NEW MOTOR VEHICLE BOARD
1507 - 21st Street, Suite 330
Sacramento, California 95811
Telephone: (916) 445-1888

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 Nos. PR-2244-10 and PR-2245-10**

DECISION

At its regularly scheduled meeting of August 23, 2012, the Public and Dealer Members of the Board met and considered the administrative record and the "Proposed Order Granting Respondent's Motion to Dismiss Protest No. PR-2245-10 (Scotts Valley)", 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 23rd DAY OF AUGUST 2012.

RAMON ALVAREZ C.
President
New Motor Vehicle Board

Aug. 27. 2012 9:07PM No. 9928 P. 2

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CERTIFIED MAIL

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 Nos. PR-2199-10, and PR-2201-10** **PROPOSED ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PROTEST NO. PR-2245-10 (Scotts Valley) RE: TERMINATION**
In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2206-10, PR-2208-10, and PR-2209-10**
In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2205-10, PR-2211-10, and PR-2212-10**

In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent	**Protest No. PR-2233-10**
In the Matter of the Protest of MEGA RV CORP. dba MCMAHONS RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest Nos. PR-2244-10 and PR-2245-10**

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PROCEDURAL BACKGROUND

1. At the time of hearing of this motion, there were 12 protests pending before the New Motor Vehicle Board ("Board") that involve the Protestant, identified in the captions of each of these protests as MEGA RV CORP., dba MCMAHONS RV (hereafter "Protestant" or "Mega") and Respondent, ROADTREK MOTORHOMES, INC. (hereafter "Respondent" or "Roadtrek").[1]

2. The 12 protests involve three dealership locations that may be identified as "Irvine", "Colton" and "Scotts Valley". Other protests, in addition to the 12 protests, and involving a location identified as "Palm Desert", have previously been dismissed.

3. All 12 of the remaining protests were consolidated for purposes of hearing on their merits.[2] A consolidated evidentiary hearing has been held over a period of 36 days before Diana Woodward Hagle, an Administrative Law Judge ("ALJ") of the Board. The final day of that hearing was conducted telephonically on April 26, 2012; the in-person hearing concluded on February 1, 2012. On May 3, 2012, the matter was deemed submitted.[3]

4. About two weeks before the in-person evidentiary hearing was completed, Roadtrek, on January 12, 2012 filed what it captioned "RESPONDENT ROADTREK MOTORHOMES, INC'S MOTION AND BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PROTESTS - SCOTTS VALLEY". The caption of the motion as filed contained three protest numbers. These are "Protest Nos. 2198-10, 2209-10, 2211-10". As can be seen from the caption and as will be discussed, the motion is directed only to the protests pertaining to the dealership location indicated as "Scotts Valley". Also, as

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[1] On March 6, 2012, counsel for Protestant voluntarily requested dismissal of Protest No. PR-2198-10, and the Board issued the Order of Dismissal with prejudice on the same day. This modification protest pertained to Scotts Valley. There are 11 protests waiting for decision.

[2] By order dated January 31, 2012, the order consolidating all 12 protests for the purposes of hearing was amended so that the protests were consolidated by type of action for preparation of the proposed decisions. The protests were consolidated as follows:

- Modification (Protest Nos. PR-2199-10 and PR-2201-10);
- Warranty reimbursement (Protest Nos. PR-2206-10, PR-2208-10, and PR-2209-10);
- Franchisor incentive program reimbursement (Protest Nos. PR-2205-10, PR-2211-10, and PR-2212-10); and,
- Termination (Protest Nos. PR-2244-10 and PR-2245-10).

The establishment protest (PR-2233-10) was not consolidated with any other protests.

[3] Counsel for the parties stipulated to allow ALJ Hagle 90 days after the matter was deemed submitted (until August 1, 2012) to submit the proposed decisions. These matters are tentatively scheduled for Board consideration on August 23, 2012, in Riverside, California.

will be discussed, the text of the motion is requesting dismissal of a fourth protest involving Scotts Valley, Protest No. PR-2245-10.

5. Mega, on January 25, 2012, filed "PROTESTANT'S OPPOSITION TO ROADTREK MOTORHOMES, INC'S MOTION TO DISMISS PROTESTS-SCOTTS VALLEY".

6. Roadtrek, on January 31, 2012, filed "RESPONDENT ROADTREK MOTORHOMES, INC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PROTESTS-SCOTTS VALLEY".

7. The hearing on this motion was held on February 17, 2012, before Anthony M. Skrocki, an ALJ of the Board.

8. Roadtrek, the moving party, was represented by Louis S. Chronowski, Esq. and Kavitha Janardhan, Esq. of Seyfarth Shaw LLP.[4] Mega was represented by Michael J. Flanagan, Esq. and Danielle R. Vare, Esq. of the Law Offices of Michael J. Flanagan.

PRELIMINARY MATTER

9. Although the caption of the motion refers to dismissal of three protests, the text of the motion is directed to all four of what are referred to as the "Scotts Valley protests"[5] and the reply of Mega and the oral arguments of both sides were applicable to all four of the Scotts Valley protests. There is no dispute that the motion, the other pleadings, and the arguments, addressed all four of the Scotts Valley protests.

10. These four Scotts Valley protests will be referred to as follows:

PROTEST NAME	PROTEST NO.	DATE FILED	VEHICLE CODE SECTION[6]
The "modification protest"[7]	PR-2198-10	January 29, 2010	3070
The "warranty claims protest"	PR-2209-10	February 18, 2010	3075
The "incentive claims protest"	PR-2211-10	February 18, 2010	3076
The "termination protest"	PR-2245-10	May 11, 2010	3070

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[4] Ms. Janardhan subsequently left the firm on June 1, 2012.
[5] Whether these are in fact "Scotts Valley protests" will be discussed below. This terminology may be used herein to refer to protests relating to Mega's franchise for that location.
[6] Unless otherwise indicated all statutory citations shall be to the California Vehicle Code.
[7] See Footnote 1.

THE ALLEGATIONS OF THE MOTION TO DISMISS

11. The motion seeking dismissal of the four Scotts Valley protests is based upon the general allegation that, "It is undisputed that Mega closed the Scotts Valley location in 2010, well before the commencement of these hearings, rendering any issues relating to the termination or modification of the Scotts Valley dealership (sic)[8] or the reimbursement of warranty and incentive claims made by that dealership moot. (Citation to record omitted.) For this reason, Mega's protests for the Scotts Valley location should be dismissed." (Motion, page 1, lines 27-28, page 2, lines 1-3)

12. Roadtrek also asserts: "Finally, Mega's Scotts Valley dealership lacks standing to bring protests against Roadtrek because it is no longer a 'dealer' as defined in the California Vehicle Code." (Motion, page 3, lines 1-2)

ORDER DENYING RESPONDENT'S MOTION TO DISMISS THE WARRANTY CLAIMS PROTEST AND THE INCENTIVE CLAIMS PROTEST (Protest Nos. PR-2209-10 and PR-2211-10)

13. On March 13, 2012, ALJ Skrocki issued an order denying Respondent's motion to dismiss the warranty claims protest (PR-2209-10) and motion to dismiss the incentive claims protest (PR-2211-10). The closure of Mega's dealership in Scotts Valley did not result in the warranty claims protest or the incentive claims protest becoming moot. Since this order was not dispositive of the protests, it was not considered by the Members of the Board.

THE NEED TO DEFER THE ORDER OF DISMISSAL OF THE TERMINATION PROTEST RELATING TO THE MEGA FRANCHISE FOR SCOTTS VALLEY

14. On March 13, 2012, ALJ Skrocki also issued an "Order Deferring Proposed Order Granting Respondent's Motion to Dismiss Protest No. PR-2245-10 (Scotts Valley) Re; Termination." Although it would ultimately be recommended in a Proposed Order that the Board grant the Motion to Dismiss as it relates to the termination of the franchise for Mega's Scotts Valley dealership, it is determined that it would be appropriate to defer such Proposed Order until the Board has before it the findings of fact and proposed decisions as to all of the other consolidated protests.

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[8] The intended termination and alleged claim of modification are of the "franchise", rather than the "dealership". This distinction will be addressed below.

15. The decision to defer the ruling as to the motion to dismiss the termination protest took into account the following:

- There is no apparent urgency for a ruling that the termination protest be dismissed immediately;
- The dealership in Scotts Valley has been closed for well over a year (and is now approaching a year and a half);
- The Motion to Dismiss was not filed until over a year after the closure of the dealership;
- There has already been significant expenditures of time and expense by the parties in discovery and in bringing the evidentiary portion of the proceedings before the Board to a conclusion;
- There will be no significant additional expenditures or other costs to the parties or of the Board in deferring the issuance of the order of dismissal; and,
- Whereas deferral of the dismissal of the termination protest will create no financial hardship on either side, dismissal of the protest prior to the conclusion and final decision of the Board as to all of the other protests may create technical or practical difficulties in unforeseen ways for the parties or the Board in addressing and bringing to a conclusion before the Board the other pending protests, including the warranty claims protest and the incentive claims protest.

THE TERMINATION PROTEST
(Protest No. PR-2245-10)

THE MOTION AS IT RELATES TO THE TERMINATION OF THE FRANCHISE FOR THE SCOTTS VALLEY LOCATION

16. The basis for the Motion to Dismiss the protest challenging the intended termination of the franchise of the Scotts Valley dealership is, as stated above, that the protest has become moot because "Mega's Scotts Valley dealership" had closed as of "approximately" October 2010, with the result being that Mega's Scotts Valley dealership was no longer a "dealer" (as allegedly required by statute) and "no longer has standing to pursue these protests". (Motion, page 3, lines 1-8)

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THE OPPOSITION TO THE MOTION RE: TERMINATION

17. Unlike the case with the modification protest, counsel for Protestant does not agree that the termination protest should be dismissed.

18. Protestant agrees that the Scotts Valley dealership did close as stated. It appears there is little or no likelihood that the Scotts Valley dealership could re-open at that location. However, Protestant asserts that the protest is not moot and also claims that Protestant has standing to bring the protest. Protestant's contentions are based upon the claim that the "Protestant", the "franchisee", and the "dealer" in all of the protests pending between these parties is the corporation, Mega RV Corp.

WHO IS THE "PROTESTANT", "FRANCHISEE", AND "DEALER"

19. Protestant's assertions are based upon its contention that, although the Scotts Valley location has closed, "Scotts Valley" did not bring these protests but that they were brought by "Mega RV Corp. dba McMahon's RV"; that "Mega RV Corp. dba McMahon's RV" is the "franchisee"; that the "dealer" in these protests is "Mega RV Corp., dba McMahon's RV"; and that Mega has not closed.

As to Who is the "Protestant"

20. Protestant is correct that the four protests subject to this motion were filed in the name of "Mega RV Corp. dba McMahon's RV", and that Mega is identified as the Protestant.

As to Who is the "franchisee"

21. Section 331.1 defines "franchisee" as follows:

> A "franchisee" is any person[9] who, pursuant to a franchise, receives new motor vehicles[10] 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.

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[9] "Person" is defined in Section 470 as follows: "'Person' includes a natural person, firm, copartnership, association, limited liability company, or corporation."

[10] "Motor vehicle" is defined in Section 415 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.

(c) For purposes of Chapter 6 (commencing with Section 3000) of Division 2, "motor vehicle" includes 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.

22. The "franchise" at issue here is a "recreational vehicle franchise" which is defined in Section 331.3 as follows:

> A "recreational vehicle franchise" is a written agreement between two or more persons having both of the following conditions:
> (a) A commercial relationship of definite duration or continuing indefinite duration.
> (b) The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail, new recreational vehicles, as defined in subdivision (a) of Section 18010 of the Health and Safety Code, that are manufactured or distributed by the franchisor, or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities.

23. Protestant is correct that it (Mega) is the "franchisee" identified as the party to the "franchise" as stated in the Dealer Agreement that is at issue in these four protests.[11] The Dealer Agreement in part states: "THIS AGREEMENT MADE BETWEEN: ROADTREK MOTORHOMES…and MEGA RV CORPORTION doing business as MCMAHON'S RV, having its head office at 1312 RV Center Drive #16, Colton CA, USA, 92324 and doing business at 5060 Scotts Valley Drive, Scotts Valley, CA 95066 (herein after called 'Dealer')".

24. The Dealer Agreement is also signed properly in behalf of Mega, as follows:

> MEGA RV CORPORATION,
> doing business as MCMAHON'S RV
> Per: s/ B. McMahon (seal)
> Name (print): Brent McMahon
> Title: President
> Birth date: [Deleted due to privacy concerns.]
> Dated: This 31st day of January 2008

25. It is concluded that Mega RV Corp. is the "franchisee" of the "franchise" that comes within Section 3070 and is the subject of these four protests.

26. Nowhere in the franchise is there any reference to an entity or "person" identified as "Scotts Valley RV", or any permutation of the Scotts Valley name, to indicate the franchisee was any entity or "person" other than Mega.

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[11] Mega has a separate franchise ("Dealer Agreement") specifically for its Scotts Valley location. The terms of this franchise differ from the terms of Mega's franchise ("Dealer Agreement") for the Irvine and Colton locations.

As to Who is the "Dealer"

27. Section 3070 uses the terms "dealer", "recreational vehicles" and "franchisee". These terms are defined in the Vehicle Code.

28. Section 285 defines "dealer" as follows:

> "Dealer" is a person not otherwise expressly excluded by Section 286 who:
> (a) For commission, money, or other thing of value, sells, exchanges, buys, or offers for sale, negotiates or attempts to negotiate, a sale or exchange of an interest in, a vehicle subject to registration, a motorcycle, snowmobile, or all-terrain vehicle subject to identification under this code, or a trailer subject to identification pursuant to Section 5014.1, or induces or attempts to induce any person to buy or exchange an interest in a vehicle and, who receives or expects to receive a commission, money, brokerage fees, profit, or any other thing of value, from either the seller or purchaser of the vehicle.
> (b) Is engaged wholly or in part in the business of selling vehicles or buying or taking in trade, vehicles for the purpose of resale, selling, or offering for sale, or consigned to be sold, or otherwise dealing in vehicles, whether or not the vehicles are owned by the person.

29. Mega is a "person" that comes within this definition. There was no evidence before the Board to indicate there is or was such an entity or "person" as "Scotts Valley RV" in existence.

30. The products that Mega sells are "vehicles" and are "motor vehicles".[12] Section 670 defines "vehicle" as "a device by which any person or property may be propelled, moved, or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks." As indicated in footnote 10 above, Section 415 defines a "motor vehicle" in part as follows:

> ...
> (c) For purposes of Chapter 6 (commencing with Section 3000)[13] of Division 2, "motor vehicle" includes 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.

31. "Recreational vehicle" is defined in Health and Safety Code section 18010 as follows:

> "Recreational vehicle" means both of the following:
> (a) A motor home, travel trailer, truck camper, or camping trailer, with or without motive power, designed for human habitation for recreational, emergency, or other occupancy, that meets all of the following criteria:

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[12] Further, "recreational vehicles" are expressly stated by the statutes to be within the statutes administered by the Board, and are deemed to be "motor vehicles" even if they have no motors. (See Section 415(c).)

[13] These are the statutes under which the Board operates.

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

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

(3) It is built on a single chassis.

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

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

32. The records of the DMV for the dealer license issued for the address of the dealership in Scotts Valley indicate the following:

Branch Location Information
MCMAHONS RV
5060 SCOTTS VALLEY DR
SCOTTS VALLEY, CA 95066
Tel: (949) 279-4493
Branch Opened: 09/12/2006
Branch Closed: (blank)
...

Main Location Information: Status of License: Valid
MCMAHONS RV
6441 BURT RD 10[14]
IRVINE, CA 92618
Tel: (949) 653-6711
Location Opened: 04/09/2001
Location Closed: (blank)
...
License Number: 52559
License First Issued: 04/09/2001
Owner of Business: MEGA RV CORP

33. Applying these various statutes, it is concluded that Mega is a "dealer" that sells "recreational vehicles" which are "vehicles" for "the purposes of" the Board's statutes, and that there is a "franchise" in existence under which Mega is the "franchisee". In addition it is clear that it is Mega that is the licensed dealer for the sale of vehicles at the Scotts Valley location.

34. It is concluded that the "person" that is the "Protestant", the "franchisee", and the "Dealer" is Mega. It is also concluded that the protests were properly brought by Mega and that it is Mega that has standing to file the protests relating to the Scotts Valley location of Mega. There is nothing to indicate there ever was an entity in existence known as Scotts Valley RV or some similar name.

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[14] This is based upon the information submitted to the Board at the time of the hearing of this motion.

35. Even the pleadings filed by Roadtrek in support of this motion refer to the Protestant as "Mega RV Corp.", state that the protests and issues relate to the "Scotts Valley location", and state that "Mega closed the Scotts Valley location".

36. References to the "Scotts Valley dealership", or to the "Scotts Valley Protests", (or perhaps even to the "Scotts Valley franchise") have been made as a matter of convenience for differentiating these four protests from the other protests filed by Mega relating to the other locations of other dealerships owned by Mega and for which Mega had franchises with Roadtrek (Irvine, Colton, and Palm Desert).

37. Such references do not remove Mega from its status as the "franchisee" or deprive Mega of its ownership of the business that was being conducted at the Scotts Valley location. Nor do such references create a new entity or "person" that never existed in law or fact.

38. Therefore, it is still "Mega RV Corp." that is the "Protestant", "franchisee" and "dealer" that had and still has standing to protest the intended termination of Mega's franchise for its dealership that had been located in Scotts Valley.

WHETHER THE TERMINATION PROTEST OF MEGA REGARDING ITS FRANCHISE FOR THE SCOTTS VALLEY LOCATION IS MOOT

39. The fact that Mega is the entity with such standing as discussed above does not mean that its protest challenging the intended termination of the franchise for the Scotts Valley location prevents the protest from being moot.

40. It is undisputed that there is a separate franchise between Mega and Roadtrek specifically for the dealership in Scotts Valley and it is this franchise that is being discussed.

41. The protest challenging the termination of Mega's franchise for the Scotts Valley location was filed on May 11, 2010, by Mega, the franchisee. Again, it is clear that in "approximately" October 2010, Mega closed the Scotts Valley dealership "for all purposes".

42. It is noted that a franchise, as is the case here, grants the franchisee the right to operate a dealership at a specific location and the license issued by the DMV is limited to operation of that dealership for that line-make as authorized by the franchise for the specific address as stated in both the franchise and the license.

43. As it is undisputed that the Scotts Valley dealership has already closed and there was no indication that it will or can be re-opened, the issue becomes simply what would be the effect of a Board Decision that sustained the protest.

44. First it is noted that there are both theoretical as well as practical distinctions between the "termination of a franchise" and the "closure of a dealership" as a "franchise" and a "dealership" are not synonymous. The "franchise", here a "recreational vehicle franchise", is the contractual relationship between the franchisor and the franchisee that comes into existence when there is the written agreement between them creating certain rights in the franchisee as stated in Section 331.3 (See paragraph 22).

45. Except for the writing which is required by the statute to evidence the existence of the franchise, the "franchise" is the intangible contractual relationship between the franchisor and the franchisee creating rights and duties in both parties. As stated in the statute, the "franchise" is the "agreement" between the parties. It is this contractual agreement and its rights and duties that are within the purview of Section 3070 and which may not be terminated by the franchisor unless there has first been compliance with Section 3070's requirements.

46. As compared to the "franchise" which is the "agreement" that created the rights and duties of both parties, the "dealership" is generally the physical facility and the premises for which the occupational license was or will be issued and which enables the franchisee to perform its obligations and exercise its rights under the franchise. Although the termination of the franchise (the contractual relationship) and the closure of the dealership (the physical facilities) are not identical, the dealership cannot operate as a "franchisee" of that line-make unless there is a franchise and the closure of the dealership prevents the franchisee from performing its duties and exercising its rights under the franchise.

47. Section 3070 restricts the power of a franchisor to terminate "the franchise" (the "agreement") and does not directly address the "closure of a dealership" (other than as one determinant of the length of time affecting the time for termination of the agreement and the time to file a protest). This is partly because it will probably be the franchisor who will be desirous of exercising its claimed right to "terminate the franchise" (the contractual relationship) whereas the franchisor will not have a right to "terminate the dealership" (i.e. "close the dealership").

48. Because the franchise is the "agreement"/contractual relationship, it may be terminated in

various ways, many of which may be stated in the franchise itself, perhaps including mutual rescission or mutual cancellation, or perhaps by the right of the franchisor to terminate the contract in the event of the occurrence or non-occurrence of certain conditions (subject to statutory limitations). The franchise may even state that the franchisee has the right to terminate the contract without cause merely by giving notice to the franchisor.

49. The "dealership", however, is not generally something jointly owned or jointly created by the parties and it will be the franchisee alone who may chose to terminate its existence. Doing so may be a breach of the franchise permitting the franchisor to terminate the "franchise"/agreement, but the franchisor cannot terminate the "dealership".[15]

50. Here the statutory scheme administered by the Board precludes a franchisor (Roadtrek) from terminating the franchise of a franchisee (Mega) unless the requirements of the Vehicle Code are met. Although properly worded in terms of preventing the termination of the "franchise" (the agreement/contractual relationship), the statute in fact is concerned about the impact of the termination of that agreement upon the financial and physical operation of the "dealership" that is essential to the performance of the obligations of the franchise. The statutes evidence that the legislature was concerned about the loss of the rights under the franchise that could severely affect the franchisee's investment in the "dealership" and it is the loss to the public of the benefits of the "dealership" that will result if the rights granted under the franchise were terminated. The "loss of the franchise" will likely result in the "loss of the dealership", with possible adverse consequences upon the franchisee, the motor vehicle business in the area, and upon the public.

51. Because of the interrelationship between the "franchise" (the "agreement" that grants the rights and imposes the duties), and the "dealership" (what is necessary to exercise the rights and carry out the duties), it is difficult to analyze them separately. Loss of the franchise rights will impact the dealership and loss of the dealership will impact the franchise rights. And, as stated above, loss of the franchise that results in loss of the dealership could also result in serious negative consequences to the three areas of legislative concern, the consuming public, the automotive business, and the franchisee.

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[15] This may not be accurate in the case of a "dealer development" situation, when the franchisor may own part or even a majority interest in the entity that owns the dealership, but that does not exist here.

52. The legislature, in the exercise of its powers, has by statute mandated that the "franchise" continue in existence and the status quo be maintained for a specific time or times, first to permit the affected franchisee to file a protest. Then, if a timely protest is filed, the statute mandates that the "franchise" (agreement), and presumably the status quo as to the existence of the dealership, must continue in effect until there is a hearing before the Board and the Board makes its determinations as to whether there is good cause for the termination. If good cause has not been established by the franchisor, the Board may order that the protest be sustained in which case the statute prevents the franchisor from terminating the franchise, and thus presumably preventing the closure of the dealership.

53. Of course, it is the loss of the "dealership" that is of practical significance. During the time periods involved, the public would ordinarily continue to have access to the goods and services provided by the dealership, the dealership's employees can remain "on the payroll", the tax base of the community is not adversely affected by a shutdown of the dealership, the owner of the dealership has not had its source of income or the value of its investment reduced or totally eliminated, and the automotive business in the area is not potentially adversely affected by the loss of that dealership.

54. The rationale for limiting the power of a franchisor from terminating a franchisee includes the recognition that a franchisor will likely suffer no adverse consequences if it terminates any one dealership but the franchisee, likely to have a large investment in the operation of that dealership, is likely dependent upon the franchisor for most if not all of its "livelihood" and that the franchisee may suffer irreparable harm if the franchise is terminated. It is also recognized that the public is dependent upon franchised dealerships for a source of those products as well as obtaining parts for and service of those vehicles.

55. If there is not good cause for the termination of the franchise, the Board's Decision sustaining the protest will protect not only the franchisee's investment but will also keep the dealership in operation thus protecting the benefits that flow from having the dealership as an ongoing enterprise, including providing the public with access to the goods and services available at that dealership.

56. In the present situation, although Mega, the franchisee, continues in existence, the Mega dealership in Scotts Valley has already closed and there is little or no likelihood that it would be able to reopen. The legislative intent of maintaining the status quo and possibly preventing the loss of the

investment of the franchisee and the loss to the public of the goods and services provided by that franchisee's dealership cannot now be effectuated. A decision of the Board sustaining the protest will not protect the franchisee's investment in that dealership or prevent the loss of the benefits to the public that flow from an ongoing enterprise.

57. The Mega dealership in Scotts Valley is no longer in operation and the public has already lost the benefits of access to it as a supplier of the goods and services that had been available to it.

58. Any decision issued by the Board that the protest be sustained and that Roadtrek not be permitted to terminate the franchise of Mega for the Scotts Valley dealership will not have the effect of maintaining the existence of the dealership with all of the benefits generated by an ongoing business and avoiding all of the negatives that would occur if Roadtrek were permitted to terminate the franchise (which would ordinarily result in the closure of an ongoing dealership).

59. Although the evidentiary portion of the hearing has been completed, the outcome of the hearing is uncertain. Following the briefs will be preparation of the findings of fact by the ALJ and the submission by the ALJ to the Board of a Proposed Decision. However, under the undisputed facts as discussed below, there is no need to determine whether Roadtrek had established good cause to terminate the franchise for the Scotts Valley location.

60. In evaluating whether there is good cause for the termination of a franchise, the Board is required to take into account "the existing circumstances" as well as the specific factors as stated in the Vehicle Code. Much of the analysis will be on: the effect upon the franchisee if the dealership ceases operations; whether the franchisee is adequately serving the public; the impact upon the public if the franchisee's dealership ceases to exist, and whether the franchisee is performing its obligations owed to the franchisor.

61. The statute clearly makes the "existing circumstances" the primary focus of what must be considered by the Board. The existing circumstances now include the undisputed fact that the Scotts Valley dealership is closed, has been closed for over a year (since October 2010), and will not reopen even if the protest is sustained. Therefore, it is difficult if not impossible to compare the effect upon the franchisee and the public "if" the dealership is closed, which is the usual result if the termination of the franchise is permitted. There is no operating dealership currently in existence, there has not been an

operating dealership for almost a year and a half, and there will be no operating dealership in the future against which a comparison could be made. The existing circumstances now involve "evaluating the factors with a closed dealership" as compared to "evaluating the factors if the dealership will be closed."

62. This is a case of concluding that "a rose is a rose" meaning that, regardless of the outcome of the hearing on the merits of the protest, as to the operation or non-operation of the dealership, there will be no difference to the franchisee, no difference to the franchisor, and no difference to the consuming public or the motor vehicle business, regardless of the result of any determination by the Board as to whether Roadtrek has good cause to terminate the franchise for Mega's dealership in Scotts Valley. This is so because the dealership is already out of operation, has been out of operation for well over a year, and will not resume operation.

63. Because the Scotts Valley dealership has been closed for well over a year and because there is little or no chance that it will reopen, there is no need to apply the good cause factors in determining what would occur if there is a loss of the dealership if the franchise is terminated. A Decision of the Board that sustains the protest and concludes that Roadtrek may not terminate the franchise of Mega's dealership in Scotts Valley is meaningless as to the practical considerations called for in the statutory scheme. Likewise, a Decision of the Board that overrules the protest and permits Roadtrek to terminate the franchise of Mega's dealership in Scotts Valley is also meaningless as to the practical considerations which are the focus of the statutory scheme. If it were to be determined that good cause to terminate the franchise was not established and that the protest should be sustained, the issuance of a Decision so stating will not result in accomplishing the legislative goal of protection of the public or protection of the franchisee by preventing the closure of the dealership. As indicated above, the Scotts Valley dealership has been closed since October 2010 and no Decision of the Board will be effective to resurrect it.

THE EFFECT OF ROADTREK'S MOTION TO DISMISS THE TERMINATION PROTEST

64. Roadtrek is seeking a dismissal of the "termination protest" filed by Mega with the motion based upon the fact that the Scotts Valley dealership has been closed since October 2010. Roadtrek is asserting that this fact makes the termination protest moot and therefore there is no need for a Decision of

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the Board on the merits of the protest.[16]

65. In essence, Roadtrek is asserting that there is no need for a hearing on the merits of the protest as Roadtrek is satisfied that the closure of the dealership has already occurred. If Roadtrek is seeking dismissal of the protest as it is satisfied that the Scotts Valley dealership has already been closed and if, as stated above, the Board cannot by its Decision prevent the closure that has already occurred or order that the dealership be re-opened, logic dictates that there is no reason to further consider whether Roadtrek has good cause for the occurrence of an event which has already occurred (the closure of the Scotts Valley dealership).

66. Roadtrek, in seeking a dismissal of the protest is asking that the Board not rule on the merits of the protest as the closure of the dealership has rendered the issue of good cause to terminate the franchise moot.

67. Mega, in opposing the motion, is seeking that the Board proceed with the consideration of the merits of the protest in the hope that the Board will conclude that Roadtrek did not meet its burden to prove good cause to terminate the franchise for the Mega dealership in Scotts Valley. However, Mega cannot be asking that the Board order that Mega be permitted to continue in existence as an operating Roadtrek dealer at the Scotts Valley location as Mega has already ceased such operations over a year ago.

68. If this motion to dismiss the termination protest is granted because of mootness, what will be removed from consideration is the assertion before the Board by Roadtrek that there is good cause for the termination of the Mega franchise for the Scotts Valley dealership. Dismissal of the termination protest will be based upon "mootness", as asserted and desired by Roadtrek, rather than whether there is good cause for its decision to terminate the franchise.

69. Dismissal of the protest because of mootness is not a finding by the Board that the Mega franchise for its Scotts Valley location may or may not be terminated. Such an order is doing nothing more than stating that any decision of the Board as to the merits of the protest would not be meaningful and would not effectuate the legislative intent.

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[16] It is noted that Roadtrek is not seeking dismissal of the termination Protest on the basis that as a matter of law, the factors the Board must consider evidence good cause to terminate the franchise. That would be akin to seeking a summary judgment.

70. The issues of whether either party is in breach of the franchise (a contract) and entitled to cancel the contract and recover damages or some other remedy as against the other can be resolved in a civil action, with the usual rules for an action for breach of contract in play. Absent other specific statutes to the contrary, such claims are not within the jurisdiction of the Board and may be pursued without the need for any prior decision by the Board as to whether the "existing circumstances" including the statutory good cause factors would or would not allow a termination of the franchise.[17]

PROPOSED ORDER

After consideration of the pleadings, exhibits, and oral arguments of counsel, it is hereby ordered that Respondent's Motion to Dismiss Protest No. PR-2245-10 (Scotts Valley) Re: Termination is granted. *Mega RV Corp. dba McMahon's RV v. Roadtrek Motorhomes, Inc.*, Protest No. PR-2245-10 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: July 24, 2012

By: _____
ANTHONY M. SKROCKI
Administrative Law Judge

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

[17] In fact, what the Board must consider as to whether there is good cause for termination of the franchise may not be what a court might consider in evaluating whether either party is in material breach of the contract so as to entitle the aggrieved party to a remedy for that breach, including termination of the contract. It is possible that, under general principles of contract law, there could be a material breach of the contract however such breach may not constitute good cause to terminate the franchise if the Board were applying the Vehicle Code. Section 3071(g), that states, "The extent of franchisee's failure to comply with the terms of the franchise", makes breach of the contract only one of the specific good cause factors the Board must consider in proceedings before it.