



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

IN THE MATTER OF  
A PROTEST REGARDING  
ESTABLISHMENT OF FRANCHISE

**MOUNTAIN TOPPERS, INC.**

Protestor,

vs.

**UNIVERSAL TRAILER CARGO  
GROUP, INC. dba WELLS CARGO  
TRAILERS,**

Respondent.

**ORDER  
SUSTAINING PROTEST**

Case No. NAFA-2018-001

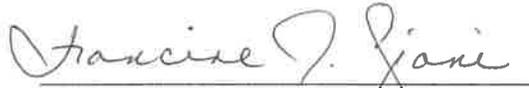
The Findings of Fact, Conclusions of Law and Recommended Order of the New Motor Vehicle Franchise Advisory Board are ratified and adopted by the Executive Director of the Department of Commerce and incorporated with this Order Denying Protest.

It is hereby ordered that Respondent Universal Trailer Cargo Group, Inc. dba Wells Cargo Trailers has failed to establish under the New Automobile Franchise Act, Utah Code Ann. 13-14-101 *et seq.*, that there is good cause for establishing an additional Wells Cargo trailer franchise in the relevant market area of Protestor Mountain Toppers, Inc. Accordingly, the protest is sustained and Respondent's request for permission to establish an additional Wells Cargo trailer franchise at Castle Country RV in Logan, Utah is hereby denied in accordance with Section 13-14-302.

## 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 *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 63G-4-302.

Dated this 30<sup>th</sup> of January, 2018.

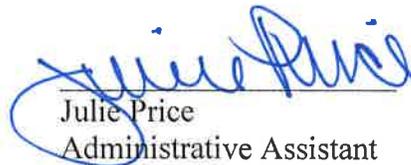
  
Francine A. Gian, Executive Director  
Utah Department of Commerce

## CERTIFICATE OF MAILING

I certify that on the 11th day of January, 2018, the undersigned served a true and correct copy of the foregoing Order Sustaining Protest by electronic and certified mail to:

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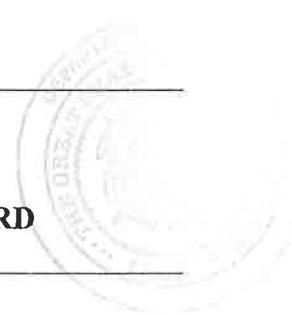
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GROUP, INC. dba WELLS CARGO  
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Respondent.

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

Case No. NAFA-2018-001

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This matter was filed with the Utah Motor Vehicle Franchise Advisory Board ("Board") within the Department of Commerce upon a protest and request for agency action filed by Protestor Mountain Toppers, Inc. ("Protestor") against Universal Trailer Cargo Group, Inc. dba Wells Cargo Trailers ("Respondent").

A hearing was held on January 10, 2018. At the hearing, the parties were represented by counsel as follows: Protestor was represented by John W. Mann; Respondent was represented by Kevin Fezell. Members of the Board present for the hearing were: Thomas Brady, Deputy Director of the Department of Commerce and Board Chair; Kirk Schneider, franchisee member; Brad Brown, recreational vehicle franchisee member; and public members Craig Britter, Ted Boyer and Bruce Jones.

The Board members reviewed the pleadings and exhibits submitted by the parties prior to the hearing. Also prior to the hearing, the parties entered into their Stipulation

Regarding Evidence and Undisputed Facts, which Stipulation is part of the record. The parties waived any objections on the grounds of authenticity, foundation, hearsay, double hearsay, or other grounds regarding Exhibits 1-8 and 20-54. Exhibit 55 was submitted by Protester at the hearing and admitted without objection by Respondent.

**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. Respondent is a manufacturer of trailers, including the cargo trailer brands of Wells Cargo and Haulmark. Wells Cargo is a franchisor that manufactures and distributes enclosed trailers to franchisees.

2. Protestor is a Wells Cargo franchisee in Cache County, Utah, located at 3880 N. Hwy. 91 in Hyde Park. Protestor has been a Wells Cargo franchisee since the mid-1980's. In addition to Wells Cargo trailers, Protestor also sells Walton Trailers, Diamond-T Trailers, H&H Trailers and Texas Pride Trailers.

3. Other Utah franchisees that sell Wells Cargo trailers in Utah include Lone Peak Trailers in Utah County, Ace Auto & Trailers Sales in Carbon County, Tooele Valley Motorsports in Tooele County, Young Trailers in Davis County, Jorgensen Chevrolet in Sanpete County, Jorgensen Honda in Sevier County and Jolly's Trailers Sales in Iron County. Salt Lake County, many times larger than Cache County, has no

Wells Cargo dealer. The Board felt Cache County was much too small, even with growth, to support two Wells Cargo dealers.

4. Castle Country RV sells various brands of trailers, recreational vehicles and ATVs. Castle Country has two locations, one in Helper, Utah and the other in Logan, Utah.

5. Around November or December 2016, the new Territory Sales Manager (“TSM”) for Respondent met with Protestor’s management and set certain goals and objectives for improving Protestor’s sales performance.

6. In April or May 2017, Castle Country RV attempted to purchase Protestor’s Wells Cargo franchise, but the owners of the two businesses were unable to reach an agreement on the terms of sale.

7. On July 20, 2017, Respondent notified Protestor and the Board of its intention to establish Castle Country RV in Logan, located 2.3 miles south of Protestor’s dealership, as an additional Wells Cargo dealer.

8. On August 29, 2017, Protestor filed its request for agency action, challenging the establishment of an additional Wells Cargo franchise in its relevant market area.

9. Protestor sold 19 Wells Cargo trailers in 2014, 30 in 2015, 21 in 2016 and 50 trailers in 2017.

10. Protestor's trailer sales numbers from 2014-2016 might be inaccurate due to a failure by Protestor to register the warranties of sold trailers during those years. The trailer side of the business and the registration of warranties was the responsibility of the

owner's father. The owner's father was dealing with the illness of his wife from 2012 until her death in 2016, and he passed away three months after his wife's death.

11. From May 2016-April 2017, a total of 220 trailers of various brands were sold in Cache County. Nine of those sales were Wells Cargo trailers by Protestor; 20 were Wells Cargo trailers sold by Young Trailers located in Layton, Utah (Davis County).

12. In 2017, Protestor ordered somewhere from 30 to 57 new trailers from Wells Cargo. Those trailers have not yet been delivered.

13. Respondent's turnaround time for delivery of trailers to franchisees is currently about seven months after the date ordered. Historically, delivery of trailers only took six to 18 weeks.

14. Protestor owns its dealership lot, and owns additional land that could be used to expand the lot. Castle Country leases its dealership lot and has two years left on its current lease. Castle Country's owner testified that his lot has space for Wells Cargo trailers.

15. When Respondent's TMS visited Protestor's lot in late 2016, he did not see many Wells Cargo signs on the lot. However, on the TSM's visit to Protestor's lot in November 2017, two Wells Cargo signs were posted on the fence. During both of these visits, a banner on the showroom building included the Wells Cargo name. That banner is a bit faded. Wells Cargo trailers on Protestor's lot have not been visible from the frontage road.

16. Protestor apparently had two websites. One website mentioned the Wells Cargo name only in text, and did not include the Wells Cargo logo or show any Wells

Cargo trailers (it did show the logos and products of U-Haul, Raider and Mahindra). The second website was apparently exclusive to Wells Cargo trailers, and included the Wells Cargo logo and several photos of trailers. Protestor has engaged someone to develop a new website at a cost of approximately \$5,000.00; the site is expected to go live in February 2018. The website mountaintoppers.com currently shows that the site is under construction and includes the logos of Mahindra, Raider and Wells Cargo.

17. Castle Country spends \$275,000.00 a year in advertising and marketing of its products, with approximately \$60,000.00 just on advertising of its trailers.

### **CONCLUSIONS OF LAW**

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

2. The parties agree that the proposed new Wells Cargo trailer dealership is within the relevant market area of Protestor’s dealership, just 2.3 miles away. Respondent thus gave notice to Protestor of its intent to establish an additional franchise. Protestor filed a protest and requested a hearing pursuant to Subsection 13-14-302(5). A hearing ordered pursuant to the filing of a protest shall be held no later than 90 days after the hearing application is filed. Subsection 13-14-304(4). Thus, a hearing in this case was originally scheduled to be held on November 27, 2017, but was subsequently continued to January 10, 2018 by agreement of the parties as permitted under Subsection 13-14-304(4)(b).

3. Respondent, as the franchisor, had the burden of proof to establish by a preponderance of the evidence that under the provisions in NAFA, it should be granted permission to enter into a franchise agreement establishing an additional franchise. Subsections 13-14-304(5), R151-4-708. After a careful review and long deliberation, four out of the six Board members were of the belief that Respondent failed to meet its burden of proof that good cause exists to establish a new franchise. Pursuant to Subsection 13-14-103(5)(b), the action of the majority of a quorum present is considered the action of the Advisory Board.

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4. In determining whether a franchisor has established good cause to establish a new franchised dealership for the same line-make in a given relevant market area, the Board and the Executive Director are required to consider the following factors:

- (1) the amount of business transacted by other franchisees of the same line-make in that relevant market area, as compared to business available to the franchisees;
- (2) the investment necessarily made and obligations incurred by other franchisees of the same line-make in that relevant market area in the performance of their part of their franchisee agreements;
- (3) the permanency of the existing and proposed investment;
- (4) whether it is injurious or beneficial to the public welfare or public interest for an additional franchise to be established , including:
  - (a) the impact on any affected municipality;
  - (b) population growth trends in any affected municipality;
  - (c) the number of dealerships in the primary market area of the new or relocated dealership compared to the number of dealerships in each primary market area adjacent to the new or relocated dealership's primary market area; and
  - (d) how the new or relocated dealership would impact the distance and time that an individual in the new or relocated dealership's primary market area would have to travel to access a dealership in the same line-make as the new or relocated dealership.
- (5) whether the franchisees of the same line-make in that relevant market area are providing adequate service to consumers for the motor vehicles of the line-make, which shall include the adequacy of:

- (a) the motor vehicle sale and service facilities;
- (b) equipment;
- (c) supply of vehicle parts; and
- (d) qualified service personnel; and

(6) whether the relocation or establishment would cause any material negative economic effect on a dealer of the same line-make in the relevant market area.

Section 13-14-306.

5. Respondent provided testimony and exhibits to show that its goal by establishing an additional franchise in Cache County is to capture more of the market share for trailer sales than Protestor has been able to achieve historically. Respondent presented census data indicating a nine percent population growth in Cache County and argued that it needs a strong dealer in Cache County to meet that growth. It also produced various exhibits showing the number of Wells Cargo trailer sales in Cache County and other Utah counties, as well as total trailer sales in these areas. Respondent's witnesses testified that Protestor has failed to order trailers on a regular basis, projecting its needs and accounting for delivery times to ensure it had a good inventory of trailers for sale at all times. Respondent provided pictures of Protestor's dealership to show that there is a lack of adequate advertising of the Wells Cargo brand, and that its Wells Cargo trailers were tucked away on the lot. Respondent's witnesses testified about some examples of dealers in the same community benefitting from each other's robust competition and from brand awareness.

6. Protestor presented exhibits and testimony to show that its dealership has Wells Cargo signs on its fence and a Wells Cargo banner on its building (although the banner appears to be fading), that it is spending money now to design an entirely new website, that its owner owns the lot and has additional acreage that can extend the lot,

that it provides good service to its customers, that Respondent has not delivered trailers ordered by Protestor for nearly seven months, that Protestor nevertheless sold 50 trailers in 2017.

7. Even though the parties waived any objection on the grounds of authenticity and foundation, the Board considered the documentary evidence by Respondent as to dealer sales data inadequate due to the fact that many of the exhibits did not appear to be from official sources, were not properly dated or labeled, and lacked proper foundation. Also, the data presented was from varying time periods and varying markets, so that the Board felt it was making unreasonable comparisons like apples and oranges.

8. In considering the first factor in Section 13-14-306, the amount of business transacted by other franchisees as compared to the business available to franchisees, the Board found that even with a population growth of nine percent in Cache County, there was not sufficient business in that small community for two dealers of the same line-make who would be located just 2.3 miles from each other. Protestor showed that it sold a total of 50 Wells Cargo trailers in 2017, roughly 22% of all trailers sold in Cache County in a 12-month period. It seems unlikely that having another Wells Cargo dealer could significantly increase the Wells Cargo market share in the community without taking the sales away from the existing Wells Cargo dealer. Thus, Respondent has failed to establish by a preponderance of the evidence that there is good cause to establish an additional dealer under this factor.

9. The second and third factors in Section 13-14-306 relate to the investment necessarily made and the permanency of those investments, as well as any obligations

incurred by other franchisees of the same line-make in the relevant market area. The Board recognized that Protestor has not put a lot of money into advertising when compared to Castle Country's efforts in advertising and marketing. However advertising alone is not sufficient to establish by a preponderance of the evidence that there is good cause to establish a new franchise. The Board noted that while Castle Country leases its lot, Protestor has been an almost permanent fixture in Cache County, owns its dealership lot, and has more land to extend the lot. Although Protestor had not placed as much signage, displayed trailers in front of the dealership and otherwise promoted the Wells Cargo brand as Respondent would have liked during the years that the owner's father was preoccupied, Protestor has already made changes and improvements that even Respondent's TSM has noted. Those changes may have occurred just in the last year, and possibly due to Respondent's notice that it wished to establish a new franchise, but they are still relevant changes. Therefore, as to the second and third factors in Section 13-14-306, good cause has not been established by a preponderance of the evidence.

10. In considering whether it is injurious or beneficial to the public welfare or public interest for an additional franchise to be established, the Board noted that 2.3 miles is such a short distance. The Board found no benefit to customers in terms of less travel since the two dealers are so close, yet the two dealerships would constantly compete for the same customers on prices, service, parts, etc., so much so that it might be injurious to the community. Two dealers in that community might start a price war resulting in the failure of one or both of the dealers. The Board also questioned whether there was a risk that Respondent might favor the new dealer when delivering inventory.

11. Respondent argued that customers who chose not to shop with Protestor but instead were going to Layton to get their trailers would now have the option of going to Castle Country's lot, which would be a public benefit. This assumes, however, that Protestor would not have a good supply of trailers on its lot. One reason advanced for customers going to Layton was Protestor's recent inability to receive inventory from Respondent. Documentary evidence also indicates that Protestor has ordered over 30 trailers in 2017; Protestor's owner testified that he ordered 57 units, and that the documents provided at the hearing will not show those orders for a few weeks. When these units eventually arrive, Protestor will have a good supply of trailers and customers will not need to travel to Layton. Protestor's owner also testified that he is ready and willing to make his Wells Cargo trailer brand sales a success and will continue to regularly order trailers to always ensure an adequate supply.

12. It is clear that Protestor's lax ordering practices in the last few years is not the only reason for its prior low sales numbers; Respondent's seven-month turnaround delivery time has also had a significant effect on Protestor's sales numbers. A new franchisee would presumably have the same delivery concerns. In fact, now that Protestor has orders in the pipeline, Protestor can continue to order on a timely basis to ensure a proper supply for the public, and do so more effectively than a new dealership that would have to start from the beginning with no inventory. For these reasons, the public benefit factor also fails to show good cause to establish a new franchise.

13. As to the next factor, whether the franchisee of the same line-make in that relevant market area is providing adequate service to consumers, there was little evidence presented to establish that Protestor's sale and service facilities were inadequate to serve

its customers. For example, there were no witnesses or documentary evidence to establish that there was any improper or untimely work done by Protestor's staff on Wells Cargo trailers, that Protestor's staff was not properly trained, or that there were any unsatisfied customers. This factor therefore fails to establish good cause for adding a new Wells Cargo dealership.

14. Finally, the Board found that there would be a material negative economic effect on Protestor, the existing franchisee, if Castle Country is established as a new Wells Cargo franchisee. The Board did not find the testimony about a potential for synergy between Protestor and Castle Country convincing, as there was no documentary evidence with actual numbers showing the success of such a move.

15. In summary, the Board concluded that Respondent has failed to establish good cause for a new Wells Cargo dealership by a preponderance of the evidence. The Board recognized that Protestor could have done much better in its sales in the past, but for various reasons, it did not.<sup>1</sup> This instant situation and process appears to have been a wakeup call for Protestor and its sales have improved in 2017, as well as its efforts to advertise and market the Wells Cargo brand. The Board also recognized that Castle Country, if it were a Wells Cargo franchisee, would be a strong dealer for Respondent, who would aggressively advertise and market the brand. However, the Board concluded that there was not sufficient business in little Cache County, even with its nine percent growth rate, for two dealers within a 2.3 mile distance.

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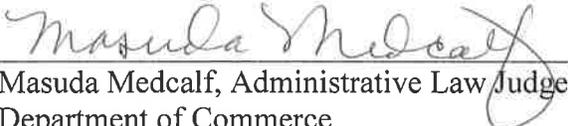
<sup>1</sup> These reasons included the illness and death of the owner's father, who was largely responsible for the trailer side of the business, and the individual who represented Respondent prior to January 2017 was perhaps not as aggressive in the sales goals established for Protestor.

## RECOMMENDED ORDER

For the foregoing reasons, the Utah Motor Vehicle Franchise Advisory Board recommends that the protest of Mountain Toppers, Inc. be sustained. Respondent has failed to establish that there is good cause to establish a new Wells Cargo trailer franchise in Mountain Toppers' relevant market area. Therefore, Respondent's application to establish an additional Wells Cargo dealership at Castle County RV in Logan, Utah should be denied.

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 30<sup>th</sup> day of January, 2018 for her review and action.

**Dated** this 30<sup>th</sup> day of January, 2018.

  
Masuda Medcalf, Administrative Law Judge  
Department of Commerce