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Respond to: Tallahassee Office

ALERT

To: Hummer Dealer Clients

From: Richard N. Sox, Esq.

Re: Reaction to GM's Plan to Congress

Date: February 19, 2009

As you know, General Motors has confirmed in a letter dated February 17, 2009 to all Hummer dealers that GM does not plan to produce Hummer vehicles beyond "their current life cycle." The letter makes it clear that no new products are planned for the Hummer linemake.

Termination of Franchise

Not surprisingly, GM's letter also claims that its communication is not intended to be notice of termination of your Hummer Dealer Agreement. In fact, we believe that the Hummer franchise has been **effectively terminated** by the *actions* of General Motors.

We believe the effective termination began with the December, 2008 announcement that the Hummer brand was under "strategic review" and was not included in the list of the core brands with which GM was moving forward. The December, 2008 announcement and other since have had the effect of destroying the going concern value your franchise had as well as causing potential customers to be much less likely to consider purchasing a Hummer vehicle. We understand from several Hummer dealer clients that competing dealerships are using GM's announcement to scare customers away from Hummer dealerships.

As mentioned in the February 17th letter, GM continues to look into the prospects of the sale of the Hummer brand. Presumably such a buyer would be located overseas with an interest in obtaining an existing distribution network in the United States. We have two concerns with this option. First, it is extremely difficult to envision a buyer for Hummer under the current

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economic conditions and considering expected fuel economy standards in the United States. Second, if a foreign (e.g., Chinese or Indian) vehicle manufacturer was to acquire the rights to the Hummer brand, it is unlikely that Hummer dealers would immediately receive vehicles from this new manufacturer apart from existing Hummer vehicles. Everything we read indicates that Chinese and Indian vehicles are still several years away from being ready for the United States market.

Despite the February 17th letter stating that current product will be provided and the chance of a sale of the Hummer brand, the bottom line is that GM has failed to live up to their end of the bargain contained in the Hummer Dealer Agreement. You were promised unique and innovative product for your Hummer franchise for as long as you were in compliance with the terms of your Hummer Dealer Agreement. In exchange for that promise, you agreed to provide stand-alone, branded facilities for the Hummer linemake at tremendous expense to you.

Strategy Going Forward

At this juncture, we believe that Hummer dealers have two choices.

1. The first course of action could be to wait out the potential opportunity of another manufacturer acquiring Hummer to determine if that manufacturer will adequately replace the Hummer vehicles historically provided by GM. One concern we have with this approach is the potential that dealers will continue to lose money while waiting such that you reach the point of not having the financial wherewithal to pursue your legal rights. We believe this may be exactly the position that GM wants to put each of you in, if you are not there already.
2. The second course of action is to bring a lawsuit against GM for the wrongful termination of your franchise. As we have already discussed with some of you, there are several viable legal claims which we believe you could bring against GM. First, because GM has announced to the world that it no longer intends to support the Hummer brand, there is a strong legal argument that your franchise has been effectively or “constructively” terminated. This claim centers on the contention that even though the manufacturer has not formally notified you of its intent to terminate your franchise, it has taken certain actions which result in the effective termination of your franchise. In the case of Hummer, following GM’s announcement to Congress in both December and yesterday, coupled with yesterday’s letter, your franchise likely has little or no blue sky value and customers are much less likely to buy a vehicle from a dealership which is slated to be discontinued.

Legal Claims

The constructive termination claim would likely be brought under your state’s franchise law as a claim for “unfair termination.” Most states make the test for the appropriateness of the termination of a franchise as whether the dealer has violated an otherwise reasonable and

material term of the franchise and whether the manufacturer has acted in a fair and equitable manner toward the dealer. With regard to Hummer, the termination of your franchise has nothing at all to do with anything the dealers have done wrong. This is simply a change in GM's business plan.

Apart from the state motor vehicle franchise laws, there may also be a claim for breach of the Dealer Agreement. The Agreement promises that if the dealer continues to meet all conditions and responsibilities under the Agreement, the Agreement will be renewed. Terminating the Agreement as a result of a change in business plans on the part of GM should not be an acceptable excuse for violating the term and termination provisions of the Agreement.

Form of Litigation

We envision litigation against GM being brought in your State's federal court either by your dealership individually or along with other Hummer dealers within your State. In the case of more than one Hummer dealer joining together in a single lawsuit, each dealer will be a named plaintiff and will be seeking his or her individual damages resulting from the elimination of the Hummer linemake. The latter approach will allow dealers to enjoy significant cost savings but should be discussed in further detail before deciding on this approach. A similar option is for dealers to file separate federal court actions and seek to have them joined under one judge pursuant to the "multi-district" litigation rules which allow a sharing of pre-trial costs before each case is again separated for purposes of trial.

Voluntary Termination by Dealer

Many dealers have asked if voluntarily terminating their franchise in order to stop the financial bleeding will negatively impact future litigation. We don't believe that it will. Dealers have a duty under the law to mitigate the damages being sustained in the form of financial losses. Although it will require additional research, we don't believe that a dealer who no longer holds a franchise will be barred from claiming a violation under the motor vehicle franchise laws for acts by the manufacturer that occurred *during* the time the dealer was a franchisee. Indeed, being forced to voluntarily terminate the franchise may actually enhance certain legal claims associated with GM's effective termination of the franchise.

Once you have had the opportunity to digest this analysis, please feel free to contact me if you wish to discuss your specific circumstances and create a plan of action going forward.