BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH
UTAH MOTOR VEHICLE FRANCHISE ADVISORY BOARD

IN THE MATTER OF A PROTEST REGARDING TERMINATION OF FRANCHISE **Utah Trailer Source, LLC,** Protestor, vs. **Logan Coach, Inc.,** Respondent.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, and RECOMMENDED ORDER**
Utah Trailer Source, LLC, Protestor, vs. **Titan Trailer Mfg., Inc,** Respondent.	Case No. NAFA-2012-003 Case No. NAFA-2012-004

INTRODUCTION

This matter was filed with the Utah Motor Vehicle Franchise Advisory Board ("Board") and the Executive Director of the Department of Commerce upon separate protests and requests for a hearing by Protestor Utah Trailer Source, LLC, challenging the termination of its dealership agreements with two manufacturers, Respondents Logan Coach, Inc. and Titan Trailer Mfg., Inc. The two matters were consolidated.

After a hearing held on April 26, 2012, the Board recommended an order dismissing the protest and concluding that no franchise relationship existed between Protestor and the Respondents. The Executive Director adopted the Board's

recommendation and dismissed the protest on May 23, 2012. Protestor appealed to the District Court. On August 12, 2014, Judge Barry Lawrence issued his Conclusions of Law and Order and Judgment on Appeal in Case No. 120408042, concluding that a franchise agreement existed between Protestor and each Respondent, reversing the Executive Director's Order of Dismissal and remanding the matter back to this agency for a determination on whether good cause existed to terminate Protestor's trailer franchises.

A hearing was again held before the Board on April 8, 2015. Present for the hearing were: Tom Brady, Deputy Director of the Department of Commerce and Board Chair; Byron Hansen, franchisee member; Brad Brown, recreational franchisee member; Constance White, public member; and Craig Britter, alternate public member.

The Board members spent many hours reviewing the pleadings and exhibits submitted by the parties prior to the hearing. All exhibits presented by the parties were admitted into evidence. After hearing the evidence, reviewing the exhibits and observing the counsel arguments, the Board members were fully advised and sufficiently informed to make the following findings of fact, conclusions of law, and recommendation to the Executive Director of the Department of Commerce.

BY THE BOARD:

The Board now enters its Findings of Fact, Conclusions of Law, and Recommended Order for review and action by the Executive Director of the Department of Commerce.

FINDINGS OF FACT

1. Respondents both manufacture livestock, horse, dump, flatbed and utility trailers.

2. Protestor is a limited liability company that sold new trailers of the following brands: Big Bubba's, Artic Fox, Northwood, Wells Cargo, Logan Coach and Titan. Protestor leased the land and buildings that comprised its dealership premises at 4500 South and Main Street in Salt Lake City, Utah.[1]

3. On August 3, 2011, Respondents sent Protestor a notice of intent to terminate Protestor's authorization to represent Logan Coach and Titan trailer products, and then issued an amended Notice on November 11, 2011. The parties have stipulated that the November 11, 2011 notice is the one at issue in this case. The November 2011 notice alleges lack of integrity, misrepresentation, slander, violation of GE flooring agreement, selling out-of-trust (selling a trailer to a customer, but failing to promptly pay Respondents for the trailer), improper use of inventory, late payments, inability to finance purchases, and customer dissatisfaction.

4. Protestor began selling Logan Coach trailers on June 23, 2008 upon entering into a "Dealership Agreement" with Carriage Industries, LLC. Protestor had a

[1]As of January 15, 2013, Protestor's motor vehicle dealer registration expired and the trailer dealership closed its doors. The LLC is still in good standing with the Utah Division of Corporations and Commercial Code, but there is no dealership facility, no employees and no inventory.

financing or "flooring agreement" on trailers it purchased from Carriage Industries through General Electric ("GE"). Protestor co-owner Paul Grant testified that GE required Protestor to pay GE within 10 days after the sale of any trailers or the sale would be considered out-of-trust.

5. Carriage Industries was dissolved in 2009 and sold to Respondent Titan Trailer Mfg. Respondent Titan then formed Respondent Logan Coach, Inc. as a Kansas Corporation, and continued to manufacture "Logan Coach" brand trailers in Logan, Utah. Respondent Logan Coach is a wholly-owned subsidiary of Respondent Titan.

6. Although Protestor continued to sell Logan Coach trailers, no new contract was executed between Protestor and Respondent Logan Coach. On or about June 1, 2009, Protestor and Respondent Titan Trailer Mfg. entered into a Standard Dealer Agreement for the sale of Titan trailers. The District Court has held that the Standard Dealer Agreement with Titan was a sales and service agreement as defined in Utah Code Ann. §13-14-102(7)(b) such that a franchisor/franchisee relationship existed between them. The Court also found a franchisor/franchisee relationship between Protestor and Respondent Logan Coach, holding that Logan Coach implicitly gave Protestor permission to use Logan Coach's trade name and its trademarks, and that they had a community of interest or shared goals of marketing new trailers, parts and services.

7. Both Respondents agreed to finance Protestor's purchase of inventory for 18 months. This financing or "flooring" arrangement was not in writing, but was based on a "handshake" between the parties. Upon entering into the flooring agreement with

Respondents for Titan and Logan Coach trailers, Protestor continued to use GE's flooring plan only for the other trailer brands it carried.

8. Although the Logan Coach and Titan trailers were two separate brands, the evidence indicates that the terms of the flooring agreements with Protestor were the same; that Titan is the owner of Logan Coach; that the issues between Protestor and each of the Respondents were the same, particularly as to Protestor's delayed payments; and that when staff members at Protestor needed to address an issue with Titan, they would contact Randy Austin, Logan Coach's General Manager. Therefore, the data for sales of Titan and Logan Coach trailers and account receivables might differ, but the Board finds that for all other practical purposes, Titan and Logan Coach were the same entity with the same policies and requirements. In particular, since no written agreement existed between Protestor and Logan Coach, the Board finds it appropriate to rely on the Standard Dealer Agreement between Protestor and Titan for both Titan and Logan Coach.

9. Paragraph 3 in the Standard Dealer Agreement provided in pertinent part:

> ¶3. Terms of Payment. Full payment for all the Products shall be made at the time of possession of such Products to DEALER, or such other time and upon such other conditions as may be agreed to and required from time to time by TITAN. Title to the Products shall pass to DEALER upon the delivery of the Products to DEALER; all risk of loss of damage in transit of the Products to DEALER shall be borne by the DEALER upon delivery by TITAN of the Products to a common carrier.
>
> 3.1 TITAN shall retain the manufacturer's statement of origin ("MSO") applicable to any Product delivered to DEALER until such time as TITAN receives, in full, payment of the purchase price for such product from DEALER.

Therefore, the Board finds that under Protestor's Standard Dealer Agreement with Titan, Protestor was required to make full payment for all trailers and parts purchased from Titan and Logan Coach at the time of possession.

10. Protestor argued that the payment terms for purchase of trailers from Respondents were not really that clear, and Protestor co-owner Pete Gordon testified that there was no agreement or understanding as to how quickly Protestor would have to pay Respondents after a trailer sale. He stated that they had a good relationship for many years with staff for Logan Coach and Titan and that "they would work with us." The Board finds that even if the Titan Standard Dealer Agreement's requirement for full payment at the time of possession had been somehow modified by the parties through their verbal flooring agreement or otherwise as "such other time and upon such other conditions as may be agreed to and required from time to time by TITAN," the electronic email dated March 18, 2010 from Randy Austin explained and established the terms of the flooring program to Protestor co-owner Paul Grant:

> Approved Flooring Dealers for Logan Coach:
>
> I am trying to get everyone on the same page concerning the 60 day flooring program offered by Logan Coach. This program is for flooring trailers and is not intended to be an open loan system. We will gladly floor all unsold trailers to approved dealers for 8% APR after the initial 60 days delayed billing, *but Logan Coach expects to receive payment immediately* for any and all trailers that are retail sold. (Emphasis added).

The March 18, 2010 email also requested immediate payment for a specific trailer sold by Protestor. Paul Grant responded to Randy Austin's email the same day, stating "You bet Randy! We'll get this taken care of quickly!" Thus, as of March 18, 2010, Protestor agreed to immediately pay Respondents for any trailers sold to customers. Randy Austin

testified that Respondents expect full payment on their flooring plans within 10 days of a trailer sale.

11. In memoranda submitted prior to the April 8, 2015 hearing and also at the hearing, Respondents argued that Protestor failed to perform adequately in its sales compared to other dealers; made few investments and incurred little obligation as a dealer; failed to substantially comply with the requirements of the franchise agreements in that Protestor failed to make timely payments on trailers and other accounts payable to Respondents; engaged in bad faith in misusing Logan Coach and Titan floored inventory and making sales out-of-trust; and failed to adequately service its customers and refused to honor warranties.

12. Protestor argues that Respondents did not have good cause to terminate its trailer franchises, and that the real reason for termination was that Respondents were unhappy with Protestor for not wanting to go along with Respondent's attempt to violate the New Automobile Franchise Act ("NAFA") by negotiating a manufacturer or factory-direct sale to a customer and asking Protestor to prepare the purchase invoice. Protestor also argues that Respondents were unhappy with Protestor's management for not firing an employee who Respondents did not like. Finally, Protestor requests an award of costs and attorney's fees.

13. The parties presented conflicting evidence as to Respondents' allegation that Protestor misused floored inventory, that Protestor lacked integrity, and other such allegations. In the end, however, the Board found that even if Protestor's version were to be believed, it was outweighed by the remaining evidence, and still led to a conclusion

that good cause was shown to terminate the franchise. Therefore, these Findings of Fact discuss only the evidence considered by the Board to be relevant to their determination of good cause to terminate the dealership.

14. Respondent provided a sales comparison between Riverbend T.S., Protestor's predecessor, and Protestor, which indicated the following sales:

Riverbend 2006 $581,616.00
Riverbend 2007 $969,374.00
Riverbend 2008 $135,983.00
Protestor 2009 $251,339.00
Protestor 2010 $366,476.00
Protestor 2011 $321,313.00

Respondents also provided the testimony of Randy Austin that Frontier Trailer Sales, the Logan Coach Dealer in Spanish Fork, Utah sold $1.5 million in trailer sales in its first full year in 2013, $1.7 million in 2014, and that this year Frontier is on the road to achieving $2 million in sales. This evidence clearly established that Protestor's sales significantly lagged those of other Logan Coach dealers in Utah.

15. The evidence presented by the parties indicated that Protestor's leased facility was adequate. Respondents did not have many requirements from Protestor other than to carry six Logan Coach and six Titan trailers at any given time.

16. The evidence presented indicated that Protestor was often in financial trouble. It was not able to finance its trailer purchases like other dealers. It was not able to keep up with its bills and was often overdue on invoices from Respondents. Protestor did not pay Respondents for trailers within 10 days of sales, such that the sales were deemed "out-of-trust." Respondents submitted invoices, letters and emails showing Protestor's long-term delinquent accounts on the flooring agreement, finance charges,

parts, advertising costs, etc. Mr. Gordon admitted that Protestor fell behind in paying some invoices, especially in 2010, but maintained that past due invoices were paid and caught up.

17. Respondents' Exhibits 34 and 35 were documents prepared by Protestor showing trailer sales from June 2009 through March 2012. Exhibit 34 related to sales for Logan Coach trailers and Exhibit 35 related to Titan trailers. These documents showed the date of trailer sales by Protestor and the date that Protestor paid Respondents for the trailers. Based on these documents, Protestor's payments to Respondent Logan Coach were within 10 days of sale approximately 13 times, while the rest of the 41 trailer sales involved payment to Logan Coach more than 10 days after sale, many of them 30 days after, and some more than 60 days after sale. Protestor's payment to Respondent Titan were within 10 days of sale approximately 11 times, while many of the 37 trailer sales involved payment to Titan more than 10 days after sale, many of them 30 days after, and some more than 60 days after sale.

18. Respondents provided testimony that they received many customer complaints about Protestor, including errors in their custom orders and Protestor's failure to respond to customer concerns. Protestor in turn presented the testimony of a few prior customers who indicated that they were happy with the sales and service they received from Protestor.

19. Evidence was presented that some of Protestor's customers went directly to Logan Coach to get warranty work done on their trailers and that Protestor did not make warranty claims to Respondents until Respondents had decided to terminate

Protestor's authority to sell Titan and Logan Coach trailers. However, the Board finds this evidence insufficient to conclude that Protestor refused to honor warranties.

20. There was no evidence presented by the parties as to any prior misrepresentations by Protestor in applying for a franchise, or any transfers of ownership or interest without Respondents' approval.

CONCLUSIONS OF LAW

1. Under the New Automobile Franchise Act ("NAFA"), a franchisor may not terminate a franchise agreement unless:

a. the franchisee has received written notice 60 days before the effective date of termination;
b. the franchisor has good cause for termination; and
c. the franchisor is willing and able to comply with Section 13-14-307 (regarding franchisor's repurchase obligations).

Utah Code Ann. § 13-14-301(1). Prior to the expiration of the 60 days, the affected franchisee may apply to the Board for a hearing on the merits, and if so requested, the termination is not effective until final determination of the issues by the Executive Director and lapsing of the applicable appeal period. Subsection 13-14-301(3).

2. In determining whether a franchisor has established good cause to terminate a franchise, the Board is required to consider the following factors:

> (a) the amount of business transacted by the franchisee, as compared to business available to the franchisee;
> (b) the investment necessarily made and obligations incurred by the franchisee in the performance of the franchisee's part of the franchise agreement;
> (c) the permanency of the investment;
> (d) whether it is injurious or beneficial to the public welfare or public interest for the business of the franchisee to be disrupted;
> (e) whether the franchisee has adequate motor vehicle sales and service

facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumer for the new motor vehicles handled by the franchisee and has been and is rendering adequate services to the public;
(f) whether the franchisee refuses to honor warranties of the franchisor under which the warranty service work is to be performed pursuant to the franchise agreement, if the franchisor reimburses the franchisee for the warranty service work;
(g) failure by the franchisee to substantially comply with those requirements of the franchise agreement that are determined by the advisory board or the executive director to be:
(i) reasonable;
(ii) material; and
(iii) not in violation of this chapter;
(h) evidence of bad faith by the franchisee in complying with those terms of the franchise agreement that are determined by the advisory board or the executive director to be:
(i) reasonable;
(ii) material; and
(iii) not in violation of this chapter;
(i) prior misrepresentation by the franchisee in applying for the franchise;
(j) transfer of any ownership or interest in the franchise without first obtaining approval from the franchisor or the executive director after receipt of the advisory board's recommendation; and
(k) any other factor the advisory board or the executive director consider relevant.

Utah Code Ann. § 13-14-305(1).

3. The Board concludes that Subsection 13-14-305(1) does not require Respondents to establish good cause to terminate under each and every enumerated factor, but only requires that the Board consider each factor and determine whether Respondents have established, by the preponderance of the evidence, that there is good cause to terminate the franchise.

4. Under Subsection 13-14-305(1)(a), the amount of business transacted by Protestor as compared to the business available, the Board finds that Respondents established good cause to terminate based on the evidence of Riverbend's performance in

full years 2006 and 2007, and Frontier Sales' performance in full years 2013 and 2014. Protestor's sales in full years 2009 and 2010 fell so far below sales by Riverbend and Frontier that it cannot be reasonably explained by a bad economic downturn, leading the Board to the belief that more business was available to Protestor.

5. In considering the investment by Protestor under Subsection 13-14-305(1)(b), the Board noted that there were few requirements from Respondents, that Protestor leased a facility that appeared to be adequate, that the facility housed other brands in addition to those of Respondents, and that Pete Gordon invested capital into the business. The Board concludes that good cause has not been established under this factor.

6. The Board finds that Protestor's investment was not sufficiently permanent in light of the leased facility, Protestor's financial track record and inability to timely pay its debts, and the fact that Protestor closed its doors, lost its lease, and ceased to do business. It appeared to the Board that Protestor had only the capital to pay what was owed, and only after much prompting from Respondents. Therefore, good cause to terminate is established under Subsection 13-14-305(1)(c).

7. In determining whether it was a benefit or injury to the public welfare to disrupt the franchisee's business, considering Subsection 13-14-305(1)(d) the Board noted that without Protestor's location in Salt Lake City, new trailer customers would go to Diamond H Trailer Sales in Montpelier, Idaho, or to Frontier Trailer Sales in Spanish Fork, Utah. For their trailer service needs, customers could also go to the Logan Coach factory in Logan, Utah. Respondents presented evidence of complaints by customers;

Protester refuted that evidence with testimony of various customers. The Board members considered the evidence and note that there were indeed some happy customers, but they find that Respondents do not have to prove that every customer is dissatisfied to establish a problem for the public. The Board concludes that even if terminating the franchises would slightly inconvenience the public in that they would have to travel further to purchase or service a trailer, termination of Protestor's franchise would in fact protect the public in light of Protestor's shaky financial history. With Protestor in business, trailer buyers were at risk of not getting clear title to their trailers; Protestor failed to timely pay off the flooring to Respondents, and Respondents held the title until full payment. The public is more secure by termination of the franchises, because customers are able to get their trailers from a dealership that is financially able to pay Respondents and timely obtain clear title for their customers.

8. Under Subsection 13-14-305(1)(e), the Board finds that Protestor's facilities and services were adequate. Although some clients took their service work directly to Logan Coach, the testimony presented by Protestor established that it was the customers' choice to do so. The Board concludes that good cause has not been established under this factor.

9. As stated in the Findings of Fact section above, there was insufficient evidence presented that Protestor refused to honor warranties. It was not clear to the Board why Protestor did not choose to take advantage of the warranty program offered by Respondents and the profit center to Protestor that the warranty program offered.

Nevertheless, the Board concludes that good cause has not been established under Subsection 13-14-305(1)(f).

10. The major consideration in this case is Subsection 13-14-305(1)(g), franchisee's failure to substantially comply with reasonable and material terms of the franchise agreement. As stated in the Findings of Fact section above, the Standard Dealer Agreement between Protestor and Titan required payment from Protestor upon possession of the trailers. To the extent that the verbal flooring agreement modified this provision, the email from Randy Austin on March 18, 2010 clearly stated that payment must be made immediately upon sale of a trailer, and Paul Grant's reply email accepted those terms. Randy Austin testified that payment on the flooring line 10 days after sale was appropriate; Paul Grant testified that the GE flooring line also required payment within 10 days of sale – an indication of standard business practices in the industry. Thus, the Board finds that full payment to Respondents on the flooring line within 10 days of a trailer sale was a material and reasonable provision of the Titan and Logan Coach franchise agreements. The Board further finds that the evidence presented by Respondents and discussed in the Findings of Fact section above established that Protestor repeatedly failed to comply with this material and reasonable term. In addition, Protestor failed to timely pay for parts, advertising and other accounts owed to Respondents. The Board concludes that based on this factor alone, even without the good cause established under other factors in the law, Respondents have established good cause to terminate Protestor's Titan and Logan Coach franchises.

11. The Board finds good cause was also established under Subsection 13-14-305(1)(h), franchisee bad faith in failing to comply with the reasonable and material terms of the franchise agreements. Protestor had plenty of experience in the industry and was well versed with GE's standards that full payment must be made on a flooring line within 10 days of sale; if there was any doubt whether Protestor could have been ignorant of Respondents' standards, Randy Austin's email in March 2010 clearly notified Protestor of the requirement for prompt payment. Nevertheless, Protestor repeatedly failed to make timely payments to Respondents on the flooring line, on parts, advertising costs, financing charges, etc., even after repeated reminders from Respondents' staff. Pete Gordon admitted at the hearing that he would not give a trailer to someone without payment; it stands to reason that Respondents would also expect their money after a trailer sale by Protestor. Protestor's argument that they continued to pay interest on the trailers and that they eventually paid all their debt to Respondents does not remove their responsibility under the franchise agreements to make timely payments, and does not dispel the notion that Protestor was a problem dealer.

12. As there was no evidence presented that Protestor made any misrepresentations in a franchisee application under Subsection 13-14-305(1)(i) or that any ownership interest was transferred without franchisor approval under Subsection 13-14-305(1)(j), the Board finds no good cause to terminate the franchises under those provisions.

13. After considering all the enumerated factors in Subsection 13-14-305(1), the Board finds that the preponderance of the evidence in this case establishes good cause

to terminate Protestor's Titan and Logan Coach franchises as discussed herein. There was evidence suggesting that Respondent Logan Coach, as manufacturer, might have negotiated terms of a trailer sale. However, as the hearing produced only one alleged instance, any such action by Respondent was greatly outweighed by the volume of evidence of Protestor's actions supporting termination. Thus, although such conduct is of concern to the Board, it had no bearing on the determination of good cause to terminate Protestor's franchises in this case, in light of Protestor's significant and repeated failures to comply with the terms of its franchise agreements and the other factors discussed above.

14. Under Subsection 13-14-107(2), after receipt of the Board's recommendation, the Executive Director shall apportion in a fair and equitable manner between the parties any costs of the adjudicative proceeding, including reasonable attorney fees. Under the circumstances of this case and the Board's findings and conclusions, it seems most fair and equitable to allow each party to bear its own attorney fees. Thus, the Board recommends that the Executive Director deny any request for attorney fees.

RECOMMENDED ORDER

For the foregoing reasons, the Utah Motor Vehicle Franchise Advisory Board recommends that the protests of Utah Trailer Sources against Logan Coach, Inc. and Titan Trailer Mfg. be denied along with its request for an award of costs and attorney's fees. Respondents have established under Subsection 13-14-305(1) that there is good

cause for terminating the trailer franchises. Pursuant to Subsection 13-14-301(3)(b), termination is not effective until the applicable appeal period lapses.

On behalf of the Utah Motor Vehicle Franchise Advisory Board, I hereby certify the foregoing Findings of Facts, Conclusions of Law and Recommended Order were submitted to Francine A. Giani, Executive Director of the Utah Department of Commerce, on the 7th day of May, 2015 for her review and action.

Dated this 7th day of May, 2015.

Masuda Medcalf, Administrative Law Judge
Department of Commerce

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH
UTAH MOTOR VEHICLE FRANCHISE ADVISORY BOARD

IN THE MATTER OF A PROTEST REGARDING TERMINATION OF FRANCHISE **Utah Trailer Source, LLC,** Protestor, vs. **Logan Coach, Inc.,** Respondent.	**ORDER DENYING PROTEST**
Utah Trailer Source, LLC, Protestor, vs. **Titan Trailer Mfg., Inc,** Respondent.	Case No. NAFA-2012-003 Case No. NAFA-2012-004

The Findings of Fact, Conclusions of Law and Recommended Order of the Utah Motor Vehicle Franchise Advisory Board are ratified and adopted by the Executive Director of the Department of Commerce. It is therefore concluded that under Utah Code Ann. §13-14-305(1), Respondents have established good cause to terminate Protestor's Logan Coach and Titan trailer franchises. Accordingly, the protest is hereby denied.

The parties are made aware that under Subsection 13-14-301(3)(b), termination may not become effective until the applicable appeal period has lapsed.

Each party shall bear its own costs and attorney's fees.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63G-4-401 and 63G-4-402, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeous v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63G-4-302.

Dated this 8th of May, 2015.

Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 8th day of May, 2015, the undersigned served a true and correct copy of the foregoing Order Denying Protest by first class and certified mail to:

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