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

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IN THE MATTER OF  
A PROTEST REGARDING  
TERMINATION OF FRANCHISE

**RockRiver, L.L.C.,**

Protestor,

vs.

**American Honda Motor Co, Inc.,**

Respondent.

**ORDER PARTIALLY VACATING  
WITHOUT PREJUDICE THE  
ORDER DENYING PROTEST  
DATED JUNE 17, 2004**

Case No. Powersport-2003-002

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Background

This proceeding was initiated by protestor RockRiver's protest and request for a hearing challenging respondent Honda's termination of its franchise agreement. One of the issues that arose in the course of the proceeding was whether or not Section 7 of the Performance Agreement between RockRiver and Honda was enforceable. That section provided that if certain representations made by RockRiver were ever found to be inaccurate, or if RockRiver were to breach its covenants that Richard Eggett shall not

have any involvement, directly or indirectly, in the ownership, management or business operations of RockRiver or the dealership, Honda could at its sole election terminate the franchise agreement.

Section 7 also provided that such termination of the franchise agreement could be done without further notice from or additional action by Honda. It also provided as follows:

Rock River waives any right to any additional notice that may be provided for by the Vehicle Act, the Powersport Act, the Sales and Service Agreements or any other law or agreement and Rock River hereby expressly waives any rights it may have to challenge such a termination whether provided for in the Vehicle Act, the Powersport Act, the Sales and Service Agreements or any other law or agreement.

RockRiver has argued in this proceeding that these just-quoted waiver provisions (the “waiver provisions”) were illegal and violated the Powersport Act. (That Act provides in Utah Code Ann. §13-35-301(3) that a franchisor may not terminate the franchise without giving 60 days notice to the franchisee, and it provides that the franchisee may apply to the Board for a hearing on the merits. In the event of such a protest, the Act provides that the termination of the franchise may not become effective until final determination of the issue by the Board and the applicable appeal period has lapsed.) Honda, on the other hand, has argued that the waiver provisions should be enforced, that RockRiver should be found to have waived its right to notice prior to termination and the right to a hearing before the Board, and that Honda should be permitted to terminate the franchise.

Whether the waiver provisions were enforceable was a major issue for determination by the Board in resolving this protest proceeding between RockRiver and Honda.

On June 17, 2004 the Executive Director of the Department of Commerce issued an Order Denying Protest in this proceeding. That order adopted, with some modification, the Findings of Fact, Conclusions of Law and Recommended Order that were issued that same day by the Board. In issuing the Order Denying Protest, the Executive Director concluded, among other things, that the waiver provisions in the Agreement were not reasonable because they violated the Powersport Act. Accordingly, the Executive Director afforded RockRiver the procedural protections offered by the Powersport Act, notwithstanding the waiver provisions which purported to negate those protections. The Executive Director then went on to ultimately decide as a substantive matter that Honda had demonstrated a proper basis for terminating the franchise, and thus RockRiver's protest was denied.

The Order Denying Protest went one step further. In addition to resolving the protest proceeding between RockRiver and Honda, the Executive Director found pursuant to Utah Code Ann. §13-35-106(1) that by requiring RockRiver to waive its rights under the Powersport Act, Honda had violated Utah Code Ann. §13-35-201(1)(e). Consequently, the Executive Director ordered Honda to pay an administrative fine of \$25,000.

Prior to the issuance of the Order Denying Protest, the Board and the

Department did not provide Honda with any formal notice that they intended to take administrative enforcement action against Honda in this proceeding pursuant to Utah Code Ann. §13-35-106.

On July 19, 2004, Honda filed a Petition for Partial Judicial Review of Informal Adjudicative Proceeding, challenging the agency actions to the extent they imposed a fine against Honda for alleged violation of the Powersport Act. That petition was filed in the Second District Court, Davis County, State of Utah, and was designated as Case No. 040700371. Prior to the issuance of this Order Partially Vacating Without Prejudice the Order Denying Protest Dated June 17, 2004, the District Court remanded the case to the Agency for the purpose of issuing this order.

#### Reasoning and Order

Section 13-35-106(2) of the Utah Code provides that prior to assessing a fine, the Executive Director shall comply with the Administrative Procedures Act, except in emergency situations. The Administrative Procedures Act provides that absent emergency circumstances, an agency must provide a notice of agency action to a person against whom it plans to take action. Utah Code Ann. §63-46b-3(1)(a).

In this case, the Agency inadvertently failed to provide Honda with a notice of agency action indicating its intention to take administrative enforcement action against it under Utah Code Ann. §13-35-106(1). Accordingly, although there was no procedural impediment to the Executive Director making any findings and issuing any orders

necessary to resolve the protest proceeding between RockRiver and Honda, it was error to make any findings or issue any orders that should properly be part of an administrative enforcement action against Honda, and this includes the assessment of a fine against Honda. It is appropriate for the Executive Director to issue the following order, correcting that error.

Therefore, it is ordered as follows:

1. To the extent the Order Denying Protest found that by requiring RockRiver to agree to the waiver provisions, Honda committed a violation of the Powersport Vehicle Franchise Act and is subject to a fine pursuant to Utah Code Ann. §13-35-106(1), the Order is vacated.

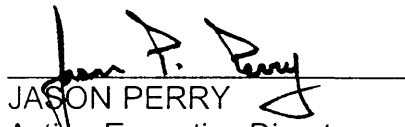
2. To the extent the Order Denying Protest imposed an administrative fine against Honda, the Order is vacated.

3. This partial vacation of the Order Denying Protest is being done without prejudice to the Agency's ability to commence an administrative enforcement proceeding against Honda to determine whether by requiring RockRiver to agree to the waiver provisions, Honda committed a violation of the Powersport Vehicle Franchise Act and should be assessed a fine pursuant to Utah Code Ann. §13-35-106(1). It is also being done without prejudice to any arguments that Honda may make or defenses that Honda may assert in the event of an administrative enforcement proceeding.

4. This partial vacation of the Order Denying Protest is limited to those aspects which constituted an administrative enforcement proceeding against Honda.

This means, among other things, that the portion of the Order Denying Protest which found that the waiver provisions in the Agreement were not reasonable because they violated the Powersport Act and that RockRiver should be afforded the procedural protections offered by the Powersport Act notwithstanding the waiver provisions, is not affected by this partial vacation of the Order Denying Protest.

DATED this 5<sup>th</sup> day of January, 2005.

  
JASON PERRY  
Acting Executive Director  
Department of Commerce

#### **NOTICE OF RIGHT TO APPEAL**

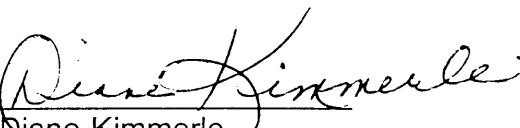
Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order Partially Vacating Without Prejudice the Order Denying Protest Dated June 17, 2004. Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois 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 63-46b-13.

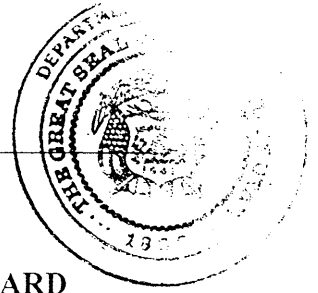
CERTIFICATE OF MAILING

I certify that on the 5<sup>th</sup> day of January, 2005, I mailed a true and correct copy of the foregoing by certified and first class mail, postage prepaid, to the following persons at the following addresses:

Greggory J. Savage  
Richard D. Flint  
Attorneys for Honda  
299 South Main Street, Suite 1800  
Salt Lake City, UT 84111-2263

Brent O. Hatch  
Mark R. Clements  
Attorneys for RockRiver  
10 West Broadway, Suite 400  
Salt Lake City, UT 84101

  
Diane Kimmerle  
Administrative Assistant



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**RockRiver, L.L.C.**

Protestor,

vs.

**American Honda Motor Co.,  
Inc.,**

Respondent.

**ORDER DENYING PROTEST**

Case No. Powersport-2003-002

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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, but modified as follows:

- a. the Board's findings and conclusions that Respondent has established good cause to terminate the dealership is hereby adopted;
- b. the Board's findings and conclusions that Respondent violated the Utah Powersport Vehicle Franchise Act's provisions is hereby adopted;
- c. the Board's recommendation of a \$50,000 fine against Respondent is reduced to \$25,000.

The Executive Director recognizes the seriousness of Respondent's violations. However, there are mitigating factors in this case in that Protestor in fact filed a protest

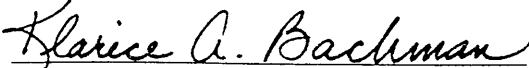


and request for a hearing before the Powersport Board and Respondent agreed to continue Protestor's franchise pending the results of this proceeding. Although Protestor alleged some damages as to products not received after the notice of termination and prior to Respondent's agreement to preserve the status quo, Protestor did not quantify those damages. Furthermore, it is likely that any such damages have been outweighed by Protestor's ability to continue in the franchise dealership while this matter has been pending.

Therefore, it is ordered that American Honda Motor Co., Inc. has established good cause to terminate the franchise of RockRiver, L.L.C. Accordingly, RockRiver's protest is hereby denied. The franchise shall be terminated within 60 days of the date of this Order Denying Protest. The parties shall comply with their respective duties upon termination as established in the Powersport Act, the parties' Performance Agreement and their Sales and Service Agreements.

Respondent is hereby fined \$25,000. Respondent shall pay that amount to the Utah Department of Commerce no later than 30 days after the date of this Order Denying Protest.

**DATED** this 17<sup>th</sup> day of June, 2004.

  
Klarice A. Bachman, Executive Director  
Department of Commerce

#### **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 Denying Protest.

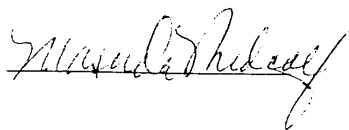
Any Petition for Review must comply with the requirements of Sections 63-46b-14 and 63-46b-15, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeois v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order on Review pursuant to Section 63-46b-13.

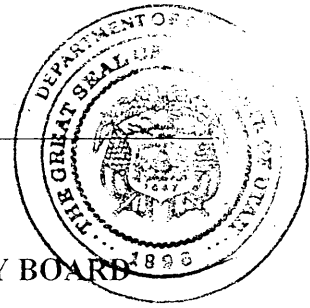
### CERTIFICATE OF MAILING

I certify that on the 7<sup>th</sup> day of June, 2004, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Order Denying Protest by certified mail and by facsimile to:

Brent O. Hatch, Esq.  
Mark R. Clements, Esq.  
HATCH, JAMES & DODGE  
10 West Broadway, Suite 400  
Salt Lake City, UT 84101  
Fax: (801) 363-6666

Greggory J. Savage, Esq.  
Richard Flint, Esq.  
Holmes, Roberts & Owen  
299 South Main Street, Suite 1800  
Salt Lake City, UT 84111-2263  
Fax: (801) 521-9639





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Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, and  
RECOMMENDED ORDER**

Case No. Powersport-2003-002

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**INTRODUCTION**

This matter was filed with the Utah Motor Vehicle Franchise Advisory Board ("Motor Vehicle Board") and the Utah Powersport Vehicle Franchise Advisory Board ("Powersport Board") within the Department of Commerce upon a protest and request for a hearing by RockRiver, LLC ("Protestor"), challenging the termination by American Honda Motor Co., Inc., ("Respondent"), of its Franchise Agreement ("Agreement").

On April 2, 2004, Respondent filed a motion to dismiss this proceeding on the grounds that Protestor had contractually waived its rights to a hearing before the Motor Vehicle Board and Powersport Board. In the alternative, Respondent asked that due to passage of House Bill 292 in the 2004 Legislative Session, the hearing should be held solely before the Powersport Board. Respondent's Motion was partially granted and a hearing was subsequently held solely before the Powersport Board on May 18, 2004.

At the hearing, the parties were represented by counsel as follows: Protestor was represented by Brent Hatch and Mark Clements; Respondent was represented by Gregory Savage and Richard Flint. Members of the Board present for the hearing were: Jason Perry, Deputy Director of the Department of Commerce and Board Chair; Glen Zumwalt; Paul Weller; Don Wood; and Robert Mousaw.

The Board members reviewed the pleading and exhibits submitted by the parties prior to the hearing. All exhibits were admitted except for Respondent's Exhibit No. 25, a videotape which Respondent withdrew at the beginning of the hearing. 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 submits the following Recommended Order for review and action by the Executive Director of the Department of Commerce.

**FINDINGS OF FACT**

1. Respondent manufactures and sells Powersport vehicles, including motorcycles, motor scooters and all terrain vehicles ("ATVs"). Respondent utilizes a distribution system made up of independent retail dealers to engage in sales of its powersport vehicles directly to consumers.
2. In 2001, Respondent had a franchise agreement with Centerville Motor Sports, L.L.C. ("CMS"), under which CMS operated Honda of Centerville/Bountiful. As a precondition to the franchise agreement, CMS had agreed to relocate the dealership to a

larger facility. Subsequently, Respondent gave CMS notice to terminate the franchise agreement due to CMS's failure to timely relocate to a larger facility. Soon after, Respondent and CMS resolved the matter by stipulating that if CMS did not relocate or transfer its dealership to a third party satisfactory to Respondent, the franchise agreement between CMS and Respondent would be terminated.

3. In September 2002, CMS attempted to transfer the dealership to Protestor. Protestor's application for a dealership was rejected by Respondent because Respondent believed that Mr. Richard Eggett, then a principal of Protestor, had been selling bootleg products.<sup>1</sup> CMS filed a protest and request for a hearing before the Powersport Board, Respondent subsequently filed an action in the U.S. District Court for the District of Utah, and the parties stipulated to stay agency proceedings pending the resolution of the federal court case. The federal case and the agency proceedings were later dismissed due to the parties' settlement negotiations. Thus, CSM terminated its relationship with Respondent.

4. On July 3, 2003, Respondent and Protestor entered into a Performance Agreement ("Agreement"), followed by three sales and service agreements ("SSAs") executed on July 18, 2003. As a result of these agreements, Protestor became a franchise dealer for Respondent, authorized to sell motorcycles, motor scooters, and ATVs.

5. Respondent's acceptance of Protestor as a franchise dealer was conditioned on the representations and warranties of Protestor that Mr. Eggett would not be involved in any part of the business. Section E in the Recitals states:

As a condition to Rock River being approved as a Honda dealer and as a continuing condition to Rock River continuing to act as a Honda dealer,

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<sup>1</sup> Bootlegging or sales of bootleg products in these Findings of Fact, Conclusions of Law and Recommended Order refers to the sales of new powersport vehicles without Respondent's authorization.

Rock River has represented to Honda that Richard Eggett shall not be employed by or have any involvement, directly or indirectly, in the ownership management or business operations of Rock River or the Dealership.

6. Section 6 of the Agreement further describes the types of activities in which Mr. Eggett was not to be involved:

Rock River agrees and expressly warrants to American Honda that Richard Eggett is not and will not be employed by Rock River or the Dealership and that he does not and shall not have any involvement, directly or indirectly, in the ownership, management or business operations of Rock River or the Dealership. This includes, but is not limited to, the following:

- (a) Richard Eggett shall not, directly or indirectly, be a member of Rock River nor shall Mr. Eggett, directly or indirectly, have any ownership or pecuniary interest in any member of Rock River. Richard Eggett shall not, directly or indirectly, have any ownership interest in the Dealership or any other interest, pecuniary or otherwise, in the profitability or financial success of the Dealership.
- (b) Richard Eggett shall have no control or input whatsoever into the management or daily operations of the Dealership and Rock River shall not knowingly allow Mr. Eggett to represent to any third party that he is in any way associated with the Dealership. Rock River shall not provide Mr. Eggett or any business associated with Mr. Eggett with any confidential or proprietary information with respect to the Dealership, Honda or any Honda products and Rock River shall not allow Mr. Eggett to use its name or the name of the Dealership to obtain any such information or attend Honda sponsored meetings such as conventions or any meetings of Honda dealers. For purposes of this Agreement, a business associated with Mr. Eggett is one in which he, directly or indirectly, holds an ownership or pecuniary interest or otherwise has any interest in the profitability or financial success of the business.
- (c) The only relationship that may exist between Rock River or the Dealership and Richard Eggett or any business associated with Mr. Eggett is that of vendor and customer and then such relationship must be only upon terms that would be no better than those provided to another similarly situated customer. In the event that Rock River or the Dealership sell any Honda products to Mr. Eggett or any business associated with Mr. Eggett, such products shall not be resold by Rock River or the Dealership unless at least six (6) month have passed since the date of original sale and during such time the product has experienced significant usage.
- (d) No business associated with Richard Eggett shall operate from the Dealership's location and no promotional materials of any type for any

business associated with Richard Eggett shall be placed at the Dealership's authorized location or otherwise be available from the Dealership.

Moreover, no business entity other than Rock River shall conduct any rental business from the authorized Dealership location.

(e) No business associated Mr. Eggett shall have its name in any promotional or marketing materials associated with the Dealership including sponsorship of any team or event or on any web site or signage whether at the Dealership's authorized location or elsewhere. No Honda marks shall be used in connection with any business associated with Mr. Eggett nor shall any Honda marks be used other than in connection with the authorized Dealership location.

(f) No new Honda product ordered by or delivered to Rock River or the Dealership shall be sold from any location occupied by any business associated with Richard Eggett...

(g) Rock River and the Dealership shall only sell new Honda products to end users and shall deliver such products to the end user at the authorized Dealership location. Neither Rock River nor the Dealership shall knowingly allow any business associated with Richard Eggett to act as a resale point of new Honda products. Rock River shall fully cooperate with American Honda in any efforts to prevent illegal sales of new Honda products.

(h) The ownership and management of Rock River and the Dealership is as set forth in the dealership application and any changes in ownership or management shall be authorized by American Honda as provided for in the Sales and Service Agreements.

7. Section 7 of the Agreement contains the following waiver provision:

American Honda has relied on the representations and covenants set forth in Section 6 in making its decision to reconsider Rock River's dealer application and to approve Rock River as a dealer. In consideration of this fact and for the avoidance of doubt, Rock River hereby expressly agrees that in the event that any representation is found at any time to be inaccurate or Rock River breaches its covenants that Richard Eggett shall not have any involvement, directly or indirectly, in the ownership, management or business operations of Rock River or the Dealership, American Honda, at its sole election, may terminate any Sales and Service Agreements under which Rock River is operating the Dealership and any other agreements between Rock River and American Honda. In such event, Rock River acknowledges that the Sales and Service Agreements or any other such agreements shall terminate without further notice from or additional action by American Honda. Rock River waives any right to any additional notice that may be provided for by the Vehicle Act, the Powersport Act, the Sales and Service Agreements or any other law or agreement and Rock River hereby expressly waives any rights it may have to challenge such a termination whether provided for in the Vehicle Act,

the Powersport Act, the Sales and Service Agreements or any other law or agreement.

The Agreement also contained a waiver provision as to any dispute that might subsequently arise relating to Protestor's agreement to relocate the dealership to a permanent location.<sup>2</sup>

8. As to conflicts between the Agreement and the SSAs, Section 9 of the Agreement states, "In the event of any conflict between this Agreement and any Sales and Service Agreement, whether now existing or entered into in the future, this Agreement is controlling."

9. The Agreement provisions regarding Mr. Eggett's involvement were fully negotiated between the parties. Protestor was aware that Respondent did not wish to have Mr. Eggett involved in any way with Protestor's dealership. Respondent made its concerns clear as early as November 21, 2002, when Respondent first denied CMS's proposed transfer to Protestor. In a letter dated February 26, 2003, Protestor's counsel confirmed to Respondent that Mr. Eggett had been removed from the company, and requested a meeting to discuss any additional requirements that Respondent might attach to the purchase of the franchise. Thereafter, Protestor submitted an amended application on March 13, 2003. The amended application did not contain Mr. Eggett's name as

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<sup>2</sup> Paragraph 2 of the Agreement provides in pertinent part:

In the event that Rock River does not (i) relocate the Dealership to the Permanent Location by midnight...shall thereafter have twenty (20) days to remedy the default...If Rock River fails to remedy the first default or receives notice of any default after the first default, American Honda, at its [sic] sole election may terminate any Sales and Service Agreements under which Rock River is operating...Rock River acknowledges that the Sales and Service Agreements shall terminate without further notice...Rock River waives any right to any additional notice that may be provided for by the Utah New Automobile Franchise Act...the Utah Powersport Vehicle Franchise Act, the sales and Service Agreements or any other law or agreement...In consideration for the additional time provided hereunder to relocate the Dealership and for the avoidance of doubt, Rock River hereby expressly waives any rights it may have to challenge such a termination whether provided for in the Vehicle Act, the Powersport Act, the Sales and Service Agreements or any other law or agreement.



either a principal or an employee. A meeting was held in June 2003 between counsel for the parties, at which time Respondent's counsel provided a draft of the Agreement. Protestor did not sign the Agreement at that meeting, but took an additional week to consider the provisions. Based upon Protestor's requests for modification, Respondent modified Section 6(c), allowing Protestor to engage in a typical vendor/customer relationship with Mr. Eggett, and Section 6(d) regarding rental businesses.

10. Protestor had other options available and was not forced to execute the Agreement if it did not wish to be bound by the provisions in Section 6(c) regarding Mr. Eggett. Protestor could have chosen to proceed with the federal action initiated by Respondent and, through CMS, could have proceeded with the administrative agency action initiated by CMS. Pursuant to Section 8.2 of the Asset Purchase Agreement executed between Protestor and CMS on September 11, 2002, Protestor could terminate the agreement if Respondent rejected Protestor's application to become an authorized dealer. If such termination occurred, under Section 8.4, CMS was required to return amounts paid by Protestor.

11. In August 2003, Respondent conducted an investigation after receiving information that Protestor had been in breach of the Agreement. Based upon the information gathered, Respondent determined that Protestor had been in continuous breach of the Agreement relating to Mr. Eggett. Respondent notified Protestor on August 29, 2003, of its intent to terminate the Agreement and demanded that Protestor cease all activities as a franchise dealer within 20 days from the date of Respondent's notice.

12. On September 17, 2003, Protestor filed a request for agency action pursuant to the Powersport Vehicle Franchise Act ("Powersport Act"), challenging the Respondent's termination of the Agreement.

13. Protestor suffered damages from August 29, 2003, until September 23, 2003, when Respondent agreed to preserve the status quo such that the franchise agreement would remain in force pending the outcome of these proceedings. Protestor's damages related to Respondent's failure to deliver products to Protestor. Protestor, however, has not quantified those damages.

14. Protestor made a significant and permanent investment in its dealership, including time and resources in training employees, professional fees, equipment, fixtures, merchandise, supplies and inventory. There was no evidence presented as to any consumer complaints against Protestor, nor was there evidence that Protestor was not performing adequately in sales and service scores. Although the parties' goals at the time the Agreement was executed was to relocate Protestor's dealership to a different location, there was no evidence presented at the hearing that the current dealership facilities were not adequate.

15. Bikesellerz.com ("Bikesellerz") is an Internet based business that advertises and sells used and new motorcycles and other powersport vehicles. Mr. Eggett admitted he is a principal of Bikesellerz. Bikesellerz is a dba of Wasatch Recreation. Wasatch Recreation is owned by Richard Eggett.

16. After Protestor and Respondent entered into the Agreement, Bikesellerz placed and continued until the date of the hearing to place used powersport vehicles on

consignment at Protestor's dealership location. Bikesellerz paid Protestor fees and commission for selling the used powersport vehicles.

17. Advertising and promotional materials connected Bikesellerz to Protestor's dealership. Even as of the week prior to the hearing, Bikesellerz advertised the sale of a new Honda motorcycle; the advertisement instructed those interested to contact Monica at Protestor's dealership. Monica, and other employees of Protestor, wore T-shirts or other clothing bearing the Bikesellerz logo. Bikesellerz logos and other promotional materials also appeared throughout the dealership facility and on signage outside the facility.

18. Mr. Eggett did not completely discontinue his involvement in the day-to-day functioning of the dealership after Protestor and Respondent had entered into the Agreement. He was often physically present at the dealership to answer questions raised by Protestor's employees, and when not physically present, he was available by telephone.

19. There was no evidence from which the Board could find that a transition period was contemplated by the parties in executing the Agreement.

### **CONCLUSIONS OF LAW**

1. Respondent claims Protestor was engaged in fraudulent inducement because Protestor always intended to keep Mr. Eggett in the business yet induced Respondent to enter into the Agreement under the pretense that Mr. Eggett would not be involved in the business. Therefore, Respondent asks the Board to rescind the Agreement based upon Protestor's fraudulent inducement. Respondent further claims that Protestor knowingly and voluntarily entered into the Agreement, and that the waiver

provisions of the Agreement should be enforced. Finally, Respondent maintains that Protestor breached the Agreement, that it acted in bad faith, and that it made misrepresentation in the franchise application.

2. Protestor, on the other hand, maintains that the Agreement was not a negotiated contract, that Protestor was forced to sign the Agreement and its waiver provisions in order to obtain the dealership. Protestor asserts that in its attempts to protect its investments and the welfare of its employees, and to avoid a potential lawsuit with CMS, it had no other option but to “reluctantly” enter into the Agreement despite its “unreasonable” provisions regarding Mr. Eggett. Further, Protestor argues that the waiver provisions were illegal and violated the Powersport Act.

3. The Board declines to consider Respondent’s fraudulent inducement claim. The elements of fraudulent inducement were discussed in the case of *Condor v. A.L. Williams & Assoc., Inc.*, 739 P.2d 634, 637 (Utah Ct. App. 1987). Even assuming the Board were to find it had authority to consider a fraudulent inducement claim in a protest of dealership termination and that Respondent proved all the elements of fraudulent inducement, the Board does not have authority to grant the remedy of rescission. Rescission is an equitable remedy that attempts to return the parties to the status quo. *Anderson v. Dooms*, 2003 UT App 241, ¶11; 75 P.3d 825 (“the status quo rule...is equitable, and requires practicality in adjusting the rights of the parties”) (citations omitted). An administrative agency cannot grant equitable remedies, and is instead charged with administering the statutes from which it obtains its authority. *Bevans v. Indus. Comm’n*, 790 P.2d 573, at 576 (Utah App. 1990) (holding that the

Industrial Commission is not a court of equity, but a statutorily-created agency that has only those powers expressly or impliedly granted to it by the legislature.)

4. Therefore, even if Protestor were found to have engaged in fraudulent inducement, the Board could not rescind the Agreement. Rather, the Board must analyze this case according to the Powersport Act and its provisions regarding a dealership termination protest, and must subsequently apply the remedies available therein.

5. Under the Powersport 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 13-35-105.

Utah Code Ann. § 13-35-301(1). In addition, prior to the expiration of the 60 days, the franchisee may apply to the Powersport Board for a hearing on the merits, and if so requested, the termination is not effective until final determination of the issues by the Board. Subsection 13-35-301(3).

6. 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 powersport vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the needs of the consumer for the new powersport 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 board to be reasonable and material and 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 board to be reasonable and material and 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 board; and
- (k) any other factor the board considers relevant.

Utah Code Ann. § 13-35-305.

#### **Part I – Good Cause for Termination Established**

7. There was little or no evidence presented by Respondent as to the factors identified in Subsections 13-35-305(1)(a) - (f), and (j). Evidence presented by Protestor indicated that Protestor had made a significant and permanent investment in the dealership, such efforts going back to 2002 when Protestor managed the dealership under a management contract with CMS, and continued in its efforts to obtain financing despite Mr. Eggett's removal from the business and efforts to secure a new facility for the dealership. Protestor appears to be performing adequately in sales and services; no customer complaints were noted; and Respondent admitted that there is an adequate market in the Bountiful/Centerville area for a Honda powersport dealership. Therefore, as to evidence presented by the parties with respect to the factors identified in Subsections 13-35-305(1)(a) - (e), Respondent has failed to establish good cause for termination of the franchise. No evidence was presented by the parties as to Subsections

13-35-305(1)(f) (regarding warranties) and (j) (regarding a transfer of ownership interest). Therefore, no good cause to terminate was established as to these factors.

8. Respondent has, however, established good cause for termination of the franchise pursuant to the factors identified in Subsection 13-35-305(1)(g) - (i). Protestor failed to comply with the reasonable and material provisions of the franchise agreement, engaged in bad faith, and made misrepresentations in applying for the franchise.

9. Under Subsection 13-35-305(1)(g), a franchisor can establish good cause for termination if the franchisee fails to comply with those requirements of the franchise agreement that are determined by the Board to be reasonable and material. Respondent claimed that Protestor had failed to comply with Section 6 of the Agreement (which prohibited Mr. Eggett's involvement in the dealership) and Section 7 (which waived Protestor's rights to notice prior to termination and the right a hearing before the Powersport Board). The Board concludes that the provisions in Section 6 as to Mr. Eggett's involvement in Protestor's business are both reasonable and material. However, as addressed in Part II of these Findings of Fact, Conclusions of Law and Recommended Order, the Board concludes that the waiver provisions in Section 7 are not reasonable and cannot be enforced.

10. Utah law generally recognizes the parties' freedom to contract. *Uintah Basin Med. Ctr. v. Hardy*, 2002 UT 92, ¶ 20, note 7, 54 P.3d 1165; *Averett v. Grange*, 909 P.2d 246, 253 (1995) ("freedom of contract generally allows the parties to structure their relationship as they see fit"). In this case, Protestor was represented by counsel, whose advice Protestor's principal testified to be adequate. Protestor had an opportunity to consider a draft of the Agreement for at least one week prior to its execution; Protestor

in fact garnered some modifications in the Agreement. Protestor had the option of continuing with the federal court case and/or a hearing before the Board. Finally, Protestor knew since 2002 that Respondent did not want Mr. Eggett involved in the dealership. Under these circumstances, Protestor freely entered into the provisions in the Agreement regarding Mr. Eggett's involvement. Although there was insufficient evidence supporting Respondent's belief that Mr. Eggett had been selling bootleg products of Respondent, the Board finds that the bootlegging issue is not relevant to the parties' right to freely enter into contractual relationships. Protestor agreed that Mr. Eggett would not be involved in the dealership and should be held responsible for its later breach of this condition.

11. Protestor failed to comply with the requirements in Section 6 of the Agreement in that it allowed Bikesellerz to operate out of the dealership location. Protestor argued that its relationship with Bikesellerz was permitted under Section 6(c), because that relationship was nothing more than a consignment arrangement. The parties disputed what constitutes a consignment relationship, but Section 6(c) does not refer in any way to consignments. It states only that Protestor may engage in a typical vendor/customer relationship.

12. In any case, whether Protestor's relationship was a consignment relationship, and whether such relationship was in fact permitted under Section 6(c) is not relevant because Protestor violated other provisions in Section 6 by allowing the sales of powersport vehicles owned by Bikesellerz to occur at the dealership facility. Section 6(d) specifically prohibits the "operation" of any business associated with Mr. Eggett from Protestor's dealership location. Mr. Eggett is an owner of Bikesellerz, and powersport



vehicles owned by Bikesellerz were sold from the dealership location. The Board concludes that whether by “consignment” or otherwise, the sale of Bikesellerz powersport vehicles from the dealership location constitutes the operation of a business associated with Mr. Eggett.

13. Protestor argues that a complete removal of Mr. Eggett from the business operations of the dealership was not practical and that a transition period was necessary. However, the Agreement between Protestor and Respondent does not address a transition period. If a transition period was in fact necessary, Protestor should have requested and obtained language to that effect in the Agreement. Protestor had an opportunity to review the Agreement and to obtain the modifications regarding rental vehicles and a vendor/customer relationship between Protestor and Mr. Eggett. There was no evidence presented that Protestor requested such a transition period, but was for some reason denied. Therefore, the Board finds Protestor’s arguments regarding a transition unpersuasive.

14. Protestor also violated Section 6(e) of the Agreement, which prohibited any business associated with Mr. Eggett from having its “promotional or marketing materials associated with the Dealership including sponsorship of any team or event *or on any web site or signage whether at the Dealership’s authorized location or elsewhere*”. (Emphasis added). The Bikesellerz logo appeared on stickers and other promotional signs throughout the dealership facility and on signs outside the building. Protestor claims that it also has the promotional stickers and signs of other customers. Even if that were true, Protestor was bound by its contractual agreement with Respondent not to advertise or display the promotional materials of any business associated with Mr.

Eggett, including Bikesellerz. In addition, the Bikesellerz web site specifically referred potential customers to Protestor's dealership.

15. Protestor engaged in bad faith in failing to comply with the Agreement under Subsection 13-35-305(1)(h). Protestor believed that the waiver provisions were not enforceable due to the advice of its counsel. Protestor had the opportunity to raise its concerns regarding the illegality and unenforceability of the waiver provisions in negotiations with Respondent. It also had the option of going before the federal court and the Powersport Board to resolve their disputes. However, Protestor chose to sign an agreement containing provisions it believed to be illegal. The Board finds such conduct to be bad faith on the part of Protestor.

16. Protestor also engaged in misrepresentations in applying for a franchise. The application fails to mention that Mr. Eggett would be involved in the dealership business either as a principal or as an employee, yet Mr. Eggett assisted Protestor's employees in conducting dealership business. Testimony established that at the time the Agreement was negotiated, Protestor intended to engage in its consignment relationship with Bikesellerz, but there was no evidence presented that Protestor notified Respondent of such intent. Rather, Protestor negotiated for the provision in Section 6(c) regarding a typical vendor/customer relationship with Mr. Eggett. Had Protestor so notified Respondent, Respondent could have explained to Protestor that a consignment relationship with Mr. Eggett as envisioned by Protestor was not permitted under Sections 6(c), 6(d) and 6(e) of the Agreement.

17. In sum, Protestor had the freedom to contract with Respondent as to Mr. Eggett's involvement in the business, it did so despite its concerns that the waiver

provisions in the Agreement were not enforceable, and despite its bad faith intent to engage in a consignment relationship with Respondent. The Board chooses to give these negative factors significant weight due to their seriousness and finds that the positive factors discussed previously do not outweigh the negative factors. *See Craig Foster Ford, Inc. v. Iowa Dept of Transportation*, 562 N.W.2d 618 (Iowa 1997) (holding that the motor vehicle board need not accord equal weight to the statutory factors.)

## **Part II – Waiver of Rights Is Void**

18. The Board concludes that the waiver provisions in the Agreement were not reasonable because they violated the Powersport Act. A franchisor is prohibited from requiring a franchisee to prospectively agree to waive its rights under the Powersport Act Utah Code Ann. §13-35-201(1)(e) provides:

(1) A franchisor in this state may not:

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(e) require a franchisee to prospectively agree to a release, assignment, novation, waiver, or estoppel that would:

(i) relieve a franchisor from any liability imposed by this chapter; or  
(ii) require any controversy between the franchisee and a franchisor to be referred to a third party if the decision by the third party would be binding;

19. Utah Code Ann. §13-35-301(1) provides a franchisee with a right to 60 days notice prior to the effective date of termination by a franchisor and further provides a right to a hearing before the Powersport Board. Respondent violated Subsection 13-35-201(1)(e) when as a precondition to entering into the SSAs with Protestor, Respondent required Protestor to first enter into the Agreement, Section 7 of which waives Protestor's rights to the 60 day notice and waives Protestor's rights to a hearing before the Powersport Board in the event of termination.

20. Respondent has argued that the waiver provisions are enforceable because they resulted from a settlement negotiation of a prior dispute between the parties and that as such, it is not in the “category of franchise agreements that are regulated by the Powersport and New Vehicle Act.” However, this argument is unavailing. As the witnesses testified and as the terms of the Agreement indicate, execution of the Agreement was a condition precedent to Protestor being approved as a franchisee. The SSAs, Respondent’s franchise agreements with Protestor, were executed just fifteen days after the execution of the Agreement. Furthermore, in the event of a conflict between the provisions in the Agreement and the SSAs, the provisions in the Agreement are controlling. *See* Performance Agreement, Section 9. Thus, Respondent’s attempts to mask the Agreement and call it something other than a franchise agreement must be rejected. Therefore, the Board will treat the Agreement and the SSAs collectively as franchise agreements.

21. Respondent next relies on the case of *Danart v. Snap-on Tools Corp.*, 1984 U.S. Dist. LEXIS 19905 (N.D. Fla. Jan. 31, 1984) in arguing that courts have “routinely upheld” contractual waivers “in the context of settlement agreements”. However, Respondent cited only the *Danart* decision in support of its argument. However, *Danart* is distinguishable from this case, because it involved the waiver of existing claims, where as this case involves the prospective waiver of Protestor’s rights.

22. In *Danart*, the parties stipulated to the termination of a franchise agreement for the sales of Snap-On tools. As part of the stipulation, the dealer and manufacturer agreed to waive any causes of action they had against each other. In a subsequent lawsuit filed by the dealer, the manufacturer filed a motion for summary

judgment based on the waiver. The Court rejected the dealer's argument that the waiver provision was contrary to Section 817.416, Fla. Stat.. (1981) and thus violated Florida public policy. Without discussing the provisions of Section 817.416, the Court held that the waiver did not violate Section 817.416 or Florida public policy. Therefore, there is no indication that Section 817.416 as interpreted by the *Danart* Court was similar in its provisions to a waiver of rights provided in the Powersport Act, particularly in light of an express provision prohibiting the prospective waiver of a franchisor's liability under the Act. A review of the current version of Section 817.416 indicates no similar provision involving a waiver.<sup>3</sup>

23. An independent research of waiver cases indicates that courts reject the prospective waiver of statutory rights as against public policy. In *Schmitt-Norton Ford, Inc. v. Ford Motor Company*, 524 F. Supp. 1099 (D. Minn. 1981), a franchise dealer transferred its franchise to another entity, but before doing so, entered into a general release with the franchisor, releasing all existing corporate and individual claims against the franchisor. 524 F. Supp. at 1102. Subsequently, a dispute arose regarding relocation of the dealership and the dealer filed a lawsuit. The Court held that the general release

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<sup>3</sup> That Section states in pertinent part:

§ 817.416. Franchises and distributorships; misrepresentations

(1) *DEFINITIONS*....

(2) *DECLARATIONS*

(a) It is unlawful, when selling or establishing a franchise or distributorship, for any person:

1. Intentionally to misrepresent the prospects or chances for success of a proposed or existing franchise or distributorship;

2. Intentionally to misrepresent, by failure to disclose or otherwise, the known required total investment for such a franchise or distributorship; or

3. Intentionally to misrepresent or fail to disclose efforts to sell or establish more franchises or distributorships than is reasonable to expect the market or market area for the particular franchise or distributorship to sustain.

(b) The execution or carrying out of a scheme, plan, or corporate organization which violates any of the provisions of this section, if knowledge or intent be proved, shall be a misdemeanor of the second degree, punishable as provided in § 775.082 and 775.083...

the dealer signed did not violate public policy. *Id.* at 1105. It was noted that the Minnesota Franchise Act contained a provision specifically permitting voluntary settlements of disputes, and that only *prospective waivers of rights* were invalid. *Id.* Thus, the dealer's waiver of his existing rights did not violate state public policy under the Minnesota Franchise Act. *Id.* See also *Rochester Ford Sales, Inc. v. Ford Motor Co.*, 287 F.3d 32 (1<sup>st</sup> Cir. 2002) (The Court held that Michigan law prohibited the prospective waiver of rights, which relieves the releasee of all liability for anything he or she does in the future after the release is signed).

24. The Tenth Circuit Court of Appeals has also held that the doctrines of waiver and estoppel generally do not apply to transactions that are forbidden by statute or are contrary to public policy. *American Sur. Co. v. Gold*, 375 F.2d 523, 528 (10<sup>th</sup> Cir. 1966). See also *Tulsa Energy, Inc. v. KPL Prod. Co. (In re Tulsa Energy, Inc.)*, 111 F.3d 88, 89 (10<sup>th</sup> Cir. 1997) ("when a statute contains provisions that are founded upon public policy, such provisions cannot be waived by a private party if such waiver thwarts the legislative policy which the statute was designed to effectuate") (citation omitted).

25. Although the State of Utah has not addressed the waiver of rights provided in the Powersport Act, it has had that opportunity in the area of employment law. In the case of *Druffner v. Mrs. Fields, Inc.*, 828 P.2d 1075 (Utah Ct. App. 1992), the Court of Appeals considered an employee's ability to release his employer from liability for claims arising under the Fair Labor Standards Act ("FLSA"). In that case, the dispute related to a former employee's reimbursement claim for unused vacation days. The employer offered a fixed sum to settle the employee's claim, and the employee accepted, signing a waiver and release agreement waiving all claims arising out of his employment,

including FLSA claims. 828 P.2d at 1075. The employee later filed a complaint for overtime compensation. The District Court entered summary judgment for the employer, finding that the law allows the parties to compromise and settle their disputes. The Court of Appeals reversed.

26. The *Druffner* Court recognized that generally parties are allowed to voluntarily enter into binding contracts. *Id.* at 1080. However, it held that “contracts tending to encourage violation of laws are void as contrary to public policy. *Id.* (citing *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 710 (1945)). The *Druffner* Court found the U.S. Supreme Court’s analysis in *O’Neil* as to mandatory language in the FLSA compelling. With respect to Section 207(a)(1) of the FLSA (requiring that an employer shall not employ a worker longer than the specified time without payment of overtime compensation), the *Druffner* Court stated the following:

This mandatory language demonstrates that an employee may not waive his or her right to overtime compensation. “Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.”

828 P.2d at 1077 (quoting *O’Neil*, 324 U.S. at 704).

27. Applying the *Druffner*, *O’Neil*, and *Gold* opinions along with the franchise cases from other jurisdictions, the Board concludes that the waiver of Protestor’s rights to a hearing before the Board and waiving the sixty-day notice prior to termination of the franchise violated the law and public policy. These rights as guaranteed by the Powersport Act were intended to further the public policies giving rise to the Act, that of preventing unequal bargaining power between franchisors and franchisees and preventing unfair practices by franchisors. These purposes are clearly stated by the Utah State

Legislature in the New Automobile Franchise Act, after which the Powersport Act was modeled. *See* Utah Code Ann. §13-14-101. Furthermore, the Powersport Act specifically prohibits a franchisor from requiring such waivers or releases. Utah Code Ann. §13-35-201(1)(e). Therefore, Respondent violated Subsection 13-35-201(1)(e) by requiring Protestor to waive its rights under the Powersport Act.<sup>4</sup> To find otherwise would be to eviscerate the protections set forth in the Powersport Act.

28. Respondent has argued the Powersport Act was not violated, because Section 7 of the Agreement does not purport to “relieve a franchisor from any liability imposed by this chapter”, claiming that it still intends to comply with the Act’s requirements for buy-back in the event of termination. The Board declines to read the term “liability” as narrowly as Respondent suggests. According to Black’s Law Dictionary, the word “liability” is “a broad legal term. It has been referred to as of the most comprehensive significance, including almost every character of hazard or responsibility. Black’s Law Dictionary, Revised Fourth Edition, p. 1059 (citations omitted). “Liability” includes “the state of one who is bound in law and justice to do something which may be enforced by action.” *Id.* (citation omitted). Thus, the Board concludes that the term “liability” is broad and can include Respondent’s duties to comply with the notice and hearing requirements of the Powersport Act.

29. Upon the finding of a violation, the Board may recommend the assessment of an administrative fine. Utah Code Ann. §13-35-106(1) and (2). In

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<sup>4</sup> A franchisor is also prohibited from requiring a franchisee to enter into an agreement with the franchisor that is unfair or prejudicial to the franchisee, by threatening to cancel a franchise agreement existing between the franchisor and the franchisee. Utah Code Ann. §13-35-201(1)(h). Although the parties did not address this provision, it appears that Respondent’s requirement that Protestor agree to the illegal waiver provisions of the Agreement under threat of termination could also be violative of Subsection 13-35-201(1)(h).



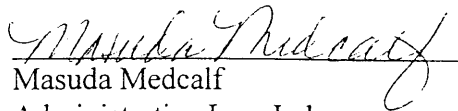
determining the amount and appropriateness of an administrative fine, the Board is required to consider the gravity of the violation, any history of prior violations by Respondent, and any attempt by Respondent to retaliate against the Protestor for seeking relief under the Powersport Act. Subsection 13-35-106(3)(a). Although there is no evidence of prior violations by Respondent or any attempts to retaliate against Protestor, the Board finds that Respondent's violation in requiring the waiver of statutory rights is serious and recommends a fine of \$50,000. The Board believes that a fine in any amount less than \$50,000 would not adequately reflect the magnitude of the violation and might not prevent future violations by Respondent.

## RECOMMENDED ORDER

For the foregoing reasons, the Utah Powersport Vehicle Franchise Advisory Board recommends that the protest be denied. Respondent has established good cause to terminate the franchise dealership due to Protestor's failure to comply with contractual provisions prohibiting Mr. Eggett's involvement with the franchise dealership and its bad faith in that regard, as well as Protestor's misrepresentations that Mr. Eggett would not be involved in the dealership. However, the Board also finds that Respondent's Performance Agreement violates the Powersport Act by requiring Protestor to waive its statutory rights to 60 days notice prior to termination of its franchise and its right to a hearing before the Board to determine whether good cause is established to terminate the franchise. The Board therefore recommends the assessment of a \$50,000 fine against Respondent for such violation.

On behalf of the Utah Powersport Vehicle Franchise Advisory Board, I hereby certify the foregoing Findings of Facts, Conclusions of Law and Recommended Order were submitted to Klarice A. Bachman, Executive Director of the Utah Department of Commerce, on the 17<sup>th</sup> day of June, 2004 for her review and action.

Dated this 17<sup>th</sup> day of June, 2004.

  
Masuda Medcalf  
Administrative Law Judge