

NEW MOTOR VEHICLE BOARD  
1507 - 21st Street, Suite 330  
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STATE OF CALIFORNIA  
NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

MEGA RV CORP., dba McMAHON'S RV,

Protestant,

v.

WESTERN RECREATIONAL VEHICLES, INC.,

Respondent.

Protest No. PR-1983-05

DECISION

At its regularly scheduled meeting of January 31, 2007, the Public and Dealer Members of the Board met and considered the administrative record and "Findings After Remand: Proposed Order" in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as modified as its final Decision in this matter. On page 59, the language at lines 25-28 is stricken from footnote 51.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 2<sup>nd</sup> DAY OF FEBRUARY 2007.

*David W. Wilson*  
DAVID W. WILSON  
President  
New Motor Vehicle Board

*by HAW*

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CERTIFIED MAIL

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8 STATE OF CALIFORNIA  
9 NEW MOTOR VEHICLE BOARD

10 In the Matter of the Protest of  
11 MEGA RV CORP., dba McMAHON'S RV,  
12 Protestant,  
13  
14 v.  
15 WESTERN RECREATIONAL VEHICLES, INC.,  
16 Respondent.

Protest No. PR-1983-05

FINDINGS AFTER REMAND: PROPOSED  
ORDER

ORDER DENYING PROTESTANT'S  
REQUEST TO ENGAGE IN DISCOVERY

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1 **IDENTITY AND STATUS OF THE PARTIES**

2 1. Protestant, Mega RV Corp., dba McMahon's RV ("McMahon's"), is a new recreational  
3 vehicle ("RV") dealer as defined in Vehicle Code section 426<sup>1</sup> and is licensed as such by the Department  
4 of Motor Vehicles ("DMV"). McMahon's operates an RV dealership at 1312 RV Center Drive, #12,  
5 Colton, California.

6 2. Respondent, Western Recreational Vehicles, Inc. ("WRV") is incorporated in the State of  
7 Washington and has its principal place of business at 3401 West Washington Avenue, Yakima,  
8 Washington. WRV is a distributor as defined in Section 296 and is licensed as such by the California  
9 DMV.

10 **PROCEDURAL BACKGROUND**

11 **THE FILING OF THE PROTEST (DECEMBER 29, 2005)**

12 3. On December 29, 2005, McMahon's filed an Amended Protest<sup>2</sup> pursuant to Section 3070  
13 asserting among other things that:

- 14 ▪ McMahon's and WRV were "...parties to a franchise, as that term is defined in Section 331...";  
15 ▪ "...[WRV] had established an additional franchise within [McMahon's] exclusive territory...";  
16 ▪ "This act unilaterally modifies the franchise agreement between [McMahon's] and [WRV]";  
17 ▪ "Such modification will substantially affect McMahon's sales and service obligations, as well as  
18 its investment in its [WRV] franchise"; and  
19 ▪ "...WRV failed to provide the required notice of such modification under Section 3070(b)..."<sup>3</sup>

20 **WRV'S MOTION TO DISMISS (APRIL 3, 2006)**

21 4. On April 3, 2006, WRV filed "RESPONDENT'S MOTION TO DISMISS FOR LACK OF  
22 SUBJECT MATTER JURISDICTION." WRV's motion was premised upon the claim that there is no  
23 written agreement that constitutes a "franchise" as that term is defined in the Vehicle Code, meaning that  
24

25  
26 <sup>1</sup> Unless otherwise indicated, all later statutory references shall be to the California Vehicle Code.

27 <sup>2</sup> An Amended Protest was necessary as the original Protest, filed on December 28, 2005, cited Section 3060 as the basis for  
the Protest rather than Section 3070.

28 <sup>3</sup> McMahon's is correct that WRV gave no notices to McMahon's or the Board of any intent of WRV to modify the claimed  
franchise of McMahon's. It is assumed that at least one of the reasons why WRV gave no notices is because WRV denies that  
a franchise exists.

1 McMahon's would not be a "franchisee", WRV would not be a "franchisor", and the Board would have  
2 no jurisdiction to hear the protest.

3 5. On April 24, 2006, McMahon's filed "PROTESTANT (sic) REPLY TO RESPONDENT'S  
4 MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION".

5 6. On May 2, 2006, WRV filed its "MEMORANDUM IN RESPONSE TO PROTESTANT  
6 (sic) REPLY TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER  
7 JURISDICTION".

8 **THE FIRST HEARING BEFORE AN ALJ ON THE MOTION TO DISMISS (MAY 4, 2006)**

9 7. On May 4, 2006, a scheduled telephonic hearing was held before Anthony M. Skrocki,  
10 Administrative Law Judge ("ALJ") for the Board. Kevin L. Bryant, of the LAW OFFICES OF  
11 MICHAEL M. SIEVING, represented McMahon's. James S. Berg, of JAMES S. BERG, PLLC, and  
12 Bruce L. Ishimatsu of LOEB & LOEB, LLP, represented WRV.

13 8. The pleadings of both parties and supporting documentation before the Board at this first  
14 hearing on the motion referred to the fact that there were two originals of a writing captioned "Dealer  
15 Agreement" that could constitute a "franchise", that both of them had been signed by Brent McMahon,  
16 the president of McMahon's, and both of these documents had been returned to and received by WRV.

17 9. There was and is a factual dispute as to whether either or both of these two originals had  
18 been signed by a representative of WRV after the documents were signed by Mr. McMahon and returned  
19 to WRV. In support of its Motion to Dismiss, WRV did provide a photocopy of one of the two originals.  
20 This photocopy shows the signature only of the president of McMahon's but the photocopy did not and  
21 does not negate the possibility that one or both of the originals of the Dealer Agreement had been signed  
22 by a representative of WRV.

23 10. The Board had not been provided with either original of what was claimed to be the  
24 partially executed or fully executed Dealer Agreement (the claimed "franchise"), and counsel for WRV  
25 were unable to respond with certainty as to the whereabouts of the two original documents. This May 4,  
26 2006 hearing resulted in an order of continuance containing the following language:

27 ...Upon questioning by the administrative law judge as to the existence of the  
28 originals of the two copies of the Dealer Agreement referred to in the documents  
submitted by the parties, counsel for the parties agreed that the hearing on the

1 motion should be continued to allow them to respond appropriately...

2 **FURTHER BRIEFING BY THE PARTIES AND RESUMPTION OF THE HEARING ON THE MOTION**

3 11. On May 19, 2006, McMahon's submitted its "SUPPLEMENTAL BRIEF OF MEGA RV  
4 CORP., dba MCMAHON'S RV IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS FOR  
5 LACK OF SUBJECT MATTER JURISDICTION".

6 12. On May 26, 2006, WRV submitted "RESPONDENT'S SUPPLEMENTAL BRIEF IN  
7 RESPONSE TO SUPPLEMENTAL BRIEF OF MEGA RV".

8 13. No original of either of the two Dealer Agreements was provided to the Board.

9 14. The hearing on the motion resumed on June 7, 2006, again before ALJ Anthony M.  
10 Skrocki. As in the first hearing, Kevin L. Bryant represented McMahon's and James S. Berg and Bruce  
11 L. Ishimatsu represented WRV.

12 **RESULTS OF THE SECOND HEARING HELD ON THE MOTION TO DISMISS (JUNE 7, 2006)**

13 15. In summary, the ALJ, in a Proposed Order dated July 10, 2006,<sup>4</sup> found that:

14 ■ Two originals of documents captioned "Dealer Agreement", had been prepared by an employee of  
15 WRV and mailed to McMahon's for signature by Mr. McMahon. Both unsigned originals were to  
16 be signed first by Mr. McMahon and then returned to WRV for the possible later signature of Mr.  
17 Doyle, the only person at WRV with the authority to sign the Dealer Agreement.

18 ■ Paragraph 24 of the Dealer Agreement states as follows:

19 24. Signature. This Agreement, to be valid, must bear the signature of a duly  
20 authorized officer of Dealer, if a corporation, or the signature of one of the partners  
21 of the Dealer if a partnership, or the signature of the Dealer if an individual, and by  
(sic) a duly authorized officer of WRV. (Dealer Agreement, page 12)

22 ■ Both originals were signed by Mr. McMahon and returned to and received by employees of WRV.

23 ■ Both originals disappeared while in the custody of an employee of WRV and have never been  
24 produced by WRV.

25 ■ The evidence submitted (in the form of affidavits and declarations) was overwhelming that Mr.  
26 Doyle of WRV had not signed either of the two originals of the "Dealer Agreement".

27  
28 <sup>4</sup> This Proposed Order is Attachment 1 and is incorporated herein by reference.



1 2006 and WRV's reply brief on November 13, 2006.

2 21. Oral arguments were heard on November 15, 2006, with Michael M. Sieving representing  
3 McMahan's and James S. Berg and Bruce L. Ishimatsu representing WRV.

4 THE SCOPE OF THE ORDER OF REMAND AND ITS  
5 APPLICATION TO THE PARTIES' BRIEFS

6 22. The Board's Order of Remand was broadly worded and encompasses: "...whether or not  
7 there are" "any exceptions" to the "written document requirements," "stated in Vehicle Code section  
8 331 as it applies to the jurisdiction of the Board in this matter..." (Emphasis added.)

9 23. "(W)hether there ...are" is interpreted to mean not only whether there "could be any"  
10 exceptions but also whether they "are" applicable to this situation. This will be addressed further below  
11 in response to this issue as raised by McMahan's.

12 24. The language "any exceptions" is interpreted to refer to the possibility that there may be  
13 multiple exceptions to each of the two elements needed by the Vehicle Code.

14 25. The language "written document requirements" (plural), and the reference to Vehicle Code  
15 section 331, are a recognition that there are at least two "requirements" needed to satisfy the statutory  
16 language of "written agreement" and that there is a need to determine if there are "any" exceptions to  
17 these required elements.

18 26. The two obvious elements that must be met to satisfy the "requirements, stated in Vehicle  
19 Code section 331..." are that there must be an "agreement"<sup>7</sup> and that it must be "written".

20 27. Before there can be a discussion of any "exceptions" to these requirements, there must be  
21

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22 <sup>7</sup> Although all "contracts" are "agreements" not all "agreements" are "contracts". Although McMahan's attempts to make  
23 some distinctions in this regard (addressed below), it is determined that the term "agreement" as used in Section 331 should be  
24 interpreted to include a "contract" and that the parties here intended that their "agreement" be a "contract" before it would  
25 come into existence and be a "franchise". The language in Section 331 refers to a franchisee being "granted the right to offer  
26 for sale or lease, or to sell or lease..." etc. This right could be encompassed within a written contract or perhaps in a written  
27 gratuitous license to do the various things listed in Section 331. A gratuitous license was likely not what the parties intended  
28 here as one of the sticking points was the minimum stocking inventory McMahan's would be obligated to carry. There is no  
attempt here to define a "franchise" narrowly. Because the parties intended their "agreement" to be a "contract", as there would  
be no "agreement" until the "contract" was signed, the terms will be used interchangeably. Civil Code section 1549 states: "A  
contract is an agreement to do or not to do a certain thing."

1 an understanding of the principles of contract law relating to “formation” of a contract (the “agreement”  
2 here), followed by what may be needed to satisfy any statutory requirements imposed that might limit a  
3 parties right to “enforce” the contract (if it had been formed), and what statutory requirements must be  
4 met for it to have the status of a “franchise”<sup>8</sup> (that it be “written”). The issues of “formation” of a  
5 contract, as intended here by the parties, as well as the issues of “enforceability” as raised by McMahon’s,  
6 are governed primarily by the same sources of law, but by different provisions and principles within those  
7 sources. These primary sources are the California Uniform Commercial Code<sup>9</sup> (“UCC”), the Civil Code,  
8 and common law. The issue of what is required for a “franchise” begins with the Vehicle Code (Section  
9 331 “A franchise is a written agreement...”), but requires delving into all three of the other sources of law  
10 above (UCC, Civil Code, and common law) in order to respond to the Board’s Order of Remand and the  
11 assertions of McMahon’s as to whether there are any “exceptions” to the Vehicle Code requirements that  
12 a franchise “is a written agreement”. Whether there was an “agreement” involves issues of “formation”.  
13 The need that the agreement be “written” involves the issue of “enforceability” or status.<sup>10a</sup>

14 28. Formation of the contract - Formation of a contract is controlled by the intentions of the  
15 parties and whether a contract has been formed requires an inquiry into whether there was mutual assent  
16 manifested between them that did result in a contract. The UCC, Civil Code, and common law<sup>11</sup>  
17 recognize that the parties are free to set their own “rules” as to when and how this needed assent may be,  
18 or even, as in this case, must be manifested. These “rules” will be referred to below as “party-created”  
19 requirements to the **formation** of a contract.

20 29. Enforcement or status of the contract – Even if the parties had formed a contract, there may  
21 be statutes which preclude enforcement of that “perfectly good contract” unless there is a “writing” or  
22

23 <sup>8</sup> There can be an “agreement” that is not a “franchise”, but there cannot be a “franchise” that is not an “agreement”.

24 <sup>9</sup> The application of the UCC to this situation, as relied upon by McMahon’s, will be discussed below. Effective January 1,  
25 2007, Division 1 and some of Division 2 of the UCC were amended and renumbered. However, the prior versions were in  
26 effect at the time of the instant dispute and will control for purposes of this Proposed Order.

27 <sup>10</sup> By “status” it is meant that, although the “agreement” may be a contract, which could make the parties obligated to each  
28 other and enforceable by way of a civil action, the “agreement” will not be deemed to have the status of a “franchise” (to bring  
it within the scope of the Vehicle Code and the Board’s jurisdiction) unless it is “written” and also contains certain terms as  
required by Section 331.

<sup>11</sup> All three of these sources of law recognize that the key ingredient for formation of an enforceable agreement (a contract) is  
that the parties must have objectively manifested their intent to be bound. The outcome of this issue, under these facts, would  
be the same no matter which source or combination of sources of law would be applied.

1 even a "signed writing". Such statutes are commonly included within a "generic" term called "the statute  
2 of frauds", which, if applicable, would preclude a party from having the right to enforce the contract (even  
3 though it is proven to exist) unless the contract met the statutory requirements that it be written and  
4 perhaps even signed. These statutes will be referred to as "legislatively-created" requirements to the  
5 **enforcement** of the existing contract. The contract may have been **formed** orally or by the conduct of the  
6 parties, however, the contract may not be enforceable (or in this case have the status of a "franchise"), if it  
7 does not satisfy the statutory requirements.

8       30.     The Vehicle Code requirements of "agreement" (formation) and "written" (enforcement) -  
9 The two requirements imposed by the Vehicle Code are that there "... is a written agreement...". The  
10 first requirement would be that there is an "agreement". This is an issue of formation - whether the  
11 parties intended to form a contract - and would be subject to any "party-created" requirements, here that  
12 the Dealer Agreement be signed by both McMahan's and WRV.

13       31.     The second question, of whether the agreement was "written", is a question of  
14 "enforceability" of the agreement. This is whether the agreement, if formed, is in the proper form or  
15 format (in writing) as required by the legislature. Even though there may be an oral contract, or perhaps a  
16 contract implied from the parties' conduct, the contract may not be enforceable, or be a "franchise", if it  
17 does not meet the legislature's requirements. In this case, even though there may have been an  
18 "agreement", unless it is "written" it will not have the status of a "franchise".

19       32.     For there to be a franchise, there must be both an "agreement" and it must be "written". If  
20 there is no "agreement", there can be no "franchise". If there is an "agreement", but it is not "written",  
21 there can be no "franchise."

22       33.     If either one of these two requirements is missing, there would be no "franchise", unless as  
23 the Board has inquired in its Order of Remand, there is a recognized exception that would take the place  
24 of the missing element.

25       34.     However, if both of the requirements are missing as is the case here, the question would  
26 then be whether there are any exceptions that would operate to satisfy or avoid each of the two  
27 requirements, with the result being a "franchise" even though there was no "agreement" and even though  
28 there was nothing that was "written".

1           35.     The prior Proposed Order concluded that there was no "agreement" between the parties.  
2 This conclusion was based upon the parties' own ("party-created") requirement for formation of the  
3 contract that the Dealer Agreement would not be valid until it was signed by both of them. Paragraph 24  
4 of the Dealer Agreement stated:

5           This Agreement, to be valid, must bear the signature of a duly authorized officer of Dealer,  
6 if a corporation, or the signature of one of the partners of the Dealer if a partnership, or the  
7 signature of the Dealer if an individual, and by (sic) a duly authorized officer of WRV.  
(Dealer Agreement, page 12)

8 This paragraph was directly above the lines for the parties' signatures.

9           36.     The prior Proposed Order concluded that because it could not be established that WRV had  
10 signed either of the documents, it could not be found that an agreement or contract was formed. The  
11 party-created requirement that the document be signed by both to form the contract had not occurred. The  
12 only document before the Board, as well as the evidence submitted, led to the conclusion that what was  
13 "written", instead of evidencing that there was an agreement, evidenced that there was no agreement as  
14 the express language indicated that there was no agreement unless the Dealer Agreement had been signed  
15 by both. Implicit in this conclusion that there was no "agreement" was also the conclusion that there  
16 was nothing "written" that could satisfy the requirements of Section 331. Rather than what was "written"  
17 evidencing an "agreement", what was "written" evidenced that there was "no agreement".

18           37.     The Order of Remand directed that the parties submit briefs addressing "whether or not  
19 there are any exceptions to the written document requirements, stated in Vehicle Code section 331".

20           38.     It would be pointless to focus solely upon whether there are any exceptions to the  
21 requirement of "written" to the exclusion of any exceptions to the requirement of "agreement", as the  
22 primary impediment to the finding of a "written agreement" is that, due to lack of intent to be bound,  
23 there is no "agreement". Thus, it is necessary first to determine if there is an exception to the primary  
24 requirement that there be an "agreement" before discussing whether there is an exception to the  
25 requirement that it be "written".

26           39.     Therefore, in order to determine if there are "exceptions" that might be applicable, one  
27 must start with the two elements required by Section 331 (an "agreement" and that it be "written"), focus  
28 on them separately, determine if there are any exceptions recognized by law as to each of them, and then

1 evaluate whether there were any allegations of fact presented, that, if proven, would satisfy a recognized  
2 exception for the needed elements operating together.

3 40. The "written agreement" requirements under the facts of this case are somewhat unusual,  
4 and the analysis more complicated, in that they involve two different but equally important sources, (1)  
5 the parties themselves, and (2) the legislature, and two significantly different concerns, (1) formation, and  
6 (2) enforcement (or status). The parties have manifested their requirement that for there to be an  
7 "agreement" the document must be signed by both McMahon's and WRV, and the legislature has  
8 mandated that the parties' "agreement", before it will be deemed to be a franchise, must be "written".  
9 Although the party-created requirement of a signed writing and the legislatively-created requirement that  
10 the agreement be written sound similar, they are not, and the rules that apply to them, and what exceptions  
11 may exist as to each, involve two significantly different areas of contract law.

12 41. The parties, as they are permitted to do, have established their own standard as to when the  
13 contract would be formed. McMahon's and WRV have expressly manifested that the contract would not  
14 be valid until it was signed by both McMahon's and WRV. Thus, there is a party-created requirement of  
15 a "signed writing" for the formation of the contract.

16 42. The legislature has also established requirements that certain contracts must be "written",  
17 or that they be "in writing and signed". These legislatively-created requirements have nothing to do with  
18 formation. They effect only, if there has been an agreement made, whether it will be enforceable. In this  
19 case, the agreement, if one was made, must be "written" for it to have the status of a "franchise" so as to  
20 come within the statutory scheme which has been entrusted to the Board for administration.

21 43. The parties are the "determiners" of when an "agreement" is formed and the legislature is  
22 the "determiner" of when such an agreement will have the status of a "franchise".

23 44. Here, the parties have required that there be a signed writing for there to be an "agreement"  
24 formed and the legislature has established the requirement that, to have the status of a "franchise", any  
25 "agreement", when it is formed, be "written" and contain certain terms. Therefore, there must be a  
26 confluence of the two requirements, the party-created requirement of a "signed writing" to form an  
27 "agreement", and the legislatively-created requirement that the parties' agreement be "written" before it  
28 will be enforced or recognized as a "franchise" under which McMahon's will have the status of a

1 “franchisee” with standing to protest under Section 3070.

2 45. Because of the different purposes and different sources of these two requirements of  
3 “agreement” and “written”, the party-created requirement of a signed writing needed for the formation of  
4 the “agreement” will be subject to different exceptions than the legislatively-created requirement of a  
5 “writing” for the agreement to be enforceable, or have the status of a “franchise”.

6 46. Response to the Order of Remand requires an analysis of whether “there are any  
7 exceptions to the written document requirements, stated in Vehicle Code section 331”. As the  
8 “requirements” stated in Section 331 are that there be a “written agreement”, the inquiry is interpreted to  
9 include:

10 A. Whether there are any exceptions to the party-created requirement that the “Dealer  
11 Agreement” be signed by both McMahon’s and WRV before an “agreement” could have been formed?

12 B. If there is an exception under A. that could result in an “agreement” even though the party-  
13 created requirement of a signed writing was not met, whether there are any exceptions to the  
14 legislatively-created requirement that the agreement, or in this case, the exception to an agreement, to be  
15 enforced as a franchise, be “written”?<sup>12</sup>

16 47. As to A. above - Whether there is an exception that could be found to the requirement of  
17 the parties (that the Dealer Agreement be signed by both McMahon’s and WRV before there would be an  
18 “agreement”) is a question of contract formation. This is dependent upon the parties’ objective intentions  
19 as to if and when the contract would be formed. The express language of the parties here requires that the  
20 writing be signed by each party for there to be an “agreement”. This is a “party-created” requirement that  
21 goes to formation of the agreement and clearly evidences their intent that the Dealer Agreement will not  
22 be valid unless it is signed by both parties.

23 48. This is the primary focus of the Proposed Order previously submitted to the Board, in  
24 \_\_\_\_\_

25 <sup>12</sup> To find that there are “any exceptions to the written document requirements, stated in Vehicle Code section 331” will require  
26 that there be two exceptions found. As there was a prior finding that an “agreement” could not be found, there will have to be  
27 an exception found to the requirement of an “agreement”. And, as there is nothing that is “written” that evidences an  
28 “agreement”, there will also have to be an exception to the requirement that “it” (whatever is found to operate as an exception  
to an “agreement”) be “written”. As there was no “agreement” and there was nothing “written” evidencing an agreement, an  
exception will be needed for both of these requirements.

1 which it was determined that there was no agreement as neither party intended to be bound without the  
2 signatures of both. If there was no signature of a representative of WRV, there could not be an  
3 "agreement" at all and therefore no "written agreement" which is needed for there to be a franchise as  
4 defined in Section 331. The absence of proof that the writing was signed by WRV precluded a finding of  
5 formation of the contract and thus an "agreement" could not be established.

6 49. The Order of Remand requires making determinations as to whether there are any  
7 exceptions to the party-created requirement (as stated in paragraph 46A above) that the writing be signed  
8 by both parties before a contract would be formed.

9 50. As to paragraph 46B above - The significance of the need for a "writing" has two sources  
10 here. As discussed above, the first is the "party-created" requirement of a signed writing to "form" the  
11 contract and the second would be any "legislatively-created" requirements that will have to be met to  
12 make the agreement enforceable and have the status of a franchise.

13 51. The fact that there may be recognized exceptions to the legislatively-created requirement  
14 of a writing needed to enforce a contract or agreement will be totally irrelevant if the parties never had an  
15 "agreement" or contract and there were no exceptions to this party-created requirement of a signed  
16 writing that is needed for formation.

17 52. The finding of the "party-created" requirement that the Dealer Agreement be signed by  
18 both McMahon's and WRV to form the contract is premised on the fact that the Dealer Agreement states  
19 that it will not be valid unless it is signed by both parties. This relates to the issue in 46A. above, that is  
20 whether there could be an exception to the party-created requirement that the Dealer Agreement be signed  
21 by both McMahon's and WRV before there would be an "agreement".

22 53. The parties' concern with "formation" of the contract, goes to the "when and if" of the  
23 contract being formed. McMahon's and WRV manifested their intent that not only was there a writing  
24 required, but also that the Dealer Agreement would be valid only when and if it was signed by both of  
25 them. It was the parties who required that the writing be signed by both before the contract would be  
26 formed.

27 54. Here, the second source of the requirement for a writing is the legislature. It is most  
28 important to remember that this legislatively-created writing requirement has nothing to do with the

1 formation or existence of an agreement or contract. These statutes merely determine, assuming the  
2 agreement or contract can otherwise be proven to exist, whether the agreement or contract in existence is  
3 enforceable, or comes within the statutory scheme at issue. Here, the Vehicle Code requires the  
4 "agreement" (if there is one) be "written" for it to have the status of, or constitute, a "franchise".

5 55. This legislative requirement is imposed as a matter of public policy and dictates the  
6 "format" of the agreement, that is it must be "written" (and perhaps signed), as well as what terms<sup>13</sup> are  
7 required to be in the writing for it to constitute a "franchise". The Vehicle Code requirements of a  
8 "written agreement" do not in any way establish any requirements for the formation of the agreement.  
9 Formation is left to the parties within the rules established by the UCC, the Civil Code, and common law.

10 56. The usual primary concern of the legislature in enacting statutes requiring writings or  
11 signed writings is "evidentiary". This means that such a statute, commonly called a "statute of frauds",  
12 requires that contracts involving specified subject matter must be "evidenced" (or "proven") by a writing  
13 signed by the person sought to be held to the contract rather than being proven by the oral testimony of  
14 the opposing party or even other witnesses. Under most such statutes, it is irrelevant that an oral  
15 contract may have been formed and that its formation and existence can be conclusively proven. If the  
16 contracts are not in writing, they may not be enforceable or in this case not be deemed to be a franchise.  
17 Another reason given for such statutes is that they are "cautionary", meaning that the parties should not  
18 enter into such transactions lightly and without due deliberation. Requiring such contracts to be in writing  
19 will involve additional time to prepare the writing. Requiring that it be signed will impress upon the  
20 parties the significance and solemnity of the undertaking. A third reason for such statutes is that persons  
21 should be required to have important contracts in written form so there is greater certainty as to its  
22 existence and as to its terms. Such certainty, it is believed, should minimize the possibility of later  
23 disputes due to lapsed memory or "selective memory" as to the parties' obligations, and, if litigation  
24 involving the contract does occur, the task of the adjudicative body will be simpler with the certainty of a  
25 written document before it. The statutes usually require a "signed writing" of only the party against  
26 whom enforcement is being sought. Legally recognized exceptions to the requirement of a signed writing

27  
28 <sup>13</sup> See Section 331 for a listing of "conditions" required to be in the written agreement for it to constitute a "franchise".

1 may be applicable.

2 57. In this case, Section 331 requires a “written agreement”; with no reference to it being  
3 signed. However, McMahon’s also cites UCC section 2201<sup>14</sup>, which if applicable, does require that there  
4 be a **writing signed by WRV** for it to be enforceable against WRV.

5 58. Therefore, in order to address whether there are any exceptions to the requirements of  
6 Section 331, that there be an “agreement” which is “written”, as well as the claimed exceptions as  
7 asserted by McMahon’s, it will be necessary to determine if there are: (1) any exceptions to the party-  
8 created requirement to formation that the Dealer Agreement be signed by McMahon’s and WRV in order  
9 to be valid; and (2) any exceptions to the legislatively-created requirement of the UCC that the contract be  
10 “in writing and signed” by WRV before the contract will be enforceable. Both of these are necessary to  
11 resolve the assertions of McMahon’s as to exceptions it claims exist to the more broadly stated  
12 legislatively-created dual requirements<sup>15</sup> of the Vehicle Code, which are that there be an “agreement” and  
13 that it be “written” before it will have the status of a “franchise”.

14 59. Although the briefs have not discretely done so, they will be analyzed as follows:

15 **A. EXCEPTIONS TO THE REQUIREMENT THAT THERE BE AN “AGREEMENT”**

16 - THE PARTY-CREATED WRITING REQUIREMENT FOR FORMATION – This requires analyzing whether there  
17 are any exceptions that will result in a franchise being formed notwithstanding the expressly manifested  
18 intentions of the parties that there will not be an “agreement” unless the document captioned “Dealer  
19 Agreement” was signed by both McMahon’s and WRV;

20 **B. EXCEPTIONS TO THE REQUIREMENT THAT IT BE “WRITTEN” – THE**

21  
22  
23 <sup>14</sup> As discussed below, it is likely that the UCC is applicable to this situation. If so, then the rules contained in the UCC as to  
24 the formation, interpretation, and enforcement of the contract will be governed by Division 2 of the UCC. McMahon’s has  
25 asserted the exceptions to the requirements of a signed writing as contained in UCC section 2201. However, if UCC section  
26 2201 is applicable, it would require that the writing evidencing the contract be signed by an authorized agent of WRV before  
27 the contract would be enforceable against WRV. The exceptions to this UCC requirement as raised by McMahon’s in response  
28 to the Order of Remand will also be discussed. The statutory requirements for being “written” or “in writing and signed”, and  
any exceptions thereto, were not addressed in the prior Proposed Order as it had been determined that an “agreement” could  
not be established. If there was no “agreement”, then there could be no writing representing something that does not exist.  
<sup>15</sup> The party-created requirement that the Dealer Agreement be signed by both McMahon’s and WRV involves the solitary  
issue of formation. The UCC requirement that the contract be evidenced by a writing signed by WRV to be enforceable  
against WRV involves the solitary and separate issue of enforceability of the contract if it existed. The Vehicle Code  
requirements are twofold. There must be an “agreement” (formation) and it must be “written” for it to be enforceable as a  
“franchise”.

1 LEGISLATIVELY-CREATED REQUIREMENTS FOR THE AGREEMENT, IF IT WAS MADE, TO BE ENFORCEABLE  
2 OR HAVE THE STATUS OF A FRANCHISE – This requires analyzing whether the briefs put forth any  
3 exceptions that relate to the legislatively-created requirement that there be a “written agreement” which  
4 would satisfy Section 331. This also requires analysis of whether, as advocated by McMahon’s, there are  
5 any exceptions established by UCC section 2201 that the writing be “signed” by WRV, which would  
6 allow the contract, **if formed**, to be enforced despite the absence of a signature of WRV.

7 MCMAHON’S FIRST CONTENTION<sup>16</sup> AS STATED IN ITS “OPENING BRIEF<sup>17</sup>”  
8 (FILED NOVEMBER 3, 2006)

9 60. The first heading in McMahon’s Opening Brief is: “A. The Board has the Requisite  
10 Subject Matter Jurisdiction to Hear the Instant Protest, Because the Intent of the Parties to Enter into a  
11 Franchise Relationship Was Reduced to a Written Agreement.” (Opening Brief, page 2, lines 16-18)  
12 McMahon’s first contention is that the writing that does (or did) exist, even though signed only by Mr.  
13 McMahon, is sufficient to constitute a “written agreement”, thereby satisfying the requirement of Section  
14 331(a).<sup>18</sup> (Opening Brief, page 3, lines 8-15).

15 61. There are at least two problems with this assertion.

16 A. First, it is not responsive to the Order of Remand as it is not addressing “...whether or not  
17 there are any exceptions to the written document requirements stated in Vehicle Code section 331...”  
18 (Emphasis added. Order of Remand, Page 2, lines 9-10) Rather than addressing whether there are any  
19 “exceptions” either to the “party-created” requirement for formation of the “agreement” or the  
20 “legislatively-created” requirement for a “written agreement”, McMahon’s is asserting that the “Dealer

21  
22 <sup>16</sup> Although both sides have responded to the Order of Remand , because it is McMahon’s that is desirous of finding an  
exception to the “written agreement” requirements for a “franchise”, the focus will be on McMahon’s assertions.

23 <sup>17</sup> The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon  
to reach a finding, and are not intended to be all-inclusive.

24 <sup>18</sup> 331. (a) A "franchise" is a written agreement between two or more persons having all of the following conditions:

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

26 (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.

27 (3) The franchisee constitutes a component of the franchisor's distribution system.

28 (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.

1 Agreement” satisfies Section 331(a)<sup>19</sup> (even though unsigned by Mr. Doyle).

2 B. Second, McMahon’s, in asserting that the parties in fact had an “agreement” which was  
3 reduced to “writing”, is re-arguing the issue that was addressed in the original Proposed Order of July 10,  
4 2006. (Opening Brief, page 3, lines 24-28, page 4, lines 1-28, page 5, lines 1-11) That Proposed Order  
5 found (among other things) that there was no “agreement” as the parties did not intend to be bound until  
6 the Dealer Agreement was signed by both parties. As it could not be established that Mr. Doyle of WRV  
7 had signed either of the two original documents, there could be no finding that an “agreement” existed.

8 62. McMahon’s, in support of its position contends here that it is significant that **there is no**  
9 **requirement in Section 331(a)** that the writing be signed by one or all of the parties for it to constitute an  
10 agreement. (Emphasis added. Opening Brief, page 3, lines 8-15) This totally misses the point.  
11 McMahon’s is confusing the party-created requirement for formation of the agreement with the  
12 legislatively-created requirement that the agreement, if it exists, be “written” for it to have the status of a  
13 “franchise”. It was the parties who established the requirement that the document be signed by both  
14 before it would be valid as the “agreement” which is required to exist to satisfy Section 331.

15 63. McMahon’s is correct that the Vehicle Code is silent as to whether a signature is  
16 required on the “written agreement”.<sup>20</sup> However Section 331(a) clearly requires an “agreement” and it is  
17 the parties themselves who are in control as to when an “agreement” is reached. In this case, the  
18 objectively manifested intentions of the parties were that signatures of both parties were required before  
19 the writing could be “valid” as a Dealer Agreement. The writing states “This Agreement, to be valid must  
20 bear the signature of ... Dealer ... and ... a duly authorized officer of WRV.” (Dealer Agreement, page  
21

22  
23 <sup>19</sup> In particular, see the language at the conclusion of this argument on page 5, at lines 10-11, where McMahon’s states, “...  
because of the existence of a written agreement, as required by Vehicle Code section 331, the Board has ... subject matter  
jurisdiction over this dispute”. (Emphasis added.)

24 <sup>20</sup> McMahon’s makes references to the UCC, including UCC section 2201. Although the Vehicle Code does not expressly  
25 require that the “written agreement” be signed, UCC section 2201(1) (a “statute of frauds” provision) does expressly require  
26 that a contract within its scope must be signed by the party against whom enforcement is sought. This statute would require that  
27 the writing be signed in behalf of WRV. If McMahon’s is correct that a contract was formed without the signature of an agent  
of WRV, then the contract would be unenforceable under UCC section 2201(1) as against WRV unless an exception to the  
28 requirement of a signed writing exists. The absence of the “legislatively-required” signature of an authorized agent of WRV  
could preclude enforcement of the contract against WRV even if it were found that the contract did exist. However, this point  
would be moot if there is no contract in existence. The problem here is not whether there is a signature of an agent of WRV to  
satisfy the evidentiary function of the “statute of frauds”, which is to establish written evidence of the existing contract. The  
problem here is that there is no “party-required” signature of an agent of WRV which was necessary to form the contract.

1 12) If there was no signature in behalf of WRV on the document, there was no "agreement".

2 64. McMahon's quotation from and references to Evidence Code section 250 for the definition  
3 of a "writing" are not helpful. There are no contentions made that the documents captioned "Dealer  
4 Agreement" would not be "writings". The problem is not that there is no "writing". The problem here is  
5 that there is no writing which evidences an "agreement". The only writing before the Board is a  
6 photocopy of the Dealer Agreement and on its face it evidences there is no "agreement". The other  
7 evidence submitted was not sufficient to establish the possibility that either of the two originals of the  
8 Dealer Agreement, although "writings", were "agreements".

9 65. The absence of the signature of an agent of WRV raises two separate issues. These are:  
10 (1) Was an "agreement" created if the Dealer Agreement was not signed by WRV? (In other words, is  
11 there an exception to the party-created requirement of a signed writing that could result in an agreement?),  
12 and (2) If there was an agreement found as a result of an exception (such as estoppel) are there any  
13 exceptions to the legislative requirements that the "agreement" found be evidenced by a writing signed by  
14 WRV (as required by the UCC) or that it be "written" in order to have the status of a "franchise" (as  
15 required by the Vehicle Code)?

16 **WAS THERE AN AGREEMENT DESPITE THE LACK OF A WRITING SIGNED BY WRV**  
17 **(IS THERE AN EXCEPTION TO THE PARTY-CREATED REQUIREMENT OF A SIGNED WRITING)?**

18 66. As to McMahon's claim that an "agreement" can arise despite the lack of a writing signed  
19 by WRV, McMahon's urges the application of UCC section 1201(b)(3)<sup>21</sup> which contains a definition for  
20 "Agreement". (Opening Brief, page 3, line 28, page 4, lines 1-2)

21 67. UCC section 1201 states in part:

22 \_\_\_\_\_  
23 <sup>21</sup> The UCC would likely be applicable to the transaction between the parties. This is because Division 2 of the UCC applies to  
24 "transactions in goods" (UCC section 2102) and the purpose of the Dealer Agreement was the sale between the parties of  
25 recreational vehicles which would come within the statutory definition of "goods" as stated in UCC section 2105(1). The  
26 California Supreme Court, in *Steiner v. Mobil Oil Corp.*, 20 Cal. 3d 90 (1977), (a case not cited by either party), had no  
27 difficulty in applying Division 2 of the UCC to the formation of a contract under which Mobil Oil was appointing Steiner as a  
28 dealer in Mobil products. The Supreme Court pointed out that the gasoline which Steiner promised to purchase and Mobil  
agreed to sell (under the Mobil dealer agreement the formation of which was at issue) fell within the definition of "goods". If  
Division 2 of the UCC is applicable, then so also would be the general provisions contained in Division 1. However, if  
Division 2 does not apply, then neither would Division 1 as none of the other divisions of the UCC have any apparent  
application to the creation of the intended franchise. The statutes in Division 1 will apply only to those transactions otherwise  
within one of the other divisions of the UCC. McMahon's cannot rely upon Division 1 of the UCC as authority unless  
Division 2 or some other Division of the UCC is applicable to the transaction.

1 1201. The following definitions apply for purposes of this code, subject to additional  
2 definitions contained in the subsequent divisions of this code that apply to specific  
3 divisions or chapters thereof, and unless the context otherwise requires:

4 (3) "Agreement" means the bargain of the parties in fact as found in their language or  
5 by implication from other circumstances, including course of dealing, usage of trade, and  
6 course of performance as provided in this code (Sections 1205, 2208, and 10207).  
Whether an agreement has legal consequences is determined by the provisions of this  
code, if applicable, and otherwise by the law of contracts (Section 1103). (Compare  
"contract.")

7 68. Section 1201(b)(3) is more of an aid in determining the possible sources of the "terms" of  
8 the parties' "agreement", if one exists, and whether those sources can be used to "supplement"<sup>22</sup> (be in  
9 addition to) the express terms of an agreement, rather than whether there was an agreement made. Rather  
10 than being within Division 1 of the UCC, the rules for formation of a contract<sup>23</sup> would be more  
11 specifically governed by Division 2 of the UCC, the Civil Code, and common law.<sup>24</sup>

12 69. Whatever its purpose, UCC section 1201(b)(3) relied upon by McMahon's refers to a  
13 "bargain of the parties in fact as found in their language or by implication from other circumstances,  
14 including course of dealing, usage of trade, and course of performance as provided in this code (UCC  
15 Sections 1205, 2208, and 10207)". Paradoxically, what is being done here is analyzing the effect of  
16 statutes intended to be used to determine what the terms of an existing contract should be and what  
17 sources of possible terms should control in the event of any inconsistencies between or among the  
18 sources. Here, the statutes are being used to determine the supremacy of possible sources of the parties'  
19 intentions as to the non-existence of a contract and concluding that the expressed intentions of the parties

20  
21  
22 <sup>22</sup> If there is a written contract in existence, the same sources of supplemental terms are recognized by UCC section 2202,  
23 which states: "Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth  
24 in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included  
therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be  
explained or supplemented.

25 (a) By course of dealing or usage of trade (Section 1205) or by course of performance (Section 2208); and

26 (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and  
exclusive statement of the terms of the agreement. (Emphasis added.) This section, referred to as the "parol evidence rule"  
would apply only if there were a written agreement as has been alleged by McMahon's.

27 <sup>23</sup> The last sentence of 1201(3), states: "... Whether an agreement has legal consequences is determined by the provisions of  
this code, if applicable, and otherwise by the law of contracts (Section 1103)..."

28 <sup>24</sup> UCC-section 1-103 provides: "Unless displaced by the particular provisions of this code, the principles of law and equity,  
including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation,  
duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

1 that there not be a contract should have supremacy over inconsistent implications that are being asserted  
2 by McMahon's.

3 THE PARTIES LANGUAGE

4 70. As for the parties' "bargain ... as found in their language", the parties' clear language here  
5 states they did not intend to have a "valid" "agreement" until the "Dealer Agreement" had been signed by  
6 both McMahon's and WRV. The "language" of the parties clearly states there would be no agreement  
7 until the document was signed by both parties. An agent of WRV did not sign it, so there is no  
8 "agreement", "as found in their language".

9 COURSE OF DEALING, USAGE OF TRADE, AND COURSE OF PERFORMANCE

10 71. As to "course of dealing, usage of trade, and course of performance" (which have  
11 references to UCC sections 1205 and 2208), it is noted that:

- 12 ▪ There was no "course of dealing" alleged to exist between these parties<sup>25</sup>;
- 13 ▪ There was no "usage of trade" alleged to exist which would be applicable to these parties<sup>26</sup> to  
14 evidence formation of a contract; and
- 15 ▪ There was no "course of performance" alleged, which, if established, would be applicable to these  
16 parties<sup>27</sup> to evidence formation of a contract.

17 72. Further, if any of these could be used as an aid for determining "if" an agreement was  
18 reached, rather than what the enforceable terms of the agreement were if an agreement existed, their  
19 significance is subordinate to the "express" terms of the "Dealer Agreement". This is because both UCC

20 <sup>25</sup> UCC section 1205(1) states: "A course of dealing is a sequence of previous conduct between the parties to a particular  
21 transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions  
22 and other conduct." "Course of dealing" refers to the "previous" conduct of these parties, that is, prior to this transaction.

23 <sup>26</sup> UCC section 1205(2) states: "A usage of trade is any practice or method of dealing having such regularity of observance in a  
24 place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The  
25 existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written  
26 trade code or similar writing the interpretation of the writing is for the court." McMahon's did not offer to prove that it is the  
27 "practice or method of dealing" in the RV field to create franchises without the signature of the franchisor.

28 <sup>27</sup> UCC section 2208(1) states: "Where the contract for sale involves repeated occasions for performance by either party with  
knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance  
accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement." (Emphasis  
added.) As can be seen, this relates to post-contract conduct of the parties as it refers to performance of "the contract" and  
allows the course of performance to be used to determine the "meaning" of the terms of the agreement. UCC section 2208(3)  
states: "Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant  
to show a waiver or modification of any term inconsistent with such course of performance." (Emphasis added.) This  
language allows course of performance to result in a possible modification or waiver of the terms of an existing contract but  
does not make reference to the formation of a contract.

1 sections 1205 and 2208 establish that “express terms” control course of performance as well as course of  
2 dealing and also trade usage.<sup>28</sup> The “express terms” in the writing, which will control all implications that  
3 might arise, are that the Dealer Agreement “... to be valid” must be signed by “... a duly authorized  
4 officer of WRV.”

5 73. Therefore, even if there had been a contrary trade usage, or course of dealing claimed to  
6 exist, both would be subordinate to the “express terms” that the agreement would not be a “valid”  
7 agreement until signed by representatives of both McMahon’s and WRV. As to “course of performance”,  
8 this would be applicable only if a contract had been formed and the parties subsequently acted in such a  
9 way as to evidence their intent as to a meaning of a term of the existing contract, or their performance of  
10 the existing contract indicated an intent to modify or waive the terms of the existing contract.

11 74. After quoting from UCC section 1201(b)(3), McMahon’s asserts that “In this instance, the  
12 intent of both parties to enter into an agreement, as evidenced by their actions, is quite clear.” (Opening  
13 Brief, Page 4, lines 2-3) McMahon’s also asserts the conduct “... clearly indicates that WRV intended to  
14 enter into such an arrangement with McMahon’s RV.” (Opening Brief, page 4, lines 23-24)

15 75. It is unclear how this assertion of the parties “actions” and conduct support the contention  
16 of the heading that the “... the Intent of the Parties to Enter into a Franchise Relationship Was Reduced to  
17 a Written Agreement”. However, if McMahon’s intends for these claimed “actions” and conduct of the  
18 parties, to be the “other circumstances”, as used in UCC section 1201(b)(3), to show an “agreement”,<sup>29</sup>  
19 they again are irrelevant for three reasons. First, the only written manifestation of intent here is the intent  
20 NOT to have a “valid” agreement until the “Dealer Agreement” was signed in behalf of both parties.  
21 Second, the alleged conduct was not sufficient to negate the expressed intent that no agreement would be  
22 formed until both had signed. Third, the Vehicle Code requirements of a “written agreement” cannot be

23  
24 <sup>28</sup> UCC section 2208(2) states: “The express terms of the agreement and any such course of performance, as well as any course  
25 of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such  
26 construction is unreasonable, express terms shall control course of performance and course of performance shall control  
27 both course of dealing and usage of trade (Section 1205).” (Emphasis added.)

28 <sup>29</sup> Rather than attempting to apply UCC section 1201, the more relevant section of the UCC as to the “actions” and conduct of  
the parties evidencing “formation” of a contract would be UCC section 2204 which was not cited by McMahon’s. This section  
states: “(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both  
parties which recognizes the existence of such a contract.” But, the same three problems that exist in attempting to apply  
“conduct” under UCC section 1201 also preclude the application of UCC section 2204.

1 satisfied solely by the conduct of the parties.

2 76. McMahon's further states that when Mr. McMahon signed both originals of the Dealer  
3 Agreement "... and returned the signed agreements to WRV", it was "At that time, **Mr. McMahon**  
4 **understood** that McMahon's RV was thereafter a WRV franchisee." (Emphasis added. Opening Brief,  
5 page 4, lines 17-18).<sup>30</sup>

6 77. However, as McMahon's accurately states, "A contract is a result of the objective  
7 manifestation of the parties and if these are sufficient, the subjective intentions or beliefs of the parties are  
8 immaterial." (Opening Brief, page 4, lines 25-27)

9 78. Objectively, the "Dealer Agreement" states there will be no "Agreement" until signed by  
10 both parties. Thus, the subjective belief of Mr. McMahon not only is "immaterial" (just as McMahon's  
11 asserts) but Mr. McMahon's claimed subjective belief is inconsistent with the objectively manifested  
12 intent in the very writing that Mr. McMahon signed. Directly above Mr. McMahon's signature, the  
13 document stated that it would not be valid until a signature in behalf of WRV was added to Mr.  
14 McMahon's signature.

15 **CONCLUSIONS AS TO McMAHON'S FIRST ARGUMENT THAT THE "INTENT**  
16 **OF THE PARTIES TO ENTER INTO A FRANCHISE RELATIONSHIP WAS**  
17 **REDUCED TO A WRITTEN AGREEMENT"**

18 **THE ARGUMENT IS NOT WITHIN THE SCOPE OF THE ORDER OF REMAND**

19 79. First, it is determined that McMahon's claim that the "Dealer Agreement" is a sufficient  
20 "writing" to evidence a "written agreement" is not within the scope of the Order of Remand as it does not  
21 relate to "any exceptions" to the requirements of a "written agreement" as stated in Section 331(a). This  
22 contention of McMahon's addresses neither the issue of a possible exception to the party-created  
23 requirement of a signed writing to form a contract nor a possible exception to the legislatively-created  
24 requirement that the agreement be "written".

25 **THE "WRITTEN" DOCUMENT DOES NOT CONSTITUTE OR EVIDENCE AN "AGREEMENT"**

26 80. Second, McMahon's claim that the "INTENT OF THE PARTIES TO ENTER INTO A

27 <sup>30</sup>Under this reasoning, would McMahon's be bound as a "franchisee" if the document had been signed first by an agent of  
28 WRV and put in the mail to McMahon's even if Mr. McMahon refused to sign it? Or would McMahon's be correct if it  
claimed that "It says right there, there is no franchise until we both sign it and I didn't sign it"?

1 FRANCHISE RELATIONSHIP WAS REDUCED TO A WRITTEN AGREEMENT” is without legal or  
2 factual merit as the document captioned “Dealer Agreement”, although “written”, does not constitute or  
3 evidence an “agreement”.

4 THE CONDUCT OF THE PARTIES, IF IT EVIDENCED AN AGREEMENT, DOES NOT CONSTITUTE A  
5 “WRITTEN AGREEMENT”

6 81. Third, although the conduct of the parties, under proper circumstances, can be sufficient to  
7 establish or form “an agreement” and sufficient to establish “terms” to supplement an existing contract,  
8 conduct of the parties is not sufficient to establish or otherwise satisfy the requirement of a “written  
9 agreement” as stated in Section 331(a). No attempt was made to explain how the conduct of the parties  
10 could satisfy, or operate as an exception to, either the party-created requirement of a signed writing to  
11 form the contract, or the legislatively-created requirement that the agreement be “written” to have the  
12 status of a “franchise”.

13 82. Therefore, it is determined that McMahon’s contention that, “The intent of the parties to  
14 enter into a franchise relationship was reduced to a written agreement” is without merit.

15 McMAHON’S SECOND CONTENTION AS STATED IN ITS “OPENING BRIEF”  
16 (FILED NOVEMBER 3, 2006)

17 83. McMahon’s claims in the second heading that: “B. WRV Is Estopped from Claiming that  
18 the Disputed Franchise Agreement is Unenforceable”. (Opening Brief, page 5, lines 12-13)

19 84. Under this heading McMahon’s asserts that:

- 20       ▪ “... the relevant facts in this instance support a determination that the disputed agreement  
21 is nonetheless enforceable ...”; (Opening Brief, page 5, lines 15-16)
- 22       ▪ “... based upon its objective manifestations, WRV should be estopped from now alleging  
23 that the agreement between it and McMahon’s RV is unenforceable”; (Opening Brief, page  
24 5, lines 21-22)
- 25       ▪ “... the failure of one party to execute a written agreement is not dispositive of whether  
26 such can be enforced against the non-signing party”; (Opening Brief, page 5, lines 24-25)
- 27 and,
- 28       ▪ “Promissory estoppel may operate as an exception to statute of frauds (sic).” (Opening

1 Brief, page 5, line 27)

2 85. McMahon's provides no immediate or separate analysis in support of these propositions  
3 and it is assumed that all were intended to relate to the topic of "estoppel" as stated in this second heading  
4 of McMahon's Opening Brief. This assumption may not be accurate as the concluding paragraph under  
5 this heading of "estoppel" asserts three somewhat more specific alleged exceptions to the requirement of a  
6 signed writing and only one of these is premised on estoppel. These three claimed exceptions as stated by  
7 McMahon's are as follows:

8 In this instance, the various legal exceptions to the requirements of a signed  
9 written contract with regards to the enforceability against a specific party are applicable  
10 through analogy.<sup>31</sup> Specifically, (1) WRV failed to object, in writing, to McMahon's  
11 RV's signing of the agreement within a reasonable time, (2) McMahon's RV reasonably  
12 changed its position based upon WRV's representations, and (3) following McMahon's  
13 RV'S execution of the agreement, both parties performed as if McMahon's RV was a  
14 franchisee of WRV. (Opening Brief, page 6, lines 1-6)

15 86. Although all three of these are possible exceptions to the signed writing required by the  
16 "statute of frauds" as contained in UCC section 2201, only the second assertion above is premised on  
17 estoppel. Further, none of them address the more important fact that the parties themselves created a  
18 requirement that there be a signed writing to form the contract. That is, these arguments address possible  
19 exceptions to the legislatively-created writing requirement for the enforcement of an oral contract if one  
20 existed (as contained in UCC section 2201) but do not supply any support for why they should be  
21 recognized as exceptions to the party-created requirement for a signed writing to form the contract.

22 MCMAHON'S FIRST SUBHEADING IN ITS SECOND CONTENTION IS THAT: "1. WRV FAILED TO  
23 OBJECT, IN WRITING, TO THE SIGNING OF THE AGREEMENT BY MCMAHON'S RV WITHIN A  
24 REASONABLE TIME OF RECEIVING SUCH"

25 87. McMahon's first specific contention under the general heading of "estoppel" quotes all of  
26 UCC section 2201(1) and (2) and has the following subheading: "1. WRV failed to object, in writing, to  
27 the signing of the agreement by McMahon's RV within a reasonable time of receiving such."

28 88. This subheading, under the general heading alleging estoppel, has nothing to do with

<sup>31</sup> McMahon's wishes to use these claimed exceptions to the legislatively required writing "through analogy". However, the 1<sup>st</sup>  
and 3<sup>rd</sup> claimed exceptions as stated by McMahon's appear to be based upon legislatively-created exceptions to a specific  
statute-(UCC-section-2201)-in-Division-2-of-the-UCC-that-likely-applies-to-this-transaction,-and-the-2<sup>nd</sup>-claimed-exception-is  
premiered upon estoppel that would be applicable to UCC section 2201 as will be discussed below without the need to resort to  
analogy.

1 estoppel and the discussion here is less than helpful. It does not assert what the legal effect<sup>32</sup> should be of  
2 the claimed failure of WRV “to object, in writing to the signing of the agreement by McMahon’s RV....”  
3 (Opening Brief, page 6, lines 3-4) Unfortunately, the specific textual argument and legal authority  
4 claimed in the brief leads to more confusion.<sup>33</sup>

5 89. The specific discussion addressing whatever significance this assertion by McMahon’s  
6 may have (that WRV “failed to object in writing to the signing of the agreement by McMahon’s”), begins  
7 with quotes of UCC section 2201(1) and (2).

8 90. UCC section 2201(1) mandates that, absent an exception, “... a contract<sup>34</sup> for the sale of  
9 goods for the price of ... \$500 or more is not enforceable... unless there is some writing sufficient to  
10 indicate that a contract for sale has been made between the parties and signed by the party<sup>35</sup> against whom  
11 enforcement is sought or by his or her authorized agent or broker.”

12  
13 <sup>32</sup> Any “failure to object” has a very limited effect. Even if UCC section 2201(2) applied, failure to object does not equate to  
14 an acceptance of an offer or other manifestation of assent that would form a contract. It merely takes away the defense of the  
15 statute of frauds from the party who received the confirmation and did not send written objection. That is, the receiving party  
16 would no longer have the statutory defense of, “Even if there was an oral contract, it is not enforceable because there is no  
17 writing signed by me.” UCC section 2201(2) provides: “Between merchants if **within a reasonable time a writing in  
confirmation of the contract and sufficient against the sender is received** and the party receiving it has reason to know its  
18 contents, it satisfies the requirements of subdivision (1) against the party **unless written notice of objection to its contents  
is given** within 10 days after it is received.” (Emphasis added.) Although irrelevant under these facts, the statutory time within  
19 which to give notice of objection is “10 days” not a “reasonable time” as asserted by McMahon’s.

20 <sup>33</sup> McMahon’s is misapplying the statute it is asserting should be applicable. McMahon’s “curious” assertion is that WRV  
21 “failed to object, in writing, to McMahon’s RV’s signing of the agreement”. (Emphasis added.) The basis for this  
22 contention is unknown as there is nothing in UCC section 2201(2) that refers to objecting to the other party’s “signing of the  
23 agreement”. It is possible that what was meant was that WRV failed to object to the “contents” of that writing, which  
24 purportedly stated that it was in “confirmation of the contract”. UCC section 2201(2) is premised on the assumption that a  
25 merchant who receives, from another merchant, a writing purporting to be in “confirmation” of a contract that had never been  
26 made would respond by a written objection to “its content” and the failure to do so is a tacit admission evidencing that the  
27 contract referred to in the “confirmation” was in fact made (but does not form the contract). What McMahon’s fails to explain,  
28 is why WRV would be required to object, or lose the statute of frauds defense, when the writing expressly states that there will  
be no agreement until it is signed by both parties and thus cannot be “in confirmation” of a previously formed contract. As  
stated in the prior footnote, even if it could be found that the “failure of WRV to object in writing” took away WRV’s statute of  
frauds defense, McMahon’s would still be required to prove that the agreement was formed, which cannot be done as the  
contract could not be found to be formed without finding that WRV signed the Dealer Agreement.

<sup>34</sup> The language of the statute, “a contract ... is not enforceable” indicates that the drafters assumed that there would be a  
contract already formed and that the section has nothing to do with formation. The contract, although in existence, will not be  
enforceable unless the standards established by the statute are met or an exception exists.

<sup>35</sup> Note that the statute is concerned only with the signature of “the party against whom enforcement is sought.” There is no  
requirement that both parties sign the writing to satisfy the statute of frauds. An existing contract can be enforced against a  
“signing party” even though the “signing party” cannot enforce the contract against the “non-signing party”. Under these facts,  
if there had been an oral contract formed (assuming there was no language in the Dealer Agreement requiring that it be signed  
by both to be valid), the fact that McMahon’s signed the document would make any previously formed oral contract  
enforceable against McMahon’s by WRV but, absent an exception, the oral contract would not be enforceable by McMahon’s  
against WRV. However, here the party-created requirement that both parties must sign the Dealer Agreement in order for there

1 91. As can be seen, if this statute is applicable to the "Dealer Agreement" between  
2 McMahon's and WRV, UCC section 2201(1) would require that the contract be signed by WRV  
3 regardless of whether the Vehicle Code required that the "written agreement" be signed.

4 92. UCC section 2201 is another legislatively-created writing requirement to the  
5 "enforceability" (not formation) of a contract. Absent a signed writing or an exception, an oral contract  
6 (or a contract formed by conduct), even though it existed, would not be enforceable. The statute would  
7 operate as an affirmative defense to the enforceability of the contract. If the defense were not timely  
8 asserted, the party having the defense would be deemed to have waived it and the oral contract, if one  
9 existed, would be enforceable notwithstanding the fact that the statute was not satisfied.

10 93. McMahon's citing and relying upon UCC section 2201(1) even by analogy operates  
11 against McMahon's assertion that the Dealer Agreement did not require that it be "signed" to constitute a  
12 "franchise". UCC section 2201(1), if it applied, would require that the "agreement", called for by the  
13 Vehicle Code, be evidenced by a writing signed by WRV for it to be enforceable against WRV.

14 94. In addition, none of the provisions of UCC section 2201 have anything to do with the  
15 **formation** of a contract. Contracts are commonly formed when one party makes an offer and the other  
16 manifests assent through an acceptance. Any exceptions recognized by UCC section 2201 relate solely to  
17 the absence of a signed writing needed to "enforce" a contract and are irrelevant as to issues of  
18 "formation" of a contract.

19 95. Establishing an exception to the statutory requirement of a signed writing evidencing the  
20 contract merely has the effect of defeating the "statute of frauds defense" and permits enforceability of the  
21 oral contract, if one exists. This means that, if an exception to the writing requirement can be established,  
22 the party wishing to enforce the oral contract can do so, but that party must still prove the existence  
23 (formation), as well as the terms of the oral contract sought to be enforced, which cannot be done through  
24 UCC section 2201. In addition, it is important to note that the exceptions established by UCC section  
25 2201 would NOT operate to satisfy or excuse the "party-created" requirement that there be a signed  
26 writing for the contract to be formed.

27  
28 to be a contract formed means that neither party can enforce anything against the other as there is no contract in existence until both sign.

1 96. McMahon's quotation of UCC section 2201(2) is as follows:

2 (2) Between merchants if within a reasonable time a writing in confirmation of the  
3 contract and sufficient against the sender is received and the party receiving it has reason to  
4 know its contents, it satisfies the requirements of subdivision (1) against the party *unless*  
5 *written notice of objection to its contents is given within 10 days after it is received.*  
(Italics in the brief.)

6 97. Although none of the quoted language or any part of UCC section 2201 has anything to do  
7 with formation of a contract, this is followed by a confusing discussion of "offer and acceptance" with  
8 reference to two cases that have nothing to do with a writing needed to form a contract or a writing  
9 needed to satisfy the statute of frauds (which are two different issues). It is true that an offer can be  
10 accepted by the conduct of the offeree which will then form a contract, but this is neither an "estoppel"  
11 issue (as one would expect to find discussed under the general caption), nor does it have any relationship  
12 to the language in UCC section 2201(2) as italicized by McMahon's. The language in italics determines  
13 when a party who has not signed a writing could "lose the statute of frauds defense". UCC section  
14 2201(2) merely states that the legal effect of a failure by the recipient to object to the confirmation is that  
15 the confirmation signed by the sender "satisfies the requirements of subdivision (1)" against the party who  
16 did not object. This makes the oral contract (if one existed) enforceable against the party who received  
17 the confirmation even though the receiving party did not sign a writing as required by UCC section  
18 2201(1).

19 98. The failure to object to a "confirmation of the contract" does not constitute an  
20 "acceptance" of an offer and does not result in formation of the contract. If there is no contract in  
21 existence, the failure to object to a "confirmation" does not create a contract. See also footnote 32. The  
22 party who sent the confirmation will still have the burden of proving that there was a contract formed,  
23 orally or by conduct. The failure of WRV to object, even if UCC section 2201(2) were applicable and  
24 satisfied, does not preclude WRV from requiring that McMahon's establish that the party-created  
25 requirement to form a contract was satisfied, that is that the Dealer Agreement was signed by both parties.

26 99. McMahon's concluding paragraph under this subheading reads as follows:

27 Although it is still disputed whether WRV ever executed either copy of the  
28 agreement mailed to McMahon's RV, the totality of the circumstances nonetheless  
warrants a finding that the agreement contemplated by the parties, reduced to a

1 writing, signed by McMahon's RV, and thereafter accepted by WRV should be  
2 held to be enforceable against WRV. (Emphasis added.)

3 100. This ambiguous conclusion under the ambiguous heading appears again to be asserting that  
4 the claimed "failure to object" by WRV, through the application of UCC section 2201(2), meant that the  
5 "agreement" was "signed by McMahon's" and "accepted by WRV", thus forming a contract.<sup>36</sup> Even if all  
6 of the elements of UCC section 2201(2) were met, failure of WRV to object would not result in "the  
7 agreement" being "accepted by WRV."

8 CONCLUSIONS AS TO MCMAHON'S FIRST SUBHEADING IN ITS SECOND CONTENTION THAT: "1.  
9 WRV FAILED TO OBJECT, IN WRITING, TO THE SIGNING OF THE AGREEMENT BY MCMAHON'S  
10 RV WITHIN A REASONABLE TIME OF RECEIVING SUCH"

11 101. There are several problems with the contentions of McMahon's (whatever they may be)  
12 under this first subheading as UCC section 2201(2) is being improperly asserted (directly or by analogy)  
13 for the following reasons:

14 

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15 <sup>36</sup> It is possible that McMahon's is attempting to make an argument that WRV had made an "acceptance by silence", which  
16 would apply to the issue of "formation" and not the statute of frauds. This would require a finding that the Dealer Agreement  
17 when signed by McMahon's and mailed to WRV constituted an offer by McMahon's. Although this is likely the correct  
18 characterization (as was contended by WRV for a different purpose), this contention was rejected by McMahon's in its Reply  
19 Brief at page 3, lines 24-25, where it is stated: "Respondent incorrectly alleges that the Dealer Sales and Service Agreement  
20 ('Dealer Agreement') signed by McMahon's RV constituted an 'offer' to WRV." Although "acceptance by silence" is  
21 recognized as a possible way for an offeree (here WRV) to manifest an intent to accept and form a contract, it is rarely found to  
22 exist. See *C.L. Wold v. League of The Cross of The Archdiocese of San Francisco, Incorporated*, 114 Cal.App. 474 (1931),  
23 where the court stated, "Ordinarily mere silence or inaction in the face of the offer of a contract cannot amount to an  
24 acceptance. The circumstances must be such as to impose upon the offeree a duty to speak if he is to be held bound to a  
25 contract by remaining mute. 'Silence alone does not give consent, even by estoppel, for there must not only be the right, but the  
26 duty, to speak before the failure so to do can estop a person from afterward setting up the truth.' (13 C.J., p. 276; *Royal Ins. Co.*  
27 *v. Beatty*, 119 Pa. 6 [4 Am. St. Rep. 622, 12 A. 607]; *More v. New York Bowery Fire Ins. Co.*, 130 N.Y. 537 [29 N.E. 757];  
28 *Bank of Buchanan County v. Continental Nat. Bank of Los Angeles*, 277 Fed. 385, 390; *In re Baum's Estate*, 274 Pa. 283 117  
A. 684.)" The court then indicates that one of the situations, which seems to be right on point here, in which silence can be  
found to operate as an acceptance to form a contract is when a sales agent solicits an order for his principal from the plaintiff,  
with the order subject to confirmation by the principal. The principal may then be under a duty to reject the offer within a  
reasonable time or be found to have accepted by silence. However, McMahon's not only has not asserted this as an exception  
to the "party-required" signed writing to form a contract, but this possibility is inconsistent with the assertion quoted above  
from McMahon's brief. Thirdly, the un-refuted declaration of Harry Collier, a then-employee of WRV, stated that he had  
discussions with a then-employee of McMahon's, Michael Weiss, who was actively involved in trying to obtain the franchise  
for McMahon's, "virtually every day between ... May 8<sup>th</sup> and June 1<sup>st</sup> 2005. Those discussions repeatedly addressed the  
status of my attempts to secure Mr. Doyle's signature on the Dealer Agreement. Mr. Weiss was continuously pushing me to  
facilitate McMahon's receipt of the Alpine Coach product line in Colton, and I worked hard, albeit unsuccessfully, to  
accomplish that." (Collier Declaration, page 4, lines 2-8). Therefore, based on this Declaration, McMahon's would have  
imputed notice and knowledge of the fact that Mr. Doyle had not signed the Dealer Agreement so that McMahon's could not  
reasonably claim there was "silence" on the part of WRV that caused McMahon's to believe the "offer" as contained in the  
Dealer Agreement had been "accepted" by the silence of WRV. Therefore, the "exception" of "acceptance by silence" would  
not be provable by McMahon's to show that there was an "agreement" formed.

- 1     ▪ Under the law, application of UCC section 2201(2) does not result in an acceptance to form a  
2     contract. The only effect of the failure of a party to object to a confirmation is to “satisfy” the  
3     statute of frauds that is take away the statute of frauds defense from the person who received the  
4     confirmation. UCC section 2102(2) could not be used as an exception to the party-created  
5     requirement of a signed writing for the formation of the contract to find an “agreement” as  
6     required by Section 331.
- 7     ▪ Under the facts, UCC section 2201(2) has no application here at all as the Dealer Agreement that  
8     was sent back to WRV was not a “confirmation” of a contract. Although UCC section 2201(2)  
9     could operate as an exception to the statutory requirement of a signed writing, this would be so  
10    only if what was sent to WRV was a “writing in confirmation of the contract”. The Dealer  
11    Agreement, which is the writing that was sent to WRV, could not be interpreted as a  
12    “confirmation” of a contract, as, on its face, it states that there will be no contract until it is signed  
13    by both parties. Therefore, the facts would not result in UCC section 2201(2) operating as an  
14    exception to the UCC requirement that the writing be signed by WRV or to the Vehicle Code  
15    requirement that the agreement be “written”.

16       102. In summary, (1) UCC section 2210(2) does NOT operate as an exception to the “party-  
17    created” requirement of a signed writing for the FORMATION of the contract; (2) under these facts,  
18    UCC section 2201(2) does not apply as an exception to satisfy the legislatively-created requirement  
19    imposed by UCC section 2201(1) of a signed writing needed to enforce a contract (if one existed); and (3)  
20    UCC 2201(2) would not operate as an exception to satisfy the requirement imposed by the Vehicle Code  
21    that the agreement be “written”.

22       MCMAHON’S SECOND SUBHEADING IN ITS SECOND CONTENTION IS THAT: “2. MCMAHON’S RV  
23       REASONABLY CHANGED ITS POSITION BASED UPON THE REPRESENTATIONS MADE TO IT BY  
24       WRV”

25       103. The argument under this subheading, although also ambiguous, at least asserts some of the  
26    elements necessary for the application of “equitable estoppel”. In the concluding paragraph of this  
27    subheading, McMahon’s states: “Consequently, equity demands that WRV should be estopped from now  
28    alleging that the disputed agreement is unenforceable.” (Reply Brief, page 8, lines 11-12)

104. The language used refers to an “agreement” and that WRV should be estopped from

1 asserting it is “unenforceable”. Therefore, it is assumed that McMahon’s is addressing estoppel as an  
2 exception to allow an oral contract (if one exists) to be enforceable despite the lack of a legislatively-  
3 required signed writing (the statute of frauds issue). It is assumed that McMahon’s is not addressing  
4 whether estoppel would apply as an exception to the party-created requirement that the Dealer Agreement  
5 be signed by both McMahon’s and WRV to form the contract (the formation issue). If McMahon’s were  
6 addressing the application of estoppel to the formation issue, one would expect the contention to be that  
7 “... WRV should be estopped from now alleging that there was no agreement”, rather than that the  
8 “agreement is unenforceable.”

9 105. Although not cited by McMahon’s or WRV, a leading case in California addressing the  
10 concept of estoppel and the statute of frauds as enacted in UCC section 2201 is *Allied Grape Growers v.*  
11 *Bronco Wine Company* (1988) 203 Cal. App. 3d 432.

12 106. The court in *Allied Grape* recognized the importance of legislative intent by first  
13 specifically referring to the existence of UCC section 1103(b) which would , “Unless displaced by the  
14 particular provisions” of the UCC, not only permit but require the application of common law principles,  
15 including estoppel, to supplement the provisions of the UCC.<sup>37</sup>

16 107. In its analysis of the application of estoppel being used to avoid the writing requirement  
17 imposed by UCC section 2201, the court stated:

18 It [estoppel] does not nullify the statute of frauds because the elements of equitable  
19 estoppel must still be proven.

20 In California, the doctrine of estoppel is proven where one party suffers an  
21 unconscionable injury if the statute of frauds is asserted to prevent enforcement of **oral**  
22 **contracts**. (*Irving Tier Co. v. Griffin* (1966) 244 Cal.App.2d 852, 863, 864 [53 Cal.Rptr.  
23 469].) Unconscionable injury results from denying enforcement of a contract after one  
24 party is induced by another party to seriously change position **relying upon the oral**  
25 **agreement**. It also occurs in cases of unjust enrichment. (*Monarco v. Lo Greco*  
26 (1950) 35 Cal.2d 621, 623-624 [220 P.2d 737].) (Emphasis added.)

27 108. It is noted that the court makes reference to the fact that the party asserting estoppel must  
28 prove:

<sup>37</sup> UCC section 1103 provides: “Unless displaced by the particular provisions of this code, the principles of law and equity,  
including ...estoppel...shall supplement its provisions.” (Emphasis added.)

- 1 A. A serious change of position in reliance **upon the oral contract or oral agreement**; and  
2 B. Unconscionable injury [to McMahon's] or unjust enrichment [to WRV].

3 109. The court also noted that the jury had been instructed that it had to find all of the elements  
4 of a contract (which would include that a contract was formed) before damages could be awarded for the  
5 claimed breach of contract.

6 **THIS MEANS THAT FOR ESTOPPEL TO BE RELEVANT THE FIRST QUESTION THAT MUST BE ASKED**  
7 **IS, "DID AN ORAL CONTRACT (OR ORAL AGREEMENT) EXIST?"**

8 110. The previous Proposed Order already before the Board determined that it could not be  
9 established that the parties had entered into an oral contract (or any contract) as their manifested intent  
10 was that there would be no contract until the Dealer Agreement was signed by both parties.

11 111. As to "representations" made by WRV, McMahon's asserts that, "...it is beyond dispute  
12 that McMahon's RV changed its position based upon the various representations made by WRV with  
13 regards to its intent to enter into a franchise agreement with McMahon's RV and **its subsequent**  
14 **acceptance of McMahon's RV as a franchisee.**" (Emphasis added.) (Opening Brief, page 8, lines 1-3).

15 112. The discussion above found that there could be no "subsequent acceptance of McMahon's  
16 RV as a franchisee" by failing to object to the content of the Dealer Agreement when it was returned to  
17 WRV, nor was there conduct sufficient to result in an agreement. The prior Proposed Order before the  
18 Board also determined that there was no "acceptance" that resulted in McMahon's becoming a franchisee  
19 as this would require that the Dealer Agreement be signed by WRV, and further that there was insufficient  
20 evidence to find there were representations by any employee of WRV that the Dealer Agreement had been  
21 signed.

22 113. It was determined that there are insufficient facts alleged, which, if proven would establish  
23 an oral contract (or an agreement arising from conduct.)

24 **WAS THERE A SERIOUS CHANGE OF POSITION BY MCMAHON'S IN RELIANCE UPON THE CLAIMED**  
25 **ORAL CONTRACT?**

26 114. There are two aspects to this. One is that the change of position must be "in reliance" upon  
27 communications from WRV and the other is that the extent of the reliance must be "serious". (See *Allied*  
28 *Grape*, supra) As to reliance by McMahon's, it is alleged that McMahon's "...ordered three extremely

1 expensive motorhomes from WRV.” (Opening Brief, page 8, lines 3-5) As was previously found, these  
2 motorhomes were ordered prior to the Dealer Agreement being forwarded to McMahon’s so they could  
3 not have been purchased in reliance on the unsigned Dealer Agreement sent to McMahon’s. Further, to  
4 claim they were purchased in reliance upon some prior oral “franchise agreement” would be inconsistent  
5 with the contention that when Mr. McMahon signed the Dealer Agreement and put it in the mail back to  
6 WRV, that Mr. McMahon “understood that McMahon’s RV was thereafter a WRV franchisee.”  
7 (Emphasis added.) (Opening Brief, page 4, lines 16-18). It could not be found that the purchase of the  
8 motorhomes was done in reliance upon an oral agreement that McMahon’s was a franchisee.

9 115. As to the second element, it cannot be found that the purchase of three motorhomes by a  
10 motorhome dealer for resale was a “serious change of position” sufficient to satisfy this requirement of  
11 estoppel. Nor would such a purchase evidence a franchise as the uncontested evidence presented by way  
12 of declarations was that any dealer could purchase new motorhomes from WRV even though they were  
13 not franchisees.

14 **WAS THERE UNCONSCIONABLE INJURY TO MCMAHON’S OR UNJUST ENRICHMENT TO WRV?**

15 116. The allegations of McMahon’s do not support a possible finding that McMahon’s suffered  
16 “unconscionable injury” as a result of its claimed reliance upon the claimed contract. In *Allied Grape*, the  
17 unconscionable injury to the plaintiff included the fact that 850 tons of perishable grapes wound up  
18 “rotting in the fields” as the buyer refused to accept them and there was no ability or opportunity to sell  
19 them to anyone else.

20 117. The only claimed significant reliance that could have resulted in injury to McMahon’s was  
21 in connection with the purchase of the three motorhomes. However, two of these motorhomes were re-  
22 purchased by WRV and the third was sold by McMahon’s with no facts to show if this sale was at a profit  
23 or a loss. Although there may have been some expenses incurred by McMahon’s in connection with these  
24 purchases and re-sales, there are insufficient allegations to show that what injury there may have been to  
25 McMahon’s was “unconscionable” or that there was any “unjust enrichment” to WRV. The facts here are  
26 a far cry from those in *Allied Grape* where the seller, seeking to enforce a proven oral contract and apply  
27 estoppel to overcome the statute of frauds defense of the lack of a signed contract, suffered the loss of 850  
28 tons of grapes that rotted in the vineyards as they could not be re-sold after the buyer’s breach of the oral

1 contract.

2 118. Many courts which apply estoppel to enforce a contract within the statute of frauds will  
3 look to the more specific factors listed in the Restatement (Second) of Contracts (1981), ("Restatement")  
4 to determine if it is appropriate to do so.

5 119. Section 139 of the Restatement provides:

6 [a] promise which the promisor should reasonably expect to induce action or  
7 forbearance on the part of the promisee or a third person and which does induce the action  
8 or forbearance is **enforceable notwithstanding the Statute of Frauds if injustice can be  
9 avoided only by enforcement of the promise.** (Emphasis added.)

10 120. The Restatement then enumerates what it calls "circumstances" which are "significant" in  
11 "determining whether injustice can be avoided only by enforcement of the promise". These factors are:

- 12 (a) the availability and adequacy of other remedies, particularly cancellation and  
13 restitution;
- 14 (b) the definite and substantial character of the action or forbearance in relation to the  
15 remedy sought;
- 16 (c) **the extent to which the action or forbearance corroborates evidence of the  
17 making and terms of the promise, or the making and terms are otherwise  
18 established by clear and convincing evidence;** (Emphasis added.)
- 19 (d) the reasonableness of the action or forbearance;
- 20 (e) the extent to which the action or forbearance was foreseeable by the promisor.  
21 (Restatement (Second) of Contracts sec. 139(2))

22 121. Looking at just Restatement 139(2)(c) above, there was not "clear and convincing  
23 evidence" that there was a promise made by WRV that McMahan's was a franchisee; there was no "clear  
24 and convincing evidence" that the parties had agreed on the "terms" of the claimed franchise; nor does the  
25 action of McMahan's in purchasing three motorhomes corroborate either the making or the terms of the  
26 claimed franchise. The allegations of McMahan's cannot be interpreted as leading to "clear and  
27 convincing evidence" of the existence of a promise or the terms of a promise by WRV (or as required by  
28 the court in *Allied Grape*, an oral contract) sufficient for the application of estoppel.

122. In *Allied Grape*, both the formation and the terms of the oral contract had been clearly  
established. Allied's reliance on the oral contract was definite and substantial (Allied forbore from selling  
the grapes to third parties in reliance on the oral contract which obligated Bronco Wine to purchase them);

1 by the time Bronco Wine repudiated the oral contract the grapes could not be re-sold as all the other  
2 wineries were already operating at capacity; and Bronco Wine had full knowledge of all of the facts. As  
3 the grapes wound up rotting in the vineyard, injustice could be avoided only by enforcing the oral  
4 contract.

5 **CONCLUSIONS AS TO McMAHON'S SECOND SUBHEADING IN ITS SECOND**  
6 **CONTENTION: "2. McMAHON'S RV REASONABLY CHANGED ITS POSITION BASED**  
7 **UPON THE REPRESENTATION MADE TO IT BY WRV."**

8 **WHETHER ESTOPPEL SHOULD BE APPLIED TO THE LEGISLATIVELY- IMPOSED REQUIREMENT OF A**  
9 **SIGNED WRITING AS CONTAINED IN UCC SECTION 2201."**

10 123. The law is clear that, under appropriate circumstances, the principle of estoppel can be  
11 used as an exception to the writing requirement imposed by UCC section 2201 which could result in the  
12 enforceability or limited enforceability of an oral contract if one existed.

13 124. However, it is determined that there are insufficient facts alleged to show that an oral  
14 contract or other agreement was formed between the parties as their intent was that there not be a contract  
15 until both had signed the Dealer Agreement.

16 125. Further, it is determined that McMahon's assertions are not sufficient to satisfy the  
17 requirements for application of estoppel for the following reasons:

- 18 ■ If there was an oral contract that was breached by WRV, McMahon's has not shown that it  
19 could not recover in restitution to the extent of any unjust enrichment to WRV.  
(Restatement, section 139(2)(a))
- 20 ■ WRV has re-purchased two of the motorhomes which means there has been a cancellation  
21 of their sale and restitution of their purchase price to McMahon's. The third motorhome  
22 was sold by McMahon's, with no indication that it was not to a retail customer.  
(Restatement, section 139(2)(a))
- 23 ■ There are insufficient allegations to establish a "definite and substantial" change of  
24 position by McMahon's. (Restatement, section 139(2)(b))
- 25 ■ The change of position alleged by McMahon's is not sufficiently corroborative to establish  
26 the making of the contract, especially in light of the express language in the Dealer  
27 Agreement negating the existence of a contract. (Restatement, section 139(2)(c))

- 1           ▪ The change of position alleged by McMahon's is not sufficiently corroborative to establish
- 2           the terms of the contract, especially in light of the dispute as to the minimum quantity to be
- 3           purchased by McMahon's. (Restatement, section 139(2)(c))
- 4           ▪ Neither the making nor the terms of the contract have been "otherwise established by clear
- 5           and convincing evidence". (Restatement, section 139(2)(c))
- 6           ▪ McMahon's has not offered sufficient evidence to show that it was reasonable for it to
- 7           change position on a contract that it knew would not exist until it was signed by WRV.
- 8           (Restatement, section 139(2)(d))
- 9           ▪ McMahon's has not offered sufficient evidence to show that it was foreseeable by WRV
- 10          that McMahon's would change position when McMahon's knew, or should have known,
- 11          there was no contract formed. (Restatement, section 139(2)(e))
- 12          ▪ Unlike the facts as they existed in *Allied Grape*, McMahon's allegations do not show:
- 13            1.       A serious change of position in reliance upon an oral agreement, promise or
- 14            representation; or,
- 15            2.       Unconscionable injury to McMahon's; or
- 16            3.       Unjust enrichment to WRV.

17           **CONCLUSION AS TO WHETHER ESTOPPEL SHOULD BE APPLIED TO THE LEGISLATIVELY**

18           **IMPOSED REQUIREMENT OF A SIGNED WRITING AS CONTAINED IN UCC SECTION 2201**

19           126. Although estoppel is a recognized exception to the statute of frauds, the principle of

20           estoppel would not be applicable under the facts as alleged by McMahon's to operate as an exception to

21           the legislatively established requirement of a signed writing as contained in UCC section 2201.

22           **WHETHER ESTOPPEL SHOULD BE APPLIED TO THE LEGISLATIVELY IMPOSED REQUIREMENT**

23           **OF A "WRITTEN AGREEMENT" AS STATED IN VEHICLE CODE SECTION 331**

24           127. This legislatively imposed requirement of the Vehicle Code is more general in that it states

25           only that there be a "written agreement" as compared to UCC section 2201(b), which requires "...some

26           writing sufficient to indicate that a contract for sale has been made between the parties and signed by

27           the party against whom enforcement is sought or by his or her authorized agent or broker." (Emphasis

28           added.) As noted above, this UCC section expressly requires that the writing be "signed" (in this case by

1 WRV), whereas Section 331 does not expressly require that the “written agreement” be signed. However,  
2 McMahon’s has relied upon UCC section 2201 in an attempt to find exceptions to the requirement of a  
3 “signed writing” and has not stated any reasons as to why the Vehicle Code language of “written  
4 agreement” should be interpreted to exclude the contract at issue from the requirements of UCC section  
5 2201 (or why UCC section 2201 should not be at least used in interpreting the meaning of “written  
6 agreement”.)

7 128. Unlike UCC section 2201, there are no cases which have applied the concept of estoppel to  
8 the requirement that a “franchise” under Section 331 be evidenced by a “written agreement”. Neither has  
9 any authority been cited comparable to UCC section 1103(b) which would evidence the legislative intent  
10 of expressly allowing the importation of common law principles such as estoppel to supplement the  
11 Vehicle Code, which in this case would have the effect of abrogating the express language of the Vehicle  
12 Code requiring a “written agreement”.

13 129. Before the court in *Allied Grape* allowed estoppel to be used as an exception to the UCC  
14 section 2201 requirement of a signed writing, the court made two points. The first was that it was the  
15 legislature itself that opened the door for the use of estoppel to avoid its own requirement of a signed  
16 writing as mandated by UCC section 2201. As stated above, this was because UCC section 1103  
17 expressly allowed the use of estoppel to supplement the other provisions of the UCC. The other point  
18 made by the court was that although estoppel could be applied to avoid the requirement of the UCC that  
19 there be a signed writing to enforce the oral contract that it was also necessary that the oral contract be  
20 found to exist.

21 130. Here, no showing has been made of statutory authority for the application of estoppel to  
22 avoid Section 331’s requirements of a “written agreement” and there has not been sufficient evidence  
23 offered that would establish an oral contract or oral agreement between McMahon’s and WRV.

24 131. If estoppel were permitted to be applied to find an exception to the Vehicle Code  
25 requirements of a “written agreement”, it would result in allowing McMahon’s to enforce an “oral  
26 franchise” or a “franchise implied from the conduct of the parties” or allowing a “franchise” to be found  
27 even though there is neither an “agreement” nor is it “written”.

28 132. To find a “franchise” despite the absence of a “written agreement” can cause difficulties

1 into the future. There are many situations in which ascertaining the “terms” of a franchise are critical for  
2 purposes of application of the Vehicle Code and resolving protest disputes. It is difficult enough to  
3 determine what all of the terms may be even with a written agreement supplying the “core” terms. In  
4 addition to the evidentiary and cautionary concerns mentioned above, the legislative requirement of a  
5 “written agreement” was likely in recognition of the need for some definitive basic source for the  
6 respective obligations and rights of the parties.<sup>38</sup> To allow estoppel to result in an “oral franchise” would  
7 result in greater difficulty than now exists in establishing the “terms” of a franchise, or, as is the case here,  
8 serving the evidentiary function of resolving even the “simple” question of whether a “franchise” exists.

9 133. It is noted that UCC section 2201 clearly recognizes that there can be an oral contract that  
10 is valid in the eyes of the law but merely that the “contract is not enforceable” unless certain requirements  
11 are met or exceptions established. In fact, if one of the parties does not timely raise the defense of the  
12 statute of frauds, it will be deemed waived and the oral contract can and will be enforced as though there  
13 were no statute requiring that the contract be evidenced by a signed writing. However, the Vehicle Code  
14 states that “A franchise is a written agreement...”. (Emphasis added.) Unlike the UCC, there is no  
15 language in the Vehicle Code that states that an “oral franchise is not enforceable” unless it is “written”.  
16 Also, unlike UCC section 2201, in which the legislature enacted specific exceptions to the requirement of  
17 a signed writing to allow the oral contract to be enforced if it existed, there are no specific exceptions in  
18 Vehicle Code section 331 to the requirement that “A franchise is a written agreement...”

19 ///

20 ///

21 \_\_\_\_\_  
22 <sup>38</sup> For example, the importance of being able to ascertain the terms of the franchise is evident in Section 3071 which provides  
23 in part: “In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue  
24 a franchise of a dealer of new recreational vehicles, the board shall take into consideration the existing circumstances,  
25 including, but not limited to, all of the following:

26 ...

27 (e) Whether the franchisee has adequate new recreational vehicle sales and, if required by the franchise, service facilities,  
28 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.

(f) Whether the franchisee fails to fulfill the warranty obligations agreed to be performed by the franchisee in the  
franchise.

(g) The extent of franchisee's failure to comply with the terms of the franchise.  
(Emphasis added.)

1 CONCLUSION AS TO WHETHER ESTOPPEL SHOULD BE APPLIED TO THE LEGISLATIVELY  
2 IMPOSED REQUIREMENTS OF A "WRITTEN AGREEMENT" AS STATED IN VEHICLE CODE  
3 SECTION 331

4 134. It is concluded that the term "written agreement" as contained in the Vehicle Code should  
5 not be interpreted to allow an "oral agreement" to constitute a "franchise" nor should an "agreement  
6 implied by conduct" be sufficient to constitute a "franchise".

7 135. It is also concluded that neither estoppel nor any of the other legally recognized exceptions  
8 to the usual statute of frauds provisions should be permitted to apply to the Vehicle Code requirements  
9 that there be a "written agreement".

10 136. However, even if estoppel or some other exceptions could be applicable (by analogy or  
11 directly) to the "written agreement" required by the Vehicle Code, McMahon's allegations are insufficient  
12 to justify application of the exceptions (including estoppel) to the Vehicle Code requirements of a  
13 "written agreement".

14 WHETHER ESTOPPEL SHOULD BE APPLIED TO THE PARTY-IMPOSED REQUIREMENT THAT  
15 THERE BE A SIGNED WRITING IN ORDER FOR THE CONTRACT TO BE FORMED

16 137. Although it is possible to interpret McMahon's arguments under this subheading as  
17 relating to formation, it is unclear if that was McMahon's intent. The subheading reads: "2. McMahon's  
18 RV reasonably changed its position based upon the representations made to it by WRV."

19 138. The arguments asserted by McMahon's are general, make vague references to estoppel,  
20 and conclude the arguments under this subheading by stating, "Consequently, equity demands that **WRV**  
21 **should be estopped from now alleging that the disputed agreement is unenforceable.**" (Emphasis  
22 added.) (Reply Brief, page 8, lines 11-12)

23 139. The "disputed agreement" as used by McMahon's here could have two interpretations  
24 which are:

25 A. The "disputed agreement" could mean an oral agreement which McMahon's claims exists  
26 (which would raise the statute of frauds issue that has already been discussed above); or

27 B. The "disputed agreement" could mean the "Dealer Agreement", with estoppel being  
28 applied to "create" a contract even if there is no signature in behalf of WRV. As indicated, this latter  
interpretation would involve issues of formation.

1 140. Because the statute of frauds/estoppel issues have been discussed above, the following  
2 discussion will relate to whether estoppel could and should be applied to the formation issue, B., above.

3 141. There is no dispute that California also recognizes the application of estoppel to make  
4 promises enforceable even though no contract has been formed. This is done in accordance with the  
5 theory contained in Restatement section 90.<sup>39</sup> This is similar to the application of estoppel to allow  
6 enforcement of an oral contract that is subject to the statute of frauds, as contained in Restatement section  
7 139, discussed above.

8 142. However, recognizing the existence of the principle of estoppel does not mean that facts  
9 exist that would justify its application, or even that the issue has been sufficiently raised by a prima facie  
10 showing or allegation that such facts exist.

11 143. The analysis of whether there are sufficient allegations of estoppel to enforce a promise  
12 even though no contract was formed will focus upon the elements generally needed for Restatement  
13 section 90.

14 144. These elements needed for the application of estoppel are:

15 A. A promise was made; (It is noted that in most cases the promise must be clear and  
16 unambiguous in its terms.) (See footnote 39)

17 B. Under circumstances where it was foreseeable that the promisee (McMahon's) will rely;

18 C. The promisee does in fact reasonably rely (by change of position);

19 D. The promisee suffers detriment (harm – which could include economic loss or lost  
20 opportunity and some jurisdictions require the harm be substantial) as a result of the reliance;

21  
22 <sup>39</sup> The Restatement Second of Contracts, section 90, subdivision (1) provides as follows concerning claims for promissory  
estoppel:

23 A promise which the promisor should reasonably expect to induce action or forbearance on the part of  
24 the promisee or a third person and which does induce such action or forbearance is binding if injustice  
25 can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as  
justice requires.

26 California has adopted the Restatement's view on promissory estoppel claims. (*Kajima/Ray Wilson v. Los Angeles County*  
*Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310 (*Kajima*)). The elements of a promissory estoppel claim are  
27 "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance  
must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." (Emphasis  
28 added.) (*Laks v. Coast Federal Savings & Loan Assn.* (1976) 60 Cal.App.3d 885, 890.)

1 E. Injustice can be avoided only by enforcing the promise; and,

2 F. The remedy may be limited, as justice requires.

3 145. However, although the estoppel concept is recognized by California to make a promise  
4 enforceable even though there is no contract (oral or otherwise), as will be discussed below, it would not  
5 be appropriate to apply it here as the elements of estoppel that would be needed are non-existent under the  
6 facts as alleged by McMahon's.

7 146. It must be remembered that it has already been determined that the parties had clearly  
8 manifested their intent that there be no contract until the writing was signed by both McMahon's and  
9 WRV.

10 147. For estoppel to overcome this expressly manifested intent of the parties as to when and  
11 how a contract would be formed, McMahon's would have to prove:

12 A. WRV made a promise or representation to McMahon's;

13 B. That such promise or statement was made under circumstances that it was foreseeable that  
14 McMahon's would rely upon it;

15 C. That McMahon's did reasonably rely by changing position (incurring costs or losing  
16 opportunities); and

17 D. That injustice can be avoided only by enforcing the promise relied upon.

18 If these elements are found, then a remedy can be limited as justice requires. This last sentence means  
19 that the deciding body need not treat the "promise" as though it resulted in a contract or in this case that it  
20 resulted in a "franchise".

21 148. As previously found, McMahon's would **not** be able to establish that:

22 A. There was a promise by WRV to grant a franchise without the need for a signature in  
23 behalf of WRV;

24 B. There were representations to McMahon's by WRV employees that the Dealer Agreement  
25 had been signed by Mr. Doyle;

26 C. There was reliance by McMahon's resulting from the mailing by WRV of the unsigned  
27 Dealer Agreements to McMahon's (inconsistently with McMahon's claims, the three motorhomes could  
28 not have been purchased in reliance upon this act of WRV as they were purchased prior to the preparation

1 of the unsigned Dealer Agreements);

2 D. It was foreseeable to WRV that McMahon's would rely upon being a franchisee prior to  
3 the Dealer Agreement being signed by WRV;

4 E. The claimed reliance by McMahon's on its belief that it was or would be a franchisee prior  
5 to the Dealer Agreement being signed by WRV was reasonable; and

6 F. Injustice can be avoided only by finding McMahon's to be a "franchisee".

7 CONCLUSION AS TO WHETHER ESTOPPEL SHOULD BE APPLIED TO THE PARTY-IMPOSED  
8 REQUIREMENT THAT THERE BE A SIGNED WRITING IN ORDER FOR THE CONTRACT TO BE  
9 FORMED

10 149. Although estoppel can be used to make a promise enforceable, even though there was no  
11 contract, it is determined that the factual elements needed for the application of estoppel cannot be  
12 established and therefore estoppel could not be applied to overcome the party-created requirement to  
13 formation that there be the signatures of both parties on the Dealer Agreement before it was effective as a  
14 franchise. Thus, estoppel cannot be used here as an exception to the Vehicle Code requirement that there  
15 be an "agreement".

16 MCMAHON'S THIRD CONTENTION IS THAT: "3. WRV PERFORMED UNDER THE DISPUTED  
17 WRITTEN AGREEMENT." (OPENING BRIEF, PAGE 8, LINE 13)

18 150. Again it is difficult to determine the focus of this subheading. It is under the general  
19 heading of "estoppel" and concludes with the contention that "Consequently WRV should be estopped  
20 from now claiming that a franchise relationship between the parties does not exist." Opening Brief, page  
21 5, lines 12-13, page 9, lines 6-7) However, nothing asserted under this third heading, that "WRV  
22 performed under the disputed written agreement", has anything to do with estoppel. (Emphasis added.)  
23 Estoppel would require some change of position by McMahon's, not WRV.

24 151. McMahon's assertions start with the contention that a contract was **formed** by the conduct  
25 (performance) of WRV (the "formation issue"), but they conclude with a case that assertedly stands for  
26 the proposition that an oral contract for the sale of goods "was enforceable because part performance  
27 satisfied statute of frauds (sic)." (Opening Brief, page 9, lines 1-2) As stated above, formation of a  
28 contract, and the enforceability of an existing contract required by a statute to be in writing, are different  
issues.

1 STARTING WITH THE FORMATION ISSUE - ANALYSIS OF McMAHON'S CONTENTION THAT THE  
2 CONTRACT WAS FORMED AS "WRV PERFORMED UNDER THE DISPUTED WRITTEN  
3 AGREEMENT"

4 152. The citation to and quotation of Civil Code section 1584 is of no help because there is no  
5 explanation as to how its language is relevant to this fact situation. The Civil Code quotation is  
6 "[p]erformance of the conditions of a proposal, or the acceptance of the consideration offered with a  
7 proposal, is an acceptance of the proposal." (Opening Brief, page 8, line 16-18) If anything, this Civil  
8 Code section would indicate that no acceptance occurred as the "conditions of the proposal" were that  
9 there would be no valid Dealer Agreement until it was signed by both parties, and McMahon's could not  
10 establish that it was signed by WRV.

11 153. McMahon's citation to and quotation of UCC section 2204 is likewise of no help. The  
12 quotation from UCC section 2204(3) states:

13 (3) Even though one or more terms are left open a contract for sale does not fail for  
14 indefiniteness if the parties have intended to make a contract and there is a reasonably  
15 certain basis for giving an appropriate remedy. (Emphasis added.)

16 154. This section would permit the enforcement of a contract even if some of the terms were left  
17 open but only "if the parties have intended to make a contract".

18 155. It is clear here that the parties had not "intended to make a contract" until both had signed  
19 the Dealer Agreement. As to the "terms", there was disagreement between WRV and McMahon's as to  
20 the minimum stocking number, but that was not a term to be "left open". The quarterly minimum  
21 stocking quantity stated in the Dealer Agreement was 5 units. Because Mr. Doyle of WRV wanted a  
22 higher minimum stocking number, the dispute over the stocking number minimum quantity was a term  
23 that prevented formation of a contract as neither side "intended to make a contract" (UCC section  
24 2204(3)) unless one party's minimum quantity was agreed to by the other.

25 156. As to McMahon's general position, there is no doubt that a contract can be formed by the  
26 conduct of the parties if the conduct is a sufficient manifestation of intent to be bound. However, as  
27 discussed in the early part of this document, the express manifestations of the parties as to when the  
28 contract will be formed will generally control. The conduct referred to by McMahon's earlier in its  
Opening Brief pertained to the purchase of three motorhomes. This was done prior to the Dealer

Agreement being signed by Mr. McMahon and it was determined that there was no franchise created as of

1 that time as both parties knew and intended that any franchise would result only upon the signing of a  
2 Dealer Agreement, which, when prepared, expressly required the signatures of both parties for it to be  
3 "valid".

4 157. The conduct referred to by McMahon's in this latter part of the brief refers to payment by  
5 WRV for warranty services performed by McMahon's. However, as stated by WRV, "The parties agreed  
6 with Judge Skrocki that the briefing ordered by the Board would be limited to the existing record. The  
7 record in this case is devoid of any evidence or mention of 'performance' by WRV (or McMahon's)  
8 following the May 8, 2005 signing of the Dealer agreement by McMahon's, the last act by either party."  
9 (WRV Reply Brief, Page 6; lines 15-18). McMahon's also asserts in its Reply Brief that "... the parties  
10 stipulated that no additional declarations or evidence would be allowed at this juncture." (McMahon's  
11 Reply Brief, page 5, lines 2-3).

12 158. Therefore, the conduct of the parties as to the performance of warranty repairs and  
13 payment for warranty claims will not be considered. However, even if it were, the mere fact that WRV  
14 may have consented to allow McMahon's to perform warranty service does not by itself constitute a  
15 "franchise", even if such authorization to perform warranty repairs and service were in a signed writing.  
16 Such a conclusion is foreclosed by Section 331(b) which states:

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

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

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

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

25 159. As all three of the above apply to McMahon's, the performance of and payment for  
26 warranty repairs and service could not evidence a "franchise" as it would be in direct derogation of  
27 Section 331 (b), which states "The term 'franchise' does not include..." such a situation. (Emphasis  
28 added.)

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1 WHETHER THE ALLEGED PERFORMANCE BY WRV WOULD ALLOW THE CONTRACT TO BECOME  
2 ENFORCEABLE BECAUSE PART PERFORMANCE SATISFIED STATUTE OF FRAUDS (SIC)" (OPENING  
3 BRIEF, PAGE 9, LINE 1-2)

4 160. This is an attempt by McMahon's to establish what is called the "part performance"  
5 exception to the statute of frauds. If properly applied, it would permit limited enforceability of an oral  
6 contract, if one existed.

7 161. Again, there is no specific analysis of or attempt to apply this principle to the facts before  
8 the Board. McMahon's brief at this point contains the following:

9 See also, *Samuels v. L.A. Mattress Co.* (App. 1951) 102 Cal.App.2d 827, 829 (Where the  
10 preponderance of evidence supported findings that buyer accepted delivery of five bales of  
11 cotton linters, and that such was part performance of contract to buy 50 bales of cotton  
12 linters for price exceeding \$500, the contract was enforceable because part performance  
13 satisfied statute of frauds.)" (Opening Brief, page 8, lines 26-27, page 9, lines 1-2)

14 162. This case and quote is of no help to McMahon's. This is because the "part performance  
15 exception" to the statute of frauds that was applied in the cited case in 1951 was that which then existed as  
16 former Civil Code section 1724(1) and which, in 1965, was replaced by the statute of frauds provision  
17 now contained in UCC section 2201(3)(c).

18 163. UCC section 2201(3)(c) states:

19 (3) **A contract** which does not satisfy the requirements of subdivision (1) but  
20 **which is valid in other respects is enforceable:**

21 ...  
22 (c) With respect to goods for which payment has been made and accepted or  
23 which have been received and accepted (Section 2606). (Emphasis added.)

24 164. As can be seen from the bolded statutory language, there must first be a "contract ... which  
25 is valid..." before any of the exceptions to the requirement of a signed writing will be applicable to make  
26 that existing contract enforceable. There is no question that merely finding facts which may satisfy an  
27 exception to the requirement of a signed writing imposed by UCC section 2201 does not result in the  
28 formation of a contract. There are no assertions here that would be sufficient to establish a "contract ...  
which is valid..."

165. Even if there had been an oral contract between McMahon's and WRV, the part  
performance exception is of no significance here. The *Allied Grape* case (cited above in the discussion of  
estoppel operating as a common law exception to UCC section 2201), also decided the same issue being  
asserted here, which is to what extent the application of the statutory part performance exception to the

1 statute of frauds under UCC section 2201(3)(c) would allow enforcement of an oral contract (if one  
2 existed). The court concluded that the effect of UCC section 2201(3)(c) is to limit the enforcement of the  
3 oral contract only to the extent of the part performance and does not permit enforcement of the entire oral  
4 contract. The language of the court in *Allied Grape* is appropriate here.

5 Allied's (in this case, McMahon's) assertion that partial performance takes an oral  
6 contract outside the statute of frauds is not supported by any California case authority. The  
7 California Uniform Commercial Code was not operative until June 1, 1965, and it does not  
8 have retroactive application. (Cal. U. Com. Code, § 10101.) The disputes in the three  
9 authorities cited by *Allied* predate<sup>40</sup> the California Uniform Commercial Code and rely  
10 upon the California Civil Code as authority for the proposition that partial performance  
11 takes an oral contract outside the statute of frauds even if the partial performance does not  
12 complete the performing party's obligations under the contract. (*Nelson v. Specialty  
13 Records, Inc.* (1970) 11 Cal.App.3d 126, 141 [89 Cal.Rptr. 540]; *Sloan v. Hiatt* (1966) 245  
14 Cal.App.2d 926, 933 [54 Cal.Rptr. 351]; *Price v. McConnell* (1960) 184 Cal.App.2d 660,  
15 667 [7 Cal.Rptr. 695].)

16 In fact, the *Sloan* case actually indicates that partial performance is limited in  
17 application under section 2201, subdivision (3)(c), and the Official Code Comments. (245  
18 Cal.App.2d at p. 933.) Official Comment No. 2 limits the buyer's obligation to make a  
19 payment under the oral contract to only those goods which are actually received. Comment  
20 No. 2 states: "2. 'Partial performance' as a substitute for the required memorandum can  
21 validate the contract only for the goods which have been accepted or for which payment  
22 has been made and accepted.  
23 ...

24 Other jurisdictions also limit the doctrine of partial performance under the Uniform  
25 Commercial Code to only that part of the oral agreement actually performed by the parties.  
26 (*Howard Const. Co. v. Jeff-Cole Quarries, Inc.* (Mo.App. 1983) 669 S.W.2d 221, 230-231;  
27 *Colorado Carpet Installation v. Palermo* (Colo.App. 1982) 647 P.2d 686, 687-688; *In re  
28 Estate of Nelsen* (1981) 209 Neb. 730 [311 N.W.2d 508, 509-510].)

166. In this situation with McMahon's and WRV, the only goods received and accepted were  
the three motorhomes and (if there were no writing pertaining to their sale) the oral contract for their sale  
or for the sale of any other number of motorhomes, would be enforceable only up to those three that were  
in fact delivered to and accepted by McMahon's. Unlike the law under the former Civil Code section as  
applied by the court in the case cited by McMahon's, the UCC does not allow enforceability of the entire  
oral contract as a result of only part performance.

167. It appears that the thrust of the UCC part-performance exception is not well-suited for

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<sup>40</sup> The *Samuels* case cited by McMahon's was decided in 1951. As was the case in *Allied Grape*, the *Samuels* case predated the 1965 adoption of the UCC and relied upon the former Civil Code as authority.

1 application to this dispute.<sup>41</sup> And, as indicated above, even if the exception did apply, its effect is only to  
2 make an oral contract partially enforceable. However, even to enforce the contract to the extent of the  
3 part performance, McMahon's would still be required to prove "A contract ... which is valid..." (UCC  
4 section 2201(3)), which it cannot do as to the franchise.

5 CONCLUSIONS AS TO THE LEGAL SIGNIFICANCE OF THE ASSERTION THAT "WRV PERFORMED  
6 UNDER THE DISPUTED WRITTEN AGREEMENT"

7 168. Whatever may have been the purpose of asserting this claimed fact, it is of no legal  
8 significance as to the issues before the Board for the following reasons:

9 A. As to the formation of the franchise and the party-created requirement of a signed writing:  
10 (1) The claimed assertion that WRV "performed" based on the facts alleged is not adequate to establish  
11 that a franchise was formed by conduct in the face of the express intent of the parties that the Dealer  
12 Agreement would not be valid until it was signed by both McMahon's and WRV. This party-created  
13 requirement for the formation of the franchise was not met; and, (2) Neither the part performance  
14 exception stated in UCC section 2201(3)(c), nor any of its other provisions, can be used to establish the  
15 formation of a franchise.

16 B. As to the satisfaction of the statutory requirements of writings as set forth in the UCC and  
17 the Vehicle Code: (1) The application of the part-performance exception under UCC section 2201(3)(c)  
18 (limiting enforcement of an oral contract only to the performance actually rendered) will not operate  
19 under these facts to satisfy the legislatively-created requirement of UCC section 2201(1) that there be a  
20 writing signed by WRV evidencing the contract; and, (2) The claimed performance by WRV would not  
21 satisfy the legislatively-created requirement set forth in Section 331(a) that for a "franchise" to exist there  
22 must be a "written agreement". Part-performance does not constitute a "written agreement".

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26 <sup>41</sup> There is authority that if the oral contract alleged is for an indivisible single item of a "good", then any part payment for that  
27 single item would make the "entire" oral contract for that single item enforceable as the part payment for the one item  
28 evidences the sale of one item. See *Lockwood v. Smigel* (1971) 18 Cal.App.3d 800, in which the down payment on the  
purchase of an automobile permitted enforcement of the existing oral contract for the sale of that one vehicle. Delivery by  
WRV and acceptance by McMahon's of the three motorhomes would have only the effect of making any oral contract that  
existed enforceable up to three motorhomes.

1 McMAHON'S FURTHER CONTENTIONS<sup>42</sup> AS STATED IN ITS "REPLY BRIEF"  
2 (FILED NOVEMBER 9, 2006)

3 McMAHON'S FIRST CONTENTION IN ITS REPLY BRIEF IS: "A. FOR THE BOARD TO OBTAIN  
4 THE NECESSARY JURISDICTION OVER THE INSTANT DISPUTE, VEHICLE CODE SECTION 331  
5 SIMPLY REQUIRES A 'WRITTEN AGREEMENT' TO EXIST BETWEEN THE PARTIES"  
6 (REPLY BRIEF, PAGE 2, LINES 16-18)

7 169. This argument is premised on the assertion that Section 331 does not require that the  
8 "written agreement" be signed. Again, this misses the point that the Vehicle Code does require an  
9 "agreement" and that it is the parties who determine what it takes for an "agreement" to exist. Here the  
10 parties required that the agreement be signed by both McMahon's and WRV before it would be valid.

11 170. McMahon's asserts, "Therefore, a written agreement satisfying the statutory framework of  
12 Vehicle Code section 331 does exist in the instant matter and consequently, the Board has the necessary  
13 jurisdiction to proceed with the Protest." (Reply Brief, page 3, lines 19-21).

14 171. This argument is not meaningful for the following reasons.

15 A. It is not responsive to the Order of Remand as it does not address whether there "... are  
16 any exceptions to the written document requirements, stated in Vehicle Code Section 331...". (Order of  
17 Remand, page 2, lines 10-11)

18 B. It is re-arguing that there was an "agreement" despite the absence of the signature of WRV.  
19 WRV's signature was expressly required by the documents signed by McMahon's before the documents  
20 would become "valid" as "Dealer Agreements". This issue was decided against McMahon's in the earlier  
21 Proposed Order as well as in these Findings After Remand. The findings were that the parties had no  
22 intent to form a contract without the Dealer Agreements being signed by both. As McMahon's could not  
23 establish that this "party-created" requirement of a signed writing to have an "agreement" was met, there  
24 can be no "agreement" found.

25 C. Claiming that no signature of WRV is needed is inconsistent with McMahon's  
26 arguments in its Opening Brief in which McMahon's relies upon UCC section 2201 which expressly  
27 requires a writing signed by WRV, or an exception, for the contract to be enforceable. There is no

28 <sup>42</sup> As stated in regard to the Opening Briefs, because it is McMahon's that is desirous of finding an exception to the "written agreement" requirement for a "franchise", the focus will be on McMahon's assertions in its Reply Brief.

1 mention by McMahon's of the interrelationship between the Vehicle Code requirement of a "written  
2 agreement" and the UCC requirement of a "...writing signed by the person against whom enforcement is  
3 sought..." As stated above, it could not be established that there was an "agreement" and therefore there  
4 could not be a "written agreement" as required by the Vehicle Code. It could not be established that there  
5 was a "writing sufficient to indicate that a contract...has been made between the parties and signed by ..."  
6 WRV as required by the UCC, or that there was a "written agreement" as required by the Vehicle Code,  
7 and there were no assertions of fact made that, if proven, would satisfy the possible exceptions to these  
8 requirements of the legislature.

9 **MCMAHON'S REPLY BRIEF NEXT ASSERTS: "B. THE WRITTEN AGREEMENT IN QUESTION**  
10 **IS A VALID AND ENFORCEABLE AGAINST RESPONDENT (SIC)" (REPLY BRIEF, PAGE 3, LINES 22-**  
11 **23)**

12 172. Protestant's contention that "the written agreement in question is ... valid and enforceable  
13 against Respondent" and the argument supporting it are not persuasive for the following reasons.

14 A. As with the prior argument, the caption and the initial argument under it are not responsive  
15 to the Order of Remand as they do not address whether there are "...any exceptions to the written  
16 document requirements, stated in Vehicle Code Section 331..." (Order of Remand, page 2, lines 10-11)  
17 McMahon's is again arguing that the Dealer Agreement, even if unsigned by WRV, would constitute a  
18 "written agreement" sufficient for Section 331, an issue decided adversely to McMahon's in the prior  
19 Proposed Order as well as above.

20 B. The argument also restates a prior ill-founded contention that, "... Respondent failed to  
21 object to McMahon's RV's execution of the agreement within a reasonable time". (Reply Brief, page 4,  
22 lines 5-6) There is again no analysis as to the legal effect of this claimed fact. This assertion was  
23 discussed above and found to be not only erroneously asserted<sup>43</sup> but also not factually applicable.<sup>44</sup> This

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26 <sup>43</sup> In addition to being applicable only to enforceability of an existing contract, rather than formation of a contract, the  
27 exception is not based on a failure to object to the other party's "execution of the agreement" but rather failure to object to its  
28 "content", which is the assertion by the other party that the writing was purportedly "in confirmation" of an existing contract.  
UCC section 2201(2); See footnotes 32 and 33.

<sup>44</sup> The Dealer Agreement by its express terms could not be interpreted to be a "confirmation" of an agreement as it states it will  
not be valid until signed by both parties.

1 exception under the UCC cannot be used as a basis for establishing the needed assent to form a contract.  
2 If the exception applied, it can only be used to enforce an oral contract otherwise proven to exist.

3 173. There is also the conclusion by McMahon's that: "As previously stated in McMahon's  
4 RV's Opening Brief on this issue, numerous exceptions exist **with regards to the enforceability of**  
5 **agreements** against a non-signing party. In this instance, the facts before the Board clearly indicate that  
6 these exceptions should be applied." (Emphasis added). (Reply Brief, page 4, lines 7-9).

7 174. This contention again appears to relate to the claimed exceptions to the legislatively-  
8 created requirements for the **enforceability of oral contracts**, all of which have been analyzed above and  
9 found wanting. There are no contentions pertaining to any exceptions to the party-created requirement of  
10 the need to have a signed writing for the **formation of a contract**.

11 **MCMAHON'S THIRD CONTENTION IN ITS REPLY BRIEF IS: "C. EQUITABLE ESTOPPEL IS**  
12 **APPLICABLE UNDER THE PRESENT CIRCUMSTANCES"** (REPLY BRIEF, PAGE 4, LINES 12-13)

13 175. This contention is at least within the scope of the Order of Remand as a possible exception  
14 to the requirement of a "written agreement".

15 176. McMahon's contentions in its Reply Brief are that the representations of WRV upon which  
16 McMahon's relied were:

- 17 A. "[WRV's] promise to enter into a franchise agreement"; (Reply Brief, page 4, line 19)  
18 B. "[WRV] represented to McMahon's RV that [the Dealer Agreement] had been executed by  
19 WRV." (Reply Brief, page 4, lines 21-22)

20 177. As to A., assuming the allegation were found to be true, the claim of a "promise to enter  
21 into a franchise agreement" is similar to an agreement to agree and absent some egregious facts, which are  
22 not alleged here, an agreement to agree would not be a sufficient basis to find a contract or a franchise  
23 formed as a result of the application of the principle of estoppel. If McMahon's could establish that  
24 injustice resulted from a foreseeable and reasonable change of position by McMahon's upon such an  
25 uncertain promise, some very limited remedy might be granted in a civil suit,<sup>45</sup> but there would be no  
26 basis for finding a contract or a franchise formed either in a civil action or in this administrative

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27  
28 <sup>45</sup> A court would have the discretion to limit the remedy as "justice requires" without finding that a franchise exists.

1 proceeding.

2 178. As to B., the claim that WRV represented to McMahon's that the Dealer Agreement had  
3 been signed by WRV was analyzed and rejected in the prior Proposed Order before the Board. The  
4 evidence presented by McMahon's was such that the likelihood of McMahon's being able to establish  
5 such representation was made was not sufficient to raise a triable issue of fact.

6 THE ACTION OF THE BOARD BEING SOUGHT BY McMAHON'S

7 179. McMahon's, in its Brief requests to be allowed to engage in discovery prior to a ruling by  
8 the Board on this motion.

9 180. McMahon's in its Reply Brief states:

10 Thus, whether the exceptions to the written documents requirements stated in  
11 Section 331 are *satisfied* in the instant matter is not relevant to the present brief. (Italics in  
12 the original.) If the ALJ determines that a written document requires an executed written  
13 agreement and there are exceptions to the same, then both the parties must be allowed to  
14 conduct further discovery to establish facts as to the existence of the executed written  
15 agreement and its exceptions. Since neither has party (sic) has produced any documents or  
16 held any depositions, it would be premature to determine if there are any facts satisfying  
17 the exceptions to the written document requirement. Therefore, to the extent that equitable  
18 estoppel operates as an exception to the written agreement requirement of Section 331, the  
19 Board has the necessary jurisdiction over the Protest and should allow the parties to  
20 conduct discovery accordingly." (Reply Brief, Page 5, lines 4-13)

21 181. Part of the above is a contention that "whether the exceptions to the written documents  
22 requirements stated in Section 331 are *satisfied* in the instant matter is not relevant to the present brief."  
23 (Italics in the original.) However, the language of the Order of Remand is "... whether or not there are  
24 any exceptions to the written document requirements, stated in Vehicle Code section 331 as it applies to  
25 the jurisdiction of the Board **in this matter**." (Emphasis added.) It does not say, "whether there **could be**  
26 any exceptions" and it specifically refers to "this matter".

27 182. The Order of Remand has been interpreted broadly to include not only whether there  
28 "could be", but whether there "are" such exceptions that "are" applicable "in this matter" and this  
Proposed Order has been written accordingly.

183. Another part of the language above is a request by McMahon's that a ruling on the Motion

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1 to Dismiss be deferred<sup>46</sup> so that “both parties must be allowed to conduct further discovery to establish  
2 facts as to the existence of the executed written agreement and its exceptions.” (Reply Brief, page 5, lines  
3 7-8). The request for discovery to establish facts as to the existence of “the executed written agreement”  
4 will be discussed below.

5 184. As to the “exceptions”, this could be a reasonable request as there is no doubt that estoppel  
6 is recognized by California as an exception to the legislatively-created requirements for a signed writing  
7 as contained in UCC section 2201. The application of estoppel to avoid the statute of frauds defense is  
8 also recognized in Restatement section 139.

9 185. Estoppel is also recognized as being applicable to the requirement that a contract exist  
10 before there can be an enforceable promise. The California courts have found promises to be enforceable  
11 even though no contract had been formed. This principle is recognized in Restatement section 90.

12 186. However, no authority has been cited as to whether estoppel can or should apply to the  
13 requirement of the Vehicle Code that there be a “written agreement” for there to be a contract with the  
14 status of a franchise.

15 187. Looking first at the requirement for an “agreement”, (one half of the Vehicle Code  
16 requirements), it was determined that no agreement could be proven to exist. It was also determined that  
17 the only exception that might apply would be estoppel, but the principles of estoppel under the facts as  
18 alleged would not result in finding either an agreement or an otherwise enforceable promise. Therefore,  
19 although estoppel could be used to find an “agreement” or an enforceable promise, estoppel would not be  
20 applicable to reach such results under the facts as alleged.

21 188. One of the Vehicle Code elements needed for the Board to have jurisdiction is not present.  
22 There is no “agreement” based either upon the parties intent to form one or by application of estoppel.

23 189. Looking next at the requirement that if there were an agreement, that it be “written”, it was  
24

25 <sup>46</sup> Seven lines later McMahan’s Reply Brief, under the caption III. CONCLUSION, states that the action being sought by  
26 McMahan’s is as follows: “For the above-stated reasons, the New Motor Vehicle Board has the necessary subject matter  
27 jurisdiction to proceed with, hear, and decide the instant Protest.” (Emphasis added.) (Reply Brief, page 5, lines 14-16).  
28 Again, it appears that McMahan’s is taking inconsistent positions. McMahan’s is contending that it would like to engage in  
discovery to be given the opportunity to establish if a signed writing exists as well as whether any exceptions exist. At the  
same time, McMahan’s is asking that the Board “proceed with, hear and decide the instant Protest.” These requests will be  
considered in the alternative.

1 determined that there was no writing that satisfied the requirements of the statute of frauds as stated in  
2 UCC section 2201. Neither were there sufficient facts alleged that would satisfy any of the exceptions  
3 provided elsewhere in that section of the UCC, nor were there sufficient facts alleged that would justify  
4 the application of estoppel.

5 190. It was also determined that there were no exceptions asserted by McMahon's that if proven  
6 would satisfy the Vehicle Code requirement that the agreement be "written".

7 191. At this point, it is best to summarize McMahon's responses to the Order of Remand and  
8 the courses of action that would be available to the Board, giving due consideration to what is being  
9 requested by McMahon's as to the need for discovery prior to ruling on this motion.

10 **SUMMARY OF McMAHON'S CLAIMED EXCEPTIONS TO THE WRITTEN DOCUMENT**  
11 **REQUIREMENTS, AS STATED IN VEHICLE CODE SECTION 331**

12 192. The following are what McMahon's has provided in response to the Order of Remand as  
13 "...exceptions to the written document requirements, stated in Vehicle Code section 331 ..." and the  
14 determinations that have been made as to: (a) their status as exceptions; and (b) if they could be  
15 exceptions, whether there are sufficient allegations of fact which, if proven, would satisfy the  
16 requirements for the exception to be applicable.

17 **FIRST CLAIMED EXCEPTION: "...THE INTENT OF THE PARTIES ... WAS REDUCED TO A**  
18 **WRITTEN AGREEMENT"**

19 193. This is not an exception to the requirement of Section 331. It is a claim that there was a  
20 "written agreement". This claim has been addressed in the previous Proposed Order before the Board and  
21 decided adversely to McMahon's.

22 **SECOND CLAIMED EXCEPTION:<sup>47</sup> "WRV FAILED TO OBJECT, IN WRITING, TO THE SIGNING OF**  
23 **THE AGREEMENT BY McMAHON'S RV WITHIN A REASONABLE TIME OF RECEIVING SUCH"**

24 194. This is an attempt to apply a legislatively-created exception under UCC section 2201(2)  
25 to the statute of frauds as contained in UCC section 2201(1) that there must be a writing signed by WRV  
26

27 <sup>47</sup>McMahon's asserted a second major heading claiming estoppel. However, this was then broken down into three  
28 subheadings and the subheadings will be addressed as the next-in-order exceptions. Although under the heading of estoppel,  
this claimed exception has nothing to do with estoppel.

1 to enforce a contract, if one existed. However, there is no UCC section that addresses the legal effect of  
2 failing to object to the other party's "signing of the agreement" as asserted by McMahon's. The exception  
3 that is contained in UCC section 2201(2) to satisfy the legislative requirement for a signed writing is not  
4 applicable under these facts as the Dealer Agreement that was sent to WRV was not a confirmation of a  
5 contract. The facts as alleged would not satisfy the legislatively-created exception in UCC section  
6 2201(2) to the signed writing required by UCC section 2201(1) to enforce a contract.

7 195. UCC section 2201(2) is not a recognized exception to the party-created requirement of a  
8 signed writing to form a contract.

9 THIRD CLAIMED EXCEPTION: "MCMAHON'S RV REASONABLY CHANGED ITS POSITION UPON  
10 THE REPRESENTATIONS MADE TO IT BY WRV"

11 196. Of the three subheadings under the topic of estoppel, as claimed by McMahon's, this is the  
12 only one that is based on estoppel.

13 197. Estoppel is a recognized "exception" that can be used for at least three purposes:

14 A. If there was an oral contract formed, estoppel can be applied to allow enforcement of the  
15 oral contract notwithstanding a statute that requires such a contract to be in a signed writing to be  
16 enforceable. This would be applying what is commonly called "equitable estoppel" (under Restatement  
17 section 139 and recognized by California) to avoid a statutory requirement of a "writing" or a "signed  
18 writing" for a contract (if formed) to be enforceable.

19 B. Even though there was no contract formed, estoppel can make a promise enforceable to  
20 the extent necessary to avoid injustice. This would be applying what is called "promissory estoppel"  
21 (under Restatement section 90 and recognized by California) to enforce a promise that would not  
22 otherwise be enforceable as there was no contract and could possibly be used here even though there was  
23 no "agreement". This would be applying estoppel to a "formation" issue.

24 C. Even though there was no signed writing that may be needed to enforce a contract that was  
25 in fact formed orally or by conduct, estoppel can be used to preclude someone from alleging and proving  
26 that no signed writing exists. This would require that there have been a false statement of fact made, in  
27 this case by WRV's agents, that the writing had been signed, or that no writing was necessary. If the  
28 other elements of estoppel could be established (foreseeable and reasonable reliance upon that statement,

1 resulting in a change of position to the economic detriment of McMahon's, and resulting injustice), then  
2 WRV could be estopped from proving the truth of the facts that there was no signed writing. This is an  
3 example of the traditional "equitable estoppel" (also recognized by California).

4 198. As to A. above (application of estoppel to the statutory requirement of a writing to enforce  
5 a contract otherwise proven to exist), there are insufficient allegations of fact that if proven would allow a  
6 trier of fact to find: an oral contract was formed; that it was reasonable for McMahon's to rely upon the  
7 oral contract; that there was a substantial change of position by McMahon's in reliance upon the oral  
8 contract; that there would be unconscionable injury that would result to McMahon's if the oral contract  
9 were not enforced or recognized; and that no other alternative would be available other than treating  
10 McMahon's as a franchisee even though no franchise existed.

11 199. As to B. above (the requirement of a "promise"), this is related to the issue of formation of  
12 the contract, that is whether WRV made a promise that should be enforced to some extent even though no  
13 contract was formed. Any claim of estoppel here would require a showing that there was a promise made  
14 by WRV that McMahon's was a franchisee, or would become a franchisee, despite the requirement that  
15 the Dealer Agreement to be valid required the signature of Mr. Doyle of WRV; that McMahon's was  
16 reasonable in relying upon that promise; and that injustice can be avoided only by enforcing the promise  
17 to make McMahon's a franchisee.

18 200. Application of estoppel here would also require a finding that WRV should be estopped  
19 from asserting the party-created requirement that the Dealer Agreement be signed by both McMahon's  
20 and WRV before McMahon's would be a franchisee.

21 201. There are insufficient allegations of fact by McMahon's that would, if proven, establish  
22 any promise by WRV that would dispense with the requirement of a signature by an agent of WRV to  
23 form the contract, or that McMahon's was a franchisee despite the lack of a Dealer Agreement signed by  
24 both parties.

25 202. As to C. above, this is the possibility that agents of WRV made a statement that the Dealer  
26 Agreement had been signed by Mr. Doyle or that a signed Dealer Agreement would not be necessary to  
27 have a franchise. The prior Proposed Order addressed the contention of McMahon's that Mr. McMahon  
28 had been told that the Dealer Agreement had been signed by Mr. Doyle. It was determined that, under the

1 facts as presented in the affidavits and declarations, that this could not be a provable fact.

2 203. As to possible statements by WRV's agents that a signed Dealer Agreement would not be  
3 necessary - there were insufficient facts alleged to establish that this is a possibility.

4 204. Whether applying A. or B. or C. above, there are insufficient allegations of fact to show  
5 that it was reasonable for McMahon's to rely upon any such claimed promise or representation or that  
6 McMahon's did in fact so rely or that injustice can be avoided only by enforcement of the claimed  
7 promise or otherwise justify applying estoppel.

8 FOURTH CLAIMED EXCEPTION: WRV PERFORMED UNDER THE DISPUTED WRITTEN  
9 AGREEMENT<sup>48</sup>

10 205. McMahon's citation to a case interpreting a Civil Code section that no longer exists to  
11 allow part performance as an exception to the non-enforceability of an oral contract required to be in a  
12 signed writing is of no help. This is because part-performance as a recognized exception to the  
13 requirements of a signed writing needed to enforce an oral contract is now found in UCC section  
14 2201(3)(c).

15 206. Although part-performance can be utilized as an exception to the statutory requirement for  
16 a signed writing under UCC section 2201, this exception is not relevant here for the following reasons:

17 A. The part-performance exception to the statutory requirement of a signed writing to enforce  
18 an oral contract permits enforcement of an otherwise proven oral contract only to the extent of the part  
19 performance, the goods delivered by WRV and accepted by McMahon's (here three motorhomes).

20 B. Under the theory asserted by McMahon's, proving part-performance does not prove the  
21 formation of a contract. As argued, it would not operate as an exception to the party-created requirement  
22 that there be a signed writing for there to be a valid agreement formed. Part-performance as asserted  
23 satisfies only the legislatively-created requirement of a signed writing under UCC section 2201(1) and  
24 UCC section 2201(3)(c) allows enforcement of an oral contract only to the extent of the part performance.

25 C. Part performance does not constitute a "written agreement" as required by the Vehicle  
26 Code and would not operate as an exception to the Vehicle Code requirement.

27  
28 <sup>48</sup> Although this subheading is under the major heading of estoppel, as with the second claimed exception, this claim has  
nothing to do with estoppel.

1                    **ANALYSIS OF McMAHON'S REQUEST THAT A RULING ON THE MOTION**  
2                    **BE DEFERRED TO ALLOW FOR DISCOVERY**

3                    207. McMahon's states, "If the ALJ determines that a written document requires an executed  
4 written agreement and there are exceptions to the same, then both parties must be allowed to conduct  
5 further discovery to establish facts as to the existence of the executed written agreement and its  
6 exceptions." (Reply Brief, page 5, lines 5-8 with a similar request at page 2, lines 4-8)

7                    208. Again, McMahon's language creates problems as it is a two-pronged request. First, it is  
8 requesting to be allowed to engage in discovery "to establish facts as to the existence of the executed  
9 written agreement" as well as "its exceptions". (Emphasis added.)

10                    **McMAHON'S REQUEST TO ENGAGE IN DISCOVERY "TO ESTABLISH FACTS AS TO THE**  
11                    **EXISTENCE OF THE EXECUTED WRITTEN AGREEMENT"**<sup>49</sup>

12                    209. McMahon's request "to conduct further discovery to establish facts as to the existence of  
13 the executed written agreement" has nothing to do with the Order of Remand and is attempting to cover  
14 the issues addressed in the first Proposed Order before the Board.

15                    210. Therefore, McMahon's request to engage in further discovery to establish the existence of  
16 the executed written agreement is denied.

17                    **McMAHON'S REQUEST TO ENGAGE IN DISCOVERY TO "ESTABLISH FACTS AS TO THE**  
18                    **EXISTENCE OF THE EXECUTED WRITTEN AGREEMENT AND ITS EXCEPTIONS."** (ITALICS ADDED)

19                    211. The second part of the request to defer the ruling is based upon the claimed need to  
20 determine facts as to the "exceptions". It was determined that McMahon's has not established the  
21 possibility of the existence of what it calls exceptions to the "executed written agreement", with the  
22 possible exception of estoppel.

23                    212. It was determined that estoppel could be an exception to the requirement that the parties  
24 actually had an "agreement" (formation) and could also be an exception to the requirement of an  
25 "executed written agreement" (McMahon's language above), which would include the UCC requirement  
26

27                    <sup>49</sup>This is similar to a request that McMahon's had made in its briefs submitted on May 19, 2006 in connection with the second  
28 hearing by the ALJ on the Motion to Dismiss, to which WRV had responded, and which resulted in the prior Proposed Order  
already before the Board.

1 that the writing be signed by WRV. Although estoppel is recognized as an exception to the requirements  
2 of an "agreement" and the requirements of a "signed writing", it was also determined that estoppel has not  
3 yet been nor should be now applied to the dual requirements of the Vehicle Code that a "franchise" "is a  
4 written agreement". It was also determined that, taking the facts in the light most favorable to  
5 McMahon's, they would not be sufficient to satisfy the elements needed for estoppel for the purpose of an  
6 exception to the requirement of an agreement, or for the purpose of an exception to the requirement of a  
7 signed writing needed by the UCC, or (assuming estoppel should be so applied) for the purpose of an  
8 exception to the requirements of a "written agreement" needed by the Vehicle Code.

9 213. In any case, estoppel is primarily predicated upon a detrimental change of position by the  
10 person asserting the concept, which in this case would be McMahon's, with the change of position being  
11 caused by the other party, here WRV, and resulting injustice which could not be avoided unless estoppel  
12 were applied.

13 214. It is difficult to envision what kind of new "facts" might be discoverable that would raise a  
14 triable issue of fact as to whether the elements of estoppel exist for whatever purpose McMahon's asserts  
15 it may be applicable (1) formation of an agreement, or (2) satisfying the UCC requirement of a "signed  
16 writing" or (3), satisfying the Vehicle Code requirements of a "written agreement".

17 215. This is because McMahon's has had full knowledge of whatever communications it claims  
18 were made to it by WRV upon which McMahon's purportedly relied, and presumably McMahon's has  
19 made its allegations as to those communications in the light most favorable to it. Likewise, McMahon's  
20 has had full knowledge of its claimed change of position and presumably has made its allegations of fact  
21 accordingly in the light most favorable to it.

22 216. These allegations have been evaluated as to whether, if they were proven, they would  
23 establish a prima facie case to satisfy the elements of estoppel to establish an "agreement", or an  
24 exception to an "agreement", or an exception to the statutory requirements of a "signed writing" under  
25 UCC section 2201, or an exception to the statutory requirement of a "written agreement" under the  
26 Vehicle Code, and the conclusion in all cases is, "No."

27 ///

28 ///

1 CONCLUSION AND ORDER AS TO MCMAHON'S REQUEST  
2 TO ENGAGE IN DISCOVERY

3 217. McMahon's has not alleged sufficient facts to warrant the opening of discovery<sup>50</sup> as to the  
4 issue of whether there was a "franchise" in existence between the parties, or whether there could be "any  
5 exceptions to the written document requirements, stated in Vehicle Code section 331".

6 218. Therefore, McMahon's request to "be allowed to conduct further discovery to establish  
7 facts as to the existence of the executed written agreement and its exceptions" is denied.

8 RESPONSE TO ORDER OF REMAND

9 EXCEPTIONS TO THE PARTY-CREATED REQUIREMENT THAT THE DEALER AGREEMENT BE  
10 SIGNED BY BOTH BEFORE THERE WOULD BE AN "AGREEMENT" FORMED

11 219. It is determined that although there could be exceptions applicable to the party-created  
12 requirement of a "signed writing" for the formation of an "agreement", none of the exceptions as asserted  
13 by McMahon's are applicable under the facts as alleged that would result in an "agreement".

14 EXCEPTIONS TO THE REQUIREMENT THAT THERE BE A "SIGNED WRITING" AS REQUIRED FOR  
15 AN AGREEMENT TO BE ENFORCEABLE (UCC SECTION 2201)

16 220. It is determined that although there could be exceptions applicable to the legislatively-  
17 created requirement of a "signed writing" for the enforceability of a contract as stated in UCC section  
18 2201, none of the exceptions as asserted by McMahon's are applicable under the facts as alleged.

19 EXCEPTIONS TO THE COMBINED REQUIREMENT, AS CONTAINED IN THE VEHICLE CODE, THAT  
20 THERE BE AN "AGREEMENT" AND THAT IT BE "WRITTEN" FOR THERE TO BE A "FRANCHISE"

21 221. It is determined that McMahon's has not established there are any exceptions that would  
22

23  
24 <sup>50</sup> Section 3050.1 provides in part: "(b) For purposes of discovery, the board or its executive director may, if deemed  
25 appropriate and proper under the circumstances, authorize the parties to engage in the civil action discovery  
26 procedures in Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure, excepting the provisions  
27 of Chapter 13 (commencing with Section 2030.010) of that title." (Emphasis added.) If there were any merit to McMahon's  
28 requests, it would be possible for the Board to grant the request for limited discovery and order that the matter be remanded for  
a hearing solely upon the issue of whether the elements of estoppel exist.

1 be applicable to the Vehicle Code requirements that there be a "written agreement" before a contract  
2 would have the status of a "franchise".

3 222. It is determined that:

4 A. There has been no authority cited that expressly allows for exceptions to the requirements  
5 of a "written agreement" as stated in the Vehicle Code;

6 B. McMahon's has not alleged sufficient facts to show an "agreement";

7 C. McMahon's has not alleged sufficient facts to show an exception to the party-created  
8 requirement of a "signed writing" to form an "agreement";

9 D. McMahon's has not alleged sufficient facts to show an exception to the legislatively  
10 required "signed writing" as stated in the UCC for a contract to be enforceable; and,

11 E. There is not a sufficient showing of alleged facts that could constitute exceptions to the  
12 dual requirements of the Vehicle Code, (the substantive requirement that there be an "agreement" and the  
13 formalistic requirement that it be "written") that must be met to result in a "franchise".

14 223. It is determined that McMahon's has not established that there "are any exceptions to the  
15 written document requirements, stated in Vehicle Code section 331 as it applies to the jurisdiction of the  
16 Board in this matter."

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1 ORDER

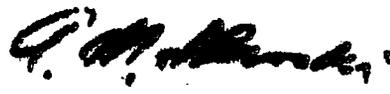
2 Protestant's request to "be allowed to conduct further discovery to establish facts as to the  
3 existence of the executed written agreement and its exceptions" is denied.

4 PROPOSED ORDER

5 Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted. The Protest of  
6 *Mega RV Corp., dba McMahon's RV v. Western Recreational Vehicles, Inc.*, PR-1983-05 is dismissed  
7 without prejudice.<sup>51</sup>

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

14 DATED: January 9, 2007

15 By:   
16 ANTHONY M. SKROCKI  
17 Administrative Law Judge

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

20 <sup>51</sup> The prior Proposed Order included a recommendation that the Protest be "dismissed without prejudice". As stated in  
21 footnote 16 to that Proposed Order:

22 Dismissal without prejudice is deemed appropriate in the event, however unlikely, that the originals of the  
23 Dealer Agreements may re-appear, perhaps during some other proceeding and possibly in some other  
24 forum and that, contrary to the above, they are discovered to contain the signature or signatures of Doyle.  
25 For this same reason, this order is not intended to be factually determinative either due to res judicata or  
26 collateral estoppel on the issue of whether there was in fact a signature of Doyle on the Dealer Agreements.  
27 This order is limited in its effect to a finding that, on the facts presently before the Board, McMahon's  
28 cannot be determined to be a franchisee of WRV.

The prior recommendation of a "dismissal without prejudice" remains appropriate for the following additional reason.  
If McMahon's believes it has suffered a loss in some way that McMahon's attributes to WRV, McMahon's has recourse to the  
judicial system to seek a remedy. It is deemed more reasonable to allow McMahon's to pursue remedies in such a civil suit in  
which, perhaps with a liberal construction of the elements needed for estoppel, a lesser "remedy" may be available other than  
finding a "franchise". It does not seem wise to apply a concept of estoppel (or other exceptions) liberally to find a complex  
relationship, indefinite in duration, but likely long-term, and uncertain as to essential terms, when there is no "written  
agreement" as required by the literal reading of Section 331(a).

1 NEW MOTOR VEHICLE BOARD  
1507 - 21<sup>ST</sup> Street, Suite 330  
2 Sacramento, California 95814  
Telephone: (916) 445-1888

CERTIFIED MAIL

3  
4  
5  
6  
7  
8 STATE OF CALIFORNIA

9 NEW MOTOR VEHICLE BOARD

10  
11 In the Matter of the Protest of )  
12 MEGA RV CORP., dba McMAHON'S RV, ) Protest No. PR-1983-05  
13 Protestant, ) PROPOSED ORDER GRANTING  
14 v. ) "RESPONDENT'S MOTION TO  
15 WESTERN RECREATIONAL VEHICLES, ) DISMISS FOR LACK OF SUBJECT  
INC., ) MATTER JURISDICTION"; and  
16 Respondent. ) PROPOSED ORDER DISMISSING  
PROTEST WITHOUT PREJUDICE

17  
18 To: Michael M. Sieving, Esq.  
Kevin L. Bryant, Esq.  
19 Attorneys for Protestant  
LAW OFFICES OF MICHAEL M. SIEVING  
20 350 University Avenue, Suite 105  
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21 Bruce L. Ishimatsu, Esq.  
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24 James S. Berg, Esq.  
25 Attorney for Respondent  
JAMES S. BERG, PLLC  
26 105 North 3<sup>rd</sup> Street  
Yakima, Washington 98901

27 ///

28 ///

ATTACHMENT 1

IDENTITY AND STATUS OF THE PARTIES

1  
2 1. Protestant, Mega RV Corp., dba McMahon's RV ("McMahon's"),  
3 is a new recreational vehicle ("RV") dealer as defined in Health &  
4 Safety Code section 18002.6 and is licensed as such by the Department  
5 of Motor Vehicles ("DMV"). McMahon's operates an RV dealership at  
6 1312 RV Center Drive, #12, Colton, California.

7 2. Respondent, Western Recreational Vehicles, Inc. ("WRV") is  
8 incorporated in the State of Washington and has its principal place of  
9 business at 3401 West Washington Avenue, Yakima, Washington. WRV is a  
10 distributor as defined in California Vehicle Code section 296<sup>1</sup> and is  
11 licensed as such by the California DMV.

THIS MOTION CHALLENGES WHETHER THE BOARD HAS  
JURISDICTION TO HEAR THE PROTEST

12  
13  
14 3. Although both parties are licensees over which the Board  
15 could have jurisdiction, for the Board to have jurisdiction to hear  
16 this protest filed by McMahon's, there must be a "franchise" in  
17 existence between the parties by the terms of which McMahon's is the  
18 "franchisee" and WRV is the "franchisor".<sup>2</sup>

19 4. WRV has filed a "Motion to Dismiss [the Protest] For Lack of  
20 Subject Matter Jurisdiction" asserting there is no franchise and that  
21 McMahon's is not a franchisee. Therefore, the issue before the Board  
22 at this time is whether the parties entered into a "franchise", as  
23 that term is defined in the Vehicle Code.

24 ///

25 ///

26 \_\_\_\_\_

27 <sup>1</sup> Unless otherwise indicated, all later statutory references shall be to the  
28 California Vehicle Code.

<sup>2</sup> All three of these terms are defined in the Vehicle Code and an analysis follows.

PROCEDURAL BACKGROUND<sup>3</sup>

The Filing Of The Protest

5. On December 29, 2005, McMahon's filed an Amended Protest<sup>4</sup> pursuant to Section 3070 asserting as follows:

- McMahon's is a new RV dealer as that term is defined in Health & Safety Code section 18002.6;
- McMahon's and WRV were "...parties to a franchise, as that term is defined in Section 331...";
- The "Dealer Agreement" between the parties granted McMahon's the "exclusive right to purchase Product(s) from [WRV] for resale in the Territory...";
- "...Respondent agreed that it would not 'sell Product(s) to persons other than [McMahon's] in the Territory'";
- "...Respondent had established an additional franchise within Protestant's exclusive territory...";
- "This act unilaterally modifies the franchise agreement between [McMahon's] and [WRV].";
- "Such modification will substantially affect McMahon's sales and service obligations, as well as its investment in its [WRV] franchise."; and
- "...WRV failed to provide the required notice of such modification under Section 3070(b)(2)..."<sup>5</sup> (Amended Protest, page 2, lines 4-18)

---

<sup>3</sup> The references to testimony, exhibits, or other parts of the record contained herein are examples of the evidence relied upon to reach a finding, and are not intended to be all-inclusive.

<sup>4</sup> An Amended Protest was necessary as the original Protest, filed on December 28, 2005, cited Section 3060 as the basis for the Protest rather than Section 3070.

<sup>5</sup> McMahon's is correct that WRV gave no notices to McMahon's or the Board of any intent of WRV to modify or terminate the claimed franchise of McMahon's. It is assumed that at least one of the reasons why WRV gave no notices is because WRV denies that a franchise exists.

1           6.     In a footnote to the amended protest, McMahon's also  
2 asserted that WRV "...has failed to recognize [McMahon's] as a  
3 franchisee..." which "...amount[s] to a constructive termination of the  
4 Agreement..." and that McMahon's reserved the right to file a protest  
5 until there was "...proper notice of termination as required by Section  
6 3070(a)..." (Amended Protest, page 2, footnote 2)

7           The Motion To Dismiss, Subsequent Filings And Prior Proceedings

8           7.     On April 3, 2006, WRV filed "RESPONDENT'S MOTION TO DISMISS  
9 FOR LACK OF SUBJECT MATTER JURISDICTION" supported by a "MEMORANDUM OF  
10 POINTS AND AUTHORITIES" and affidavits of Harry Collier (formerly the  
11 Western Regional Account Manager of WRV), and Ron Doyle (President of  
12 WRV), together with a photocopy of a document captioned "WESTERN  
13 RECREATIONAL VEHICLES, INC. DEALER AGREEMENT."

14           8.     On April 24, 2006, McMahon's filed "PROTESTANT (sic) REPLY  
15 TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER  
16 JURISDICTION". This document was supported by a declaration of Brent  
17 McMahon, President of McMahon's.

18           9.     On May 2, 2006, WRV filed its "MEMORANDUM IN RESPONSE TO  
19 PROTESTANT (sic) REPLY TO RESPONDENT'S MOTION TO DISMISS FOR LACK OF  
20 SUBJECT MATTER JURISDICTION", accompanied by a declaration of Burk  
21 Morgan, Vice President, Director of Sales (Alpine Coach) for WRV, and  
22 a declaration of Michael J. Sebastian, President of Saddleback RV,  
23 Inc.

24           The First Hearing On The Motion To Dismiss (Held On May 4, 2006)

25           10.    On May 4, 2006, a scheduled telephonic hearing was held  
26 before Anthony M. Skrocki, administrative law judge for the Board.

27 Kevin L. Bryant, of the LAW OFFICES OF MICHAEL M. SIEVING represented  
28 McMahon's. James S. Berg, of JAMES S. BERG, PLLC, and Bruce L.

1 Ishimatsu of LOEB & LOEB, INC., represented WRV.

2 11. WRV's motion is premised upon the claim that there is no  
3 writing that constitutes a "franchise" as that term is defined in the  
4 Vehicle Code.

5 12. However, the pleadings of both parties and supporting  
6 documentation before the Board at this first hearing on the motion  
7 referred to the fact that there were two originals of a writing  
8 captioned "Dealer Agreement" that could constitute a "franchise", that  
9 both of them had been signed by the president of McMahon's, and both  
10 of these documents had been returned to and received by WRV.

11 13. What was unknown and what is in factual dispute is whether  
12 either or both of these two originals had been signed by a  
13 representative of WRV after the documents were signed by Brent McMahon  
14 and returned to WRV. In support of its Motion to Dismiss, WRV did  
15 provide a photocopy of one of the two originals. This photocopy shows  
16 the signature only of the president of McMahon's but the photocopy did  
17 not and does not negate the possibility that one or both of the  
18 originals the Dealer Agreement had been signed by a representative of  
19 WRV.

20 14. As the Board had not been provided with any original  
21 (preferably both originals) of what was claimed to be either the  
22 partially executed or fully executed Dealer Agreement (the  
23 "franchise"), and because counsel for WRV were unable to respond with  
24 certainty as to the whereabouts of the two original documents (which,  
25 as stated, had been admitted by both sides to be or have been in  
26 existence, signed by Brent McMahon and returned to and received by  
27 WRV), the May 4, 2006 hearing resulted in an order of continuance  
28 containing the following language:

1 ..Upon questioning by the administrative law judge as to  
2 the existence of the originals of the two copies of the  
3 Dealer Agreement referred to in the documents submitted by  
4 the parties, counsel for the parties agreed that the hearing  
5 on the motion should be continued to allow them to respond  
6 appropriately..

7 Further Briefing By The Parties And Resumption Of The Hearing On  
8 The Motion

9 15. On May 19, 2006, McMahon's submitted its "SUPPLEMENTAL BRIEF  
10 OF MEGA RV CORP., dba MCMAHON'S RV IN SUPPORT OF OPPOSITION TO MOTION  
11 TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION." This was  
12 accompanied by a "SUPPLEMENTAL DECLARATION OF BRENT MCMAHON IN SUPPORT  
13 OF PROTESTANT MEGA RV COPR (sic), dba MCMAHON'S RV'S OPPOSITION TO  
14 RESPONDENT WESTERN RECREATIONAL VEHICLES, INC.'S MOTION TO DISMISS FOR  
15 LACK OF SUBJECT MATTER JURISDICTION."

16 16. On May 26, 2006, WRV submitted "RESPONDENT'S SUPPLEMENTAL  
17 BRIEF IN RESPONSE TO SUPPLEMENTAL BRIEF OF MEGA RV". It was  
18 accompanied by a "Declaration of Harry Collier in Response to  
19 Supplemental Declaration of Brent McMahon", a "Declaration of Kane  
20 Phillips", formerly an Inside Sales Representative for Alpine Coach  
21 products of WRV, and a "Supplemental Declaration of Burk Morgan Re  
22 Dealer Agreement".

23 17. No original of either of the two Dealer Agreements was  
24 provided to the Board.

25 18. The hearing on the motion resumed on June 7, 2006, again  
26 before Anthony M. Skrocki, an administrative law judge for the Board.

27 As in the first hearing, Kevin L. Bryant represented McMahon's and  
28 James S. Berg and Bruce L. Ishimatsu represented WRV.



1 21. For the Board to have jurisdiction to hear a protest  
2 pursuant to Section 3070, McMahon's would have to be a "franchisee"  
3 and WRV would have to be a "franchisor" under an existing "franchise".

4 22. WRV, in its Motion to Dismiss asserts that "...there has never  
5 existed a franchise relationship between..." McMahon's and WRV. (WRV  
6 Memorandum of Points and Authorities, page 1, lines 31-32)

7 THE STATUTORY DEFINITIONS

8 23. As stated above, Section 3070(b)(1) grants a right to file a  
9 protest only to a "franchisee", which is defined in Section 331.1 as  
10 follows:

11 331.1. A "franchisee" is any person who, pursuant to a  
12 franchise, receives new motor vehicles subject to  
13 registration under this code, new off-highway motorcycles, as  
14 defined in Section 436, new all-terrain vehicles, as defined  
15 in Section 111, or new trailers subject to identification  
16 pursuant to Section 5014.1 from the franchisor and who offers  
17 for sale or lease, or sells or leases the vehicles at retail  
18 or is granted the right to perform authorized warranty  
19 repairs and service, or the right to perform any combination  
20 of these activities. (Emphasis added.)

21 24. "Franchisor" is defined as follows:

22 331.2. A "franchisor" is any person who manufactures,  
23 assembles, or distributes new motor vehicles subject to  
24 registration under this code, new off-highway motorcycles, as  
25 defined in Section 436, new all-terrain vehicles, as defined  
26 in Section 111, or new trailers subject to identification  
27 pursuant to Section 5014.1 and who grants a franchise.  
28 (Emphasis added.)

29 25. Recreational vehicles are included within the definition of  
30 "motor vehicles" pursuant to Section 415 which provides:

31 415. (a) A "motor vehicle" is a vehicle that is self-  
32 propelled.

33 (c) For purposes of Chapter 6 (commencing with Section  
34 3000) of Division 2, "motor vehicle" includes a recreational  
35 vehicle as that term is defined in subdivision (a) of Section

1 18010 of the Health and Safety Code, but does not include a  
truck camper.<sup>7</sup> (Emphasis added.)

2 26. Section 3070 provides for the right of a "franchisee" to  
3 file a protest and Sections 331.1 and 331.2 mandate that there must be  
4 a "franchise" in existence before any person can be a franchisee or  
5 franchisor.

6 27. Thus the critical definition is that of the word "franchise"  
7 and the only portion of the statutory definition of "franchise" at  
8 issue with regard to the Motion to Dismiss is as follows:

9 331. (a) A "franchise" is a written agreement between  
10 two or more persons having all of the following conditions:..  
11 (Emphasis added.)

12 28. There is no dispute that there was a writing, and there is  
13 no dispute that it was signed by Brent McMahon, the president of  
14 McMahon's. The questions are: (1) whether the writing must be signed  
15 by a representative of WRV? and, (2) if so, whether it was signed by  
16

17  
18 <sup>7</sup> Health and Safety Code section 10810(a) defines a "recreational vehicle" as:

19 18010. "Recreational vehicle" means both of the following:

20 (a) A motor home, travel trailer, truck camper, or camping  
21 trailer, with or without motive power, designed for human habitation for  
22 recreational, emergency, or other occupancy, that meets all of the  
23 following criteria:

24 (1) It contains less than 320 square feet of internal living room  
25 area, excluding built-in equipment, including, but not limited to,  
26 wardrobe, closets, cabinets, kitchen units or fixtures, and bath or  
toilet rooms.

(2) It contains 400 square feet or less of gross area measured at  
maximum horizontal projections.

(3) It is built on a single chassis.

(4) It is either self-propelled, truck-mounted, or permanently  
towable on the highways without a permit.

~~(b) A park trailer, as defined in Section 18009.3.~~

1 Ron Doyle, the president of WRV, so as to constitute a "written  
2 agreement"<sup>8</sup> within the statutory definition?

3 Undisputed Facts As To Whether There Is A Franchise Between  
4 McMahon's And WRV

5 29. WRV utilizes a writing captioned "WESTERN RECREATIONAL  
6 VEHICLES, INC. DEALER AGREEMENT" ("Dealer Agreement") in connection  
7 with the granting of a franchise. (Exhibit 1 to Collier Affidavit,  
8 Doyle Affidavit, page 2, lines 20-33)

9 30. WRV prepared two unsigned Dealer Agreements (including an  
10 attached "Exhibit Schedule" specifically applicable to McMahon's) and  
11 forwarded both Dealer Agreements to McMahon's. These were to be  
12 signed by an authorized representative of McMahon's and returned to  
13 WRV for the possible subsequent signature of an authorized  
14 representative of WRV. (Collier Affidavit, page 4, lines 29-32)

15 31. The two originals of the Dealer Agreements were signed on  
16 May 8, 2005 by Brent McMahon, president of McMahon's (Supplemental  
17 Declaration of Brent McMahon, page 2, lines 2-4), and were  
18 subsequently returned to and received by WRV. (Collier Affidavit, page  
19 5, lines 8-13, Doyle Affidavit, page 4, lines 15-17, Collier  
20 Declaration, page 5, lines 16-27, and Phillips Declaration, page 2,  
21 lines 4-16)

22  
23 <sup>8</sup> Section 331 does not by its express terms require that the "written agreement" be  
24 signed by either or both parties. Although the statute itself might be interpreted  
25 so that the writing being "signed" is impliedly required by the statute, there is no  
26 need to so conclude under these facts. This is so because an enforceable "agreement"  
27 (a contract) will come into existence in accordance with the manifested intentions of  
28 the parties. Here, the writing states that it will be valid as an "agreement" only  
if it is signed by both parties. Therefore, and as will be discussed further below,  
whether the statute does or does not require the signatures of both parties is  
irrelevant as the parties themselves have expressly stated that there will be no  
agreement unless there are the signatures of both parties on the writing. Section  
331 requires that there be an "agreement" and here the parties have established there  
would be no agreement unless and until the document had been signed by both parties,  
thus the signatures of both parties are necessary for there to be an agreement.

1 32. Paragraph 24 of the Dealer Agreement states as follows:

2 24. Signature. This Agreement, to be valid, must bear  
3 the signature of a duly authorized officer of Dealer, if a  
4 corporation, or the signature of one of the partners of  
5 Dealer if a partnership, or the signature of the Dealer if an  
6 individual, and by (sic) a duly authorized officer of WRV.  
7 (Dealer Agreement, page 12)

8 33. This paragraph is immediately above the places for the  
9 signatures of those signing in behalf of the parties.

10 34. Neither party was able to provide to the Board either of the  
11 two original documents which were undisputedly signed by Brent McMahon  
12 in behalf of McMahon's. As stated above, both originals had been  
13 returned to WRV by McMahon's, as McMahon's had been instructed to do,  
14 and WRV admits it received both of these documents signed by  
15 McMahon's.

16 35. The only document captioned "Dealer Agreement" before the  
17 Board is a reproduction (photocopy), supplied by WRV, of one of the  
18 originals that was signed by Brent McMahon. This copy shows Brent  
19 McMahon's signature and an inserted date of May 8, 2005 on the same  
20 page (page 12) as paragraph 24 quoted above. Brent McMahon's  
21 signature for McMahon's is in the appropriate place. The WRV  
22 signature line is blank.

23 36. This photocopy of the Dealer Agreement also contains an  
24 "Exhibit Schedule" attached as the last page (page 13). This Exhibit  
25 Schedule also shows an inserted date of May 8, 2005 and the signature  
26 of Brent McMahon in the appropriate place. As is the case with page  
27 12, the WRV signature line on the Exhibit Schedule is blank.

28 37. Thus, the only document before the Board that could possibly

1 represent a "franchise" as defined in Section 331 is a photocopy of  
2 one of the two original Dealer Agreements signed by Brent McMahon in  
3 behalf of McMahon's. This copy does not evidence a signature of a  
4 representative of WRV.

5 The Legal Significance Of Paragraph 24 Of The Document Captioned  
6 "Dealer Agreement"

7 38. It is hornbook law that parties are free to state  
8 specifically their intent as to when and if a contract will come into  
9 existence and that their stated intent will be determinative. (See  
10 footnote 8 supra.)

11 39. Paragraph 24 of the Dealer Agreement states that "This  
12 Agreement, to be valid must bear the signature of a duly authorized  
13 officer of Dealer...and by (sic) a duly authorized officer of WRV."

14 40. Stated negatively, without the signatures of officers of  
15 both parties, the agreement will not be "valid". It is clear that the  
16 parties manifested their intent that an agreement would not exist  
17 until and unless the document was signed by both parties.

18 41. The Vehicle Code empowers only a franchisee to file a  
19 protest pursuant to Section 3070. One can be a franchisee only if  
20 there is a franchise. There can be a franchise only if there is a  
21 written agreement. There can be an agreement only if the parties  
22 intend to create one.

23 42. The only writing presently before the Board states that the  
24 parties recognize and intend that the Dealer Agreement "to be valid"  
25 must be signed by authorized officers of both parties. As previously  
26 stated, the parties' intentions will control as to if and when the

27 "agreement" became effective ("valid") to constitute a "franchise".

28 43. As it is undisputed that Brent McMahon signed both of the

1 two original Dealer Agreements, the question then becomes whether  
2 either of the two Dealer Agreements was ever signed by an authorized  
3 representative of WRV (in this case, Ron Doyle President of WRV).

4 44. As stated above, the intentions of the parties as to when  
5 the agreement would be "valid" are clear. Because it was already  
6 signed by Brent McMahon, it would be valid and become an agreement  
7 upon being signed by an authorized officer of WRV. There was no  
8 requirement that either of the originals be returned to McMahon's  
9 after being signed by a representative of WRV in order for the Dealer  
10 Agreement to become valid. Therefore, if either one of the two Dealer  
11 Agreements had been signed by an authorized officer of WRV, the  
12 agreement would have become instantly valid and would constitute a  
13 "franchise" within the definition of the Vehicle Code..

14 45. The photocopy of the Dealer Agreement provided to the Board  
15 is of no value whatsoever in helping to ascertain whether either of  
16 the two originals had been signed by Ron Doyle (hereinafter "Doyle").<sup>9</sup>  
17 It therefore becomes necessary to track what happened to the two  
18 original Dealer Agreements after they were signed by Brent McMahon and  
19 returned to WRV. This will be followed by a discussion of allocating  
20 the burden of going forward and the burden of proof as to whether  
21 there was, or was not, a Dealer Agreement signed by Doyle:

22 ///

23 ///

24 ///

25 ///

26 \_\_\_\_\_

27 <sup>9</sup> Doyle is the president of WRV. The documents submitted indicate that only Doyle is  
28 authorized to sign the WRV Dealer Agreements in behalf of WRV. (Doyle affidavit, page  
2, lines 30-32) There are no facts to indicate, nor is there a claim, that the  
Dealer Agreements were signed by some other representative of WRV.

CHRONOLOGICAL SEQUENCE OF EVENTS INCLUDING THE TRACKING  
OF THE TWO ORIGINAL DEALER AGREEMENTS<sup>10</sup>

Late 2004 Or Early 2005

46. Discussions occurred between Harry Collier<sup>11</sup> ("Collier") (former Western Regional Account Manager for WRV) and Michael Weiss ("Weiss") (employee of McMahon's) regarding obtaining a Dealer Agreement for McMahon's Colton facility. Weiss and Collier were friends and had extensive contacts based upon Weiss' previous employment as Sales Manager with Saddleback RV, a WRV franchisee in Irvine, California. Weiss represented that McMahon's might agree to a stocking level of ten units of Alpine Coach products per calendar quarter.

Mid Or late April 2005

47. As there was a possibility that the WRV franchise for the Colton area might be granted to Saddleback RV if Saddleback RV opened a facility in the Colton area, it was not until mid or late April 2005 before Collier mentioned to Doyle (president of WRV) Collier's discussions about entering a Dealer Agreement with McMahon's. Because Collier had concerns about the performance of Saddleback RV, and due to the persistence of Weiss, Collier broached the subject of McMahon's with Doyle and informed him of the possibility that McMahon's would agree to a stocking level of ten units per quarter. Collier was encouraged to continue discussions with McMahon's.

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<sup>10</sup> Unless otherwise indicated, the findings in this heading are based primarily upon the Collier affidavit of March 28, 2006.

<sup>11</sup> Collier voluntarily left the employ of WRV to become Southwest Regional Account Manager for Monaco Coach, Inc. At the time he signed his affidavit (March 28, 2006), Collier was employed as a real estate agent for Coldwell Banker-Associated Realty in Yakima.

1           Late April 2005

2           48. Arrangements were made for and a visit was made by McMahon's  
3 representatives to the WRV plant in Yakima. While making the  
4 arrangements, Collier learned that Brent McMahon would not agree to a  
5 stocking level of ten.

6           49. Brent McMahon expressed a desire to execute a Dealer  
7 Agreement while in Yakima, wanted to purchase three Alpine Coach units  
8 at that time and stated he would order two more at some time in the  
9 future. Collier considered this to be the equivalent of a stocking  
10 level of five units, rather than the ten units anticipated, and when  
11 he told Doyle about this lower stocking level, was told that Doyle  
12 would not sign a Dealer Agreement with McMahon's. (Doyle affidavit,  
13 dated March 29, 2006, page 3, lines 30-33, page 4, lines 1-4)

14           April 29, 2005

15           50. The three Alpine Coaches ordered by McMahon's during the  
16 visit were invoiced to McMahon's.<sup>12</sup> Collier represents that, "One need  
17 not be a dealer to purchase an Alpine Coach directly from WRV." (See  
18 also Affidavit of Doyle, dated March 29, 2006, page 2, lines 11-15)

19           Post-Visit Events In Late April 2005

20           51. Following the April visit, Collier phoned Brent McMahon to  
21 notify him that Collier was sending what he called "two unsigned  
22 drafts of WRV's Dealer Agreement" with a stocking level shown as five.  
23 Collier did this without the direction or knowledge of Doyle and in  
24 the hope that the two sides would agree on a compromise stocking level

25 \_\_\_\_\_  
26 <sup>12</sup> The three Alpine Coaches were delivered to McMahon's on May 4, 2005. No other  
27 coaches were purchased by McMahon's. As stated above, the coaches were invoiced to  
28 McMahon's on April 29, 2005 and delivered on May 4, 2005. As both dates were prior  
even to the signing of the Dealer Agreement by Brent McMahon on May 8, 2005, the  
vehicles could not have been purchased or "received pursuant to a franchise" in  
accordance with Section 331.1

1 number. (See also Doyle affidavit, dated March 29, 2006, page 4,  
2 lines 13-20) Collier instructed Brent McMahon to review the drafts,  
3 sign them if they were acceptable and return them both to Collier who  
4 would then "seek to obtain Mr. Doyle's signature", and, if and when he  
5 did so, Collier would return one of the two signed documents to  
6 McMahon's.

7 May 8, 2005 And Later

8 52. On May 8, 2005, Brent McMahon signed both of the Dealer  
9 Agreements which had been mailed to him by WRV. They were returned to  
10 WRV and eventually received by Collier who sought to have them signed  
11 by Doyle. Doyle was unwilling to sign due to the low stocking level  
12 of only five units and what Doyle believed to be McMahon's  
13 "operational style that occasionally created procedural difficulties."  
14 (See also Doyle affidavit, page 4, lines 20-30)

15 53. Telephone contact continued between Collier and McMahon's.

16 54. Collier and Doyle had a business trip to California already  
17 planned for the end of May or early June 2005.

18 55. Brent McMahon alleges that it was during phone calls after  
19 the May 8, 2005 signing of the two Dealer Agreements and before the  
20 meeting at McMahon's Irvine dealership in late May or early June 2005,  
21 that he was informed by Collier that Doyle had signed the Dealer  
22 Agreements and that they would be brought to the Irvine meeting.  
23 (Brent McMahon Declaration, page 2, lines 22-24; Brent McMahon  
24 Supplemental Declaration, page 2, lines 5-9)

25 56. In contrast, Collier asserts that he had informed Weiss that  
26 Collier and Doyle would bring the two documents that had been signed  
27 by Brent McMahon (but not by Doyle) and have a meeting in hope of  
28 resolving their concerns. In specific response to Brent McMahon's

1 declaration, Collier states that he "...never told Mr. McMahon, or  
2 anyone else, at any time, that Ron Doyle signed a Dealer Agreement  
3 with McMahon's RV (or Mega RV Corp., dba McMahon's RV)." (Collier,  
4 Supplemental Declaration, page 2, lines 11-14)

5 57. Collier's business practice, when Doyle did sign a Dealer  
6 Agreement, was to be sure the Dealer Agreement was returned to the  
7 dealer by overnight express mail and it would not have been kept for  
8 later delivery at the future meeting in Irvine. (Collier,  
9 Supplemental Declaration, page 3, lines 1-17)

10 58. Doyle learned of the upcoming Irvine meeting after it had  
11 been arranged by Collier, but Doyle, shortly before the meeting was to  
12 be held, decided not to attend or participate. (Doyle affidavit, page  
13 5, lines 1-7) The meeting did occur at McMahon's Irvine facility but  
14 without Doyle. The participants at the meeting were Steve McMahon,  
15 Jonny Siroonian, and Collier. During the meeting with Steve McMahon  
16 and Siroonian, Collier spoke with Brent McMahon only by phone.

17 Whereabouts Of The Two Original Dealer Agreements

18 Summary Of Facts As Contained In A Declaration Of Kane  
19 Phillips, ("Phillips") A Former Employee Of WRV

20 59. Phillips worked in support of Collier, who was his  
21 supervisor. Phillips, at the request of Collier, mailed the two  
22 unsigned original Dealer Agreements to McMahon's. Collier received  
23 the agreements after they were signed and sent back by Brent McMahon.  
24 Collier gave them to Phillips, who in turn then either handed the  
25 Dealer Agreements to Doyle or placed them in Doyle's box. Phillips  
26 would have been the one who would have mailed one of the Dealer  
27 Agreements back to Brent McMahon after they had been signed by Doyle.  
28 However, Doyle returned the Dealer Agreements to Phillips without them

1 having been signed by Doyle. They sat on Phillip's desk for about two  
2 weeks before he returned them to Collier at which time they had not  
3 been signed by Doyle. Phillips was aware of phone calls from Weiss at  
4 McMahon's and the continuing but unsuccessful efforts of Collier to  
5 obtain the signature of Doyle. Phillips does not know what happened  
6 to the two Dealer Agreements after they were given back to Collier.

7 Summary Of Facts As Contained In Affidavit And  
8 Supplemental Declaration Of Collier

9 60. Collier admits that he took the two original Dealer  
10 Agreements, which he says were signed only by Brent McMahon, with him  
11 to his business meetings in California but states that he did not take  
12 them to the meeting at McMahon's facility in Irvine because Doyle was  
13 not attending that meeting. Collier does not remember if he brought  
14 the two Dealer Agreements back to Yakima with him and has no  
15 recollection of what happened to them. (Collier, Supplemental  
16 Declaration, page 5, lines 16-27)

17 Summary Of Facts As Contained In Declaration Of Burk Morgan,  
18 Vice President, Director Of Sales For WRV

19 61. Burk Morgan ("Morgan") has access to all of WRV's files and  
20 records concerning the contacts with dealers and prospective dealers.  
21 He has searched the files and records but has been "unable to locate  
22 any original Dealer Agreement between WRV and McMahon's RV. The only  
23 copy of the Dealer Agreement in WRV's possession was received from  
24 McMahon's RV long after the events at issue. It shows only the  
25 signature of Brent McMahon, and a date of May 8, 2005." (Morgan  
26 Declaration, page 2, lines 2-23)

27 ///

28 ///

ALLOCATION OF BURDEN OF ESTABLISHING WHETHER THERE IS  
OR IS NOT A FRANCHISE BETWEEN THE PARTIES

1  
2  
3       62. Because a "franchise" between the parties is necessary for  
4 the Board to have jurisdiction to hear the protest filed by McMahon's,  
5 and because the parties contest whether there is a written agreement  
6 constituting a franchise, it is necessary to decide which party should  
7 have the burden of proof as to the existence or non-existence of the  
8 franchise. This, again, is for the sole purpose of determining  
9 whether the facts are sufficient to establish jurisdiction of the  
10 Board.

11       63. Under these particular facts, as there is no dispute that  
12 there was a writing that could constitute a franchise and that it was  
13 signed by Brent McMahon, the issue narrows down to whether there is  
14 sufficient evidence to establish that the Dealer Agreement was signed  
15 by Doyle, the president of WRV.

16       64. As the protest was filed by McMahon's it would typically be  
17 incumbent upon McMahon's to establish that it was a franchisee, a  
18 status required by Section 3070. As discussed above, in order to do  
19 so, McMahon's ordinarily would have to be able to prove there was a  
20 written agreement; with the specific and sole issue here being whether  
21 the writing had been signed by a representative of WRV after the  
22 documents had been returned to WRV. WRV admits that the two originals  
23 of the writing called "Dealer Agreement" had existed, admits both had  
24 been signed by Brent McMahon, and that, when they were last seen, the  
25 Dealer Agreements were in the possession of employees of WRV.

26       65. Under these circumstances, there is no way for McMahon's to  
27 produce the writings which McMahon's claims to be the written  
28 agreements constituting the franchise.

1           66. The only evidence McMahon's has presented is a declaration  
2 from Brent McMahon in which he states that he had been told, during a  
3 phone conversation at some indefinite period of time, by Collier of  
4 WRV, that Doyle had signed the documents.

5           67. McMahon's, as the protestant, should have the burden of  
6 going forward by pleading and making a preliminary showing that it was  
7 a franchisee of WRV. This McMahon's has done by its pleadings and by  
8 the statement of Brent McMahon in his declaration that he had been  
9 told that Doyle had signed the Dealer Agreements.

10           68. However, if the ultimate burden of proving that Doyle signed  
11 the agreement is upon McMahon's, the contention of McMahon's that it  
12 is a franchisee could fail as Brent McMahon's declaration may not be  
13 sufficient by itself to prove the truth of the matter asserted. But,  
14 under the circumstances as stated above and as explained below,  
15 McMahon's evidence is at least sufficient to shift to WRV the burden  
16 of proving that McMahon's is not a franchisee of WRV as there was  
17 never a signature of Doyle on either of the two original agreements  
18 which had been signed by Brent McMahon.

19           69. The facts and rationale for shifting the burden to WRV to  
20 negate the claim that Doyle had signed the Dealer Agreements are as  
21 follows:

- 22           ▪ WRV admits it had received the two agreements signed by  
23           Brent McMahon;
- 24           ▪ Neither of the two original Dealer Agreements was returned  
25           to McMahon's so McMahon's cannot produce either of the  
26           original Dealer Agreements, signed or unsigned;

27 ///

28 ///

- 1           ▪ WRV is the party in the best and only position to establish
- 2           whether or not Doyle signed the Dealer Agreements after they
- 3           were returned to WRV;
- 4           ▪ WRV has not provided the Board with either of the two
- 5           original Dealer Agreements signed by Brent McMahon;
- 6           ▪ WRV had physical possession of the two original Dealer
- 7           Agreements up until the time they disappeared; and
- 8           ▪ WRV cannot present any facts to show how, when, where or why
- 9           the documents were lost or destroyed or who was responsible
- 10          for their loss or destruction.

11           70. Therefore, it is neither fair nor realistic to place the  
12 burden on McMahon's of proving a fact that it is impossible for  
13 McMahon's to prove and which can be established or negated only by  
14 WRV.

15           71. At the first hearing on WRV's motion, held on May 4, 2006,  
16 the Board was provided only with a photocopy of one of the original  
17 Dealer Agreements. This photocopy bears the signature of Brent  
18 McMahon but not Doyle. Neither the whereabouts of the two originals  
19 nor the genesis of the photocopy was then, or now, established. The  
20 original Dealer Agreements have not been located and the only  
21 reference to the photocopy's origin is in Morgan's declaration signed  
22 on May 23, 2006, which was submitted with the supplemental documents  
23 in connection with the resumption of the hearing on June 7, 2006.  
24 Morgan, a vice-president of WRV states that the photocopy "...was  
25 received from McMahon's RV long after the events at issue." (Morgan  
26 Supplemental Declaration, page 2, lines 20-22)

27           72. It would be impossible for McMahon's to have in its  
28 possession an original of the Dealer Agreements, whether signed by

1 Doyle or not, unless WRV, in some manner, had returned the agreement  
2 to McMahon's, which WRV did not do.

3 73. In summary, because McMahon's, through circumstances beyond  
4 its control and without fault on its part, is not physically able to  
5 produce or otherwise factually prove an agreement signed by WRV, even  
6 if one existed, and because the documents themselves and the facts  
7 pertaining to whether they were or were not signed by Doyle were and  
8 are exclusively and totally within the control of and available only  
9 to WRV, it is deemed appropriate to shift the burden to WRV to prove  
10 that Doyle did not sign the agreements at any time.

11 74. The disappearance of the two Dealer Agreements is a fact  
12 that cannot be ignored for two other related reasons. In addition to  
13 being a factor that points toward shifting the burden of proof of "no  
14 agreement" to WRV as discussed above, it is also something that could  
15 result in at least an inference, if not a presumption, that the  
16 content of the documents would be adverse to the position being taken  
17 by the party who is responsible for their disappearance or possible  
18 destruction, which is WRV. Secondly, the standard applied to  
19 determine if WRV met the burden of proof may be raised. If there were  
20 a trial on the factual issue, because of the one-sided nature of the  
21 access to the documents themselves and the facts, it is possible that  
22 the burden of proving the absence of a signature of Doyle on the  
23 missing documents would perhaps have to be established by clear and  
24 convincing evidence rather than by merely a preponderance of the  
25 evidence.

26 75. However, this is a motion to dismiss. As such, it is  
27 necessary to find that, under the facts as presented, as a matter of  
28 law, there is no jurisdiction in the Board to hear the protest.

1 Because, WRV is the moving party on the motion to dismiss, and  
2 because, as explained above, WRV is the only party which had the  
3 documents and knowledge of the facts as to whether Doyle signed the  
4 Dealer Agreements, the burden is upon WRV to refute the allegation and  
5 evidence presented by McMahon's, and to establish that there is no  
6 evidence of a signed writing constituting a franchise.

7 THE EVIDENCE AS PRESENTED BY THE PARTIES

8 Evidence Presented By McMahon's That The Dealer Agreements Were  
9 Signed By Doyle

10 76. McMahon's presented the following evidence as to the  
11 existence of an agreement signed by Doyle.

12 Declaration Of Brent McMahon Dated April 24, 2006

13 77. This declaration of Brent McMahon in part stated:

14 . . .

15 8. Mr. Collier had scheduled a meeting to discuss  
16 future projects as per the terms of the agreement at McMahon  
17 (sic) facility in Irvine. I was informed that Mr. Doyle had  
18 executed the agreement and he would bring it with him at the  
19 meeting. But during the meeting, Mr. Collier stated that WRV  
20 had decided to establish an additional dealership with  
21 Saddleback RV in Colton area (sic)...There was no discussion  
22 about the agreement that it was not signed by Mr. Doyle or  
23 that there was no executed written agreement.

24 Declaration Of Brent McMahon Dated May 16, 2006

25 78. This subsequent declaration of Brent McMahon, states in part  
26 that:

27 . . .

1           3.    On a date falling between May 8, 2005 and the date  
2           on which the representatives of WRV met with Protestant at  
3           its Irvine facility in late May, early June, I had a  
4           telephone conversation with Harry Collier during which I was  
5           informed that Ron Doyle, President of WRV, had in fact  
6           signed the Agreement. I was further informed that Mr.  
7           Collier would bring a fully executed Agreement to McMahon's  
8           RV when he came for the Irvine meeting.

9           4.    Nevertheless, at the Irvine meeting, I was  
10          informed by Mr. Collier that WRV had decided to establish an  
11          additional dealership with Saddleback RV at their Colton  
12          location. Furthermore, I was not informed that either or  
13          both of the Agreements had not been signed by Mr. Doyle or  
14          that there was no fully executed copy of a dealership  
15          agreement. (Brent McMahon Supplemental Declaration, page 2,  
16          lines 5-13)

17          79. This evidence is minimal at best as to whether Doyle signed  
18          a Dealer Agreement, but is deemed sufficient to meet the Protestant's  
19          burden of going forward with its claim.

20          Evidence Presented By WRV That The Dealer Agreements Were Not  
21          Signed By Doyle

22          80. In support of its motion to dismiss and in rebuttal to the  
23          assertions of Brent McMahon, WRV presented the following evidence in  
24          the form of affidavits and declarations.

25          ///

26          ///

27          ///

28          ///

1 Affidavit Of Harry Collier Dated March 26, 2006

2 81. This affidavit of Collier<sup>13</sup> states in part:

3 14. A short time after my receipt of the Dealer  
4 Agreement from McMahon's, I began receiving phone calls from  
5 Mr. Weiss inquiring about the status of the Dealer  
6 Agreement. I responded that Mr. Doyle had not signed the  
7 Agreement, and further that the problem related to the  
8 stocking levels. During that same time period I also had a  
9 telephone communication with Mr. McMahon wherein I provided  
10 the same information. (Collier affidavit, page 5, lines 23-  
11 29)

12 82. Collier also stated that, in regards to the Irvine meeting,

13 On behalf of WRV, I met with Mr. Steve McMahon and Mr.  
14 Jonny Siroonian. I also spoke by phone with Mr. Brent  
15 McMahon. I informed that (sic) Mr. Doyle was unwilling to  
16 sign the Dealer Agreement and that WRV had decided against  
17 pursuing further efforts to establish any dealer or  
18 franchise relation with McMahon's. Some of the  
19 representatives of McMahon's reacted angrily to this  
20 information, but it did not change WRV's decision.<sup>14</sup> Mr.  
21 Doyle would not, and did not, execute the Dealer Agreement.  
22 (Collier affidavit, page 6, lines 7-14).

23 ///

24 ///

25 \_\_\_\_\_  
26  
27 <sup>13</sup> Collier states that he voluntarily left the employ of WRV in late June 2005 and  
~~has not been associated with WRV in any capacity since then.~~ (Collier affidavit,  
page 6, lines 29-33)

28 <sup>14</sup> No declarations or affidavits of Weiss, Siroonian, or Steve McMahon were submitted  
by McMahon's.

1 Declaration Of Harry Collier Dated May 23, 2006

2 83. Collier, in this supplemental document, states in part as  
3 follows:

4 2. Mr. McMahon claims, under oath, that on some  
5 undetermined date between May 8, 2005, and a meeting I  
6 attended in Irvine, California, with Mr. McMahon, I told him  
7 that Ron Doyle...had signed a Dealer Agreement with McMahon's  
8 RV. In no uncertain terms and as strenuously as I can  
9 testify to this issue, I have never told Mr. McMahon, or  
10 anyone else, at any time, that Ron Doyle signed a Dealer  
11 Agreement with McMahon's RV (or Mega RV Corp., dba McMahon's  
12 RV).

13 . . .

14 6. ...Mr. Weiss was continuously pushing me to  
15 facilitate McMahon's receipt of the Alpine Coach product line  
16 in Colton, and I worked hard, albeit unsuccessfully, to  
17 accomplish that. Against this backdrop, one would reasonably  
18 think that had Mr. Doyle signed the agreement, I would have  
19 mentioned this fact to Mr. Weiss. Notably absent, however,  
20 is any declaration from Mr. Weiss suggesting that I made such  
21 a statement...Mr. Doyle never signed the Dealer Agreement and I  
22 never told or suggested to anyone that he did or would.

23 (Emphasis in the original) (Page 4, lines 5-16)

24 9. Regarding the current whereabouts of the two  
25 original Dealer Agreements signed by Mr. McMahon, I have no  
26 recollection of what became of them. I had them with me in  
27 California, but did not bring them to the meeting at  
28 McMahon's in Irvine because Mr. Doyle refused to attend.

1 Furthermore, they had not been signed by Mr. Doyle. By the  
2 date of that meeting, Mr. Doyle had affirmatively determined  
3 that he preferred to work with Saddleback RV in the Colton  
4 area. Since the only reason to bring the agreements to the  
5 McMahan's meeting would have been to have them available in  
6 the event we convinced Mr. Doyle to work with McMahan's, his  
7 refusal to attend foreclosed the issue. I do not even  
8 remember bringing the agreements back to Yakima.

9 10. I voluntarily left WRV at the end of June, 2005,  
10 and do not have access to the internal records and files.  
11 One could only speculate what became of them. However, I  
12 can state without equivocation that Mr. Doyle never signed  
13 the subject Dealer Agreement, despite my repeated,  
14 encouragement that he do so. (Page 5, lines 15-33)

15 Affidavit of Ron Doyle, President Of WRV, Dated March 29, 2006

16 84. Doyle's affidavit states in part:

17 4. ...For all times material hereto, I have been the  
18 only person authorized to execute a Dealer Agreement on  
19 behalf of WRV. That practice has been followed without  
20 exception. (Doyle affidavit, page 2, lines 30-33)

21 . . .  
22 9. ...I did not become aware of these drafts [the two  
23 Dealer Agreements sent by Mr. Collier to McMahan's for Mr.  
24 McMahan's signature] until after they had been signed by Mr.  
25 McMahan and returned to Mr. Collier...At no time have I signed  
26 a Dealer Agreement with McMahan's RV or Mega RV, whether in  
27 the form signed by Mr. McMahan or any other form." (Doyle  
28 affidavit, page 4, lines 16-18, and 27-30)

1 11. I have never signed or executed any Dealer  
2 Agreement with McMahon's RV or Mega RV, regardless of the  
3 facility location... (Doyle affidavit, page 5, lines 8-10)

4 Declaration Of Burk Morgan, Vice President Of WRV  
5 (Dated April 26, 2006)

6 85. Morgan states in part:

7 The only such 'agreement' in the possession of WRV was  
8 signed by Mr. McMahon but not by or on behalf of WRV. (Page 2,  
9 lines 27-28) That agreement was subsequently returned to WRV,  
10 but Mr. Doyle refused to sign for WRV. (Page 3, lines 3-4)

11 Supplemental Declaration Of Burk Morgan, Vice President Of WRV  
12 (Dated May 26, 2006)

13 86. In this supplemental declaration, Morgan states in part:

14 2. ...In all respects, I have searched every possible  
15 place where the original Dealer Agreements might have been  
16 filed or retained.

17 3. Despite my efforts, I have been unable to locate  
18 any original Dealer Agreement between WRV and McMahon's RV.  
19 The only copy of the Dealer Agreement in WRV's possession  
20 was received from McMahon's RV long after the events at  
21 issue. It shows only the signature of Brent McMahon; and a  
22 date of May 8, 2005. (Declaration, Page 2, lines 15-23)

23 Declaration Of Kane Phillips, Former Employee of WRV  
24 (Dated May 23, 2006)

25 87. Phillips states in part:

26 2. In May, 2005, I recall receiving from Mr. Collier  
27 Dealer Agreements that had been executed on behalf of  
28 McMahon's RV by Mr. Brent McMahon. I was the individual

1 who, at the request of Mr. Collier, originally sent these  
2 agreements to McMahon's several days earlier. Shortly  
3 thereafter, I either handed these agreements directly to Mr.  
4 Ron Doyle or placed them in his box...It would have been my  
5 job to send a fully executed copy of the Dealer Agreement  
6 back to McMahon's following its signing by Mr. Doyle.  
7 However, within a few days, Mr. Doyle returned the  
8 agreements to me, unsigned. Mr. Doyle made it clear to me  
9 that he was not going to sign the agreements. Thereafter,  
10 they sat on my desk for approximately two weeks.

11 (Declaration, page 2, lines 4-15)

12 . . . .  
13 4. The Dealer Agreements finally left my possession  
14 for good when I returned them to Mr. Collier. It was  
15 apparent that the dispute over signing the agreements was  
16 between Messers. Collier and Doyle, and I did not want to be  
17 in the middle of it. When I returned the agreements back to  
18 Mr. Collier, I know that they had not been signed by Mr.  
19 Doyle. Had they been signed, I would have returned them to  
20 McMahon's, which I never did. (Declaration, page 2, lines  
21 26-31)

22 . . . .  
23 7. It was my experience during the time that I was  
24 employed at WRV that Dealer Agreements that were not fully  
25 executed were either shredded or thrown away. I do not  
26 know, however, what was done with the dealer agreements  
27 discussed above. (Declaration, page 3, lines 8-12)

28 ///

1                   ANALYSIS AS TO WHETHER THERE IS SUFFICIENT EVIDENCE  
2                   TO RAISE A TRIABLE ISSUE OF FACT OF WHETHER  
3                   A DEALER AGREEMENT WAS SIGNED BY MR. DOYLE

4           88. The only evidence presently before the Board that could  
5 support a conclusion that there was a Dealer Agreement signed by Doyle  
6 is the statement by Brent McMahon that he had been told by Collier  
7 that Doyle had signed the Dealer Agreements.

8           89. There are at least two issues raised by the statement of  
9 Brent McMahon alleging that Collier told Brent McMahon that Doyle had  
10 signed the Dealer Agreements. The first is whether there is a triable  
11 issue of fact as to whether Collier made the statement; the second is,  
12 assuming the statement was made by Collier, whether there is a triable  
13 issue of fact as to whether the statement is true, that Doyle did in  
14 fact sign the Dealer Agreements.

15                   Whether There Is A Triable Issue Of Fact As To Whether Collier  
16                   Made The Statement To Brent McMahon

17           90. Collier has denied making such a statement to Brent McMahon  
18 or anyone else. In addition to this denial, the circumstances as to  
19 the practices and procedures of the employees of WRV in returning a  
20 Dealer Agreement to a franchisee (when a Dealer Agreement is signed by  
21 Doyle), the close relationship between Collier and Weiss, the frequent  
22 contacts between the two of them, and the absence of any statement by  
23 Weiss, indicate that it is most unlikely that McMahon's could  
24 establish that Collier had made the statement to Brent McMahon and  
25 would not have made such a statement to others.

26                   Whether The Statement By Brent McMahon As To What Collier Said,  
27                   Even If Found To Have Been Made By Collier, Is Sufficient To  
28                   Raise A Triable Issue Of Fact As To Whether It Was True

29           91. The following facts are relevant as to whether the statement  
30 of Collier, if made, is sufficient to raise a triable issue of fact as

1 to whether Doyle did in fact sign the Dealer Agreements.

2 92. There is no corroborative evidence of the fact asserted that  
3 Doyle had signed the Dealer Agreement. There is no direct evidence by  
4 a percipient witness stating that he or she saw Doyle sign the Dealer  
5 Agreement. Nor is there evidence from anyone that he or she saw  
6 Doyle's signature on the Dealer Agreements. All of the persons who  
7 saw the Dealer Agreements state that the documents contained only the  
8 signature of Brent McMahon.

9 93. There is no admission by Doyle that he signed a Dealer  
10 Agreement. In fact, the opposite is true. Doyle denies signing a  
11 Dealer Agreement. As stated above, the persons who saw the Dealer  
12 Agreements after they had been presented to Doyle for his possible  
13 signature state that when they last saw the documents they did not  
14 contain the signature of Doyle.

15 94. In addition to what was stated about the absence of Doyle's  
16 signature, the factual circumstances do not support the contention  
17 that Doyle signed the Dealer Agreements. These facts include the  
18 practices and procedures of WRV in returning a Dealer Agreement to a  
19 franchisee (when the Dealer Agreement is signed by Doyle), the close  
20 relationship between Collier and Weiss, the frequent contacts between  
21 the two of them, and the absence of any statement by Weiss (discussed  
22 above) are indicative that it is most unlikely that it could be found  
23 that the Dealer Agreements had been signed by Doyle.

24 95. There is no other evidence that would support the statement  
25 of Brent McMahon that the Dealer Agreement was signed by Doyle.  
26 Therefore, even if Collier had stated that Doyle had signed the Dealer  
27 Agreements, this statement of Brent McMahon as to what Collier had  
28 told him is not only uncorroborated but also negated by the evidence

1 presented by WRV and thus would not be sufficient in itself to  
2 establish the truth of the matter asserted, which is that Doyle in  
3 fact had signed a Dealer Agreement.

4 96. If McMahon's is allocated the burden of proving that it was  
5 a franchisee, it has failed to do so as the evidence McMahon's has  
6 presented as to whether Doyle signed the Dealer Agreement is not  
7 sufficient.

8 97. Even if the evidence presented by McMahon's was sufficient  
9 to establish that the statement of Collier was made, it is not  
10 sufficient to establish the truth of the statement, that the Dealer  
11 Agreements were in fact signed by Doyle.

12 98. If, contrary to the above, it were determined that McMahon's  
13 had made a prima facie showing of a signature by Doyle, causing the  
14 burden of proving no signature to be shifted to WRV, the evidence  
15 presented in behalf of WRV is sufficient, under whatever standard may  
16 be applied<sup>15</sup>, to refute McMahon's contentions. There are affidavits  
17 and declarations under penalty of perjury submitted by Doyle, Collier  
18 (who is no longer employed by WRV), and Phillips, that the Dealer  
19 Agreements were not signed by Doyle. These are sufficient to overcome  
20 any prima facie showing by McMahon's that Doyle had signed the Dealer  
21 Agreements.

22 99. To the extent that the still-unexplained loss or destruction  
23 of the Dealer Agreements raises an inference or even a rebuttable

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24  
25 <sup>15</sup> This is a Motion to Dismiss the protest with the motion asserting that the Board  
26 has no jurisdiction to hear the protest because there is no franchise and McMahon's  
27 is not a franchisee. Both sides cite and quote from *Aguilar v. Atlantic Richfield*  
28 *Co.* (2001) 25 Cal. 4<sup>th</sup> 826, which is an anti-trust case involving a motion for  
summary judgment and which contains a discussion distinguishing between a burden of  
persuasion and a burden of proof. To the extent the standards in regard to a summary  
judgment motion (as discussed in *Aguilar*) are applicable to this motion to dismiss,  
they would indicate that WRV should prevail on its motion.

1 presumption that the documents had been signed by Doyle, the inference  
2 or presumption has been overcome by the evidence submitted by WRV.

3 CONCLUSION

4 100. The evidence presented by McMahon's (again, which is only  
5 that Brent McMahon states that Collier told Brent McMahon that Doyle  
6 had signed the document) is not adequate to raise a triable issue of  
7 fact. Further, even if the statement by Brent McMahon was found  
8 sufficient to show that Collier had made the statement, such a  
9 statement by Brent McMahon as to what Collier said is not sufficient  
10 by itself to support a finding that Doyle had in fact signed the  
11 Dealer Agreement.

12 101. In the absence of a signature of Doyle on one of the Dealer  
13 Agreements, it cannot be found that there was an "agreement" as  
14 required by the definition of a "franchise" in Section 331. If no  
15 "franchise" can be established, then McMahon's cannot be a  
16 "franchisee", as defined in Section 331.1, and WRV cannot be a  
17 "franchisor", as defined in Section 331.2. If McMahon's is not a  
18 franchisee and WRV is not a franchisor, McMahon's has no protest  
19 rights under Section 3070.

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ORDER

1  
2 Respondent's Motion to Dismiss for Lack of Subject Matter  
3 Jurisdiction is granted. The Protest of Mega RV Corp., dba McMahon's  
4 RV v. Western Recreational Vehicles, Inc., PR-1983-05 is dismissed  
5 without prejudice.<sup>16</sup>

6  
7 I hereby submit the foregoing which  
8 constitutes my proposed order in  
9 the above-entitled matter, as the  
10 result of a hearing before me, and  
11 I recommend this proposed order be  
12 adopted as the decision of the New  
13 Motor Vehicle Board.

DATED: July 10, 2006

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15   
16 By: \_\_\_\_\_  
17 ANTHONY M. SKROCKI  
18 Administrative Law Judge  
19  
20  
21

22 George Valverde, Director, DMV  
23 Mary Garcia, Branch Chief,  
24 Occupational Licensing, DMV

25 <sup>16</sup> Dismissal without prejudice is deemed appropriate in the event, however unlikely,  
26 that the originals of the Dealer Agreements may re-appear, perhaps during some other  
27 proceeding and possibly in some other forum and that, contrary to the above, they are  
28 discovered to contain the signature or signatures of Doyle. For this same reason,  
this order is not intended to be factually determinative either due to res judicata  
or collateral estoppel on the issue of whether there was in fact a signature of Doyle  
on the Dealer Agreements. This order is limited in its effect to a finding that, on  
the facts presently before the Board, McMahon's cannot be determined to be a  
franchisee of WRV.