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 OF DISMISSAL** Case No. NAFA-2012-003 Case No. NAFA-2012-004
Utah Trailer Source, LLC, Protestor, vs. **Titan Trailer Mfg., Inc,** Respondent.	

The Findings of Fact, Conclusions of Law and Recommended Order in this matter are ratified and adopted by the Executive Director of the Department of Commerce. It is therefore concluded that Respondents Logan Coach, Inc. and Titan Trailer Mfg., Inc. did not have a franchise relationship with Protestor Utah Trailer Source, LLC, and their termination of Protestor's dealership agreement is not subject to the requirements of the New Automobile Franchise Act ("NAFA"), Utah Code Ann. § 13-14-101 *et seq.* Accordingly, the protest is hereby dismissed. "When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action." *Maverick Country Stores,*

Inc. v. Industrial Comm'n et al., 860 P.2d 944, 947 (Utah App. 1993), *citing Varian-Eimac, Inc. v. Lamoreaux*, 767 P.2d 569, 570 (Utah App. 1989).

Each party shall bear its own costs and attorney fees.

The parties are made aware that under Subsection 13-14-301, where a termination of a franchise is subject to the notice and hearing requirements, the termination may not become effective until the final determination by the Executive Director, and the applicable appeal period has lapsed. Here, Protestor may still appeal the determination that the Executive Director and the Board do not have jurisdiction.

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 23rd of May, 2012.

Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 23 day of May, 2012, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order of Dismissal by certified and electronic mail to:

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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.

At the hearing held on April 26, 2012, the parties were represented by counsel as follows: Protestor was represented by Bryan P. Fishburn; Respondent was represented

by Brad Bearnson and Aaron Bergman. Members of the Board present for the hearing were: Thad LeVar, Deputy Director of the Department of Commerce and Board Chair; Fred Barber, recreational franchisee alternate member; Tim Bangerter, 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, except Protestor's Exhibit 50, which was withdrawn. Because of the affirmative defense raised by Respondents that their relationships with Protestor did not constitute a franchise, the hearing was conducted in phases, addressing first the issue of whether a franchise exists, which was further broken down into two steps based on the definition of a franchise. The Board deliberated after the parties presented their evidence at these stages, and given the Board's determination that they would make a recommendation that no franchise relationships existed between the parties, the hearing was adjourned before proceeding on the issue of whether good cause was established to terminate Protestor's dealership.

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 the following 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. The following findings are based on the parties' Stipulation of Facts:

a. Logan Coach, Inc. ("Logan Coach") is a Kansas corporation, authorized to do business in Utah. Logan Coach's manufacturing facility is located in Logan, Utah. Logan Coach builds horse trailers, contractor's trailers, Silver Eagle motorcycle trailers and custom order trailers.

b. Titan Trailer Mfg., Inc. ("Titan") is a Kansas corporation, authorized to do business in Utah. Titan manufactures trailers at its facility in Waterville, Kansas. Titan manufactures livestock, horse, dump, flatbed, and utility trailers. Titan also builds custom order trailers.

c. Utah Trailer Source, LLC ("UTS") is a limited liability company, located in Murray, Utah. From 2008 to the present, UTS has sold various brands of trailers. Presently, UTS sells new the following brands: Big Bubba's trailers, Logan Coach trailers, Northwood trailers, Titan trailers and Wells Cargo trailers.

d. UTS leases the land and buildings that comprise its dealership premises. UTS' dealership consists of 1.178 acres at the southeast corner of 4500 South and Main Street in Murray, Utah. UTS' premises house a 10,400 square foot building.

e. In June of 2008, UTS began selling "Logan Coach" named trailers after entering into a written "Dealership Agreement," dated June 23, 2008. At that time in 2008, "Logan Coach" brand trailers were manufactured by Carriage Industries, a Utah Corporation.

f. In 2009, Carriage Industries was dissolved and sold to Titan. Logan Coach [Respondent to this action] was then formed as a Kansas Corporation, and continued to manufacture "Logan Coach" brand trailers in Logan, Utah.

g. In 2009 and thereafter, UTS continued to sell Logan Coach trailers. No new written dealer agreement was entered into by UTS and Logan Coach as to their continuing relationship.

h. On June 1, 2009, Titan and UTS entered into a written "Standard Dealer Agreement," under which UTS sells Titan trailers.

i. Logan Coach, Titan and UTS have engaged in cooperative advertising. This cooperative advertising is voluntary in nature. As a condition to cooperative advertising, preapproval was required by Logan Coach and/or Titan. In the course of their relationship, UTS, Logan Coach and/or Titan have sponsored or participated in several events together.

j. In August of 2011, Logan Coach and Titan each sent UTS a notice of intent to terminate. The parties have stipulated that if the Logan Coach/Titan/UTS relationships are governed by the Utah New Automobile Franchise Act, these first notices were not sufficient under the requirements of that Act.

k. On November 11, 2011, Logan Coach and Titan jointly sent a new Amended Notice to UTS of their intent to terminate. The parties have stipulated that if the Logan Coach/Titan/UTS relationships are governed by the Utah New Automobile Franchise Act, this new Amended Notice is sufficient Notice under the requirements of the Act.

2. The following additional findings are made based on the evidence presented at the hearing:

a. A dealer agreement between UTS and Titan was not signed by the parties after the agreement signed on June 1, 2009 expired on December 31, 2010; the parties continued to perform as before.

b. Paragraph 5.7 of the June 1, 2009 agreement with Titan provided that the dealer shall:

> [A]cquire maintain and comply with, as applicable, at its sole cost and expense, all applicable licenses, ordinances, permits, statutes, codes or rules required to perform its duties under this Agreement and to sell and service the Products. Dealer further agrees to, in or before the end of each calendar year during the term of this Agreement send copies of all such licenses, ordinances, permits statutes, codes or rules to Titan and to take no action to service or

sell or promote the sale of the products before providing copies of such licenses ordinances permits, statutes codes or rules to Titan.

c. UTS was previously listed on Titan and Logan Coach websites as an authorized dealer.

d. Testimony at the hearing revealed that whether or not a written contract existed between UTS and the Respondents at the time the termination notice was issued, the parties' understanding from prior contracts and by practice was that the Respondents did not require UTS to sell exclusively the trailers made by Respondents, did not require any investment from UTS, any specific advertising, any specialized training or specialized tools, any dedicated showroom or facility, any specific services, or any sales quotas.

e. UTS has a repair shop with four bays and eight doors. It was unclear whether UTS has at all times hired trained service personnel to service trailers. There was testimony that UTS employees have serviced Titan and Logan trailers for its customers, but those services have been minor, such as fixing lights, tires and wheel bearings. One witness testified that UTS provided warranty service on the trailer he bought from UTS, and he was satisfied with the work done on the trailer. He also went directly to Logan for another repair but only because it was more convenient for him. An invoice for $2,677.50 was admitted into evidence, and testimony indicated the invoice represented a trade on UTS warranty work on a Logan Coach trailer. Otherwise, UTS provided no records to document services, and UTS has not billed Respondents for services performed under the warranty programs. Testimony indicated that many owners of trailers purchased from UTS brought their repairs directly to Logan Coach. Thus, the Board finds that UTS did not routinely service Respondents' trailers.

f. Testimony indicated that Respondents gave Protestor an initial sales kit that included banners, logos, shirts with the Respondents' logos, promotional materials, etc., but UTS was not required to use these items. UTS displayed promotional materials and banners inside its show room, but was not required to do so. UTS at one time had permanent signs with the Respondents' logos on the outside of its sales facility, but recent pictures of the UTS facility presented at the hearing showed no such permanent signs.

g. UTS and Respondents jointly sponsored various local events, but UTS usually brought the events to the attention of Respondents and Respondents did not require UTS to participate in these events.

h. Periodically, UTS displayed demo trailers bearing the Respondents' logos, but Respondents did not require UTS to use or maintain demo trailers.

CONCLUSIONS OF LAW

1. Under the New Automobile Franchise Act ("NAFA"), a franchisor who wishes to terminate a franchise agreement with a dealer must meet certain notice requirements. Utah Code Ann. § 13-14-301(1). The franchisee is entitled to request a hearing before the Board, and if the Executive Director enters an order that the franchisor has established good cause, the franchisor may terminate the franchise agreement with the dealer. Subsection 13-14-301(3).

2. A franchise is defined 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).

A. There Was No Sales and Service Agreement Between UTS and Logan Coach

3. In June 2008, when Carriage Industries sold its assets to Titan and the new Logan Coach company was formed, UTS continued to sell Logan Coach trailers.

However, as the parties have stipulated, no written contract authorizing UTS to sell and service trailers was executed between UTS and Logan Coach. UTS argues that under Subsection 13-14-102(7)(a), franchise agreement may be found from a course of dealing or practice, and it presented various documents such as correspondence between Logan Coach representatives and UTS, Internet web pages for Respondents that identified UTS as an authorized dealer to sell and service Logan Coach and Titan trailers, etc. In order to find a franchise agreement under Subsection 13-14-107(b), however, the Board and Executive Director must conclude that there was a written contract between the parties.

4. According to the rules of statutory construction, the legislative intent, manifested by the plain language of the statute, is of paramount concern. *Department of Natural Resources v. Huntington-Cleveland Irrigation Co.,* 2002 UT 75, ¶ 13, 52 P.3d 1257. In looking to the plain language of a statute, we "presume that the legislature used each word advisedly and [we] give effect to the term according to its ordinary and accepted meaning"..."and we seek to render all parts [of the statute] relevant and meaningful." *Id., citations omitted.* However, we cannot "infer substantive terms into the test that are not already there . . . the interpretation must be based on the language used and [we have] no power to rewrite the statute to conform to an intention not expressed." *I.M.L. v. State,* 2002 UT 110, ¶ 25, 61 P.3d 1038.

5. A ruling made previously in a related matter involving the parties held that Subsection 13-14-102(7)(b) was placed separately from Subsection 13-14-102(7)(a) and must be interpreted separately:

> [I]f the Legislature had intended that a sales and service agreement must meet both prongs of Subsection 13-14-102(7)(a), it would not have seen it

> necessary to place Subsection 13-14-102(7)(b) as a separate stand-alone provision under the definition of a franchise. There would have been no reason to have a Subsection 13-14-102(7)(b); or, a phrase such as "including sales and service agreements" would have been inserted into the language of Subsection 13-14-102(7)(a).

Order Denying Respondents' Motion to Dismiss and Order Denying Protestor's Motion for Summary Disposition, Case Nos. NAFA-2012-001 and 002, p. 6. Similarly, if the Legislature had intended the phrase "course of dealing or a practice" to apply to Subsection 13-4-107(b), it would have placed that phrase in Subsection 13-14-107(b). Without such language, Subsection 13-14-107(b) is interpreted as requiring a written sales and service contract between the parties to constitute a franchise. As there was no written contract between UTS and Logan Coach, no sales and service agreement was present.

B. There Was No Sales and Service Agreement Between UTS and Titan

6. A written contract was executed by Titan and then UTS owner Paul Grant on June 1, 2009, which was to be effective from January 1, 2010 to December 31, 2010. UTS Exhibit 4, ¶ 2.2. This contract contained ¶ 5.7, a provision that stated UTS had a duty to sell and service the products. Even though the parties continued to deal with each other in the same way after December 31, 2010, no evidence was entered to establish that a new sales and service contract was executed between UTS and Titan that was effective at the time that Titan gave UTS a notice of termination in 2011. As previously stated, without a written sales and service contract, Subsection 13-14-107(b) cannot be met.

7. Thus, a franchise relationship is not found to exist between either UTS and Logan or UTS and Titan by virtue of Subsection 13-14-107(b). This conclusion is

supported by standards in the motor vehicle franchise industry which traditionally uses lengthy and detailed dealership agreements that clearly set forth the duties and responsibilities of the franchisee and the franchisor, with numerous provisions relating to the sales and service duties, establishing sales quotas, minimum purchase requirements, customer satisfaction criteria, etc. The only written contracts presented in this matter were not effective at the time of the 2011 termination notice and hardly mentioned the requirement to service trailers.

C. No Community of Interest Was Established

8. Under Subsection 13-14-107(a), a franchise exists where a license has been granted to use a trade name or trademark, service mark or related characteristic and a community of interest exists in the marketing of new motor vehicles, parts and services. NAFA has not defined a community of interest in marketing and Utah courts have not had an opportunity to define it either. The state of New Jersey has a statute similar to that of Utah with respect to the license to use a trade name or trademark provision and the community of interest.[1]

9. The Third Circuit Court, in applying New Jersey law, held that:

> A community of interest exists when the terms of the agreement between the parties or the nature of the franchise business requires the licensee, in the interest of the licensed business's success, to make a substantial investment in goods or skills that will be of minimal utility outside the franchise. In order for a community of interest to exist, a two-part test must be met: (1) the distributor must have made substantial "franchise-specific" investments, and (2) the distributor must have been *required* to

[1] "Franchise" mean a written arrangement for a definite or indefinite period, in which a person grants to another person a license to use a trade name, trade mark, service mark, or related characteristics, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise. N.J.S.A. § 56:10-3a.

> make these investments by the parties' agreement or the nature of the business.

Cassidy Podell Lynch, Inc. v. Syndergeneral Corp., 944 F.2d 1131, 1138-40 (3rd Cir. 1991). The Board finds the analysis in *Cassidy* instructive to the current matter.

10. Although no written contracts existed between UTS and Respondents at the time the termination notices were issued, Subsection 13-14-107(a) allows us to consider the course of dealing between the parties to determine whether a community of interest has been established. After considering the evidence, the Board finds that UTS failed to establish a community of interest.

11. UTS argues that a community of interest exists, because it made substantial franchise-specific investments by way of developing customer good will; UTS also alleges that the majority of its business is comprised of sales of Logan Coach and Titan trailers. Reliance on Respondents' products is not automatically evidence that a franchise relationship existed. Otherwise, a dealer could unilaterally convert a dealer relationship into a franchise relationship without regard to the original intent of the parties in entering into the dealer agreement. *See Cassidy,* at 1142. In addition, the Board does not agree with UTS that it made a substantial investment in developing customer good will. The Board found that an important way to earn customer good will and loyalty is in servicing trailers that they purchase. However, the Board found that UTS did not have a real commitment to servicing Respondents' trailers, particularly the warranty repairs. Had a franchise relationship been intended by the parties, there would likely have been a more concerted effort by UTS to keep the business of its customers who purchased Titan and Logan Coach trailers by routinely providing warranty services.

12. Moreover, Respondents did not exercise the type of control over UTS that would give rise to a franchise relationship. Respondents did not impose minimum sales quotas or minimum product purchase requirements, did not set any showroom or repair facility requirements, and UTS was free to sell and did sell several other trailer brands. Respondents did not impose a requirement that a minimum percentage of the dealer's products be from Respondents; UTS' participation in the joint advertising initiatives and joint promotions of various program was optional and often recommended by UTS. Although Respondents initially provided promotional materials to UTS to display at the UTS facility, including banners, shirts, logos, information about the trailers, etc., there was no testimony that Respondents required UTS to use these materials. The lack of permanent signage on the building with Respondents' logos was further evidence to the Board that a franchise was not intended by the parties. Finally, Respondents did not require training for UTS staff that could not be transferred to other trailer brands UTS sold.

13. During deliberations it became immediately clear that the Board members felt a community of interest had not been established by Protestor, and as such, a franchise would not be found to exist under Subsection 13-14-107(a) regardless of the Board's findings on the issue of whether Respondents had granted Protestor a license to use Respondents' trade name, or trademark, service mark, or related characteristic. Therefore, the Board found it unnecessary to continue deliberations on the license issue.

D. Summary

14. In summary, Protestor UTS has failed to establish that a franchise relationship existed between it and Respondents. Under Subsection 13-14-107(2), 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 their 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 no franchise be found to exist between Protestor and the individual Respondents and that the parties bear their own attorney fees.

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 22nd day of May, 2012 for her review and action.

Dated this 22nd day of May, 2012.

Masuda Medcalf
Administrative Law Judge