

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term, 2014

4 (Argued: October 6, 2014 Decided: May 19, 2015)

5 Docket Nos. 13-4066, 13-4310

6 _____
7 Beck Chevrolet Co., Inc.,
8 Plaintiff–Appellant–Cross–Appellee,

9 v.

10 General Motors LLC,
11 Defendant–Appellee–Cross–Appellant.
12 _____

13 Before: SACK, LIVINGSTON, and LOHIER, *Circuit Judges*.

14 The plaintiff, a motor vehicle dealer, appeals from a July 13, 2012, order
15 granting summary judgment to the defendant, a motor vehicle manufacturer,
16 and a September 30, 2013, final judgment denying the plaintiff's two remaining
17 claims for injunctive relief, entered in the United States District Court for the
18 Southern District of New York (Alvin K. Hellerstein, *Judge*). The plaintiff's
19 contract and New York Dealer Act claims arise principally out of a dispute over
20 the defendant's performance standards, vehicle allocation system, and alleged
21 unlawful modification of its franchise agreement with the plaintiff. We conclude
22 that New York state law is insufficiently developed for us to ascertain its proper

1 interpretation in the context of several issues raised on this appeal, and that
2 questions as to what the applicable laws require should therefore be certified to
3 the New York Court of Appeals. We further conclude that the district court did
4 not err in dismissing the plaintiff's vehicle allocation claim, denying the
5 plaintiff's request for attorney's fees, or dismissing the defendant's counterclaim
6 for rescission.

7 We therefore AFFIRM in part and CERTIFY the remaining questions to the
8 New York Court of Appeals.

9 RUSSELL P. MCRORY, Arent Fox LLP,
10 New York, NY, *for Plaintiff-Appellant-Cross-*
11 *Appellee.*

12 JAMES C. MCGRATH, Seyfarth Shaw LLP,
13 (Christina Chan, Bingham McCutchen LLP,
14 *on the brief*), Boston, MA, *for Defendant-*
15 *Appellee-Cross-Appellant.*

16 SACK, *Circuit Judge:*

17 This appeal requires us to address, apparently for the first time, several
18 provisions contained in New York's Franchised Motor Vehicle Dealer Act (the
19 "Dealer Act"), codified at New York Vehicle and Traffic Law sections 460 – 473.
20 The plaintiff, Beck Chevrolet Co., Inc., is the proprietor of a Chevrolet dealership
21 of the same name (the corporation and dealership are referred to hereinafter
22 collectively as "Beck."). Beck brought suit against its franchisor, General Motors,

1 LLC ("GM"), for claims arising under the Dealer Act, and state contract law
2 claims, for imposition of unfair and unreasonable performance standards, unfair
3 modification of the franchise agreement, and refusal to deliver vehicles. The
4 district court (Alvin K. Hellerstein, *Judge*), granted GM's motion for summary
5 judgment with respect to the claims in Beck's first amended complaint, but
6 granted it leave to assert two claims for injunctive and declaratory relief under
7 the Dealer Act, sections 463(2)(c) and (gg). Following a bench trial, the district
8 court dismissed the second amended complaint and GM's counterclaim for
9 rescission of the franchise agreement. It also denied each party's application for
10 attorney's fees.

11 Several of the issues we must consider in order to resolve this appeal
12 require that we address unsettled questions of New York law. Beck challenges
13 the district court's rulings that GM's performance metrics are neither unfair nor
14 unreasonable and that GM's expansion of Beck's sales area did not constitute a
15 "modification" of its Franchise Agreement under section 463 of the Dealer Act.
16 We conclude that New York state law is insufficiently developed in these areas to
17 enable us to predict with confidence how the New York Court of Appeals would
18 resolve these questions. We therefore certify to the Court of Appeals two

1 questions concerning the application of the Dealer Act. We affirm the district
2 court's dismissal of Beck's claims for attorney's fees and unfair allocation of
3 vehicles, and GM's counterclaim for rescission of the Participation Agreement.

4 **BACKGROUND**

5 Beck, located in Yonkers, New York, is a retail dealer in Chevrolet
6 automobiles. It is operated under a set of franchise agreements entered into with
7 the defendant, GM, which is a limited liability company whose sole member is a
8 citizen of Delaware with its principal place of business in Michigan.

9 In 2009, General Motors Corp. ("Old GM") entered into widely reported
10 bankruptcy proceedings in the United States Bankruptcy Court for the Southern
11 District of New York. In the course of those proceedings, Old GM, the defendant
12 GM's predecessor corporation, sought to shrink its dealer network in an effort to
13 reduce competition among retail dealers in General Motors automobiles and
14 improve the profitability of the remaining individual franchises.

15 As part of this effort, Old GM offered two types of agreements to its
16 franchisees. Some were offered a Participation Agreement, under which their
17 franchises would continue, while others were offered a Wind-Down Agreement,
18 under which their franchises would be terminated in exchange for cash

1 payments to them. Beck initially executed a Wind-Down Agreement in which it
2 agreed to terminate its operations in or before October 2010 in exchange for a
3 payment to Beck of approximately \$390,000.

4 Old GM subsequently sold substantially all of its assets and assigned its
5 interest in all its Participation and Wind-Down Agreements with franchisees to
6 GM, the defendant in this case. Beck asked GM to reconsider Old GM's decision
7 to terminate the franchise. GM agreed to offer Beck a Participation Agreement in
8 place of the Wind-Down Agreement. The parties executed that agreement in
9 September 2009.

10 From that point on, two contracts governed Beck's relationship with GM:
11 a Dealer Sales and Services Agreement (the "Dealer Agreement"), which contains
12 standard provisions that set out the basic terms of the relationship between GM
13 and any dealer franchise, and a September 2009 Participation Agreement, which
14 further modified and supplemented the basic Dealer Agreement. Together, these
15 agreements govern several issues central to this dispute, including Beck's
16 primary geographic area of responsibility and the performance standards to
17 which it is subject. The terms of these agreements are all subject to the Dealer

1 Act, which also contains certain mandatory provisions governing the
2 manufacturer-franchisee relationship.

3 ***Performance Monitoring Formula***

4 The primary issue on appeal relates to GM's use of a Retail Sales Index
5 ("RSI") to measure its dealers' sales performance. In arriving at the RSI value for
6 a particular dealership, GM assigns each dealer an "Area of Primary
7 Responsibility" and, in some instances, an "Area of Geographic Sales and Service
8 Advantage" ("AGSSA"). An Area of Primary Responsibility is a geographic area
9 in which a dealer is expected to sell GM automobiles and otherwise represent
10 GM. Urban Areas of Primary Responsibility, such as the part of Westchester
11 County, New York, in which Beck is located, are typically served by more than
12 one GM dealer. GM accordingly subdivides those areas into AGSSAs, for each of
13 which a single dealer is responsible. Both the Areas of Primary Responsibility
14 and the AGSSAs are composed of census tracts drawn by the U.S. Census
15 Bureau.¹ AGSSAs and Areas of Primary Responsibility are non-exclusive –

¹ According to the United States Census Bureau,

Census Tracts are small, relatively permanent statistical subdivisions of a county or equivalent entity that are updated by local participants prior to each decennial census as part of the Census Bureau's Participant Statistical Areas Program. The Census Bureau delineates census tracts in situations where no local participant existed or where state, local, or tribal

1 dealers are allowed to sell and market vehicles to consumers outside of their own
2 AGSSAs. The function of these territory markers is not to protect dealers from
3 competition but to provide a benchmark against which GM can measure dealers'
4 sales.

5 In determining an RSI for a Chevrolet dealer such as Beck, GM divides the
6 dealer's actual retail sales by its expected sales, which are calculated as described
7 below. Expressed as a formula:

$$\frac{\text{Dealer's Total Sales}}{\text{Expected Sales Based on State Average}} \times 100 = \text{RSI}$$

8
9 Dealers are required to attain an RSI of at least 100, which GM contends is an
10 "average" score.² "Total sales" measures all of a particular dealer's actual sales in

governments declined to participate. The primary purpose of census tracts is to provide a stable set of geographic units for the presentation of statistical data.

Geographic Terms and Concepts – Census Tract, U.S. Census Bureau, http://www.census.gov/geo/reference/gtc/gtc_ct.html (last visited Apr. 20, 2015).

² We refer to this rather imprecisely as an "average" score because it reflects the requirement that each dealer's market share equal GM's average statewide market share. Unless all dealers attain the exact same market share, one would expect a substantial number of dealers to score higher than average each year. It necessarily

1 a particular period of time. The "expected sales" metric is based not on the raw
2 state average among dealers, but on an "adjusted" statewide average market
3 share for Chevrolet products in the dealer's AGSSA.³

4 GM calculates each dealer's expected sales by first taking into account all
5 new motor vehicle registrations in the United States. It then compiles the
6 registrations by census tract and subdivides them into "segments" of the motor
7 vehicle market, based on types of automobiles. To choose two examples, small
8 sport utility vehicles are a segment, as are mid-size sedans.

9 GM adjusts the expected sales figure for statewide and local
10 characteristics. First, it takes into account Chevrolet's market share within the
11 segments in which it competes on a statewide basis. For example, because
12 Chevrolet does not compete in the luxury sedan segment of the market, that
13 segment is excluded when calculating Chevrolet's statewide market share.
14 Chevrolet does compete in the markets for mid-size sedans and pickup trucks,
15 however. If, hypothetically, there are 10,000 mid-size sedans sold in New York

follows that a substantial number will fall short, as well. And as dealer performance improves, the sales required to achieve an RSI of 100 will increase.

³ GM has used a weighted statewide average since 1999, when it switched from using a national average. GM's method is thus in keeping with the industry standard; the vast majority of GM's competitors use a statewide or regional average, and some still compare their dealers' performance to a national average.

1 State and 600 of those are Chevrolets, Chevrolet will have a 6 percent market
2 share in New York State among mid-size sedans. If there are 20,000 pickup
3 trucks sold in New York State, and 5,000 of those are Chevrolets, Chevrolet will
4 have a 25 percent market share in New York State among pickup trucks.

5 Second, the expected sales figure takes into account the relative popularity
6 of a particular segment in the dealer's AGSSA. In other words, the market-share
7 percentages described above are used to calculate each dealer's expected sales. If
8 Chevrolet is a particularly strong statewide competitor in the market for a
9 particular type of car – pickup trucks, for example – but the market for pickup
10 trucks in a particular (likely urban or suburban) AGSSA is relatively small, then
11 the dealership's expected sales targets for pickup trucks would be relatively low.
12 For example, a Chevrolet dealer in an AGSSA in which only four total pickup
13 trucks are purchased in a given year would be expected to sell only one
14 Chevrolet pickup truck, while a dealer in an AGSSA in which 100 pickup trucks
15 are purchased in a given year would be expected to sell twenty-five. GM asserts
16 that these segment-based adjustments reduced Beck's targets by more than
17 twenty-five percent from the unadjusted state average. Beck does not contend
18 otherwise.

1 Local adjustments do not account for local brand popularity, however.
2 For example, dealers like Beck operating in the southern part of the state
3 ("downstate") do not receive a downward adjustment in sales expectations even
4 though Chevrolet, as a brand, is more popular in upstate markets than in
5 Yonkers, Beck's location, and elsewhere in Westchester County and some nearby
6 suburban counties.

7 ***Beck's Performance under the Current RSI Formula***

8 The Dealer Agreement establishes the basic outlines of GM's performance
9 evaluation process. Specifically, it provides that a dealer's RSI is "satisfactory"
10 only if it is equal to or greater than 100. If the dealer's RSI is above 100 and in the
11 top fifteen percent statewide, it is classified by GM as "superior."

12 If performance falls below satisfactory, GM is authorized by the
13 Participation Agreement to take one or more remedial measures set forth in
14 Article 13.2 of the Dealer Agreement. The ultimate step possible in this process is
15 termination of the agreement on ninety days' prior written notice. The
16 Participation Agreement further provides:

17 In addition to the [RSI, GM] will consider any other relevant factors
18 in deciding whether to proceed under the provisions of Article 13.2
19 to address any failure by Dealer to adequately perform its sales
20 responsibilities. [GM] will only pursue its rights under Article 13.2

1 to address any failure by Dealer to adequately perform its sales
2 responsibilities if [GM] determines that Dealer has materially
3 breached its sales performance obligations under this Dealer
4 Agreement.

5 J.A. 157. According to GM, GM prefers not to terminate dealers who fall below
6 target levels, and has remedial programs to help improve performance at those
7 dealerships.

8 Beck's RSI was considerably lower than 100 in the years leading up to
9 GM's 2009 bankruptcy reorganization. The Participation Agreement established
10 a roadmap for improving Beck's performance in stages, requiring Beck to attain
11 an RSI of 70 in 2010, 85 in 2011, and 100 in 2012. But Beck's RSI fell far short of
12 these targets, remaining close to 50 in each year. GM ultimately waived the
13 Participation Agreement's performance requirements for the 2010 calendar year,
14 but began enforcing performance targets in 2011.

15 *Inventory Issues*

16 Beck asserts that many of its performance issues derived from its inability
17 to obtain adequate inventory from GM. GM uses a vehicle allocation system
18 called "turn and earn," through which a dealer's allotted inventory is calculated
19 as a function of past sales. While Beck was operating under the Wind-Down
20 Agreement, it was not permitted to place orders for new vehicle inventory with

1 GM. According to Beck, Beck's depressed inventory caused sales to slow. Beck
2 argues that as a result of this slowdown, it could not order adequate inventory
3 under the "turn and earn" process even after it entered into the Participation
4 Agreement which permitted it to order vehicles from GM.

5 In an effort to boost sales, GM instituted a "special vehicle allocation
6 process" that was in effect from October 2010 through January 2011. The
7 program was designed to allow dealers to order more vehicles during those four
8 months than the "turn and earn" program would have permitted. Despite its
9 depressed inventory in the months leading up to the program's launch, Beck
10 objected to the program as a "poison pill and recipe for disaster." Letter from
11 Russell S. Geller, Vice President, Beck Chevrolet Co., Inc., to James W. Bunnell,
12 General Manager—U.S. Sales operations, General Motors LLC (Oct. 11, 2010)
13 (J.A. 185-86). The program, Beck asserted, would result "in the delivery of too
14 many vehicles too quickly," and would overload Beck's facilities, imposing high
15 additional costs. *Id.* The vehicles would be delivered in winter, an unpopular
16 season for purchasing new cars in New York, and Beck would be unlikely to sell
17 them in a timely fashion. Beck opted not to participate heavily in the allocation
18 program, declining 661, or 87 percent, of the vehicles GM offered to it. GM

1 urged Beck to reconsider its approach in two letters sent in November 2010, but
2 apparently to no avail.

3 After GM ended the program and resumed its ordinary "turn and earn"
4 process, Beck started ordering more cars than GM allocated. For example, in
5 January 2011, while the special allocation was in effect, GM offered Beck 177
6 vehicles; Beck ordered only 31. GM resumed its ordinary process in February
7 2011, at which point GM shipped only 18 vehicles. Beck ordered 67. This
8 imbalance continued for the remainder of 2011, with Beck ordering between 22
9 and 84 vehicles each month, and GM shipping between 2 and 49 fewer vehicles
10 than Beck had requested. Although Beck sold fewer cars than it had in its
11 inventory in 2011, Beck contends that it could have sold more had GM honored
12 its requests for an additional 218 vehicles between February and December 2011.

13 *Extension of the Participation Agreement*

14 As noted, Beck signed a Participation Agreement with GM in 2009. But
15 during 2010, Beck operated under a short-term Dealer Agreement, which was set
16 to expire on April 30, 2011. The parties anticipated renewing the Dealer
17 Agreement only if Beck attained its 2010 performance target: an RSI of 70. But,
18 because of the allocation issues, GM waived the performance requirements for

1 2010. Attaining an RSI of 70 for 2010 was no longer a prerequisite to gaining an
2 extension. Instead, GM sent Beck a letter on April 6, 2011, offering to extend the
3 Dealer Agreement to April 30, 2012, and conditioning any further extension on
4 Beck meeting specified conditions:

5 If Dealer [Beck] meets its year end 2011 RSI and CSI ["Customer
6 Satisfaction Index"] performance requirements under the
7 Participation Agreement, and if Dealer is otherwise in compliance
8 with its obligations under the Dealer Agreement, GM will then
9 further extend the Dealer Agreement to April 30, 2013 to correspond
10 with Dealer's year end 2012 RSI and CSI requirements.

11 However, should Dealer not meet its 2011 Performance
12 Requirements, or should Dealer otherwise not be in compliance with
13 its obligations under the Dealer Agreement, GM shall have no
14 obligation to extend the Dealer Agreement beyond April 30, 2012.

15 Letter from William P. Flook, Jr., Zone Manager, General Motors LLC, to Leon
16 Geller, Dealer Operator, Beck Chevrolet Co., Inc. (Apr. 6, 2011) (J.A. 229). GM
17 noted that Beck would be deemed to have accepted the offer simply by opening
18 for business on May 1, 2011.

19 Beck considered this to be an unlawful modification of the terms of its
20 franchise because it conditioned renewal on accepting new terms. Beck brought
21 suit in Supreme Court, Westchester County in an effort, *inter alia*, to stop the

1 modification from going into effect.⁴ One day later, on April 28, 2011, GM sent a
2 follow-up letter explaining that the April 6 letter was intended "solely to extend
3 the Chevrolet Dealer Sales and Service Agreement to April 30, 2012," not to
4 modify the terms of existing agreements, and that the agreements applicable
5 between the parties would remain in full effect according to their terms. Letter
6 from William P. Flook, Jr., Zone Manager, General Motors LLC, to Leon Geller,
7 Dealer Operator, Beck Chevrolet Co., Inc. (Apr. 28, 2011) (J.A. 232).

8 *Enlarging Beck's Market Area*

9 At about the same time, on April 22, 2011, GM informed Beck that based
10 upon its review of its dealer network, GM had concluded that it should make
11 changes to the Areas of Responsibility or AGSSAs for many GM dealerships.
12 The letter, which stated that it was provided "pursuant to New York Vehicle &
13 Traffic Law § 463(2)(ff)(1)," notified Beck that its AGSSA would be increased by
14 four census tracts in Westchester and Fairfield Counties and reduced by seven
15 census tracts in Bronx County. Letter from William P. Flook, Jr., Zone Manager,
16 General Motors LLC, to Russell S. Geller and Leon Geller, Dealer Operators, Beck

⁴ GM removed the case to federal court on April 28, 2011. The removed action is the case before us on appeal.

1 Chevrolet Co., Inc. (Apr. 22, 2011) (J.A. 234). The practical effect of this change
2 was to increase Beck's expected sales.

3 ***Procedural History***

4 On April 27, 2011, as noted, Beck brought suit against GM in New York
5 State court alleging violations of the New York Dealer Act for, *inter alia*,
6 modifying the franchise agreement without due cause, applying arbitrary or
7 unfair sales performance standards, refusing to deliver vehicles, and unlawful
8 nonrenewal of the franchise, as well as claims for breach of the Dealer
9 Agreement, and breach of GM's fiduciary duties. Based on the diversity of
10 citizenship of the parties, GM removed the case to the United States District
11 Court for the Southern District of New York. Following Beck's filing of an
12 amended complaint, GM moved for summary judgment. The district court
13 granted GM's motion on July 13, 2012, dismissing Beck's first amended
14 complaint in its entirety. Beck subsequently filed a second amended complaint,
15 seeking declaratory and injunctive relief on two of its Dealer Act claims. GM
16 counterclaimed for rescission of the Participation Agreement.

17 Following a September 2013 bench trial, the district court ruled in GM's
18 favor on the claims in Beck's second amended complaint, denied both parties'

1 applications for attorney's fees, and dismissed GM's counterclaim as moot and
2 legally insufficient. Beck, on appeal, challenges most of the district court's
3 rulings against it, and GM cross-appeals from the dismissal of its claim for
4 rescission.

5 While this case was pending in the district court, GM sought to terminate
6 Beck's franchise agreement. Beck initiated state administrative proceedings
7 challenging the termination. On the same day that we heard oral argument in
8 this appeal, the administrative court ruled that GM's statewide RSI standard was
9 unreasonable as to downstate Chevrolet dealers and that GM had therefore
10 failed to demonstrate due cause to terminate Beck's franchise agreement. *Beck*
11 *Chevrolet Co., Inc. v. Gen. Motors LLC*, No. FMD 2013-02 (N.Y. Dep't of Motor Veh.
12 Oct. 6, 2014).

13 DISCUSSION

14 Beck argues that: first, GM's method of calculating RSI is not fair or
15 reasonable under Dealer Act section 463(2)(gg) because it does not account for
16 local brand preferences; second, GM's expansion of Beck's AGSSA constituted a
17 modification of Beck's franchise in violation of Dealer Act section 463(2)(ff); third,
18 GM violated Dealer Act section 463(2)(a) by refusing to deliver all of the

1 inventory Beck ordered; and fourth, Beck was the prevailing party on its price
2 discrimination and unlawful modification claims and therefore is entitled to
3 attorney's fees.⁵ GM also appeals from the district court's dismissal of its
4 counterclaim for rescission of the Participation Agreement. Finally, both sides
5 challenge some of the district court's evidentiary rulings.

6 I. Standard of Review

7 "On appeal from a bench trial, the district court's findings of fact are
8 reviewed for clear error and its conclusions of law are reviewed *de novo*." *Mobil*
9 *Shipping & Transp. Co. v. Wonsild Liquid Carriers Ltd.*, 190 F.3d 64, 67 (2d Cir.
10 1999). The application of law to undisputed facts is also subject to *de novo*
11 review, *Deegan v. City of Ithaca*, 444 F.3d 135, 141 (2d Cir. 2006), as are mixed
12 questions of law and fact, *Man Ferrostaal, Inc. v. M/V Akili*, 704 F.3d 77, 82 (2d Cir.
13 2012).

14 To the extent that Beck also appeals from the district court's dismissal of its
15 first amended complaint, we review that summary judgment award *de novo*,
16 "construing the evidence in the light most favorable to the non-moving party.

⁵ To the extent that Beck intended to pursue its contract claim against GM for "sabotaging Beck's reputation and its ability to increase its sales," Beck Br. at 2-3, it has "abandoned . . . [that] claim[] by failing to give [it] more than cursory treatment in its brief on appeal." *Giuffre Hyundai, Ltd. v. Hyundai Motor Am.*, 756 F.3d 204, 207 n.2 (2d Cir. 2014).

1 We will affirm . . . only where there is no genuine issue of material fact, and the
2 moving party is entitled to judgment as a matter of law." *Lynch v. City of New*
3 *York*, 737 F.3d 150, 156 (2d Cir. 2013) (citation omitted).

4 **II. Reasonableness of GM's Performance Metrics**

5 Beck's primary contention on appeal is that GM's performance standards
6 are "unreasonable, arbitrary or unfair" under Dealer Act section 463(2)(gg). The
7 district court granted GM's motion for summary judgment on Beck's claim for
8 damages under that section and, following a bench trial, ruled in GM's favor on
9 Beck's request for injunctive relief. Beck contends that the district court erred in
10 reading an "egregiousness" requirement into the Dealer Act, misread relevant
11 case law, and improperly constrained Beck's ability to present its case.

12 Insofar as we and the parties can determine, neither the New York Court
13 of Appeals nor the Appellate Division of the New York Supreme Court has
14 interpreted section 463(2)(gg)'s prohibition of "unreasonable, arbitrary or unfair
15 sales or other performance standard[s]." The parties therefore rely principally on
16 legislative history, administrative decisions, and several out-of-state cases
17 interpreting more or less similar state laws.

1 We look to the Dealer Act's legislative history primarily in an effort to
2 understand the scope of judicial involvement in overseeing franchisor/franchisee
3 relationships that the New York State legislature envisioned. Unfortunately, the
4 legislative history is largely inconclusive on this point. There is support for both
5 the position that the state legislature intended the courts to correct unequal
6 bargaining power and cabin franchisors' ability to impose conditions on dealers
7 and the position that it simply intended to protect franchisees against
8 arbitrariness and gross injustice.

9 The Dealer Act was passed in 1983 in order to "promote the public interest
10 and the public welfare" by

11 regulat[ing] motor vehicle manufacturers, distributors
12 and factory or distributor representatives and . . .
13 dealers of motor vehicles doing business in this state in
14 order to prevent frauds, impositions and other abuses
15 upon its citizens and to protect and preserve the
16 investments and properties of the citizens of this state.

17 N.Y. Veh. & Traf. Law § 460. Beck argues that the legislature further intended to
18 "establish an equilibrium of bargaining power between the motor vehicle
19 manufacturer and the motor vehicle dealer." Assembly Mem. in Support, Bill
20 Jacket, L.1983, ch. 815, at 6. Establishing equilibrium was apparently thought
21 necessary in light of the "great disparity in bargaining power between motor

1 vehicle manufacturer and motor vehicle dealer." *Id.* The bill therefore sought "to
2 provide certain basic protections for the dealer in areas where such protection
3 [wa]s deemed necessary." *Id.*

4 Section 463(2)(gg), added by amendment in 2008, established new dealer
5 protection, making it unlawful for a franchisor "[t]o use an unreasonable,
6 arbitrary or unfair sales or other performance standard in determining a
7 franchised motor vehicle dealer's compliance with a franchise agreement." The
8 parties disagree about the proper reading of this provision. Beck contends that a
9 performance standard that fails to take into account external forces that affect
10 dealers' performances, such as local brand preferences, is unreasonable. GM
11 argues that only unjust, deceptive, irrational, or capricious standards run afoul of
12 section 463's protections, and that its requirements are none of those.

13 More specifically, Beck contends that the district court erroneously read an
14 "egregiousness" requirement into section 463(2)(gg), under which a court will
15 reverse only egregious or deceptive decisions of the franchisor. The district court
16 expressed agreement with the First Circuit's position in *Coady Corp. v. Toyota*
17 *Motor Distributors, Inc.*, 361 F.3d 50 (1st Cir. 2004), interpreting the Massachusetts
18 "Dealer's Bill of Rights," Mass. Gen. Laws ch. 93B, that "[a] distributor acting

1 honestly is entitled to latitude in making commercial judgments[,] and . . . [i]n
2 this context, it is only the egregious decision that should be labeled 'arbitrary' or
3 'unfair.'" *Coady Corp.*, 361 F.3d at 56. Chapter 93B forbade "arbitrary or unfair"
4 modifications to franchise agreements. *See id.* at 55. The court reasoned that the
5 applicable Massachusetts provision did "not demand perfection in allocation or
6 warrant a substitution of judicial for business judgment." *Id.* at 56. Instead, the
7 "egregiousness" standard imposed by the law is highly deferential to the
8 franchisor. *See id.*

9 Beck contends that it was inappropriate for the district court to adopt that
10 interpretation of section 463(2)(gg). The New York provision, Beck argues, casts
11 "a wide net," forbidding not only arbitrary standards but also unreasonable ones.
12 Beck Reply Br. at 6. It is possible that the inclusion of "unreasonable" in section
13 463(2)(gg) is meant to signify a higher bar for franchisors' actions than non-
14 arbitrariness review. *See, e.g.*, N.Y. Stat. Law §§ 231-32 (instructing that each
15 word in a statute should be given distinct effect according to its ordinary
16 meaning). That reading might also comport with the law's general purpose to
17 protect motor vehicle dealers "against the superior economic power of the
18 franchisors." *Bronx Auto Mall, Inc. v. Am. Honda Motor Co.*, 934 F. Supp. 596, 608

1 (S.D.N.Y. 1996), *aff'd on the opinion of the district court*, 113 F.3d 329, 330 (2d Cir.
2 1997) (per curiam).

3 It is not clear, however, that the 2008 amendment that created section
4 463(2)(gg) was intended to have such a broad effect. Some of the legislative
5 history suggests that the legislature was primarily concerned with performance
6 standards that were too confusing or too poorly communicated to be understood
7 and followed by automobile dealers. *See* N.Y. Sponsor's Mem., Bill Jacket, 2008
8 S.B. 8678, ch. 490, at 13 (emphasizing that the amendment "brings more openness
9 in dealer franchisor communications"); N.Y. Mem. in Support, Bill Jacket, 2008
10 S.B. 8678, ch. 490, at 42-44 (Mark Schienberg, President of the Greater New York
11 Automobile Dealers Association, explained that section 463(2)(gg) will "prevent
12 misunderstandings" and override performance standards that are too
13 complicated and insufficiently communicated). It may be, then, that the statute
14 was designed only to ensure that franchisors' performance standards are
15 transparent and comprehensible, and that their substantive requirements are not
16 egregious.

17 Assuming *arguendo* that Beck's reading of the statute is correct, we address
18 its core contention that the statewide average GM uses to determine expected

1 sales is unreasonable for its failure to account for local variations in brand
2 popularity. The relevant facts regarding this performance standard are
3 essentially undisputed. First, GM's performance metric is based on a statewide
4 sales average that does not account for depressed brand popularity, *i.e.*, the
5 relative unpopularity of Chevrolet automobiles, in the relevant metro-area
6 markets. Second, GM's metric does account for some local variation based on the
7 popularity of a given vehicle segment, such as pickup trucks, small sport utility
8 vehicles, and mid-size sedans. Third, under the relevant agreements, a failure to
9 meet an RSI of 100 could result in GM's termination of the franchise or other
10 remedial measures.

11 On these facts, the district court decided that the use of a statewide
12 average was administratively convenient, objective, and easily understood, and
13 that GM's formula adequately adjusted for local conditions through its
14 segmentation analysis. The court appeared to adopt GM's contention that
15 applying a more localized standard would "doom[] the entire make of Chevrolet
16 vehicles to mediocrity" because it would not encourage better sales in
17 underperforming areas. Trial Tr. at 669 (Sept. 24, 2013) (Special App'x 108). For
18 these reasons, it concluded that the metric was reasonable.

1 The few reported decisions addressing performance standards have not
2 adopted consistent interpretations of what is reasonable or acceptable. In a
3 related context, the New York Department of Motor Vehicles recently
4 determined that although Honda's use of statewide averages to gauge sales
5 effectiveness was "not a perfect system," it was also not "patently unreasonable,
6 arbitrary, or unfair." *Hartley Buick GMC Truck, Inc. v. Am. Honda Motor Co.*, No.
7 FMD 2010-05 at 5, 8-9 (N.Y. Dep't of Motor Veh. Nov. 1, 2011), *aff'd*, No. 28447
8 (N.Y. Dep't of Motor Veh. Admin. App. Bd. Feb. 28, 2012).

9 Several other administrative courts have reached the opposite conclusion,
10 however, rejecting statewide performance standards in favor of those that take
11 local variations into account. Most relevant for present purposes, the
12 Administrative Law Judge ("ALJ") who considered Beck's challenge to GM's
13 notice of termination concluded that "[f]or the New York City metropolitan area,
14 the RSI standard of GM is unreasonable" in part because "it does not realistically
15 reflect the Chevrolet sales challenges that Beck and other New York metropolitan
16 dealers face." *Beck Chevrolet Co., Inc. v. Gen. Motors LLC*, No. FMD 2013-02, at 9
17 (N.Y. Dep't of Motor Veh. Oct. 6, 2014). Although Beck has not argued that we

1 are bound by that decision,⁶ our desire to avoid potentially inconsistent results in
2 state, federal, and administrative courts in part motivates our decision to certify
3 this issue to the New York Court of Appeals.

4 Beck also relies heavily on *North Shore, Inc. v. General Motors Corp.*, No.
5 MVRB 79-01 (Ill. Mot. Veh. Rev. Bd. May 28, 2003), *aff'd in relevant part sub nom.*
6 *General Motors Corp. v. Illinois Motor Vehicle Review Board*, 361 Ill. App. 3d 271, 836
7 N.E.2d 903 (2005), *aff'd*, 224 Ill. 2d 1, 862 N.E.2d 209, 308 Ill. Dec. 611 (2007), in
8 which an Illinois ALJ resolved a challenge to GM's proposed addition of
9 dealerships in the greater Chicago area. The ALJ concluded that measuring sales
10 performance based on comparisons between similar market areas was preferable
11 to using a statewide or nationwide standard. *See Gen. Motors Corp. v. State Motor*
12 *Vehicle Review Bd.*, 224 Ill. 2d 1, 21-22, 862 N.E.2d 209, 223-24, 308 Ill. Dec. 611,

⁶ Beck notified the court of the Department of Motor Vehicles' decision in a letter filed pursuant to Federal Rule of Appellate Procedure 28(j). It did not suggest that the administrative decision did or might have a preclusive effect on any aspect of this action and we accordingly consider the argument waived. We recognize, however, that if the issue of whether GM's RSI was reasonable was "necessarily raised and decided" by the Motor Vehicle Department, that determination could have preclusive effect here. *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 499-500, 467 N.E.2d 487, 489-90 (1984). Faced with a similar issue, however, the Department of Motor Vehicles concluded that the Southern District of New York's 2013 decision in this action had no preclusive effect on the dispute before it. *Beck Chevrolet*, No. FMD 2013-02, at 6 (deciding that "the issue of reasonableness of the RSI is not precluded by the Federal Court decision as the burden of proof in this proceeding has shifted from Beck to GM" and explaining differences in the evidence put forth and considered in the two actions).

1 625-26 (2007) (discussing the state motor vehicle review board's decision).
2 Although not decided under the New York Dealer Act or a provision similar to
3 its section 463(2)(gg), the Illinois courts expressly decided that a standard that
4 takes local variations, such as import bias, into account is a "superior" method of
5 determining performance. *Id.*

6 An administrative court in Texas reached the same conclusion in a similar
7 case, reasoning that it was

8 patently unfair to conclude that a standard is
9 appropriate for comparison with a given market if most
10 of the markets used in creating the standard are
11 fundamentally dissimilar to the market at issue. Stated
12 another way, [an] ALJ cannot endorse a process that
13 characterizes a market as "underperforming" simply
14 because it fails to meet a standard so profoundly
15 influenced by markets bearing so little resemblance to
16 the market in question.

17 *Landmark Chevrolet Corp. v. Gen. Motors Corp.*, No. 02-0002 LIC at 20-21 (Tex. Mot.
18 Veh. Bd. Sept. 16, 2004), *aff'd sub nom. Austin Chevrolet, Inc. v. Motor Vehicle Bd.*,
19 212 S.W.3d 425 (Tex. App. 2006); *see also Halleen Chevrolet v. GMC*, No. 03-
20 050MVDB-277-SS at 5 (Ohio Mot. Veh. Dealers Bd. July 21, 2006) (report and
21 recommendation) ("[I]t is inappropriate to consider the expected Ohio average to
22 an urban multi-dealer area such as the [designated area] in this case. Because

1 single market dealers in rural areas tend to achieve about the expected state
2 average and the urban dealers tend to achieve below, it seems that the average is
3 somewhat flawed in a case such as this.").

4 And the United States District Court for the Southern District of New York
5 recently denied a defendant's motion to dismiss a similar claim under the New
6 York Dealer Act. *See CMS Volkswagen Holdings, LLC v. Volkswagen Grp. of Am.,*
7 *Inc.*, 25 F. Supp. 3d 432, 441-42 (S.D.N.Y.), *reconsideration and reargument denied*,
8 2014 WL 4961769, 2014 U.S. Dist. LEXIS 141105 (S.D.N.Y. Oct. 3, 2014).

9 These decisions are, of course, not binding on us, but they are instructive.
10 That several ALJs who routinely consider disputes between franchisors and
11 franchisees have concluded that statewide averages are not reasonable
12 performance indicators gives us pause. It seems sensible enough to conclude
13 that car dealers located in different parts of a single state would face different
14 barriers to success, including variations in local brand preferences. By failing to
15 take this into account, the existing performance standards make it likely that that
16 the lowest-performing dealers will be concentrated in the areas in which GM's
17 brands are the weakest.

1 At the same time, however, section 463(2)(gg) does not mandate that
2 franchisors impose individually tailored or perfectly just performance standards.
3 It prohibits only performance standards that are "unreasonable, arbitrary or
4 unfair." And, as the district court recognized, GM's performance standards have
5 significant virtues, including ease of administration, predictability, uniformity,
6 and encouragement of innovation in struggling markets. They give GM greater
7 flexibility to demand changes or shut down unproductive dealerships. And,
8 importantly, they appear to represent the industry standard.

9 Recognizing these competing considerations and the absence of existing
10 guidance from the New York Court of Appeals, we think it best to certify the
11 following question to it for its determination:

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

18

19 **III. Modification of the Dealer Agreement**

20 Beck also appeals from the district court's grant of summary judgment
21 against it on its claim that changes to its AGSSA constituted an unfair

1 "modification" of its Dealer Agreement under section 463(2)(ff)(1)-(2) of the New
2 York Vehicle & Traffic Law. That subsection provides that it is

3 unlawful for any franchisor, notwithstanding the terms
4 of any franchise contract . . . [t]o modify the franchise of
5 any franchised motor vehicle dealer unless the
6 franchisor notifies the franchised motor vehicle dealer,
7 in writing, of its intention to modify the franchise of
8 such dealer at least ninety days before the effective date
9 thereof, stating the specific grounds for such
10 modification.

11 N.Y. Veh. & Traf. Law § 463(2)(ff)(1). "Modification" is defined as "any change or
12 replacement of any franchise if such change or replacement may substantially
13 and adversely affect the new motor vehicle dealer's rights, obligations,
14 investment or return on investment." *Id.* § 463(2)(ff)(2). Upon receiving notice of
15 an intended modification, the franchisee may challenge the modification as
16 unfair. A modification is "unfair if it is not undertaken in good faith; is not
17 undertaken for good cause; or would adversely and substantially alter the rights,
18 obligations, investment or return on investment of the franchised motor vehicle
19 dealer under an existing franchise agreement." *Id.* § 463(2)(ff)(3).

20 The April 22, 2011, letter notifying Beck that GM had increased Beck's
21 AGSSA by four census tracts stated that it was provided "pursuant to New York
22 Vehicle & Traffic Law § 463(2)(ff)(1)." Letter from William P. Flook, Jr., Zone

1 Manager, General Motors LLC, to Russell S. Geller and Leon Geller, Dealer
2 Operators, Beck Chevrolet Co., Inc. (Apr. 22, 2011) (J.A. 234). Beck argues that
3 GM thereby acknowledged that the revision constituted a "modification" under
4 the Dealer Act for which GM failed to demonstrate good cause. The Dealer
5 Agreement states, however, that GM "retains the right to revise the Dealer's Area
6 of Primary Responsibility at General Motors[]" sole discretion consistent with
7 dealer network objectives." J.A. 143. If the agreement expressly reserves to GM
8 the power to unilaterally revise the Area of Primary Responsibility, such a
9 revision might not constitute a contract modification.

10 The district court concluded that the exercise of contractually conferred
11 discretion generally does not constitute a modification of the contract. *See also,*
12 *e.g., Subaru Distribs. Corp. v. Subaru of Am., Inc.*, 47 F. Supp. 2d 451, 459 n.3
13 (S.D.N.Y. 1999) (periodic quota amendments contemplated by contract did not
14 constitute amendments to dealer agreement); *In re Kerry Ford, Inc.*, 106 Ohio App.
15 3d 643, 651-52, 666 N.E.2d 1157, 1162-63 (1995) (use of service bulletins to provide
16 updated service standards did not modify the contract where they were
17 contemplated by the sales and service agreement). But we are not convinced that
18 the Dealer Act contemplated that result. If the act was designed to protect

1 franchisees from manufacturers' disproportionate bargaining power, we might
2 read section 463(2)(ff)(1) to proscribe contractual provisions that allow
3 manufacturers to circumvent the Act's protections by retaining unilateral
4 discretion to revise specified elements of the Dealer Agreement.

5 Moreover, under the Dealer Act, a modification is "any change . . . of any
6 franchise if such change or replacement may substantially and adversely affect
7 the new motor vehicle dealer's rights, obligations, investment or return on
8 investment." N.Y. Veh. & Traf. Law § 463(2)(ff)(2). GM argues that the word
9 "franchise" refers to the Dealer Agreement, and because a change to the AGSSA
10 has no impact on the Dealer Agreement, a change to the AGSSA is not a
11 modification. But the statute defines a "franchise" not in terms of a single
12 agreement, but as a "written arrangement." N.Y. Veh. & Traf. Law § 462(6). This
13 "arrangement" might extend beyond the Dealer Agreement to include secondary
14 documents, including those defining Beck's AGSSA. Only one New York court
15 has addressed this issue so far as we know, and it concluded that a change to the
16 dealer's Area of Primary Responsibility does constitute a modification under
17 section 463(2)(ff). *See Van Wie Chevrolet, Inc. v. Gen. Motors LLC*, No. 2012-0284 at
18 2-3 (N.Y. Sup. Ct. Onondaga Cnty. June 13, 2014).

1 On the other hand, if the Dealer Act was designed to do no more than
2 ensure clarity in communications and negotiations between franchisor and
3 franchisee, it most likely would not apply to GM's express reservation of the
4 right to modify Beck's AGSSA. In the absence of any state appellate court
5 decisions indicating how the New York Court of Appeals would rule on this
6 issue, we also certify the following question for its determination:

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

12

13 **IV. Vehicle Allocation**

14 Beck next contends that the district court erred in granting summary
15 judgment on its claim that GM wrongly refused to deliver requested vehicles.
16 This claim also arises under the Dealer Act, but unlike the claims discussed
17 above, we are confident that we can correctly resolve this question without
18 certification to the New York Court of Appeals. *See Licci ex rel. Licci v. Lebanese*
19 *Canadian Bank, SAL*, 673 F.3d 50, 74 (2d Cir. 2012) ("[W]e need not certify if we are
20 confident that we can correctly resolve the matter at issue ourselves . . .").

1 Under the Dealer Act, it is unlawful to "refuse to deliver in reasonable
2 quantity and within a reasonable time after receipt of a dealer's order to any
3 franchised motor vehicle dealer any vehicle covered by such franchise which is
4 publicly advertised by such franchisor to be available for immediate delivery."
5 N.Y. Veh. & Traf. Law § 463(2)(a). Although "[d]isputes over reasonableness are
6 usually fact questions for juries," *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995),
7 "[s]ummary judgment . . . is [] appropriate when the non-moving party has failed
8 to set forth any facts that go to an essential element of the claim," *King v.*
9 *Crossland Sav. Bank*, 111 F.3d 251, 259 (2d Cir. 1997).

10 Beck relies on an affidavit submitted by its vice-president to support its
11 claim. We conclude that the uncontested facts asserted in it are insufficient to
12 allow Beck to prevail. They establish only the following: Beck had low
13 inventory entering 2010 as a result of having entered into the Wind-Down
14 Agreement in 2009. Under that agreement, Beck was not allotted any new
15 inventory. GM had a "turn and earn" vehicle allocation system by which dealers
16 were allocated inventory based on prior sales. Beck argues that low inventory
17 under the Wind-Down Agreement yielded low sales in 2009, which made it
18 difficult to re-build its inventory after it signed the 2010 Participation Agreement.

1 Beck acknowledges, however, that it had sufficient inventory to meet
2 demand at all times in 2010 and 2011 and that it refused cars offered to it. In
3 2010, for example, Beck received 358 vehicles and sold only 289, leaving 69 (plus
4 any remaining inventory from 2009) unsold entering 2011. GM administered its
5 special allocation program from October 2010 through January 2011, which
6 would have enabled Beck to receive additional inventory each month. Beck
7 acknowledges that it refused to take part in the program, arguing that it would
8 have resulted in too much inventory during the low-sale winter months. But
9 Beck's own ordering patterns appear to disprove Beck's explanation of the basis
10 for its refusal to participate in the special allocation program. GM offered Beck
11 177 vehicles in January 2011. Beck ordered only 31, refusing the other 146. In the
12 next two months, after the special allocation program had ended but still during
13 winter, Beck ordered 151 cars – significantly more than its allocation. Beck offers
14 no explanation for its refusal to take the 146 extra cars offered in January in light
15 of its substantial order in the following two months. Moreover, Beck had more
16 than adequate inventory to satisfy its 2011 sales of 347 cars.

17 On these facts, the district court properly determined that "the admissible
18 evidence [wa]s insufficient to permit a rational juror to find in favor of the

1 plaintiff." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir.
2 2002). Even if Beck could have benefited from a different vehicle allocation
3 system, and even if it could have sold additional vehicles had GM allocated
4 them, Beck provides no evidence suggesting that GM's system for allocating
5 vehicles was unreasonable or unfair. To the contrary, GM employed an
6 equitable allocation system based on past performance. When it became clear
7 that the system was inadequate for dealers who had entered Wind-Down
8 Agreements before signing Participation Agreements, GM modified the system
9 to offer additional inventory. Beck refused the vast majority of what GM offered,
10 including 146 of the vehicles offered in January 2011. Nevertheless, it ordered
11 151 vehicles beyond GM's allocation in the following two months. GM's refusal
12 to deliver to Beck exactly the number of vehicles it asked for in the month it
13 asked for them does not constitute a failure to deliver a "reasonable quantity [of
14 vehicles] [] within a reasonable time." N.Y. Veh. & Traf. Law § 463(2)(a).

15 **V. Attorney's Fees**

16 Beck also asserts that it is entitled to attorney's fees on two claims
17 dismissed by the district court, arguing that it was the "prevailing party" as to
18 those claims because GM voluntarily abandoned the policies that Beck had
19 challenged. Although attorney's fees frequently are statutorily limited to

1 prevailing parties, *see, e.g.*, 42 U.S.C. § 12205 ("In any action or administrative
2 proceeding commenced pursuant to this chapter, the court or agency, in its
3 discretion, may allow the prevailing party, other than the United States, a
4 reasonable attorney's fee."); 17 U.S.C. § 505 ("Except as otherwise provided by
5 this title, the court may also award a reasonable attorney's fee to the prevailing
6 party as part of the costs."), a party need not qualify as a "prevailing party" in
7 order to receive a fee award under the Dealer Act.

8 The Dealer Act provides that "the court may award necessary costs and
9 disbursements plus a reasonable attorney's fee to any party." N.Y. Veh. & Traf.
10 Law § 469(1). The district court declined to grant attorney's fees to either party
11 both because the "[p]laintiff [wa]s the losing party and because an award of
12 attorneys' fees would not be appropriate . . . given the good faith nature of the
13 claims and defenses. . . ." Order at 2 (Sept. 25, 2013) (Special App'x 91). We
14 review a district court's fee determination for abuse of discretion. *McDaniel v.*
15 *Cnty. of Schenectady*, 595 F.3d 411, 416 (2d Cir. 2010).

16 Setting aside the question whether Beck was required to be the prevailing
17 party in order to qualify for an attorney's fee award, the district court did not
18 abuse its discretion in denying Beck's fee request. The court's denial of fees was

1 not based on "an erroneous view of the law or on a clearly erroneous assessment
2 of the evidence." *In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008) (internal quotation
3 marks omitted). On the contrary, its decision to deny fees because of the "good
4 faith nature of the claims and defenses," Order at 2 (Sept. 25, 2013) (Special App'x
5 91), was "located within the range of permissible decisions," particularly in light
6 of section 469's permissive language, *Sims*, 534 F.3d at 132 (internal quotation
7 marks omitted).

8 **VI. GM's Counterclaim for Rescission**

9 GM appeals from the district court's dismissal of its counterclaim for
10 rescission of the Participation Agreement as moot. The crux of GM's
11 counterclaim is that Beck failed to meet the state average RSI – an essential
12 element of the Participation Agreement. Having dismissed Beck's claims against
13 GM and apparently believing that the dismissal would be dispositive of the
14 related termination proceeding in the Motor Vehicle Department, the district
15 court determined that GM no longer had any need to bring suit for rescission.
16 But in light of the Motor Vehicle Department's ruling against GM in its effort to
17 terminate the franchise, we do not think that GM's counterclaim for rescission is
18 moot. We nonetheless affirm the district court's dismissal, albeit on a different
19 basis.

1 Rescission is an equitable remedy, the use of which is generally left to the
2 courts' discretion. But that discretion may be displaced by "clear and valid
3 legislative command." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S.
4 483, 496 (2001). In other words, where the legislature has clearly expressed its
5 intent to cabin a court's discretion to fashion equitable remedies, the court must
6 respect those limitations. Such is the case here. Section 463(2)(d)-(e) of the New
7 York Vehicle and Traffic Law expressly requires due cause, notice, and an
8 opportunity to cure before the franchisor may terminate the franchise. N.Y. Veh.
9 & Traf. Law § 463(2)(d)-(e). "Terminate" is defined to include "rescission." *Id.*
10 § 462(17). As a result, we would only be empowered to grant rescission to GM if
11 it had first demonstrated due cause for rescission and provided Beck with both
12 notice and the opportunity to cure. GM failed to satisfy those prerequisites, and
13 we therefore affirm the district court's dismissal of this claim.

14 **VII. Evidentiary Issues**

15 Finally, Beck and GM each challenge several of the district court's
16 evidentiary rulings. We review evidentiary rulings for abuse of discretion. *Ret.*
17 *Plan of UNITE HERE Nat'l Ret. Fund v. Kombassan Holdings A.S.*, 629 F.3d 282, 287
18 (2d Cir. 2010). We will grant a new trial "if the district court committed errors
19 that were a clear abuse of discretion that were clearly prejudicial to the outcome

1 of the trial," measuring prejudice "by assessing the error in light of the record as a
2 whole." *Marshall v. Randall*, 719 F.3d 113, 116 (2d Cir. 2013) (internal quotation
3 marks omitted). We address each of the parties' challenges briefly, concluding
4 that none has merit.

5 First, Beck challenges the district court's exclusion of a portion of an expert
6 witness report comparing the number of non-GM competitor dealerships in
7 upstate New York and downstate New York. Beck sought to use the report to
8 cross-examine GM's witness about whether GM should consider inter-brand
9 competition in designing performance metrics. But even assuming that the
10 district court erred in excluding the expert report, Beck suffered no prejudice.
11 *See United States v. Gupta*, 747 F.3d 111, 133-34 (2d Cir. 2014) (setting forth several
12 factors that are to be considered by a reviewing court in determining whether
13 any error was harmless, including the "importance of . . . unrebutted assertions,"
14 duplication of evidence, and the strength of the opposing party's evidence on
15 that point (alteration in original)). Counsel for Beck questioned GM's expert at
16 length about the same topic addressed in the report. The expert responded that
17 RSI should not be adjusted by regional differences in inter-brand competition,
18 and that existing segmentation captures those disparities. Beck was thus able to

1 elicit the same testimony without the report that it would have been able to with
2 it, making introduction of the report duplicative and unnecessary to rebut GM's
3 case.

4 Second, Beck challenges the district court's exclusion of a document
5 reflecting the amount of advertising money spent nationwide and in New York
6 City, which purportedly would show that GM spent less on advertising in the
7 New York City area in 2010 and 2011 than in 2009 and 2012. The district court
8 properly excluded the report both because Beck sought to use it to cross-examine
9 GM's expert witness, Sharif Farhat, on a topic that was beyond the scope of his
10 direct examination, *see* Fed. R. Evid. 611(b); *United States v. Koskerides*, 877 F.2d
11 1129, 1136 (2d Cir. 1989), and any comparison that did not include relative
12 spending upstate and downstate was minimally useful, at best, *see* Fed. R. Evid.
13 401, 403. The possible explanations for Beck's poor performance in 2010 and 2011
14 are not at issue in this case. The question is whether it was and is reasonable for
15 GM to compare Beck's performance to the performance of upstate dealers. While
16 evidence that GM spent less on advertising in the New York City area relative to
17 what it spent upstate might enhance Beck's argument, then, evidence that GM

1 spent less on advertising in New York City in 2010 and 2011 relative to 2009 and
2 2012, or even relative to the rest of the country, does not.

3 Third, the district court did not err in foreclosing Beck's attempt to cross-
4 examine GM's expert on whether GM's exit from the market for leasing vehicles
5 to drivers could have adversely impacted downstate dealers. The expert had not
6 testified about leasing on direct examination, and he testified on cross-
7 examination that leasing did not have an impact on RSI calculations and that he
8 was unaware of any bearing it may have had on Beck's situation. The district
9 court plainly acted within its discretion in curtailing this line of questioning
10 under Rule 611, which instructs that "[c]ross-examination should not go beyond
11 the subject matter of the direct examination and matters affecting the witness's
12 credibility." Fed. R. Evid. 611(b); *see also Koskerides*, 877 F.2d at 1136.

13 Finally, GM challenges the district court's exclusion of evidence that Beck's
14 own operational decisions were at fault for its poor performance. As noted, this
15 evidence would not have been relevant to the question whether GM employed
16 an "unreasonable, arbitrary or unfair sales or other performance standard," N.Y.
17 Veh. & Traf. Law § 463(2)(gg), and was therefore properly excluded. *See* Fed. R.
18 Evid. 401, 403. To the extent that GM's performance standard is unreasonable, it

1 is so because it compares dealerships whose sales are influenced by distinct
2 market factors. That Beck could have made certain operational changes is not
3 relevant.

4 **CONCLUSION**

5 For the foregoing reasons, we AFFIRM the district court's judgment in part
6 and CERTIFY the remaining questions to the New York Court of Appeals.

7 8 **Certification**

9 In this Circuit, "[i]f state law permits, the court may certify a question of
10 state law to that state's highest court." 2d Cir. R. 27.2(a). The New York state law
11 permitting certification is N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27(a), which
12 provides, "Whenever it appears to . . . any United States Court of Appeals . . . that
13 determinative questions of New York law are involved in a case pending before
14 that court for which no controlling precedent of the [New York] Court of
15 Appeals exists, the court may certify the dispositive questions of law to the Court
16 of Appeals." We have discretion to certify questions to the New York Court of
17 Appeals even where, as here, the parties have not requested certification. *See*
18 *Licci*, 673 F.3d at 74.

1 Several factors guide our decision to exercise this discretion. "First, and
2 most important, certification may be appropriate if the New York Court of
3 Appeals has not squarely addressed an issue and other decisions by New York
4 courts are insufficient to predict how the Court of Appeals would resolve it."
5 *Penguin Grp. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 42 (2d Cir. 2010). "Second, the
6 question on which we certify must be of importance to the state, and its
7 resolution must require [] value judgments and important public policy choices
8 that the New York Court of Appeals is better situated than we to make." *Licci*,
9 673 F.3d at 74 (citations and internal quotation marks omitted; brackets in
10 original). Finally, certification is appropriate if the question or questions are
11 "determinative of a claim before us." *Id.* (internal quotation marks omitted).

12 None of the provisions of the New York Dealer Act implicated in this case
13 has been addressed by the New York Court of Appeals or, at any length or
14 depth, by another state court. The disposition of this case could have a
15 substantial impact not only on the relationship between General Motors and its
16 franchisees, but also on other franchisor/franchisee relationships in New York
17 State. And GM's performance metrics are industry standard. A ruling that the
18 standard violates the New York Dealer Act could therefore result in statewide—

1 or perhaps even broader—challenges and changes. And deciding these issues
2 would require us to determine the level of judicial intervention in the
3 franchisor/franchisee relationship that the New York Legislature intended. Such
4 a determination implicates significant policy issues and is, we think, best decided
5 by state courts.

6 We accordingly certify the following two questions to the New York Court
7 of Appeals:

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

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

19 "As is our practice, we do not intend to limit the scope of the Court of
20 Appeals' analysis through the formulation of our questions, and we invite the
21 Court of Appeals to expand upon or alter these questions as it should deem
22 appropriate." *Licci*, 673 F.3d at 75 (internal quotation marks and brackets
23 omitted).

1 It is hereby ORDERED that the Clerk of this Court transmit to the Clerk of
2 the New York Court of Appeals this opinion as our certificate, together with a
3 complete set of the briefs, the appendix, and the record filed in this Court by the
4 parties. The parties shall bear equally any fees and costs that may be imposed by
5 the New York Court of Appeals in connection with this certification. This panel
6 will resume its consideration of this appeal after the disposition of this
7 certification by the New York Court of Appeals.