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NEW MOTOR VEHICLE BOARD

In the Matter of the Protest of CALIFORNIA NEW CAR DEALERS ASSOCIATION Protestant, v. JAGUAR LAND ROVER NORTH AMERICA, LLC, Respondent.	**Protest No. PR-2463-16** **RESPONDENT JAGUAR LAND ROVER NORTH AMERICA, LLC REPLY BRIEF ON REMAND**

Respondent Jaguar Land Rover North America, LLC ("JLRNA") submits this reply brief on remand in response to the brief submitted by the California New Car Dealers Association (the "Association").

In its brief on remand, the Association notes that subdivision (y)(1) of Section 11713.3 prohibits JLRNA from taking or threatening to take an "adverse action" against a dealer under its Amended Export Policy (the "Policy") unless "the dealer knew or reasonably should have known of the customer's intent to export … the vehicle in violation of the [Policy]." Association Brief at 3. The Association goes on to reference the rebuttable presumption found in subdivision (y)(1) and the requirement that the rebuttable presumption be disclosed to dealers in the Policy pursuant to subdivision (y)(3). Association Brief at 6. Based on these two statutory references, the Association reads a wholly new requirement into Section 11713.3; namely, that the statute requires all export policies – in addition to including the language of subdivision (y)(3) – to explicitly state the "knew or reasonably should have known" language. Association Brief at 6-7 (the presumption required by subdivision (y)(3) "would make no sense in an export policy that fails to state that violations occur only if the dealer knew or should have known of the customer's intent to export. In other words, if the policy states that the dealer enjoys a presumption against having knowledge of the customer's intent to export, but then makes no mention of knowledge of export intent, the dealer would have no idea how the presumption pertaining to knowledge … could have any bearing on whether the dealer could be penalized for violating the policy."). Based on this "requirement" that the Policy explicitly use the "knew or reasonably should have known" language (in addition to the required (y)(3) language), the Association concludes that the Policy violates subdivision (y)(1) unless "failing to exercise an adequate level of due diligence is in all respects equivalent to a dealer's knowledge or constructive knowledge of the customer's intent to export." Association Brief at 7. The Association's position should be rejected.

First, as JLRNA has previously acknowledged and as the Board has now ordered, the Policy must be amended to add the rebuttable presumption language found in subdivision (y)(3). JLRNA intends to amend the Policy in that regard immediately following the resolution of this matter, which, as JLRNA has noted, will resolve any potential ambiguity in the Policy's due

diligence language. Second, the Association's position proceeds from a false premise; namely, that subdivision (y)(1) requires JLNRA to include the knew or reasonably should have known language or something "in all respects equivalent" to it in the Policy. The statute contains no such requirement. Indeed, given that the legislature – in subdivision (y)(3) – required that certain language (i.e., the rebuttable presumption) be included in all export policies, had the legislature intended to require the use of the knew or reasonably should have known language separate from the (y)(3) requirement it would have done so. (The Association's argument that the statute requires additional language is especially ironic because it is the Association who drafted and sponsored the statutes at issue in this case. See, e.g., Proposed Decision at ¶¶ 41-42 (noting the Association's sponsorship)). Finally, the Association's argument strays from the narrow issue presented on remand. The question presented here is not whether the Policy should include additional or different language. The narrow question presented is whether the "adequate level of due diligence" language in the Policy by itself violates subdivision (y)(1). JLRNA contends that it does not and that, in any event, the Association has not carried its burden of proof to demonstrate that it does. Nothing in subdivision (y)(1) prohibits JLRNA from requiring dealers to conduct due diligence in an effort to identify potential vehicle exporters. While the due diligence best practices and red flags described in the Policy are themselves no longer at issue in this matter, the fact remains that the Policy goes to great lengths to describe the best practices dealers can follow when reviewing potential transactions. The fact that the policy requires dealers to conduct an adequate level of due diligence does not itself violation subdivision (y)(1).

For the foregoing reasons and those explained in JLRNA's prior briefs in this matter, JLRNA respectfully requests a ruling that the Association has not met its burden to establish that the due diligence standard in the Policy violates the prohibitions of subdivision (y)(1) of Section 11713.3.

Date: June 7, 2017

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By:

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to this action. My business address is Hogan Lovells US LLP, 1999 Avenue of the Stars, Suite 1400, Los Angeles, CA 90067.

On June 12, 2017, I caused the foregoing document described as: **RESPONDENT JAGUAR LAND ROVER NORTH AMERICA, LLC REPLY ON REMAND** to be served on the interested parties in this action as follows:

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[X] **BY MAIL.** I sealed said envelope and placed it for collection and mailing following ordinary business practices.

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[X] **(State)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **June 12, 2017,** at Los Angeles, California.

Colm A. Moran
Printed Name

Signature