

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

BECK CHEVROLET CORP., INC.,

Appellant,

-against-

No. 48

GENERAL MOTORS,

Respondent.

20 Eagle Street
Albany, New York 12207
March 22, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

RUSSELL P. MCRORY, ESQ.
ARENT FOX LLP
Attorneys for Appellant
1675 Broadway, 34th Floor
New York, NY 10019

JAMES C. MCGRATH, ESQ.
SEYFARTH SHAW LLP
Attorneys for Respondent
World Trade Center East
Two Seaport Lane, Suite 300
Boston, MA 02210

Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good
2 afternoon, everyone. Our first matter on the
3 calendar is Beck v. General Motors.

4 Counsel.

5 MR. MCRORY: Good afternoon, Your Honors,
6 and may it please the court. My name is Russell
7 McRory from Arent Fox and I represent the plaintiff-
8 appellant, Beck Chevrolet.

9 The statistics in this case are quite
10 striking.

11 CHIEF JUDGE DIFIORE: Excuse me, would you
12 like to reserve some rebuttal?

13 MR. MCRORY: Yes, Your Honor. I would
14 respectfully request the right to reserve three
15 minutes for rebuttal.

16 CHIEF JUDGE DIFIORE: Certainly.

17 MR. MCRORY: Thank you.

18 The statistics in this case are quite striking.
19 At any given time, fifty percent of all New York Chevrolet
20 dealers are out of compliance and in breach of their
21 dealer agreement with - - - with General Motors.

22 JUDGE PIGOTT: I liked your Lake Wobegon
23 reference, with respect of that that everyone is
24 above average. But is your complaint with the
25 contracts that you signed with GM? Is - - - if you

1 read the VNT, it reads like the UCC for - - - for car
2 dealerships; you know, you got to be fair, you can't
3 be arbitrary, you can't do this and that. And where
4 does this fit in? I - - - are you saying that the
5 law - - - excuse me, that the contracts you signed
6 are wrong, that they can't be used in the state of
7 New York?

8 MR. MCRORY: Well, Your Honor, in those
9 areas where the New York legislature chose to
10 regulate the franchisor-franchisee relationship, the
11 statute governs and not - - - and not the contract.
12 In the - - - in the - - -

13 JUDGE PIGOTT: But they can't - - - but
14 they - - - I wasn't very articulate, but I'm saying,
15 the VNT says you got to be fair. It's about - - -
16 it's about what it's - - - you know, you read through
17 all of that, including (ff), and it's just saying you
18 can't be arbitrary. All of it seems to me to be just
19 logical. And - - - so what are we - - - what's the
20 problem here? I mean, you're saying it's arbitrary
21 because half of you are out of compliance?

22 MR. MCRORY: Well, Your Honor, I think - -
23 - there are several cases cited in our brief where
24 they - - - where the courts take exactly that
25 position, is that any standard that relegates half

1 the dealer body to a situation where they are in
2 breach of their - - - of their dealer agreements - -
3 -

4 JUDGE PIGOTT: Well, are you referring to
5 the out-of-state cases that you just put in your
6 compendium?

7 MR. MCRORY: Yes, yes, Your Honor.

8 JUDGE PIGOTT: Yeah. Most of those,
9 though, had to deal with moving dealerships or
10 denying an assignment of a dealership. I mean, it
11 was, you know, the whole enchilada was being
12 discussed, not just the number of cars you were
13 selling.

14 MR. MCRORY: Yes, Your Honor. I mean, the
15 issue of using a statewide average or a regional
16 average comes up in a variety of contexts. Some of
17 the ones Your Honor mentioned, relocating a dealer,
18 adding a new dealer to a network. But it all - - -
19 but obviously, in this case, what it dealt with was
20 ultimately the termination or the attempted
21 termination of Beck Chevrolet.

22 JUDGE RIVERA: Also, are you arguing that
23 in order for a standard to meet the requirements of
24 not being unreasonable or arbitrary or unfair, excuse
25 the double negative, that all of the dealerships have

1 to have complied? Is the fact that some can't comply
2 the reason that it's unfair, or unreasonable, or
3 arbitrary?

4 MR. MCRORY: Well, Your Honor, what I've -
5 - - the situation here is not whether they can or
6 can't; the situation here is that fifty percent can't
7 - - - will not, cannot, shall not comply with the - -
8 - with the - - -

9 JUDGE RIVERA: Because it's marked as a
10 "average"?

11 MR. MCRORY: Because it's marked as an
12 average and the - - -

13 JUDGE RIVERA: Someone always has to be
14 below the average?

15 MR. MCRORY: And - - - right, it's not just
16 some - - -

17 JUDGE RIVERA: So then is your challenge
18 that what GM should be applying is a floor as opposed
19 to an average?

20 MR. MCRORY: Your Honor, I - - -

21 JUDGE RIVERA: A baseline.

22 MR. MCRORY: Your Honor, what I think what
23 we're talking about here is - - - is a sales
24 performance standard, and what - - - and what I would
25 argue, and I think other courts have looked at, is

1 that when you have a large average, a regional
2 average or a statewide average, and you adjust only
3 for a small piece of consumer preferences and local
4 market conditions, that is unreasonable and unfair.
5 Which you - - - what the courts have recognized
6 consistently, again and again, is that where the
7 consumer preferences and market situations in the
8 local market differ dramatically from the larger
9 state or regional markets, that you have to look at
10 things on a more local basis. You have - - -

11 JUDGE STEIN: If we agree with you, does
12 that mean that virtually all of the car manufacturers
13 in the country are going to have to change their
14 standards?

15 MR. MCRORY: No, Your Honor; I don't think
16 that's the case. Well, I mean, first of all we're
17 dealing with New York, which is a very - - - it's a
18 state onto itself, if I - - - if I could say that.
19 The metro New York area downstate is significantly
20 different than areas of upstate New York.

21 JUDGE STEIN: Let me - - - that may be
22 true, but if we were to agree that - - - that a local
23 factor has to be factored in here, how do you
24 determine what's the appropriate locality? I mean,
25 isn't that in itself sui generis?

1 MR. MCRORY: Well, Your Honor, for example,
2 General Motors doesn't organize itself by states; it
3 organizes itself by regions, and zones, and
4 districts. So, if General Motors itself can organize
5 itself on more local geographies, there's no reason
6 why those same local geographies can't also be used
7 to evaluate New York's.

8 JUDGE PIGOTT: So under that standard - - -
9 under the standard you want, what happens?

10 MR. MCRORY: Well, in this case, Your
11 Honor, if you'll - - - and if you're looking at
12 individual dealers and comparing them not against - -
13 - not only - - - I'm not saying necessarily that you
14 have to completely throw out state averages or
15 regional averages; they may be useful for some
16 purposes, they may be useful for some large scale
17 purposes. But when you are - - - when you're
18 evaluating dealer performance, what you have to get
19 at is how are dealers comparing to other like-kind
20 dealers that face similar market conditions and
21 similar barriers to success, I think is the phrase
22 the Second Circuit used.

23 JUDGE STEIN: Are you arguing that these
24 standards are all three of the things that are
25 prohibited - - - they are unreasonable, they are

1 arbitrary, and they are unfair - - - or are you
2 arguing only some of those?

3 MR. MCRORY: Your Honor, I think a state -
4 - - a state or regional average, again, just adjusted
5 for a small slice of consumer preferences, is unfair
6 and unreasonable. I think the arbitrariness comes in
7 more in the application. For example, obviously we
8 have in this case - - - and this was an issue brought
9 up by a Judge Zulkosky in the DMV proceeding is, GM
10 was not able to articulate why Beck was called from
11 the herd and subjected to a termination proceeding
12 when there were a lot more dealers below it.

13 JUDGE RIVERA: Is it - - - isn't part of a
14 problem though, with your argument - - - and you'll
15 correct me if I'm wrong, that - - - that what GM's
16 position is that what you are calling brand
17 preference is in part driven by the inability of a
18 dealer to actually persuade the potential purchasing
19 public of the strengths of that brand; that it's not
20 that it's inherent to the brand, it's the dealer.

21 MR. MCRORY: Your Honor, I think there are
22 two factors at issue here; there's not just in the -
23 - - in this case in the DMV level, but also in other
24 cases involving GM. I've - - - we reference the
25 Landmark case and the Northshore case, that they have

1 found that - - - that Chevrolet in particular, and GM
2 in general, have issues - - - have market issues in
3 the metro markets.

4 JUDGE RIVERA: Uh-huh.

5 MR. MCRORY: And numerous cases have found
6 that. The testimony in this case, in the Federal
7 Court, that was admitted. GM's own expert said that
8 GM - - - Chevrolet faces challenges in metro markets
9 around the country. New York is the biggest metro
10 market of them all.

11 JUDGE ABDUS-SALAAM: Would you have - - -
12 then would you have GM adopt some sort of metro-
13 market standard to apply to those areas where they
14 are - - - the dealers are particularly having
15 trouble, and how would that relate to a nationwide
16 standard?

17 MR. MCRORY: Well, Your Honor, I think - - -
18 - for example, I think that's - - - that's a point
19 that I touched on briefly before. General Motors
20 organizes itself along localized geographies. For
21 example, the New York City zone, which is basically
22 the tristate area around Manhattan, and that is in
23 fact a benchmark that Beck's expert used below. And
24 Beck performs much more - - - its sales performance
25 goes up much higher when it's compared again like-

1 kind dealers, dealers facing the same market
2 conditions in metro New York.

3 JUDGE PIGOTT: But doesn't that argument
4 take you to the point you were saying earlier that
5 you were being terminated when those that have done
6 worse than you are not?

7 MR. MCRORY: Correct.

8 JUDGE FAHEY: How do you account - - -

9 JUDGE PIGOTT: I was halfway through the
10 sentence.

11 JUDGE FAHEY: Oh, I'm sorry, Judge, I'm
12 sorry.

13 JUDGE PIGOTT: I was just going to - - - I
14 was just saying, so are you making the argument that
15 they can only fire the worst, the one who sells the
16 least vehicles, because that's the one that can't say
17 - - - and somebody else that's worse is still a
18 franchisee?

19 MR. MCRORY: Well, Your Honor, I think this
20 goes exactly to the cases that GM cited, is when - -
21 - when you have a dealer that is - - - that is poorly
22 performing under a state average, under a local
23 average, under every different metric that can
24 possibly be thrown at the dealer, those are the
25 dealers that have been subject to termination.

1 And those are the cases that GM decided
2 where that has occurred; and that shouldn't be
3 surprising. Any metric where you're looking at the
4 bottom fifty percent, that's going to capture the
5 badly performing dealers. The problem here is that
6 it's also capturing the dealers that are not
7 performing badly, that are facing market conditions
8 that are very different than a state or regional
9 average. So it's - - - it's creating false
10 positives, or false negatives is probably the better
11 way to put it.

12 JUDGE FAHEY: What - - - what - - -

13 JUDGE RIVERA: If - - - if they just impose
14 a floor, as opposed to the average, getting back to
15 my other question, would that comply with the
16 statute?

17 MR. MCRORY: Your Honor - - -

18 JUDGE RIVERA: If they just said we want -
19 - - we expect every dealer in York State to sell a
20 minimum X. We're not basing - - - we're not
21 comparing; we just say that's the minimum, you want
22 our dealership, that's the minimum.

23 MR. MCRORY: Your Honor, it dep - - - I
24 think the answer is it depends how X is calculated.
25 In this case, how X is calculated is based on state-

1 average market share adjusted only for segment
2 popularity. So any time you're saying sell X, you
3 have to figure out how you're going to sell X.

4 JUDGE RIVERA: But under the RSI with that
5 average they do, GM does go and look at something
6 else, right, they don't automatically terminate. Or
7 do they automatically terminate, whereas a floor
8 would say, that's - - - that's the benchmark; you
9 don't hit it, we're terminating this franchise.

10 MR. MCRORY: Well, Your Honor, in this
11 case, and this is something that Judge Zulkosky
12 specifically found, is GM offered no other reasons
13 except for the failure to meet RSI and state-average
14 standards; so that - - - that's the facts of this
15 case. And the - - - and in fact I think that goes to
16 the arbitrariness issue, and I think that also was
17 raised in the DMV decision.

18 JUDGE STEIN: But - - - but - - -

19 JUDGE FAHEY: Before you get - - - before
20 you get to that, Curry, the Curry dealership - - -

21 MR. MCRORY: Uh-huh.

22 JUDGE FAHEY: That's in Yonkers also, isn't
23 it?

24 MR. MCRORY: It's further to the north;
25 it's in Scarsdale.

1 JUDGE FAHEY: How do you account for the
2 difference in the numbers?

3 MR. MCRORY: Your Honor, there is - - -
4 first of all, Cur - - - let's put this in
5 perspective; Curry's RSI scores, I think, were around
6 eighty, so - - - they weren't considered - - -

7 JUDGE FAHEY: They weren't over a hundred
8 either, I recognize that.

9 MR. MCRORY: I would also think it's - - -
10 there were several issues with - - - with Curry's.
11 What you saw generally in the market is, as you went
12 south to north, the performance, you know, changed.
13 I think the worst dealer were in Brooklyn and
14 Manhattan, then the Yonkers - - - then the Bronx,
15 then Yonkers, then Curry in Scarsdale. So there was
16 definitely a south - - - sort of a south-to-north
17 increase in the popularity of Chevrolet vehicles.

18 JUDGE FAHEY: And you would attribute that
19 to going from the more urban to the more suburban?

20 MR. MCRORY: Yes, that would - - - that
21 would be one factor. One - - - and one issue for
22 example, why Curry - - - that was an issue, I think,
23 Judge Hellerstein raised in his decision at the
24 district court level, is - - - and we had said, the
25 road network accounted for a lot of it, is that a lot

1 of Beck's territory was, for example, right along the
2 Bronx River Parkway, which actually - - - it's diff -
3 - - it's much easier for those customers to go north
4 to Scarsdale than they are to go south to Yonkers.
5 So even though Beck was assigned territory that was
6 as the crow flies, closer to it, it was actually more
7 convenient for those customers to go north.

8 JUDGE PIGOTT: But isn't that kind of a
9 point? I mean, how do we decide this one is
10 arbitrary and that one is not, and set a standard? I
11 mean, obviously at some point, that's what the
12 court's asking us about, is how does this - - - how
13 does this apply.

14 I couldn't help but think that in Vermont
15 you must own a Subaru. Nobody owns a car other than
16 a Subaru in Vermont. So I mean, if you have a Chevy
17 dealer in Montpelier, you may not be doing very well,
18 right? But that's not your fault. But if you're
19 losing money, can't they say, time to stop?

20 MR. MCRORY: Well, Your Honor, again, I
21 think the issue is - - - is - - - what I think is
22 happening here is that when you are applying this
23 type of a state standard and applying it at the state
24 average, and the state marketplace is very different
25 than the local marketplace, it's generating the false

1 positives or false negatives that I talked about
2 before. If it's not - - -

3 JUDGE STEIN: Are all the - - -

4 MR. MCRORY: Sorry.

5 JUDGE STEIN: Are all the franchise
6 agreements for the same length of time?

7 MR. MCRORY: Your Honor, I think - - -
8 there is really two answers to that question; I think
9 technically, the General Motors franchise agreements
10 are five-year agreements, but under one of the
11 provisions of New York law is that they're
12 effectively evergreen; you cannot manufacture - - -
13 you cannot refuse to renew a franchise agreement.

14 JUDGE STEIN: So how - - - so then how does
15 the manufacturer, if it decides that it just isn't -
16 - - it isn't productive, you know, to have a
17 dealership in that particular location anymore, you
18 know, no matter who it is, because of the
19 demographics or the lo - - - you know, where it is
20 along the highway or, you know, whatever the case may
21 be, what does the manufacturer have to do?

22 MR. MCRORY: Well, if the manufacturer can
23 establish that the dealer is poorly performing, and
24 we see from the cases from General Motors that they
25 are able to do that on occasion when they can

1 actually prove the case, then the dealership can be -
2 - - can be terminated. If what you're asking, Your
3 Honor, is if - - - I see my time is expired, if you
4 want me to finish the question, if is - - -

5 JUDGE STEIN: Let me just clarify the
6 question a little bit. Rather than just poorly
7 performing, but just more in general. So, poorly
8 performing, it's circular, because poorly performing
9 depends on what the standard is. But if in the - - -
10 in the mind or the eye of GM, this is just not a
11 profitable place to have a dealership.

12 MR. MCRORY: Your Honor, I believe there is
13 New York legi - - - law on that particular issue; I
14 believe it's passed in the last couple of years,
15 maybe at around the time of the bankruptcies, where
16 there are limitations on, essentially, an exit from
17 the marketplace. I think it maybe came out at the
18 time when Oldsmobile was - - - was removed as a
19 brand. So there are limitations on that place in the
20 Dealer Act. That's not the issue here, of course,
21 but the Dealer Act I think does address that issue.

22 CHIEF JUDGE DIFIORE: Counsel, what is the
23 impact on this case of the fact that the statewide
24 standard was in place and known to Beck at the time
25 that they entered into the participation agreement

1 with GM? Anything?

2 MR. MCRORY: Your Honor, I think what - - -
3 what that, I mean, the - - - ultimately, the statute
4 always prevails; there are numerous provisions in the
5 dealer agreement and in the participation agreement
6 that are at odds with what's in the statute. And
7 dealers sign and renew their dealer agreements every
8 year or every several years. And simply because you
9 signed those documents, the Dealer Act always
10 prevails over the dealer agreement.

11 The - - - the legislative history behind
12 this makes it clear that these are basically adhesive
13 contracts. They are - - - they are generated of
14 undue and imbalanced bargaining power between the
15 manufacturer and the dealer. And so I think that the
16 legislature spoke clearly on that.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. MCRORY: Thank you, Your Honor.

19 CHIEF JUDGE DIFIORE: Counsel.

20 MR. MCGRATH: Good afternoon and may it
21 please the court. I'm James McGrath, I'm together
22 with Katherine Moskop; we represent General Motors.

23 Answering yes to either of the certified
24 questions - - -

25 JUDGE RIVERA: But why don't you just

1 include the local challenges, why not?

2 MR. MCGRATH: Well, Your Honor, we do
3 consider local conditions and we consider them in a
4 number of ways, and Judge Hellerstein made specific
5 findings in this regard. The first way we do it is
6 through the segmentation process.

7 JUDGE RIVERA: Uh-huh.

8 MR. MCGRATH: And I think that's being
9 underestimated in the analysis here because - - -

10 JUDGE RIVERA: The SUV versus the pickup
11 truck, this kind of thing?

12 MR. MCGRATH: Correct. And Chevrolet does
13 very well in pickup trucks, but pickup trucks aren't
14 particularly popular in Yonkers.

15 JUDGE RIVERA: Well, I thought their
16 argument was, well, yes, Chevrolet does better in
17 pickup trucks, but the pickup trucks for that other
18 brand still do better because it's the brand.

19 MR. MCGRATH: Well, first of all - - -
20 well, first of all, the segmentation process makes a
21 significant adjustment. So Beck is not being asked
22 to meet state average; it's being asked to meet
23 seventy-five percent of state average as a result of
24 just that process alone.

25 Judge Hellerstein then found that in

1 addition to that localization, GM looks at a variety
2 of other indices to corroborate the reasonableness of
3 that calculation. And in this case, there were
4 multiple; there was the fact that Curry outsells Beck
5 in Beck's own market area, even though it's less
6 convenient to customers located in that area.

7 There's the - - -

8 CHIEF JUDGE DIFIORE: What do you attribute
9 that to?

10 MR. MCGRATH: Operator performance.

11 JUDGE PIGOTT: What does that mean?

12 MR. MCGRATH: That means the dealer is not
13 aggressively marketing vehicles in its market area so
14 - - -

15 JUDGE PIGOTT: What does that mean? I was
16 thinking about it; are you saying they're not
17 spending enough on advertising, are you saying that -
18 - - I don't know what else they're supposed to do.

19 MR. MCGRATH: Not spending enough on
20 advertising, not having nice facilities, not pricing
21 their vehicles properly, not having inventory in
22 stock.

23 JUDGE RIVERA: I'm sorry for the pun, is
24 that where the rubber hits the road, that they argue,
25 there in not much - - - there is nothing else we can

1 do, we've gone as far as we can; and your argument
2 is, you're just not a good dealer, if you'd did
3 better, you'd get better numbers.

4 MR. MCGRATH: If we were looking solely at
5 RSI, maybe that would be a valid criticism. But we
6 looked well beyond RSI in determining Beck's
7 compliance with its franchise obligations. And Judge
8 Hellerstein found that evidence compelling; it found
9 the fact that Curry was able to improve, that Major
10 in Long Island City was able to improve dramatically,
11 that Ford and Chrysler in the same market were able
12 to easily exceed state average, compelling.

13 JUDGE ABDUS-SALAAM: Counsel, your - - -
14 your client worked with this Beck dealership,
15 correct? You, I think, made some suggestions to
16 them; are you saying they didn't follow the
17 suggestions that you made to improve their dealership
18 performance?

19 MR. MCGRATH: We are, Your Honor. And I
20 think the allocation issue is - - - is the most - - -
21 the easiest example of that. We offered Beck
22 hundreds of additional cars in order to help it meet
23 its sales performance obligations. It turned almost
24 virtually every one of them down.

25 CHIEF JUDGE DIFIORE: Was the timing of

1 that right?

2 MR. MCGRATH: Well, the evidence in the
3 record was that as soon as the program ended, still
4 in the winter months in New York, Beck started
5 ordering significant amounts of additional vehicle -
6 - - vehicles during the same time period. Beck
7 challenged that on appeal, Judge Hellerstein rejected
8 its allocation claim, and the Second Circuit affirmed
9 - - -

10 JUDGE STEIN: On a more general basis,
11 though, how - - - how can a standard be fair if at
12 any one time, half of the people or the businesses
13 fall below the standard; how can that be fair - - -

14 MR. MCGRATH: Evaluating performance
15 against average is very common. And the most - - -
16 the most readily known example of that is grading
17 students on a curve. You're grading students against
18 an average where, necessarily, approximately half
19 will be above average and half will be below the
20 average. But the question is what do you do with
21 that result.

22 JUDGE RIVERA: Yeah, but their argument - -
23 - I get your point about that, but I think their
24 argument is without taking into consideration these
25 local challenges that - - - you're really not doing

1 the kind of assessment you're talking about; you're
2 not really applying an average that way because in
3 your example, the students always have the
4 opportunity to be above the average. And their
5 argument is, these challenges, if you don't take them
6 into consideration, I mean, we will never be able to
7 meet that mark.

8 MR. MCGRATH: Well, we do take those local
9 - - - I don't agree that we don't take the local
10 considerations into performance; we do it through the
11 segmentation process and we look it - - - do it
12 through looking at other indices and we look - - - do
13 it by looking - - -

14 CHIEF JUDGE DIFIORE: Why not brand
15 preference?

16 MR. MCGRATH: Well, brand preference,
17 that's an in - - - that's a very interesting issue
18 because I don't think - - - GM doesn't want to adjust
19 for brand preference; they want to know why a
20 particular dealer is not able to sell as many Chevy
21 Malibus in a particular market as the adjusted
22 average would suggest it could. If you - - - if you
23 take brand preference out of the occasion - - - of
24 the equation, you're not evaluating performance.
25 That's what is - - - the metric is designed to do.

1 JUDGE RIVERA: You would say it's a
2 resistance from a business model perspective of
3 admitting there is something inherently wrong with
4 the brand; because that's what you would have to do,
5 no?

6 MR. MCGRATH: Exactly. And there is
7 nothing in this case to suggest that there is somehow
8 something wrong with the Chevrolet brand. And I
9 think the best evidence of that, we typically see the
10 claim that there's an import bias in this market. GM
11 specifically looked at this issue, it looked at how
12 its domestic competitors, Ford and Chrysler were
13 doing, located on the same street as Beck, within a
14 mile of its dealership. And it found that they were
15 performing well above state average. That - - -

16 JUDGE RIVERA: But it could - - - it could
17 be the metric hits GM harder, right? And that's
18 their point.

19 MR. MCGRATH: If it was only the metric, if
20 GM wasn't considering all these other factors, maybe
21 - - - maybe that would be true. But the fact that GM
22 looks beyond the metric, and its contract says it
23 will look beyond the metric before claiming that the
24 dealer is in breach, that - - - that makes the
25 standard fair and reasonable.

1 JUDGE FAHEY: But for them to get on your
2 radar, I thought his argument was for them to get on
3 your radar, in the sense that you're concerned about
4 them, you identified them as a problem dealer, you'll
5 only look at these numbers, and that's where they say
6 they are put in a very difficult position, right?
7 They're always on the defensive.

8 MR. MCGRATH: Well, I think it's a
9 continuum, and I go back to my grading on the curve
10 analogy. If there is a student that is getting an F,
11 you're going to pay more attention to that student
12 and try to help that student improve. And GM's
13 rating process is designed to do that. If a dealer
14 is below average, it's ranked either needs
15 improvement, needs significant improvement - - - it's
16 only those dealers that are on the bottom fifteen
17 percent of the state, like Beck, that are rated
18 unsatisfactory.

19 And then GM doesn't move to terminate them,
20 as we heard at trial. Termination is extremely rare.
21 What it does is it focuses resources and it provides
22 information to the dealers to help them identify and
23 take advantage of the opportunity in the marketplace.

24 JUDGE RIVERA: But that would still be in
25 violation. If it really was unreasonable or

1 arbitrarily unfair, that would still be in violation
2 of the statute, right? The statute doesn't talk
3 about termination, per se.

4 MR. MCGRATH: Correct, correct. And this
5 case wasn't about termination, that issue wasn't
6 before Judge Hellerstein, and it's not what the
7 Second Circuit needs to decide on appeal.

8 JUDGE FAHEY: I thought Beck's expert,
9 Rosner (ph.), said that eighty-three percent of the
10 dealers would fail under this standard.

11 MR. MCGRATH: And Judge Hellerstein took
12 that testimony into account in evaluating whether the
13 standard properly takes into account local
14 variations.

15 JUDGE FAHEY: But you see why it's not a
16 curve? If eighty-three percent of you are failing,
17 there really isn't a curve from any sense that I know
18 of.

19 MR. MCGRATH: Well, it's a curve when you
20 look at the state as a whole. And Judge Hellerstein
21 recognized that simply because the dealers in the
22 downstate area needed to improve - - -

23 JUDGE FAHEY: I accept that - - - I accept
24 your argument there. Then we get back to object - -
25 - can an objectively be drawn - - - standard be drawn

1 geographically that isn't reflected on urban lines
2 versus rural lines, because obviously Westchester
3 County is a great deal different from Niagara County.
4 Chevys sell great in Niagara County, they don't in
5 Westchester County; that's just a reality. And there
6 is obviously a big difference in the urban area here,
7 in the urban area Herkimer County.

8 So those obvious factors come into play,
9 and you say, well, all right, then what would be the
10 objective standard by which you would draw those
11 lines?

12 MR. MCGRATH: And none was offered by
13 Beck's expert.

14 JUDGE FAHEY: And what about what plaintiff
15 says, the company itself doesn't?

16 MR. MCGRATH: The company organizes itself
17 into - - - into zones, which are very large areas,
18 for purposes of deploying its field staff. It's for
19 an entirely different purpose than evaluating dealer
20 performance.

21 JUDGE FAHEY: Well, but you assume that
22 there is an economic rationality to the way that they
23 draw those lines. And the lines of states are drawn
24 on historical realities that have very little to do
25 with economic realities. So the economic reality

1 would seem to be more objective in your basis, and
2 the line should then comport to that.

3 MR. MCGRATH: I think Judge Hellerstein
4 recognized there was some economic reality to
5 applying states. Not only did it provide
6 predictability and uniformity and objectivity, but
7 dealers in a particular state are subject to the same
8 tax laws, the same franchise regulations, the same
9 document fees; so there is some economic correlation
10 between using state as a measure and the atmosphere
11 within the state, just as this court decides cases
12 for the entire state of New York.

13 What the Second Circuit and Judge
14 Hellerstein recognized was that no standard is going
15 to be perfect. But this standard has tremendous
16 attributes and virtues. And it takes into account
17 local variations in a way that makes it reasonable
18 and fair.

19 JUDGE STEIN: Well, what's so difficult
20 about just adding this - - - this extra variable?

21 MR. MCGRATH: Because then you're going to
22 - - - then you're going to inject a whole great deal
23 of subjectivity into the analysis. And Beck's expert
24 conceded this at trial. That these - - -

25 JUDGE STEIN: But you already do that with

1 the segmentation, why can't you just do it with the
2 brand?

3 MR. MCGRATH: Any - - - any area that you
4 draw is going to have to be evaluated on a segment
5 basis. But as Beck - - - Beck's expert conceded at
6 trial, the arbitrary areas that he drew, that Judge
7 Hellerstein found were gerrymandered, have to be
8 evaluated every year, they have to be redrawn,
9 they're going to be different for every dealer,
10 they're going to - - - they're going to inject
11 uncertainty and subjectivity into the process.

12 And I don't think that's what a statute
13 that is akin to the UCC, that's designed to prohibit
14 conduct that transcends the bounds of commercial
15 norms, which is what this language indicates,
16 requires.

17 JUDGE STEIN: But again, don't you already
18 do that with other factors, like the segmentation?

19 MR. MCGRATH: We take the standard, the
20 objective standard that's based on state, and then we
21 segment adjust that. So you get into the lo - - -
22 you account for the local variations.

23 JUDGE STEIN: Okay, so why couldn't you use
24 the same areas, or draw the same lines with
25 segmentation or with brand that you do with

1 segmentation?

2 MR. MCGRATH: You could, but what you would
3 have to decide is where exactly do you draw the
4 different geographic area.

5 JUDGE STEIN: What I'm saying is that you
6 already do that, don't you?

7 MR. MCGRATH: We - - - we don't, Your
8 Honor. We do segmentation based on the state average
9 benchmark. We come up with the benchmark; that's
10 step one. Then we segment adjust that benchmark for
11 the local market area. I think - - -

12 JUDGE STEIN: So that's what I'm talking
13 about, so you - - - you're saying you're using the
14 term "local market area".

15 MR. MCGRATH: Correct.

16 JUDGE STEIN: Okay. So - - - so you've
17 defined, for the purpose of the segmentation issue,
18 what the local market area is. Why can't you use
19 that very same local market area to look at brand
20 preference?

21 MR. MCGRATH: You could.

22 JUDGE STEIN: Okay.

23 MR. MCGRATH: You could, but the - - - but
24 drawing the geographic benchmark and taking the first
25 step would be inherently subjective under the

1 approaches that Beck suggests. You're going to have
2 to debate which areas should be included on an annual
3 basis, and the dealers would never know which area
4 they were going to be evaluated against.

5 JUDGE RIVERA: So you're saying the brand
6 preference, these metrics over this brand preference,
7 and the segmentation, are not coterminous. So they
8 may not - - - there may not be overlap.

9 MR. MCGRATH: The segmentation is designed
10 to adjust based on available registration data, and
11 this is unique in this industry, for what kind of
12 custom - - - what kind of vehicles do customers
13 living in the Yonkers market prefer. And the
14 availability of that data is - - - is quite powerful,
15 because you don't have to speculate as to what kind
16 of vehicles they'll buy based on their income levels
17 or other demographics; we have the actual data. And
18 that's what we're doing.

19 JUDGE STEIN: Doesn't that data show you
20 what brand - - -

21 MR. MCGRATH: Well, what the resulting
22 performance metric shows is how the particular brand
23 is performing in that market. So we want to know how
24 the Chevy Malibu is performing versus the Toyota
25 Camry and the Honda Accord. That's precisely what a

1 metric is designed to evaluate, because we want - - -

2 CHIEF JUDGE DIFIORE: Are you suggesting
3 that the sales efforts of your dealers can overcome
4 some geographic preference for a brand?

5 MR. MCGRATH: Well, yes - - - yes, I am.
6 Because the only way we can sell cars to customers in
7 New York is through our dealers. So we are
8 completely beholden to their marketing efforts to do
9 that. And it's all about marketing, and advertising,
10 and inventory, and beating the competition in the
11 particular market.

12 Being more aggressive than Toyota, and
13 Honda, and Ford, and Chrysler; that's what the
14 performance metric is designed to do. And it's not
15 designed as a club to bludgeon the dealers; it's
16 designed as a tool. And there is a sales performance
17 evaluation that's twenty or so pages in the record.
18 It identifies by model where there is opportunity.

19 JUDGE STEIN: So you want the downstate
20 dealers, for example, to work harder than the upstate
21 dealers, because the upstate dealers don't need to.

22 MR. MCGRATH: In fact, we don't. We want
23 the upstate dealers to work - - - downstate dealers
24 to simply work as hard as the customers prefer those
25 vehicles in the area, only seventy-five percent of

1 state average here.

2 JUDGE PIGOTT: How often do you - - - do
3 you find yourself in a situation where you're
4 terminating a dealership?

5 MR. MCGRATH: As the evidence - - - Judge
6 Hellerstein found below, it's extremely rare. This
7 is not used as a tool for termination. My time is
8 running short; I'd like to touch on the second
9 question, if I may.

10 And that's - - - the issue, with respect to
11 the second question, is whether a manufacturer's
12 exercise of a discretionary contract right somehow
13 modifies or changes the franchise relationship with
14 the dealer. And this was done - - - alleged with
15 respect to GM's modification of Beck's market area,
16 its AGSSA. And AGSSAs change all the time for a
17 variety of reasons, the most basic of which is the
18 United States redoes the census every year and the
19 census tracts change.

20 JUDGE STEIN: Is that a change to the
21 franchise agreement?

22 MR. MCGRATH: It is not, because in the
23 franchise agreement, GM recognizes that all the
24 dealers' AGSSAs are going to need to be reevaluated
25 from time to time. And GM has to, for the entire

1 network, do that, so the dealers agree that GM has
2 the right to do that in the sole - - - its sole
3 discretion. So where GM - - -

4 JUDGE FAHEY: So assuming it conflicts with
5 463(2)(gg), who trumps?

6 MR. MCGRATH: Well, 4 - - -

7 JUDGE FAHEY: I don't like that word, but I
8 mean, which one would - - -

9 MR. MCGRATH: 463 would trump, but it
10 doesn't conflict with 463.

11 JUDGE FAHEY: Okay.

12 MR. MCGRATH: The legislature here has
13 chosen to curtail some discretionary rights. For
14 instance, GM reserves the right to add or relocate
15 dealers in its dealer agreement. The legislature
16 enacted a specific provision curtailing that right in
17 463(2)(cc).

18 JUDGE STEIN: So unless it's specifically
19 curtailed by the legislature, you could have a
20 franchise agreement that leaves anything else and
21 everything else to the sole discretion of the
22 manufacturer, and then you could do whatever you
23 wanted.

24 MR. MCGRATH: For purposes of the business
25 relationship, this ongoing business relationship,

1 both parties have significant discretionary rights
2 under the franchise agreement. Beck reserves the
3 right to determine how much inventory to stock, how
4 much advertising to conduct, and the like. The
5 legislature here, and - - -

6 JUDGE RIVERA: How isn't that against the
7 language itself, it's unlawful for a franchisor
8 notwithstanding the terms of any franchise contract.
9 So you can't write into your contract, we don't care
10 what the statute says, we keep the discretion, do
11 whatever we want - - - I'm paraphrasing obviously,
12 that's not the way you've written the agreement - - -

13 MR. MCGRATH: Right.

14 JUDGE RIVERA: - - - but you get my point.

15 MR. MCGRATH: Well, I think the legislature
16 was concerned with changing defined obligations in
17 the franchise agreement. For instance, if you say,
18 you will have ninety days' notice if we decide to
19 terminate you, and then all of a sudden we say,
20 you'll only have sixty days, that's a modification.
21 And I think what the legislature was worried about,
22 was as Mr. McRory said, these are evergreen
23 agreements; they expire every five years, but were we
24 not - - - required to renew them unless we showed due
25 cause and good faith for not doing that.

1 So what the legislature was concerned about
2 was, when these come up for a renewal, we shouldn't
3 be able to modify all sorts of definite provisions.

4 JUDGE RIVERA: Are you not able to modify,
5 or you just have to modify pursuant to the
6 requirements of the statute - - -

7 MR. MCGRATH: Pursuant to the - - -

8 JUDGE RIVERA: - - - isn't that slightly
9 different?

10 MR. MCGRATH: Correct. You're - - -

11 JUDGE RIVERA: Doesn't prohibit the
12 modification, necessarily.

13 MR. MCGRATH: Thank you, Your Honor. We
14 must give notice and demonstrate good cause for the
15 modification. The legislature here, and you can look
16 at 463, has been very precise and has regulated very
17 minute aspects of this relationship. Other states
18 have passed APR modification statutes that require
19 notice and - - - and a showing of good cause in order
20 to modify a dealer's market area.

21 New York has not done that. And I would
22 encourage that - - - the court to resist Beck's
23 invitation to add requirements to this statute either
24 on a performance standard or the mod - - - the APR
25 revisions that the legislature chose not to enact in

1 2008.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. MCGRATH: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MR. MCRORY: Your Honor, the North Shore
6 case, I think, from out of Illinois, that went all
7 the way to the Illinois Supreme Court, illustrates
8 the fundamental flaw with using the statewide
9 averages adjusted only for the segment popularity.

10 JUDGE PIGOTT: Well, they added a new
11 dealership there, didn't they?

12 MR. MCRORY: They were adding a dealership,
13 but they were - - - they were addressing whether the
14 use of a statewide average adjusted for segment
15 popularity is a useful tool, an accurate tool, a fair
16 and reasonable tool.

17 JUDGE PIGOTT: One thing that strikes me in
18 this whole business is, we don't know a darn thing
19 about the automobile business, and frankly, a whole
20 lot about franchising; you know, we've got these two
21 questions to address. I think of, you know, a new
22 dea - - - a new owner of a franchise. Besides, I'm
23 going to spend a million dollars advertising, and I'm
24 going to get every darn customer I can out of this,
25 and the dealer next to him, you know, however close

1 or far, suffers as a result of that. And I don't
2 know - - - you know, who are we to say, oh, this is
3 unfair that this is going on? I don't know how, you
4 know, all of these permutations can get sorted out by
5 us.

6 MR. MCRORY: Well, I mean, Your Honor, the
7 legislature sort of kicked it into the court's, you
8 know, bailiwick to handle this. So - - -

9 JUDGE PIGOTT: But isn't it always a
10 question of fact? I mean, you did have a, you know,
11 a trial in the Southern District, and I think one of
12 the points that was made was that the RSI did not
13 seem to be, you know, determinative in any fashion;
14 am I misreading that?

15 MR. MCRORY: Well, Your Honor, it is - - -
16 it is determinative. Because, I mean, what - - -
17 always at issue - - - even though this was not the
18 termination case, that was the DMV case, termination
19 was always an issue here. The - - - the issue that
20 precipitated the case was the letter from GM in April
21 of 2011 saying, if you don't meet your performance
22 requirements, we will not renew you at the end of
23 this term.

24 JUDGE RIVERA: Can any - - - can any dealer
25 - - - since he's saying the point of the average is

1 always to keep someone below - - - excuse me, is it
2 possible for a dealer to consistently be below that
3 one hundred RSI mark, and nevertheless not be
4 terminated?

5 MR. MCRORY: Yes, Your Honor. I mean,
6 that's something that the - - - that the Judge
7 Zulkosky addressed. And he couldn't fig - - - he
8 said there was no - - - basically no credible
9 explanation offered by GM why Beck was selected out
10 of all these dealers below a hundred, below fifty.

11 JUDGE RIVERA: The others didn't get
12 terminated.

13 MR. MCRORY: It - - - it was, I mean, I
14 think he felt it was basically arbitrary why Beck was
15 culled from the herd in this - - - in this regard.
16 The state average - - - the state average standard
17 adjusted - - -

18 JUDGE STEIN: Could you just talk for a
19 minute, though, about the APR changing - - -

20 MR. MCRORY: Yes.

21 JUDGE STEIN: - - - and whether it - - - if
22 your agreement - - - if your franchise agreement says
23 that it's at the sole discretion, so there is no APR
24 built into that agreement, how is a change then a
25 change - - -

1 MR. MCRORY: Your Honor, and I think that
2 the Second Circuit may have misread the agreement.
3 The APR is part of the agreement; there is an APR
4 addendum that is part of the franchise agreement.

5 It is - - - I'll give you the exact cite in
6 a second, but the - - - it's an addendum to the
7 franchise agreement, just like the standard
8 provisions are an addendum to the franchise
9 agreement.

10 JUDGE STEIN: But do they have discretion
11 to modify that - - - contract - - -

12 MR. MCRORY: Under the contract, they have
13 discretion to modify the APR, and presumably the
14 AGSSA as well.

15 The - - - but it is part of the contract, the
16 APR addendum says, under a dealer's sales and service
17 agreement as part of it. The letter that was sent by GM
18 to Beck Chevrolet said, keep - - - you know, this is your
19 APR addendum, keep it with your dealer sales and service
20 agreement. At oral argument, there was - - - counsel
21 admitted that - - - or GM was not arguing that it was not
22 part of the dealer agreement; this is part of the dealer
23 agreement. And it's not just any part of the dealer
24 agreement, it's one that affects sales performance, it
25 goes into the denominator of the RSI calculation, it

1 affects a whole host of other things that affect the
2 operational performance of the dealer.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MR. MCRORY: Thank you.

5 CHIEF JUDGE DIFIORE: Thank you.

6 (Court is adjourned)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Beck Chevrolet Corp., Inc. v. General Motors, No. 48 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: March 24, 2016