NEW YORK STATE | **Department of Motor Vehicles**

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APPEALS BOARD

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June 14, 2016

GENERAL MOTORS LLC
DANIEL ADAMCHECK
39 OLD RIDGE ROAD, SUITE 1
DANBURY, CT 06810

Re: NOTICE OF APPEAL DECISION
Appeal Docket No.: 34452
Case No.: FMD201302A

Dear Appellant:

The above-referenced Administrative Appeal was decided by the Appeals Board on the date indicated on the enclosed Decision of Appeal, pursuant to Article 3-A of the Vehicle and Traffic Law.

This is a final, administrative determination of the Department. Any further appeal of an adverse decision should be made to the New York State Supreme Court pursuant to Article 78 of the Civil Practice Law and Rules.

Very truly yours,

APPEALS BOARD
PROCESSING UNIT

Encl.:

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NYS DEPARTMENT OF MOTOR VEHICLES
ADMINISTRATIVE APPEALS BOARD
DECISION OF APPEAL

GENERAL MOTORS LLC
C/O DANIEL ADAMCHECK
39 OLD RIDGE ROAD, SUITE 1
DANBURY, CT 06810
FRANCHISE MOTOR VEHICLE DEALER - CASE NO.: FMD2013-02

DOCKET NO.: 34452
DECIDED BY BOARD: MAY 31, 2016

Pursuant to Vehicle and Traffic Law (VTL) §471-a of the Franchised Motor Vehicle Dealer Act (Article 17-A of the Vehicle and Traffic Law), Beck Chevrolet Co., Inc. (Beck), a franchised motor vehicle dealer located in Yonkers, New York, filed a Request for Adjudicatory Proceeding with the Department of Motor Vehicles seeking review of a Notice of Non-Renewal of Dealer Sales and Service Agreement by General Motors LLC (GM), the franchisor and appellant. After a hearing, the Administrative Law Judge prohibited the termination pursuant to reasons stated in GM's termination letter of June 11, 2013, because GM failed to establish due cause to terminate Beck's franchise. GM now appeals the Administrative Law Judge's determination.

A transcript was submitted and reviewed.

PRESERVED ARGUMENTS

1. The Administrative Law Judge erred in concluding that, under VTL §463(2)(d)(1), GM's non-renewal notice relied solely on Beck's failure to meet its Retail Sales Index (RSI) requirements, because the notice specifically cites various considerations on which GM relied in addition to Beck's unsatisfactory RSI scores, GM presented substantial evidence at the hearing that it relied on these other considerations, and the evidence collectively established that GM had due cause not to renew Beck's dealer agreement.

2. The DMV erred as a matter of law in refusing to recognize the collateral estoppel effect in this proceeding of an earlier ruling by the United States District Court for the Southern District of New York, which held that GM's RSI does not constitute "an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement" under Section 463(2)(gg) of the VTL.

3. The Administrative Law Judge's Decision is not supported by substantial evidence where it is undisputed that Beck breached its commitments under the Dealer Agreement and Participation Agreement, GM's performance standard was previously held to be fair and reasonable after a plenary trial, and Beck failed to cure its performance within a reasonable time after GM's notice of default.

PROCEDURAL HISTORY

Beck filed a Request for Adjudicatory Proceeding pursuant to Article 17-A of the Vehicle and Traffic Law, seeking to challenge the termination of its Motor Vehicle Franchise Agreement by GM. Beck sought a determination prohibiting GM from terminating Beck's franchise because GM lacked due cause and did not act in good faith. Pursuant to VTL §471-a(3), GM requested a resolution of the dispute without a hearing. VTL §471-a(3) specifies that such requests are only to be granted where no unresolved material issue of fact is presented in the matter. The Administrative Law Judge, after consideration of the presented papers, issued a determination without a hearing and recognized the collateral estoppel effect of a decision issued by the Federal District Court regarding an action that had been filed prior to the issuance by GM of the Notice of Non-Renewal of Beck's franchise agreement. (The Federal District Court found that the use by GM of a New York Statewide standard to assess Beck, an exclusively downstate dealership, to be reasonable.) The Administrative Law Judge found that Beck's failure to reach the established sales scores was a material breach of the contract and that Beck was provided a reasonable opportunity to cure the defect. The Administrative Law Judge also concluded that there was no evidence that GM acted in bad faith in seeking termination of the franchise agreement.

Beck appealed the original determination of the Administrative Law Judge issued without a hearing to the Administrative Appeals Board. The Administrative Appeals Board reversed and remanded, finding that the issuance of a determination without a hearing was not proper as there were unresolved material issues of fact presented. In particular, the Appeals Board found that the determination by the Federal Court was not binding in the Department's administrative adjudication and that the Administrative Law Judge had failed to address whether or not factors beyond Beck's control were the cause of Beck's failure to achieve the required sales index.

Upon remand and after a full hearing, the Administrative Law Judge found in Beck's favor, concluding that the use of a statewide sales standard to assess the performance of a dealer in the downstate area of New York was not reasonable. In particular, the Administrative Law Judge found that, for "the New York City metropolitan area, the RSI standard of GM is unreasonable as it does not realistically reflect the Chevrolet sales challenges that Beck and other New York metropolitan dealers face, and GM is not applying the RSI uniformly to all dealers in New York..." "GM's method of determining the RSI as applied for metropolitan NYC is unreasonable and the performance of Beck otherwise materially meets the standards of GM; therefore, GM lacks due cause to terminate Beck's franchise." The Administrative Law Judge further found that, contrary to the assertions of GM, GM had not established any other reason for the termination of the franchise agreement other than Beck's failure to meet the Retail Sales Index.

GM now appeals the most recent determination of the Administrative Law Judge.

UNDISPUTED FACTS

The primary subject matter of this proceeding is GM's proposed termination of a Dealer Sales and Service Agreement and a 2009 supplemental Participation Agreement. These contracts were entered into as part of a bankruptcy reorganization effort by GM and superseded any previous franchise agreements between the parties and GM's predecessor-in-interest. During the predecessor's bankruptcy proceeding, Beck entered a wind-down agreement to terminate its franchise in exchange for a money payout. After GM acquired certain assets of the predecessor, GM agreed to rescind Beck's wind-down agreement and issued Beck a Participation Agreement. The Participation Agreement in conjunction with Beck's Dealer Sales and Services Agreement allowed Beck to operate as a GM franchise operation. Pursuant to Article 9 of the Dealer Sales and Service Agreement, Beck would be subject to periodic review of its sales performance and would be required to achieve a Retail Sales Index (RSI) score of 100 or greater. These performance standards were modified by the Participation Agreement in Paragraph 9, wherein Beck was required to achieve RSI scores of 70 for 2010, 85 for 2011, and 100 for 2012.

Beck failed to achieve the RSI scores required by the agreements. Beck's yearly score for 2010 was 50.1, 50.9 for 2011, and 50.6 for 2012. Beck was provided a yearly sales performance report by GM, detailing the score for the preceding year. On June 8, 2012, GM issued Beck a Notice of Breach of GM's Dealer Sales and Service Agreement and Participation Agreement, citing Beck's failure to reach the required RSI scores as a breach of the contract and providing a cure period through May 31, 2013. Beck's RSI scores did not improve to the required levels. On June 11, 2013, GM issued Beck a Notice of Nonrenewal of Dealer Sales and Service Agreement which indicated that GM was terminating its Participation Agreement because Beck's "RSI for calendar 2011 was only 50.9, which constituted a breach" of both the Dealer Sales and Service Agreement and Participation Agreement.

The RSI is a fraction, expressed as a percentage, where the numerator is a dealer's actual sales and the denominator is a dealer's expected sales. Expected sales are determined by applying the Chevrolet brand's state market share, in each vehicle segment where Chevrolet competes, to the competitive vehicles registered in the dealer's assigned market area.

Beck does not deny that it failed to reach the RSI scores contained in the Agreement. Rather, Beck contends that the use of a statewide standard in calculating the scores is not appropriate or reasonable as the market for the Chevrolet brand in downstate New York is dramatically different from the market in the remainder of the state. Beck further contends that the failure to achieve the required scores was due to factors beyond its control.

LITIGATION HISTORY

Beck filed an action against GM, the franchisor, in state Supreme Court for claims arising under the Franchised Motor Vehicle Dealer Act. GM removed the action to the United States District Court for the Southern District of New York (Federal District Court). Beck filed a second amended complaint asserting claims for injunctive and declaratory relief under the Franchised Motor Vehicle Dealer Act, including a claim alleging that GM used an unreasonable, arbitrary and unfair performance standard, pursuant to VTL §463(2)(gg). After a bench trial, the Federal District Court held against Beck, and Beck appealed. The U.S. Court of Appeals for the Second Circuit (Federal Court of Appeals) determined that resolution of the appeal depended upon unsettled New York law and certified a question of law to the New York Court of Appeals regarding whether a performance standard requiring average performance based on statewide sales data in order for a dealer to retain its dealership was unreasonable, arbitrary, or unfair under VTL §463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types.

TESTIMONY/EVIDENCE

Hearing dates: 9/22/14, 9/23/14, 9/24/14

The GM Manager of Dealer Network Planning Analysis, Alvon Giguere, testified that, as part of its 2009 bankruptcy, GM needed to restructure the dealer network and eliminate some dealerships. (Transcript 39) As part of this restructuring, Westchester County was cut from eight Chevrolet dealers to four. (Transcript 40) Beck was originally one of the dealers to be "wound down" and removed from the network. Beck would have then been replaced by a "backfill." (Transcript 41) After a series of negotiations, GM ultimately agreed to let Beck remain. (Transcript 41) In addition to the usual dealer agreement, Beck was also assigned an escalating sales standard as part of a Participation Agreement. (Transcript 42-43)

The sales standard used to judge dealers by GM is the Retail Sales Index (RSI). (Transcript 11) The RSI is a mathematical calculation that takes the dealer's actual retail sales divided by "dealer opportunities," using the expected sales based on a segment adjusted state average (market penetration) and multiplied by 100 to convert the number into an index. (Transcript 12-13) GM looks at individual products that GM offers and at the state average penetration for that product within the competitive group of the segment. GM uses its statewide market share multiplied by the vehicle registrations in the dealer's assigned territory (commonly referred to as its AGSSA – area of geographic sales and service advantage) to calculate "dealer opportunities." (Transcript 12-13, 17, 22) The witness believed that the segment adjustment process takes into account many of the economic and demographic differences from market to market. (Transcript 28-29) The witness acknowledged that, given the differences in markets between upstate and downstate, the New York Dealers Association had raised concerns that a statewide market share standard was not appropriate for downstate dealers. (Transcript 27-28) The witness believed that the use of a statewide standard for calculating the RSI was reasonable. (Transcript 44)

As part of the new Participation Agreement, Beck was required to achieve an escalating sales standard. In 2010, Beck would be required to achieve an RSI of 70. In 2011, Beck would be required to achieve an RSI of 85. In 2012, Beck would be required to achieve an RSI of 100. (Transcript 43) An RSI of 100 represents an average dealer within the state, and is generally the required sales effectiveness for a dealer. (Transcript 12-13) Beck failed to meet the required standard in each of the years.

On cross examination, the witness acknowledged that, as the RSI of 100 represents an average dealer, approximately half of the GM dealers in the state do not satisfy the sales requirement each year and that it was fairly typical for a significant number of dealers to a achieve an RSI score below 100. (Transcript 85-86) The witness further acknowledged that, as a general trend, upstate dealers perform better than downstate dealers. (Transcript 82) Further, when compared to the other downstate dealerships, Beck's sales performance was "approximately in the middle." In fact, only four of the 23 downstate dealerships met an RSI of 100. (Transcript 90) Beck's total sales did improve during the timeframe of the Participation Agreement, from 218 vehicles in 2009, to 417 vehicles in 2013, a 93 percent increase. (Transcript 92-94) The witness further acknowledged that if the RSI were calculated using a New York metropolitan area standard as opposed to a statewide standard, Beck's RSI would approximately double. (Transcript 101)

The GM Northeast Regional Director for Sales, Service and Marketing, Daniel Adamcheck, testified that he was directly involved in the decision not to renew Beck's franchise. (Transcript 121) "The dealership is located in a very strong area we believe is good for Chevrolet and good for the dealership in that market. The dealership, from a physical standpoint, is one that has let time kind of slip by, and has not been kept up over time, has somewhat deteriorated quicker than the market around it had." (Transcript 124) During the bankruptcy reorganization, Beck had initially accepted an offer to wind down. (Transcript 125-126) Eventually, Beck indicated a desire to continue in business. Ultimately, there was an "influx of senators and congressman asking General Motors" to "look at things closer" regarding dealerships that were being wound down. There was also an "unbelievable persistence" from the management of Beck, indicating that they were going to improve operations going forward. (Transcript 129-130) Beck did not raise any complaints regarding the RSI calculation formula prior to signing the Participation Agreement. However, after signing, Beck became "very adversarial." The witness further explained, "...every request, every question was challenged and we went back and forth on every single issue." (Transcript 142-143, 145)

The witness acknowledged that the primary reason for termination of Beck was its failure to meet the RSI requirements. However, another reason for termination was that Beck had not put forth sufficient effort to improve its operations. (Transcript 173, 176)

GM provided dealerships in Beck's position several programs to help them improve sales, including the Dealer Performance Agreement Program (DPAP), the Essential Brand Element (EBE), and the Supplemental Facilities Improvement Program (SFIP). One of the programs offered as part of the

Essential Brand Element project allowed dealerships to receive money to be used towards upgrading facilities, marketing and training. (Transcript 160-164) The funds were earned by the dealership through the purchase from GM of additional inventory that was available beyond the normal allotment procedure. Product was in short supply at the time. (Transcript 153-154) The witness noted that Beck did not order all of the vehicles made available to it through this program. (Transcript 158-159) Beck never completed the facility upgrades it agreed to upon its participation in these programs (Transcript 179-195), never shared any marketing or business plans with GM (Transcript 212-213), and never prepared the GM prescribed business plan. (Transcript 147-151) As of the time of the hearing, Beck had received $882,000 in EBE funds and had not performed the required facility image upgrades. (Transcript 207)

The witness noted that other downstate dealers had made operational changes which had resulted in improved sales. The witness did not believe that GM's market penetration prevented sales improvements from occurring. GM's lack of leasing programs did not impede dealerships from improving sales. Further, while imports did offer leasing arrangements, these were regarded as an alternate to traditional sales due to the "credit crunch" which was going on at the time. (Transcript 271-280)

On cross examination, the witness acknowledged that GM had extended the deadline for Beck to complete the renovations until April 30, 2014, which was after the Notice of Termination was issued. The witness further acknowledged that the EBE money was earned by the dealership for accepting the additional allocation of vehicles. Beck had to pay GM for these vehicles. (Transcript 331-332) Mr. Adamcheck thought it was reasonable for GM to allow Beck to continue with the EBE facilities upgrade program despite the breach notice. (Transcript 338) The witness also indicated that there had never been a problem with Beck meeting its customer satisfaction or capitalization requirements under the Participation Agreement (Transcript 339-340)

The witness further stated that when GM got out of the leasing market, it "did create a void in the market," (Transcript 343) because of the loss of a portfolio of people who wanted to lease and were creditworthy and could go to some of the other manufacturers that were leasing at the time. (Transcript 344-345) The dealers had no control over the decision to cease the leasing programs, but had to deal with the repercussions of that decision. (Transcript 346) The witness further acknowledged that there were several downstate dealerships that had RSI levels lower then Beck's, but none of those dealers received a breach notice from GM, and GM did not attempt to terminate the other dealerships. (Transcript 413-416)

A Dealer Network Analysis, Customer Relationship Management and Site Analysis Consultant from Urban Science Applications, Sharif Farhat, was called as a witness on behalf of GM. The witness testified that he performed an analysis of the Beck facility, in which he measured the performance of the dealer and then analyzed the likely causes of the performance. (Transcript 447) The witness used sales and registration data to assess how the dealer and brand were performing relative to the general market. (Transcript 449) The primary conclusion of the witness was that Beck did not achieve required sales benchmarks and that its poor performance was not due to factors outside of its control. (Transcript 461)

The witness further concluded that the use of a state average in calculating sales performance was appropriate and reasonable. The use of such a standard is objective and does not change from year to year. All of the dealers involved are subject to the same laws and tax requirements. If the dealer were to use a smaller area, any changes to the smaller area could be subjective. (Transcript 471-472) The witness noted that several downstate dealers were able to reach the required RSI in 2012. (Transcript 485-486) Applying the statewide standard to the calculation of Beck's expected RSI, Beck was expected to sell 662 vehicles in 2012. It actually sold 335 vehicles, resulting in an

RSI of 50.6 for the year. (Transcript 481) The witness did not believe that the goal for Beck to sell 662 cars was unreasonable. (Transcript 491-492.) The dominant dealership for sales in the Yonkers area, where Beck is located, is Curry Chevrolet, which is located in Scarsdale. This suggests that consumers are rejecting Beck, rather than the Chevy brand. (Transcript 511)

The witness further concluded that Beck's poor performance was caused by its own poor operations. (Transcript 558) The witness visited the facility and found, "it's not a good-looking store." (Transcript 560) The witness reviewed Beck's advertising, and found that the advertising effort was "very low." (Transcript 563-564) The witness noted that Beck showed a significant improvement in the end of 2012, during a period of time in which Beck briefly hired a different sales manager and increased its advertising budget. "I think with additional effort this dealership could improve dramatically. Its own actions show that opportunity is there for improvement. But for whatever reasons, it chose not to do that." (Transcript 492-493)

The witness further concluded that factors beyond Beck's control were not the cause of its poor performance. The witness ran models controlling for territory designation (Transcript 510), Buffalo and Rochester manufacturing bias (GM has manufacturing facilities in the Buffalo/Rochester area which can lead to artificially inflated sales numbers in this area) (Transcript 522), import bias (Transcript 523), and leasing bias (Transcript 534-535). In every instance, Beck's performance remained poor when compared to other facilities. The witness further opined that unemployment, another factor cited by Beck, is, "a very poor indicator for new vehicle demand." (Transcript 548.)

On cross examination, the witness acknowledged that the New York metropolitan media market is the largest in the country, but has the fourth lowest General Motors market share in the country. (Transcript 663-665) The witness further acknowledged that Beck's sales increased from 218 vehicles in 2009 to 417 vehicles in 2013, a 93 per cent increase. (Transcript 677)

Hearing date: 9/29/14 – 9/30/14

On September 30, 2014, a Financial Background Consultant from Urban Science Applications, Herbert Walter, was called as a witness on behalf of GM. The witness had a background in quantitative analysis, accounting and finance, and was qualified as an expert on financial operations of motor vehicle dealerships. (Transcript 215-219) The witness analyzed Beck's operations and finance, reviewing in particular "management decisions of the Beck dealership as it relates to the Participation Agreement, to see if the Beck dealership made changes in its operations and management decisions to implement or to take on the requirements of and changes needed to implement the Participation Agreement." In particular, the witness was looking at sales, advertising, inventory, and use of leverage tools. (Transcript 221)

In performing the analysis, the witness reviewed the Participation Agreement, Beck's financial statements, composite financial statements for other dealerships, inventory and sales records, and other expert reports submitted in conjunction with this matter. (Transcript 223) Based upon this analysis, the witness formed an opinion. "I found that Beck did not make changes in its operations management decisions over time, following the signature on the Participation Agreement, meaning 2010 through 2012." (Transcript 225) The witness found that Beck was not a strong financial performing dealership. Beck had access to funds, inventory, and customers that were sufficient to make additional sales. (Transcript 226)

The witness noted that over the time period in question, Beck was substantially less profitable than other similar dealerships. (Transcript 229-230) From 2010 to 2012, Beck's sales volume did not grow. (Transcript 235) Beck did not change its pricing strategy. (Transcript 251-252) They did not leverage the unencumbered property to obtain finance to improve operations. (Transcript 231)

Beck reduced its expenditures on advertising. (Transcript 272-273) They lowered the sales force from 6.5 sales people to 5.5 sales people. (Transcript 289-292) Beck did not accept additional inventory allocation which would have allowed additional sales. (Transcript 302-305) Beck spent less on staff training than comparable facilities, and very little on capital improvements to the facility. (Transcript 313, 317) "They didn't really change the pricing on any kind of consistent basis. They didn't change their advertising until you get to late '12 and into '13 there is some changes. They have reduced their sales staff. Their training is below the comparison groups. They don't have the profitability of the other dealerships. They have the availability of additional inventory. So, they have the opportunity, and as you can see with this, working capital." (Transcript 319) On cross-examination, the witness acknowledged that none of the areas of Beck's finances and operations the witness had discussed were the basis for terminating Beck's franchise (Transcript 325).

On September 29, 2014, Russell Geller, the Vice President and General Manager for Beck, testified that Beck had entered into, and agreed to the terms of the post-bankruptcy Participation Agreement. (Transcript 191) Beck did not raise any formal objection to the use of the statewide standard for calculating the RSI prior to entering the Participation Agreement. (Transcript 199) As GM had never before raised any issues with Beck with regard to a low RSI, "...we didn't put much credence to the fact that we weren't hitting 100...There was never anything that was ever done to my dealership as well as hundreds of thousands of other dealerships...Never in my wildest dreams after nine years of not hitting RSI did I ever think that GM would actually enact a termination against me based on this. Their previous behavior never showed me that." (Transcript 199-200) The witness acknowledged that Beck did not achieve the RSI requirements set forth in the Agreement. (Transcript 204-205) The Notice of Breach indicated that the only basis for breach was not obtaining the RSI of 85 for 2011. No other reason for the breach was provided (Transcript 374) The witness did not know why GM singled Beck out for termination based on failing to achieve the performance standard. (Transcript 376) Beck consistently scored better in customer satisfaction, including cleanliness and attractiveness of the facility, overall purchase and delivery experience, and service, than other GM dealers, in its zone, region and entire network, including other GM dealers near Beck who had RSI scores below Beck. (Transcript 379-385)

On September 30, 2014, Russell Geller further testified that he has always thought that GM's expected sales were too high. (Transcript 31) The witness cited to numerous factors beyond Beck's control that contributed to its inability to meet the RSI goals.

The witness noted that under the Participation Agreement, GM was required to provide assistance in creating an action plan to improve sales. GM refused to do so unless Beck provided a written business plan on GM's template through the DART system. The witness noted that under the Participation Agreement, a written business plan was voluntary and not required to trigger GM's obligation. (Transcript 3-4, 8) In 2011, Beck completed all parts of the GM business plan template except the sales forecast section. (Transcript 5-6) Beck did not complete a sales forecast section for GM's business plan because GM inserted a network planning volume (NPV) in the template, which was substantially different from Beck's RSI figure, representing a number between 30-40 per cent higher than the RSI. Beck did not complete the section of the GM template because this would require Beck to submit sales data that would be entered into a calculation formula using NPV figures which would increase the RSI calculation by 30 to 40 percent. (Transcript 7-8) The witness did not know why GM would use a NPV figure which was different in Beck's business plan, if GM required Beck to satisfy the RSI under its Dealer Agreement or Participation Agreement. The witness provided GM with marketing information in an email in 2011 (Transcript 9-10) and completed the sales forecast portion of the business plan to GM for 2012. (Transcript 13) Beck did not receive any feedback from GM regarding the business plans that were submitted. (Transcript

11, 14-15, 16) Although GM promised in writing to assist Beck to achieve its performance requirements, GM never provided any assistance in Beck's efforts to sell GM cars. (Transcript 18)

In order to properly execute its own business plan, the witness believed Beck needed specific additional vehicle allocations. The witness made a request to his District Manager. "He had led me to believe that if I provided a wish list to him that I would receive some or all of the wish list." (Transcript 12) Beck requested additional allocation of vehicles, including 10 Sonics, 20 Cruses, with a total of 80 vehicles, trucks and cars as a wish list to GM, in addition to the vehicles Beck would normally request. Beck never received the requested vehicles. (Transcript 12-13) Beck was offered additional vehicles through the special allocation program. As part of this program, Beck was offered 200 cars up front. "If I'm selling approximately 30 vehicles a month and the industry standard is to stock a 65 to 75 day supply, and I'm now asked to buy 200 cars upfront, it was a staggering number." (Transcript 20-21) The facility did take 40 of the vehicles, but did not have space for all of those that were offered. (Transcript 24.) This allowed some room for sales growth. (Transcript 27-28) Another special allocation was offered in 2011 and 2012. This program consisted heavily of Malibus and Traverses. "These two car lines were experiencing national double-digit sales losses, and the New York market was exhibiting similar sales losses." (Transcript 37-38) The witness believed that GM was trying to use Beck as a scapegoat. "It was indicative to me that these vehicles could not be wholesaled to other dealers, because they were obviously turning them away. And General Motors looked to me to be the scapegoat to take these vehicles. And I was not going to let that happen." (Transcript 38) The only vehicles Beck did accept from this offer were 20 Equinoxes. (Transcript 39)

The witness testified that, for some time in 2011, GM was manipulating Beck's sales objective numbers on the GM weekly sales sheets that were sent to all dealers. The witness asked a GM representative why every other dealer wasn't receiving the same inflated sales objective figures on the sales sheets as Beck. Without prior notice, Beck was removed from the daily sales report. This led to a lack of trust by both employees inside the facility and throughout the industry. Not being on the sales sheet cast negative aspersions to the dealership and cast doubt if the dealership was actually in business with GM. Beck was the only dealer out of 63 dealers in the New York zone not to appear on the sales sheet for a year and a month. As a result of this, Beck's sales manager left the facility. This action by GM also made hiring new employees difficult. (Transcript 42-49) In February 2012, Beck was put back on the list with high sales objective numbers. In July 2012, Beck's correct sales objectives began appearing on the monthly report again. (Transcript 52)

Beck's sales were also affected by GM exiting the leasing market in 2008. Prior to this, leasing constituted 75 percent of sales for the facility. After GM exited the leasing market in 2008, Beck's percentage dropped down to 46 percent (Transcript 71-72) The witness indicated that his interpretation, as well as other dealers' interpretation, was that GM's RSI standard was a goal, but when the RSI became an application of termination and only towards Beck, it was unreasonable. (Transcript 73)

The witness further noted that Beck increased, not decreased its advertising spending after it entered the Participation Agreement. (Transcript 77) Further, the reduction in salespeople was the result of winding up a co-located Saab dealership, and did not result in a reduction of Chevrolet salespeople. More than half of Beck's sales staff had received the GM Mark of Excellence Award in 2012. (Transcript 78) The witness believed that Beck made appropriate expenditures for staff training. (Transcript 79-81)

The witness testified that GM constantly compared Beck to Major Chevrolet, another local dealership. The witness knew the sales performance of Major Chevrolet to be poor or as poor as everyone else's. Suddenly, Major Chevrolet's sales performance shot from an RSI in the 50's to over 100. A contributory factor to Major Chevrolet's increased RSI was that during the time period in question, GM placed a GM financial representative inside of the other dealership, giving them an unfair sales advantage that was afforded to no other dealer. (Transcript 82) Beck asked to be provided the same benefit, but the request was denied. (Transcript 83-84)

Throughout the time in question, Beck took a lower gross profit per vehicle than other dealerships in the area in order to compete. (Transcript 85) Going forward, Beck has a plan which places an emphasis on internet and smart phone advertising, with a projected 12 percent sales growth. (Transcript 104-106)

Hearing date: 10/1/14

The Vice President of the Fontana Group, Ted Stockton, an expert witness in sales performance requirements enforced by automotive manufacturers upon auto dealers, testified that he was hired by Beck as a consultant on sales performance requirements in the automotive dealership industry to analyze the reasonableness of the use of GM's RSI calculations in drawing conclusions about the quality of Beck's sales performance. (Transcript 4-8) The witness concluded that, for multiple reasons, GM's RSI calculations do not provide a reasonable measure of the quality of a dealer's sales efforts. (Transcript 10-11) This is for two principal reasons. First, the RSI is based in part on expected sales within the assigned territory of the dealership. This is not a good practice because most dealerships sell less than 40 percent of their vehicles to consumers within their own territory. (Transcript 10-12) The second problem with the calculation is that the use of a statewide average is based in large part on unfounded assumptions. "This assumption that the State average market share is applicable to all parts, all subsections of the State simply doesn't hold up." (Transcript 13-14) There were factors that from the design of the RSI statistic the witness could tell were not accounted for and had the potential of affecting market share and were certainly outside the control of the dealer. (Transcript 16)

The witness noted that, with respect to the use of a statewide standard, the GM market share in Beck's sales area is "around 50 to 60 percent of the State average." (Transcript 46) The most statistically significant demographic factors affecting market share for automobile dealers are age, education level, and income of the consumers. These demographic issues matter and are outside of the control of the dealership. (Transcript 18-19) The witness noted that Chevrolet market shares are significantly affected by the level of population with a four-year degree, as well as the level of competition. Product segmentation used in calculating the RSI does not account for all of these variables. (Transcript 15) The Chevrolet market share is also very sensitive to leasing. "The higher the lease concentration, the lower Chevrolet's market share." (Transcript 22)

The witness also found that Chevrolet's market was sensitive to the amount of interbrand competition "to a statistically significant degree." (Transcript 24) "Beck's particular market is not particularly favorable in terms of the types of vehicles that consumers purchase. So Beck is on the losing end. All other things being equal, Beck is at a disadvantage. And statewide we show that that turns into a market share deficit." (Transcript 26-27) Further affecting the statewide average are two major manufacturing facilities in the Buffalo area. There are no such facilities in Beck's territory. The presence of such facilities increases sales in the local region for several reasons. First, GM provides discounts to employees and family members from the facility. Second, there is a perceived self-interest of consumers who live near the manufacturing facility regarding the local community and economy. (Transcript 44-45)

The witness further explained that the GM assigned territories do not accurately reflect local consumer opinions regarding convenience. "If we had a consumer driven or a market behavior driven dealer area, it would not match well to the GM AGSSA (territory assignments)." (Transcript

33-36.) The witness studied the general consumer patterns outside of the automotive industry in this region, and found, "they prefer to shop to the north, they prefer to shop around New Rochelle, and they tend to leave the area around Beck for their normal shopping." (Transcript 31)

The witness applied an "R squared" analysis to the data. The witness explained that what the data is "... resoundingly telling us is that the decision to incorporate upstate New York in the analysis is not just unreliable, it deletes from any reliability that we would see there... It means that you have two separately performing, separately concentrated, separately oriented markets." (Transcript 39-40)

Hearing date: 10/2/14

The President of the Fontana Group, Joseph Roesner, testified that he was hired by Beck as a sales performance consultant. The witness reviewed the data and analyzed Beck's performance and concluded that the sales performance requirements imposed by GM on Beck are not reasonable. (Transcript 8-9) The witness noted that at any point in time, 50 percent of the total dealer body for Chevrolet is below the 100 RSI requirement and could be subject to termination. The witness determined that, in New York, there are "... identifiable differences between two portions of the state that would be the downstate area and the upstate area." Only one market in the New York metropolitan area was able to meet the RSI calculated using a state average in either 2011 or 2012. (Transcript 9) There are factors that cause fluctuations in the RSI calculation that are outside of a dealer's control, including the market share of the Chevrolet brand, overall industry performance, and unusual factors that may apply to other dealers in the state. (Transcript 10)

Considering the significant, identifiable differences between the downstate and upstate, "the state standard is not an appropriate benchmark, particularly for purposes of termination." (Transcript 10) The witness explained that 83 percent of Chevrolet dealers are located upstate. (Transcript 11) The overall Chevrolet market share for the state of New York is 12.24 percent. However, the Chevrolet market share for the nine downstate counties of New York is only 6.3 percent, compared with a market share of 18.4 percent for the upstate counties. (Transcript 13, 16) "So you can see that the registration effectiveness in the nine downstate counties is less than half of what it is for the balance of New York." This obviously indicates, "... differences in these two areas downstate versus upstate as to the acceptance of the Chevrolet product." These differences are caused by several factors, including the presence of General Motors manufacturing plants in Buffalo and Rochester, and the representation discrepancies for import brands in upstate New York versus downstate New York. (Transcript 17-18)

If the RSI calculation is controlled for the Buffalo and Rochester area bias, the RSI for Beck increases from 60.3 to 70.2 during the period of July through December 2012, which constituted the provided cure period. Controlling for import bias causes the RSI to increase from 60.3 to 91.1. If both factors are controlled for simultaneously, the RSI goes to 98.92. (Transcript 24-26)

The witness recalculated the RSI for Beck using the Chevrolet market share of the nine downstate New York counties. Under this calculation, Beck had an RSI of 92.04 for 2011, 86.12 for 2012, and 98.92 for the cure period. (Transcript 28-29) Beck's sales fell in the middle when compared to the other dealerships in GM's own defined "New York City zone." (Transcript 29-32)

The witness explained that GM adjusts the RSI for segment, breaking the auto industry into segments based upon usage and size, (grouping together pick-up trucks, small, medium and luxury SUVs, sedans, etc.) with no additional adjustments. The RSI calculation does not account for all of the demographic, socioeconomic, factories, or representation issues that exist in one area versus another. (Transcript 42)

ANALYSIS AND DISCUSSION

The determination should be affirmed. The testimony and evidence presented at the hearing was sufficient to support the findings of the Administrative Law Judge.

VTL §463(2)(d)(1) provides in pertinent part that it shall be unlawful for any franchisor to terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer except for due cause, regardless of the terms of the franchise.

VTL §463(2)(e)(1) provides in pertinent part that any franchised motor vehicle dealer who receives a written notice of termination may have a review of the threatened termination by requesting an adjudicatory proceeding, as provided in VTL §§469 and 471-a.

VTL §463(2)(e)(2) provides that the issues to be determined in a review of a termination

> "are whether the franchisor's notice of termination was issued with due cause and in good faith. The burden of proof shall be upon the franchisor to prove that due cause and good faith exist. The franchisor shall also have the burden of proving that all portions of its current or proposed sales and service requirements for the protesting franchised new motor vehicle dealer are reasonable. The determination of due cause shall be that there exists a material breach by a new motor vehicle dealer of a reasonable and necessary provision of a franchise if the breach is not cured within a reasonable time after written notice of the breach has been received from the manufacturer or distributor."

VTL §463(2)(e)(3) provides in pertinent part that the franchisor shall provide notification in writing to the dealer that the dealer has 180 days to correct dealer sales and service performance deficiencies or breaches and that the franchise is subject to termination if the dealer does not correct those deficiencies or breaches. If the termination is based upon performance of the dealer in sales and service then there shall be no due cause if the dealer substantially complies with the reasonable performance provisions of the franchise during such cure period, and, no due cause if the failure to demonstrate such substantial compliance was due to factors which were beyond the control of such dealer.

VTL §463(2)(gg) provides that it shall be unlawful for any franchisor, notwithstanding the terms of any franchise contract, to "use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement."

The appellant, GM, contends that the Administrative Law Judge committed error in determining that GM's Non-Renewal Notice relied solely on Beck's failure to meet its Retail Sales Index requirements. Pursuant to VTL §463(e)(3), prior to issuing the Notice of Non-Renewal of Dealer Sales and Service Agreement, GM, the franchisor, was required to provide a notification in writing to the dealer that the dealer had 180 days to correct any dealer sales and service performance deficiencies or other breaches. Thus, the Notice of Non-renewal of Dealer Sales and Service Agreement dated June 11, 2013 must be read in conjunction with the June 8, 2012 Notice of Breach of GM Dealer Sales and Service Agreement and Participation Agreement, which preceded it. The sole basis of breach cited in the initial Notice of Breach was Beck's failure to meet the required retail sales performance. The Notice of Breach stated that "GM is providing this notice to Dealer that Dealer has failed to meet its performance obligations with respect to sales and is in material breach of the Dealer Agreement." Within the subsequent Notice of Non-Renewal, GM refers to operational deficiencies necessary to meet Beck's sales improvement obligations. However, these alleged deficiencies were not part of the original Notice of Breach.

Moreover, the operational deficiencies cited by GM in the Notice of Non-Renewal are all disputed by Beck, raising an issue of credibility, which the Administrative Law Judge was in the best position to address, having seen and heard the witnesses. In concluding that Beck did not perform poorly with respect to the operational requirements of the Participation Agreement, the Administrative Law Judge mentions numerous factors, including Beck's high Consumer Satisfaction Index scores, Beck's high level of working capital exceeding GM requirements by 30 percent, Beck's out performance of other dealerships in district, zone, and regional training standards, Beck's new car advertising, which exceeded district, zone, and regional averages, and Beck's average gross profit per vehicle, which was below the district and zone averages, indicating that Beck vehicles were not priced too high. The Administrative Law Judge noted that Beck's personnel had received commendations and awards from GM. Further, while GM had expressed concerns regarding the appearance of the facility, the Administrative Law Judge indicates that the photos of Beck's facility which were submitted by Beck are in "marked contrast" to those that were submitted by GM. Therefore, the Administrative Law Judge committed no error.

Beck appealed the determination of the Federal District Court that GM's performance metrics were not unfair or unreasonable. The U.S. Court of Appeals for the Second Circuit (Federal Court of Appeals) certified to the New York Court of Appeals the question of whether a franchisor's sales performance standard that uses "average" performance based on statewide sales data in order to determine a dealer's compliance with a franchise agreement was "unreasonable, arbitrary, or unfair" under VTL §263(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle. (See, Beck Chevrolet Co., Inc. v. General Motors, LLC, 787 F.3d 663 (2d Cir. 2015)). The Federal Court of Appeals indicated that the question was being certified to the New York Court of Appeals because the law regarding New York's Franchised Motor Vehicle Dealer Act was insufficiently developed for the court to ascertain its proper interpretation.

In response, the New York Court of Appeals recently held that GM's Retail Sales Index (RSI) was unlawful under VTL §463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types (Beck Chevrolet Co., Inc. v. General Motors LLC, 2016 NY Slip Op 03412 (May 3, 2016)). The Court stated "...GM's exclusion of local brand popularity or import bias rendered the standard unreasonable and unfair because these preference factors constitute market challenges that impact a dealer's sales performance differently across the state. It is unlawful under section 463(2)(gg) to measure a dealer's sales performance by a standard that fails to consider the desirability of the Chevrolet brand itself as a measure of a dealer's effort and sales ability." (Id. at 7)

GM's argument that the Administrative Law Judge erred as a matter of law in refusing to recognize the collateral estoppel effect of a disposition following a bench trial by the U.S. District Court for the Southern District of New York (Federal District Court) is unavailing in light of the recent decision of the New York Court of Appeals. As acknowledged by the appellant when requesting a stay of the instant proceeding pending the New York Court of Appeals answer to the first question certified by the Federal Court of Appeals, which the Board granted, it is clear that the resolution of the certified question by the New York Court of Appeals has a direct and significant impact on the outcome of this proceeding. The determination of the New York Court of Appeals is binding and consistent with the Administrative Law Judge's decision that GM lacked due cause to terminate Beck's franchise because, among other reasons, GM's sales performance standard was unfair and not reasonably applied.

The Administrative Law Judge's conclusion that the application of a statewide standard was not reasonable in this instance was supported by substantial evidence in the record. As the Administrative Law Judge points out, most of the dealers in the New York City metropolitan area were not meeting GM's statewide RSI standard and were not being terminated. In fact, among the underperforming dealers in the 9 downstate counties, GM was proceeding against Beck only, rendering the standard was unreasonable in its application. Beck's overall sales from 2009 (the time of the GM bankruptcy) to 2014 almost doubled from 218 sales to 417 sales, yet Beck's RSI went only from 40.4 to 50.2 when calculated using the statewide standard. Moreover, the evidence presented during the hearing established that, when compared to other similarly situated Chevrolet dealers in downstate New York, Beck's performance fell approximately in the middle of all of the dealers in this region. When calculations of the RSI were made using the Chevrolet market share in this downstate region, Beck's sales came very close to the 100 RSI goal. Moreover, evidence indicated that Beck met or exceeded the other requirements of the Participation Agreement.

Beck also indicated there were several factors beyond its control which affected the failure to reach the targeted RSI requirements. Consumer bias towards import vehicles, the effect of GM's exit from leasing programs, the education, age, and income demographics of the territory, and consumer patterns demonstrating preference for shopping to the north, particularly towards the New Rochelle area, are all factors which are outside of Beck's control. Pursuant to VTL §463(2)(e)(3), there is no cause for termination, "if the failure to demonstrate such substantial compliance was due to factors which were beyond the control of such dealer."

DECISION BY THE BOARD

The determination is affirmed. The original decision remains.
