

STATE OF CALIFORNIA



MEMO

To : PUBLIC MEMBERS ONLY

Date: October 4, 2012

From : WILLIAM G. BRENNAN
ROBIN PARKER

Subject: CONSIDERATION OF REFERRAL TO THE DEPARTMENT OF MOTOR VEHICLES TO CONDUCT AN INVESTIGATION AND MAKE A WRITTEN REPORT, AND/OR EXERCISE ITS AUTHORITY AND POWER TO INITIATE DISCIPLINARY PROCEEDINGS AGAINST ROADTREK MOTORHOMES, INC.'S OCCUPATIONAL LICENSE FOR VIOLATING VEHICLE CODE SECTION 3070(b)

MEGA RV CORP., dba MCMAHON'S RV v. ROADTREK MOTORHOMES, INC.

Protest No. PR-2199-10

MEGA RV CORP., dba MCMAHON'S RV v. ROADTREK MOTORHOMES, INC.

Protest No. PR-2201-10

BOARD'S POWERS:

The Board's powers pursuant to Section 3050(c) include the following:

(1) Direct the department to conduct investigation of matters that the board deems reasonable, and make a written report on the results of the investigation to the board within the time specified by the board.

...

(3) Order the department to exercise any and all authority or power that the department may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of the license of any new motor vehicle dealer, manufacturer, manufacturer branch, distributor, distributor branch, or representative as that license is required under Chapter 4 (commencing with Section 11700) of Division 5.

...

REFERRAL TO DMV IN MODIFICATION PROTESTS (PR-2199-10 AND PR-2201-10):

The Board has found that Roadtrek Motorhomes, Inc. ("Roadtrek") violated Vehicle Code section 3070(b)¹ in that it failed to provide notice to Mega RV Corp., dba McMahan's RV

¹ All statutory references are to the California Vehicle Code unless noted otherwise.

("Mega RV") and the New Motor Vehicle Board ("Board") of Roadtrek's intended modification of Mega RV's franchise for both its Colton and Irvine locations.

ANALYSIS:

The Vehicle Code section that is most commonly applicable to the failure of a franchisor to comply with the requirements of the statutes under which the Board operates is Section 11713.3(l). However this section is limited to violations of the requirements of Article 4 of the Board's statutes and RV franchisors are subject to Article 5 of the Board's statutes. Section 11713.3(l) was not amended to conform to the statutes that brought RV franchisors within the Board's jurisdiction. Section 11713.3(l) reads as follows:

11713.3. It is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed pursuant to this code to do, directly or indirectly through an affiliate, any of the following:

...

(l) To modify, replace, enter into, relocate, terminate or refuse to renew a franchise in violation of Article 4 (commencing with Section 3060) of Chapter 6 of Division 2.

...

As stated above, the Board has found that Roadtrek modified the franchise of Mega RV without complying with the requirements of Section 3070(b), however Section 3070(b) is within Article 5 of the Board's statutes, not Article 4 and thus the conduct of Roadtrek does not come within Section 11713.3(l).

Referral to Department of Motor Vehicles ("DMV") may be meaningless if the conduct is not subject to a sanction that may be imposed by DMV. The Board cannot order DMV to do something that DMV is not empowered to do. Depending on the action taken by the Board, it will defer to DMV to determine what sanction, if any, may be imposed.

Mega RV previously filed two petitions with the Board that sought a referral to DMV pursuant to Section 3050(c)(1) and (3), which the Board denied. It may be inconsistent at this point to refer these protests to DMV given the prior Board action.

A summary of the allegations in the petitions are as follows:

Petition No. P-456-10: The Public Members of the Board denied the relief requested at the June 15, 2010, General Meeting.

- Petitioner alleges that it "...was the number one volume selling Roadtrek dealer in the world." However, in late 2008, there were various disputes "...pertaining to unpaid warranty claims, unpaid incentive claims, flooring issues, and other issues related to [the] conduct of Roadtrek in unlawfully modifying the model year of vehicles in [Mega RV's] inventory."
- Petitioner contends that in January 2010 it became aware of Roadtrek's plans to

establish one or more dealerships within the exclusive territories that had been contractually assigned to Mega RV's Irvine dealership, Mega RV's Colton dealership, and Mega RV's Scotts Valley dealership. Petitioner contends this would result in a modification of the dealer agreements.

- Petitioner alleges that at all times it was in "good standing" under the terms of its franchise agreements.
- Roadtrek ceased paying any warranty and incentive claims submitted by Petitioner.
- Roadtrek stopped shipping product to Petitioner "...yet has not given any notice of intent to terminate as required under 3070."
- Roadtrek "...admittedly appointed Mike Thompson's RV [MTRV] as a Roadtrek dealer within the exclusive territory of [Mega RV]" without proper notice and despite the modification protests on file.
- Roadtrek has unilaterally determined that Petitioner is no longer in "good standing".

Petition No. P-457-10: The Public Members of the Board denied the relief requested at the December 3, 2010, General Meeting.

- Mega RV acquired the franchise in approximately 2001.
- Mega RV was the number one selling Roadtrek dealer in the world for almost 10 years.
- A "receivables dispute arose between the parties which has led to the filing of a federal action...as well as numerous protests before the Board.
- Roadtrek took possession of Mega RV's Roadtrek inventory (without prior notice) at the Pomona Show in October 2009.
- Without the statutorily required notice or hearing before the Board, Roadtrek "entered into a franchise relationship with [MTRV] in approximately January 2010, which has four dealership locations within [Mega RV's] exclusive Roadtrek territory." MTRV's Colton dealership is located "virtually across the street from [Mega RV]."
- Roadtrek has refused to ship RV units to Mega RV since about October 2009. Jim Hammill, Roadtrek's President, claimed under penalty of perjury in declarations before the Board, "that [Mega RV] remained a Roadtrek dealer and that [Mega RV] had not ordered any units." Mega RV has ordered units on several occasions and Roadtrek refuses to deliver the units.
- Roadtrek has not paid Mega RV for warranty, incentives, holdback, advertising co-op, and so on. Mega RV claims additional "damages for the unlawful de facto termination of [Mega RV's] Roadtrek franchises."
- For the 2010 Pomona Show, MTRV was advertised as the official authorized Roadtrek dealer.
- Roadtrek did not give the statutorily required notice of intent to termination Mega RV until June 14, 2010.
- Section 108 of the Dealer Agreement provides:

Dealer territory shall be limited to an area within 60 mile radii of Irvine, California, Colton, California and Stanton California. So long as Dealer remains in good standing during the terms of this [Dealer] Agreement, [Roadtrek] will not locate another dealer within Dealer's territory.

- Roadtrek’s establishment of new Roadtrek franchises within Mega RV’s “contractually assigned” exclusive territories, Roadtrek’s refusal to deliver units to any of Mega RV dealerships, and the “turning off of [Mega RV’s] parts account” by Roadtrek are “a modification of the franchises, which had a substantial effect on [Mega RV’s] sales and service obligations and investment.” The modification is in violation of the Vehicle Code because notice was not provided to Mega RV.
- Mega RV can no longer sell or service Roadtrek units because Roadtrek refuses to ship vehicles and parts; Mega RV’s customers are referred to MTRV.
- In an order dated July 29, 2010, the United States District Court for the Central District of California referred certain causes of action in Mega RV’s counterclaim to the Board under the doctrine of primary jurisdiction. The 12 pending protests cover Mega RV’s protest rights pursuant to Vehicle Code section 3070, et seq. However, the pending protests do not cover any rights Mega RV has pursuant to the unlawful acts sections of the Vehicle Code; Section 11700, et seq.

The Board adopted ALJ Hagle’s Proposed Decision in the establishment protest that denied Mega RV’s request that the establishment of MTRV in violation of Section 3072 be referred to the DMV. It may be inconsistent for the Board to refer the modification protests to DMV as the Board has already refused to refer the establishment protest which involves the same facts that violated two statutes that required notices. The violations of Section 3072 and Section 3070(b) were both due to the establishment of MTRV (Section 3072 establishment) in the exclusive territory of Mega RV (Section 3070(b) modification).

Referral to DMV to take action affecting the license of Roadtrek might affect Roadtrek’s ability to transact business in California and impact “innocent third parties”. As to Mega RV, it already has litigation ongoing in federal court and could possibly obtain remedies under Section 11726 which provides as follows:

Any licensee suffering pecuniary loss because of any willful failure by any other licensee to comply with any provision of Article 1 (commencing with Section 11700) or 3 (commencing with Section 11900) of Chapter 4 of Division 5 or Article 3 (commencing with Section 3052) of Chapter 6 of Division 2 or with any regulation adopted by the department or any rule adopted or decision rendered by the board under authority vested in them may recover damages and reasonable attorney fees therefor in any court of competent jurisdiction. Any such licensee may also have appropriate injunctive relief in any such court.

However, taking licensing action may involve the following considerations:

- Licensing requirements are generally believed to be necessitated by a need to protect the public so the issue could become whether the conduct of Roadtrek here was of a level to impact the public at large to such an extent that the Board believes that action against the licensee (Roadtrek) is warranted.

- The results could extend to Roadtrek employees, suppliers, cities/counties, other Roadtrek dealers and their employees, and current and potential buyers of Roadtrek vehicles.

To limit the possible ripple effect of licensing action against Roadtrek, the Board could direct DMV to limit, by application of Section 11727, whatever action is to be taken. This section provides:

The revocation or suspension of a license of a manufacturer, manufacturer branch, distributor, distributor branch, or representative may be limited to one or more municipalities or counties or any other defined area, or may be revoked or suspended in a defined area only as to certain aspects of its business, or as to a specified dealer or dealers.

If the Board believes it appropriate to refer this matter to DMV, and if DMV has the power to act, this section would permit the suspension of the license of Roadtrek as to the MTRV dealerships that were unlawfully established in violation of Section 3070(b) and located within the exclusive territory (60 mile radius) of Mega RV's Colton location.

If Roadtrek did not have the right to enter into the franchise with MTRV, then the franchise is void and MTRV does not have the right to offer for sale or lease, or to sell or lease at retail, or the right to perform authorized warranty repairs and service. This conduct could potentially violate Sections 11713.22 and 11713.23 as follows:

331.3. 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. (Underline added.)

11713.22. (a) Upon mutual agreement of the parties to enter into a recreational vehicle franchise, it is unlawful and a violation of this code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code to fail or refuse to provide a recreational vehicle dealer with a written recreational vehicle franchise that complies with the requirements of Section 331.3.

(b) Notwithstanding Section 331.3, a recreational vehicle franchise described in this section shall include, but not be limited to, provisions regarding dealership transfer, dealership termination, sales territory, and reimbursement for costs incurred by the dealer for work related to the

manufacturer's warranty for each line-make of recreational vehicle covered by the agreement. (Underline added.)

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

11713.23. (a) A recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch licensed under this code shall not sell a new recreational vehicle in this state to or through a recreational vehicle dealer without having first entered into a written recreational vehicle franchise with that recreational vehicle dealer, that complies with the requirements of Section 331.3 and that has been signed by both parties. (Underline added.)

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

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

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

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

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

11740. The remedies and penalties provided in this code for a violation of this article are cumulative to the remedies and penalties provided by other laws.

REFERRAL TO DMV WAS DENIED IN THE ESTABLISHMENT (COLTON) AND TERMINATION (COLTON AND IRVINE) PROTESTS:

The Dealer Members and Public Members considered the Proposed Decisions that included denying referring the matters to DMV. The Proposed Decisions were ultimately adopted by the Board as follows:

Decision	Dealer Members Who Voted to Adopt the Proposed Decision	Public Members Who Voted to Adopt the Proposed Decision
Establishment (PR-2233-10)	Ramon Alvarez C. Peter Hoffman Victoria Rusnak David Wilson	Tom Flesh David Lizárraga Bismarck Obando Glenn Stevens
Termination (PR-2244-10)	Ramon Alvarez C. Peter Hoffman David Wilson (Victoria Rusnak was opposed)	Tom Flesh Bismarck Obando Glenn Stevens (David Lizárraga was opposed)

Analysis:

In the event counsel raises any issues concerning potential problems with the Dealer Members' consideration of the Proposed Decisions, the following analysis should be considered:

The Board in adopting the ALJ's Proposed Decision was considering only the protest that was before it. There was no separate petition being considered by the Board at this time. The protests were filed pursuant to Sections 3070 and 3072. Although the protests did request that the allegations be referred to DMV, it is Section 3067 that sets forth what the Board is empowered to do in issuing its decision on a protest.

(a) The decision of the board shall be in writing and shall contain findings of fact and a determination of the issues presented. The decision shall sustain, conditionally sustain, overrule, or conditionally overrule the protest. Conditions imposed by the board shall be for the purpose of assuring performance of binding contractual agreements between franchisees and franchisors or otherwise serving the purposes of this article. ... (Underline added.)

There is nothing in the protest provisions that empowers the Board to include in its decision on the protest that there may be a referral to DMV pursuant to Section 3050(c).

Because of the above, the language in the Proposed Decisions as adopted by the Board referring to the Protestant's request for referral to DMV was a legal nullity. It had no legal effect other than to affirm that what the Board had done previously in formally considering the petitions, which was to decline to refer the matter to the DMV. There was nothing to indicate that the prior decisions on the petitions, considered only by the Public Members, were going to be changed by the Decision on the protests. Any such change as to the

Board's previous actions on the petitions would have been beyond the power of the Board in considering the protests.

As the Proposed Decisions specifically stated, the prior requests of Mega RV had already been considered by the Public Members in two separate petitions and the Board declined to refer the matters asserted in the petitions to the DMV. In light of this, the facts and requests as contained in the protests have already been considered and acted upon by the Public Members.

Although ALJ Hagle included additional language concerning the reasoning for denying the requests for referral to DMV, the Board's Decision to adopt the Proposed Decisions as written had no effect upon the already-decided denial of the same requests when they were formally and properly considered by only the Public Members of the Board when the Board acted on the petitions.

In conclusion, the Board's adoption of the Proposed Decisions had no effect on the Board's prior action by the Public Members that declined the request for referral to the DMV pursuant to Section 3050(c). This is so for at least two reasons: (1) The adoption by the Board (including the Dealer Members) of that portion of the Proposed Decision relating to Section 3050(c) was inconsistent with Section 3050(c); and (2) Even if it was permissible for the Dealer Members to participate, the result was consistent with the prior determination of the Board that was issued with only the Public Members participating.

The following language quotes ALJ Hagle's Proposed Decisions that were adopted by the Dealer Members and Public Members of the Board at the August 23, 2012, Special Meeting.

Establishment Decision (PR-2233-10):

71. Protestant requested that Roadtrek's conduct in failing to give Mega RV written notice that it intended to establish an additional Roadtrek franchisee in Colton, California, in a location which would put Mega RV within the new franchisee's relevant market area be referred to the DMV for investigation and action pursuant to Section 3050.

72. Roadtrek's interpretation of the statute, that it "grandfathers" in to the exception those RV dealerships in business at a particular location on January 1, 2004, without reference as to whether they were franchisees of a particular line-make on that date or before, is not unreasonable under the circumstances even though, upon analysis of the legislative history, it is not the proper interpretation.

73. James Hammill testified that he had looked at the wording of Section 3072(b)(5) to determine its application to Roadtrek's intended appointment of MTRV as its franchised dealer. A layperson would not be reasonably expected to conduct the kind of extensive analysis contained in ALJ Skrocki's Order and later ruling. The section is unique to the RV industry; no similar exemption appears in the "establishment" section (3062) relative to passenger cars and trucks.

74. According to James Hammill, "[Mega RV was] not in good standing under the agreement... [t]hey had no inventory, they weren't attempting to buy any inventory..." (RT 11/8:24-25) In late December of 2009, James Hammill was of the opinion that Roadtrek "... didn't have a relationship (with Mega RV)"..."[n]obody" was selling Roadtreks in the Los Angeles and Orange County areas. (RT 11/7:210-211)

75. For the reasons stated above, Protestant's request is denied.

Termination Decision (PR-2244-10):

211. Protestant requested that Roadtrek's conduct in pursuing a course of conduct which resulted in the *de facto* termination of Mega RV's Roadtrek franchise in Colton, California be referred to the DMV for investigation and action pursuant to Section 3050.

212. For the reasons stated above, Protestant's request is denied.

CONCLUSION:

After the presentation of public comments, the Public Members will determine in open session the following:

1. Whether to ask the DMV to conduct an investigation of the matters that the Board deems reasonable, and make a written report on the results of the investigation to the Board within the time specified by the Board (Veh. Code § 3050(c)(1)); and/or
2. Whether to request that the DMV exercise any and all authority and power that it may have with respect to the issuance, renewal, refusal to renew, suspension, or revocation of Roadtrek's occupational license for violating Vehicle Code section 3070(b).

This topic is being agendaized for discussion and consideration by the Public Members only at the October 17, 2012, Special Meeting.

If you have any questions or require additional information, please contact me at (916) 324-6197 or Robin at (916) 323-1536.