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, ESTABLISHMENT OF FRANCHISE & BREACH OF CONTRACT **SAM T. EVANS PICKUP COVER & TRAILER SALES, INC.** Protestor, vs. **UNIVERSAL TRAILER SALES COMPANY, LLC & UNIVERSAL TRAILER CARGO GROUP, INC. SUCCESSOR TO HAULMARK INDUSTRIES INC.,** Respondents.	**ORDER DENYING PROTESTS**
IN THE MATTER OF A PROTEST REGARDING TERMINATION OF FRANCHISE **SAM T. EVANS TRUCK TOP & ACCESSORY SHOP, INC.** Protestor, vs. **UNIVERSAL TRAILER SALES COMPANY, LLC & UNIVERSAL TRAILER CARGO GROUP, INC. SUCCESSOR TO HAULMARK INDUSTRIES INC.,** Respondents.	Case No. NAFA-2015-001 Case No. NAFA-2015-002

The Findings of Fact, Conclusions of Law and Recommended Order of the New Motor Vehicle Franchise Advisory Board are ratified and adopted by the Executive Director of the Department of Commerce and hereby incorporated with this Order

Denying Protests. It is therefore ordered that Respondents Universal Trailer Sales Company, LLC & Universal Trailer Cargo Group, Inc. Successor to Haulmark Industries, Inc. have established under Subsection 13-14-301(b) that there is good cause for terminating the Sam T. Evans Pickup Cover & Trailer Sales, Inc. (STE Ogden) and the Sam T. Evans Truck Top & Accessory Shop, Inc. (STE Midvale) franchises. Thus, the protests filed by STE Ogden and STE Midvale are hereby denied as well as their request for costs and attorney's fees.

The parties are made aware that any termination is not effective until the applicable appeal period lapses pursuant to Subsection 13-14-301(3), and that under Subsection 13-14-301(1)(c), Respondents may not terminate these franchises unless Respondents are willing and able to comply with their repurchase obligations in Section 13-14-307.

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 15th of January, 2015.

Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 15th day of January, 2015, the undersigned served a true and correct copy of the foregoing Order Denying Protests by first class and certified mail to:

Nicole C. Evans, Esq.
Victor Copeland, Esq.
BALLARD SPAHR LLP
201 South Main Street, Suite 800
Salt Lake City, UT 84111-2221

Kevin R. Feazell, Esq.
CORS & BASSETT LLC
537 E. Pete Rose Way, Suite 400
Cincinnati, OH 45202-3502

Julie Price
Administrative Assistant

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IN THE MATTER OF A PROTEST REGARDING TERMINATION OF FRANCHISE **SAM T. EVANS TRUCK TOP & ACCESSORY SHOP, INC.** Protestor, vs. **UNIVERSAL TRAILER SALES COMPANY, LLC & UNIVERSAL TRAILER CARGO GROUP, INC. SUCCESSOR TO HAULMARK INDUSTRIES INC.** Respondents.	Case No. NAFA-2015-001 Case No. NAFA-2015-002

This matter was filed with the Utah Motor Vehicle Franchise Advisory Board ("Board") within the Department of Commerce upon separate protests and requests for hearing by Protestors Sam T. Evans Pickup Cover & Trailer Sales, Inc. (hereafter, "STE

Ogden") and Sam T. Evans Truck Top and Accessory Shop, Inc. (hereafter, "STE Midvale")[1] against Respondents Universal Trailer Sales Company, LLC and Universal Cargo Group, Inc., Successor to Haulmark Industries, Inc. The two cases were consolidated and a joint hearing was held on Tuesday, December 16, 2014.

At the hearing, the parties were represented by counsel as follows: Protestors were represented by Nicole Evans and Victor Copeland; Respondents were represented by Kevin Feazell. Members of the Board present for the hearing were: Thomas Brady, Deputy Director of the Department of Commerce and Board Chair; Blake Strong and Byron Hansen, franchisee members; Tim Bangerter, public member; and Craig Britter, alternate public member.

The Board members reviewed the pleadings and exhibits submitted by the parties prior to the hearing. The parties presented few additional exhibits at 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 considered themselves sufficiently informed to make a 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. Protestor STE Ogden, located at 3272 Wall Avenue, Ogden, Utah, and its sister company, STE Midvale, located at 8516 S. 300 W., Midvale, Utah, are franchisees

[1] STE Ogden and STE Midvale are sometimes referred to jointly as "Protestors."

who sell and offer for sale new cargo trailers that constitute new motor vehicles manufactured and distributed by Respondents.

2. STE Ogden and STE Midvale were the first franchisees in Utah authorized by Respondents to sell new Haulmark brand product lines and were established as franchised dealers in 1993.

3. Pursuant to a Dealer Agreement executed on June 19, 2007, Respondents gave STE Ogden the exclusive right to sell and solicit orders for Haulmark brand product lines within a four-mile radius of the STE Ogden location and the non-exclusive right to sell and solicit orders for the sale of the Haulmark brand product lines within a 20-mile radius from the STE Ogden location. The Agreement required STE Ogden to maintain a minimum inventory of products, 18 units to be exact, "as amended from time to time in [Respondents'] sole discretion." Dealer Agreement, ¶4(a)(3) and Exhibit A to the Agreement.

4. The Agreement also required STE Ogden to satisfy a minimum annual sales quota of $306,000.00, and further stated:

> Following the conclusion of the initial one-year term, the Annual Sales Quota will be assessed on a pro-rated basis beginning on the day following the conclusion of the first one-year term and continuing until the conclusion of that calendar year. Thereafter the Annual Sales Quotas will be assessed on a calendar year basis beginning January 1st of the next year. Annual Sales Quotas will be reviewed, and in [Respondents'] sole discretion and judgment, revised, on an annual basis as set forth in this paragraph 4(a)(4).

Dealer Agreement, ¶4(a)(4) and Exhibit A to the Agreement. Paragraph ¶1(b) of the Dealer Agreement further states:

> Minimum Annual Sales means the minimum amount of annual sales of Products that must be made by Dealer as set forth on Exhibit A and as adjusted by [Respondents] on an annual basis after consultation with Dealer. Dealer acknowledges that it has reviewed these performance

> quotas with [Respondents] before entering into this Agreement and agrees that they are reasonable, attainable and material to the inducement of the parties to enter into this Agreement.

The termination provision in the Agreement provided that "[Respondents] may terminate this agreement immediately upon written notice to Dealer upon . . . Dealer's failure to perform, or Dealer's breach of any of its undertakings, obligations or covenants . . . ." *Id.*, ¶12(a)(i).

5. By letter dated July 1, 2014, Respondents notified STE Ogden of their intention to terminate the Dealer Agreement effective August 30, 2014. The letter stated:

> Please be advised that your status as a dealer of our products is terminated, effective August 30, 2014. The reason for this action is your continuing and exceedingly low level of purchases and sales of our products. When you became a dealer of our products, and entered into a dealer agreement with us, you committed to minimum annual sales of not less than $306,000 of our products. However our records indicate that your gross sales of product for the last several years have been as follows:
>
> | | |
> |---|---|
> | 2011: | $ 93,615 |
> | 2012: | $144,721 |
> | 2013: | $ 67,331 |
> | YTD 2014: | $ 59,627 |
>
> This is substantially less than your commitment to us and evidences a steadily decreasing interest or ability in functioning as a dealer of our products.

6. Pursuant to a Dealer Agreement executed on June 19, 2007, Respondents gave STE Midvale the exclusive right to sell and solicit orders for Haulmark brand product lines within a four-mile radius of the STE Midvale location and the non-exclusive right to sell and solicit orders for the sale of the Haulmark brand product lines within an 11-mile radius from the STE Midvale location. The Agreement required STE Midvale to maintain a minimum inventory of products, 25 units to be exact, "as amended

from time to time in [Respondents'] sole discretion." Dealer Agreement, ¶4(a)(3) and Exhibit A to the Agreement.

7. The Agreement also required STE Midvale to satisfy a minimum annual sales quota of $422,450.00, and further stated:

> Following the conclusion of the initial one-year term, the Annual Sales Quota will be assessed on a pro-rated basis beginning on the day following the conclusion of the first one-year term and continuing until the conclusion of that calendar year. Thereafter the Annual Sales Quotas will be assessed on a calendar year basis beginning January 1st of the next year. Annual Sales Quotas will be reviewed, and in [Respondents'] sole discretion and judgment, revised, on an annual basis as set forth in this paragraph 4(a)(4).

Dealer Agreement, ¶4(a)(4) and Exhibit A to the Agreement. Paragraph ¶1(b) of the Dealer Agreement further states:

> Minimum Annual Sales means the minimum amount of annual sales of Products that must be made by Dealer as set forth on Exhibit A and as adjusted by [Respondents] on an annual basis after consultation with Dealer. Dealer acknowledges that it has reviewed these performance quotas with [Respondents] before entering into this Agreement and agrees that they are reasonable, attainable and material to the inducement of the parties to enter into this Agreement.

The termination provision in the Agreement provided that "[Respondents] may terminate this agreement immediately upon written notice to Dealer upon . . . Dealer's failure to perform, or Dealer's breach of any of its undertakings, obligations or covenants . . . ." *Id.*, ¶12(a)(i).

8. By letter dated July 1, 2014, Respondents notified STE Midvale of their intention to terminate the Dealer Agreement effective August 30, 2014. The letter stated:

> Please be advised that your status as a dealer of our products is terminated, effective August 30, 2014. The reason for this action is your continuing and exceedingly low level of purchases and sales of our products. When you became a dealer of our products, and entered into a dealer agreement with us, you committed to minimum annual sales of not less than

$422,450 of our products. However our records indicate that your gross sales of product for the last several years have been as follows:

2011:	$193,602
2012:	$182,713
2013:	$ 77,342
YTD 2014:	$0

This is substantially less than your commitment to us and evidences a steadily decreasing interest or ability in functioning as a dealer of our products.

9. On August 28, 2014, Protestor STE Midvale filed a request for agency action pursuant to the New Automobile Franchise Act ("NAFA"), challenging Respondents' termination of its franchise. STE Midvale alleged that Respondents could not establish good cause to terminate the franchise in light of Respondents' failure to timely deliver products and in light of unreasonable quotas. STE Midvale requested that if good cause is established, that an order be issued declaring that Respondents are obligated to pay the amount required under Utah Code Ann., Section 13-14-307, including reasonable compensation under Subsections13-14-307(g) – (i). Finally, STE Midvale requested an award of costs and attorney's fees.

10. On August 29, 2014, Protestor STE Ogden filed a request for agency action challenging Respondents' termination of its franchise and further alleging that Respondents violated the exclusivity provisions in the Dealer Agreement and violated NAFA provisions in establishing a new franchise in STE Ogden's relevant market area without proper notice to STE Ogden. STE Ogden alleged Respondents established Big Tex Trailer Sales as a franchise to sell the same products 2.3 miles from STE Ogden. STE Ogden claimed that Respondents could not establish good cause to terminate the franchise in light of Respondents' failure to timely deliver products and in light of

unreasonable quotas. STE Ogden requested that if good cause is established, that an order be issued declaring that Respondents are obligated to pay the amount required under Section 13-14-307, including reasonable compensation under Subsection13-14-307(g) – (i). Finally, STE Ogden requested an award of costs and attorney's fees.

11. Respondents have no formal procedure or method established to annually assess or modify the minimum inventory and minimum sales quotas of their franchisees.

12. Respondents have not modified the minimum inventory and minimum sales quotas for STE Ogden and STE Midvale in writing since execution of the Dealer Agreements in June 2007.

13. In February 2009, Respondents' trailer manufacturing plant located in Springville, Utah was closed. For a brief period of time after that, Respondents filled orders from Protestors with trailers manufactured in Arizona. In January 2010, Respondents opened a trailer manufacturing facility in Ogden, Utah, and began filling Protestors' orders from that facility. Also in late 2010 Universal Trailers Sales Company, LLC merged the manufacturing of its Haulmark and Wells Cargo brands.

14. In June 2014, Respondents authorized Big Tex Trailer Sales, located in Ogden, Utah to sell an unmarked basic trailer manufactured by Respondents. Respondents were unaware that some trailers delivered to Big Tex bore the name "Universal Trailers." When they became aware of this, Respondents took action and had the label removed.

15. Respondents have not entered into any dealer agreement with Big Tex in Ogden for the sale of Haulmark brand trailer products, nor do Respondents provide any training, marketing materials or any other support to Big Tex in Ogden. Respondents do,

however, have a franchise agreement with Big Tex located in Utah County by which Big Tex is authorized to sell Haulmark brand products in Utah County.

16. Respondents' delivery time for trailers fluctuates based on weather conditions, growth of the industry, demand, location and other factors. The current range nationally is anywhere from five weeks to 16 weeks depending on the product. Over the last few years, as the economy has improved nationally since the recession, delivery times have increased for all manufacturers, not just Respondents.

17. Despite the increased delivery times for Respondents' products, some Haulmark brand dealers have been quite successful in increasing their trailer sales in recent years by anticipating demand and adjusting their orders for trailers accordingly.

18. From August 2010 to June 2012, Respondents' Regional Sales Manager ("RSM") visited with staff at STE Midvale on four occasions. The RSM also met with staff at STE Ogden on four occasions from May 2011 to August 2012. On some of these visits, the RSM discussed with Protestors' staff the dealerships' sales and inventory numbers in light of their quotas and discussed ways that they could increase their sales, such as incentive programs and discounts. Protestors' staff explained that they needed faster delivery of trailers to meet fleet orders from certain customers. After his last visits to Protestors in 2012, the RSM communicated with STE Ogden and STE Midvale staff through emails and by telephone. STE Ogden and STE Midvale did not request a visit or training from the RSM after his last visit to those dealerships.

19. There was no convincing evidence presented that Respondents guaranteed to Protestors a delivery time frame of 4-6 weeks after receiving an order for trailers, nor

was there convincing evidence presented that Respondents provided quicker delivery times to other Haulmark brand franchisees.

20. Protestors disputed the accuracy and reliability of Respondents' Exhibit 9, a Quarterly Market Share report prepared by Statistical Surveys, Inc., and Protestors offered their Exhibits Q, R, S and T to show the accuracy issues with Exhibit 9. Exhibits Q. R, S and T are also prepared by Statistical Surveys, Inc. and provide retail sales data from 2011-2014 for all trailers sold in Utah. After hearing testimony about Exhibits 9, Q, R, S and T, the Board finds that the information provided in those documents is not relevant or helpful to their review. The Board finds Protestors' purchase history since 2003 in Exhibit 5 and Exhibit 8's comparison of six other dealers against Protestors' purchase history from 2010-2014 persuasive and relevant to the issues in this case.

21. There was insufficient evidence presented by the parties as to Protestors' investment in the performance of their franchise agreements, the permanency of Protestors' investments, the benefit or injury to the public if these dealerships are terminated, whether Protestors are providing adequate service (sales, equipment, parts, personnel), any problems with Protestors' honoring warranties, any bad faith by franchisee in complying with material and reasonable terms of the franchise agreement, any prior misrepresentations by Protestors in applying for a franchise, or any transfers of ownership or interest without Respondents' approval.

22. At the hearing before the Board, Protestors moved for a directed verdict. Protestors' motion was denied.

CONCLUSIONS OF LAW

1. Under the New Automobile Franchise Act ("NAFA"), a franchisor is required to notify the Board and relevant franchisees "if the franchisor seeks to . . . enter into a franchise agreement establishing a motor vehicle dealership within a relevant market area where the same line-make is represented by another franchisee." Utah Code Ann. §13-14-302(1)(a).

2. NAFA defines a franchise or franchise agreement as follows:

> (a) "Franchise" or "franchise agreement" means a written agreement, or in the absence of a written agreement, then a course of dealing or a practice for a definite or indefinite period, in which:
> (i) a person grants to another person a license to use a trade name, trademark, service mark, or related characteristic; and
> (ii) a community of interest exists in the marketing of new motor vehicles, new motor vehicle parts, and services related to the sale or lease of new motor vehicles at wholesale or retail.
> (b) "Franchise" or "franchise agreement" includes a sales and service agreement.

Subsection 13-14-102(7).

3. Respondents' sales of unmarked trailers to Big Tex in Ogden do not meet the definition of "franchise" or "franchise agreement." There is no evidence presented of any written agreement between Respondents and Big Tex Ogden or evidence of a course of dealing between them that gave Big Tex Ogden a license to sell Haulmark brand products. The evidence presented by Protestors that a "Universal Trailer" name plate was on a trailer in Big Tex Ogden's lot does not establish a course of dealing that Big Tex Ogden has a license from Respondents to sell the Haulmark brand. Pursuant to their Dealer Agreements, Protestors are licensed to sell Haulmark brand products, not Universal Trailers in general. Moreover, the Board found the testimony of Respondents' witness Jeff Jones credible when he explained that the factory made a mistake in sending

the trailer to Big Tex Ogden with the "Universal Trailer" name plate, and that once he learned of this mistake, he made sure the plate was removed from the trailer. Thus, the Board concludes there is insufficient evidence that a franchise relationship exists between Respondents and Big Tex Ogden such that Respondents were not required to comply with the notice requirements of Section 13-14-302.

4. We next address whether Respondents' termination of Protestors' franchise dealerships was proper. Under NAFA, a franchisor may not terminate a franchise agreement unless:

a. the franchisee has received written notice 60 days prior to 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).

5. 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). In addition, Subsection 13-14-305(2) provides in pertinent part:

> Notwithstanding any franchise agreement, the following do not constitute good cause, as used in this chapter for the termination or noncontinuation of a franchise:
> (a) the sole fact that the franchisor desires greater market penetration or more sales or leases of new motor vehicles . . .

6. Respondents maintain that Protestors violated their Dealer Agreements by failing to meet their annual minimum inventory and sales quotas in the last four years. However, the termination letters issued on July 1, 2014 do not mention the minimum inventory quotas. Thus, Protestors argue that the sole reason for termination of their franchises is Respondents' desire to achieve greater market penetration or more sales, which cannot establish good cause under Subsection 13-14-305(2)(a). Protestors further

argue that their minimum sales requirements are unreasonable, because Respondents failed to timely deliver products, and because Respondents failed to adjust the minimum annual sales quota.

7. Despite STE Ogden and STE Midvale's arguments to the contrary, it was apparent to the Board that the desire to obtain more sales or greater market penetration was not the sole reason for Respondents' notice of termination, which is prohibited in Subsection 13-14-305(2)(a). The termination notices specifically identified Protestors' failure to meet their obligations under their Dealer Agreements over a long period of time as well as their inadequate sales. Because Subsection 13-14-305(2)(a) does not apply, it is necessary to consider the factors in Subsection 13-14-305(1) to determine if Respondents met their burden of proof that good cause exists to terminate the two dealerships.

8. Respondents provided little or no evidence as to the factors identified in Subsections 13-14-305(1)(b) (investment by franchisee), (c) (permanency of investment), (d) (injury or benefit to the public), (e) (adequate service), (f) (honoring warranties), (h) (bad faith by franchisee), (i) (prior misrepresentation in applying for franchise), and (j) (transfer of ownership without approval). Therefore, as to these factors, Respondents have failed to establish good cause to terminate Protestors' franchises.

9. Respondents have established good cause to terminate the dealerships, however, based on Protestors' failure to meet their annual sales obligations under their Dealer Agreements, which the Board finds to be material and reasonable. In addition, evidence was presented at the hearing as to business transacted by Protestors compared to business that is available (Subsection 13-14-305(1)(g)), which the Board concludes is

relevant and establishes additional good cause to terminate the franchises. The other factors raised by Protestors (delivery delays, Respondents' favorable treatment to other dealers in detriment to Protestors, bad faith by Respondents in permitting Big Tex to sell unlabeled trailers) have also been considered by the Board under Subsection 13-14-305(1)(k) and discussed below as further support for a conclusion that there is good cause to terminate the franchises.

10. Protestors acknowledged in signing the Dealer Agreements that they had reviewed the minimum annual sales quota and that they agreed the quota was reasonable, attainable and material. Dealer Agreements, ¶1(b). At the hearing, Protestors attempted to show that the Dealer Agreements were "contracts of adhesion" and that Protestors had no choice but to sign the agreements as written. The Board does not find this to be true. First, the owners of the two dealerships were likely represented by counsel as they have a lawyer in the family. In addition, looking at the purchase history of STE Ogden and STE Midvale, it appears in 2006 they each purchased approximately $50,000.00 more in products than the quota established in the 2007 Dealer Agreements. Thus, the minimum sales quota of $306,000 was reasonable for STE Ogden in light of its total purchases of $360,075.00 in products in 2006; and the minimum sales quota of $422,450.00 was reasonable for STE Midvale in light of its total purchases of $479,219.00 in 2006.

11. The Board acknowledges that the effect of the recession on the motor vehicle industry could have made the quotas established in 2007 unreasonable. However, Respondents did not attempt to terminate Protestors during that time, and no harm came to Protestors. Now the economy is improving, and the witnesses at the hearing all confirmed that sales in the trailer industry are improving. Thus, the 2007 quotas are

again reasonable and maybe even generous given that the other Haulmark dealerships are able to steadily increase their sales.[2] A review of the purchase history of six Haulmark dealers in Utah from 2010-2014 shows that there is business available in the trailer industry and that Protestors could have taken advantage of the improved U.S. economy to increase their sales and better meet their purchase obligations under their Dealer Agreements. Although Protestors attempted to show that there were discrepancies in Respondents' Exhibit 8, Todd Campbell, owner of Wasatch Trailer Sales, confirmed the accuracy of the numbers at least as to his dealership. The Board concludes that this confirmation by Mr. Campbell also makes the remaining dealership purchase numbers more likely to be accurate and less likely to be falsified.

12. The Board finds that delivery deadlines and the merger of the Haulmark and Wells Cargo manufacturing facility were not the cause of Protestors' decreasing sales. There was insufficient evidence presented as to what effects the merger had on delivery in general, and Protestors had the same delivery time frames as other Haulmark dealers. Todd Campbell testified that his dealership sells several other brands of trailers and he has noticed the same delays across the board, because the demand in the industry has increased. He testified that he is successful despite the delivery delays, because he anticipates the market and adjusts his orders accordingly. The Board also found Mr. Campbell's testimony helpful as to the support his staff is able to obtain from Respondents' RSM. While Protestors' witnesses claimed they didn't get that same

[2] The Board was concerned about Respondents' lack of a formal process by which to assess annually the quotas set for dealerships as stated in the Dealer Agreements. However, the language of the Dealer Agreements left the discretion to do the assessments solely with the Respondents. Under the circumstances, it would have been advisable for Protestors to make repeated requests in writing to have annual assessments and written adjustments made as per the provisions of the Agreements. However, there was no evidence presented that any written request was made by Protestors for an evaluation during the past four years of declining sales.

support, the Board finds that if they had requested it, the RSM and other Respondents' staff would have provided the assistance. One of the common complaints by Protestors' witnesses, for example, was that they did not know who their internal sales representative was. However, Respondents quickly pointed out that the contact information of Respondents' staff is readily available online.

13. The Board does not find bad faith on the part of Respondents as alleged by Protestors, who claim that the termination of their franchises was a result of STE Ogden complaining about Respondents' agreement with Big Tex Ogden. The Board notes that the termination letters to Protestors were mailed on July 1, 2014. STE Ogden's owner, Eric Evans, testified that after he received the termination notice, he called the RSM and in that same conversation, complained about Big Tex improperly selling trailers in STE Ogden's exclusive territory. Based on this testimony, there could be no improper retaliation or bad faith by Respondents, as Mr. Evans did not raise the Big Tex issue until after he had received the termination notice. Nevertheless, the Board was concerned about the business model of a manufacturer selling unlabeled products that looks for all purposes like a product that is normally sold through a franchise. The Board felt this could be a real concern for the industry in the future unless it is addressed in some way.

14. In summary, the Board found that after the Dealer Agreements were executed between Protestors and Respondents, circumstances changed for both sides and their business models changed. It is clear that STE Ogden and STE Midvale's sales have been down for quite some time, and Respondents want only to enforce the deal they reached with Protestors back in 2007, annual sales that meet Protestors' quotas. Protestors as franchisees, have a responsibility for their business model and for executing

on their business model. It was imperative for Protestors to force the issue with Respondents and get an assessment and adjustment on their annual sales quota when sales dropped, but Protestors relied more and more on their fleet sales. They found that the Look brand of trailers could be produced ore quickly and they could more readily fill trailer orders through their Look franchises. Protestors had good relationships with Respondents' old staff members but did not attempt to cultivate the same relationships with Respondents' new employees. In fact, a former Haulmark representative began working for Look Trailers, which made it easier for Protestors' staff to work with Look Trailers in getting their orders filled.

RECOMMENDED ORDER

For the foregoing reasons, the Utah Motor Vehicle Franchise Advisory Board recommends that the protests of STE Ogden and STE Midvale be denied along with their request for an award of costs and attorney's fees. Respondents have established under Subsection 13-14-301(b) that there is good cause for terminating the STE Ogden and STE Midvale Haulmark franchises. Subsection 13-14-301(1)(c) sets forth that Respondents may not terminate these franchises unless Respondents are willing and able to comply with their repurchase obligations in Section 13-14-307. Further, any termination is not effective until the applicable appeal period lapses. Subsection 13-14-301(3).

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 15th day of January, 2015 for her review and action.

Dated this 15th day of January, 2015.

Masuda Medcalf

Masuda Medcalf, Administrative Law Judge
Department of Commerce