



NEWSLETTER

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THE END OF THE MERCURY BRAND *WHAT DEALERS CAN DO*

by Eric L. Chase

Announcement and Offer

On June 2, 2010, Ford Motor Company confirmed in writing its video conference announcement to Mercury dealers a day earlier that the brand would be discontinued. Along with the announcement, Ford provided a “Mercury Resignation Benefits Offer” (“MRBO”) to every dealer. That offer consisted of a bottom-line dollar amount with two components: a Mercury sales credit and a Mercury parts return credit. Each dealer also received a form of Settlement Agreement and a Notice of Termination to be effective December 31, 2010. Nationwide, anecdotal information from dealers indicates that the dollar amounts offered varied dramatically, from five figures to seven figures per dealer.

Initial Dealer Reaction— Mixed

At first, dealers across the country reacted in different ways. To some, the proposed deal, after all, seemed

dramatically better than, say, Chrysler’s Plymouth termination and GM with Oldsmobile—not to mention the chaos wrapped in GM’s and Chrysler’s bankruptcies of 2009. Ford crowed to *Automotive News* that it was being generous and fair.

And yet...not so fast. For many, even most dealers, the MRBO might not be so generous after all; or even reasonable. This especially so for exclusive Lincoln-Mercury stores, but even Ford-Mercury and Ford Lincoln-Mercury dealers should take a closer look. What now seems clear is that every Mercury dealer should review and consider what the consequences of signing are and what their options may be.

Components of the MRBO

The offer consists of two core components. First, there is a “Mercury Sales Credit,” which is unnecessarily and inexplicably complicated (more on this later). Basically, the Mercury Sales Credit is an award based upon average yearly retail sales for 2007-2009 multiplied by a per unit dollar amount, which in



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turn, is based on the percentages of Mercury units sold during those years of the total of Ford, Mercury and/or Lincoln new vehicle retail sales. The second component of the MRBO is the “Mercury Parts Return Credit.” Again, the formula is unnecessarily convoluted and consists of a method to determine the percentage of parts and inventory that are Mercury. This aspect of the MRBO purports to be especially generous, because Ford will pay for

those parts, even though the dealer can retain and sell them.

Evaluating the offer for Adequacy and Fairness

In determining the fairness or appropriateness of Ford's offer, dealers should consider looking at familiar valuation benchmarks, as well as some other complicating factors in this case. A dealer should look at the revenue flow experienced in recent years, along with consideration of obligations such as rent, taxes, etc. that accompany the facility in which Mercury operates. Also, consider the impact of the loss of the Mercury line upon the remaining franchise(s). If you had a Lincoln-Mercury store, does the end of Mercury make Lincoln alone unviable?

In any effort to gauge the fairness of Ford's methodology, an affected dealer may face some frustration. This is because Ford does not explain why or how it arrived at the methodology it used. The four-tiered payment plan, based upon the percentage of Mercury units sold during 2007, 2008 and 2009 (historically bad years for the brand), is hardly self-explanatory as a method for fair compensation. In fact, Ford does not explain exactly what the ultimate offering amount is supposed to represent. It is surely not fair market value, nor is it any approximation of predicted losses of the affected Mercury dealers. Indeed, in the case of a Lincoln-Mercury operation that may be losing half or more of its volume of sales, a dealer in those circumstances fac-

ing losses as far as the eye can see should consider whether he can recover for the anticipated loss of the Lincoln, as well as the Mercury franchise. This is not to say that all dealers should spurn the Ford offer, but most dealers should seriously consider the alternatives. Moreover, the four tiers of the payment multiplier, from a low of \$1,500 per unit to a high of \$2,500 are inexplicable.

What Can a Dissatisfied Dealer Do?

If a dealer is considering a challenge to Ford's offer, or even to simply seek reasonable negotiation, he or she should promptly file an appeal with Ford's Dealer Policy Board. Under the Mercury Dealer Agreement, Paragraph 18(b) requires the dealer, when served with a Notice of Termination, to file an appeal with the Board as a condition to the preservation of any other legal rights. In other words, the dealer cannot first seek relief in court under state or federal law; rather, a dealer must first seek relief with the Board. The dealer may then want to consider whether it makes sense to go to court, if not successful with the Board. Although Paragraph 18(b) would require a Board filing within 15 days of June 2, Ford has extended that time until the middle of December.

State Franchise Law

Many state associations made valiant efforts in strengthening their franchise laws following Chrysler's announcement that it was discon-

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tinuing its Plymouth brand in 2001 and GM's announcement that it was discontinuing its Oldsmobile brand in 2004. Below are examples of state franchise laws that address a manufacturer's termination of a dealer and/or brand. **It is recommended that you contact your state association to obtain a copy of your state's provisions on this topic, as protections will vary from state to state.**

New Jersey Law (including Colorado and Ohio)

Colorado, New Jersey and Ohio are states that provide a specific remedy for dealers whose brand is being terminated. Essentially, in New Jersey, the law requires a payment to the dealer in an amount at least equivalent to the fair market value of the motor vehicle franchise on:

“(1) the date the franchisor announces the action which results in the termination, cancellation or nonrenewal; or

“(2) the date on which the notice of termination, cancellation or nonrenewal is issued, whichever amount is higher.”

The dealers’ interpretation of the law in their favor has been tested in court. See *Stadium Chrysler Jeep v. DaimlerChrysler Motors Co.*, 324 F. Supp. 2d 587 (D.N.J. 2004). In this litigation, five Plymouth dealers asserted their rights under New Jersey law to be compensated at fair market value, and Chrysler vigorously resisted the dealer’s position. In ruling on cross-motions for summary judgment, Judge Pisano held that the dealers were correct and that they should be compensated pursuant to the terms of the statute. The damages were settled in confidential agreements.

New York Law

Although New York’s auto franchise law (McKinney’s Vehicle and Traffic Law, §460 et seq.) does not have

the explicit remedy of some other state laws (that set fair market value as the benchmark for a lost line), the statute is nevertheless helpful to dealers in these circumstances. The helpful provisions of the Vehicle and Traffic Law include, among other terms, the following:

- In New York, auto franchise termination can only be for “due cause.” This means that there has to be “a material breach by [the dealer] of a reasonable and necessary provision of the franchise.” Within the meaning of this language, there is no “due cause” when a manufacturer terminates a brand. *Id.* § 463(2)(d).
- It is an “unreasonable restriction” when the franchisor prevents a dealer from “obtaining the fair value of the franchise or the fair value of the dealership business as a going concern.” *Id.* § 466(2).
- New York also instructs the franchisor to pay an affected “dealer a sum equivalent to the reasonable rental value of the franchise or the fair facility for one year...” *Id.* § 467.

Taken together, these provisions can be reasonably interpreted to contend that a Mercury dealer is entitled to “fair value” for his or her business, in addition to the rental value of the Mercury premises for a year.

Elements of Relief for Dealers Choosing to Challenge Ford’s Offer

Of course, the specific analysis of a dealer’s harm and potential harm can only be done with reference to that dealer’s specific facts. Nevertheless, these are the core elements of relief that should be considered:

- Lost fair market value of the Mercury franchise
- Special costs/expenses (e.g. mortgage)
- Loss of value and/or constructive termination of the remaining franchise(s) (i.e. Lincoln and/or Ford).

The Bottom Line for Mercury Dealers

While every dealer should carefully evaluate his or her options in the context of the Ford offer, many should discuss all the practicalities and the legal costs and potential benefits with a seasoned and experienced automotive franchise lawyer. For those dealers who do decide to accept Ford’s offer, be sure to “carve out” any ongoing or known claim that would otherwise be released. □

Eric L. Chase is a member of the firm of Bressler, Amery & Ross, which has offices in Manhattan, Florham Park, New Jersey and Miramar, Florida. A significant part of Mr. Chase’s practice is the representation of automobile dealers nationwide. This article is not to be considered legal advice.

WARRANTY ALERT!

REVISED REQUIREMENTS FOR APPROVALS

By Brad Summers

As of March 1, 2010, Ford has changed the approval programs once again. Ford introduced the Cost Cap Tool (PTS Web Site). This **MUST** be used whenever you are replacing or completing a major repair on an engine or transmission. A lack of using this tool could result in a reduction of your claims payment.

All dealers still need approvals for the diesel assemblies and related components. All complete engines (6007, 6006) for diesels (4.5, 6.0, 6.4, 6.7 liters) require approval from the hotline. You will also need approval for selected 6.0 liter components of cylinder heads and

gaskets (6049, 6051) and injectors (9E927). The 6.4 liter requires approval on injectors (9E527) and the injector pump (9A543). Hybrid components still need approval for a high voltage battery (10B759), transmission (7000) and converter (14B227).

Some dealers will need approval on gas engine assemblies (6007, 6006), if you had a code present on your 126 Warranty Report from your September 2009 report in the group of gas engines (AA).

Please review the letter dated February 8, 2010, on the subject of, "2010 Warranty Prior Approval Program Requirements – Diesel and Hybrid." To determine what pro-

grams apply to your dealership, go to "My Approval Programs" under the Warranty Guidelines Homepage on the FMCDDealer.com web site.

Under the 10B15 program, if you have completed the reprogram and/or stress test and the vehicle returns with a transmission concern, you must obtain prior approval from the Recall hotline before repairing or replacing the transmission. □

Brad Summers is a Warranty Specialist, with over twenty-years experience working with dealers, and has worked with the Ford Dealers Alliance for almost fifteen years.



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