



## DECISION COVER SHEET

ACTION BY: Public Members Only

ACTION BY: All Members

To : BOARD MEMBERS

Date: August 14, 2012

From : ADMINISTRATIVE LAW JUDGE: Diana Woodward Hagle

CASE: MEGA RV CORP. dba MCMAHON'S RV v. ROADTREK MOTORHOMES, INC.  
Protest Nos. PR-2205-10, 2211-10, and PR-2212-10

TYPE: Vehicle Code section 3076 Protests (Franchisor Incentive Program Claims)  
Proposed Decisions  
PR-2205-10 (Colton Dealership Location)  
PR-2211-10 (Scotts Valley Dealership Location)  
PR-2212-10 (Irvine Dealership Location)

NOTE: An expanded statement of facts is found in the Decision Cover Sheet for termination protests PR-2244-10 and PR-2245-10.

### PROCEDURE SUMMARY:

- **PROTESTS FILED ON CALENDAR:** February 9, 2010, February 18, 2010, and February 18, 2010, respectively.
- **MOTION RELEVANT TO FRANCHISE INCENTIVE CLAIMS PROTEST FILED:**
  - Protestant's Objection to Introduction in Evidence of James E. Hammill's Declaration Re: Franchisor Incentive Program Claims [Vehicle Code Section 3076]
  - On March 20, 2012, Administrative Law Judge Diana Woodward Hagle issued an Order Overruling Protestant's Objection to Introduction in Evidence of James E. Hammill's Declaration Re: Franchisor Incentive Program Claims; Findings Related Thereto. The Order is attached to the Proposed Decision as Exhibit A.
- **COUNSEL FOR PROTESTANT:** Law Offices of Michael J. Flanagan  
Michael J. Flanagan, Esquire  
Gavin M. Hughes, Esquire  
Erin R. Hegedus McIntosh, Esquire  
Danielle R. Vare, Esquire (as of 11/21/11)
- **COUNSEL FOR RESPONDENT:** Seyfarth Shaw, LLP  
Louis S. Chronowski, Esquire  
Kavitha Janardhan, Esquire (until 5/1/12)  
James D. McNairy, Esquire

**EFFECT OF PROPOSED DECISION:** This Proposed Decision would sustain Protest Nos. PR-2205-10, PR-2211-10 and PR-2212-10.

**SUMMARY OF PROPOSED DECISION:**

- The issues presented are the following:
  - (1) Did Mega RV sustain its burden of proof of establishing that Roadtrek violated Section 3076, in that Roadtrek failed to fulfill obligations to Mega RV for franchisor incentive program claims?
  - (2) Did Roadtrek sustain its burden of proof of showing that it paid approved claims in a manner meeting the requirements of Section 3076? ( Here, the burden of proof is allocated to Respondent because it is in a better position to have knowledge of the facts regarding these issues.)
- The resolution of the issues is the following:
  - (1) Mega RV has sustained its burden of proof of establishing that Roadtrek violated Section 3076.
  - (2) Roadtrek has not sustained its burden of proof of showing that it paid approved claims in a manner meeting the requirements of Section 3076, as follows:
    - A. Roadtrek did not "pay" approved incentive claims within the meaning of the statute when it "offset" or "credited" the claims without notice to Mega RV; and
    - B. Even assuming *arguendo* that Roadtrek's "offsetting" or "crediting" approved incentive claims is proper, Roadtrek failed to "pay" approved claims within the statutory time stated in Section 3076.
- Damages, if any, will be determined in the pendant federal court case between the parties.
- Roadtrek called its "franchisor incentive program" the Consumer Cash Back Incentive Program ("CCB"). Each week, CCB incentives were announced on the dealer-only portion of Roadtrek's website: if certain listed van models and model years were "retail delivered" within "effective dates", consumers would receive amounts which ranged between \$500 and \$7,000. To get the incentive, dealers submitted to Roadtrek a CCB Incentive Claim Form signed by the customer, together with sales documents. Roadtrek would then send the incentive check directly to the dealer. Roadtrek took the position that it was up to the dealer and the customer how to apply the cashback---Mega RV would take it off the price of the MSRP or would use it as a down payment.

- Beginning at an unknown time, but at least as early as September 12, 2008, Roadtrek would "offset" or "credit" approved CCB Incentive Program claims submitted by Mega RV against amounts it contended were owed to it by Mega RV.
- Roadtrek did not advise Mega RV that it was "offsetting" or "crediting" approved CCB Incentive Program claims against amounts it contended were owed to it by Mega RV for vans, parts, shows and interest. Roadtrek did not advise Mega RV of the dates that it was "offsetting" or "crediting" the claims, nor did Roadtrek identify to Mega RV the vans, parts, shows and interest against which the claims were "offset" or "credited".
- The facts recited in Exhibit A are based upon the declaration of James E. Hammill, initially General Manager and now President and CEO of Roadtrek. Exhibit A examines 14 franchisor incentive claims.
- Roadtrek's failure to provide notice to Mega RV is compounded by the complexity of some of its "offsets":
  - (1) In regard to the sale of a 2010 Roadtrek AG, Roadtrek grouped the \$5,000 incentive with other "offsets" totaling \$25,000, then "offset" the \$25,000 against nine separate line-items which Roadtrek contended that Mega RV owed it for vans, although none of the vans was the 2010 Roadtrek AG (Exhibit A, pp. 18-19); and
  - (2) In regard to the sale of a 2008 Roadtrek AD, Roadtrek grouped the \$1,500 incentive with other "offsets" totaling \$4,874.98, then "offset" the \$4,874.98 against six separate line-items which Roadtrek contended that Mega RV owed it for one van, two shows, and three parts invoices, asserted debts ranging from 9/21/07 to 12/19/08. (Exhibit A, pp. 8-9)
- On one occasion, in regard to the sale of a 2010 Roadtrek AD, Roadtrek neither paid to Mega RV the \$2,000 incentive nor did it "offset" the amount against obligations it contended were owed by Mega RV to Roadtrek. (Exhibit A, pp. 19-20)
- Assuming *arguendo* that Roadtrek's "offsetting" or "crediting" of accounts was a proper manner to "pay" franchisor incentive program claims, there were two instances where Roadtrek "paid" Mega RV beyond the 30 days permitted by Section 3076(a):
  - (1) In regard to the sale of a 2009 Roadtrek AG, Roadtrek vouchered check #56857 on 12/18/08, but offset \$375 which Roadtrek contended that Mega RV owed for parts purchased on or about 4/17/09, four months later (Exhibit A, p. 7); and
  - (2) In regard to the sale of a 2008 Roadtrek AD, Roadtrek vouchered check #56857 on 12/18/08, but offset \$375 which Roadtrek contended that Mega RV owed for parts purchased on or about 4/17/09, four months later (Exhibit A, pp. 8-9).
- The requirement in Section 3076(a) that approved franchisor incentive program claims must be "paid" within 30 days of approval assumes that the franchisee will receive a meaningful

statement identifying with particularity the franchise incentive claim being paid, the exact amount of the claim being paid, the date the claim is being paid (or "credited" or "offset"), and the account or debt against which the "offset" or "credit" is made. Moreover, if the franchisor elects to "pay" by way of a "credit" or an "offset", both parties must be in agreement not only that the franchisee approves of this manner of "payment", but also that there is an agreed-upon debt the franchisee owes against which the "credit" or "offset" is made. None of the above conditions of payment were present in Roadtrek's processing of Mega RV's approved CCB Incentive Program claims.

- Finally, there is a fundamental problem with a franchisor "offsetting" payments to a franchisee for incentive claims which it has approved. The dollar amounts of a manufacturer's incentives are designed to motivate customers to buy, and dealers to sell, particular models chosen by the manufacturer. Under Roadtrek's CCB Incentive Program, the customer must sign the claim form so the customer is well aware of the incentive and its amount. The customer, the targeted beneficiary of the program, expects a reduction in price or application to a down payment. To remove this immediate benefit by "offsetting" would defeat the dealer's incentive to make the sale, since it would be paying the customer out of its own pocket (or cut its profit margin) the amount of the franchisor's incentive. And, since the franchisor's incentive is available to all its franchisees, customers would likely buy elsewhere if the franchisee is unwilling to offer an incentive knowing it would be "offset".

#### **RELATED MATTERS:**

- Related Case Law: None.
- Applicable Statutes: Vehicle Code sections 331.1, 331.2, 3076, 3066(b).
- Related Board Protests: There are 11 *Mega RV Corp. dba McMahons RV v. Roadtrek Motorhomes, Inc.* protests that are pending a decision on their merits. These Proposed Decisions will be considered at the August 23, 2012, General Meeting as follows:
  - Protest Nos. PR-2199-10 (Colton) and PR-2201-10 (Irvine) Section 3070(b) modification.
  - Protest Nos. PR-2206-10 (Colton), PR-2208-10 (Irvine), and PR-2209-10 (Scotts Valley) Section 3075 warranty reimbursement.
  - Protest Nos. PR-2205-10 (Colton), PR-2211-10 (Scotts Valley), and PR-2212-10 (Irvine) Section 3076 franchisor incentive program reimbursement.
  - Protest No. PR-2233-10 (Colton) Section 3072 establishment.
  - Protest Nos. PR-2244-10 (Colton/Irvine) Section 3070(a) termination.
  - Protest No. PR-2245-10 (Scotts Valley) - A Proposed Order Granting Respondent's Motion to Dismiss Protest No. PR-2245-10, a Section 3070 termination protest for the Scotts Valley location, will also be considered at the August meeting.