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

CERTIFIED MAIL

STATE OF CALIFORNIA

NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of MEGA RV CORP. dba MCMAHON'S RV, Protestant, v. ROADTREK MOTORHOMES, INC., Respondent.	**Protest No. PR-2201-10** **ORDER CONFIRMING DECISION TO SUSTAIN PROTEST** **Vehicle Code section 3070(b)** **[Modification – Irvine]**

PROCEDURAL BACKGROUND

PARTIES AND COUNSEL

1. Protestant Mega RV Corp doing business as McMahon's RV (herein "Mega RV" or "Protestant") is a recreational vehicle dealership, with several California and Arizona locations. Until early 2012, its primary dealership location was in Irvine, California at 6441 Burt Road, #10; on or about March 31, 2012, Protestant relocated that dealership to 5400 Garden Grove Boulevard, Westminster, California.

2. Mega RV is a California corporation owned by Brent McMahon. Mega RV is a

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"franchisee" within the meaning of Vehicle Code section 331.1.[1]

3. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J. Flanagan, Esquire; Gavin M. Hughes, Esquire; Erin R. Hegedus McIntosh, Esquire; and Danielle R. Vare, Esquire (as of 11/21/11), 2277 Fair Oaks Boulevard, Suite 450, Sacramento, California.

4. Respondent Roadtrek Motorhomes, Inc. (herein "Roadtrek" or "Respondent") manufactures Class B motorhomes. It is located in Kitchener, Ontario, Canada.

5. Roadtrek is a Canadian corporation. Roadtrek is a "franchisor" within the meaning of Section 331.2.

6. Respondent is represented by Seyfarth Shaw, LLP, by Louis S. Chronowski, Esquire; and Kavitha Janardhan, Esquire (until 5/1/12), 131 South Dearborn Street, Suite 2400, Chicago, Illinois.

PRELIMINARY PROCEDURAL NOTE

7. Between January and July of 2010, Mega RV filed with the New Motor Vehicle Board ("Board") 18 protests alleging the failure of Roadtrek to comply with the provisions of the Vehicle Code and requesting hearings on the merits of the various protests. The protests involved Mega RV's dealership locations in Irvine, Colton, Scotts Valley and Palm Desert. By the first day of the hearing in August 2011, 12 protests had been consolidated for hearing, and six protests had been dismissed. Hereinafter, the consolidated protests shall be referred to as the "Protests."

8. Also in 2010, Mega RV filed with the Board two petitions (Petition Nos. P-456-10 and P-457-10) against Roadtrek. Both petitions were rejected upon first consideration and the portions of the petitions that sought adjudication of the dispute pursuant to Section 3050(c)(2) were dismissed by the Board at the June 15, 2010, and December 3, 2010, General Meetings, respectively. The petitions also requested that the Board direct the Department of Motor Vehicles (hereinafter "DMV") to conduct an investigation of the allegations contained in the petitions and to order DMV to exercise any and all authority over Respondent's Occupational License. These requests were also denied at the meetings noted

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[1] Hereinafter, unless otherwise indicated, all Section references are to the Vehicle Code. The statutory references are subject to some qualification: although the parties are properly identified as "franchisee" and "franchisor" under Sections 331.1 and 331.2, it was only as of January 1, 2009 that Section 331.3 ("recreational vehicle franchise"), as well as Sections 11713.22 and 11713.23 ("written [RV] franchise agreement" and "sale of new [RV]") were enacted. Section 3072 ("establishing or relocating RV dealerships") became effective January 1, 2004.

above.

9. On January 31, 2012, the September 20, 2010 order of consolidation for purposes of the merits hearing was amended for preparation of the Proposed Decisions and Decision by the Board; the new order consolidated the Protests into five groups, as follows:

Vehicle Code	Type of Protest	Filed	Protest Nos.
Section 3070(b)	Modification	January 29, 2010 January 29, 2010 January 29, 2010	PR-2198-10 (Scotts Valley) [2] PR-2199-10 (Colton) PR-2201-10 (Irvine)
Section 3075	Warranty reimbursement violations	February 9, 2010 February 18, 2010 February 18, 2010	PR-2206-10 (Colton) PR-2208-10 (Irvine) PR-2209-10 (Scotts Valley)
Section 3076	Franchisor incentive program violations	February 9, 2010 February 18, 2010 February 18, 2010	PR-2205-10 (Colton) PR-2211-10 (Scotts Valley) PR-2212-10 (Irvine)
Section 3072(a)	Establishment violations	May 11, 2010	PR-2233-10 (Colton)
Section 3070(a)	"*De facto* termination"	July 13, 2010 July 13, 2010	PR-2244-10 (Colton/Irvine) PR-2245-10 (Scotts Valley)

10. A hearing on the merits of the Protests was held before Administrative Law Judge Diana Woodward Hagle on the following dates in 2011: August 9 through 12; August 15 through 19; September 21 through 23; September 30; November 7 through 11; November 14 and 15; November 17 and 18; and November 28 through December 2. Hearing dates in 2012 were the following: January 9 and 10; January 12 and 13; January 18 and 19; January 31; and February 1.

11. The hearing was re-opened for a telephonic hearing on April 26, 2012 to provide evidence of the relocation of Mega RV's primary dealership location from Irvine to Westminster.

12. The matters were submitted on May 3, 2012.[3]

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[2] Subsequently, Protestant requested dismissal of Protest PR-2198-10, which was ordered on March 6, 2012.

[3] In October 2010, counsel for the parties stipulated to extend the time the ALJ has to render the proposed decisions from 30 to 60 days after the matters were deemed submitted; the time for the Board to consider the proposed decisions was also extended from 30 to 60 days from the date the ALJ submits the proposed decisions. On May 29, 2012, counsel stipulated to extend the ALJ's time to final and sign the proposed decisions from 60 days to 90 days, or August 1, 2012.

PENDANT FEDERAL CASE

13. The parties to these protests are also parties to an action for money damages currently pending in United States District Court in the Central District of California, Case No. CV 09-09466 SJO. The federal proceeding is stayed pending the Board's Decision in these Protests. (RT 9/21: 36-37)[4]

THE EFFECT OF THE BOARD ACTION ON AUGUST 23, 2012 (PROTEST NO. PR-2201-10)

14. Administrative Law Judge Hagle's Proposed Decision, which recommended that Protest No. PR-2201-10 asserting the claimed modification of the franchise for the Irvine location be overruled, was not adopted by the Board at its August 23, 2012, Special Meeting.

15. Following lengthy public comments by counsel for the parties, the Public Members and Dealer Members of the Board deliberated in closed Executive Session. Thereafter, as to this protest, and as reflected in the Board's draft minutes of August 23, 2012, "Mr. Stevens moved to reject the Administrative Law Judge's Proposed Decision. The modification protest for Irvine was sustained up until the time it relocated to Westminster. Roadtrek violated Vehicle Code section 3070(b)(1)."[5] "…Mr. Wilson seconded the motion. The motion carried unanimously."

16. The Board, acting by and through its Public Members and Dealer Members, expressly decided that the protest was sustained. Protestant had met its burden of proving that there was an intended modification and that the modification would substantially affect Protestant's sales or service obligations or investment. Generally, sustaining such a protest would further require findings that the franchisor had not met its burden under Section 3066(b) of proving good cause to modify the franchise. However, as discussed below, whether there was good cause for the modification that has been found to have occurred is irrelevant. But, because of the facts common to some of these protests, the Board has also concluded that even if the proper notices had been provided, the modification would not be permitted as Roadtrek did not establish good cause for the modification. Therefore, the Board has found

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[4] References herein to "RT" followed by a date (excluding the year) are to the transcripts of the proceedings. References to "Exh" are to Exhibits.

[5] It is possible that the Board may refer this matter to the Department of Motor Vehicles pursuant to Section 3050(c)(1) and (c)(3). However, because of Section 3050(c), which provides in part: "A member of the board who is a new motor vehicle dealer may not participate in, hear, comment, advise other members upon, or decide any matter considered by the board pursuant to this subdivision that involves a dispute between a franchisee and franchisor…" consideration of such a referral will require a separate agenda item to be considered only by the Public Members at the next Board meeting.

that the attempted modification is invalid for two reasons: (1) The notices required by Section 3070(b) were not provided; and, (2) Roadtrek has not established good cause for the modification. See further discussion below.

17. It is undisputed that Respondent did not comply with the provisions of Section 3070(b) requiring notices to the franchisee and the Board of such an intended modification. The statute is clear. Absent such notices, a franchisor has no power to modify the franchise if the modification will substantially affect the franchisee's sales or service obligations or investment, and any attempt to modify the franchise without compliance with the statute is of no legal effect whether there is good cause for the intended modification or not. The Board decided that it could not consider whether a franchisor (who has not complied with the statute) has good cause to modify the franchise if the modification is illegal. The absence of notice has the effect of barring the modification. Proving good cause for the modification does not negate the requirements for the legislatively-mandated notices that must precede the intended modification.

18. It is implicit that any findings and conclusions in the Proposed Decision that are inconsistent with the Board's determination to "reject the Administrative Law Judge's Proposed Decision" or inconsistent with the decision to "sustain the protest" have also been rejected.

19. When the Board sustained the protest on August 23, 2012, it also stated it would draft its own decision which would be finalized several weeks after the Board Meeting. This Order Confirming Decision is the culmination of the Board's Decision on August 23, 2012.

STATEMENT OF THE CASE

Background

20. On January 29, 2010, Roadtrek executed a Dealer Agreement with a recreational vehicle[6] dealer other than Mega RV to sell and service Roadtrek RVs at dealership locations which Mega RV alleged were within Mega RV's "exclusive" territories, as more particularly described below.

Modification Protest No. PR-2201-10 - Irvine Dealership Location

21. On January 29, 2010, Mega RV filed Protest No. PR-2201-10 with the Board. The protest

[6] Hereinafter, recreational vehicles will sometimes be referred to as "RVs".

alleged that Roadtrek had violated Section 3070(b) by failing to give the required notices of Roadtrek's intent to modify Mega RV's Irvine, California franchise by establishing another franchisee, Mike Thompson's Recreational Vehicles, dba Mike Thompsons RV Superstores ("MTRV"), in the "exclusive sales area" Roadtrek had previously assigned to Mega RV's Irvine dealership location (i.e., within a 60-mile radius of the dealership).

22. As stated above, Roadtrek did not provide the statutorily required notice to Mega RV or the Board. Neither Mega RV nor the Board "received" the notice as required by Section 3070(b).[7]

Vehicle Code Section 3070(b) - Modification of a Franchise

23. Section 3070(b) provides, in pertinent part, the following:

> Notwithstanding…the terms of any franchise, a franchisor of a dealer of recreational vehicles may not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected franchisee written notice thereof at least 60 days in advance of the modification or replacement.
> …

PRE-HEARING ORDER RELATIVE TO ADJUDICATION OF ISSUES

24. On August 3, 2011, ALJ Skrocki issued an Order Granting in Part and Denying in Part Protestant's Motions in Limine.

25. Among other issues, the order discussed Mega RV's motion for an order dispensing with a hearing regarding the "good cause" factors in Section 3071.

26. ALJ Skrocki did rule that no Section 3071 hearing be held. The substance of the Order is the following:

> …Evidence as to these issues will be limited to whether the establishments of the additional franchises in Colton and Irvine were within the contractually assigned territories of Protestant, and if so whether they resulted in modification of Protestant's franchises and come within the language of Section 3070(b)(1) which reads in part as follows:
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> > (b)(1) Notwithstanding Section 20999.1 of the Business and Professions Code or the terms of any franchise, a franchisor of a dealer of recreational vehicles may not modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment, unless the franchisor has first given the board and each affected

[7] Such notice is required whenever a franchisor seeks to modify or replace a franchise with a succeeding franchise if the modification or replacement would substantially affect the franchisee's sales or service obligations or investment. (Section 3070(b))

franchisee written notice thereof at least 60 days in advance of the modification or replacement. …

If the establishment of the additional franchises in the exclusive territories of Protestant do not constitute a modification of Protestant's franchises, or even if they do constitute modifications, if they are such that they do not substantially affect Protestant's sales or service obligations or investment, then Section 3070(b)(1) does not require there be notice of the modifications to Protestant or the Board. If this is the case, then there is no right to protest the claimed modifications and there is no right to a hearing on the merits of the protests that have been filed. Said another way: (a) If there is no modification of the franchise, Respondent is not required to give notice of what is a "non-modification" and there is no right to protest; (b) If there is a modification, but the modification will not substantially affect the Protestant's sales or service obligations or investment, Respondent is not required to give notice of the modification and there is no right to protest.

However, if the establishment of the additional franchises was within the exclusive territories of Protestant and do constitute modifications of Protestant's franchises and if these are modifications that substantially affect Protestant's sales or service obligations or investment then Section 3070(b)(1) does require notice to Protestant and the Board. If no such notice was given, the modifications are deemed ineffective (void) as a matter of law and there should be no requirement that a hearing be held to provide an opportunity for Respondent to show that there was good cause for the modifications, which in these cases would have the effect of depriving Protestant of its exclusive territories.

The burden of going forward and the burden of proof as to whether there are (a) modifications to Protestant's franchises, and (b) that these are modifications which substantially affect Protestant's sales or service obligations or investment are upon Protestant.

Respondent's assertion that there is no modification as Protestant no longer has a right to the exclusive territories as it is no longer in good standing is also a question of fact that, if asserted by Respondent at the hearing, will have to be resolved as it relates directly to the issue as to whether there was a modification of the franchises.

As to these specific facts and issues that the provisions regarding exclusive territories no longer existed, the burden of going forward and the burden of proof shall be allocated to Respondent…Although this is a "claim" by Respondent it is a factual claim, not a legal claim for which a remedy is sought. It is merely an assertion by Respondent that no notice was needed pursuant to Section 3070 as there was no modification of the franchise. Thus, the issue is still limited to whether there was or was not a modification of the franchise which is within the jurisdiction of the Board as the only relief being sought is pursuant to Section 3070.

With regards to the modification protests, the only issues that need be addressed at the upcoming merits hearing are:

a. Was there a modification of the franchises (which includes whether the exclusive territory provision was no longer applicable due to the assertion by Respondent that Protestant was no longer in good standing); and, if there was a modification,

b. Whether the modification substantially affects Protestant's sales or service obligations or investment.

If Protestant cannot meet its burden of proof as to these fundamental issues, there is no right to file a protest and no need for Respondent to prove there is good cause for the

claimed modifications.

> If Protestant does meet its burden of proof as to these fundamental issues, and if there was no notice from Respondent that satisfied the requirements of Section 3070, the claimed modifications were done in derogation of the statutes and are of no effect. The analysis stated as to Motion No. 1 would be applicable here. (Underline added.)
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> …[R]egardless of which of the conclusions are made here, there is no need for a hearing to address the good cause factors as stated in Section 3071. (Underline added.)

EFFECT OF THE BOARD'S DECISION REGARDING THE ESTABLISHMENT OF MTRV IN COLTON ON THIS MODIFICATION DECISION

27. As stated in the above order, there would have been no need for a merits hearing on this modification protest if the statutorily mandated notices had not been provided by the franchisor. However, a merits hearing was held pursuant to Section 3072 involving the establishment of MTRV at the Colton location. The ultimate findings and holdings in that protest (PR-2233-10) are found to be applicable to this modification protest. And, as the establishment protest was sustained with Mega RV having established good cause not to permit the establishment of MTRV at the Colton location, so should this modification protest be sustained when the burden of proving good cause for the modification of the exclusive territory as provided in the franchise would be on Roadtrek.

28. In the establishment protest, Mega RV was found to have established good cause not to allow the establishment of MTRV at the Colton location. Considering all the evidence introduced during the consolidated hearing, it is also concluded that Roadtrek did not meet its burden of proof to establish good cause to permit the modification of the franchise terms granting Mega RV the exclusive territory. The proper procedure, when there are no notices, would be to declare any conduct improperly or illegally consummated as being void *ab initio*, thus requiring the franchisor to comply with the statute and give the required notices.

29. However, the Board is cognizant of the fact that in this matter, discovery has been completed, and a merits hearing has been held. It would be a waste of the parties' and the Board's resources to start over again. Therefore, the Board, under these unique circumstances only is treating the protest as though it had been filed after notice had been given and received, and is ruling in favor of Protestant on the merits of the protest, as well as ruling on the legal effect of the lack of required notice to the Protestant and the Board. The Board specifically finds that Protestant Mega RV is not harmed by this

approach, as it will have prevailed on both the establishment protest and the modification protest. By the Board's Order, Roadtrek is prevented from modifying the franchise for the Colton location and is prevented from establishing the additional dealership at the Colton location. Likewise Roadtrek is not adversely affected by merging the findings and conclusions of the modification protest with the establishment protest, as the Board's Order is consistent as to the ultimate effect of the decision on Roadtrek. The basic issues and facts between the modification protest and the establishment protest were generally the same. The Board concludes that the only material difference is which of the parties had the burden of proof as to the ultimate issues in each protest. Under the facts of these matters, Mega RV has met its burden of proving good cause in not permitting the establishment of the additional Roadtrek dealership in Colton. This is the same ultimate outcome as in the modification case.

ISSUES PRESENTED

30. What effect, if any, does the relocation in March 2012 of Mega RV's dealership location from Irvine to Westminster have on the continuation of Protest No. PR-2201-10?

31. If the relocation has no effect on the continuation of the protest, then the issues are the following:

A. Did Roadtrek sustain its burden of proof of establishing that Mega RV had no franchise right to an exclusive territory since (as Roadtrek alleges) Mega RV was no longer in "good standing" under the Roadtrek franchise agreement?

B. If Roadtrek fails to sustain its burden of proof stated above, did Mega RV sustain its burden of proof of showing that Roadtrek's establishment of an additional Roadtrek franchise within Mega RV's "contractually assigned exclusive territory" was a "modification" of Mega RV's Irvine franchise?

C. If Mega RV sustained its burden of proof that its franchise was "modified" by the establishment of an additional Roadtrek franchise which meant that Mega RV had lost the right to the exclusive territory provided in the franchise, did Mega RV sustain its burden of proof of showing that the "modification" substantially affected Mega RV's sales or service obligations or investment?

PROTESTANT'S CONTENTION

32. Mega RV contends that Roadtrek's establishment of additional Roadtrek franchisees within

Mega RV's "contractually assigned exclusive territories" were "modifications" of Mega RV's franchise.

33. Consequently, Protestant maintains that the modifications depriving Mega RV of its contractual right to an exclusive territory substantially affect its sales and service obligations, as well as its investment in the Roadtrek franchise. Roadtrek was required to give notice to Protestant and the Board of such modification, which it did not. Since Roadtrek did not give Protestant and the Board notice prior to modifying its franchise, the modification should be deemed void and MTRV's Roadtrek franchise should be required to cease operations. (Protestant's Post-Hearing Opening Brief, p. 20)

RESPONDENT'S CONTENTION

34. Respondent contends there was no modification since Mega RV no longer has a franchise right to the exclusive territories as Mega RV was no longer in "good standing" under the Dealer Agreement. Roadtrek further contends that the determination of whether Mega RV is in "good standing" is not a matter within the jurisdiction of the Board. It was within Roadtrek's discretion to determine whether Mega RV was in "good standing" and entitled to maintain exclusive territories under the Dealer Agreement. Therefore, Roadtrek was under no statutory obligation to give notice to Mega RV of its establishment of an additional Roadtrek franchise.

35. The words in Section 3070(b) "notwithstanding…the terms of any franchise", according to Respondent "…mean that the notice and protest requirements, when triggered by a modification, cannot be waived by a dealer agreement. Here, the notice and protest requirements of Section 3070(b) have not been triggered by a modification." (Underline in original; Respondent's Reply to Protestant's Post-Hearing Brief, p. 20)

IDENTIFICATION OF WITNESSES AND EXHIBITS

PROTESTANT'S WITNESSES

36. Brent McMahon is the president and CEO of Mega RV Corp, doing business as McMahon's RV. (RT 8/9: 76-173; 8/10: 14-244; 8/11: 6-267; 8/12: 7-249; 8/15: 6-205; 8/16: 6-124)

37. Paul Schilperoort is the Director of Operations at Mega RV, a position he has held since mid-2008. His duties include overseeing the "…daily operations of the entire company, which entail service and parts, the sales operations, and the accounting office". He initially was hired in November 2005 as service and parts director. (RT 8/16:127-220; 8/17:117-218; 8/18:6-215; 8/19:8-211; 9/21:9-

190; 9/22: 6-71; 1/31:207-226; 2/1:6-144; 4/26:30-100)

38. Frank De Gelas[8] is the President of Mike Thompson's RV Super Stores, which operate RV dealerships in five locations in Southern California, including Colton, California.[9] (RT 1/13:7-77)

RESPONDENT'S WITNESSES

39. Jeff Hanemaayer is the son of the founder of Roadtrek. Until 2009, he was Chairman of the company, handling marketing, finance and accounting. He described himself and James Hammill "…more as co-CEO's…", each involved in different areas of the company. (Exh 601; RT 11/14:11-249; 11/15:6-166)

40. James Hammill is President and CEO of Roadtrek. He was initially hired as General Manager in April 2005. He was appointed President around the beginning of 2007 and was named a Director of the company in 2008. He oversees "…all operations, everything tangible about the company, reporting to the board of directors… sales, manufacturing, engineering, quality, materials, purchasing… [e]ssentially all departments." (RT 9/22: 73-242; 9/23:6-220; 11/7:8-217; 11/8:9-187; 11/9:6-225; 11/10: 6-208; 11/11:6-93)

EXHIBITS

41. Exhibit 600 is the Dealer Agreement between the parties which was executed on February 22, 2006. It establishes Roadtrek franchisees at Mega RV's Irvine and Colton dealership locations.

42. Exhibit 685 is the Roadtrek Motorhomes, Inc. Dealer Agreement with MTRV which was executed on January 29, 2010. It establishes Roadtrek franchisees at MTRV's dealership locations in Santa Fe Springs, Fountain Valley (two locations), and Colton (directly across the street from Mega RV's dealership).

FINDINGS OF FACT[10]

PRELIMINARY FINDINGS

43. Roadtrek is a Class B motorhome manufacturer headquartered in Kitchener, Ontario,

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[8] Frank De Gelas was called as an adverse witness under Evidence Code section 776.

[9] MTRV has three year-round locations in Southern California and one temporary location. The Fountain Valley location has an address on both sides of the freeway and is counted as two locations. (RT 1/13:8)

[10] References herein to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a finding and are not intended to be all-inclusive.

Canada. (RT 11/14:12-13) The company, founded by Jacques Hanemaayer, was previously known as Home & Park Motorhomes. (RT 11/14:12-15; 1/10:148-149)

44. Brent McMahon, the owner of Mega RV, started in the recreational vehicle business working with his stepfather, who owned a dealership (and who also sold Roadtrek RVs) at TraveLand, which once was a large multi-dealer RV park in Irvine, California. On December 1, 2000, Brent McMahon incorporated Mega RV Corp and started his own small dealership selling used RVs on one of the TraveLand lots. On April 9, 2001, he established Mega RV as a new recreational vehicle dealer. (Exh 1; RT 11/15:177; 1/13:66-67)

45. On February 22, 2006, Roadtrek and Mega RV entered into a Dealer Agreement covering Mega RV's Irvine, Colton and Stanton dealership locations. (Exh 600) The agreement was for a three-year period, and the parties contemplated that the agreement would be renewed. (Exh 600, Section 520)

46. As indicated above, on January 29, 2010, Respondent Roadtrek executed a Dealer Agreement[11] with MTRV to sell and service Roadtrek motorhomes. Frank De Gelas, President/Secretary of MTRV signed on behalf of the dealership and James Hammill signed on behalf of Roadtrek. The Dealer Agreement created a franchisee-franchisor relationship in which there were four MTRV dealership locations from which Roadtrek motorhomes would be sold and serviced: Santa Fe Springs (the "head office"), Fountain Valley (two locations), and Colton, California. (Exh 685; RT 4/26:18-19)

47. The distances between Mega RV's Colton and Irvine locations and MTRV's locations are outlined as follows:

	MTRV Santa Fe Springs	MTRV Ward Street Fountain Valley	MTRV Talbert Avenue Fountain Valley	MTRV Colton
Mega RV Irvine	21.4 miles	10.8 miles	10.9 miles	35.9 miles
Mega RV Colton	42.9 miles	43.6 miles	43.5 miles	0.2 miles

(Exh 63)

All MTRV locations are located within a 60 mile radius of Mega RV's Irvine and Colton locations and are thus within the exclusive territories assigned to Mega RV under its franchise for the Irvine location

[11] The Roadtrek-MTRV Dealer Agreement (Exh 685) is a "written recreational vehicle franchise agreement" pursuant to Sections 331.3, 11713.22 and 11713.23.

and the Colton location.

FINDINGS RELATING TO THE RELOCATION OF MEGA RV'S "TRAVELAND" DEALERSHIP IN IRVINE TO WESTMINSTER

48. In March of 2012, Mega RV closed its RV dealership at TraveLand in Irvine, California and relocated it to a new location in Westminster, California. (Exh 537; RT 4/26:31)

49. There is no "written RV franchise agreement" between the parties referencing Mega RV's dealership location in Westminster, California.

50. Nothing in the 2006 Dealer Agreement supports an argument that it would encompass a relocated dealership location. Although Roadtrek promised to "work with [Brent McMahon] to expand his operation..." and "…expansions will be negotiated at the time of the expansion"---these phrases connote not only active participation by Roadtrek, but also the establishment of additional dealerships, not relocation of an existing dealership. (Exh 600, Section 111)

51. There is no evidence that Roadtrek participated in, or consented to, the relocation of Mega RV's dealership from Irvine to Westminster.

52. There is no evidence that the parties intended to establish a Roadtrek franchise at Mega RV's relocated dealership location in Westminster.

53. There is no franchise for Mega RV to sell Roadtrek vans from its Westminster dealership.

FINDINGS RELATING TO ROADTREK'S CLAIM THAT MEGA RV HAD NO FRANCHISE RIGHT TO AN EXCLUSIVE TERRITORY BECAUSE MEGA RV WAS NO LONGER IN "GOOD STANDING" UNDER THE DEALER AGREEMENT

54. The Dealer Agreement which Roadtrek and Mega RV executed on February 22, 2006 established Mega RV's Roadtrek franchise. The Dealer Agreement required Mega RV, in order "…to remain in good standing under this Agreement…", to "stock" and "prominently display" a total of 22 Roadtrek vans (four different models) at each of Mega RV's three dealership locations. (Exh 600, Section 109)

55. As long as Mega RV maintained its "good standing" status, Roadtrek guaranteed that it would not locate another dealer within a "…60 mile radii…" of each dealership location and that Mega RV would "…have the exclusive right to purchase, display and resell Roadtreks, parts and accessories in

the [Dealer's] Territory…". (Exh 600, Sections 107 and 108) As long as Mega RV remained in "good standing" under the agreement, it would not only retain its "exclusive" dealer territories but would also receive full cooperation from Roadtrek "in all special promotions" (Exh 600, Sections 107, 108, 520).

56. Therefore, under the Dealer Agreement, Mega RV had an "exclusive" Roadtrek territory within a "60 mile radii" of its Irvine dealership which was located until March 2012 at 6441 Burt Road, #10, Irvine, California.

57. Section 3070(b) bars a franchisor from franchise modifications unless there is compliance with the terms of the statute regarding notices. Section 3070(b) clearly states that it is applicable "Notwithstanding the terms … of any franchise… ." As indicated in paragraph 22, Roadtrek did not provide the requisite notices. The fact that Roadtrek is now asserting that the exclusive territory is a term that may be modified upon the claimed loss of good standing without compliance by Roadtrek with the notice requirements of Section 3070(b) is not persuasive to this Board. The following language, "Notwithstanding…the terms of any franchise, a franchisor of a dealer of recreational vehicles may not modify…" indicates that a franchisor must provide the Section 3070(b) notice to all franchisees in all instances in which the modification would substantially affect the franchisees' sales or service obligations or investment. To conclude otherwise negates the clear language of the statute, results in circular reasoning, and would open the door for franchisors to become "their own judge" and decide what may be permitted to be modified by the terms of the franchise alone, thus avoiding the applicability of Section 3070(b).

58. For purposes of determining whether there was a modification of the franchise, the contract term permitting the modification upon the asserted loss of Mega RV's "good standing" is not relevant.

FINDINGS RELATING TO WHETHER THE ESTABLISHMENT OF AN ADDITIONAL ROADTREK FRANCHISE WITHIN MEGA RV'S EXCLUSIVE TERRITORY WAS A MODIFICATION OF MEGA RV'S IRVINE FRANCHISE

59. Section 108 of the Dealer Agreement expressly states that:

> Dealer territory shall be limited to an area within 60 mile radii of Irvine, California, Colton, California and Stanton California. So long as Dealer [Mega RV Corporation, doing business as McMahon's RV, having its head office at 1312 RV Center Dr #16, Colton, CA, USA, 92324 and doing business at 1312 RV Center Dr #16, Colton, CA, 92324 and at 6441 Burt Road #10, Irvine, CA 92618] remains in good standing during the terms of this [Dealer] Agreement, [Roadtrek] will not locate another dealer within Dealer's territory.

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60. It is indisputable that establishing an additional Roadtrek franchisee within these geographic areas is in derogation of the express terms of the franchise. Although Roadtrek asserted that it was merely exercising its contractual right as to this express term in the franchise, it cannot avoid the applicability of Section 3070(b)(1). What Roadtrek did with regard to the establishment of MTRV had the legal effect of depriving Mega RV of the exclusive territory that had been granted to it under the terms of the franchise. Whether Roadtrek claims it had the right to do so, and no matter what it may be called, this constitutes a "modification" of the franchise and is thus governed by Section 3070(b)(1), and the Legislative intent in requiring proper notices to franchisees and the Board.

61. Thus, if the modification of the franchise language regarding the exclusive territory granted to Mega RV substantially affected Mega RV's sales or service obligations or investment, Roadtrek was required to provide the notices mandated by Section 3070(b). Then Roadtrek would be precluded by the statute from modifying or attempting to modify the franchise until the passage of 60 days after the effective date of such notices. Similarly, if Mega RV had received the notice, and if Mega RV had filed a protest within 30 days from receipt of the notice, Roadtrek would remain barred by the statute from attempting to modify the franchise until there is a finding by the Board that there is "good cause for the modification." (Section 3070(b)(1))

62. The absence of such required notices meant that Roadtrek remained barred by the statute from modifying the franchise until Roadtrek complied with the statute. This would be so even though Roadtrek may ultimately have had good cause for the modification.

FINDINGS RELATING TO WHETHER MEGA RV SUSTAINED ITS BURDEN OF PROOF OF SHOWING THAT THE MODIFICATION SUBSTANTIALLY AFFECTED MEGA RV'S SALES OR SERVICE OBLIGATIONS OR INVESTMENT

63. According to [Protestant's witness] Brent McMahon, a dealer would not take on a franchise if the franchisor would not guarantee an exclusive territory. (RT 8/9:130-133) A dealer must have a territory in which it is able to sell vehicles without a same line-make dealership on every corner. (RT 8/9:130-133) The lack of an exclusive territory affects not only a dealer's sales ability but its parts and service business. (RT 8/9:133-135)

64. In order to meet its sales and service obligations under a Dealer Agreement, a dealer must make certain investments in its franchise. To maintain service facilities, there are expenditures for parts,

maintenance of infrastructure, service technicians, diagnostic and service equipment. (Exh 609; RT 8/9:134; 8/10:96, 100)

ANALYSIS

65. Here, as shown in the chart in paragraph 47, Roadtrek established four MTRV dealerships in the exclusive territory assigned to Mega RV's Irvine dealership. The evidence and testimony in this protest makes it clear that the establishment of MTRV as a Roadtrek franchisee within Protestant's exclusive territory, as defined by the Dealer Agreement, substantially affected Mega RV's sales and service obligations and investment.

66. The Board cannot act with regard to Mega RV's Westminster location as Mega RV has no franchise with Roadtrek to operate as a Roadtrek franchisee at Mega RV's current location in Westminster.

67. The protest is claiming that it is the franchise for the Irvine location that is being modified as Mega RV claims it has been deprived of the exclusive territory granted by this franchise. Because Mega RV is no longer operating a dealership at the Irvine location, the location for which the Roadtrek franchise was granted, the decision and order in this protest will be limited to the time prior to Mega RV's relocation to Westminster.

DETERMINATION OF ISSUES

68. Roadtrek's claim, that there was no modification of the exclusive territory provision of Mega RV's franchise as this was permitted by the terms of the franchise, is rejected.

69. Mega RV sustained its burden of proof of showing that Roadtrek's establishment of an additional Roadtrek franchise within Mega RV's "contractually assigned exclusive territory" was a "modification" of Mega RV's Irvine franchise.

70. Mega RV sustained its burden of proof of showing that the "modification" substantially affected Mega RV's sales and service obligations and investment.

71. Roadtrek violated Section 3070(b) by not providing Mega RV and the Board with the statutorily required notices and by establishing MTRV within Mega RV's "contractually assigned exclusive territory".

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ORDER CONFIRMING DECISION TO SUSTAIN PROTEST

As indicated by a vote of the Public Members and Dealer Members of the Board at its August 23, 2012, Special Meeting, Protest No. PR-2201-10 has been sustained with the effect of this order operative upon the franchise and the parties up to the time the dealership was relocated to Westminster. Roadtrek was and is statutorily barred from modifying the franchise of Mega RV for its Irvine location as Roadtrek has not complied with Section 3070(b)(1). Roadtrek violated Vehicle Code section 3070(b)(1). In a separately agendized item, the Public Members of the Board will consider whether this matter should be referred to the Department of Motor Vehicles pursuant to Vehicle Code section 3050(c)(1) and (c)(3).

DATED: October 17, 2012

By: _____
RAMON ALVAREZ C,
President
New Motor Vehicle Board

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