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 ADRENALINE POWERSPORTS, Protestant, v. POLARIS INDUSTRIES, INC., Respondent.	**Protest No. PR-2418-15**

DECISION

At its regularly scheduled meeting of June 17, 2015, the Public Members of the Board met and considered the administrative record and Administrative Law Judge's "Proposed Order Granting Respondent's Motion to Dismiss Protest for Lack of Jurisdiction", in the above-entitled matter. After such consideration, the Board adopted the Proposed Order as its final Decision in this matter.

This Decision shall become effective forthwith.

IT IS SO ORDERED THIS 17th DAY OF JUNE 2015.

GLENN STEVENS
President
New Motor Vehicle Board

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CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of ADRENALINE POWERSPORTS, Protestant, v. POLARIS INDUSTRIES, INC., Respondent.	**Protest No. PR-2418-15** **PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROTEST FOR LACK OF JURISDICTION**

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FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

7. Although Adrenaline is within the relevant market area[3] of GBMP's location, for reasons stated below, PSI did not give notice pursuant to Section 3062(a)(1) to either Adrenaline or the Board.

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

9. Adrenaline filed its "Opposition to Motion to Dismiss Protest for Lack of Jurisdiction" on March 16, 2015.

10. PSI filed its "Reply Memorandum in Support of Motion to Dismiss Protest for Lack of

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[1] The Motion at issue indicates that the proper name for Respondent is "Polaris Sales, Inc." rather than "Polaris Industries, Inc." (Motion, page 1, lines 18)

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

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

Jurisdiction" on March 23, 2015.

MOTION TO DISMISS

Respondent's Assertions in its Motion to Dismiss

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

12. PSI explains its arguments as follows:

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

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

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

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

14. According to Respondent, it was only upon the effective date of this amendment, January 1, 2015, that Adrenaline's Dealer Agreement became a "franchise" under Section 331(a)(2) and it was not until that date that future Dealer Agreements for the vehicles defined in Sections 500 and 531 (the Ranger UTVs and LSV RHOVs) became subject to Section 3062.[5] (Motion, page 2, lines 17-23)

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

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

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

Protestant's Assertions in its Opposition

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

19. The documents Adrenaline obtained from PSI purported to show that prior to January 1, 2015, a "franchise" had been executed between GBMP and PSI and that GBMP had acquired flooring for the new line-make. Adrenaline argues that it is undisputed that prior to January 1, 2015, GBMP did not have an occupational license issued by DMV for the Polaris line and did not have Polaris products at its

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[5] ALJ Skrocki found that there was a "franchise" prior to January 1, 2015, but that Adrenaline was not a "franchisee" until January 1, 2015. (See discussion below.)

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

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

20. Adrenaline contends GBMP "...was not a 'franchisee' for the Polaris line as of January 1, 2015.[7] GBMP did not 'receive new motor vehicles' from Polaris prior to that time, and did not sell or lease, or offer to sell or lease, Polaris vehicles until some time after the amendments to Section 111 became effective." (Opposition, page 3, lines 1-5)

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

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

Respondent's Assertions in its Reply to the Opposition

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

24. Respondent argues that, "Occupational licensing regulation does not kick in until after the manufacturer certifies on the DMV's Form OL-124 that section 3062 does not apply or that its requirements have been complied with. That occurred in this case when Polaris [PSI] executed the

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[7] "Section 331.1 defines 'franchisee' as: '... any person who, pursuant to a franchise, *receives new motor vehicles* subject to registration under this code, ... new all-terrain vehicles , as defined in Section 111, ... from the franchisor ***and** who offers for sale or lease, or sells or leases the vehicles at retail* ..." (Opposition, page 2, lines 22-25; emphasis in original)

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

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

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

APPLICABLE STATUTES

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

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

29. Section 331 defines a "franchise" as follows:

> (a) A "franchise" is a written agreement between two or more persons having all of the following conditions:
> (1) A commercial relationship of definite duration or continuing indefinite duration.
> (2) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail <u>new motor vehicles or new trailers subject to identification pursuant to Section 5014.1 manufactured or distributed by the franchisor</u> or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.
> (3) The franchisee constitutes a component of the franchisor's distribution system.

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

(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.
(Underline added.)

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

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

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

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

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

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'franchisors' and 'franchisees'" (as defined in Sections 331.2 and 331.1 respectively).[9]

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

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

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

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

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

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

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

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

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

vehicles".

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

As to the Parties to a Franchise who would be "Franchisors" and "Franchisees" to whom the Board's Statutes would Apply

41. Section 331.1 defines "franchisee" as follows:

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

42. Section 331.2 defines "franchisor" as follows:

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

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

a. Only "franchisors" are required to provide the notices as stated in Section 3062;

b. It is only "franchisees" and the Board that must receive the notices; and,

c. The Board must hear a protest only if it is filed by a "franchisee" that is required to receive the notices.

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

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

Prior to January 1, 2015

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

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

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

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

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

As of January 1, 2015

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

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

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

- As of January 1, 2015, Adrenaline (Protestant) for the first time became a "franchisee" of PSI as to the two types of vehicles (UTVs and ROHVs);
- As of January 1, 2015, PSI would for the first time become a "franchisor" as to the two types of vehicles;
- As of January 1, 2015, GBMP (New Dealer) would for the first time become a "franchisee" as to the two types of vehicles.

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

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

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

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

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

ANALYSIS

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

Legislative Grant of Power to the Board

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

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

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

The Statutory Obligation of a "Franchisor" to Existing "Franchisees"

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

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

line-make is represented, **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. (Emphasis added.)

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

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

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

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

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

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

The Significance of and Need for the OL-124

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

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

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

68. The OL-124 has two alternative boxes to check. Not checked was the second box that Section 3062 has been complied with but no protests have been filed. The box that was checked (the first box) certified 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 (sic) the same line-make located within the relevant market area." (Underline added.)

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

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

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

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

The Claim of Adrenaline that Establishing an Additional Motor Vehicle Dealership Requires More than Just Execution of the "Franchise"

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

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

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

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

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

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

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

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

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

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

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

> (a) "All-terrain vehicle"[11] means a motor vehicle subject to subdivision (a) of Section 38010 that is all of the following:
> (1) Designed for operation off of the highway by an operator with no more than one passenger.

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

(2) Fifty inches or less in width.
(3) Nine hundred pounds or less unladen weight.
(4) Suspended on three or more low-pressure tires.
(5) Has a single seat designed to be straddled by the operator, or a single seat designed to be straddled by the operator and a seat for no more than one passenger.
(6) Has handlebars for steering control.
(b) Notwithstanding subdivision (a), for purposes of Chapter 6 (commencing with Section 3000) of Division 2[12] *and Chapter 4 (commencing with Section 11700) of Division 5, "all-terrain vehicle" also means a recreational off-highway vehicle as defined in Section 500 and a utility-terrain vehicle as defined in Section 531.* (Italics added.)

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

Facts and Law Not in Dispute

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

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

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

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

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

Whether Polaris LSV Vehicles are ROHVs as Defined in Section 500

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

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

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

88. Although it is uncertain, it appears as though the Polaris LSV[14] vehicles are battery-powered only. If this is in fact the situation, then the Polaris LSV vehicles may not come within the definition of "recreational off-highway vehicles" as contained in Section 500.

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

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

89. Section 500 defines "recreational off-highway vehicles" as follows.

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

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

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

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

DETERMINATIONS

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

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

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

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

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

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

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

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

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

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

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

PROPOSED ORDER

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

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

DATED: May 28, 2015

By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

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