

NEW MOTOR VEHICLE BOARD
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STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of

MEGA RV CORP. dba MCMAHONS RV,

Protestant,

v.

ROADTREK MOTORHOMES, INC.,

Respondent.

Protest No. PR-2234-10
Protest No. PR-2235-10
Protest No. PR-2236-10

DECISION

At its regularly scheduled meeting of August 24, 2010, the Public and Dealer Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protests", in the above-entitled matters. After such consideration, the Board adopted the Proposed Order.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 24th DAY OF AUGUST 2010.



ROBERT T. (TOM) FLESH
President
New Motor Vehicle Board

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CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 MEGA RV CORP. dba MCMAHON'S RV,
13 Protestant,
14 v.
15 ROADTREK MOTORHOMES, INC.,
16 Respondent.

Protest No. PR-2234-10
Protest No. PR-2235-10
Protest No. PR-2236-10

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS PROTESTS**

17
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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 motor vehicle
3 dealer as defined in Vehicle Code section 426,¹ and is licensed as such by the Department of Motor
4 Vehicles ("DMV"). McMahon's operates recreational vehicle (RV)² dealerships at the following
5 locations:

- 6 ■ 1313 RV Center Drive, #12, Colton, California.
- 7 ■ 5060 Scotts Valley Road, Scotts Valley, California 95066 ("McMahon's Scotts Valley");
- 8 ■ 6441 Burt Road, #10, Irvine, California 92618 ("McMahon's Irvine"), and
- 9 ■ 77840 Varner Road, Palm Desert, California 92211 ("McMahon's Palm Desert").

10 2. There have been multiple protests filed as to each of these locations but this order pertains
11 only to the last location listed here, McMahon's Palm Desert. The three protests identified in the caption
12 have not been consolidated by order of the Board but are tracking the same schedule for purposes of this
13 motion.

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

18 **PROCEDURAL BACKGROUND**

19 **THE PRIOR PROTESTS OF MCMAHON'S PALM DESERT AND**
20 **DISMISSALS BY BOARD (PR-2200-10, PR-2207-10, AND PR-2210-10)**

21 **Protest No. PR-2200-10**

22 4. McMahon's Palm Desert had previously filed Protest No. PR-2200-10 with the Board
23

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

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

27 ³ Section 672 defines "vehicle manufacturer" as follows:

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

1 alleging that Roadtrek intended to modify the franchise of McMahon's Palm Desert by appointing an
2 additional franchisee in the exclusive territory that had been granted to McMahon's Palm Desert which
3 would constitute a modification of their franchise in violation of Section 3070(b)(1). This protest was
4 filed on January 29, 2010.

5 5. On February 25, 2010, Roadtrek filed "Respondent's Motion to Dismiss Protest" (PR-
6 2200-10) asserting that there was no franchise in existence between McMahon's Palm Desert and
7 Roadtrek and therefore there could be no modification of a franchise that would come within the Board's
8 statutes.

9 6. After briefing of the issues and a March 15, 2010 hearing before Anthony M. Skrocki, an
10 Administrative Law Judge of the Board ("ALJ Skrocki"), it was determined that there was insufficient
11 evidence to establish that a franchise existed between Roadtrek and McMahon's for the Palm Desert
12 location. ALJ Skrocki recommended to the Board that Roadtrek's Motion to Dismiss be granted and that
13 the protest of McMahon's Palm Desert (PR-2200-10) be dismissed without prejudice.

14 **Protest Nos. PR-2207-10 and PR-2210-10**

15 7. On February 18, 2010, McMahon's Palm Desert filed two protests with the Board, PR-
16 2207-10 and PR-2210-10, pursuant to Section 3075 (warranty reimbursement) and Section 3076
17 (franchisor incentive program reimbursement), respectively. Each protest alleged a failure on the part of
18 Roadtrek to pay the money owed as required by the statutes.

19 8. On March 18, 2010, Roadtrek filed a motion to dismiss eight consolidated protests
20 including PR-2207-10 and PR-2210-10. The motion asserted that McMahon's Palm Desert is not a
21 franchisee as there is no written franchise between the parties. This portion of the motion incorporated
22 by reference the arguments contained in the motion to dismiss the protest of McMahon's Palm Desert in
23 PR-2200-10.

24 9. After briefing of the issues, a hearing in PR-2207-10 and PR-2210-10 was held on April 7,
25 2010 before ALJ Skrocki. It was also determined that there was insufficient evidence to establish that a
26 franchise existed between McMahon's Palm Desert and Roadtrek. ALJ Skrocki recommended to the
27 Board that Roadtrek's motion to dismiss be granted and the protests of McMahon's Palm Desert be
28 dismissed without prejudice.

1 **Board adopts proposed orders dismissing McMahon's Palm Desert protests**

2 10. At the Board's May 5, 2010, General Meeting, the Public and Dealer Members of the
3 Board considered ALJ Skrocki's "Proposed Order Granting Respondent's Motion to Dismiss Protest
4 (PR-2200-10)" and "Proposed Order Granting Respondent's Motion to Dismiss Protest Nos. PR-2207-10
5 and PR-2210-10", both dated April 19, 2010. During the Board meeting, counsel for McMahon's Palm
6 Desert, Michael M. Sieving, addressed the Board stating that he had recently discovered that there was in
7 existence an OL-124 form⁴ that had not been presented during the prior proceedings. However, as the
8 OL-124 was not part of the record, it could not be considered by the Board.

9 11. The Board unanimously adopted ALJ Skrocki's proposed orders. Protest Nos. PR-2200-
10 10, PR-2207-10, and PR-2210-10 were dismissed without prejudice as was recommended by the ALJ. In
11 the event that evidence of a franchise was discovered, McMahon's Palm Desert could re-file its protests.

12 **THE PROTESTS BEFORE THE BOARD IN THIS MOTION**

13 12. On May 11, 2010, McMahon's filed the following new protests with the Board, all
14 pertaining to the claimed Roadtrek franchise for McMahon's Palm Desert.

15 13. Protest No. PR-2234-10 alleges that: "during the course of the franchise relationship
16 between the parties, Protestant properly submitted to Respondent claims for payments pursuant to a
17 franchisor incentive program. Roadtrek has failed to disapprove Protestant's claims in writing stating the
18 specific grounds for disapproval. 'A claim not specifically disapproved in writing within 30 days from
19 receipt, shall be deemed approved on the 30th day.' V.C. section 3076. Roadtrek has failed to pay the
20 monies owed to Protestant pursuant to the incentive claims submitted." (Protest, page 2, lines 6-11)

21 14. Protest No. PR-2235-10 alleges that Roadtrek, in violation of Section 3070, intends to
22 establish an additional Roadtrek dealer within Protestant's exclusive territory resulting in a modification
23 of Protestant's franchise without notice, without Protestant's knowledge or consent, and that such
24 modification "will substantially affect Protestant's sales and service obligations and investment."
25 (Protest, page 2, lines 4-9)

26
27
28 ⁴ "OL-124" is the form number on the lower left of a form used by the License Operations Division of the Department of Motor Vehicles. The form provided by McMahon's will be discussed in detail.

1 May 5 meeting. These paragraphs contain the analysis regarding the lack of a franchise for McMahon's
2 Palm Desert. The "Proposed Order Granting Respondent's Motion to Dismiss Protest Nos. PR-2207-10
3 and PR-2210-10", also adopted by the Board at its May 5 meeting, incorporated the content of the
4 Proposed Order in Protest No. PR-2200-10. All of what is contained therein pertaining to Protest No.
5 PR-2200-10 is applicable to the current protests and current motion to dismiss, and is incorporated and
6 made applicable to the issues regarding the current motion to dismiss these three protests.

7 22. Incorporated herein are the following paragraphs from the Proposed Order in Protest No.
8 PR-2200-10:⁵

9 **THE PALM DESERT MOTION**

10 109. Roadtrek's motion to dismiss alleges that the protest should be dismissed
11 as McMahon's Palm Desert is not a franchisee of Roadtrek

12 110. This contention is based upon the claim by Roadtrek that there is no
13 franchise in existence between Roadtrek and McMahon's Palm Desert. If there is no
14 franchise, there can be no modification that would be subject to Section 3070.

15 **THE OPPOSITION FILED BY MCMAHON'S PALM DESERT**

16 111. The Opposition filed by McMahon's Palm Desert alleges that:

- 17 a. "...such written franchise does exist". (Opposition, page 2, line 10);
- 18 b. McMahon's Palm Desert "has been unable to locate its copy of the
19 franchise..." (Opposition, page 2, lines 11-12);
- 20 c. McMahon's Palm Desert "has been a Roadtrek dealer at its Palm desert
21 location since approximately December 2008/January 2009..." (Opposition, page 2, lines
22 11-13);
- 23 d. "Roadtrek has delivered units to this location, which units McMahon's
24 stocked and sold." (Opposition, page 2, line 13-14);
- 25 e. McMahon's Palm Desert is listed on McMahon's website as a Roadtrek
26 dealership location (Opposition, page 2, lines 20-21);

27
28 ⁵ The language in this prior order is applicable to all three protests at issue here as all require that McMahon's Palm Desert be a "franchisee" of Roadtrek.

1 f. "(P)ursuant to V.C. section 11713.22 it is unlawful for a manufacturer 'to
2 fail or refuse to provide a recreational vehicle dealer a written dealer agreement that
3 complies with the requirements of Section 331.'" (Opposition, page 2, lines 17-20)

4 g. "If Roadtrek's argument that no written franchise exists were in fact
5 accurate, it would be in violation of V.C. Section 11713.22 exposing it to money
6 damages, injunctive relief and attorney's fees." (Opposition, page 2, footnote 3)

7 **THE STATUTORY REQUIREMENTS FOR THE BOARD TO HAVE JURISDICTION OVER**
8 **THE PROTEST OF MCMAHON'S PALM DESERT**

9 112. There is no dispute that for the Board to have jurisdiction over this protest
10 there must be a "franchise" in existence under the terms of which McMahon's Palm
11 Desert would be a "franchisee" and Roadtrek would be a "franchisor". The dispute
12 between the parties is whether there is or is not a "franchise" in existence between them.
13 If there is a franchise, McMahon's Palm Desert is a franchisee and the Palm Desert
14 Motion, which is based solely upon the lack of a franchise, should be denied. If there is
15 no franchise, then McMahon's Palm Desert would not be a franchisee, there would be no
16 franchise being modified, the Board would have no jurisdiction and the protest should be
17 dismissed.

18 113. The Board's enabling statutes include the following:

19 3050. The board shall do all of the following: ...

20 (d) Hear and decide, within the limitations and in accordance with the procedure
21 provided, **a protest presented by a franchisee** pursuant to Section 3060, 3062,
22 3064, 3065, or 3065.1. A member of the board who is a new motor vehicle dealer
23 may not participate in, hear, comment, advise other members upon, or decide, any
matter involving a protest filed pursuant to Article 4 (commencing with Section
3060), unless all parties to the protest stipulate otherwise. (Emphasis added.)

24 114. Although the Vehicle Code was amended in 2003 to include Recreational
25 Vehicle franchises to those subject to the Board's jurisdiction (by adding Sections 3070
26 through 3079), conforming amendments were not made to the above Section 3050. The
27 new statutes were effective in 2004.

28 115. This protest was filed purportedly pursuant to Section 3070(b)(1), which

1 provides in part as follows:

2 Notwithstanding ... the terms of any franchise, a **franchisor** of a dealer of
3 recreational vehicles may not modify ... **a franchise** ... if the modification or
4 replacement would substantially affect the **franchisee's** sales or service
5 obligations or investment, unless the **franchisor** has first given the board and
6 each affected **franchisee** written notice thereof at least 60 days in advance of the
7 modification or replacement. Within 30 days of receipt of a notice satisfying the
8 requirements of this section, or within 30 days after the end of any appeal
9 procedure provided by the franchisor, **a franchisee may file a protest** with the
10 board and the modification or replacement does not become effective until there is
11 a finding by the board that there is good cause for the modification or
12 replacement. (Emphasis added.)

13 116. As can be seen, this section applies only to a **franchisor** desiring to
14 modify a **franchise** of a "dealer in recreational vehicles" and permits such a **franchisee**
15 to file a protest.

16 117. The Vehicle Code contains the following definitions:

17 ▪ Vehicle Code section 331 defines a "franchise" as follows:

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

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

22 (2) The franchisee is granted the right to offer for sale or lease, or to sell or
23 lease at retail new motor vehicles... manufactured or distributed by the franchisor
24 or the right to perform authorized warranty repairs and service, or the right to
25 perform any combination of these activities.

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

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

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

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

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

(Emphasis added.)

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1 “written agreement” for a franchise to exist.

2 119. There is nothing before the Board to establish factually that there is a
3 “written agreement” between McMahon’s Palm Desert and Roadtrek that would qualify
4 as a franchise. As explained below, even if the factual assertions of McMahon’s Palm
5 Desert were accepted as true, they would not on their own establish the existence of the
6 “written agreement” as needed under these statutes for a franchise.

7 120. The Opposition filed in behalf of McMahon’s Palm Desert contains a
8 Declaration of Brent McMahon. This Declaration states in part that:

9 4. “McMahon’s opened its Palm Desert location in approximately
10 November/December of 2008;

11 5. In approximately January 2009, McMahon’s executed a written franchise
12 agreement with ROADTREK MOTORHOMES, INC. ... for McMahon’s Palm Desert
13 location;

14 6. I [Mr. McMahon] executed the written franchise agreement on behalf of
15 McMahon’s in approximately January of 2009 and sent my executed copy to Roadtrek.
16 However, after a diligent search, I and McMahon’s have thus far been unable to locate a
17 copy of the written franchise agreement for McMahon’s Palm Desert location, but such
18 franchise agreement does exist;²²

19 7. Under the franchise agreement, McMahon’s has begun to stock and sell
20 Roadtrek recreational vehicles at its Palm Desert location in approximately December
21 2008/January 2009 with the knowledge and consent of Roadtrek.

22 8. Roadtrek has stopped delivering units to any of McMahon’s dealership
23 locations.”

24 121. What is not stated in the Declaration includes the following:

25 a. Whether (as was the case with the written franchise document for
26 McMahon’s Colton and McMahon’s Irvine) there was a witness who signed the franchise

27
28 ²² There is nothing to indicate that Mr. McMahon is referring to a Dealer Agreement that had been executed by both parties, which would be necessary for there to be a “written agreement”.

1 at the time it was signed by Mr. McMahon.

2 b. If there was such a witness who signed the document with Mr. McMahon,
3 who this witness was.

4 c. Whether there was a copy made of the document before it was mailed to
5 Roadtrek and it is this copy that cannot be located;

6 d. Whether at the time the document was signed by Mr. McMahon, that it
7 had already been signed by a representative of Roadtrek. (This is the most significant
8 fact that was not asserted in the Declaration.)

9 122. It is noted that the signatures on the franchises for the other three locations
10 were signed and dated to indicate that they had been signed first by Mr. McMahon and
11 subsequently signed as "Accepted" by a representative of Roadtrek. The significance of
12 this is that, even if Mr. McMahon had signed the document as he stated there would have
13 to be a signature of the authorized representative of Roadtrek before there would be a
14 franchise in existence.

15 123. The signatures on the other franchises, as indicated in Paragraphs 25 and
16 64 above, are as follows:

17 2006 FRANCHISE

18 For McMahon's Colton and McMahon's Irvine - Signed by Mr. McMahan
19 with the date shown as February 21, 2006; witnessed by Richard Biegel.

20 For Roadtrek - Signed by Jim Hammill with the date shown as February
21 22, 2006; witnessed by Paul Cassidy.

22 2008 FRANCHISE

23 For McMahon's Scotts Valley - Signed by Mr. McMahon with the date
24 shown as January 31, 2008; (There is no witness signature.)

25 For Roadtrek - Signed by Paul Cassidy with the date shown as February 8,
26 2008; witnessed by D. Allen.

27 124. These signatures and dates indicate the following:

28 a. These franchises for the other three dealerships were signed first

1 by Mr. McMahon. At the time he signed them, they did not contain any signature
2 in behalf of Roadtrek. The signing by Mr. McMahon was an “offer” from his
3 companies to Roadtrek. The franchises did not come into existence as “written
4 agreements” until they were signed by an agent of Roadtrek which in each case
5 was subsequent to the signatures of Mr. McMahon.

6 b. As to the claimed franchise of McMahon’s Palm Desert - The
7 declaration of Mr. McMahon that he signed the document does not establish that
8 the document had been executed in behalf of Roadtrek. Even if Mr. McMahon
9 did sign the document as he stated, his signature alone would not constitute a
10 “written agreement” and there is nothing before the Board to indicate that the
11 document had been signed by an agent of Roadtrek.

12 c. The Reply Brief of Roadtrek was accompanied by a Declaration of
13 James Hammill, the President and CEO of Roadtrek, who declares that there is no
14 record of a dealer agreement for McMahon’s Palm Desert and that Mr. Hammill
15 has no recollection of signing an agreement in behalf of Roadtrek for a franchise
16 of McMahon’s Palm Desert.

17 d. Without any evidence to establish that an agent of Roadtrek signed
18 the Dealer Agreement, even if signed by McMahon’s Palm Desert, there is no
19 evidence of a franchise with McMahon’s Palm Desert.

20 125. As for the other contentions in the Opposition filed by McMahon’s
21 Palm Desert, these are:

22 a. “...Roadtrek has delivered units to this location, which units
23 McMahon’s stocked and sold.” (Opposition, page 2, line 13-14);

24 Although a contract may be established between the parties based upon
25 their conduct, commonly called an implied-in-fact contract, such a contract does
26 not constitute a statutory “franchise” as defined by the Vehicle Code. Such a
27 contract based upon the conduct of the parties is not a “written agreement” that is
28 required for a “franchise”.

1 b. McMahon's Palm Desert is listed on McMahon's website as a
2 Roadtrek dealership location (Opposition, page 2, lines 20-21);

3 What McMahon's lists on its own website does not satisfy the statutory
4 requirement of a "written agreement" as required in the statutory definition of a
5 franchise.

6 c. “(P)ursuant to V.C. section 11713.22 it is unlawful for a
7 manufacturer ‘to fail or refuse to provide a recreational vehicle dealer a written
8 dealer agreement that complies with the requirements of Section 331 (sic).”
9 (Opposition, page 2, lines 17-20)

10 126. Section 11713.22 in its entirety provides:

11 (a) **Upon mutual agreement of the parties to enter into a recreational**
12 **vehicle franchise, it is unlawful** and a violation of this code for a manufacturer,
13 **manufacturer branch, distributor, or distributor branch licensed under this code to**
14 **fail or refuse to provide a recreational vehicle dealer with a written**
15 **recreational vehicle franchise that complies with the requirements of Section**
16 **331.3.**

17 (b) Notwithstanding Section 331.3, a recreational vehicle franchise described in
18 this section shall include, but not be limited to, provisions regarding dealership
19 transfer, dealership termination, sales territory, and reimbursement for costs
20 incurred by the dealer for work related to the manufacturer's warranty for each
21 line-make of recreational vehicle covered by the agreement.

22 (c) This section applies only to a dealer and manufacturer agreement involving
23 recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health
24 and Safety Code, but does not include an agreement with a dealer who deals
25 exclusively in truck campers.
26 (Emphasis added.)

27 127. As in the other sections defining a “franchise”, this section also requires
28 that there be “mutual agreement of the parties to enter into a recreational vehicle
franchise” and reinforces or at least recognizes the importance that this mutual agreement
be in writing. The “mutual agreement to enter into” the franchise does not dispense with
the need that there be a written agreement for there to be a franchise but in fact
recognizes the importance that the agreement be in “written” form as otherwise there
would not be a “franchise” as defined in Section 331 or 331.3.

 128. The statute uses the language a “mutual agreement ... to enter into ...” an
RV franchise. There is a difference between an “agreement to enter” into a recreational

1 vehicle franchise, and the actual entry into the franchise relationship itself. This could be
2 interpreted to apply to at least three scenarios. These are: (a) The “agreement to enter”
3 could be just that, the parties agree today to enter into a franchise tomorrow, meaning
4 there would still be no franchise until “tomorrow” and only then if the document is
5 signed by both; (b) It could be that the statute is directed at a situation in which the
6 parties orally agree today to all of the needed terms and consider the “deal done” with the
7 written franchise to be signed by both of them in due course as a formality; or, (c) It
8 could be that the statute is directed at the situation in which both parties do sign the
9 written document but the purported franchisor refuses to provide a copy of the written
10 document to the purported franchisee, or the document that is provided does not comply
11 “with the requirements of Section 331.3”.

12 129. If the facts indicate either scenario (a) or (b) exists, even though the
13 purported franchisor may be found to be in violation of the statute, there would be no
14 franchise. Under these circumstances, finding a violation of Section 11713.22 does not
15 result in the finding of a franchise and in fact would result in a finding that there is no
16 franchise as there was no written agreement. In essence, a party claiming to be a
17 franchisee would be in a Catch-22 situation if that party also claims that the facts are
18 those described in (a) or (b) above, as such a party would be at the same time claiming
19 that the statute was violated because there is no written agreement (meaning the party is
20 admitting the lack of the writing needed for there to be a franchise).

21 130. It is possible that Section 11713.22 was intended to apply to situation (c)
22 above, where the parties have reached a mutual agreement, the franchise document has
23 been signed by both, but either no copy has been provided to the franchisee or the
24 franchise document does not comply with Section 331.3 as mandated. But, as with
25 situation (a) and (b), the violation of Section 11713.22 does not establish the existence of
26 the “franchise” that is required to exist for McMahan’s Palm Desert to be a franchisee.
27 Section 11713.22 makes it unlawful for the manufacturer “... to fail or refuse to provide a
28 recreational vehicle dealer with a written recreational vehicle franchise...” but, before

1 such a finding can be made, the Section initially requires that there be "... mutual
2 agreement of the parties to enter into a recreational vehicle franchise..." And, even if
3 there is such mutual agreement, and even if Section 11713.22 is violated, until the
4 agreement is in written form, there is no "franchise" as defined by the Vehicle Code.

5 131. The facts as alleged by McMahon's Palm Desert could support the
6 findings that there was a "mutual agreement of the parties to enter into a recreational
7 vehicle franchise" as established by the alleged conduct of the parties and therefore it is
8 possible that Section 11713.22 was violated. However, the facts as alleged by
9 McMahon's Palm Desert do not support that critical first element which must be shown
10 for McMahon's Palm Desert to be a franchisee, that there be a "written" agreement.²³
11 McMahon's Palm Desert may establish what is termed an "implied-in-fact" agreement
12 based upon the conduct of the parties but such an agreement will not operate as a
13 statutory "franchise" as it is not written.

14 132. An additional contention in McMahon's Palm Desert opposition is: "If
15 Roadtrek's argument that no written franchise exists were in fact accurate, it would be in
16

17 ²³ There are other provisions of the Vehicle Code that focus upon the importance of a "written franchise" that has been
18 "signed by both parties" including Section 11713.23 which provides as follows:

19 (a) A recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch licensed under
20 this code shall not sell a new recreational vehicle in this state to or through a recreational vehicle dealer
21 without having first entered into a written recreational vehicle franchise with that recreational vehicle dealer,
22 that complies with the requirements of Section 331.3 and that has been signed by both parties.

23 (b) A recreational vehicle dealer shall not sell a new recreational vehicle in this state without having first
24 entered into a written recreational vehicle franchise, that complies with the requirements of Section 331.3,
25 with a recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch licensed under this
26 code, that has been signed by both parties.

27 (c) (1) A recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch shall not
28 ship a new recreational vehicle to a recreational dealer on or after January 1, 2009, without a recreational
vehicle franchise that has been signed by both parties.

(2) A recreational vehicle dealer shall not receive a new recreational vehicle from a recreational vehicle
manufacturer, manufacturer branch, distributor, or distributor branch on or after January 1, 2009, without a
recreational vehicle franchise that has been signed by both parties.

(d) Any new recreational vehicle inventory that has been purchased by a recreational vehicle dealer, or shipped by
a manufacturer, manufacturer branch, distributor, or distributor branch, before January 1, 2009, may be sold at any
time without a recreational vehicle franchise.

(e) This section applies only to a dealer and manufacturer agreement involving recreational vehicles, as defined in
subdivision (a) of Section 18010 of the Health and Safety Code, but does not include an agreement with a dealer
who deals exclusively in truck campers.
(Emphasis added).

1 violation of V.C. Section 11713.22 exposing it to money damages, injunctive relief and
2 attorney's fees." (Opposition, page 2, footnote 3)

3 133. As stated above, if scenario (a) or (b) applied, the fact that McMahon's
4 Palm Desert may establish it is entitled to the relief mentioned, does not make it a
5 franchisee under the statutory definition of a franchise as there would be no written
6 agreement. And, if scenario (c) applied, the franchise would exist because it is in writing
7 not because Section 11713.22 may have been violated.

8 23. The next paragraph in the prior order recommended that Roadtrek's motion to dismiss the
9 protest be granted and that the protest be dismissed without prejudice. The order expressly stated that the
10 protest could be re-filed if McMahon's Palm Desert could establish a "franchise" existed.

11 24. Nothing has changed as to the facts or the law as recited above. Absent some new
12 evidence establishing a "franchise", these three new protests (PR-2234-10, PR-2235-10, and PR-2236-
13 10) should also be dismissed for the reasons stated in the above quoted language. The facts as stated in
14 the Board's prior findings have not changed and do not establish a franchise exists between McMahon's
15 Palm Desert and Roadtrek.

16 25. However, as the protests were dismissed without prejudice, McMahon's is not barred
17 from bringing the protests back before the Board.

18 **THE NEW CLAIM OF MCMAHON'S**

19 26. Apparently McMahon's Palm Desert has still not been able to locate a copy of a Dealer
20 Agreement which it claimed had been signed by Mr. McMahon and that it claimed it once had in its
21 possession.

22 27. Other than the June 10, 2010, declaration of McMahon's counsel, Tina Hopper, that
23 attached a copy of the portion of the May 5 Board Meeting transcript that pertained to McMahon's and
24 Roadtrek, no additional declarations have been submitted by McMahon's in connection with the new
25 protests.

26 28. The only additional document being offered by McMahon's Palm Desert now is a copy of
27 an OL-124 attached to its protests.

28 29. On page 2 of its opposition, McMahon's Palm Desert, in one continuous paragraph, makes

1 the following assertions which are the entirety of its claim that there is a “franchise” between the parties:

2 ...A writing evidencing the agreement of the parties for McMahon’s to sell and service
3 Roadtrek vehicle at its Palm Desert, CA location does exist. (Footnote 1 omitted) The OL-
4 124 located by McMahon’s is a writing evidencing the agreement of the parties that
5 McMahon (sic) sell and service Roadtrek recreational vehicles at its Palm Desert, CA
6 dealership location. Furthermore, when dismissal of the previous Palm Desert protests
7 were (sic) discussed at the May 5, 2010 Board meeting, Brent McMahon testified before
8 the Board that Roadtrek shipped units to McMahon’s Palm Desert dealership location.
9 (Footnote 2 omitted) The OL-124 is a sufficient writing to bring these Protests within the
Board’s jurisdiction. McMahon (sic) was certainly at least a de facto franchisee of
Roadtrek at its Palm Desert location and has the right to have its Protest heard under V.C.
Section 3066. Merely because McMahon’s cannot locate a document entitled “dealer
agreement” and Roadtrek refuses to provide it, this should not result in McMahon (sic)
being denied its rights under the Vehicle Code, as McMahon’s received, sold and serviced
Roadtrek units at its Palm Desert dealership location and the OL-124 is evidence of the
parties agreement to this effect. (Opposition, page 2, lines 9-24)

10 **WHETHER THE OL-124 CONSTITUTES A FRANCHISE OR EVIDENCES THAT A FRANCHISE EXISTS**

11 30. There is no question that there must be a “franchise” between the parties for McMahon’s to
12 be a franchisee with the right to file a protest and for the Board to have jurisdiction over the dispute.
13 There can be no question that the definitions of the term “franchise” (Section 331) and “recreational
14 vehicle franchise” (Section 331.3) as contained in the Vehicle Code are applicable.⁶

15 31. The following analysis is an attempt to addresses the various contentions of Protestant as
16 contained on Page 2 of its opposition (quoted in paragraph 29 above). The paragraph is being parsed in
17 order to give each contention specific consideration.

18 **McMahon’s first contention in its opposition**

19 32. McMahon’s first contention is that: “The OL-124 located by McMahon’s is a writing
20 evidencing the agreement of the parties that McMahon (sic) sell and service Roadtrek recreational
21 vehicles at its Palm Desert, CA dealership location.” (Opposition, page 2, lines 11-14)

22 33. This contention is more in the nature of a conclusion as there is nothing to explain how the
23 OL-124 would satisfy the statutory requirement that there be a “franchise” between the parties or that
24 McMahon’s Palm Desert is a “franchisee” of Roadtrek, both of which are requirements for the application
25 of the Vehicle Code sections under which the protests were filed.

26 34. As indicated above, “franchise” is defined in Section 331 which in part reads as follows:

27
28 ⁶ Two of the three protests at issue cite Section 331 but the opposition does not. None of the pleadings filed by Protestant cite Section 331.3.

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

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

4 (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail
5 new motor vehicles or new trailers subject to identification pursuant to Section 5014.1
6 manufactured or distributed by the franchisor or the right to perform authorized warranty
7 repairs and service, or the right to perform any combination of these activities.

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

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

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

14 35. As indicated above, a "recreational vehicle franchise" is defined in Section 331.3 which
15 states:

16 A "recreational vehicle franchise" is a written agreement between two or more persons
17 having both of the following conditions:

18 (a) A commercial relationship of definite duration or continuing indefinite duration.

19 (b) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail,
20 new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and
21 Safety Code, that are manufactured or distributed by the franchisor, or the right to perform
22 authorized warranty repairs and service, or the right to perform any combination of these
23 activities.

24 36. Both Section 331 and Section 331.3 start with the same initial requirement, that there be a
25 "... written agreement between two or more persons..."

26 37. A comparison of the requirements set forth in Section 331 and Section 331.3 and what is
27 contained in the OL-124 will follow in an attempt to evaluate whether the conclusions asserted in
28 McMahon's opposition are tenable.

38. The copy of the OL-124 (attached as Exhibit 1) provided to the Board by McMahon's
Palm Desert is captioned:

"CERTIFICATE OF PROPOSED FRANCHISE" (Underline added.)

The upper right corner of the form contains "Dealer License Number 52559"

The caption itself indicates there is a "Proposed Franchise" not that there is a franchise.

39. Looking at this language alone, the OL-124 does not evidence that it is intended by the
parties to be a "written agreement". Nor does the document indicate that a "written agreement" that
would constitute a franchise even exists. It merely states that a "franchise" is "proposed". It does not
satisfy the requirement of Section 331 and Section 331.3 that there be a "written agreement between two

1 or more persons". If anything, the caption shows just the opposite, that at the time the document was
2 created there was not a franchise yet in existence as the document indicates that the franchise is only
3 "proposed".

4 40. The "Instructions" printed on the form, which are not part of what is being "certified" to
5 have occurred, state that the OL-124 is required to be "completed by" a "Manufacturer" or "Distributor".
6 Although it states that it is "The licensed dealer [who] is responsible for submitting this form to the
7 Department of Motor Vehicles with the appropriate application form(s)", the form is not required to be,
8 "completed" or signed by the dealer. As there was no declaration submitted attesting to the creation of
9 the OL-124, it is unknown if any portion of the OL-124 was completed by McMahon's. It is assumed that
10 the signature that appears on the form (discussed below) is that of a representative of Roadtrek.

11 41. The substantive text of the copy of the OL-124, as submitted to the Board, states the
12 following in blocks that are marked with a "√" or an "x".

13 42. The first language marked has a "√" in the block so that it reads:

14 "This location is a Permanent Location"

15 [The alternative block applies to a "Temporary Branch Location" and was not marked with a "√".]

16 The next language which was selected by the use of an "x" in the block is:

17 "I/We Roadtrek Motorhomes, Inc. License Number 54321, hereby certify that:

18 Written notification to the New Motor Vehicle Board and each franchisee is not required pursuant
19 to Vehicle Code section 3062(b) or 3072(b), or there are no other franchised dealers within the
same line-make located within the relevant market area."

20 [The alternative block that could have been marked but was not reads:

21 "Written notification has been provided to the Board and each franchisee of this line-make of the
22 intent to establish an additional motor vehicle dealership or relocate an exiting motor vehicle
23 dealership within the relevant market area, and no protests have been filed. (A change in
ownership of an existing established location shall not be construed as establishing an additional
location.) Enter date of notification below."] (Underline added.)

24 43. None of the above language establishes the existence of a "written agreement" between
25 Roadtrek and McMahon's Palm Desert. The OL-124 establishes no more than what it states, that there is
26 a franchise "PROPOSED" by Roadtrek. At best the OL-124 certifies that there is "intent to establish" on
27 the part of Roadtrek, and that Roadtrek in preparation for doing so has either given notice of its intent to
28 do so to the Board and other dealers or that Roadtrek is not required to provide such notice.

1 44. So far, the form is nothing more than a "certificate" to be completed by Roadtrek that it has
2 complied with the notice requirement imposed by the Vehicle Code which must be done preliminarily to
3 establishing an additional dealership/franchisee, or that Roadtrek is not required to provide the
4 notifications mandated by Section 3072 prior to establishing an additional dealership/franchisee.

5 45. The OL-124 then requires the "Manufacturer or Distributor" to provide certain information
6 as follows: [The text in bold is what was inserted apparently by the person or persons who completed the
7 form.]

8 MAKE OF VEHICLE(S), MOTORHOME(S) OR RECREATIONAL TRAILER(S)

9 **Roadtrek [Printed]**

10 DATE THE NEW MOTOR VEHICLE BOARD AND DEALER(S) WERE NOTIFIED , IF
11 APPLICABLE

12 **N/A [Printed]**

13 PROPOSED FRANCHISEE NAME (AS IT APPEARS ON LICENSE OR APPLICATION FOR
14 LICENSE)

15 **MCMAHONS RV [Typed]**

16 DEALER LICENSE NUMBER IF APPLICABLE

17 **52559 [Typed]**

18 ADDRESS (AS SHOWN ON LICENSE OR APPLICATION FOR LICENSE)

19 **77840 Varner Road Palm Desert, Palm Desert, CA 92211 [Typed]**

20 AUTHORIZED SIGNATURE (OWNER OF RECORD OR LICENSED REPRESENTATIVE)

21 **S/ [Illegible signature]**

22 DATE

23 **[Illegible month]/21/08 [Printed]**

24 PRINT OR TYPE NAME

25 **Ted Klaver [Printed]**

26 OWNER OR REPRESENTATIVE LICENSE NUMBER

27 **Controller [Printed] [There is no license number indicated.]**

28 46. Although the OL-124 is "written", there is nothing on it which indicates it is a "written
agreement between two or more persons" which is needed for a "franchise" (under either definition of

1 “franchise” or “recreational vehicle franchise”). Therefore, the OL-124 submitted to the Board in
2 opposition to the motion to dismiss does not itself constitute a “franchise” nor is there any language on it
3 that indicates that a “franchise” exists. One of the blocks to be completed, shown above, asks for the
4 name of the “Proposed Franchisee”, which would indicate that there is no franchise yet in existence. (See
5 discussion above re: caption language of “Certificate of Proposed Franchise”.)

6 47. The remainder of the front page of the submitted OL-124 contains only the language from
7 the Vehicle Code. The reverse page of the completed form (a chart that identifies when an OL-124 form
8 is required along with notice to the Board) was not provided to the Board.

9 48. There is only the one signature on the OL-124.⁷ The signature is illegible but below the
10 signature is the hand-printed name “Ted Klaver” with the title “Controller” hand-printed in the block that
11 asks for “Owner or Representative License Number”. No “License Number” is shown.

12 49. In addition to not evidencing a “written agreement”, the OL-124 does not contain any
13 language which would satisfy the first condition that is in both Section 331 (franchise) and Section 331.3
14 (recreational vehicle franchise), which is that the written agreement have the condition that there is: “A
15 commercial relationship of definite duration or continuing indefinite duration.”

16 50. It is determined that the OL-124 does not constitute a “written agreement” and does not
17 evidence there is a “commercial relationship of definite duration or continuing indefinite duration”, both
18 of which are required for there to be a “franchise” or “recreational vehicle franchise”.

19 51. The OL-124 is nothing more than a certification required by the DMV either:

- 20 ■ That the manufacturer or distributor that is intending to establish an additional dealership has
21 complied with Section 3072; or,
22 ■ That Section 3072 is not applicable.

23 **McMahon’s second contention in its opposition**

24 52. McMahon’s second contention is that: “Furthermore, when dismissal of the previous Palm
25 Desert protests were (sic) discussed at the May 5, 2010 Board meeting, Brent McMahon testified before
26 the Board that Roadtrek shipped units to McMahon’s Palm Desert dealership location.” (Opposition,

27 _____
28 ⁷ As there is only one signature on the OL-124, it would not satisfy the requirement of Section 11713.23(a), 11713.23(b), or
11723.23(c)(1) or (c)(2), all of which require there be “a recreational vehicle franchise that has been signed by both parties.”

1 page 2, lines 14-16)

2 53. These same facts were alleged by McMahon's and were considered by the Board when it
3 adopted the proposed order dismissing PR-2200-10 where it was said, in part, at paragraph 124:

4 124. As for the other contentions in the Opposition filed by McMahon's Palm Desert,
5 these are:

6 a. "...Roadtrek has delivered units to this location, which units McMahon's
7 stocked and sold." (Opposition, page 2, line 13-14);

8 Although a contract may be established between the parties based upon their
9 conduct, commonly called an implied-in-fact contract, such a contract does not constitute a
10 statutory "franchise" as defined by the Vehicle Code. Such a contract based upon the
11 conduct of the parties is not a "written agreement" that is required for a "franchise".

12 ...

13 54. Also see paragraph 130 above of the prior order in which it is stated:

14 McMahon's Palm Desert may establish what is termed an "implied-in-fact"
15 agreement based upon the conduct of the parties but such an agreement will not operate as
16 a statutory "franchise" as it is not written.

17 55. The conduct of the parties does not constitute a "written agreement". Without a written
18 agreement, there can be no franchise. If there is no franchise, the Board does not have jurisdiction.

19 **McMahon's third contention in its opposition**

20 56. McMahon's third contention in its opposition is that: "The OL-124 is a sufficient writing
21 to bring these Protests within the Board's jurisdiction." (Opposition, page 2, lines 16-17)

22 57. This is nothing more than what was claimed in its first contention discussed above. There
23 is no analysis or support for this statement.

24 **McMahon's fourth contention in its opposition**

25 58. McMahon's fourth contention is that: "McMahon (sic) was certainly at least a de facto
26 franchisee of Roadtrek at its Palm Desert location and has the right to have its Protest heard under V.C.
27 Section 3066." (Opposition, page 2, lines 17-20)

28 59. There is no analysis or support for this statement. This contention is similar to

1 McMahon's second contention addressed above and there is nothing to explain how the conduct of the
2 parties, which could result in an implied-in-fact contract, could satisfy the statutory requirement that a
3 "franchise" be a "written agreement".

4 60. Both Section 331 and 331.3 require that there be a "written agreement".

5 61. As stated in the prior orders, the importance of having a "written agreement" complying
6 with Section 331.3 is emphasized by the enactment of Sections 11713.22 and 11713.23.

7 62. Section 11713.22 in part provides:

8 (a) **Upon mutual agreement of the parties to enter into a recreational vehicle**
9 **franchise, it is unlawful** and a violation of this code **for a manufacturer,** manufacturer
10 branch, distributor, or distributor branch licensed under this code **to fail or refuse to**
11 **provide a recreational vehicle dealer with a written recreational vehicle franchise that**
12 **complies with the requirements of Section 331.3.** (Emphasis added.)

13 63. Section 11713.23 provides as follows:

14 (a) **A recreational vehicle manufacturer,** manufacturer branch, distributor, or
15 distributor branch licensed under this code **shall not sell a new recreational vehicle in**
16 **this state to or through a recreational vehicle dealer without having first entered into**
17 **a written recreational vehicle franchise with that recreational vehicle dealer, that**
18 **complies with the requirements of Section 331.3 and that has been signed by both**
19 **parties.**

20 (b) **A recreational vehicle dealer shall not sell a new recreational vehicle** in this state
21 **without having first entered into a written recreational vehicle franchise, that**
22 **complies with the requirements of Section 331.3,** with a recreational vehicle
23 manufacturer, manufacturer branch, distributor, or distributor branch licensed under this
24 code, **that has been signed by both parties.**

25 (c) (1) **A recreational vehicle manufacturer,** manufacturer branch, distributor, or
26 distributor branch **shall not ship a new recreational vehicle to a recreational dealer on**
27 **or after January 1, 2009, without a recreational vehicle franchise that has been signed**
28 **by both parties.**

(2) **A recreational vehicle dealer shall not receive a new recreational vehicle** from a
recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch
on or after January 1, 2009, without a recreational vehicle franchise that has been
signed by both parties.

(d) Any new recreational vehicle inventory that has been purchased by a recreational
vehicle dealer, or shipped by a manufacturer, manufacturer branch, distributor, or
distributor branch, before January 1, 2009, may be sold at any time without a recreational
vehicle franchise.

(e) This section applies only to a dealer and manufacturer agreement involving
recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and
Safety Code, but does not include an agreement with a dealer who deals exclusively in
truck campers.
(Emphasis added.)

64. McMahon's pleadings and documents allege that Mr. McMahon signed a copy of a
franchise in January 2009 for Palm Desert. However, as can be seen, post January 1, 2009, the above

1 statutes will be violated unless there is a “written recreational vehicle franchise...that complies with the
2 requirements of Section 331.3...that has been signed by both parties.” McMahon’s claim that it was “a
3 de facto franchisee” may mean there has been a violation of Section 11713.23, but alleging and proving
4 the violation does not prove the existence of a “franchise”. In fact, alleging and proving that one is only a
5 “de facto franchisee” is in effect establishing a violation of Section 11713.23 and thus has the effect of
6 proving there was no “franchise”.

7 **McMahon’s fifth contention in its opposition**

8 65. McMahon’s fifth contention is that: “Merely because McMahon’s cannot locate a
9 document entitled ‘dealer agreement’ and Roadtrek refuses to provide it, this should not result in
10 McMahon’s being denied its rights under the Vehicle Code, as McMahon’s received, sold and serviced
11 Roadtrek units at its Palm Desert dealership location and the OL-124 is evidence of the parties agreement
12 to this effect.” (Opposition, page 2, lines 20-24)

13 66. This contention has several parts. Starting with the last first: “... the OL-124 is evidence
14 of the parties agreement...” This has been discussed above. The OL-124 is not evidence of anything
15 more than that Roadtrek is proposing or intending to establish the additional franchisee and that Section
16 3072 has either been complied with or is not applicable. Submission of an OL-124 is generally only one
17 of several steps that must be taken prior to the creation of the franchise and the establishment of the
18 dealership. No evidence of course of prior dealings between the parties or trade custom was offered or
19 established to show the sequence of these steps and when an OL-124 would be issued.⁸

20 67. The contention above that begins: “Merely because McMahon’s cannot locate a
21 document entitled ‘dealer agreement’” ignores the basic problem. The problem is not whether the
22

23 ⁸ It may be that in their prior transactions (course of prior dealings), the OL-124 was not issued by Roadtrek until after a
24 franchise was signed by both parties. Or, it may be that it is the custom of practice in the RV trade that an OL-124 is never
25 issued until after a franchise is signed by both parties. However, there was no assertion that either a course of prior dealings or
26 a trade usage existed and should be applied here. As the assertion was not made, there would be no need to determine if there
27 were any contrary express terms that would control or that if a course of prior dealings or trade custom were established that
28 they would be sufficient to conclude that the “written agreement” needed for a “franchise” existed for otherwise the OL-124
would not have been issued. As to these possibilities, see for example only, California Commercial Code, section 1303, and in
particular subsection (g) thereof which reads:

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the
other party notice that the court finds sufficient to prevent unfair surprise to the other party.

1 required document can be located, but whether the required document ever existed. McMahon's alleges
2 that Mr. McMahon signed the document and that it cannot locate a copy of what he signed. However,
3 nothing has been submitted that establishes that the "dealer agreement" was signed by a representative of
4 Roadtrek. (See facts relating to this in the prior order quoted above.)

5 68. McMahon's is not being denied the right to a hearing because it cannot locate a document.
6 It is Roadtrek that should not be required to comply with Section 3072 unless the document required by
7 the Vehicle Code did in fact exist at one time. If it did, whether a copy of it could or could not be located
8 now is irrelevant. Obviously "locating" it would conclusively establish its existence but not locating it
9 does not mean it never existed. There is nothing before the Board establishing that there ever existed a
10 written agreement between the parties that constituted a franchise.

11 69. Another portion of this fifth contention is that McMahon's is being denied the right to a
12 hearing because "... Roadtrek refuses to provide it..." Again, this misses the point. There is absolutely
13 nothing before the Board indicating that the document ever existed and is being withheld by Roadtrek.
14 In fact, the declaration from James Hammill, the President and CEO of Roadtrek stated that there was no
15 record of such a dealer agreement and that Mr. Hammill had no recollection of signing an agreement for
16 McMahon's Palm Desert. (Exhibit A to Respondent's Reply Brief in PR-2200-10; See paragraph 124(a)-
17 (d) of the order in PR-2200-10, above)

18 70. The remaining portion of this fifth contention is that McMahon's should not be denied the
19 right to a hearing "as McMahon's received, sold and serviced Roadtrek units at its Palm Desert
20 dealership location..." (Opposition, page 2, lines 22-24) This is nothing more than repeating the claim
21 that McMahon's was acting as a "franchisee" under an implied-in-fact contract or was a "de facto
22 franchisee" or that it was doing so with "the OL-124 as evidence to this effect". (Opposition, page 2,
23 lines 23-24)

24 71. This is a combination of the first argument that the OL-124 is evidence of "the parties
25 agreement" and that the parties conduct should be taken into consideration as a substitute for the writing.
26 As stated above, the OL-124 does not evidence "the parties agreement".

27 72. Protestant is asserting again that the conduct of the parties evidences that there is a "de
28 facto" franchise and that the Board should recognize such conduct as a substitute for the written

1 agreement. However, this is the very conduct that the legislature has made illegal under Section
2 11713.23. It would be incongruous to say the least for the Board to conclude that what may amount to
3 illegal conduct between the parties is sufficient to dispense with the legislatively-created requirement that
4 there be a "written agreement" that is needed for the Board to have jurisdiction to hear the protests. This
5 would be a case of proving the violation of one statute in order to cloak oneself with the protection
6 provided by another statute.

7 **CONCLUSION**

8 73. As stated above, both Sections 331 and 331.3 require for a franchise to exist that there be a
9 "written agreement". Nothing has been offered that would establish there is a franchise between
10 McMahan's Palm Desert and Roadtrek.

11 **PROPOSED ORDER**

12 After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered
13 that Respondent's Motion to Dismiss Protests is granted. Protest Nos. PR-2234-10, PR-2235-10, and
14 PR-2236-10 (*Mega RV Corp. dba McMahan's RV v. Roadtrek Motorhomes, Inc.*) are dismissed.
15 However, the dismissals are without prejudice to the right of McMahan's Palm Desert to again bring
16 such protests if McMahan's Palm Desert discovers or can prove the existence of a written agreement
17 signed by both parties and constituting a franchise as defined in Section 331 or Section 331.3.

18
19 I hereby submit the foregoing which constitutes my
20 proposed order in the above-entitled matters, as the
21 result of a hearing before me, and I recommend this
22 proposed order be adopted as the decision of the
23 New Motor Vehicle Board.

24 DATED: July 30, 2010



25 By: _____
26 ANTHONY M. SKROCKI
Administrative Law Judge

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



LICENSING OPERATIONS DIVISION

CERTIFICATE OF PROPOSED FRANCHISE



Instructions:

- This form must be completed by a licensed Manufacturer or Distributor.
- The licensed dealer is responsible for submitting this form to the Department of Motor Vehicles with the appropriate application form(s).
- This form will NOT be accepted if modified or altered and must contain an original signature.

The location is a Permanent Location
 Temporary Branch Location (must be 30 days or less)
 Date(s) of Event: From: _____ To: _____

I/We _____ LICENSE NUMBER
 MANUFACTURER/DISTRIBUTOR NAME
 Roadtrek Motorhomes, Inc. 54321
 hereby certify that:

- Written notification to the New Motor Vehicle Board and each franchisee is not required pursuant to Vehicle Code section 3062(b) or 3072(b), or there are no other franchised dealers within the same line-make located within the relevant market area.
- Written notification has been provided to the Board and each franchisee of this line-make of the intent to establish an additional motor vehicle dealership or relocate an existing motor vehicle dealership within the relevant market area, and no protests have been filed. (A change in ownership of an existing established location shall not be construed as establishing an additional location.) Enter date of notification below.

MAKE OF VEHICLE(S), MOTORHOME(S), OR RECREATIONAL TRAILER(S)

DATE THE NEW MOTOR VEHICLE BOARD AND DEALER(S) WERE NOTIFIED, IF APPLICABLE

N/A

PROPOSED FRANCHISEE NAME (AS IT APPEARS ON LICENSE OR APPLICATION FOR LICENSE)	DEALER LICENSE NUMBER (IF APPLICABLE)
MCMAXIONS RV	52559
ADDRESS (AS SHOWN ON LICENSE OR APPLICATION FOR LICENSE)	CITY STATE ZIP CODE
77840 VARNER ROAD	PAIM DESERT CA 92211
AUTHORIZED SIGNATURE (OWNER OF RECORD OR LICENSED REPRESENTATIVE)	DATE
	05/21/10
PRINT OR TYPE NAME	OWNER OR REPRESENTATIVE LICENSE NUMBER
Ted Klaver	Controller

CALIFORNIA VEHICLE CODE (CVC) - Sections 3062 or 3072*, states in part:

Establishing or Relocating Dealerships

3062. (a) (1) Except as otherwise provided in subdivision (b), if a franchisor seeks to enter into a franchise establishing an additional motor vehicle dealership within a relevant market area where the same line-make is then represented, or seeks to relocate an existing motor vehicle dealership, the franchisor shall, in writing, first notify the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing dealership within or into that market area. Within 20 days of receiving that notice or within 20 days after the end of any appeal procedure provided by the franchisor, any such franchisee may file with the board a protest to the establishing or relocating of the dealership. If, within this time a franchisee files with the board a request for additional time to file a protest, the board or its Executive Director, upon a showing of good cause, may grant an additional 10 days to file the protest. When such a protest is filed, the board shall inform the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor shall not establish or relocate the proposed dealership until the board has held a hearing as provided in Section 3066, nor thereafter, if the board has determined that there is good cause for not permitting the dealership. In the event of multiple protests, hearings may be consolidated to expedite the disposition of the issue.

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

- (1) The relocation of an existing dealership to any location that is both within the same city as, and is within one mile from, the existing dealership location.
- (2) The establishment at any location that is both within the same city as, and is within one-quarter mile from, the location of a dealership of the same line-make that has been out of operation for less than 90 days.

*Section 3072, pertaining to Recreational Vehicles, contains virtually identical provisions, however, there are additional exemptions not listed above. Recreational Vehicle Manufacturers are encouraged to review the entire California Vehicle Code Section.

