New York State - Department of Motor Vehicles
Empire State Plaza, Albany, N. Y.

Enclosed is the Administrative Law Judge Findings concerning a Motor Vehicle hearing.

SAFETY HEARING BUREAU

Beck Chevrolet Co., Inc.
DBA Beck Chevrolet Saab
561 Central Park Ave.
Yonkers, NY 10704

OCT 10 2014

STATE OF NEW YORK
DEPARTMENT OF MOTOR VEHICLES
DIVISION OF SAFETY AND BUSINESS HEARINGS

BECK CHEVROLET CO., INC.
DBA BECK CHEVROLET SAAB
Dealer/ Franchisee,

v.

GENERAL MOTORS LLC,
Franchisor

Case No. FMD 2013-02
Administrative Law Judge:
Walter Zulkoski

Pursuant to Article 17-A of the New York State Vehicle and Traffic Law, the Franchised Motor Vehicle Dealer Act (hereafter "FMVDA"), Beck Chevrolet Co., Inc., dba Beck Chevrolet Saab (hereafter "Beck") seeks to challenge a Notice of Termination of its Chevrolet franchise by General Motors LLC, (hereafter "GM"). This case was begun in accordance with Vehicle and Traffic Law Section 471-a, and 15 N.Y.C.R.R., part 127.13.

Section 463.2(e)(2) of the FMVDA provides that a franchisor, here GM, many not terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer, here Beck, except for "due cause" and "in good faith". GM's Notice of Termination indicates Beck has violated its franchise agreement by failing to meet the parties agreed sales performance requirements. In its Request for Adjudicatory Proceeding that initiated this case, Beck claims: GM's sales performance requirements are unreasonable; Beck has materially complied with the reasonable and necessary provisions of its franchise agreement; GM's stated reasons for terminating its franchise are pre-textual; such a termination lacks due cause; and GM is not acting in good faith. GM was represented by its attorney, James C. McGrath of Bingham, McCutchen, LLP. Beck was represented by its attorneys, Russell P. McRory and James M. Westerlind of Arent Fox, LLP.

The witnesses for GM included: Daniel J. Adamcheck, Regional Director of Chevrolet Sales, Service and Marketing, Alvon Giguere, Manager of Dealer Network Planning Analysis, Sharif Farhat, Urban Science Applications, Inc., Herb Walter, Certified Public Accountant and

Russell Geller, a Vice-President/Dealer/Principal of Beck who testified for both sides. The other witnesses for Beck included Joseph F. Roesner, The Fontana Group, Inc., and Edward Stockton, The Fontana Group, Inc.

The hearing to address these issues was held in Yonkers on September 22nd, 23rd, 29th, 30th, and October 1st and 2nd of 2014. GM's Exhibits 1 through 83 and Beck's Exhibits 100 through 210 were received and marked into evidence during the hearing.

FINDINGS OF FACT

Beck is a New York Corporation and a franchised motor vehicle dealer as defined in the FMVDA. Beck has been a Chevrolet dealer since 1966 and its predecessors have operated at Beck's location since 1930. GM is a Delaware Corporation authorized to do business in New York State and is a franchisor as defined in the FMVDA. As part of a 2009 bankruptcy proceeding, General Motors Corporation (hereafter "Old GM") terminated some dealers offering them "Wind-Down Agreements" to terminate their franchises and offered other dealers, "Participation Agreements" to continue in operation. Old GM then sold these agreements to GM. Beck was offered a Wind-Down Agreement for a cash payment of $390,000.00. Beck asked GM to reconsider its offer of a Wind-Down Agreement and several months later was given a Participation Agreement in 2009 (GM's Exhibit 9) which is an extension of GM's Dealer Sales and Service Agreement (GM's Exhibits 11 and 12). As part of this process, GM reduced the number of dealers in the Westchester County, New York market area from 8 to 4, of which Beck was one of the remaining 4.

Upon entering into the Participation Agreement in this case GM expected and Beck agreed to: under Section 9(a) to increase its Retail Sales Index (hereafter "RSI") to 70 in 2010, 85 in 2011 and 100 in 2012; under Section 9(b) to obtain a Customer Satisfaction Index (hereafter "CSI") in sales and service that equals or exceeds the average for Chevrolet dealers in the GM's Northeast region; under 9(c) to make the necessary image improvements to comply with GM's Facility Image Requirements; and under Section 9(d) to maintain actual net working capital that meets or exceeds the working capital standard established by GM. In a letter dated June 8, 2012, GM, through its Dealer Network Manager, Michael A. Garrick, notified Beck that Beck had breached the Participation Agreement because Beck "failed to meet its performance obligations with respect to sales and is in material breach of the Dealer Agreement" (GM's Exhibit 45). Pursuant to the FMVDA Section 463.2(e)(3), Beck was given 6 months to "correct its sales performance deficiencies". Subsequently in a letter dated June 11, 2013 (GM's Exhibit 58), GM though its northeast regional director of sales, Daniel J. Adamcheck, gave notice to Beck that GM was terminating its Participation Agreement for failure to obtain the RSIs agreed to by the parties in the Participation Agreement stating "...Dealer's RSI for calendar 2011 was only 50.9, which constituted a breach of both the Dealer [Sales and Service] Agreement and the Letter [Participation] Agreement."

The measure of a Beck's sales performance under Section 9(a) of the Participation Agreement is its RSI. The RSI is a percentage determined by the actual sales of a dealer over the dealer's expected sales. An RSI of 100 indicates the dealer is selling the number of vehicles the franchisor expects can be sold in the dealer's Area of Geographic Sales and Service Advantage (hereafter "AGSSA"). The dealer's expected sales are determined by applying the Chevrolet's state market share in each segment (ie. Sedans, SUVs, pick-up trucks, etc.) to the competitive (other makes such as Ford and Chrysler) vehicles registered in the dealer's AGSSA. This system for determining the RSI is commonly used by GM's competitors.

As part of its Participation Agreement, Beck agreed to achieve an RSI of 70 in 2010, 85 in 2011 and 100 in 2012. GM waived the RSI requirement for Beck for 2010. Beck's RSI for 2011 was 50.9 and for 2012, 50.6. The other 22 dealers in the New York City metropolitan area (here the 9 downstate counties of Rockland, Westchester, Bronx, New York, Kings, Richmond, Queens, Nassau, and Suffolk as shown on Beck's Exhibit 149, tab 8, page 3) had RSIs ranging from 22 to 234.5 in 2012 with 12 dealers with RSIs below that of Beck and 3 others within 5 points of Beck (Beck's Exhibit 153). Mr. Adamcheck testified at the hearing that none of the other dealers in the nine downstate counties have received the 180 day notice to cure deficiencies or breaches that would subject the dealer to the termination process pursuant to FMVDA Section 463.2(e)(3). Of the 4 dealers in Westchester County where Beck is located one had an RSI of 80.5, the second had an RSI of 53.1, and the third had an RSI of 50.2 in 2012. In 2013, Beck's RSI was 105th out of 127 for New York State (pages 3 and 5 of GM's Exhibit 65). Thus in 2013, 22 dealers in New York were below Beck's RSI but not one of those in the 9 downstate counties was facing the termination process that Beck is now challenging. Section 463.2(gg) of the FMVDA provides that GM may not "use an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement".

Both Beck and GM cite authorities to support their positions on the reasonableness of GM's method of obtaining the RSI of a particular dealer. GM uses a statewide average that most of its competitors use. Beck says in the termination process a more reasonable method is to use a New York City metropolitan average to include the 9 downstate counties of Westchester, Rockland, Bronx, New York, Richmond, Kings, Queens, Nassau, and Suffolk as it more closely resembles realistically what the market is like for Chevrolet products in the New York City metropolitan area or other method based on GM's New York metropolitan zone or a 30 mile radius around Beck's AGSSA. Other jurisdictions have agreed with Beck that dealers in large metro areas should not be held to a statewide average. Those case cited by Beck, North Shore, Inc. v. GM No. MVRB 79-01, 361 Ill.App.3d 271, affd. 224 Ill.2d 1 (Illinois), Landmark Chevrolet Corp. v. GM Dkt. No. 02-0002 LIC, 212 S.W.3d 425 (Texas), Halleen Chevrolet v. GM Case No. 03-050MVDB-277-SS, Case No. 06CVF-11739 and Andy Chevrolet v. GM Case No. 05-01-MVDB-304-J (Ohio) and GM v. Kinlaw 78

N.C.App. 521, 338 S.E.2nd 114 (North Carolina), support a more realistic RSI method for large metropolitan areas such as NYC. This position is supported by the President of the New York State Automobile Dealers Association in a letter dated July 2, 2013 to GM's Global Chief of Marketing (tab 30 page 1 of Beck's Exhibit 149) and by Tom Liddy, the lead analyst for R.I. Polk & Co. forecasting practice (Beck's Exhibit 176). Ironically, Beck's overall sales from 2009 (when Old GM became New GM) to 2014 almost doubled from 218 sales to 417 yet its RSI went from 40.4 to only 50.2 based on GM's statewide RSI standard (Beck's Exhibit 182, page 236).

The cases cited by GM to support its statewide standard of determining RSI show dealers who are performing very poorly on many levels of comparison including sales: Giuffre Hyundai, LTD. dba Giuffre Hyundai v. Hyundai Motor America, USDC(EDNY) 13-CV-0520, (consumer fraud-New York); Hassett Lincoln-Mercury, Inc. dba Hassett Isuzu v. Isuzu Motors America, Inc. USDC (EDNY) No. 06-CV-00367, (lowest sales volume in entire U.S.-New York); In Matter of Lakes Subaru, Ltd., NH Motor Vehicle Industry Board Docket No. 0080, (last in state sales-New Hampshire); In the Matter of Seacrest Imported Auto, Inc. dba Nissan of Stratham, NH Motor Vehicle Industry Board Docket No. 04-06, affm'd NH Rockingham County Superior Court Docket No. 218-2010-CV-471 (last in state sales-New Hampshire); Lanford Ford, Inc. v. Ford Motor Company, Maryland Motor Vehicle Administration Case No. MDOT-MVA-12-03-10560, (lowest level of sales in region with no one else coming close-Maryland & District of Columbia). A New York decision, Hartley Buick GMC Truck, Inc., dba Hartley Honda v. American Honda Motor Co., Inc., Case No. FMD 2010-05, aff'd Docket No. 28447 NYS DMV Administrative Appeals Board (New York) cited by GM is distinguishable on its facts as a poor performing dealership in many ways other than its RSI and was the "worst performing dealer in the State", p.2 Appeals Board decision. Beck is not the worst performing dealer in the New York metropolitan area or in the state.

GM contends the issue of whether the RSI is reasonable has already been decided by the U.S. District Court of New York in Beck Chevrolet Co., Inc., v. General Motors, LLC, 11 Civ. 2856 (GM's Exhibit 1) and Beck is thus collaterally estopped from raising the issue of reasonableness in this proceeding. However as the NYS DMV Administrative Appeals Board stated in an interim appeal, Docket No. 32580 (April 29, 2014), in this case, FMD2013-02, the issue of reasonableness of the RSI is not precluded by the Federal Court decision as the burden of proof in this proceeding has shifted from Beck to GM. Similarly, North Star Int'l Trucks, Inc. v. Navistar Inc., 2013 Minn. App. Unpubl. LEXIS 447 (Minn. Ct. of App. May 20, 3013), lv. App.den. (Minn. Sup. Ct. Aug. 6, 2013) and Nesbitt v. Nimmich, 30 N.Y.2d. 622 (1972). The Appeals Board also was concerned about factors that were beyond the control of Beck as downstate dealers faced stiffer competition from other makes, significant preference for other makes, reduced advertising by GM of the Chevrolet brand in the downstate market and Chevrolet's low market share of vehicles in the downstate market. GM cites New York case law that requires new evidence be presented in the collateral case to avoid inconsistent results, Schwartz v. Pub. Adm'r of Bronx Cnty., 246 N.E.2d 725 (N.Y. 1969), Gilberg v. Barbieri, 423 N.E.2d 807, 809, (N.Y. 1981), Kosakow v. New Rochelle Radiology Associates, 274 F.3d 706, 731-732 (2d Cir. 2001), In re Bennett Funding Grp., Inc., 367 B.R. 269, 293-294 (Bankr. N.D.N.Y. 2007, Norris v. Grosvenor Mktg.Ltd., 803 F.2d 1281, 1286 (2d Cir. 1986). Here the evidence indicates that among the "underperforming" dealers in the 9 downstate counties GM is only proceeding against Beck. There is nothing in the U.S. District Court decision in Beck, supra, indicating that evidence of how the standard was being enforced was presented in determining reasonableness of GM's RSI standard. In other words, is the standard reasonable if not all dealers are being held to it.

Given the fact that most of the dealers in the New York City metropolitan area are not meeting GM's statewide RSI standard and are not being terminated, the statewide RSI standard that GM uses is not reasonably applied. However, assuming GM's statewide RSI standard is reasonable or whereas here, even if a NYC metropolitan area RSI standard is used, Beck has not meet the RSIs agreed to in its Participation Agreement with GM of 100 by 2012, is this a reason to terminate its franchise? GM does not base its decisions to terminate a franchise agreement solely on the basis of the dealer's RSI per the transcript of Alvon Giguere, GM's Manager of Dealer Networking Planning and Analysis (Exhibit A on page 288 attached to Beck's Administrative Appeal Form). Similarly Article 9 of the Dealer Sales and Service Agreement (GM's Exhibit 12) which provides in "addition to the Retail Sales Index, General Motors will consider any other relevant factors in deciding whether to proceed under the provisions of Article 13.2 to address any failure by Dealer to adequately perform its sales responsibilities." Though contrary to this assertion by Mr. Giguere and Article 9 of the Dealer Sales and Service Agreement, the termination letter of Mr. Adamachuk (GM's Exhibit 58) gives no reason for the termination other than Beck's failure to meet its RSI. Section 463.2(d)(1) of the FMVDA requires that the termination notice must state "the specific grounds for such termination, cancellation or refusal to renew". If RSI alone is not the sole basis to terminate a franchise, then failure of Beck to attain the RSI in the Participation Agreement is not a material breach of the Participation Agreement as required by FMVDA Section 463.2(e)(2) as no other "specific" reason is given in the termination letter of Mr. Adamcheck.

Has Beck performed poorly under the other provisions of the Participation Agreement? Under Section 9(b) of the Participation Agreement, GM also evaluates its Facility Image requirements. It does not like Beck's facility's physical appearance. Though while GM has shown photos of Beck's facility (GM's Exhibit 26) and compared it to competing brand facilities in Beck's AGSSA, (pages A-54, A-55, & A-56 attached to GM's Exhibit 70), it has not shown photos of what other Chevrolet dealers' facilities look like to support its claim that Beck's facility is below its standards by a preponderance of the evidence. Also the picture of Beck's facility (page A-54 of GM's Exhibit 70) is in marked contrast to Beck's picture of its facility (Beck's Exhibit 113) and is closer to the demands of GM's Design Intent Documents (GM's Exhibit 50). Additionally the testimony or GM's Zone Manager William Flook for Beck's Zone in the U.S. District Court case 11 Civ. 2856 stated that image is only a function of sales over the long term. Exhibit H, a GM produced list, attached to Beck's Administrative Appeal Form shows Beck met or exceeded the other requirements of the Participation Agreement (see also Beck's Exhibits 115 through 119 and 136 through 148). Under Section 9(c) of the Participation Agreement Beck's Consumer Satisfaction Index (hereafter CSI) exceeds zone and regional averages as of October 21, 2013. Ironically another dealer, Major Auto in Queens County, with an RSI of over 100 had a Purchase and Delivery Satisfaction Survey rating of only 45 while Beck with an RSI of 50.24 had a rating of 92.6 (Exhibit I attached of Beck's Administrative Appeal Form). Under Section 9(d) of the Participation Agreement, its net working capital exceeds GM's guidelines by 30%. Additionally Beck out performs the district, zone and regional averages for GM training standards. Its new car advertising exceeds district, zone, and regional averages. Beck's average gross profit on new vehicles is below district and zone averages meaning its vehicles are not being priced too high. Beck and Beck personnel have received commendations and awards from GM (Beck's Exhibits 108, 115 through 121). Thus in every other aspect other that it's RSI, Beck has complied with the reasonable and necessary provisions of its Participation Agreement.

In its Request For Adjudicatory Proceeding, Beck raises two issues, bad faith on the part of GM and GM's decision is pre-textual. The fact that GM may be attempting to create more opportunities for another dealer or dealers in Westchester County as evidenced by an email of Robert Seacrest to Troy Irrer, dated April 4, 2011 (Exhibit I attached to Beck's Request For Adjudicatory Proceeding), is too speculative and is not supported by any other evidence of bad faith on the part of GM. There is no evidence that GM's decision to terminate Beck's franchise is pre-textual, though Mr. Geller in his testimony admitted he knew GM's plans were to put another dealer at his location should he be terminated.

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 and thus GM lacks due cause to terminate Beck's franchise. Beck's CSI exceeds zone and regional averages. Its GM training standards exceed district, zone and regional averages. Its new car advertising exceeds district, zone, and regional averages. Its net working capital exceeds GMs guidelines. Its new car prices are not set too high. Bases on the RSIs of other dealers in the 9 downstate counties, Beck is materially and reasonably complying with its sales performance requirements as compared to other dealers. There is not sufficient evidence to support GM's assertion that Beck's physical appearance does not meet its standards for other NY Chevrolet dealers. GM's method of the 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.

DISPOSITION:

Section 463.2(d)(1) of the Franchised Motor Vehicle Dealer Act allows a franchisor, in this case GM, to terminate, cancel or refuse to renew the franchise of any franchised motor vehicle dealer only with due cause, regardless of the terms of the franchise agreement and such due cause is lacking by a preponderance of the evidence in GM's attempt to terminate Beck's franchise and GM is therefore prohibited from terminating Beck's franchise pursuant to reasons stated in its termination letter of June 11, 2013.

<u>Dated</u>: October 6, 2014
Yonkers

Walter Zulkoski
Administrative Law Judge