CTQ-2015-00002

Court of Appeals

of the

State of New York

BECK CHEVROLET CO., INC.,

Appellant,

– v. –

GENERAL MOTORS LLC,

Respondent.

ON APPEAL FROM THE QUESTIONS CERTIFIED BY THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
IN DOCKET NOS. 13-4066-CV AND 13-4310-CV

BRIEF FOR *AMICI CURIAE* ALLIANCE OF AUTOMOBILE MANUFACTURERS AND ASSOCIATION OF GLOBAL AUTOMAKERS IN SUPPORT OF DEFENDANT-RESPONDENT

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DISCLOSURE STATEMENT

The Alliance of Automobile Manufacturers and the Association of Global Automakers are not-for-profit corporations, which have no parent companies, no subsidiaries, and no affiliates.

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CERTIFIED QUESTIONS

1. Is a performance standard that requires "average" performance based on statewide sales data in order for an automobile dealer to retain its dealership "unreasonable, arbitrary, or unfair" under New York Vehicle & Traffic Law section 463(2)(gg) because it does not account for local variations beyond adjusting for the local popularity of general vehicle types?[1]

2. Does a change to a franchisee's Area of Primary Responsibility or AGSSA constitute a prohibited "modification" to the franchise under section 463(2)(ff), even though the standard terms of the Dealer Agreement reserve the franchisor's right to alter the Area of Primary Responsibility or AGSSA in its sole discretion?

[1] Respondent General Motors has requested that this question be reframed to more accurately reflect (a) the statutory provision in question and (b) the issue that was actually tried by the U.S. District Court. Resp. Br. at 35-38. The Alliance of Automobile Manufacturers and the Association of Global Automakers support that request.

STATEMENT OF INTEREST

The Alliance of Automobile Manufacturers, Inc. (the "Alliance") and the Association of Global Automobiles ("Global Automakers" and, collectively, with the Alliance, "Amici") respectfully submit this brief as *amici curiae* in support of the position of respondent General Motors, LLC ("GM"), that the questions certified by the U.S. Court of Appeals for the Second Circuit should be answered in the negative.

The Alliance is a nonprofit trade association comprised of twelve members who are manufacturers and/or distributors[2] of passenger cars and light trucks, viz.: BMW Group; Fiat Chrysler LLC; Ford Motor Company; GM; Jaguar Land Rover; Mazda; Mercedes-Benz USA; Mitsubishi Motors; Porsche Cars North America; Toyota; Volkswagen Group of America; and Volvo Cars of North America, LLC. Global Automakers is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 12 international motor vehicle manufacturers, including American Honda Motor Co.; Aston Martin Lagonda of North America, Inc.; Ferrari North America, Inc.; Hyundai Motor America; Isuzu Motors America, Inc.; Kia Motors America, Inc.; Maserati North America, Inc.; McLaren Automotive Ltd.; Nissan North America, Inc.; Subaru of America, Inc.; Suzuki Motor of America, Inc.; and Toyota Motor North America, Inc. Together,

[2] For the sake of brevity, this brief refers to manufacturers and distributors collectively as "manufacturers."

Amici represent almost every automobile manufacturer whose vehicles are sold in the United States.

Amici's members sell their products to independently owned and operated dealerships throughout the United States. Accordingly, they have a significant interest in the courts' interpretation of the duties owed by manufacturers to those independent businesses.

Amici's mission is to advance the common interests of their members engaged in manufacturing, importing, and/or selling motor vehicles in the United States. In addition, Amici articulate and advocate their members' needs and interests before the public as well as the legislative, administrative, and judicial branches of local, state, and national governments. Amici have participated as *amici curiae* in both state and federal courts, including the United States Supreme Court.

Amici have a particularly strong interest in the issues raised in this case because the questions certified to this Court by the Second Circuit are framed in a broad way, such that a broad answer could affect all of their members' business practices. Further, Beck at times appears to be asking this Court to issue a ruling that would apply to the franchise agreements and decision-making processes of all manufacturers. *See, e.g.*, Beck Reply Br. at 17.

Amici believe that (i) the decision of the U.S. District Court for the Southern District of New York in favor of GM and against Beck was correct and should be affirmed, and (ii) the questions certified to this Court should not only be answered in the negative, but the answers should be carefully tailored to the facts of, and the actual issues litigated in, this case.

Amici have filed a motion for leave to file this brief.

INTRODUCTION

The two questions certified to this Court relate to Beck's appeal of two rulings by U.S. District Judge Alvin Hellerstein.

First, Judge Hellerstein granted summary judgment dismissing Beck's claim that GM violated the New York Franchised Motor Vehicle Dealer Act (the "Dealer Act"), N.Y. Veh. & Traf. L. ("VTL") §§ 460 *et seq.*, when it revised Beck's "Area of Primary Responsibility" ("APR"). A1635-1638. Section 463(2)(ff)(1) of the Dealer Act makes it unlawful for a franchisor "[t]o modify the franchise" of any dealer without providing the dealer with 90 days' notice and 120 days to file a lawsuit or administrative proceeding protesting the modification. The Act defines "modification" as "any change or replacement of any franchise" that may "substantially and adversely affect" the dealer's rights. VTL § 463(2)(ff)(2).

Judge Hellerstein ruled that there was no "change or replacement" of the franchise because the franchise agreement itself gave GM discretion to revise the

APR. A1635. Accordingly, Judge Hellerstein never reached the question whether there was a change that "substantially and adversely affect[ed]" Beck's rights.

Judge Hellerstein's decision was consistent with the statutory language and with the common-sense meaning of a contract "modification." In this connection, it is important to understand that APRs are not exclusive sales territories granted to dealers; they are merely areas used for assessing dealer *and brand* performance. Thus, the GM franchise agreement defines the APR as an area "used by [GM] in assessing performance of dealers and the dealer network." A143 (Art. 4.2). Because APRs must be revised from time-to-time for a wide variety of reasons, GM expressly "retains the right to revise Dealer's Area of Primary Responsibility at [GM's] sole discretion consistent with dealer network planning objectives." *Id.*

When a party exercises a discretionary right under a contract, the party does not "modify" that contract. An automobile franchise agreement necessarily confers discretion on one or the other of the parties with respect to numerous matters and transactions that will take place during their long-term relationship. To hold, as Beck urges, that a manufacturer's exercise of a discretionary right under a franchise agreement is a "modification" of the franchise, potentially subject to 90 days' notice and a subsequent protest that could take years to reach a final decision, could impose unreasonable and unworkable restrictions on manufacturers with respect to a host of matters, including vehicle pricing and

model introduction and discontinuation. There is no basis for such an interpretation in the statutory language or the evident legislative intent.

Second, Judge Hellerstein found, following a four-day bench trial at which he heard testimony from expert witnesses for both Beck and GM, that Beck had failed to prove that, in using its Retail Sales Index ("RSI") metric, GM had violated the Dealer Act by "us[ing] an unreasonable, arbitrary or unfair sales or other performance standard in determining a [dealer's] compliance with a franchise agreement." VTL § 463(2)(gg). A1673-74; *see* A1197-1228 (findings of fact and conclusions of law). Accordingly, Judge Hellerstein denied Beck's requests for an injunction and a declaratory judgment. A1674.

In support of his ruling, Judge Hellerstein found (among other things) that GM (1) rates as "unsatisfactory" only dealers whose RSI score is below 85 and which rank "in the bottom 15% of dealers in the state," A1211; (2) uses the RSI scores "as a[n] exhortatory tool to get these dealers to improve sales," *id.*; (3) "uses other indices to check the reasonableness" of the RSI score by, for example, comparing the dealer's performance to that of the other domestic brands (namely, Ford and Chrysler) in its APR and by looking at the dealer's share of the Chevrolet sales made in its own APR, A1214-15; (4) considers "not only the dealer's RSI but also other mitigating factors which might explain failures to meet the sales targets" in making a termination decision, A1211; and (5) "will not seek to terminate a

dealer simply because the dealer did not achieve an RSI of 100," *id*.

Notwithstanding these specific findings of Judge Hellerstein, Beck argues that GM's use of the RSI metric is unreasonable, arbitrary and unfair because, supposedly, a failure to achieve average performance (*i.e.*, an RSI of 100) can result in termination. *See*, *e.g.*, Beck Br. at 43; Beck Reply Br. at 2, 10-17. But Beck's premise is contrary to Judge Hellerstein's findings, the evidentiary basis of which Beck does not even attempt to challenge. Moreover, it was not the issue that was tried by Judge Hellerstein. That issue was whether GM had violated VTL §463(2)(gg) by "us[ing] an unreasonable, arbitrary or unfair sales or other performance standard in determining a franchised motor vehicle dealer's compliance with a franchise agreement." In finding that GM did not violate this statute, Judge Hellerstein properly considered the way in which GM actually "uses" the RSI standard – *i.e.*, to "exhort" improved performance from below-average dealers and to seek to terminate only those dealers at the very bottom of the RSI ratings, and then only if (i) the dealer has failed to improve despite prior cure notices, (ii) other indices confirm the reasonableness of the RSI rating, and (iii) there are no mitigating factors that might explain the dealer's performance. A1211; A1214-15.

As Judge Hellerstein advised the parties before the trial, "[t]his is not a termination case." A893. That case, Judge Hellerstein said, could be "tr[ied]

elsewhere." A894. On that basis, Beck itself argued (successfully) that certain evidence concerning its poor performance should be excluded from the trial. A903. Beck further advised Judge Hellerstein that the issue before him was not a legal issue but "purely facts and figures" and "a pure expert case." A887, A903.

Now that Judge Hellerstein has found GM's expert evidence to be more persuasive than Beck's, however, Beck appears to ask this Court for a sweeping legal ruling that RSI and similar metrics used by other manufacturers may not be used in dealer termination cases. That is an issue that should be decided on a case-by-case basis in *actual* termination cases – not in this case. Contrary to Beck's assertions, the vast majority of courts and agencies ruling on dealer terminations for poor sales performance – including the only sales termination case in which the New York Department of Motor Vehicles (the "DMV") has rendered a final decision – have found metrics similar to RSI to be a fair and reasonable way to evaluate dealer performance and a useful tool in determining whether there is due cause for termination.

Moreover, *no* court has held what Beck apparently asks this Court to hold – *i.e.*, that it is in all cases unreasonable, arbitrary, and/or unfair to use state average sales effectiveness as a benchmark in making a termination decision.

STATEMENT OF FACTS

Both of the certified questions touch on matters of vital importance to automobile manufacturers – *i.e.*, how they (1) assess their retail sales performance in the extremely competitive automotive market and (2) make decisions aimed at improving that performance. Evaluating and improving dealer performance is critical to improving brand performance and hence market share because manufacturers are prohibited under New York law from selling or leasing vehicles to the public other than through their franchised dealers. VTL § 463(2)(y).

As in most industries, automobile manufacturers look at their market share and look for opportunities to improve that share. In this process, automobile manufacturers have a unique ability to determine how well a brand is performing in a specific geographic area because of state law requirements that every automobile be registered and that every registration have a specific home or business address. *See* A925. As a result, unlike manufacturers of television sets or washing machines, an automobile manufacturer can obtain reliable information concerning the exact locations not only of the customers who have purchased its various car models and the dealers who sold them but also those of the customers who purchased its competitors' models. *See* A925, A1001-03, A1091.

Registration data is collected from the states by companies such as R. L. Polk, from whom most manufacturers purchase such information. *See* A925,

A1001. That information is then analyzed by the manufacturers and by companies such as Urban Science Applications, Inc. ("USAI"), which provides reports to manufacturers and dealers concerning (among other things) (i) how brands and dealers are performing in various markets, (ii) which dealers are selling specific vehicles to consumers who reside in specific markets, and (iii) where the brands and dealers have opportunities for additional sales. *See* A982-83, A1002-04, A1042-43, A1088-89.

Over the years, USAI and the industry have refined and improved their methods of assessing retail sales performance. For example, in calculating its market share, a manufacturer typically does not look at its share of all automobile sales but rather at its share of its "competitive group" – *i.e.*, the specific brands and vehicle models with which its brand and models compete. A1003. Thus, a luxury brand will not consider non-luxury vehicles and models in calculating market share. Moreover, in assessing performance in any specific geographic area, most manufacturers use a "segmentation" process to adjust for the popularity of various vehicle "segments" – *e.g.*, SUVs, pickup trucks, compact cars, etc. – in that specific geographic area. A1096-98; *see, e.g.*, *Superior Pontiac Buick GMC, Inc. v. Nissan North America, Inc.*, No. 08-10642, 2012 WL 1079719, at *6 (E.D. Mich. Mar. 30, 2012) ("*Superior Pontiac*").

To assess not only how well the dealer is performing but also whether changes need to be made to the dealer network, most manufacturers assign to each dealer an area for assessing retail sales performance. A925, A930. GM calls this an "Area of Primary Responsibility" or "APR." *See* A1092, 1095.[3] Other manufacturers use other terms, such as "Area of Responsibility" ("AOR"), "Primary Market Area" ("PMA"), or "Area of Statistical Analysis" ("ASA"). *See*, *e.g.*, *Fred Lavery Co. v. Nissan North America, Inc.*, 99 F. App'x 585, 587 (6th Cir. 2004) ("*Fred Lavery*") (PMA "is a geographic area . . . [used] as a tool to evaluate [dealer's] performance of its sales obligations"); *Hartley Buick GMC Truck, Inc. v. American Honda Motor Co., Inc.*, No. FMD 2010-05, at 4, ¶ 10 (N.Y. DMV Div. of Safety & Bus. Hearings Nov. 1, 2011) (ASA's are created to evaluate performance), *aff'd*, No. 28447 (N.Y. DMV Appeals Bd. Feb. 28, 2012) ("*Hartley Honda*"). This brief will refer to all such areas as "APRs."

An APR generally consists of the census tracts or zip codes that are closer (based on air distance or driving miles) to the dealer than to any other same brand dealer, based on the assumption that the dealer has the geographic advantage over any other same-brand dealer with respect to customers in that APR. A931, A973, A1095; *see*, *e.g.*, *Superior Pontiac*, 2012 WL 1079719, at *9-10; *Hartley Honda*,

[3] In APR's that are served by multiple dealers, such as Westchester County, GM assigns each dealer "AGSSA" within the APR. A1250. An AGSSA is determined in the same manner as, and used for the same purposes as, the APR in single-dealer markets. Accordingly, this brief will use the single term "APR."

at 4, ¶ 10. APRs are assigned by census tract or ZIP code because registration data can be linked to a particular census tract or ZIP code. *See* A930, A1002.

As with GM, for most manufacturers an APR is not an exclusive sales area – *i.e.*, it does not "belong" to the dealer and any dealer can sell to customers in that APR. A966, A973, A1105; *see*, *e.g.*, *Infiniti Auto. of Norwood, Inc. v. Nissan North America, Inc.*, No. 2004-00010, at 3 (Mass. Super. Ct. Aug. 4, 2005) ("PMA's are non-exclusive"). One of the principal purposes of assigning APRs is to determine whether changes need to be made to the dealer network – in which case changes may need to be made to the APR itself. A1004-05, A1089; *see*, *e.g.*, *Rambasek v. Nissan North America, Inc.*, No. 09-03-MVDB-286-D, at 14 (Ohio MVDB Jan. 7, 2005) ("*Rambasek*") (manufacturer "changes its PMAs routinely, and relatively frequently, because of the dynamic nature of demographics and other factors"). For example, after assigning an APR to a particular dealer, the manufacturer may determine that population growth, economic growth, increased vehicle registrations and/or increased competition in a particular area in or near the APR calls for the appointment of another dealer in that area. When this occurs, changes will necessarily be made to the existing dealer's APR, because certain of the census tracts or zip codes assigned to that dealer will be closer to the new dealership. *See* A988. As explained by the court in *BMW of North America, Inc.*

v. New Motor Vehicle Board, 162 Cal. App. 3d 980, 209 Cal. Rptr. 50 (1984) ("*BMW*"):

> The total group of zip code areas assigned to a particular dealer is that dealer's A.O.R. By design, these areas of responsibility throughout the United States are contiguous. … [I]t follows that the appointment of a new dealer will necessarily alter the A.O.R.s of the nearest dealers.

Id. at 992, 209 Cal. Rptr. at 58 (holding that change to APR was not a "modification" of franchise).

Manufacturers may also change APRs when they discover that a dealer is not penetrating certain census tracts or zip codes assigned to it. For example, the manufacturer may determine, based on traffic or shopping patterns or natural boundaries (such as a river), that those particular census tracts should be reassigned to another existing dealer whom customers in those census tracts or zip codes appear to find more convenient. *See* A931. In addition, manufacturers must *routinely* modify APRs when the U.S. Government changes census tracts (which occurs every 10 years) or when the U.S. Post Office changes zip codes (which can happen more frequently). *See*, *e.g.*, *Superior Pontiac*, 2012 WL 1079719, at *9.

Given the basic purpose and functions of an APR, and the need to adjust it as market conditions evolve, the franchise agreements of most manufacturers, like

GM's, (1) do not specify a precise APR and (2) provide that the manufacturer can revise the APR in its discretion.[4]

As mentioned above, one of the purposes of an APR is to assist in assessing the individual dealer's sales performance. Most manufacturers use a "sales effectiveness" metric which is similar (but not necessarily identical in all aspects) to the RSI metric used by GM. A971, A985, A1054-55, A1094; *see, e.g.*, *Ralph Gentile, Inc. v. State Div. of Hearings & Appeals*, 334 Wis. 2d 712, 734-35, 800 N.W.2d 555, 566 (Wis. Ct. App. 2011) (most manufacturers use sales effectiveness in one form or another). Beck's own expert admitted that "sales effectiveness is a valid way to measure a dealer's sales performance." A971.

Simply put, sales effectiveness is a comparison of the dealer's actual sales, wherever made, to the dealer's "expected sales." *See* A1006. Expected sales are calculated with reference to the opportunity available to the dealer in its APR. Typically, expected sales are calculated by applying, on a segment-adjusted basis, the brand's market penetration rate in a broad geographic area – such as the state, the region, or the nation – to the actual competitive group registrations in the dealer's APR. A926-27, A971, A1003, A1094; *see In re Ralph Gentile, Inc. v. Nissan North America, Inc.*, No. TR-07-0001, at 15 (Wis. Div. of Hearings &

[4] Amici note, however, that some manufacturers have, at certain times, granted exclusive sales areas to dealers in their franchise agreements and designated those areas as APRs or by some similar name. Franchises that grant such exclusive sales areas would be subject to a different analysis on the modification issue than that in this case.

Appeals, Feb. 4, 2010) ("*Ralph Gentile*") (explaining sales effectiveness), *aff'd sub nom. Ralph Gentile, Inc. v. State Div. of Hearings & Appeals*, No. 10-cv-1050 (Wis. Cir. Ct. Sept. 13, 2010), *aff'd*, 334 Wis. 2d 712, 800 N.W.2d 555 (Wis. Ct. App. 2011).

Manufacturers – including GM, as Judge Hellerstein specifically found, A1211 – do not take the position that a dealer may be terminated simply for being below average. *See, e.g.*, *Fred Lavery*, 99 F. App'x at 592-93; *Love Nissan, Inc. v. Nissan North America, Inc.*, DOAH Case No. 04-2247, at 50-51 (Fla. DHSMV Apr. 13, 2006) ("*Love Nissan*") ("The magnitude of the short-fall must be considered in determining whether the dealer's performance is so ineffective as to warrant termination."). Comparison to an average is a way of grading all dealers on a common scale – much the way colleges grade students on a "curve" in which the average grade is a "C." A1063, A1092; *see Love Nissan*, at 50; *accord*, *In re Seacoast Imported Auto, Inc.*, No. 04-06, at 11 (N.H. Motor Vehicle Ind. Bd. Apr. 12, 2010) ("*Seacoast*"), *aff'd, Seacoast Imported Auto, Inc. v. Nissan North America, Inc.*, No. 218-2010-CV-471 (N.H. Super. Ct. Nov. 29, 2010).

As the numerous cases cited in the parties' briefs show, dealers served with termination notices typically have sales effectiveness that is substantially below average (often only a small fraction of average) for extensive periods of time and are "at the very low end of the spectrum." A1006; *see*, *e.g.*, *Ralph Gentile*, at 8

(upholding termination of dealer whose sales effectiveness declined from 58.3% to 40.7% of regional average over five-year period); *Seacoast*, at 11 (between 44.3% and 23.1% of regional average); *Love Nissan*, at 18-25, 43 (termination notice was based on dealer's performance during three-year period in which the dealer's sales effectiveness ranged between approximately 45% and 57% of regional average).

Moreover, as Beck's own "distinctions" of the cases relying on poor sales effectiveness in upholding terminations show, manufacturers (including GM, as Judge Hellerstein specifically found) look at other metrics to confirm that the dealer's poor sales effectiveness is not due to factors beyond its control. *See* Beck Reply Br. at 21-33.

Sales effectiveness, however, provides a common metric on which *all* same-brand dealers can be evaluated, and thus avoids the inevitable claims of discrimination that would arise if Beck's alternative were adopted – *i.e.*, a different metric to judge every dealer.

ARGUMENT

I. GM DID NOT USE AN UNREASONABLE, ARBITRARY OR UNFAIR PERFORMANCE STANDARD

Section 463(2)(gg) makes it unlawful for a manufacturer "[t]o use an unreasonable, arbitrary, or unfair sales or other performance standard in determining a [dealer's] compliance with a franchise agreement." Judge Hellerstein found that GM did not do so.

The question certified by the Second Circuit asks whether RSI is an "unreasonable, arbitrary, or unfair" standard "because it does not account for local variations beyond adjusting for the local popularity of general vehicle types."[5] GM's use of RSI (i) is not "unreasonable" because RSI is an objective metric that takes account of most of the relevant factors, and no alternative metric that takes account of additional relevant factors has been devised or proposed; (ii) is not "arbitrary" because (among other things) GM uses other metrics to check the RSI result and to address any significant alleged local variations such as import bias; and (iii) is fair because it is used to evaluate *all* Chevrolet dealers in the state of New York, rather than devising separate, unequal standards for each dealer.

The vast majority of courts and agencies that have heard evidence on the "sales effectiveness" metric have found it to be a reasonable way to evaluate dealers' sales performance. These tribunals include the New York DMV, which upheld Honda's use of state-average sales effectiveness in deciding to terminate a dealer for poor sales performance in *Hartley Honda*, *supra*.

In addition to *Hartley Honda*, GM has cited ten cases from seven (7) other states in which the court or agency relied on sales effectiveness as a reasonable benchmark in sustaining a dealer termination. *See* GM Br. at 56-58. There are

[5] Amici note that GM's expert, Sharif Farhat, testified that it was not appropriate to adjust for the other factors urged by Beck. A1093, A1098, A1102, A1106, A1146. Amici respectfully submit that the actual issue on this appeal should be whether the trial court was "clearly erroneous" in crediting Farhat's opinion over that of Beck's expert, based on the entire record in this case.

numerous additional cases reaching the same conclusion. *See, e.g.*, *Love Nissan*, at 14, ¶ 20 ("Historically, by case law, and by expert testimony in the instant proceeding, it is found that [the manufacturer's] method for evaluating its dealers' sales performances is a reasonable, industry-accepted practice for evaluating new car dealers."); *Seacoast*, at 17 ("The methodology that Mr. Farhat used in reaching his conclusion that Nissan properly terminated [dealer] has been recognized and accepted by courts, administrative agencies, and this Board"); *General Motors Corp. v. Stan Olsen Pontiac GMC-Trucks, Inc.*, No. CI 03-2208, at 6-7 (Neb. Dist. Ct. Dec. 9, 2003) (upholding termination of GM dealer based on RSI and finding that "GM's methods for determining sales performance appear to be reasonable."); *Rambasek*, at 25-27 (rejecting attack by dealer, who relied on two of the same cases Beck cites here, on reasonableness and fairness of sales effectiveness methodology); *Lanham Ford, Inc. v. Ford Motor Co.*, No. MDOT-MVA-12-03-10560, at 36-41 (Md. MVA Aug. 10, 2005) (finding Urban Science's sales effectiveness methodology, and Ford's similar methodology for evaluating dealer, to be reasonable and fair).[6]

[6] Amici note that, of the six non-GM cases cited by Beck, four were decided in the 1960's or 1970's and involved Chrysler's former "MSR" index, which is not the same as the segment-adjusted sales effectiveness test. *See* Beck Br. at 37-39. In the only recent case cited by Beck, the Ohio Motor Vehicle Dealers Board expressly acknowledged "that the [sales effectiveness] standard has been accepted by this Board and others as a reasonable measure of performance." *Sims Buick-GMC Truck, Inc. v. Nissan North America, Inc.*, No. 9-12-MVDB-364-D, at 20 (Ohio MVDB Feb. 4, 2011), *aff'd sub nom. Sims v. Nissan North America, Inc.*, Nos. 12 AP 833, 12 AP 835, 2013 WL 3270914 (Ohio Ct. App. Jun. 25, 2013). Thus, Beck misrepresents the

Courts and agencies have repeatedly rejected the argument, reprised by Beck here, that using "average" sales effectiveness as a benchmark is unreasonable because, statistically speaking, about half of the dealers will be below average. In *Fred Lavery*, for example, the U.S. Court of Appeals for the Sixth Circuit rejected a dealer's argument that its manufacturer unreasonably used sales objectives tied to regional average performance:

> Lavery claims that the district court erred when it concluded that achieving the regional average in sales penetration was a "reasonable sales objective" under the agreement. … As Lavery sees it, requiring average performance is inherently unreasonable because it means that a large number of dealers will be in breach of their dealer agreements at any given time. Whether one acts "reasonably" is generally a mixed question of law and fact.
>
> . . . .
>
> Lavery, however, is in no position to challenge Nissan's actions on this ground. The dealership was not terminated for being average or even for being below average but for being conspicuously below the performance of other dealerships.

Fred Lavery, 99 F. App'x at 592-93 (citations omitted).

Beck attempts to "distinguish" this huge body of case law on the ground that, in most cases, the manufacturers relied on metrics and factors *in addition to* sales effectiveness. Beck Reply Br. at 21-33. But so does GM, as Judge Hellerstein found, A1211, A1214-15 – a finding based on extensive evidence in the record. *See* A1005-06, A1008, A1050-53, A1059-61, A1121-22.

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great weight of the case law when it claims that manufacturers have "met with limited success" in cases involving the sales effectiveness metric. Beck Br. at 37.

Beck's "distinctions" of the many cases that are contrary to its position merely prove the point that the reasonableness of a manufacturer's use of sales effectiveness in making a termination decision must be decided on a case-by-case basis. Moreover, Beck cites *no* case holding what Beck apparently asks this Court to hold – that it is in all cases unreasonable to use state-average sales effectiveness as a benchmark in making a termination decision.

A number of the tribunals that have found sales effectiveness to be a reasonable metric have recognized that it takes most of the relevant factors into account because it is based on actual consumer behavior in the APR. For example, it takes the local economy and local demographics into account because such factors are reflected in actual consumer behavior. *See*, *e.g.*, *Superior Pontiac*, 2012 WL 1079719, at *10-11, 18; *Love Nissan*, at 32-33, ¶¶ 72, 74; *Ralph Gentile*, at 9, ¶ 23.

In addition, manufacturers use other metrics to take account of any significant alleged local variations, such as "import bias." Here, GM took account of this factor by looking at the performance of the Ford and Chrysler dealers in Beck's APR, both of whom were performing at *above* state average for their brand. A988; A1093 and A1135 (in 2012, Beck sold 335 Chevrolets, while Ford dealer on same road sold over 1200 units and Chrysler dealer sold over 1500); A1109-13, A1158-59. Thus, even if Beck were correct that there is an "import bias" in certain

parts of the "downstate area," actual consumer behavior militates against finding such a bias in Beck's APR. Indeed, it appears that the principal bias in the area is an anti-Beck bias, since the vast majority of Chevrolet buyers who reside in Beck's APR buy their Chevrolets from other Chevrolet dealers. *See* A974 (Beck captures only 27% of the Chevrolet sales in its own APR); A1116, A1120-21.

Moreover, neither Beck nor its expert, Joseph Roesner, has proposed an alternative metric that takes into account the factors that they claim sales effectiveness does not take into account.[7] In fact, when asked by Judge Hellerstein how he would do so, all Roesner could offer was that "you [should] drill down a bit" and "take . . . into account" the "things that affect this dealer or this market differently than what we're using as a benchmark." A966. That, of course, is exactly what GM did when it looked at the performance of the other domestic dealers in Beck's APR and at Beck's share of the Chevrolet sales in its APR. Moreover, all Roesner did in this case was to apply the *same* sales effectiveness methodology as GM, using different geographical benchmarks. A968 (in response to Judge Hellerstein's question, Roesner admits he is "applying the same methodology as was used [by GM] to create statewide averages" using "alternative market areas").

[7] For example, one of the principal "factors" Beck cites is that there is allegedly "more competition" in the downstate area than upstate. But Roesner conceded, in response to questions by Judge Hellerstein, that (1) there was also more density of population downstate and (2) in order to conclude there was more competition downstate, Roesner would have to compare the population densities – which Roesner admitted he hadn't done. A988.

Finally, while courts and agencies have upheld the use of national, regional, and state average as a sales effectiveness benchmark, using state average enables the manufacturer to evaluate all dealers in the state on an equal basis. Dealers within a state are subject to the same business conditions, such as taxes and registration fees. A1082. In addition, the franchise relationship is regulated on a state-by-state basis. Many state motor vehicle statutes have anti-discrimination provisions that require the manufacturer to treat all dealers in the state equally. *See, e.g*, Fla. Stat. § 320.641(3) (franchisor must apply grounds for termination in a "uniform and consistent manner"); Ga. Code § 10-1-663(b)(3); Mo. Rev. Stat. § 407.825(27). Moreover, the statutory prohibitions on termination without "due cause" and "good faith," set forth in the New York Act and most other state franchise statutes, effectively prohibit discrimination in evaluating dealers' performance. Accordingly, if manufacturers were to use different metrics to evaluate dealers within the state, they would be faced with claims of discrimination by every dealer whose sales performance the manufacturer found unsatisfactory.

Accordingly, the first certified question should be answered "No." In addition, Amici submit that the large body of case law cited above demonstrates that the issues raised by Beck are not susceptible of "blanket" rules to apply to the entire industry. Manufacturers use sales effectiveness in different ways and have different processes for making termination decisions. The cases reflect, for

example, that the duration of cure periods provided by manufacturers varies and that there is no automatic performance trigger for termination. For these reasons, the reasonableness of a manufacturer's use of sales effectiveness (whether in the context of termination or otherwise) presents a question of fact that should be decided on a case-by-case basis.

II. THE APR REVISION WAS NOT A PROHIBITED MODIFICATION OF THE FRANCHISE

A. Exercising a Contract Right Is Not a "Modification"

Judge Hellerstein correctly ruled that where, as here, the franchise agreement gives the manufacturer the discretionary right to revise the APR, the manufacturer does not "modify" the franchise under § 463(2)(ff) when it exercises that contractual right. His ruling is consistent with the statutory definition of "modification," basic contract law, and the evident legislative intent – which is to require a manufacturer to give notice when it intends to introduce a superseding franchise agreement or amendments to the terms and conditions of the franchise agreement. If § 463(2)(ff) were interpreted to apply to the manufacturer's exercise of its discretionary contract rights, it would impose unreasonable and unworkable procedural burdens on decisions that manufacturers must make on a regular basis.

For purposes of § 463(2)(ff), the statute defines "modification" as "any change or replacement of any franchise if such change or replacement may substantially and adversely affect the [dealer's] rights, obligations, investment or

return on investment." VTL § 463(2)(ff)(2). The statute defines a "franchise" as "a written arrangement . . . in which a manufacturer or distributor grants to a [dealer] a license to use a trade name, service mark or related characteristic, and in which there is a community of interest in the marketing of motor vehicles or services related thereto . . . and/or pursuant to which a [dealer] purchases and resells or offers . . . products associated with the name or mark or related components of the franchise." VTL § 462(6).

By referring to a "change or replacement" of the franchise, the legislature intended to address the manufacturer's imposition of a change to the parties' "written arrangement" – *i.e.*, the introduction of a superseding franchise agreement or amendments to the written terms of its franchise agreement. From time to time, manufacturers revise their standard dealer agreement provisions for various reasons, such as addressing perceived gaps or dealing with newly-arising issues. When the stated term of an individual dealer's franchise agreement expires, the manufacturer may propose to use the revised form of standard provisions for the renewal of the franchise. In addition, some franchise agreements – such as the GM agreement in this case – give the manufacturer the right to replace an existing dealer's agreement with "a superseding form of dealer agreement or an amendment to the dealer agreement" that it "offers . . . to its dealers generally." A179.

Statutes such as § 463(2)(ff) are intended to give the dealer notice-and-protest rights when the manufacturer introduces a superseding agreement or general amendment that may have a substantial, adverse effect on the dealer. *See, e.g., Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777 (Tex. App. 2012) (distributor offered new form of agreement to dealer at time of renewal).

It is not a "modification" of a franchise, or of any other contract, when one of the parties exercises a discretionary right under the contract. A contract may "leave[] particulars of performance to be specified by one of the parties." N.Y.U.C.C. § 2-311(1); *In re Associated Teachers of Huntington, Inc. v. Board of Educ.*, 33 N.Y.2d 229, 233-34, 351 N.Y.S.2d 670, 673 (1973) ("Both common law and statutory law recognize the existence of contractual obligations where either the satisfactory performance of one party or the existence of conditions precedent is left solely to the good faith judgment of the other party.").[8] When that party specifies such particulars, it obviously does not "modify" the contract.

Given the nature and scope of a motor vehicle franchise, the agreement must necessarily leave certain particulars of performance to one party or the other. For example, the dealer has the discretionary right to decide which specific vehicles to order, how to price them to consumers, how much advertising to do, etc.

[8] A motor vehicle dealer agreement is a contract for the sale of goods under Article 2 of the U.C.C. *Old Country Toyota Corp. v. Toyota Motor Distributors, Inc.*, 966 F. Supp. 167, 170 (E.D.N.Y. 1997); *Subaru Distributors Corp. v. Subaru of America, Inc.*, 47 F. Supp. 2d 451, 464-70 (S.D.N.Y. 1999). *See also* VTL § 470 ("The provisions of this article shall be in addition to and not in lieu of those contained in the uniform commercial code.")

Similarly, the franchise agreement necessarily gives the franchisor, who will be supplying products to the franchisee over an extended period of time, discretion with respect to various matters. These include the wholesale price of vehicles sold to the dealer, *see* A152 (Art. 6.3.1), the introduction or discontinuation of vehicle models, *see* A151 (Art. 6.1), and the allocation of vehicles among its dealers, *see Id.*

It is unlikely that the legislature intended to require manufacturers to provide notice and an opportunity for dealers to protest every time the manufacturer made a decision with respect to vehicle pricing or model availability that might "substantially and adversely" affect a particular dealer. It is even more unlikely that the legislature intended to give judges and juries the authority to determine whether, for example, vehicle prices should be changed, what vehicle models should be introduced or discontinued, or whether a manufacturer can adjust its formula for allocating vehicles among its dealers.

Yet, if Beck were correct, each time a manufacturer decided to make any such changes, the manufacturer might be required to provide notice and an opportunity for judicial review. After all, there appears to be no meaningful statutory basis to distinguish these discretionary rights from GM's discretionary right to revise Beck's APR.

The statute itself, however, does provide a meaningful basis for determining when a manufacturer must give notice of its intention to exercise a discretionary contractual right: *i.e.*, the statute expressly provides for notice-and-protest rights. Examples include a manufacturer's intention to terminate or not renew a franchise, § 463(2)(d); to require a renovation of the dealership facilities, § 463(2)(e)(1); to withhold consent to a transfer of an interest in a franchise, § 463(d), (k); or to charge back a warranty or sales incentive payment, § 465(7).

Another example, and one which is of particular relevance here, is the dealer's statutory notice-and-protest right when the manufacturer intends to add a new dealer to its network or to permit the relocation of an existing dealer. Most dealer agreements (like GM's) provide that the dealer's appointment is "non-exclusive" and either expressly or implicitly give the manufacturer the discretion to appoint additional dealers or to relocate dealers closer to an existing dealer. *See*, *e.g.*, A141 (Art. 1), A143-44 (Art. 4.3). In the 2008 amendments, however, the state legislature expressly limited this right by adding § 463(2)(cc). That provision requires a franchisor to give notice when it intends to establish a new dealer in, or relocate an existing dealer into, a statutorily-defined "relevant market area" (or "RMA"). VTL § 463(2)(cc)(1); *see* VTL § 462(15) (definition of RMAs). If a dealer provided with such notice files a protest, the manufacturer must show "good cause" to establish or relocate the dealer. VTL § 463(2)(cc)(1), (3).

The 2008 amendments, however, did not include a similar provision regarding manufacturers' rights to alter a dealer's APR. This absence is particularly significant because, at the time the 2008 amendments were adopted, a number of states *had* enacted statutes specifically limiting a manufacturer's right to modify a dealer's APR. *See* GM Br. at 65 (collecting statutes). The New York legislature did not follow suit and adopt an APR-modification statute.

Concluding that an APR change is not a "change . . . of the franchise[]" under § 463(2)(ff) would not deprive franchisees of the protections of the Dealer Act. To the extent that a change in the APR affects the standard by which the dealer's performance is measured (Beck's principal complaint here), the dealer can challenge the fairness of the standard under § 463(2)(gg). Moreover, neither an enlargement nor a reduction of the APR affects a dealer's geographical protection from competition because the statutory RMA is not defined by reference to the APR.

The latter point distinguishes both of the out-of-state cases on which Beck relies. In *Nissan North America, Inc. v. Royal Nissan Inc.*, 794 So. 2d 45 (La. Ct. App. 2001), the Louisiana statute defined the dealer's protest area, as well as its relocation rights, with reference to the APR assigned by the manufacturer. *Id.* at 47-49. Similarly, in *Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 292 Wis. 2d 549, 717 N.W.2d 184 (2006), the Wisconsin statute

expressly *required* the manufacturer "to designate in writing the area of sales responsibility assigned" to the dealer and then defined the dealer's protest area (i.e., the RMA) as the greater of that APR or a 10-mile radius. 717 N.W.2d at 207 (citing Wis. Stat. §§ 218.0114(11) and 218.0116(7)).[9] The Dealer Act has no similar provisions; in New York, a change in a dealer's APR has no effect whatsoever on the RMA.

The dangers of converting § 463(2)(ff) into an APR-modification statute are illustrated by the related cases of *JJM Sunrise Automotive, LLC v. Volkswagen Group of America, Inc.*, 46 Misc. 3d 755 (Sup. Ct. Nassau Co. 2014) and *Luxury Autos of Huntington, Inc. v. Volkswagen Group of America, Inc*., No. 602591-14, 49 Misc. 3d 1207(A), 2015 WL 5946047 (Table) (Sup. Ct. Nassau Co. Sept. 21, 2015), and the decision in *Van Wie Chevrolet, Inc. v. General Motors, LLC,* No. 2012-0284 (Sup. Ct. Onondaga Co. June 13, 2014). In each of these cases, a dealer plaintiff challenged the establishment or relocation of a dealership that was not protestable under § 463(2)(cc) by alleging that the establishment or relocation would change its APR and thereby effect a modification of its franchise in violation of § 463(2)(ff).

In *JJM Sunrise* and *Luxury Autos*, Audi proposed to establish a new dealership on Long Island that was outside of the protest area afforded to each of

[9] The current Wisconsin statute has a similar definition of the RMA, which includes all areas in the 10-mile radius and the APR. *See* Wis. Stat. § 218.0101(30).

the plaintiffs by § 463(2)(cc). Based on the standard industry practice of assigning to each dealer the census tracts closest to that dealer, however, certain of the outer census tracts of each plaintiff's existing APR would need to be assigned to the new dealer. The court in *JJM Sunrise* and *Luxury Autos* rejected the dealers' contention that Audi was required to give the dealers notice and an opportunity to protest the changes to their APRs. The court observed that the Dealer Act had created a right to protest new dealerships in the RMA "with great particularity," and that permitting the dealers to use § 463(2)(ff) to protest the resulting change in their APRs based on the otherwise non-protestable establishment a new dealership would frustrate the legislative intent. *JJM Sunrise*, 46 Misc. 3d at 766; *Luxury Autos*, 49 Misc. 3d 1207(A).

The *Van Wie* court reached the opposite conclusion. There, GM approved an existing dealer's request to relocate, which was exempt from protest. *See* VTL § 463(2)(cc)(2) (providing for various relocation exemptions). Because the relocating dealer would be moving closer to plaintiff, however, plaintiff complained that the move would reduce the size of its APR. The *Van Wie* court ruled that this reduction was a protestable "modification" of the plaintiff's franchise on stated premises that are clearly incorrect. For example, the court ignored the Dealer Act's definition of a franchise and stated that (1) a franchise "*could be* the right or license granted to an individual or group to market a

company's goods or services in a particular territory" and (2) "an APR and a franchise are identical in practical reality." *Van Wie*, No. 2012-0284, at 3 (emphasis added). Thus, the *Van Wie* Court was operating under the mistaken belief that an APR is an exclusive sales area, rather than what the franchise agreement says it is – an area for assessing the performance of the dealer and the brand.

Amici submit that *Van Wie* was decided incorrectly and that, as recognized by the Court in *JJM Sunrise* and *Luxury Autos*, an interpretation of § 463(2)(ff) permitting the dealers to protest a manufacturer's exercise of its discretionary right to adjust APRs would be contrary to the legislature's intent. It would encourage more lawsuits like *JJM Sunrise*, *Luxury Autos*, and *Van Wie*, because dealers have a natural self-interest in blocking or delaying any same-brand competition, even if it is outside the area within which the legislature has given them the right to protest. It would also unduly hamper manufacturers, beyond the limits the legislature has prescribed, in their efforts to improve and adjust their dealer networks. *See BMW*, 162 Cal. App. 3d 992-94, 209 Cal. Rptr. at 59 (holding that change to APR was not a "modification" of franchise under California statute similar to § 463(2)(ff) and observing that a contrary result would give dealers "a perpetual territorial monopoly").

Accordingly, § 463(2)(ff) should not be interpreted to require notice and protest of a manufacturer's exercise of discretion, granted by the franchise agreement, to revise an APR.

B. Many Changes to a Dealer's APR Will Not "Substantially and Adversely Affect" the Dealer

Even if the Court were to conclude that an APR revision may be a "modification" of a franchise under § 463(2)(ff) when the franchise agreement gives the manufacturer discretion to revise it, the Court should not rule as a matter of law (1) that GM was required to give notice in this case or (2) that all APR revisions by all manufacturers require such notice.

The Dealer Act requires notice only when "[the] change or replacement may substantially and adversely affect the [dealer's] rights, obligations, investment or return on investment." VTL § 463(2)(ff)(2). Accordingly, where the change will not have a substantial adverse effect, the manufacturer is not required to give notice. *Bray*, 363 S.W.3d 777 (even though distributor offered dealer a superseding form of franchise agreement upon renewal of the franchise, distributor did not have to provide statutory notice where the new agreement was "substantively the same" as the prior agreement).

Here, Judge Hellerstein never reached the issue of substantial adverse effect. Instead, he ruled that the revision to the APR could not be considered a "modification" of the franchise because the franchise agreement gave GM the right

to revise the APR. Further, there is evidence in the record that the change had no adverse effect on Beck because GM continued to evaluate Beck's performance based on the previously-designated APR. A973, A1076. Accordingly, the case would need to be remanded for findings on the issue of substantial adverse effect.

Moreover, there are certain APR revisions that will have little if any adverse effect on a dealer and others that will actually benefit the dealer. In this case, Beck claims that the change in census tracts adversely affects it because the change increases the number of competitive group registrations in Beck's APR and thereby increases the number of retail sales it must make to achieve an RSI of 100. Many APR revisions, however, involve the *removal* of census tracts from the dealer's APR, thus reducing the number of competitive group registrations and thereby *improving* the dealer's RSI. *See Crown Auto Dealerships, Inc. v. Jaguar Cars*, DOAH Case No. 96-4657, at 4 (Fla. DHSMV March 17, 1997) (reduction of APR was not a statutory "modification" because it could not adversely affect dealer's rights), *aff'd*, 702 So. 2d 492 (Fl. App. 1997) (Table).

Moreover, as mentioned above, manufacturers routinely revise the geographical boundaries of APR's when the U.S. Government revises census tracts or the Post Office revises zip codes. Revisions to APR's made simply to conform to such changes should not normally be subject to the notice and protest procedures because they are unlikely to have a substantial adverse effect.

Accordingly, the question whether an APR revision has a substantial and adverse effect on the dealer would need to be decided on a case-by-case basis. This Court should avoid any blanket ruling that all APR changes are subject to notice and protest.

CONCLUSION

For the foregoing reasons, the Alliance of Automobile Manufacturers and the Association of Global Automakers respectfully request that this Court answer "No" to both certified questions.

Respectfully submitted,

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