



**Department of
Motor Vehicles**

APPEALS BOARD
P.O. BOX 2935 - EMPIRE STATE PLAZA - ALBANY, NY 12220-0935

July 06, 2021

FCA US LLC
1000 CHRYSLER DRIVE
AUBURN HILLS, MI 43826

Re: **NOTICE OF APPEAL DECISION**
APPEAL DOCKET NO.: 44175
CASE NO.: FMD201901

Dear Appellant:

The Appeals Board decided the above-referenced Administrative Appeal 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.

APPEALS BOARD
PROCESSING UNIT

Enclosure:

KATHERINE MACKEY, ESQ.
WILMER CUTLER PICKERING HALE
60 STATE STREET
BOSTON, MA 02109

NYS DEPARTMENT OF MOTOR VEHICLES
ADMINISTRATIVE APPEALS BOARD
DECISION OF APPEAL

FCA US LLC
1000 CHRYSLER DRIVE
AUBURN HILLS, MI 48226
FRANCHISE DEALER 471-a Misc1 - CASE NO.: FMD-2019-01

DOCKET NO.: 44175
DECIDED BY BOARD: JUNE 29, 2021

Pursuant to Article 17-A of the Vehicle and Traffic Law (VTL), Alfredo's Foreign Cars, Inc. d/b/a Larchmont Chrysler, Jeep, Dodge (hereinafter Larchmont) filed a Request for Adjudicatory Proceeding with the Department of Motor Vehicles (DMV), seeking review of the fairness of the calculation and application of the Minimum Sales Responsibility performance metric (hereinafter MSR) by FCA, US, LLC (hereinafter FCA). After a hearing, the Administrative Law Judge found the use of MSR violated the Franchise Motor Vehicle Dealer Act (FMVDA) as it was arbitrary, unreasonable or unfair as a standard for determining sales performance and enjoined FCA from using MSR as a metric for determining compliance with its Sales Agreement with Larchmont.

A transcript was submitted and reviewed.

PRESERVED ARGUMENTS

1. The Administrative Law Judge denied FCA a fair and impartial adjudicatory proceeding.
2. The Administrative Law Judge failed to discharge his basic obligations under the Dealer Act (FMVDA).
3. The Administrative Law Judge frequently referenced Larchmont's unproven accusations in his Findings and Disposition, giving the impression of unfairness in the proceeding.
4. The Administrative Law Judge applied the incorrect legal standard to Larchmont's claim.
5. The Administrative Law Judge failed to impose the burden on Larchmont to prove that FCA's sales performance standard is unreasonable, arbitrary or unfair.
6. The determination of the Administrative Law Judge was arbitrary, capricious, or an abuse of discretion.
7. The findings of the Administrative Law Judge were not supported by substantial evidence.
8. The Administrative Law Judge erroneously concluded that MSR is the same as the RSI standard utilized by General Motors, which was struck down by the New York Court of Appeals in Beck Chevrolet Co., Inc. V. General Motors, 27 NY3d 379 (2016).
9. MSR is not an unreasonable, arbitrary or unfair sales performance standard in violation of VTL §463(2)(gg).
10. The Administrative Law Judge erroneously concluded that the dealer is expected to attain sales based on a statewide average without taking into consideration local conditions.
11. MSR takes local conditions into account through, among other things, "fair share," which adjusts for brand popularity and other local factors.
12. MSR takes local conditions into account through, among other things, "slants" adjusting for abnormal selling patterns in local markets.

13. The Administrative Law Judge first described "slants" inaccurately and incompletely before erroneously concluding that "slant" adjustments to MSR are unreasonable, arbitrary and unfair.
14. The Administrative Law Judge did not provide a sufficient explanation of how MSR is unreasonable, arbitrary, or unfair.
15. The Administrative Law Judge ignored the uncontested evidence that, from 2013 through June 2019, Larchmont failed to achieve its MSR while the two other FCA dealers in the Westchester Sales Locality achieved their MSR over the same period.
16. There was no substantial evidence that major auto brokering occurred in Larchmont's local market.
17. Auto brokering is legal in the State of New York.
18. Auto brokering is not unique to Larchmont's local market.
19. The Administrative Law Judge made gratuitous and often irrelevant observations regarding FCA's lack of good faith in failing to adjust Larchmont's MSR downward based on brokering activity.
20. The Administrative Law Judge improperly applied a good faith element, which is not applicable in a sales performance protest under VTL §463(2)(gg).
21. The Administrative Law Judge misinterpreted the decision in Dependable Dodge, Inc. V. Fiat Chrysler Automobiles, Inc., Protest Nos. PR-2435-15 and PR-2436-15 (Cal. New Motor Vehicle Board, March 15, 2017) as supporting the conclusion that MSR does not take into account competition from import bias or brand popularity.
22. The Administrative Law Judge misinterpreted and disregarded the decision in Cecil Atkisson Orange, LLC v. FCA US LLC, MVD Docket No. 15-0015.LIC, SOAH Docket No. 608-15-4315.LIC (Texas Dep't of Motor Vehicles, August 17, 2017).

CASE SUMMARY

This proceeding was initially commenced by Larchmont's filing of a Request for Adjudicatory Proceeding pursuant to Article 17-A of the Vehicle and Traffic Law. The primary subject matter of this proceeding is Larchmont's challenge to FCA's failure to adjust the Minimum Sales Responsibility (MSR) metric to account for local market conditions, such as brokering, and to enjoin the use of MSR as a performance metric.

Larchmont alleged that the MSR performance metric failed to adequately account for local market conditions, such as brokering activities of competing dealers, and was thus unreasonable, arbitrary and unfair under VTL §463(2)(gg).

After a hearing, the Administrative Law Judge found that the MSR performance metric was unreasonable, arbitrary or unfair as a sales performance standard and enjoined FCA from further use of the metric in determining compliance with its Sales Agreement with Larchmont.

TESTIMONY AND EVIDENCE

Edward Stockton, Larchmont Economics Expert - Hearing Date October 28, 2019

The witness, Edward Stockton, was qualified as an expert in advance of providing his testimony. He has a Bachelor's degree in economics and a Master's degree in applied econometrics. He writes regularly on these subjects for trade publications and participates in regular continuing professional education programs. He is the Vice President and Director of Economic Services for the Fontana Group, a management and empirical consulting firm. He has been a consultant in the retail automotive industry on sales performance standards for 21 years. (Transcript 16-18.)

The witness was hired by Larchmont to analyze the suitability of the MSR metric in evaluating dealer sales performance, including whether the MSR adequately controlled for market factors outside the dealer's control. (Transcript 5, 12.) He did not consider dealer operations, only the MSR as a sales evaluation metric. (Transcript 13-14.) He prepared a report which was entered in evidence as Exhibit P 65. After analyzing all available relevant data, the witness concluded that MSR "does not include empirical techniques, calculations, methods or controls to support the inferences drawn from it. MSR does not reliably or reasonably control for local market factors." (Transcript 21.)

In calculating MSR, the first relevant calculation is for base sales effectiveness based upon the number of statewide retail registrations in New York. The total Chrysler registrations are divided into the competitive registrations for similar product types. This percentage is then applied to each segment in the sales locality for the dealer, resulting in the base sales expectation for the segment in the locality. Large localities, like the one Larchmont is in are sub-divided into trade zones. The base sales expectation is divided among the trade zones through a calculation referred to as "fair share." Fair share allocates half the score based on registrations of the brand and half based on competitive registrations overall, resulting in the MSR metric for the segment. (Transcript 5-10.) FCA contends this "fair share" component differs from the calculation of Retail Sales Index (RSI) in Beck (referencing Beck Chevrolet Co., Inc. v. General Motors, 27 NY3d 379), and accounts for local market factors. In application, the "fair share" adjustment has little actual impact on the sales metric. (Transcript 97-99, 102.) Larchmont only sees a 1.5% reduction in sales expectation with the fair share adjustment. (Transcript 168-169.)

The witness found that when analyzing MSR in a real-world context, the metric utilizes certain base assumptions that do not hold up when dealing with "real world sales opportunity" available to a dealership. (Transcript 22.) In particular, MSR assumes that there is a local territorial advantage for the closest dealer, that the market has uniform product acceptance, and that one unit of MSR opportunity correlates with one unit of real-world opportunity. (Transcript 23-24.) The witness opined that an MSR below the required 100 does not indicate a dealer has weak operations because its calculation includes factors which are not in the dealer's control. (Transcript 26.)

MSR assumes a resident dealer is in the best position to sell vehicles in the area, but does not adjust for brokering, lease penetration or manufacturer advertising. (Transcript 26-27.) "The assumed advantage... doesn't hold very well. It's a very weak relationship... In terms of how it's applied, there's a major problem, a major deficiency." (Transcript 28.)

MSR tries to draw these inferences without doing the necessary mathematical calculations to examine the three moments of distribution: mean, variance and skew. With respect to mean, MSR compares an individual dealer to the mean without regard for any causal relationship. The MSR does not examine the meaning behind any observed score variance. MSR does not account for external factors that may cause skew. (Transcript 29-30.) Despite not examining these factors, FCA uses the MSR statistic as though the three inferences regarding the moments of distribution are supported. (Transcript 32.)

While MSR calculation is driven by sales within a dealer's territory, the nearest dealer advantage in the New York Metropolitan area, where Larchmont is located, is "quite weak." (Transcript 34, 37.) The witness studied a pool of downstate New York dealers and found that only 30% of vehicles sold were registered in the dealer's own area. 70% of the vehicles sold were registered outside the dealer's own market. (Transcript 33-34.) This indicates that the large majority of dealer sales activity downstate is unaddressed by the MSR metric.

(Transcript 37.) When a vehicle is in short supply, as has been the case for Jeeps, sales are much more dependent on who has the vehicle than where it is located. (Transcript 38.) The witness found that dealers who engage in non-location marketing are rewarded by FCA through the vehicle allocation system. The allocation of vehicles to dealers is based on total sales, not just local sales. A dealer who sells more vehicles by targeting marketing out of area, including through brokers, is given better access and price on vehicles. The registration patterns downstate are suggestive of such brokering activity. (Transcript 41-44.)

The witness created a statistical model (Larchmont 285, Table 9, p. 2) which shows that area opportunity for a dealer does not relate to actual sales opportunity at the model mix level. (Transcript 55.) The witness found that 31 of the 32 downstate dealers were outliers on what would be expected if area opportunity related to sales opportunity. (Transcript 56.) The center of sales is often over 15 miles from the dealership. (Transcript 57.)

The witness also ran a regression analysis which showed no relationship between the sales a dealer makes nationwide and opportunity in the area they are closest to. (Transcript 57-58.) An R squared analysis established that 95% of variation in sales is caused by factors other than the dealer's area. (Transcript 58-59.) All the models are consistent with a weak relationship between proximity and sales advantage. (Transcript 60.)

The witness went on to analyze factors that were specific to Larchmont's area. (Transcript 61.) He found that workplace commuting patterns would impact Larchmont's sales opportunities. More commuters leave Larchmont then come in. During the time people leave for work, they are closer to other dealerships, discounting any territorial advantage there might have been. (Transcript 61.) Dollars spent in general retail sales also support a "net out migration of trade" from Larchmont. (Transcript 62.) The witness found that Westchester County has heavy traffic making travel disproportionately difficult. Traffic tends to flow north, away from Larchmont. (Transcript 62-63.) Given all of this, the base assumptions of MSR concerning local advantage don't hold up. MSR does not control for these factors outside the dealer's control. (Transcript 66-67.)

FCA claims to adjust for these local conditions through the application of "slants" when a dealer is unusually impacted by local conditions. The witness found that the threshold for applying slants was set very high, and that even when applied, they did not adequately normalize for the market deviation. FCA appears to have "an intent or an execution not to adjust for local conditions." (Transcript 22-23.) Only three of the 32 downstate dealers have slants. These are the same dealerships that benefit from an available market in an unassigned portion of Brooklyn. (Transcript 96.) Brokering by adjacent dealers is never adjusted for by slant. It appears FCA's policy is to tolerate brokered sales. (Transcript 92.)

The witness reviewed the report of the FCA economic expert, Arthur Baines. The FCA expert concluded that MSR was reasonable without running any statistical models that control for local factors. "These conclusions were offered without any investigation of what would underlie not just any answer to these questions, but any investigation of these questions." (Transcript 68.) His report simply assumes MSR works without examining its relationship with sales and opportunity. (Transcript 69.) "It doesn't even hit an elementary starting point of what I would have expected in an analysis like this." (Transcript 70.) Further, the FCA expert report has two major issues. It relies on "by hand adjustments that occur outside MSR... to territory that are individualized and discretionary," not formulaic as they should be. Further, it does not account for self-selected outcomes relating to the interplay between MSR and the Value Growth Program (VGP). (Transcript 71.)

The witness explained that some geographic areas are left unassigned, providing a significant advantage to some dealerships in reaching the required MSR score. For example, an area in north Brooklyn is unassigned, but vehicles are still registered there. This provides an advantage to the Bay Ridge, Major World and Brooklyn Star dealerships who sell into this area to increase their MSR scores. (Transcript 73-74.) There are similar unassigned territories in Staten Island and Rockland County, which all seem to be positioned to help dealerships in areas where brokering is prominent. "FCA appears to be putting its thumb on the scale," to encourage brokering. (Transcript 76-80.)

The reliability of MSR in reflecting sales opportunity is further compromised because of the compulsion placed on dealers to reach the goals of MSR and VGP without regard for local conditions. (Transcript 87.) Dealers frequently take losses on sales and report vehicles as sold which have not reached a consumer in order to achieve scores. These types of economic decisions are not reflective of market circumstances. (Transcript 87-88.)

The final conclusion of the witness was that even with fair share adjustment, MSR has no fundamental difference from the RSI calculation that was rejected in Beck and is unfair. (Transcript 102.) MSR does not account for brokering, regional import bias, brand popularity, or segment popularity. (Transcript 178-179.) "Given the way that its used, that it affects price, it affects allegations about contract compliance, it can affect termination, it can affect succession... leaving this much unexplained and to chance and drawing inferences, in my opinion as an economist and an empirical analyst, MSR is left with driving arbitrary components and it's not reasonable to draw conclusions based on MSR." (Transcript 101.)

Eleanor Gulla, Larchmont General Sales Manager - Hearing Date October 25, 2019

Eleanor Gulla testified that her family owns the petitioner dealership, Larchmont. She has been involved in the family business since she was a child. (Transcript 59-60.) She is now the General Sales Manager and employs five full time sale's people. (Transcript 61.) FCA claims Larchmont only employs two sale's people, which is incorrect. (Transcript 62.) The facility purchases all its vehicles offered for sale from FCA. Larchmont is a profitable, well-functioning dealership that sells between 620 and 700 vehicles annually. They achieve high sales survey scores. (Transcript 134-135.) The sales performance of the facility is judged by FCA through a Minimum Sales Responsibility (MSR) metric. (Transcript 133.) This metric does not adjust well for local market conditions. Despite good profitability and high sales survey scores, Larchmont only sells approximately 75% of the MSR in vehicle volume. (Transcript 137.) In 2018, Larchmont received a letter from FCA advising that Larchmont was at risk of default for its failure to meet MSR. (Transcript 143, Exhibit 11.) Notice of default is the first step towards termination. (Transcript 150.)

The witness believes the MSR metric is unfair as it does not adjust well for local market conditions such as brokering (also referred to frequently as "in sell") and assumes all sales are done at the dealership. Dealerships engaged in brokering frequently deliver vehicles away from their facilities through the brokers. (Transcript 89, 150.) Brokering has been increasing in recent years. (Transcript 65.) "I'm no longer competing with just... a crowded field of FCA dealers, but on top of that I have to compete with brokers that are, at last count, about 600 in the metro area." (Transcript 66.)

Registered dealerships are at a significant disadvantage competing against brokers. Pursuant to the dealer agreement, the dealership must maintain a 7,000-square foot facility with signage and finish dictated by FCA. (Transcript 79.) The family has invested over 10 million dollars in the business. (Transcript 64.) Brokers have minimal operation costs.

Vehicles can come from out-of-state to brokers. Registered dealers following the rules can't match the prices at the volume brokers have. Further, dealers must follow all Department of Motor Vehicles Regulations, which brokers are not subject to. (Transcript 127.) Brokers have no floorplan to finance, no insurance, and no interest payments. (Transcript 107-108.) Brokers also present problems for the consumers. They often do not disclose their broker fees. They offer little to no privacy protection on credit applications. They offer no direct point of contact with the selling dealer if there is a problem with the vehicle. Customers are often not advised of rebates that may apply. (Transcript 125-126.)

For these reasons, the witness believes brokering renders MSR to be an unfair metric, as it increases competition without consideration of the sales maps. (Transcript 141-142.) FCA has been made aware of this but takes the position that calculation of the MSR is fair and brokering is not an issue. (Transcript 141-142.) Larchmont applied for an adjustment to its MSR based on local conditions (referred to as a "slant"). This was denied. (Transcript 137.)

One broker, VIP Broker, is located only two miles from the Larchmont facility. (Transcript 67.) Registered dealers are prohibited from conducting business away from their facilities by DMV regulations and their dealer agreements, yet VIP is essentially acting as a satellite facility for other dealers. (Transcript 84-85.) VIP also allows third parties to run credit checks and deliver vehicles, which registered dealers are not allowed to do. (Transcript 84.) VIP does not provide the same disclosures that registered dealers are required to provide in its advertisements. The witness, Eleanor Gulla, provided several video recordings of advertisements run by VIP. "We would be fined... because there is no disclosure on this ad... It doesn't state the mileage, the amount of money down, taxes due up front, DMV, parameters to qualify for the lease, MSRP... You don't even know what the price of the vehicle is." (Transcript 68, Exhibit P 30.) As VIP has no inventory of its own, they often send customers to registered dealers to test drive vehicles they are going to buy from VIP. (Transcript 72.) The witness submitted into evidence numerous photographs obtained from VIP online media sources of customers picking up vehicles from VIP, many of whom test drove the vehicle at Larchmont. (Transcript 71-72, Exhibits P 33-40.)

Several other brokers also ran advertisements into Larchmont's area. High End Auto Leasing operates in Larchmont's territory selling Jeeps. Their advertisements do not contain the required disclosure of terms. (Transcript 85-86, Exhibit P 49.) New Rochelle Auto Leasing is a broker in the next town over selling Jeeps. Their advertisements do not contain the required disclosures. (Transcript 86-87, Exhibit P 50.) White Plains Car Leasing is another nearby broker selling Jeeps. Their advertisements do not contain the required disclosures. (Transcript 87-88, Exhibit P 53.)

Competing dealerships also open satellite locations which operate as brokers. The ownership of Eastchester Chrysler Jeep opened such a location under the name New York Cars Direct Leasing in Larchmont, within walking distance of the Larchmont facility. (Transcript 89, 91.) The Eastchester ownership owns the witnesses two closest competing facilities to the south. (Transcript 91.) "Another misleading thing that they would do is if you would... Google Larchmont Jeep, they had created a webpage to make it look like you were on our webpage. So, they purposely put the store there to attract our customers." (Transcript 91.) The witness filed a complaint with FCA, but nothing was done for some time. FCA tends to look the other way with such issues. Eventually, another facility complained as well, and FCA took action. (Transcript 90.)

The witness recorded several conversations she had with her Sales Manager, who had previously worked for Eastchester and Riverdale Chrysler Jeep Dodge, concerning broker dealings and the acquisition of fleet vehicles at the other facilities. (Transcript 92.) The

Sales Manager explained that the owner of the other facilities would speak to an FCA representative and negotiate a better deal for the vehicles he would sell through brokers based on the volume. (Transcript 94.) The Sales Manager believed every dealer in the area was selling vehicles through brokers and that 50% of sales were going through brokers. The Sales Manager explained, "It is a process. We would have to bill out the deal here. A driver would come, take the car. We'd give him the paperwork. They take it to the customer. Customer signs the name and they would just overnight it back to us." (Transcript 98, Exhibit P 20.) The Sales Manager believed Larchmont should sell through brokers. "There's a pie here. And we're only using a third of it." (Transcript 100, Exhibit P 20.)

The Sales Manager told the witness that the owner of the Eastchester and Riverdale facilities was in talks to obtain even lower pricing on Durango, Grand Cherokee, Cherokee and Pacifica models. (Transcript 104.) "Brian Dennis of Eastchester CJDR, he's able to go to Detroit and work out wholesale pricing with Chrysler to be able to better broker units." This pricing is not available to Larchmont. (Transcript 112.) The Sales Manager obtained a copy of the wholesale list Eastchester had sent to a Staten Island broker. The prices were substantially lower than the best prices available to Larchmont. (Transcript 112-115, Exhibit P 18.) If Larchmont were to sell Pacificas at the price on the list, they would lose more than \$80,000 per month. "It's unheard of." (Transcript 117.) At a dealer meeting, the owner of Island Jeep on Staten Island also raised concerns regarding brokering and special pricing involving Eastchester. He emailed the witness a broker sheet he had compiled, showing many vehicles sold by Eastchester through brokers at pricing below invoice. (Transcript 122-124; Exhibit P 39.) The witness hired a private investigator to look into how VIP conducted sales. The deal offered to the investigator was \$1,900 below invoice. Larchmont could not afford to sell at that price. (Transcript 120-121.) The witness believes FCA is encouraging select dealers to sell at reduced pricing through brokers. FCA consistently opposes new legislation that would regulate or limit brokers. (Transcript 121.)

The witness testified that virtually all broker deals involve leases. (Transcript 106.) DMV regulations prohibit the dealer from submitting a credit application, which is required for a lease, without verifying the customer information. Moreover, the company Larchmont uses to fund its leases prohibits brokering. The finance agreement states: "Brokering of deals is a violation of the Groovecar dealer agreement and may result in termination of your relationship with Groovecar and all credit unions. All vehicles must be delivered from the dealership location. There are no exceptions to this policy." (Transcript 128-133, Exhibit P. 46.)

The witness explained that MSR is also unfair in that it has a significant impact on wholesale pricing for vehicles. Competitive pricing requires the dealer to assume they will qualify for discounted pricing under the Volume Growth Program (VGP.) If the dealer reaches a monthly sales objective, they receive this benefit. A failure to achieve MSR results in a penalty on VGP calculation, in that the sales objective for VGP is increased for the next month. Larchmont does not often qualify for VGP. "They boost you when you're up and they kick you when you're down." (Transcript 137-141.)

Stephen Davis, Larchmont Private Investigator - Hearing Date October 25, 2019, Volume 2

Stephen Davis testified that he is a licensed private investigator and a former Deputy Commissioner of the New York Police Department (NYPD.) He works with Nardello and Company, who hired him in this instance, performing corporate investigations. (Transcript 4.) "I was asked to assist them in an investigation into a company which they had described as an automotive broker by the name of VIP up in Westchester. I was asked to see if I could conduct an investigation into determine, basically how they conduct their business, for

people who are looking to acquire new cars for sale or lease." (Transcript 4-5.) The witness worked with Kevin Leonard, a retired NYPD officer.

The witness testified that Leonard went to the VIP website and submitted an inquiry regarding the purchase of a vehicle. He received an electronic response within 24 hours. (Transcript 5.) The response directed the purchaser to contact a local dealer to test drive the model he was interested in and then to contact VIP who would provide the best pricing on that vehicle. (Transcript 6-8, Exhibit P 74.)

The witness then went with Leonard to the VIP location in Westchester. The location consisted of a portion of a shared storefront with a counter. No vehicles were displayed. (Transcript 8.) They spoke to Nick Vurchio about leasing a vehicle. (Transcript 9.) "Mr. Vurchio indicated that they have access to cars from dealerships... throughout the country. They could obtain them... and we could get... a vehicle from VIP delivered to a place of residence or business or whatever address... the buyer wanted without having to actually visit any dealership." (Transcript 9-10). Nick further explained that they would never have to return to the office. They would conduct the whole transaction by email and phone. (Transcript 10.) Nick stated, "The reason why we're able to get better prices than the dealerships... is because our whole sales structure is different. They work based on commission... we work on volume." The vehicle would be obtained from a dealership who could mark down the car to allow them to move more volume. (Transcript 11.) The car, once delivered, could be brought to any dealership for service. Nick stated, "Our job is to do all the leg work for you... so that you don't have to call 16 different... dealerships all over the U.S." (Transcript 12.)

Kevin asked him for a Jeep Grand Cherokee Altitude. Nick was on a computer terminal searching for vehicles. At one point, he made a phone call to obtain some form of access code. (Transcript 16-17) Nick offered to arrange financing for the deal as well. Nick told Leonard that once he found the vehicle, he would send the VIN so the customer could arrange insurance. (Transcript 18.) Nick contacted Leonard the next day by electronic message. He provided quotes for a 12K mile lease and 15K mile lease with financing, a credit application, and a photograph of the vehicle. The credit application only listed VIP. No financial institution was indicated. (Transcript 20-21.) Nick did not indicate where the vehicle would come from. Through the VIN, the witness determined that the vehicle was listed for sale by Reedman Toll Auto Group in Pennsylvania. (Transcript 23-25.)

Kevin filed the credit application and requested that all paperwork be provided in advance of taking delivery. (Transcript 22, 27.) Kevin received an electronic notice that a report of his credit history was made to Chrysler Capital, not VIP. At no time did Kevin contact Chrysler Capital for financing. (Transcript 26.) Kevin was provided a cost breakdown for the vehicle, but no other paperwork. He was told that it had to come directly from the dealership at delivery. (Transcript 26-27.) Nick never disclosed the commission he would receive to broker the deal, whether he had a contract with the dealer or Chrysler Capital. Kevin never actually signed a contract with VIP for brokerage services. (Transcript 27-30.) As this was done for investigation purposes, Kevin never took delivery of the vehicle. (Transcript 42.)

Joseph Gardemal, FCA Forensic Accountant - Hearing Date October 25, 2019, Volume 1

Joseph Gardemal testified that he is a Certified Public Accountant (CPA) and forensic accountant with Alvarez and Marsal in Washington, D.C. He has worked with the automotive industry for 20 years. (Transcript 23.) "I was asked to review the financial information in the case and develop opinions related to Larchmont's financial performance." The witness was also asked to look at certain reference dealers and determine any economic impact

from brokering activity. (Transcript 26.) The witness had no opinion on how MSR is calculated. (Transcript 28.)

The witness reviewed dealer generated financial statements and composite data from two reference dealer groups. (Transcript 30.) The first reference group included Central Avenue, White Plains and Danbury, Connecticut, the dealers Larchmont identified as being heavily involved in brokering. (Transcript 31.) The second group included Central Avenue, White Plains, Chrysler City and Eastchester, which are the trade zones adjacent to Larchmont. (Transcript 33.) Using each comparison group in calculations, the witness found that Larchmont consistently falls far behind the other dealers in sales. The witness examined the information from December 2013 through June 2019 and found Larchmont did not achieve its MSR for any model line during any period. (Transcript 34-35, Exhibit R 37.) By the end of 2018, Larchmont had over two million dollars in extra working capital that could have been invested toward achieving MSR. (Transcript 39.)

From his review of the data, the witness concluded that Larchmont is a profitable dealership with positive financial performance, but consistently fails to meet the MSR metric. Larchmont has high gross retail prices but sells at low volume. If Larchmont chose a sales strategy to compete on price, they would move toward achieving MSR. (Transcript 29-30, 37-38.) The witness noted that the dealership had higher than average attainment under the Value Growth program between 2016 and 2018. (Transcript 38-39.)

On cross examination, the witness testified that he had no opinion on the effect of brokering magnitude or its impact on MSR calculation. (Transcript 43.) The witness further acknowledged that 85% of Larchmont sales are Jeeps, which is substantially more than the composite group dealers. The witness has no opinion of how this might impact MSR issues. (Transcript 59-60.)

Timothy Warner, FCA Network Development Manager for the Northeast Business Center -
Hearing Date October 29, 2019

Timothy Warner testified that he has been employed by FCA and its predecessors for 31 years. He is now the Network Development Manager for the Northeast Business Center. (Transcript 2-3.) The witness is responsible for the "health and the growth of the dealer network." He is familiar with the retail market in New York. (Transcript 4.) The witness has some familiarity with the Larchmont facility, but most corporate contact occurs through FCA's New York Sales Manager. (Transcript 5.)

MSR is used as an evaluation tool of both current and potential dealers. The metric is most often used, "with a dealer that is below MSR to help them along the way to... move them... above MSR." (Transcript 7.) FCA has "tools" available to assist dealers in improving sales. The witness has seen dealers use these tools to improve sales. Larchmont has been offered assistance in this regard. One example is that dealers have access to a digital marketing team that can help them to spend marketing money "smarter." (Transcript 8.) Another tool available is access to a program called "Market Master," which provides market data maps to help a dealer understand its market better. (Transcript 9.)

Larchmont has below average performance as a dealer. "The main topic that... generally arises when we talk about it is the... gross profit structure on each deal." Larchmont holds out for higher profit on vehicles, resulting in less sales. Lower pricing would make them more competitive and improve their MSR. (Transcript 14.) Because of its below average performance, Larchmont was sent a "monitor letter" in September 2017. This letter advised that Larchmont's sales performance was lacking. MSR was not being met. The letter also

advised Larchmont of the tools available to assist them. Larchmont did not take advantage of the tools. (Transcript 10-11, Exhibit R27, p. 376.) Another monitor letter was sent on February 16, 2018. Again, Larchmont did not take advantage of the available tools. (Transcript 12, Exhibit R 27, p. 383.)

With respect to brokers, the witness explained that the decision of whether to work with brokers is left up to each dealer. (Transcript 18.) Brokering is legal in New York, and is common in Brooklyn, Staten Island, and parts of Bronx and Rockland Counties. (Transcript 16-17.) FCA does not encourage or discourage the practice. (Transcript 18.)

FCA does not give any favored treatment to high volume dealers who might sell through brokers. (Transcript 34.) The witness spoke with relevant FCA executive staff concerning allegations of "kickbacks" for dealers selling through brokers. "I learned that neither of them had any idea of what that allegation... would entail and that none of that... activity was taking place at FCA." (Transcript 24.) In any event, Westchester County does not have much broker activity. "The population doesn't fit the mold for... the people that would search out brokers." (Transcript 21.) The witness does not believe the MSR for Larchmont is affected by brokering. (Transcript 23.)

All dealers receive the same wholesale pricing and have the same access to Value Growth Program (VGP) incentives. (Transcript 25-27.) A failure to meet MSR does not preclude VGP achievement because MSR is not a component of VGP calculation. (Transcript 27.) Larchmont, despite struggles with achieving MSR, has very good VGP achievement. Larchmont attains VGP 75% of the time, while the average for other dealers is 60%. (Transcript 29.)

Rashar Colagh, FCA Head of Supplier Diversity Development and Purchasing Communications - Hearing Date October 29, 2019

The witness testified that he is presently the FCA Head of Supplier Diversity Development and Purchasing Communications and previously was the Head of Market Representation Organization from 2013 to 2019. (Transcript 49.) The witness analyzed registrations, sales, and demographic data to determine market performance and establish a dealer network plan. (Transcript 50.)

His division is responsible for the MSR metric and defining sales areas. The witness, "applies a methodology across all dealers to determine which census tracts are allocated to what dealers." (Transcript 52.) The method considers drive distance to the facility, drive time to the facility, cross shopping patterns and demographics including population, income, and ethnic breakdown. (Transcript 52-53.) "The goal is just to assign... each census tract to one dealer based on... customer proximity to the dealership." (Transcript 53.)

In calculating sales expectations, FCA uses an MSR metric that includes a "fair share" component that is unique and differentiates the metric from the RSI metric used by General Motors. (Transcript 54, 59.) The application of the fair share to Larchmont begins by calculating the percentage of Larchmont trade zone competitive registrations as a percentage of the Westchester sales locality. This is done for each segment. Brand popularity is then accounted for by calculating the percentage of sales for the brand in each segment. The result of each is averaged to determine the dealer's fair share of the shared trade zone. By this calculation, Larchmont is responsible for 20% of sales for the Westchester area. The remaining 80% is assigned to the other dealers in the area. (Transcript 56-62.)

About 60% of New York dealers achieve the MSR metric. (Transcript 62.) Larchmont generally does not reach the MSR. Its best recent year was 2016, when it achieved 82.92% of MSR. During that year, Larchmont achieved MSR for two segments. (Transcript 66-67.)

Larchmont has requested a slant based on above average "in sell" (sales from outside the dealer's area which are registered in its area). (Transcript 70.) FCA performed a complete market analysis using 2017 data. (Transcript 72-73.) By its policy and methodology, FCA required a threshold showing of 43.3% "in sell" to qualify for a slant. The actual in sell for Larchmont was only 23.5%, so they did not qualify for the slant. (Transcript 74-79.) The threshold was determined after analyzing 140 trade zones nationally using IQR methodology, which is recognized by the National Institute of Standards and Technology in the U.S. Department of Commerce, to determine normal ranges of market penetration. (Transcript 94.) A second analysis was performed using data from the following year, resulting in a threshold of 44% and actual in sell of 24.7%. (Transcript 85-86.)

Arthur Baines, FCA Economics Expert - Hearing Date October 29, 2019

Arthur Baines testified that he is the Vice President and Co-practice Leader for the economics practice of Charles River Associates. (Transcript 141.) The witness has a Master's degree in economics from the University of North Carolina. The majority of his work involves statistical analysis and regression techniques. (Transcript 142.) He has consulted with most of the major automotive manufacturers that sell vehicles in the United States. His expert report was admitted into evidence as Exhibit R 32A. (Transcript 144-145.)

The witness was asked to analyze and assess FCA's sales performance metric referred to as MSR. He was given four tasks. First, he was to determine if MSR is functionally equivalent to RSI used by General Motors. Second, he was to determine if MSR, as designed, is arbitrary, unreasonable or unfair. Third, he was to determine if MSR, as applied to Larchmont, was unreasonable, arbitrary or unfair. Finally, he was to determine if Larchmont qualified for a local slant. (Transcript 147.)

With respect to the first task, it was the opinion of the witness that MSR is not functionally equivalent to RSI. "I've looked at the design of MSR, I've looked at the components that are included in it, what it considers. And then I've tested the application of MSR... in the Westchester sales locality, and in the downstate area." (Transcript 148.) The witness compared the formula used to calculate MSR to that used to calculate RSI and found MSR considers nine factors, to only three involved in the RSI. (Transcript 157-159.) Unlike RSI, MSR adjusts for local market conditions through the use of "fair share" calculations and the application of slants. (Transcript 170-171.)

With respect to the second task, the witness found that MSR is not arbitrary, unreasonable or unfair as designed. (Transcript 160.) The largest percentage of sales for each dealer occur within the dealer's own trade zone. (Transcript 153.) MSR further employs fair share analysis and slants to adjust for differences in local market conditions. (Transcript 163.) Larchmont's expert, in concluding that MSR was unfair, utilized industry definitions, rather than FCA's custom definitions, to define vehicle segments. This resulted in calculations that were not the actual MSR, as shifting the definition altered the registration count in the formula. (Transcript 161-162.) The Larchmont expert's models were not reliable. (Transcript 178.) FCA definitions focus on FCA's actual competitors, not just industry types. For example, FCA does not include Mercedes sedans in the four-door sedan segment because they are not really market competitors. (Transcript 163.) Further, the Larchmont expert only ran 30 "observations," which is too little data from which to draw conclusions. He created bias using a small set. (Transcript 173.)

With respect to the third task, the witness found that MSR is not arbitrary, unreasonable or unfair as it is applied to Larchmont. The other dealers in Westchester have been able to achieve MSR for the last two years. (Transcript 169.) MSR properly adjusted for local conditions through the fair share calculation. The data reflected that the sales patterns in the trade zone were not abnormal, so a slant was not called for. (Transcript 166.) The witness further observed that there was no brand popularity or import bias that required adjustment in Larchmont's trade zone. (Transcript 182.) The MSR metric is set well below the total vehicle sales in the downstate area. (Transcript 185.) The witness found that in 2018, 17 of the 30 downstate New York dealers, amounting to close to 60% of the dealers, met the MSR metric. (Transcript 215.) On cross examination, the witness acknowledged that in 2015, 15 of the 31 dealers in the New York Metropolitan Area missed MSR. In 2016, 13 of 31 dealers missed MSR. In 2017, 17 of the 31 dealers failed to meet MSR. In 2018, 13 of the 31 dealers failed to meet MSR. This combined to a failure rate of 47% from 2015 through 2018. (Transcript 273-274.)

With respect to the fourth task, the witness found that Larchmont did not qualify for a slant. The purpose of a slant is to adjust for local market conditions. (Transcript 178.) The witness found no evidence that dealers were making brokered sales into Larchmont's trade zone. (Transcript 179.) The witness replicated the analysis previously done by FCA and found that Larchmont does not qualify for a slant. (Transcript 180, 192-193.) The statistical model used by FCA to determine slants is fair and reasonable. (Transcript 197.) There was no abnormal in-sell in Larchmont's area. (Transcript 180.)

ANALYSIS AND DISCUSSION

A review of the record reveals that the hearing was fair, and the appellant had an adequate opportunity to participate in the proceedings.

A review of the Findings and Disposition reveals nothing that would create an impression of unfairness in the proceeding or bias on the part of the assigned Administrative Law Judge in favor of either party.

There is nothing in the Findings and Disposition to support the allegation by FCA that the Administrative Law Judge applied an incorrect burden of persuasion in this matter. Moreover, there was substantial evidence in the record to support the findings.

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.

There was substantial evidence in the record to support the finding of the Administrative Law Judge that the MSR performance metric is unreasonable, arbitrary or unfair as a sales performance standard under VTL §463(2)(gg).

The Court of Appeals has held that the requirements of fairness provided in the Franchise Motor Vehicle Dealer Act clearly override any contrary provisions of any dealer agreement. The Court also found that a similar standard, the Retail Sales Index (RSI), applied by General Motors, did not meet the fairness or reasonableness standard. (Beck Chevrolet Co., Inc. v. General Motors, LLC, 27 NY3d 379.)

The Administrative Law Judge did not find that MSR was the same as the GM Retail Sales Index (RSI) as the appellant contends. Rather, the Administrative Law Judge concluded that the MSR standard has similar problems to RSI that render it unfair. While many factors were considered, it appears the Administrative Law Judge relied most heavily on two issues; the large percentage of dealers that do not meet the standard, and the fact that the main means of adjustment provided is a "slant," which is only issued at the sole discretion of FCA.

The Administrative Law Judge surmised, "MSR in sum as determined by FCA does not meet the standards of the Beck (Beck Chevrolet Co., Inc. V. General Motors, LLC, 27 NY3d 379) decision and therefore is unenforceable against Larchmont. The fact that 43% of the downstate dealers are not meeting their MSR means that it is a 'flawed' metric and the sole discretion of FCA to determine what constitutes a slant is additionally an unreasonable, arbitrary or unfair sales or other performance standard and thus in violation of FMVDA." (Findings and Disposition, 8-9.)

A review of the evidence reveals that FCA's own witnesses established that a substantial portion of dealers, especially in downstate New York and the New York Metropolitan area, do not meet the MSR standard. From 2015 through 2018, 47% of dealers in the New York Metropolitan area failed to achieve the MSR metric requirement. In 2015, more than half of the dealers failed to achieve MSR. (Transcript 273-274.) In fact, as the Administrative Law Judge points out, Larchmont is a financially successful business who is in danger of default based upon the application of the present metric. (Findings and Disposition, 5.) Where a standard places financially successful facilities in danger of default, and such a high volume of dealers are not able to obtain the required metric score, the metric cannot be said to be reasonable or fair.

Moreover, a "performance standard that measures dealer success based on data that fails to accurately represent market challenges (emphasis added) would appear to undermine the franchisor and dealer's common goal of selling and servicing vehicles and franchisor products." (Beck Chevrolet Co., Inc. V. General Motors, LLC, 27 NY3d 379.) In this regard, it is clear that the calculations must do more than pay lip service in reference to local conditions. As the Administrative Law Judge pointed out, MSR does not adequately take into account local market conditions, such as strong ethnic or religious buying patterns or consumer preferences. In making this finding, the Administrative Law Judge refers to a similar decision with respect to the need for the sales standard to account for local conditions reached in California. (See, Dependable Dodge, Inc. V. Fiat Chrysler Automobiles, Inc., Protest Nos. PR-2435-15 and PR-2436-15 (Cal. New Motor Vehicle Board, March 15, 2017).) On appeal, appellant attempts to distinguish this case from the present based upon a different burden of proof and the fact that the case involved a termination petition brought by FCA. While these distinctions are true, the case nonetheless provides a further example where MSR was found to be unfair based in part on its failure to adequately account for local conditions. Further, we find no error in the Administrative Law Judge placing little weight on the appellant's cited case, Cecil Atkission Orange, LLC v. FCA US LLC, MVD Docket No. 15-0015.LIC, SOAH Docket No. 608-15-4315.LIC (Texas Dep't of Motor Vehicles, August 17, 2017). This case was from a different jurisdiction, and as the Administrative Law Judge indicates, involved a dealership whose performance "would be not acceptable by any method of determining sales performance." (Findings and Disposition, p. 8.)

The sales standard must accurately represent the market challenges faced by the facilities. Throughout the proceeding below, and on appeal, the appellant relied on distinguishing its own MSR calculation from the calculation of Retail Sales Index by General Motors, based

upon the inclusion of a "fair share" calculation and the availability of "slants" to further adjust for local conditions.

The Administrative Law Judge's finding that the issuance of a slant was at the sole discretion of FCA and is therefore additionally unreasonable, arbitrary or unfair as a sales or performance standard is also supported by the evidence. In evaluating sales standard calculations, the Court of Appeals has held that the standard must account for local market conditions, including factors such as brand popularity and import bias. (Beck Chevrolet Co., Inc. V. General Motors, LLC, 27 NY2d 379.) The appellant relies heavily on the availability of a slant to adjust for such conditions and meet this standard. In this case, the Sales Agreement (Exhibit P-1, pg. 18) leaves the determination of whether a slant is given to FCA's judgement alone. Such sole discretion of the franchisor to allow an exception was previously found to be unfair, unreasonable and arbitrary under VTL §463(2)(2)(gg). (Wide World of Cars, LLC v. Maserati North America, Inc., Case No.: FMD 2017-03, affirmed Appeal Docket No. 40445.) Moreover, there is substantial evidence indicating that the slant program does not adequately account for the actual market challenges. The Administrative Law Judge points out that only three such slants were granted in downstate counties, two for Brooklyn dealerships and one to a Long Island facility. Even with the applied slants, two of the three dealerships still could not meet the MSR standard.

The appellant also relies heavily on its "fair share" calculation in distinguishing its MSR metric from the General Motors RSI standard that has been found inadequate. There is substantial evidence in the record to support the finding that the "fair share" calculation and the occasional granting of a slant do not adequately or accurately represent the individual market challenges faced by facilities. Larchmont's expert on econometrics, Edward Stockton, after analyzing the available data, concluded that MSR relies on assumptions that do not adequately represent the real-world sales opportunities available to the dealers. (10/28 hearing session, p. 22.) He found that MSR "does not include empirical techniques, calculations, methods or controls to support the inferences drawn from it. MSR does not reliably or reasonably control for local market factors." (10/28 hearing session, p. 21.) In particular, the fair share calculation only effects the final calculation by "very, very small orders of magnitude." (10/28 hearing session, p. 161.)

To the extent that testimony and evidence offered by FCA differed from that presented by Larchmont, including conflicts between expert opinions, a question of credibility was raised. The Administrative Law Judge who saw and heard the witnesses was in the best position to determine credibility, and there is no reason to disturb the assessment of credibility in this case. (Matter of Berenhaus v Ward, 70 NY2d 436; Matter of Liuzzo v State of New York DMV Appeals Board, 209 AD2d 618; Segal v McDaniel Ford, Inc., 201 AD2d 717; Matter of Morina v Passidomo, 109 AD2d 783.)

Much has been made about the role brokering may play in the overall fairness of the MSR metric. Larchmont presented evidence that its local market conditions were impacted by, among other things, the sale of vehicles by out of area dealerships into Larchmont's area through local brokers and requested that FCA be prohibited from including brokered sales in calculating sales responsibility through MSR. The issue is not a question of legality. Such brokers are generally legal entities of New York and are authorized to do business in the State. Rather, the question is whether they impact local market conditions, and if so, does the current MSR sales metric adequately account for them?

There is substantial evidence in the record indicating that such brokering was occurring and was a significant local condition in the market. Through its General Sales Manager, as well as the private investigation firm hired to investigate the issue, Larchmont offered numerous

examples of vehicle sales made by out of area dealerships through local brokers. FCA's own witness, Timothy Warner, Network Development Manager for the Northeast Business Center, acknowledged that brokering is common in downstate New York, and that FCA does nothing to discourage the practice. (10/29 Hearing Session, pp 16-17.) Moreover, there is evidence in the record that dealers who sell through such brokers are provided better pricing on vehicles than those who do not, a factor the Administrative Law Judge rightly suggests may further indicate a lack of good faith on the part of FCA, in promoting its own interest in selling as many vehicles as possible at the expense of the dealerships. (See, Findings and Disposition, pp 7-8.) We note that the Administrative Law Judge does not suggest that any good faith standard applies to the assessment of the MSR metric as the appellant contends, only that the allegations concerning special pricing for those utilizing brokers could suggest bad faith.

All allegations notwithstanding, the Findings of the Administrative Law Judge properly focus on the primary question, which is not whether Larchmont has proven that brokering was going on in its market, or even to what degree brokering in particular directly impacted the MSR metric. Rather, as the Administrative Law Judge correctly surmises, the real, and only issue is whether MSR, in sum, meets the statutory requirements that it be fair, reasonable, and nonarbitrary. There is substantial evidence in the record to support the finding by the Administrative Law Judge that the MSR metric is flawed to the point of being unreasonable, unfair or arbitrary.

In this regard, the fact that other nearby facilities in Westchester may have achieved the MSR standard while Larchmont did not is also irrelevant. Much like the allegations concerning leasing, the issue is not one of Larchmont, or any other facility's performance under the standard, but rather an analysis of whether the standard itself is unfair.

Given the foregoing, there is substantial evidence in the record to support the determination of the Administrative Law Judge. The Findings and Disposition should be affirmed.

DECISION BY THE BOARD: The determination is affirmed. The original decision remains.