

Hummer to be Discontinued or Sold?

by : Richard N. Sox, Jr., Esq.

I don't think it comes as a surprise to anyone that GM has admitted it is "studying" what to do with the Hummer franchise and would consider the sale of the franchise. Either a discontinuance or sale of the linemake has been rumored for some time now. This does not, however, soften the blow to the approximately 300 Hummer dealers around the country. Unlike most other linemakes, Hummer is relatively new to the automotive scene as franchises were first handed out in the year 2000. As part of receiving the Hummer franchise, a dealer was required to have an exclusive facility built within 18 to 24 months. Most dealers met this obligation and expended a substantial amount of cash to acquire land and build the Quonset hut-style facility. These dealers more than likely don't even have the first mortgage paid off on the land and building.

In possibly worse shape are the dealers that have succumbed to GM's pressure over the last two years to channel the Hummer with other GM linemakes. Even if these dealers were able to relocate the Hummer franchise without building an exclusive facility, it is highly unlikely that they will obtain any significant return on their investment in the franchise.

Sure, it is always a risk to take on a brand new franchise and there are no guarantees of success. Arguably, no one could have predicted \$4- plus for a gallon of gasoline. But, a dealer has the right to expect that the manufacturer will do all it can to provide you with a viable franchise. In addition to providing product that can sell, part of providing a viable franchise is to require only what is necessary as relates to the dealership facility. Of course, this is where GM glaringly failed in its obligation.

If GM finds a buyer for the Hummer franchise, like Ford did with Jaguar and Land Rover, then there may not be much to fight about. As long as Hummer dealers are offered a continuing franchise by the new owner then, for the time being, no damage has been done. In fact, depending upon the purchaser, it may be a benefit to the Hummer dealers to have the franchise sold. It is conceivable that a foreign automaker, currently manufacturing small cars, could acquire the Hummer franchise and use Hummer dealers as a distribution chain for both Hummers and the foreign automaker's small cars. Under the right circumstances, that could be a win-win. This may end up being the case for Jaguar/Land Rover dealers as it relates to Tata's small cars.

If GM were to give up on the franchise and simply discontinue the manufacture of Hummer vehicles, then as I have described in this column several times before in discussing Pontiac, Buick and Mercury, among others, dealers will have a claim against GM for wrongful termination under the franchise laws. Hummer dealers who either recently acquired the franchise or recently constructed a Quonset hut facility have easily-quantifiable damages resulting from the termination. If GM's handling of the termination of Oldsmobile is any indication, with the right pressure, GM will settle with dealers that fall within this category.

Dealers should be actively communicating their disagreement with GM's plans in writing. Don't be afraid to go on record to remind GM of what you have invested in this franchise and warning GM that you will hold it accountable for your losses. At a minimum, GM should step up to the plate and share in those losses. Ideally, this should be done with the help of an experienced automobile franchise attorney.

The other critical step that Hummer dealers should take is to pursue changes to your automobile franchise laws to require (i) any new owner of a linemake to provide a substantially similar franchise agreement to all dealers; and (ii) if the new owner does not do so, or the linemake is simply discontinued, the manufacturer to pay the dealer the "fair market value" for the franchise that is being taken away. This is the law in only a handful of states at the moment. Read on to see how you can get

involved with your dealer association to make these protections a reality.

New dealer franchise protections

It was a very good legislative session for Florida and New York automobile dealers. Myers & Fuller worked with dealer associations in both states to draft and obtain passage of significant new franchise protections for their dealers. Florida's latest revisions to its motor vehicle franchise laws became effective upon the governor's signature on May 28, 2008. As I write this article, the New York dealer associations await their governor's signature after their new franchise provisions were passed unanimously in the New York legislature.

Some of the highlights of both states' revisions include:

- Detailed requirements for manufacturers to reimburse dealers at retail rates for warranty work;
- Protection against manufacturer coercion to participate in facility or image programs;
- A restriction on unreasonable manufacturer sales performance criteria;
- Protection from unreasonable warranty or sales incentive chargebacks; and
- In the case of New York (Florida already has such a provision), new relevant market area protections, which restrict a manufacturer's ability to add or relocate a dealership into a dealer's relevant market area.

Last summer I wrote in this column that it was time for dealers and their associations to consider planning for the pursuit of enhanced franchise protections during the upcoming legislative sessions in order to address new factory initiatives. New York and Florida, as well as others, did just that and through hard work by the association staff and lobbyists, as well as dealers' direct support of the effort, have gone a long way in leveling the playing field with the manufacturers.

Dealers of all types, large and small, domestic and import, will greatly benefit from these new protections. The domestic dealers, of course, are dealing with a lack of revenue, which will be helped with enhanced warranty reimbursement. These dealers will also be able to stave off market consolidation pressure with the help of relevant market area protections. The import dealers are not immune to manufacturer pressure. We know many of these dealers are fed up with the incessant demands to build new, bigger facilities and to sell more cars. The strict limitations on a manufacturer's ability to force a dealer to upgrade their facility, as well as the restriction on the use of unreasonable sales performance criteria, will be of great assistance to import dealers in pushing back against their manufacturers.

As most states' legislative sessions have recently ended, it is again time for dealers to work with your associations to determine if a tune-up of your franchise protections is in order. If your laws have not been significantly upgraded in the last five years, chances are good that the relatively new factory initiatives related to sales incentive programs, facility programs and the potential for the sale or discontinuance of a linemake are not addressed. We have seen over and over again how pleasantly surprised dealers and their associations are when, despite their doubts, they find that they are able to pass significant protections in their state legislature. With direct dealer involvement in the process, anything is possible because in most states there is little to no manufacturer presence. In comparison, there are car dealers in every legislative district in the state.

It only takes one determined dealer to get the ball rolling. That is exactly how New York dealers ended

up with substantial additional franchise protections. Last year I was speaking to a General Motors dealer 20 group, and one of the dealers in attendance was interested in my discussion on market consolidation and the potential for the discontinuance of poor performing linemakes. I was describing the impact state franchise laws had upon the strength of dealers' claims for damages resulting from the discontinuance of Oldsmobile. This dealer went back to his office in New York and immediately contacted the president of the Greater New York Automobile Dealers Association to discuss the possibility of obtaining some new franchise protections. The GNYADA president then contacted our office, and the rest is history.

We believe that with the economy on the skids, legislators are much more likely to listen to dealers' concerns in order to protect the significant employment and sales tax benefits dealerships provide to their states. The iron is hot – now is the time to strike. I strongly encourage you to first get involved with your dealer association (with both time and money) and then urge the association to update your franchise laws to address these new threats to your franchise.

Richard Sox is a lawyer with the firm of Myers & Fuller PA, with offices in Tallahassee, Florida and Raleigh, North Carolina. The firm's sole practice is the representation of automobile dealers in their quest to establish a level playing field when they deal with automobile manufacturers.