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 **MOUNTAIN WEST TRUCK CENTER** Protestor, vs. **HINO MOTORS SALES USA, INC.** **Respondent.**	**ORDER DENYING PROTEST** Case No. NAFA-2016-001

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 Protest. It is therefore ordered that Respondent Hino Motors Sales USA, Inc. ("Hino") has established under the New Automobile Franchise Act, Utah Code Ann. 13-14-101 *et seq.*, that there is good cause for terminating the franchise of Protestor Mountain West Truck Center ("MWTC"). Thus, the protest is hereby denied as well as MWTC's request for an award of damages, 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)(b)(ii), and that under Subsection 13-14-301(1)(c), Hino may not terminate MWTC's franchise unless Hino is willing and able to comply with its 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 18th of July, 2016.

Francine A. Giani

Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 18th day of July, 2016, the undersigned served a true and correct copy of the foregoing Order Denying Protest by electronic and certified mail to:

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IN THE MATTER OF A PROTEST REGARDING TERMINATION OF FRANCHISE **MOUNTAIN WEST TRUCK CENTER** Protestor, vs. **HINO MOTORS SALES USA, INC.** **Respondent.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, and RECOMMENDED ORDER** Case No. NAFA-2016-001

This matter was filed with the Utah Motor Vehicle Franchise Advisory Board ("Board") within the Department of Commerce by Protestor SLC Mack Sales & Service dba Mountain West Truck Center (hereafter, "MWTC") against Respondent Hino Motor Sales USA, Inc. (hereafter, "Hino").

A hearing was held on Monday, June 27, 2016. At the hearing, MWTC was represented by J. Manly Parks, Sarah O'Laughlin Kulik and Thomas B. Price; Respondent was represented by James R. Vogler and Matthew F. Singer. Members of the Board present for the hearing were: Thomas Brady, Deputy Director of the Department of Commerce and Board Chair; franchisee member Byron Hansen; public members Craig Britter and Ted Boyer, and alternate public member Bruce Jones.

The Board members reviewed the pleadings and exhibits submitted by the parties prior to the hearing. Hino presented an additional exhibit 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. Hino is a Delaware corporation with its principal office in Novi, Michigan.

2. Hino is a subsidiary of Hino Motors, Ltd. (Japan).

3. Hino Motors, Ltd. (Japan) is owned in part by Toyota.

4. Hino is the U.S. distributor of Hino-brand commercial trucks, distributing trucks through a network of dealers.

5. MWTC has been a Hino-authorized dealer in Salt Lake City for more than ten years.

6. Cutrubus Motors, Inc. in Ogden is the only other Hino-brand dealer in Utah.

7. In addition to Hino-brand trucks, MWTC sells and services Volvo and Mack trucks.

8. Hino sells medium-duty trucks.

9. Mack and Volvo do not sell medium-duty trucks.

10. Pursuant to the most recent Dealer Agreement between Hino and MWTC executed in January 2010, MWTC agreed to sell, service, repair and promote Hino products so as to obtain a reasonable share of the potential market of Hino products in its Area of Responsibility. MWTC also agreed to purchase, maintain in stock and order the minimum number of Hino vehicles as agreed through the annual dealer reviews each year, and to sell the number and type of Hino vehicles each year during the term of the agreement.

11. Hino's District Sales Manager met with MWTC's management yearly to discuss MWTC's annual sales objectives and minimum ordering and inventory levels. After each meeting, the District Sales Manager provided MWTC management with an Annual Dealer Review, which was signed by the District Sales Manager and MWTC management.

12. Although dealers may enter comments in an Annual Review if there are any disagreements with how the sales objectives and minimum ordering and inventory levels were calculated, MWTC management never entered any such comments in its Annual Dealer Reviews for years 2012-2015. At no time during any annual review meeting did MWTC management notify the Hino District Sales Manager that the sales and inventory objectives for a given year were unfairly calculated, that they were unattainable due to a Utah customer preference for domestic trucks, for four-wheel drive trucks or for trucks with more horsepower than that of Hino trucks, nor did they enter any written comments to that effect. Similarly, MWTC management did not notify the Hino District Sales Manager or enter any comments to the effect that it was not feasible for MWTC to hire a dedicated Hino salesperson.

13. MWTC's biggest client from 2010 to 2012 was American Linen Supply Co. ("Alsco"). In 2010, MWTC sold 11 trucks to Alsco and had no other sales; in 2011, sold nine trucks to Alsco and five to other clients; and in 2012, sold 17 trucks to Alsco and three to other clients. In 2013, Alsco stopped using Hino trucks and MWTC no longer had Alsco as a client. There was insufficient evidence presented as to the reasons behind this change by Alsco, and the Board felt those reasons were not relevant to the Board's determination.

14. During 2013 and 2014, Hino repeatedly notified MWTC management that MWTC was not meeting its sales and inventory objectives. These communications were in writing (with letters and emails) and in face-to-face meetings, and they were in addition to discussions held during annual dealer reviews.

15. On October 1, 2013, MWTC submitted to Hino its September 23, 2013, Business Plan, admitting that MWTC "sales plan/objective has been less than stellar;" acknowledging that its sales objective of 34 units was based on its 2012 sales and a growth factor; recognizing that it would not be able to meet its goals for 2013 in light of losing the Alsco account but also identifying ways to improve its sales, including a commitment to hire a new sales manager and an additional sales representative to focus strictly on the Hino product. Importantly, MWTC set its own objective for 2014 at 24 to 48 Hino truck sales:

> Our business intention for 2014 is targeted to begin with 2 units per month. This will be increased with the new COE truck and sales will increase to 3-4 units per month.

In the Spring of 2014 at the next annual review meeting, Hino set MWTC's 2014 sales objective at 33.

16. MWTC hired a Hino-dedicated salesperson on December 31, 2013. However, that salesperson ended up spending more of his time on selling the Volvo and Mack brands than the Hino brand. MWTC sold only four Hino trucks in 2014.

17. By letter dated March 13, 2015, Hino gave MWTC a notice of default. The Hino District Sales Manager discussed the default with MWTC's management in person on March 25, 2015, the next annual review meeting. Pursuant to Hino's March 31, 2015 letter, Hino gave MWTC an opportunity to cure the defaults (sustaining certain levels of inventory and meeting the sales objective of 33 sales for 2015). That year, MWTC increased its Hino truck sales to 16 but failed to meet the objective of 33 sales.

18. On February 4, 2016, Hino issued its Termination Notice. The letter stated, in pertinent part, that termination was due to (1) a breach of and failure to remedy sales performance obligations, and (2) breach of and failure to remedy inventory and stocking obligations:

> As the following chart demonstrates, with the exception of FY2011, MWTC consistently (i) failed to achieve the required share of the potential market of Hino vehicles in its Area of Responsibility (as measured by your Sales Effectiveness), and (ii) failed to meet its Minimum Sales Objective:

Year	Required Sales in Annual Dealer Review	Dealer Actual Sales	Dealer Sales Effectiveness	Sales Dealer Lost
CY2014	33	4	13%	29
FY2013	34	7	25%	27
FY2012	21	17	85%	4
FY2011	15	16	114%	0
FY2010	21	12	75%	9

> ***We discussed this default and a timetable for you to remedy the default at your March 25, 2015 annual review meeting . . . if you sold 33 Hino trucks by December 31, 2015 . . . You agreed to this objective, but failed to meet it . . .

> ***In your 2014 Annual Dealer Review you agreed to have 7 stock trucks in inventory and 9 on order . . . while you have maintained a sufficient level of trucks in stock since July 2015, you have failed to remedy your default because you did not maintain sufficient trucks on order or total trucks in stock and on order:

Month End	Vehicles in Stock	Vehicles on Order	Total
April 2015	4	4	8
May 2015	4	1	5
June 2015	5	1	6
July 2015	9	3	12
August 2015	10	1	11
September 2015	12	0	12
October 2015	11	0	11
November 2015	10	4	14
December 2015	11	0	11

19. On March 29, 2016, MWTC filed its request for agency action pursuant to the New Automobile Franchise Act, challenging Hino's termination of its franchise, because the sales and inventory objectives set by Hino were done unilaterally without negotiations. MWTC explained that its sales suffered due to the loss of the Alsco account, over which it had no control, and because its primary salesperson had cancer and passed away. MWTC argued that its troubles were only temporary, that its sales have been rebounding steadily, and that termination is unjustified and impermissible to the extent that termination is motivated by Hino's desire for increased sales and market penetration. MWTC requested an award of damages, as well as costs and attorney's fees.

20. Data presented indicated that the markets for both the medium-sized and the heavier trucks grew nationally over the last few years. In 2015, for example, approximately five Volvo and Mack trucks were sold for each Hino truck on a national level, but at MWTC, 44 Mack and Volvo trucks were sold for each Hino truck. Data dealing with sales in the Northern District also show that MWTC was not performing well when compared to other dealers in the District. Although MWTC performed well in

2012 at the District level, its sales were well below the District average in later years. In 2015, for example, MWTC needed to sell 31 more trucks to meet the District average.

21. Evidence presented indicated that MWTC did not actively "prospect" to identify new potential customers and set up meetings, use the conquest lists (lists of commercial truck purchasers who had not previously purchased Hino trucks) suggested by the Hino District Sales Manager, or follow up on Hino sales incentive programs that targeted consumers who had purchased competitor trucks. For example, MWTC did not download the conquest list from HinoNet (the Hino dealer intranet system) until February 15, 2016, after Hino had issued its February 4 termination notice. Data summarizing the "CPA" activity (the number of truck sales quotes given out to potential customers) indicates that MWTC gave significantly fewer quotes to potential customers than two other dealers in the Northwest District. As a general matter, Hino received fewer telephone calls from MWTC about Hino products than any other dealers. While MWTC has one Internet website that mentions Hino products, it also hosts another Internet website that only advertises the sale of Volvo and Mack trucks.

CONCLUSIONS OF LAW

1. Under the New Automobile Franchise Act, 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).

2. In determining whether a franchisor has established good cause to terminate a franchise, the Board shall 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 . . .

3. Hino's termination letter notified MWTC that MWTC was in violation of its Dealer Agreement by failing to meet its annual minimum inventory and sales objectives in the last few years. MWTC suggests that the sole reason for termination of its franchise is Hino's desire to achieve greater market penetration or more sales, which cannot establish good cause under Subsection 13-14-305(2)(a).

4. It was apparent to the Board that the desire to obtain more sales or greater market penetration was not the sole reason for Hino's notice of termination. Rather, the termination notice specifically identified MWTC's failure to meet its obligations under the Dealer Agreement over a long period of time, including the failure to meet both sales and inventory objectives. 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 Hino met its burden of proof that good cause exists to terminate the dealership. Reviewing the factors identified in Subsections 13-14-305(1)(b), the Board concludes that Hino has established good cause to terminate MWTC's dealership.

5. First, the Board found that there was sufficient evidence of business available to MWTC, and that MWTC did not take advantage of that business. Data presented indicated that the markets for both the medium-sized and heavier trucks grew

in the past few years both nationally and in the Northern District. While MWTC took advantage of that increase in market demand with its soaring Volvo and Mack sales, MWTC neglected the Hino brand, as reflected by its diminishing sales effectiveness numbers. MWTC's Hino-dedicated salesperson was able to tap into that market slightly as shown by the 16 sales MWTC achieved in 2015. If he were truly a Hino-dedicated salesperson, rather than one who spent more of his time on Mack and Volvo, it is reasonable to conclude that MWTC could have achieved close to its objective of 33 sales for 2015. Finally, MWTC agreed that there was business or sales available to it when it signed its Annual Dealer Reviews with the sales and inventory objectives, and in its 2013 Business Plan, suggested that there was sufficient business available to it such that it could achieve 24 to 48 Hino truck sales in 2014. Notwithstanding its admission of poor performance and setting its own goals in the business plan, MWTC again failed to meet its obligations. This factor tends to establish good cause to terminate under Subsection 13-14-305(1)(a).

6. In considering Subsections 13-14-305(1)(a) and (b), the Board found that MWTC has made only a nominal investment in the Hino franchise. MWTC put up some Hino signs in its facility, and it has trained some staff members in Hino sales and services. Otherwise, MWTC already had a facility from which it sold Volvo and Mack trucks when it acquired the Hino franchise. It has not put much effort into online advertising, as only one of its websites even mentions the Hino brand. MWTC's "Hino-dedicated salesperson" is more dedicated to the Volvo and Mack brand. After weighing the evidence, the Board determined that factors 13-14-305(1)(b) and (c) tended to establish good cause.

7. The Board concluded that termination of the Hino franchise would not injure the public. Due to its practices, MWTC has very few current local Hino customers who would need any service. These few customers may be inconvenienced for a short time while a new Hino franchise is established in the relevant market area, but it is expected that the public will benefit from a dealership that puts its focus on the Hino brand. Thus, good cause is established under Subsection 13-14-305(1)(d).

8. There was little evidence presented by Hino about MWTC's sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably serve the franchise consumers. Good cause was not established under Subsection 13-14-305(1)(e).

9. No evidence was presented that MWTC failed to honor warranties, such that good cause was not established under Subsection 13-14-305(1)(e).

10. The next factor was most critical to the Board in establishing good cause to terminate: MWTC's failure to substantially comply with reasonable and material terms of the franchise agreement. MWTC argued that its minimum sales and inventory requirements were unreasonable, established unilaterally without input from MWTC, and based on an unfair formula. MWTC has also argued that the objectives were high given that Utah has a preference for domestic trucks with more horsepower and with four-wheel drive. However, the evidence indicates that the District Sales Managers met several times a year with MWTC management, that there was open communication with MWTC, and that MWTC had an opportunity in its Annual Dealer Reviews to state any objections to the methodology used in calculating the sales and inventory objectives or the consideration of any local customer preferences. No objections were ever stated. In

preparing its Business Plan in 2013, MWTC even went so far as to establish its own sales objectives for 2014 at 24 to 48 trucks, which was more than the 33 sales set by Hino at the next annual review with MWTC.

11. Moreover, MWTC clearly admits its failure to meet the objectives for several years, but believes its failures should be forgiven in light of the loss of Alsco as a client and the illness of MWTC's lead salesperson. While the illness and death of MWTC's staff member was indeed tragic, neither that nor the loss of Alsco as a client excuses MWTC's failure to meet its sales and inventory objectives. MWTC has admitted it made some poor business decisions in relying on only the Alsco account, and not hiring another salesperson right away when its primary salesperson became ill, but those matters occurred in 2013. Hino waited to receive the benefit of its bargain through 2014 and 2015, and MWTC still has not performed as promised. Now in 2016, Hino has established good cause under Subsection 13-14-305(1)(g). As the Board has previously held, a franchisee has a responsibility for its business model and for executing on that business model. It was imperative for MWTC to object to the sales and inventory objectives set by Hino if MWTC felt they could not be achieved.

12. The Board does not find MWTC's failures in this case to be in bad faith. MWTC was negligent, but it did not engage in bad faith. Good cause has not been established under Subsection 13-14-305(1)(h).

13. No evidence was presented regarding any prior misrepresentations by MWTC in applying for a franchise or the transfer of any ownership or interest in the franchise, and good cause has not been established based on Subsections 13-14-305(1)(i) and (j).

14. In summary, the Board found that the totality of the factors in Section 13-14-305(1) weigh in favor of terminating MWTC's franchise.

RECOMMENDED ORDER

For the foregoing reasons, the Utah Motor Vehicle Franchise Advisory Board recommends that the protest of MWTC be denied along with its request for an award of damages and award of costs and attorney's fees. Hino has established that there is good cause for terminating MWTC's franchise. Subsection 13-14-301(1)(c) sets forth that Hino may not terminate the franchise unless Hino is willing and able to comply with its repurchase obligations in Section 13-14-307. Further, any termination is not effective until the applicable appeal period lapses. Subsection 13-14-301(3)(b).

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 18th day of July, 2016 for her review and action.

Dated this 18th day of July, 2016.

Masuda Medcalf

Masuda Medcalf, Administrative Law Judge
Department of Commerce