NADC
National Association of Dealer Counsel

DEFENDER

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In this Issue:

NADC wishes you and your family a happy and healthy holiday season!

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The Dealer's Holy Grail and Integration Clauses – A Myth and a Reality

By Scott Silverman, Silverman Advisors, PC

Have your clients ever had a CRM or marketing solutions provider under-sell and over-perform? Unlikely. Whether or not there is any holy grail of increasing sales and creating a more efficient process, there isn't a single dealer that has given up on the idea that they will eventually find it. The best sales promotions or gimmicks usually don't perform anywhere near as promised, and those that are true "game changers" predominantly come with a significant down-side because they push the regulatory envelope (unfortunately, misleading and false advertising actually works for the short-term). At the same time, every CRM tool has limitations, and there never has been and never will be, a "turnkey" product that will address every dealer's concerns. One fact seems abundantly clear - every product sold by a car dealership vendor eventually fails to perform some function that was a highlight of the sales pitch. As soon as a dealer gripes about not getting what they paid for, vendors turn to their boilerplate one-sided agreements to "hold them to the contract" and to continue receiving monthly charges over the multi-year remainder of the agreement.

Why would anyone agree to a long-term commitment during times of enormous change? Because they were wooed by the idea that they may have found the Holy Grail. As one dealer recently said, "We can be like fish; you see something shiny and you go after it."

Most dealers and dealer groups, at any given time, are working with several vendors that have sold them on the latest iteration of the "can't miss product" or the most comprehensive CRM system that money can buy. Hits and misses in this area are inevitable. Every dealer must increase the likelihood that their misses are not tied to a long-term commitment.

For each of these vendor contracts dealers and their advisors need to consider the obvious – what is the dealer getting and what is the dealer giving up in return? As counsel we need to proactively warn them that their antennas should go up when they are handed a contract that resembles an unpacked ream of paper. This does not always do the trick as many vendor contracts now have critical addendums and standard terms that are not physically presented – rather the vendor alerts dealers the terms and conditions can be downloaded from their web-site. This means one of three things: (1) you could be looking at two reams of paper to be read and they are trying to avoid incurring the cost of paper, (2) the vendor is trying to bury the abusive and unconscionable terms that you would never endorse if you read them, or (3) a combination of 1 and 2. Getting dealers' attention on these issues is not an easy task as they rarely consult their professionals on the front end before signing – and only seek our guidance when they have signed the agreements stacking the deck against them (and usually with foundational understand-

ings that are contradicted by the terms they never read).

For vendors there is good reason for lengthy contracts. Most vendors have had countless disputes with dealers, and have faced every creative (and factual) argument imaginable that dealers have used to avoid being locked into contracts that no longer serve their original purpose. Accordingly, these contracts are carefully crafted to pre-empt every creative argument that one can imagine.

Whenever a business partner or vendor fails to perform, one of the best (or most common) arguments is always the same "I did not get what was promised." However, there is a big loophole here. Every legitimate contract is drafted to reduce dealer's ability to complain about not getting what was promised – and contains an "integration clause" to accomplish this goal. Everyone has read an integration clause. Typical language will state:

> This Agreement constitutes the entire agreement between the Parties relating to this settlement. This Agreement supersedes any prior written or oral agreements concerning the subject matter. This Agreement may not be amended or modified except by an instrument in writing executed by all Parties or their respective representatives.

Who hasn't used or heard the expression "I remember when a hand-shake deal was stronger than a written contract." Integration clauses have killed this concept. It is not that dealers can't rely on what is orally promised – they just need to make absolutely sure that the keys to what they were promised are transcribed into the written contract.

Some vendors have discovered the stigma that comes with these long terms contracts and have promoted the idea of something closer to pay-as-you-go services. What might be lost with the perceived second-tier vendors offering short term deals is probably offset by the reduced commitment. Don't let your dealers underestimate how much their business will change and the need for flexibility. Don't let them get seduced by the idea of saving short money (or even legitimate dollars) by locking into a long-term deal.

What should your dealers take away from others that have learned the hard-way:

- Thoroughly explore alternatives to any proposal for contracts that extend beyond 1 year (especially for CRM systems); and
- Constantly advise them to read what they sign and ensure it is consistent with what they were sold. ■

Scott Silverman founded Silverman Advisors, PC in 2011. Scott also serves as outside general counsel for the Massachusetts' State Automobile Dealer Association representing dealer interests through-out the Northeast on franchise and regulatory issues and is a member of the NADC Board of Directors.

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