

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE COLLECTION, LLC, d/b/a THE
COLLECTION,

Petitioner,

CASE NO. 13-0338

vs.

JAGUAR LAND ROVER NORTH AMERICA,
LLC, AND WARREN HENRY JAGUAR,
LLC, d/b/a WARREN HENRY JAGUAR,

Respondents.

_____/

THE COLLECTION, LLC

Petitioner,

CASE NO. 13-4967

vs.

WARREN HENRY JAGUAR, LLC, d/b/a
WARREN HENRY JAGUAR,

Respondent.

_____/

THE COLLECTION, LLC, d/b/a THE
COLLECTION,

Petitioner,

CASE NO. 14-0157

vs.

JAGUAR LAND ROVER NORTH AMERICA,
LLC AND WARREN HENRY JAGUAR,
LLC, d/b/a WARREN HENRY JAGUAR,

Respondents.

_____/

RECOMMENDED ORDER

On October 27 through 31 and November 3 through 4, 2014, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Miami, Florida.

APPEARANCES

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For Respondent Warren Henry Jaguar, LLC:

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STATEMENT OF THE ISSUE

The issue is whether, pursuant to section 320.642, Florida Statutes (2013), Respondent Jaguar Land Rover North America LLC (JLRNA) may relocate the dealership of Respondent Warren Henry Jaguar from 20800 Northwest Second Avenue, Miami,

to the east side of Biscayne Boulevard, about 306.45 feet south of Northeast 151st Street, in North Miami.

PRELIMINARY STATEMENT

On January 18, 2013, The Collection filed a Petition or Complaint Protesting the Establishment of [the Warren Henry Jaguar] Dealership, which, after transmittal to DOAH, commenced Case No. 13-0338. On December 17, 2013, The Collection filed a letter protesting the relocation of [the Warren Henry Jaguar] Dealership, which, after transmittal to DOAH, commenced Case No. 13-4967. On January 7, 2014, The Collection filed a Petition or Complaint Protesting the Establishment of [the Warren Henry Jaguar] Dealership, which, after transmittal to DOAH, commenced Case No. 14-0157.

The three cases involve the same proposed relocation of the Warren Henry Jaguar dealership. In the first case, the notice contained an incorrect street address. In the second case, JLRNA corrected the mistake in the first notice, but The Collection protested the proposed relocation prior to the publication of formal notice. In the third case, JLRNA published the corrected notice, and The Collection protested the proposed relocation.

The three cases were consolidated by orders entered on January 16 and February 24, 2014. On March 3, 2014, The Collection filed a notice of stay issued by the Third District

Court of Appeal in connection with Case No. 3D14-338. On June 18, 2014, the appellate court dismissed the petition for a writ of certiorari. The administrative hearing was reset for the two-week period set forth above.

Although the principal of Warren Henry Jaguar, Warren Henry Zinn, was present for part of the final hearing, its counsel did not participate in the final hearing. Warren Henry Jaguar did not offer any evidence, but Mr. Zinn testified as a witness called by JLRNA.

At the hearing, The Collection called five witnesses and offered into evidence 51 exhibits: Petitioner Exhibits 1-2, 4, 6-7, 12-18 (including 13a), 20-28, 32-35, 37-44, 46, 49-55, 59-61, 63, and 65-69. JLRNA called six witnesses and offered into evidence 68 exhibits: Respondent Exhibits 1-7, 10-15, 18-55 (including 43a), 58-59, 61, 64, 67-68, 72-75, and 77-82. All exhibits were admitted except for the following: Petitioner Exhibits 2 (tab 26 withdrawn), 16 (not for truth), 32, 35 (page one only), 41-42, 55, and 67 (not for truth) and Respondent Exhibits 58-59 (not for truth) and 61 (not for truth). All excluded exhibits were proffered.

At the request of The Collection and JLRNA, the parties filed their exhibits by electronic media. Upon agreement of the parties during the hearing, the Administrative Law Judge sealed certain exhibits to prevent the disclosure of proprietary

financial and sales information. Because the parties did not file these sealed exhibits by separate electronic media, the Administrative Law Judge has sealed all of the exhibits.

The court reporter filed the transcript on February 23, 2015. Petitioner and JLRNA filed proposed recommended orders on April 9, 2015.

FINDINGS OF FACT

1. Warren Henry Jaguar is an authorized Jaguar dealer located at 20800 Northwest Second Avenue in Miami Gardens. Warren Henry Jaguar has occupied this location since 1985.

2. Since December 2012, Warren Henry Jaguar has shared this location with the Land Rover dealership of Land Rover North Dade, LLC. Both entities are owned by Warren Henry Automobiles, Inc., which also owns Infiniti and Fiscar dealerships near Warren Henry Jaguar's present location, as well as Land Rover South Dade, LLC, which is mentioned below.

3. By notice dated December 2, 2013, JLRNA informed the Department of Highway Safety and Motor Vehicles (DHSMV) that it intended to permit Warren Henry Jaguar to relocate its Jaguar dealership to a new facility to be located on the east side of Biscayne Boulevard in North Miami, about 306.45 feet south of the intersection of Biscayne Boulevard and Northeast 151st Street, in North Miami. The new dealership would be in a development to be known as Biscayne Landing. The existing and

proposed locations are both in Dade County, whose population exceeds 300,000 persons.

4. On December 9, DHSMV published notice to this effect in the Florida Administrative Register. Despite an incorrect proposed street address, The Collection's principal, Kenneth Gorin, knew the proposed location of the relocated Jaguar dealership and timely protested the proposed relocation.

5. The Collection is an authorized dealer for Jaguar, Audi, Porsche, Ferrari, Maserati, McLaren, Aston Martin, and Alfa Romeo. The Collection sells and services these vehicles from a single dealership located at 200 Bird Road in Coral Gables, Dade County.

6. Warren Henry Jaguar and The Collection are "motor vehicle dealers" within the meaning of section 320.60(11)(a)1., Florida Statutes. JLRNA is a "distributor" and "licensee" within the meaning of section 320.60(5) and (8), Florida Statutes. As such, JLRNA is authorized to distribute Jaguar and Land Rover motor vehicles to its respective authorized dealers in Florida.

7. In general, JLRNA assigns each of its dealers an area of responsibility (AOR) based on the proximity of zip codes to each dealership. Each Jaguar dealership has a non-exclusive AOR, meaning that JLRNA may unilaterally change a dealer's AOR. Although the AOR of Land Rover of North Dade is also non-

exclusive, the AOR of Land Rover of South Dade is exclusive, meaning that JLRNA may not unilaterally change its AOR.

8. The present location of Warren Henry Jaguar is east of the Sun Life Stadium. This area is in economic decline, as evidenced by widespread commercial vacancies and elevated crime levels.

9. Within Warren Henry Jaguar's AOR for its current location, the new location would be about 7.2 road miles and less than five air miles to the southeast of the current location. The proposed location would be directly west of Oleta River State Park, which is separated from Haulover Park on the ocean by a narrow finger of the northernmost portion of Biscayne Bay. The proposed location is in an area that is economically vibrant.

10. During at least one 12-month period within the 36 months preceding publication of notice of the relocation, The Collection made more than 25% of its retail sales of new Jaguars to persons who registered those vehicles within a radius of 12.5 miles of the proposed relocation site.

11. Warren Henry Jaguar's present location is about 16.3 air miles from The Collection's dealership. The proposed location is about 2.4 air miles and 2.2 road miles closer to The Collection's dealership; the new location would be about 13.9 air miles and 15.8 drive miles from the Collection. The drive

time between The Collection's dealership, on the one hand, and the present and proposed locations, on the other hand, would be almost unchanged.

12. The "community or territory" within which to judge the performance of the Jaguar brand is the combined AORs of The Collection, Warren Henry Jaguar, and Alpine Motors, which is the Jaguar dealership in Ft. Lauderdale, Broward County (CommTerr). The parties agree upon this designation of the CommTerr, which captures the three Jaguar dealers operating in Dade and Broward counties.

13. As noted in the Conclusions of Law, the adequacy of Jaguar representation in the CommTerr requires consideration of at least 11 factors, as set forth in section 320.642(2)(b). These statutory factors are considered, where appropriate, in groups.

14. Two of the 11 statutory factors are the reasonably expected market penetration for the CommTerr and the volume of registrations and service business transacted by the existing dealers in the CommTerr. See § 320.642(2)(b)3. and 11.

15. The assessment of the performance of the CommTerr requires the establishment of a benchmark against which the CommTerr may be measured. A reliable benchmark must reflect the relevant demographics of the CommTerr. A benchmark relatively

close to Broward and Dade counties would better reflect the market and demographic conditions than a more distant benchmark.

16. After considering a number of factors, JLRNA's dealer network analyst selected as a benchmark the AOR of the West Palm Beach Jaguar dealer. The analyst has testified as an expert in almost 100 cases of this type, including 10 to 15 dealer-relocation cases, and has been accepted as an expert in each case that went to trial. In the alternative, JLRNA's dealer network analyst selected as a benchmark the AORs of all Florida Jaguar dealers outside of the CommTerr. The exclusion of the CommTerr from the alternative benchmark was necessitated by the fact that the size of these two counties would have overrepresented their sales performance and effectively distorted the sales of Jaguar dealers through the remainder of Florida. These benchmark selections are reasonable.

17. The Collection's dealer network analyst did not object to the alternative benchmark, although his Florida benchmark includes the CommTerr. However, the Collection's dealer network analyst objected to the West Palm Beach AOR primarily because this was the second-highest-performing AOR in Florida in 2012, although it has since ranked lower. As already noted, reliance on the West Palm Beach AOR as a benchmark tends to control demographic variables. The reasonableness of this selection is further evidenced by the fact, noted below, that Alpine Motors

performed quite well when compared to the benchmark West Palm Beach AOR during the period in question. The objection to the West Palm Beach AOR is therefore rejected.

18. To address any material difference in market conditions between the CommTerr and the benchmark area, JLRNA's dealer network analyst analyzed consumer purchase preferences in these two markets. During the relevant period, Jaguar's offerings have been the XF, which is in the medium premium sedan segment, and the XJ, which is in the large premium sedan segment. During most of the relevant period, JLRNA also offered the now-discontinued XK, which was in the large premium sport segment. In the last couple of years, JLRNA replaced the XK model with the F model--first a convertible and then a coupe; the F model is in the premium sport segment.

19. Segmentation analysis applies more objective filters, such as body type (e.g., sedan vs. coupe) and body length, plus more subjective filters, such as eliminating otherwise-eligible line-makes, such as Hyundai, due to the perception that they are not within the core premium brand associated with Jaguar. After applying these filters and making relatively minor adjustments for segment-based market preferences between the CommTerr and the West Palm Beach AOR, the JLRNA dealer network analyst reasonably determined that Jaguar sales in the CommTerr were inadequate.

20. For instance, in 2012, for the medium premium, large premium, and large sport premium (XK not yet replaced by F) segments, the Jaguar dealers would have been expected to generate 1129 retail registrations, but achieved only 822. The expected penetration for Jaguar dealers in the CommTerr was 8.32%, but the actual penetration was only 6.06%; this translates to a retail registration effectiveness of 72.8%.

21. At the time that the JLRNA dealer network analyst prepared his initial report, 2012 was the last year for which retail registration effectiveness data was available. At the time, though, 2012 was not an anomaly. The retail registration effectiveness of the CommTerr compared to the West Palm Beach AOR was 98.1% in 2009, 83.1% in 2010, and 93% in 2011. Updating his earlier work, the JLRNA dealer network analyst showed that the CommTerr underperformed in 2013 and 2014 (through June) with retail registration effectiveness, when compared to the West Palm Beach AOR, of 85.6% and 78.2%, respectively. The downward trend from adequate performance in 2009 and near-adequate performance in 2011 became more pronounced from 2012 through June 2014.

22. As noted above, Alpine Motors performed well during this period. In 2009, 2011, and 2013, its retail registration performance exceeded the performance of the West Palm Beach AOR benchmark. The underperformance of the CommTerr is thus

attributable to the underperformance of Warren Henry Jaguar and The Collection, whose retail registration performance fell below that of the West Palm Beach AOR benchmark each year from 2009 through June 2014.

23. The CommTerr performed no better when compared to the alternative benchmark of Florida less the CommTerr. Here, the CommTerr achieved retail registration effectiveness of 100% in 2010, 95.7% in 2011, 87.5% in 2012, 90.83% in 2013, and 84.81% through June 2014. And the below-benchmark performance is attributable to Warren Henry Jaguar and The Collection, as, again, Alpine Motors' retail registration effectiveness exceeded that of Florida less the CommTerr in 2009, 2010, 2011, and 2013.

24. Based on the foregoing, new Jaguar sales have achieved below-expected market penetration in the CommTerr after consideration of all relevant factors, and JLRNA has received inadequate representation in the CommTerr as a whole. These findings are driven by penetration and representation factors applicable to the portion of the CommTerr in Dade County.

25. Two of the 11 statutory factors are: a) whether there is adequate interbrand and intrabrand competition with Jaguar in the CommTerr and adequate consumer care for Jaguar in terms of sales and service and b) whether the relocation is justified based on economic and marketing conditions pertinent to dealers in the CommTerr. See § 320.642(2)(b)9. and 10.

26. Based on population and demographics, the CommTerr encompasses one of the more important markets for luxury vehicle manufacturers in the world in terms of opportunities for sales and corporate branding. The CommTerr promises to continue to represent an important market for new luxury vehicle sales into the future. For relevant segments, new-vehicle registrations in the CommTerr have increased from 10,054 in 2010 to 17,984 in 2013. For the first six months of 2014, these registrations reached 9611, annualizing to another increase in new-vehicle registrations in 2014.

27. For the most part, the period in question covers the recovery of the auto industry from the Great Recession of 2008. However, there is some evidence that Jaguar may be a brand in decline, as its popularity among older buyers has not transferred to younger buyers. From 2006 to 2011, U.S. Jaguar sales dropped from 19,943 to 11,138 new vehicles. But the vast potential of the south Florida market to support more luxury vehicle sales supports the finding that Jaguar sales in the CommTerr are inadequate.

28. Based on the foregoing, inadequate performance by Jaguar in the CommTerr during the period in question has not been due to adverse economic and marketing conditions. Inadequate performance by Jaguar in the CommTerr is due to

inadequate representation by The Collection and Warren Henry Jaguar in engaging in interbrand and intrabrand competition.

29. Two factors of the 11 statutory factors are: a) the impact of the relocated dealer on consumers, the public interest, existing dealers, and JLRNA and b) the size and permanency of investment reasonably made and reasonable obligations incurred by existing dealers to perform their obligations under their dealer agreements. See § 320.642(2)(b)1. and 2.

30. There is substantial opportunity for additional Jaguar sales in the CommTerr through two means: conquest sales, meaning the sale of Jaguar models to purchasers who own corresponding models of competitors' vehicles, and the sale of Jaguar models by CommTerr dealers to displace pump-in sales, which are sales by Jaguar dealers outside of the CommTerr to purchasers within the CommTerr.

31. If the CommTerr dealers achieved the retail registration effectiveness of the West Palm Beach AOR, based on 2012 registration data, 350 conquest sales and 106 displaced pump-in sales would be available to the CommTerr dealers. These two categories thus represent a total opportunity of 456 new-vehicle sales. JLRNA's dealer network analyst estimates that Warren Henry Jaguar would obtain about 116 of these sales, if it relocated to the proposed location, leaving about 340 sales to

The Collection and Alpine Motors. For 2013, the dealer network analyst estimates that, if it relocated, Warren Henry Jaguar would obtain 127 sales from conquest and pump-in displacement sales, leaving 246 sales to The Collection and Alpine Motors.

32. By some measures, The Collection had, at 103 units, the largest shortfall in sales, when measured against average sales, among all U.S. Jaguar dealers for the 12 months ending in July 2014. Even The Collections' dealer network analyst conceded that sales performance of The Collection--as well as Warren Henry Jaguar (except in 2008), but not Alpine Motors--was below his Florida benchmark every year. (Pet. Ex. 2, Tab 11, p. 4.)

33. The Collection contends that its below-average performance is due to its status as a single-line Jaguar dealer, as contrasted to the dual-line (Jaguar and Land Rover) dealership of Warren Henry Jaguar and its affiliate. The Collection's claim of disadvantage as a single-line dealer fails for two reasons. First, The Collection represents numerous other luxury brands, including Audi, which features SUVs that are competitive with Land Rover SUVs. Second, Alpine Motors, which has consistently outperformed The Collection and Warren Henry Jaguar, is a single-line dealer without other brands--and has earned a profit each year since 2009.

34. Evidence offered by The Collection concerning the financial impact of the relocation was flawed. For instance, The Collection's dealer network analyst could offer no support for his assumption of a direct relationship between reduced sales revenues and reduced service and parts revenues.

35. Worse, The Collection's accountant incorrectly assumed a direct relationship between reduced gross revenues and reduced profits. The relationship between dealership revenues and profits can be complicated. For instance, notwithstanding the lost sales opportunities of 103 units for the 12 months ending in July 2014 and poor sales over the entire period in question, The Collection is the most profitable Jaguar dealership in the United States. From 2011 to 2013, The Collection's net after-tax profit climbed 45% on the sale of seven fewer new Jaguars. Similar indirect relationships between new-Jaguar sales and gross or net after-tax profits exist from 2009 through August 2014. For example, The Collection's gross profit increased 23.3% from 2010 to 2012 while its vehicle sales decreased by 9.2%.

36. Less dramatically, in attempting to demonstrate that The Collection's Jaguar-based financial performance was precarious, The Collection's accountant imputed excessive rent based on an overly generous value assigned to the facility and an excessive allocation to Jaguar of a share of the facility and

facility costs. The accountant also distorted The Collection's Jaguar-based financial performance by including one-time legal expenses paid or incurred in 2013 in connection with this dealer-relocation litigation.

37. As noted above, there is little risk posed to The Collection from the proposed relocation because there is plenty of sales opportunity in the CommTerr to go around. Thus, there is little risk posed to The Collection's investment and obligations in connection with its dealer agreement with JLRNA.

38. Moreover, there is little, if any, evidence as to the size or permanency of investment or obligations incurred by The Collection to perform its obligations under its agreement with JLRNA. The record does not permit a precise allocation of facility expenses to Jaguar--and, thus, The Collection's obligations to Jaguar--but the facility-expense allocation is smaller than estimated by The Collection's accountant.

39. JLRNA argues that a Jaguar loss, if any, would be a rounding error, given the sales and profits generated by The Collection's sales and service of the other seven brands. As framed, this argument is irrelevant because it impermissibly enlarges the scope of the issues of these cases. But where, as here, the protesting dealer represents several line-makes in a single facility and the subject line-make is a small fraction of its overall business, the investment risk posed to such a Jaguar

dealer, as The Collection, is much less than the risk posed to a single-line Jaguar dealer that represents no other line-makes.

40. Based on the foregoing, the relocation of Warren Henry Jaguar would not have an adverse impact on existing dealers, nor would it have an adverse financial impact on The Collection. And this relocation would not pose an unreasonable risk to The Collection's investment and obligations under its agreement with JLRNA.

41. Another factor of the 11 statutory factors is any action by JLRNA to deny The Collection, as to the Jaguar brand, the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make vehicles in keeping with the reasonable expectations of JLRNA in providing an adequate number of dealers in the CommTerr. See § 320.642(2)(b)4.

42. Although owned by JLRNA, Land Rover is not the same line-make as Jaguar, so JLRNA's refusal to grant The Collection a Land Rover franchise is not cognizable under this statutory factor. At some point, Mr. Gorin and Mr. Zinn negotiated the sale of Land Rover of South Dade to Mr. Gorin, The Collection, or an affiliate of either of them. But these negotiations were unsuccessful, and, of course, this proceeding cannot serve as a means of forcing Mr. Zinn (or Mr. Gorin) to sell so as to create a dual-line dealership in south Dade County. As noted above,

the dealer agreement between Land Rover of South Dade and JLRNA precludes the manufacturer's unilateral revision to the dealer's AOR, so JLRNA could not create for The Collection an AOR out of the AOR of Land Rover of South Dade, even if JLRNA were motivated to do so.

43. The corporate policy of JLRNA is to encourage dual-line dealers. There is nothing inherently objectionable in such a policy. Even with the growing popularity of Land Rover and declining popularity of Jaguar over the past several years, this corporate policy, on the present record, has not denied The Collection a reasonable opportunity for growth.

44. However, Jaguars and Land Rovers share a common engine on a number of models, and JLRNA allocates these engines between the two line-makes. Obviously, the potential exists for JLRNA to restrict the growth of single-line Jaguar dealers by allocating a disproportionately large number of engines to Land Rovers. But the record does not demonstrate that JLRNA has done so in these cases. Except for a few months leading up to the administrative hearing, when the supply of XF and new F models was constrained, all Jaguar models have otherwise been in free supply during the period in question, so JLRNA's allocations of engines between Jaguars and Land Rovers could not have denied The Collection a reasonable opportunity for growth. Further, The Collection may have declined allocations, even of the

F model, during the period in question, further underscoring the free-supply status of all Jaguar models during the relevant period.

45. Based on the foregoing, JLRNA has not denied The Collection the opportunity for reasonable growth, market expansion, or relocation, including the availability of Jaguar vehicles in keeping with the reasonable expectations of JLRNA in providing an adequate number of dealers in the CommTerr.

46. Another factor of the 11 statutory factors is any attempt by JLRNA to coerce The Collection into consenting to the relocation of Warren Henry Jaguar. See § 320.642(2)(b)5.

47. On one occasion, JLRNA's Vice President of Dealer Network Development warned Mr. Gorin that he would be "crossing a line" if The Collection persisted in objecting to the relocation of Warren Henry Jaguar. The officer made the comment at an informal encounter with Mr. Gorin during a Jaguar dealer meeting. The officer added that The Collection's relationship with JLRNA would never be the same if Mr. Gorin did not drop its protest of the relocation. The officer characterized the protest as The Collection's "suing" JLRNA.

48. The Vice President of Dealer Network Development has considerable power over Jaguar dealers. He was and is in charge of the Business Builder Program, which is the program by which dealers, such as Warren Henry Jaguar and The Collection, earn

manufacturer hold-backs by various activities. For Jaguar, these hold-backs, which are more formally known as a "variable margin program," amount to up to 7% of the manufacturer's suggested retail price (MSRP) of a vehicle and may provide the difference between a profit and loss in Jaguar dealership operations over the course of a year.

49. Notwithstanding the source of these threats, their seriousness is negated by the absence of any attempt whatsoever by JLRNA to punish The Collection for maintaining this protest. Had there been such evidence, the weight that would have been assigned to this factor would have been considerable and possibly jeopardized the proposed relocation.

50. Another factor of the 11 statutory factors is the distance, travel time, traffic patterns, and accessibility between The Collection and the proposed relocation. See § 320.642(2)(b)6.

51. As noted above, as a result of the relocation, the air distance between The Collection and Warren Henry Jaguar would be reduced by about 2.4 miles and the road distance would be reduced by about 2.2 miles. The relationship between relatively small changes in distance between dealers and the lack of meaningful impact on the non-relocating dealer is reflected in section 320.642(5)(a)4., which bars a protest if the relocating dealer reopens less than six miles from its existing location

and its new location is more than 15 miles from the non-relocating dealer. The proposed relocation meets the first criterion and, by road miles, the second criterion. But the new location, by air miles, is about one mile short of the 15-mile threshold. Nonetheless, the relatively short distance that Warren Henry Jaguar would be moving and the relatively small change in the proximity of its new location to The Collection are facts to be considered under this statutory factor.

52. In terms of travel time, the existing and new locations of Warren Henry Jaguar are both about 20.6 minutes from The Collection. And the relatively modest distance between the existing and new locations would not produce any changes in average driving time for owners of Jaguars in operation within Warren Henry Jaguar's AOR.

53. Based on the foregoing, there are no material differences in distance, travel time, traffic patterns, and accessibility between The Collection, on the one hand, and, on the other hand, Warren Henry Jaguar's existing and new locations.

54. Another factor of the 11 statutory factors is whether benefits to the consumer will likely occur from the relocation and whether these benefits are not obtainable by other geographic or demographic changes or expected changes in the CommTerr. See § 320.642(2)(b)7.

55. The MSRPs of the Jaguar models at issue range from about \$50,000 to over \$100,000. Any foreseeable changes in the demographics of the immediate vicinity of Warren Henry Jaguar's present location are not going to be of any benefit to the public that might constitute customers of these luxury cars. The relocation toward the coast benefits the public because the demographics of the immediate vicinity of the new location is more in tune with the luxury car market. After the relocation, more of Jaguar's potential customers would be able to examine JLRNA's offerings in closer proximity to their homes, and all of Jaguar's potential customers would be able to examine Jaguar's offerings in a safer setting that hosts other luxury brands for comparison shopping, such as Audi, Lexus, and Lamborghini, and other high-end retail attractors, such as fine restaurants and high-end stores, including those at the nearby Aventura Mall and planned for the Biscayne Landing development itself.

56. Based on the foregoing, the relocation of Warren Henry Jaguar will provide relevant consumers benefits that cannot be obtained by other geographic or demographic changes.

57. The final factor of the 11 statutory factors is whether The Collections is in substantial compliance with its dealer agreement with JLRNA. It is.

58. Balancing these 11 statutory factors, JLRNA has proved that its existing dealers in the CommTerr--particularly, The

Collection and Warren Henry Jaguar--have provided inadequate representation. No other factors persuade otherwise.

CONCLUSIONS OF LAW

59. DOAH has jurisdiction of the subject matter.
§§ 120.569, 120.57(1), and 320.699.

60. A licensee, such as JLRNA, that intends to permit the relocation of an existing dealer within the community or territory where the same line-make vehicle is represented by another franchised dealer must provide written notice to DHSMV. § 320.642(1). The notice must include the "specific location" of the relocated dealer, and DHSMV must publish the notice in the Florida Administrative Register. Id. For the reasons stated above, JLRNA and DHSMV materially met these requirements with the first published notice and met them with the second published notice.

61. An existing dealer has standing to challenge a proposed relocation if the dealer has a franchise agreement for the same line-make vehicle, and, during any 12-month period over the past 36 months, it made 25% of its retail sales of new motor vehicles to persons whose registered household addresses were located within 12.5 miles of the proposed new location, provided that the existing dealer is in the same county or in a county contiguous to the county of the relocating dealer.

§ 320.642(3)(b)2. For the reasons stated above, The Collection meets this standing requirement.

62. If an existing dealer with standing files a timely protest of the proposed location, the licensee has the burden of proving that "the existing franchised dealer or dealers who register new motor vehicle retail sales or retail leases of the same line-make in the community or territory of the proposed dealership are not providing adequate representation of such line-make motor vehicles in such community or territory."

§ 320.642(2)(a)2. The standard of proof is a preponderance of the evidence. § 120.57(1)(j).

63. Section 320.642(2)(b) identifies 11 non-exclusive factors that DHSMV may consider in determining the adequacy of the representation of Jaguar by existing dealers in the CommTerr. This statute provides:

In determining whether the existing franchised motor vehicle dealer or dealers are providing adequate representation in the community or territory for the line-make, the department may consider evidence which may include, but is not limited to:

1. The impact of the establishment of the proposed or relocated dealer on the consumers, public interest, existing dealers, and the licensee; provided, however, that financial impact may only be considered with respect to the protesting dealer or dealers.

2. The size and permanency of investment reasonably made and reasonable obligations

incurred by the existing dealer or dealers to perform their obligations under the dealer agreement.

3. The reasonably expected market penetration of the line-make motor vehicle for the community or territory involved, after consideration of all factors which may affect said penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, or other factors affecting sales to consumers of the community or territory.

4. Any actions by the licensees in denying its existing dealer or dealers of the same line-make the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make vehicles in keeping with the reasonable expectations of the licensee in providing an adequate number of dealers in the community or territory.

5. Any attempts by the licensee to coerce the existing dealer or dealers into consenting to additional or relocated franchises of the same line-make in the community or territory.

6. Distance, travel time, traffic patterns, and accessibility between the existing dealer or dealers of the same line-make and the location of the proposed additional or relocated dealer.

7. Whether benefits to consumers will likely occur from the establishment or relocation of the dealership which cannot be obtained by other geographic or demographic changes or expected changes in the community or territory.

8. Whether the protesting dealer or dealers are in substantial compliance with their dealer agreement.

9. Whether there is adequate interbrand and intrabrand competition with respect to said line-make in the community or territory and adequately convenient consumer care for the motor vehicles of the line-make, including the adequacy of sales and service facilities.

10. Whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and marketing conditions pertinent to dealers competing in the community or territory, including anticipated future changes.

11. The volume of registrations and service business transacted by the existing dealer or dealers of the same line-make in the relevant community or territory of the proposed dealership.

64. For the reasons noted above, JLRNA has proved by a preponderance of the evidence inadequate representation in the CommTerr.

65. At the hearing and in its posthearing memorandum of law, citing section 90.702, The Collection argued that the Administrative Law Judge should exclude testimony and exhibits of JRLNA's dealer network analyst. At the hearing, the focus of the argument was on the analyst's failure to provide a basis for the segmentation determinations that underlie his analysis and his failure to subject his hypothesis of underperformance to scientific testing. In the memorandum, the focus of the argument was on the analyst's conclusions that Jaguar was

under-represented in the CommTerr and that increased sales could come through conquest sales, rather than at the expense of other dealers in the CommTerr--namely, The Collection.

66. In its present form, section 90.702 authorizes opinion testimony imparting "scientific, technical, or other specialized knowledge" from a witness "qualified as an expert by knowledge, skill, experience, training, or education," if the testimony is "based upon sufficient facts or data," the testimony is "the product of reliable principles and methods," and the witness "has applied the principles and methods reliably to the facts of the case."

67. Preliminarily, the requirements of section 90.702 do not apply to these cases for two reasons. First, section 120.569(2)(g) provides that, other than "[i]rrelevant, immaterial, or unduly repetitious evidence," "all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." These specific provisions governing administrative hearings would have no meaning if they did not override the evidentiary provisions of chapter 90, including section 90.702.

68. Second, there is some doubt whether the requirements of section 90.702 should even apply in a nonjury trial. Compare United HealthCare Ins. Co. v. AdvancePCS, 2002 U.S. Dist. LEXIS

28262 (D. Minn. 2002) (no) with Giaimo v. Fla. Autosport, Inc., 154 So. 3d 385 (Fla. 1st DCA 2014) (per curiam) (court applied section 90.702 to administrative proceeding without considering the issue). At the very least, even in a jury trial, the trial judge's ruling as to the admissibility of expert evidence based on this reliability objection may be overturned on appeal only if the ruling was an abuse of discretion. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999).

69. Even if section 90.702 applies to an administrative hearing, The Collection invites a misapplication of this statute to the testimony identified above. Section 90.702 assumed its present form as a result of legislative amendments enacted in 2013. The legislature revised section 90.702 "to adopt the standards for expert testimony . . . as provided in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) [and] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) and to no longer apply the standard of Frye v. United States, 293 F.2d 1013 (D.C. Cir. 1923)." Ch. 2013-107, Laws of Florida.

70. In Daubert, the U.S. Supreme Court held that scientific testimony was admissible only if it was reliable, as well as relevant. 509 U.S. at 589. If constituting an assertion or inference, for an expert's opinion to come within the realm of scientific knowledge, the opinion must be derived

from the scientific method. Id. at 590. The scientific method consists of stating and testing hypotheses. Id. at 593.

71. In Kumho Tire, the U.S. Supreme Court extended Daubert to technical testimony from experts, such as engineers, who are not scientists. In extending its Daubert holding, the Court stressed the flexibility of the reliability test to be imposed by the trial court. Admissible engineering testimony in some cases might rest upon "scientific foundations," but in other cases might represent "personal knowledge or experience." 526 U.S. at 150.

72. The Kumho Tire opinion concedes that rigorous reliability requirements may not apply equally for all experts and all areas of expertise. Subjects of expertise where a scientific method may not be applicable might include "drug terms, handwriting analysis, criminal modus operandi, land valuation, agricultural practices, railroad procedures, [and] attorney's fee valuation." Id. Accord, In re T. A., 663 N.W. 2d 225, 234-35 (S.D. 2003) (in some cases, reliability must focus on "knowledge and experience"; there is no requirement that the medical profession devise a test to determine how and why a child bruises to warrant the admissibility of testimony from a medical professional that a child's injuries are consistent with abuse).

73. Two Florida opinions rejecting "pure opinion testimony" under section 90.702 in its present form seem to leave little room for "personal knowledge or experience" as a basis for a scientific expert's assertion or inference. In Giaimo, supra, the court excluded the testimony of a treating neurosurgeon because he could not explain how he arrived at his finding apportioning a claimant's injuries between two conditions. In Perez v. Bell South Telecommunications, Inc. 138 So. 3d 492 (Fla. 3d DCA 2014), the court excluded the testimony of a treating obstetrician that workplace stress caused a placental abruption because he had no studies to support this opinion. The Perez opinion requires expert testimony in the form of inference or assertion to be supported by the scientific method. Id. at 498.

74. However, at least one trial court declined to apply Daubert rigorously to the testimony of a treating physician. Flowers v. Wal-Mart Stores, Inc., 2005 U.S. Dist. LEXIS 25578 (M.D. Ga. 2005) (court dispensed with an "extensive analysis under Daubert and Kumho Tire" where a neurosurgeon who testified that a fall exacerbated a pre-existing back injury was applying "routine and accepted medical practices to the diagnosis and treatment of a patient").

75. The Collection's Daubert-based objections fail for several reasons. The main thrust of these objections is

directed to the dealer network analyst's testimony that Jaguar is under-represented in the CommTerr. This testimony is a description of existing conditions. It is not a hypothesis, nor is it a prediction that can be validated or invalidated. The expertise demonstrated by the analyst in so concluding is not scientific; it is technical. There is thus no basis to require that he adhere to a scientific method in arriving at this conclusion. It is sufficient under section 90.702 that the analyst's testimony is based on sufficient facts, the testimony is the product of reliable principles and methods, and the analyst applies the principles and methods reliably to the facts. This testimony has met all of these requirements and conforms to Kumho Tire.

76. The Collection's objection to the failure of the analyst to provide a basis for his segmentation analysis is a reformulation of its argument that JLRNA failed to produce in discovery adequate information concerning its segmentation analysis. But the main underpinnings of the analyst's testimony of under-representation are his identification of the CommTerr-- to which the parties agreed--and his identification of the benchmark, both of which are amply supported by the evidence.

77. Lastly, The Collection's objects to the analyst's opinion that post-relocation sales growth for Warren Henry Jaguar could be derived from conquest sales (and displaced pump-

in sales from Jaguar dealers outside of the CommTerr), rather than necessarily coming at the expense of The Collection. The point of the analyst's testimony is that there is no reason why the two Dade County Jaguar dealers could not both increase their sales of Jaguars, and the evidence amply supports this conclusion.

RECOMMENDATION

It is

RECOMMENDED that the Department of Highway Safety and Motor Vehicles enter a final order dismissing all protests of The Collection to the proposed relocation of Warren Henry Jaguar to the east side of Biscayne Boulevard, about 306.45 feet south of Northeast 151st Street, in North Miami.

DONE AND ENTERED this 22nd day of May, 2015, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.