacturer with a maximum speed capability of 30
10 miles per hour or less but is modified so that it has a maximum speed capability of greater
11 than 30 miles per hour satisfies the criteria set forth in this subdivision.
12 (e) Has an engine displacement equal to or less than 1,000cc (61 ci).
13 (Underline added.)

14 90. Although no evidence was presented as to “all of the ... criteria” above, it is subdivision
15 (e) that causes the patent uncertainty whether the Polaris LSV is within this definition. If the LSV is an
16 electric-only vehicle, it would be a “motor vehicle” but it would have an electric motor (likely rated by
17 watts) rather than an “engine displacement equal to or less than 1,000cc (61 ci)” as required by Section
18 500(e). “Engine displacement” by cubic centimeters or cubic inches usually refers to the ratings or sizes
19 of internal combustion engines.

20 91. If the Polaris LSV vehicles are not within the definition of a “recreational off-highway
21 vehicle,” then the protest as it relates to the Polaris LSV vehicles should be dismissed regardless of the
22 issues triggered by the amendment to Section 111. If the LSVs are not ROHVs they would not come
23 within the definition of ATVs and would not be subject to the Board’s statutes even after January 1, 2015.

24 92. However, it is clear that the Polaris Ranger vehicles are within the definition of “utility-
25 terrain vehicle” as defined in Section 531, and thus within the definition of an “all-terrain vehicle” for the
26 purposes of the Board’s statutes. Although the issues raised as to the LSV vehicles may be moot, the
27 issues regarding the Dealer Agreements as to the Ranger vehicles remain.

28 **DETERMINATIONS**

93. It is determined that there was a “franchise” between PSI and Adrenaline prior to January
1, 2015 for the Ranger and LSV vehicles.

94. It is determined that, because the Ranger and LSV vehicles were not included in the
definition of “all-terrain vehicles” prior to January 1, 2015, the PSI and Adrenaline franchise was not
subject to the statutes under which the Board operates.

1 95. It is determined that in 2014, PSI was not a “franchisor” as to the Ranger and LSV vehicles
2 and thus PSI was not required to provide notices to Adrenaline pursuant to Section 3062.

3 96. It is determined that in 2014, Adrenaline was not a “franchisee” as to the Ranger and LSV
4 vehicles and thus Adrenaline would not be entitled to receive notices pursuant to Section 3062.

5 97. It is determined that the Dealer Agreement between PSI and GBMP, executed on
6 November 26, 2014, resulted in a “franchise” as of that date between PSI and GBMP for the Ranger and
7 LSV vehicles.

8 98. It is determined that because the Ranger and LSV vehicles were not included in the
9 definition of “all-terrain vehicles”, prior to January 1, 2015, PSI was not a “franchisor” and GBMP was
10 not a “franchisee” as to those vehicles even though the Dealer Agreement between PSI and GBMP was
11 effective as a “franchise” as of November 26, 2014.

12 99. It is determined that, as of January 1, 2015, both franchises (that between PSI and
13 Adrenaline and that between PSI and GBMP) for the Ranger (UTVs), and possibly also for the LSV (if
14 they are ROHVs), became subject to the statutes under which the Board operates.

15 100. It is determined that, as of January 1, 2015, because the Dealer Agreement between PSI
16 and GBMP was already effective as a “franchise” for the Ranger and LSV vehicles, PSI was not required
17 to comply with Section 3062.

18 101. It is determined that, prior to January 1, 2015, as Adrenaline was not yet a “franchisee”,
19 Adrenaline was not entitled to receive a notice from PSI of PSI’s intent to establish GBMP as an
20 additional franchisee. As Adrenaline was not a “franchisee” required to receive notice prior to January 1,
21 2015, Adrenaline would not have the right to protest the intended establishment of GBMP (under Section
22 3062; see also Section 3050(d) empowering the Board to hear a protest filed by a “franchisee”).

23 102. It is determined that, as of January 1, 2015, at least as to Ranger UTVs, Adrenaline was a
24 “franchisee” entitled to receive notices from PSI pursuant to Section 3062 and that Adrenaline could file a
25 protest pursuant to that section as to intended establishments after January 1, 2015. However, as GBMP
26 was granted a “franchise” effective November 26, 2014, PSI was not required to provide a notice to
27 Adrenaline either prior to or subsequent to January 1, 2015 of the intention of PSI to establish GBMP as
28 an additional dealership. It is also determined that Adrenaline had no right to file a protest post January 1,

1 2015 under Section 3062 as the "franchise" between PSI and GBMP had already been legally entered into
2 as of November 26, 2014.

3 **PROPOSED ORDER**

4 After consideration of the pleadings, exhibits and oral arguments of counsel, it is hereby ordered
5 that Respondent, Polaris Industries [Sales], Inc.'s "Motion to Dismiss Protest for Lack of Jurisdiction" is
6 hereby granted. *Adrenaline Powersports v. Polaris Industries, Inc.*, Protest No. PR-2418-15 is dismissed
7 with prejudice.

8
9
10 I hereby submit the foregoing which constitutes my
11 proposed order in the above-entitled matter, as the
12 result of a hearing before me, and I recommend this
13 proposed order be adopted as the decision of the
14 New Motor Vehicle Board.

15 DATED: May 28, 2015



16 By: _____
17 ANTHONY M. SKROCKI
18 Administrative Law Judge

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27 Jean Shiomoto, Director, DMV
28 Tim Corcoran, Branch Chief,
Occupational Licensing, DMV