

1 NEW MOTOR VEHICLE BOARD
1507 - 21ST Street, Suite 330
2 Sacramento, California 95811
Telephone: (916) 445-1888

CERTIFIED MAIL

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8 STATE OF CALIFORNIA
9 NEW MOTOR VEHICLE BOARD

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11 In the Matter of the Protest of
12 PUTNAM MOTORS, INC. dba PUTNAM
LEXUS,
13 Protestant,
14 v.
15 TOYOTA MOTOR SALES, U.S.A., INC.,
16 Respondent.

Protest No. PR-2428-15

**PROPOSED ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS [SECOND] AMENDED
PROTEST**

17
18
19 To: Michael M Sieving, Esq.
SIEVING LAW GROUP, LLP
20 Attorney for Protestant
8880 Cal Center Drive, Suite 400
21 Sacramento, California 95826

22 Patricia R. Britton, Esq.
Attorney for Respondent
23 NELSON MULLINS RILEY & SCARBOROUGH, LLP
Atlantic Station, 201 17th Street NW, Suite 1700
24 Atlanta, Georgia 30363

25 Steven A. McKelvey Jr., Esq.
Steven B. McFarland, Esq.
Attorneys for Respondent
26 NELSON MULLINS RILEY & SCARBOROUGH, LLP
1320 Main Street, 17th Floor
27 P. O. Box 11070
Columbia, South Carolina 29201

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1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 1. Protestant, Putnam Motors, Inc. dba Putnam Lexus (“Protestant” or “Putnam”), is located
3 at 390 Convention Way, Redwood City, California. Protestant is a new motor vehicle dealer and
4 authorized franchisee of Toyota Motors Sales, U.S.A., Inc. (“Respondent” or “TMS”) for the Lexus brand
5 of vehicles.

6 2. Protestant is represented by Michael M. Sieving, Esq.,¹ of Sieving Law Group, LLP.

7 3. Respondent is a licensed distributor and the franchisor of Protestant. Respondent’s address
8 is 209 Technology Drive, Irvine, California.

9 4. Respondent is represented by Steven A. McKelvey, Esq. and Steven B. McFarland, Esq. of
10 Nelson Mullins Riley & Scarborough, LLP.

11 5. On or about June 12, 2015, Protestant submitted to Respondent a request for an
12 “...increase in the labor rate schedule for the warranty diagnostics, repairs and servicing performed...on
13 behalf of TMS and for which TMS is legally obligated to reimburse...” Protestant. (Protest, p. 2, lines 1-
14 4)²

15 6. By letter dated July 13, 2015, TMS notified Protestant that it was “unable to accommodate
16 [Putnam’s] request, or provide any adjustment to Dealer’s warranty labor reimbursement rate.” This
17 decision was based on what TMS stated were deficiencies in the submission and non-compliance with
18 Policy 7.4. Putnam’s warranty labor rate for Lexus vehicles remains at \$160.00 per hour. (Exhibit A to
19 Protest and [First] Amended Protest)

20 7. The following events indicate the prior proceedings leading up to the current
21 recommendation that the Board dismiss what is now the Second Amended Protest relating to the warranty
22 labor rate.

23 a. The original Protest was filed on July 31, 2015. This Protest asserted two distinctly
24 different claims pursuant to Vehicle Code section 3065.³ One claim related to the hourly labor rate being
25 paid to Putnam for performing warranty services (hereafter “the hourly labor rate claim”). This claim is

26 _____
27 ¹ The Board was notified in an unrelated matter that Mr. Sieving is now with Sieving Law Group, LLP.

28 ² Putnam had requested an increase in its warranty labor rate from its current amount of \$160 per hour to \$185 per hour. (TMS letter of July 13, 2015 denying the request.)

³ All statutory references are to the Vehicle Code unless indicated otherwise.

1 now the separate and sole subject of the Second Amended Protest and this Proposed Order. The other
2 claim of the original Protest related to the inability of Putnam to charge for performing “Safety Recall and
3 Servicing” work on Lexus vehicles due to lack of technician training (hereafter “the technician training
4 claim”). Putnam alleges that it could not charge TMS for such work as Putnam’s technicians were not
5 able to obtain the TMS-mandated training due to the failure of TMS to make such classes available to the
6 technicians. (The technician training claim is now the separate and sole subject of a new protest, PR-
7 2455-15, filed on December 22, 2015 and is not before the Board itself at this time.)

8 b. The [First] Amended Protest was filed on October 7, 2015. This Protest asserted the same
9 two claims as contained in the original Protest and clarified the assertions made by Putnam.

10 c. TMS filed a Motion to Dismiss [First] Amended Protest, and on December 16, 2015, after
11 consideration of the pleadings, the briefs of the parties, and oral arguments, Administrative Law Judge
12 (“ALJ”) Skrocki issued an Order Denying Respondent’s Motion to Dismiss [First] Amended Protest
13 (herein “Order”).⁴ The ALJ concurred with TMS that the Board had no jurisdiction to hear and consider
14 the hourly labor rate claim but concurred with Putnam that there was jurisdiction to hear and consider the
15 technician training claim. As there was just one protest and one motion to dismiss, and because the ALJ
16 found that the Board did have jurisdiction to consider the technician training claim, the Motion to Dismiss
17 [First] Amended Protest was denied. It was contemplated that the Board itself would subsequently act
18 upon the [First] Amended Protest (both as to the jurisdictional issue regarding the hourly labor rate and on
19 the merits of the technician training issue) at such time as the hearing on the merits of the technician
20 training issue had been conducted by the assigned ALJ.

21 d. The Second Amended Protest and a new Protest (PR-2455-15) were both filed on
22 December 22, 2015. Putnam, in the Second Amended Protest, included again the hourly labor rate claim
23 but deleted the technician training claim. The technician training claim is the subject of the new protest.

24 e. Putnam made these latter two filings in order to separate the two claims and have the Order
25 that the Board does not have jurisdiction to consider the hourly labor rate claim brought before the Board
26 itself for its decision (without waiting for the result of the hearing on the merits of the technician training
27

28 ⁴ Selected paragraphs of the Order (Attachment 1) are incorporated herein by reference in Paragraphs 15-20.

1 claim).

2 f. Putnam in its Second Amended Protest (regarding the hourly labor rate only) claims that
3 the December 16, 2015, Order "...effectively dismissed the portion of the Protest and Amended Protest
4 which challenged the hourly warranty labor rate paid by TMS to Putnam (based on the ALJ's
5 determination that the Board lacks jurisdiction to hear this dispute), but denied the motion to dismiss the
6 portion of the Protest and Amended Protest which challenges the training conditions imposed by TMS."
7 By the Second Amended Protest, Putnam addresses only the dispute related to the hourly warranty rate.
8 (Second Amended Protest, p. 4, lines 2-8) "Furthermore, Putnam does not seek additional proceedings
9 before the Board's ALJs regarding the ruling to dismiss the protest related to the hourly warranty labor
10 rate, but instead seeks Board member review of this jurisdictional issue in compliance with the mandate
11 of *Automotive Management Group, Inc. v. New Motor Vehicle Board* (1993) 20 Cal.App.4th 1002, 24
12 Cal.Rptr.2nd 904." (Second Amended Protest, p. 4, lines 10-14)

13 8. Neither party desires further pleadings nor a hearing before an ALJ on the issue of whether
14 the Board has jurisdiction to hear and consider the hourly labor rate issue, that is the sole subject of the
15 Second Amended Protest.

16 9. Putnam has requested that this issue of jurisdiction be presented to the Board for its
17 consideration based upon the prior pleadings of both sides as part of the Motion to Dismiss [First]
18 Amended Protest, the prior hearing on this motion, and the Order (as it applies to the hourly labor rate
19 issue).

20 10. Had there been separate protests filed initially, the ALJ would have recommended to the
21 Board that the Protest regarding the hourly labor rate be dismissed by the Board for lack of jurisdiction.
22 However, the ALJ could not recommend that the Board grant the Motion to Dismiss [First] Amended
23 Protest as it did contain a claim within the Board's jurisdiction (re: technician training). Now that Putnam
24 has filed the Second Amended Protest (limited solely to the hourly labor rate claim), the ALJ recommends
25 that the Second Amended Protest be dismissed in accordance with the findings of "no jurisdiction" as
26 contained in the Order of December 16, 2015.

27 11. Putnam is requesting that only those portions of the Order resulting in and concluding
28 that the Board had no jurisdiction as to the claim relating to the hourly warranty labor rate be considered

1 by the Board at this time.

2 12. During a January 11, 2016, conference call with counsel, ALJ Skrocki concurred that the
3 Second Amended Protest is limited to just the issue regarding the hourly warranty labor rate.

4 13. Both sides agreed that the issue of whether the Board has jurisdiction over this claim had
5 been addressed in the prior proceedings and Order applicable to the [First] Amended Protest and that there
6 is no need for further briefing or additional hearing before an ALJ as to the issue of jurisdiction regarding
7 the Second Amended Protest.

8 14. The ALJ determined that, in accordance with Protestant's request, it would be appropriate
9 and necessary to submit the issue of jurisdiction over the Second Amended Protest to the Board for its
10 decision.

11 **APPLICABLE LAW**

12 15. Section 3065 provides in part as follows:

13 (a) Every franchisor shall properly fulfill every warranty agreement made by it
14 and adequately and fairly compensate each of its franchisees for labor and parts
15 used to fulfill that warranty when the franchisee has fulfilled warranty obligations
16 of diagnostics, repair, and servicing and shall file a copy of its warranty
17 reimbursement schedule or formula with the board. The warranty reimbursement
18 schedule or formula shall be reasonable with respect to the time⁵ and compensation
19 allowed to the franchisee for the warranty diagnostics, repair, and servicing, and all
20 other conditions of the obligation. The reasonableness of the warranty
21 reimbursement schedule or formula shall be determined by the board if a
22 franchisee files a protest with the board. ...

23 (b) In determining the adequacy and fairness of the compensation, the
24 franchisee's effective labor rate charged to its various retail customers may be
25 considered together with other relevant criteria. If in a protest permitted by this
26 section filed by any franchisee the board determines that the warranty
27 reimbursement schedule or formula fails to provide adequate and fair
28 compensation or fails to conform with the other requirements of this section,
within 30 days after receipt of the board's order, the franchisor shall correct the
failure by amending or replacing the warranty reimbursement schedule or formula
and implementing the correction as to all franchisees of the franchisor that are
located in this state.

29 ...
(Emphasis added; Order, Paragraph 25.)

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34 ⁵ There is no claim that the time allowed for the performance of the warranty service is not reasonable.

1 ANALYSIS

2 16. The Board’s jurisdiction per Section 3065 for compensation for warranty service is limited
3 to determining “the reasonableness of the warranty reimbursement schedule or formula”, and if the Board
4 determines that the schedule or formula is not reasonable, the franchisor is mandated by the statute to
5 “correct the failure by amending or replacing the warranty reimbursement schedule or formula and
6 implementing the correction as to all franchisees of the franchisor that are located in this state.” (See
7 footnote 5; Order, Paragraph 27)

8 17. As indicated above, the Protest, Amended Protest and Second Amended Protest are not
9 challenging the reasonableness of the schedule or formula for determining its dealers’ labor rates but
10 rather how the schedule or formula is applied to Putnam. Putnam argues that if the formula were properly
11 applied, its request for an increase in its warranty labor rate should be approved by TMS. Although the
12 Board has jurisdiction to determine if the schedule or formula is reasonable, the Board does not have
13 jurisdiction to resolve a dispute between the parties as to whether the formula is being properly applied by
14 the franchisor to an individual franchisee. (Order, Paragraph 28)

15 18. Any claim of Putnam that it is not being paid what it is contractually or statutorily entitled
16 to receive as its hourly labor rate compensation from TMS for warranty repairs is best pursued in Superior
17 Court or Federal Court in a claim for damages. (Order, Paragraph 29)

18 CONCLUSION

19 19. There is no claim asserted in the Protest, Amended Protest, or Second Amended Protest
20 that the TMS reimbursement schedule or formula for determining the hourly labor rate to be paid to Lexus
21 dealers is not reasonable, but rather the claim is that “[t]he current warranty labor rate paid by TMS to
22 Putnam is unreasonably low, inadequate and unfair...” (Amended Protest, p. 2, lines 11-12) and that
23 “[t]he ‘formula’ utilized by TMS, as applied to Putnam, is unreasonable and does not adequately and
24 fairly compensate Putnam for the labor required to complete the warranty repairs.” (Amended Protest,
25 page 3, lines 5-8; Order, Paragraph 43)

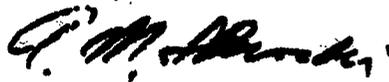
26 20. The Board does not have jurisdiction to hear and consider the issues as stated in the
27 Protest, Amended Protest, or Second Amended Protest relating to the alleged failure of TMS to pay
28 Putnam the higher warranty labor rate Putnam seeks. (Order, Paragraph 44)

1 **PROPOSED ORDER**

2 After consideration of the pleadings, exhibits, and oral arguments, it is hereby ordered that
3 Respondent's Motion to Dismiss [Second] Amended Protest is granted. Protest No. PR-2428-15 *Putnam*
4 *Motors, Inc., dba Putnam Lexus v. Toyota Motor Sales, U.S.A., Inc.* is dismissed with prejudice.
5

6
7 I hereby submit the foregoing which constitutes my
8 proposed order in the above-entitled matter, as the
9 result of a hearing before me, and I recommend this
10 proposed order be adopted as the decision of the
11 New Motor Vehicle Board.

12 DATED: January 26, 2016

13 

14 By: _____
15 ANTHONY M. SKROCKI
16 Administrative Law Judge
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25 Attachment 1

26 Jean Shiomoto, Director, DMV
27 Tim Corcoran, Branch Chief,
28 Occupational Licensing, DMV

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**ORDER DENYING RESPONDENT'S
MOTION TO DISMISS AMENDED
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20 To: Michael M Sieving, Esq.
SIEVING LAW GROUP, LLP
Attorney for Protestant
8880 Cal Center Drive, Suite 400
Sacramento, California 95826

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22 Patricia R. Britton, Esq.
Attorney for Respondent
NELSON MULLINS RILEY & SCARBOROUGH, LLP
23 Atlantic Station, 201 17th Street NW, Suite 1700
Atlanta, Georgia 30363

24
25 Steven A. McKelvey Jr., Esq.
Steven B. McFarland, Esq.
Attorneys for Respondent
NELSON MULLINS RILEY & SCARBOROUGH, LLP
26 1320 Main Street, 17th Floor
P. O. Box 11070
27 Columbia, South Carolina 29201

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ATTACHMENT 1

ORDER DENYING RESPONDENT'S MOTION TO DISMISS AMENDED PROTEST

1 This matter came on regularly for telephonic hearing on Thursday, November 19, 2015, before
2 Anthony M. Skrocki, Administrative Law Judge for the New Motor Vehicle Board ("Board"). Michael
3 M. Sieving, Esq. represented Protestant. Steven B. McFarland, Esq. of Nelson Mullins Riley &
4 Scarborough, LLP represented Respondent.

5 **FACTUAL AND PROCEDURAL BACKGROUND**

6 1. Protestant, Putnam Motors, Inc. dba Putnam Lexus ("Protestant" or "Putnam"), is located
7 at 390 Convention Way, Redwood City, California. Protestant is a new motor vehicle dealer and
8 authorized franchisee of Toyota Motors Sales, U.S.A., Inc. ("Respondent" or "TMS") for the Lexus brand
9 of vehicles.

10 2. Protestant is represented by Michael M. Sieving, Esq.,¹ of Sieving Law Group, LLP.

11 3. Respondent is a licensed distributor and the franchisor of Protestant. Respondent's address
12 is 209 Technology Drive, Irvine, California.

13 4. Respondent is represented by Steven A. McKelvey, Esq. and Steven B. McFarland, Esq. of
14 Nelson Mullins Riley & Scarborough, LLP.

15 5. On or about June 12, 2015, Protestant submitted to Respondent a request for an
16 "...increase in the labor rate schedule for the warranty diagnostics, repairs and servicing performed...on
17 behalf of TMS and for which TMS is legally obligated to reimburse..." Protestant. (Protest, p. 2, lines 1-
18 4)

19 6. By letter dated July 13, 2015, Lexus notified Protestant that it was "unable to
20 accommodate [Putnam's] request, or provide any adjustment to Dealer's warranty labor reimbursement
21 rate." This decision was based on what Lexus stated were deficiencies in the submission and non-
22 compliance with Policy 7.4. Putnam's warranty labor rate for Lexus remains at \$160.00 per hour.
23 (Exhibit A to Protest and Amended Protest)

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27 _____

28 ¹ The Board was notified in an unrelated matter that Mr. Sieving is now with Sieving Law Group, LLP.

First Protest - Filed July 31, 2015

1
2 7. On July 31, 2015, Protestant filed a protest pursuant to Vehicle Code² section 3065
3 alleging that: “The current warranty labor rate paid by TMS to Putnam is unreasonably low, inadequate
4 and unfair in consideration of Putnam’s effective labor rate charged its various retail customers and other
5 relevant criteria set forth in...Section 3065.” (Protest, p. 2, lines 11-13)

6 8. The protest additionally alleged that “... Putnam performs various Safety Recall and
7 Servicing work pursuant to the policies and procedures developed by TMS. Under these policies and
8 procedures, Putnam (and other dealers) are required to [send] a designated number of the service
9 technicians [to] attend and complete Core Technical Classes [herein “Classes”] that are administered by
10 TMS.” (Protest, p. 2, lines 14-18)

11 9. Protestant alleges that although the technicians are required to attend and complete these
12 Classes, the Classes have been full for a substantial period of time and the technicians have not been
13 permitted to obtain the required training.

14 10. The protest specifically alleges that:

15 (a) “According to the TMS policies and procedures, Putnam (and other dealers) are not
16 eligible for warranty reimbursement for Safety Recall and Servicing work unless the dealer is in full
17 compliance with the technician training requirements imposed by TMS. The technician training
18 requirements of TMS change from time to time.” (Protest, p. 2, lines 18-22)

19 (b) “In an effort to fully comply with the TMS training requirements discussed above, Putnam
20 has sought to enroll a number of its technicians in the TMS training classes. For many months, TMS has
21 responded that the training classes are ‘full’, and the Putnam technicians have been ‘waitlisted’ until some
22 unspecified future class. Many of the Putnam technicians have been waiting for a substantial period of
23 time for TMS training classes to become available with no firm commitment from TMS as to when, if
24 ever, these technicians will be able to attend the TMS required classes. (Protest, p. 2, lines 23-28)

25 (c) “Putnam does not dispute the policy of TMS to require that the dealership technicians
26 receive adequate training. However, TMS requires complete compliance with its training guidelines in
27 _____

28 ² Unless otherwise indicated all section references are to the California Vehicle Code.

1 order for Putnam to be eligible for reimbursement of the Safety and Recall Servicing claims. Putnam is
2 obligated by contract and statute to perform the service work. TMS has not devoted adequate resources to
3 its training program to ensure that these technicians receive the mandatory training in a reasonable time.
4 The implementation of the TMS policies and procedures in this regard has resulted in an unreasonable
5 situation whereby Putnam is required to perform these services and is not eligible to submit claims to
6 TMS for reimbursement for these services due to the fact that TMS refuses or has failed to provide the
7 technician training as required by the policies and procedures it seeks to enforce.” (Protest, p. 3, lines 1-
8 9)

9 11. As to Putnam’s warranty labor rate, Putnam requested the Board “...order Respondent to
10 correct the failure of TMS [the Respondent] to provide adequate and reasonable compensation to Putnam
11 based upon Putnam’s request for an increase in its warranty reimbursement labor rate.” (Protest, p. 3, lines
12 17-19)

13 12. As to the requirement regarding technician training, Putnam also requested that the Board
14 “... order Respondent to correct the failure of TMS [the Respondent] to provide adequate and reasonable
15 compensation to Putnam based upon the implementation of the training policies and procedures of TMS
16 related to the Safety and Recall Warranty Work in a manner consistent with California Law...” (Protest,
17 p. 3, lines 20-23)

18 13. A pre-hearing conference to establish a tentative merits hearing date and discovery
19 schedule was held on September 8, 2015 with ALJ Skrocki presiding. However, no dates were set as the
20 ALJ pointed out potential problems regarding the Board’s jurisdiction as to the issues raised by Putnam
21 and the relief being sought in the Protest. After a discussion, counsel for Protestant stated his intention to
22 file an Amended Protest and counsel for Respondent stated his intention to then file a Motion to Dismiss.

23 **Amended Protest - Filed October 7, 2015**

24 **As to the allegations regarding the warranty labor rate paid to Protestant**

25 14. In the Amended Protest, Protestant alleges that: “The current warranty labor rate paid by
26 TMS to Putnam is unreasonably low, inadequate and unfair in consideration of Putnam’s effective labor
27 rate charged its various retail customers and other relevant criteria as set forth in Vehicle Code
28 Section 3065.” (Amended Protest, p. 2, lines 11-13)

1 15. Protestant also alleges that “[t]he ‘formula’ utilized by TMS, as applied to Putnam, is
2 unreasonable and does not adequately and fairly compensate Putnam for the labor required to complete
3 the warranty repairs.” (Amended Protest, p. 3, lines 6-8) Protestant “... is seeking an order from the
4 Board that the formula, as applied to Putnam, is unreasonable.”³ (Amended Protest, p. 3, lines 11-12)

5 **As to the allegations regarding the policies and practices of TMS regarding payment for**
6 **Safety Recall and Servicing work**

7 16. Protestant alleges that, under the TMS policies and procedures, “... Putnam (and other
8 dealers) are required to have a designated number of the service technicians attend and complete [Classes]
9 that are administered by TMS. According to the TMS policies and procedures, Putnam (and other dealers)
10 are not eligible for warranty reimbursement for Safety Recall and Servicing work unless the dealer⁴ is in
11 full compliance with the technician training requirements imposed by TMS. The technician training
12 requirements of TMS change from time to time.” (Amended Protest, p. 3, lines 17-21)

13 17. The Amended Protest then alleges that, “[s]ince TMS requires complete compliance with
14 its training guidelines in order for Putnam to be eligible for reimbursement of the Safety and Recall
15 Servicing claims, the requirement for completion of such training is a condition, based upon the
16 unavailability of this training, is an unreasonable ‘condition’ as referenced in Vehicle Code Section
17 3065(a).” (Amended Protest, p. 3, line 28 and p. 4, lines 1-3)

18 18. As with the first protest, Protestant requests:

19 (a) As to the warranty labor reimbursement rate: “[t]hat the Board...order Respondent to
20 correct the failure of TMS [the Respondent] to provide adequate and reasonable compensation to Putnam
21 based upon Putnam’s request for an increase in its warranty reimbursement labor rate.” And,
22
23

24 ³ During oral arguments on the motion, counsel for Putnam raised for the first time a claim that what was filed with the Board
25 by TMS and what both parties have been calling the warranty reimbursement schedule or formula does not legally constitute a
26 “warranty reimbursement schedule or formula” as required by Section 3065. No ruling is made at this time as to the merits of
27 this claim. For purposes of this motion, what was filed by TMS is being treated as a warranty reimbursement schedule or
28 formula.

⁴ If Protestant’s statement is correct, there could be an anomalous result that reimbursement for Safety Recall work would be
denied even if the particular technician who performed the work was “in full compliance with the technician training
requirements imposed by TMS” but the “dealer” had not met the TMS requirements as to the “designated number” of service
technicians (if more than one) having attended and completed the Classes. (See paragraph 33 regarding TMS’ statement
regarding this condition)

1 (b) As to the requirement of technician training: “[t]hat the Board...order Respondent to
2 correct the failure of TMS [the Respondent] to provide adequate and reasonable compensation to Putnam
3 based upon the implementation of the training policies and procedures of TMS related to the Safety and
4 Recall Warranty Work in a manner consistent with California Law...”. (Amended Protest, page 4, lines
5 17-23)

6 **MOTION TO DISMISS AMENDED PROTEST**

7 **Respondent’s Assertions in its Motion to Dismiss Amended Protest**

8 19. Respondent filed its Motion to Dismiss Amended Protest on October 22, 2015. It contends
9 that the Amended Protest should be dismissed because the Vehicle Code does not give the Board subject
10 matter jurisdiction to adjudicate this dispute. Respondent contends that Section 3065 protests relating to
11 warranty labor rates are “limited to determining the reasonableness of the franchisor’s warranty
12 reimbursement schedule or formula itself...Nothing in the statute gives a dealer the right to file, or
13 authorizes the Board to adjudicate, a protest challenging the application of that schedule or formula to one
14 individual dealer.” There is no authority in Section 3065 for the Board to require a franchisor to increase
15 an individual dealer’s warranty labor rate. (Motion to Dismiss Amended Protest, p. 3, lines 10-22)
16 Respondent also asserts “[t]he Amended Protest contains no allegation that TMS’s [sic] reimbursement
17 schedule or formula is unreasonable or otherwise deficient....The Amended Protest also does not ask the
18 Board to order TMS to amend or correct its schedule or formula as to all franchised Lexus dealers in the
19 state.”⁵ (Motion to Dismiss Amended Protest, p. 4, lines 2-8)

20 20. Respondent’s Motion also alleges that Protestant is improperly challenging the application
21 of the condition requiring training prior to being reimbursed for Safety Recall and Servicing work only as
22 to Protestant’s technicians and not the condition itself. Respondent contends that nothing in Section 3065
23 authorizes such a protest which challenges the implementation of a condition to one individual dealer.

24 _____
25 ⁵ It is unclear why such an omission regarding an order of the Board to TMS as to “all franchised Lexus dealers in the state”
26 may be significant. The Board’s authority appears to be limited to determining if the schedule or formula fails to meet the
27 statutory standards (such as “adequate and fair” and “reasonable”). If the Board determines the statutory standards are not met,
28 it is 3065(b) itself that mandates what the franchisor must do and when it must be done, without the need for a specific order in
that regard. The relevant language states: “...within 30 days after receipt of the board's order, the franchisor shall correct the
failure by amending or replacing the warranty reimbursement schedule or formula and implementing the correction as to all
franchisees of the franchisor that are located in this state.”

1 (Motion to Dismiss Amended Protest, p. 5, lines 1-16)

2 **Protestant's Assertions in its Opposition to the Motion to Dismiss Amended Protest**

3 21. On November 6, 2015, Protestant filed its Opposition to Respondent's Motion to Dismiss.
4 Protestant contends that it is the Board's duty to hear a protest presented by a franchisee pursuant to
5 Section 3065, which requires a "franchisor to adequately and fairly compensate each of its franchisees for
6 warranty labor and the warranty reimbursement schedule or formula has to be reasonable 'with the respect
7 to the **time and compensation allowed to the franchisee**.'" (Opposition, p. 4, lines 13-20; emphasis in
8 original) Protestant argues that nothing in Section 3065 or the schedule/formula provided by TMS
9 requires all dealers receive the same warranty labor rate. The Board is not deprived of subject matter
10 jurisdiction over a Section 3065 protest filed by an individual dealer claiming that it is not receiving
11 fair and adequate compensation just because that schedule or formula may arguably provide a dealer in a
12 different part of California with adequate compensation. (Opposition, p. 6, lines 7-27)

13 22. Additionally, Protestant contends that the Board has jurisdiction to consider the
14 reasonableness of "all other conditions of the obligation." Protestant asserts that, the "... unavailability of
15 training is an unreasonable condition of Respondent's warranty reimbursement schedule or formula and
16 therefore subject to the Board's jurisdiction." (Opposition, p. 8, lines 18-26)

17 **Respondent's Assertions in its Reply in Support of Motion to Dismiss Amended Protest**

18 23. Respondent's reply supporting its motion to dismiss was filed on November 16, 2015.
19 Respondent contends that the Board does not have jurisdiction to adjudicate disputes seeking an increase
20 in the warranty labor rate paid to an individual dealer. (Reply, p. 2, lines 2-13) The Board's jurisdiction
21 in Section 3065 is limited to three issues according to Respondent: (1) "the reasonableness of the
22 warranty reimbursement schedule or formula"; (2) "a reduction in time and compensation applicable to
23 specific parts or labor operations"; and (3) protests challenging a manufacturer's disapproval or
24 chargeback of warranty claims. (Reply, p. 2, lines 21-28, p. 3, lines 1-6) None of these give dealers the
25 right to file a protest seeking an increase in an individual dealer's warranty labor rate or give the Board
26 the authority to order an increase. (Reply, p. 3, lines 7-10)

27 24. As to the condition regarding the TMS Classes for technicians, TMS asserts that
28 Protestant's claim that Section 3065(a) gives the Board jurisdiction to adjudicate its claims regarding

1 technician training is inaccurate because the language makes it clear that these protests are limited to
2 challenges to the reasonableness of the condition itself and not the application of that condition to
3 individual dealers. (Reply, p. 5, lines 11-14)

4 APPLICABLE LAW

5 25. Section 3065 provides in part as follows:

6 (a) Every franchisor shall properly fulfill every warranty agreement made by it
7 and adequately and fairly compensate each of its franchisees for labor and parts
8 used to fulfill that warranty when the franchisee has fulfilled warranty obligations
9 of diagnostics, repair, and servicing and shall file a copy of its warranty
10 reimbursement schedule or formula with the board. The warranty reimbursement
11 schedule or formula shall be reasonable with respect to the time⁶ and compensation
12 allowed to the franchisee for the warranty diagnostics, repair, and servicing, and all
13 other conditions of the obligation. The reasonableness of the warranty
14 reimbursement schedule or formula shall be determined by the board if a
15 franchisee files a protest with the board. ...

16 (b) In determining the adequacy and fairness of the compensation, the
17 franchisee's effective labor rate charged to its various retail customers may be
18 considered together with other relevant criteria. If in a protest permitted by this
19 section filed by any franchisee the board determines that the warranty
20 reimbursement schedule or formula fails to provide adequate and fair
21 compensation or fails to conform with the other requirements of this section,
22 within 30 days after receipt of the board's order, the franchisor shall correct the
23 failure by amending or replacing the warranty reimbursement schedule or formula
24 and implementing the correction as to all franchisees of the franchisor that are
25 located in this state.

26 ...
27 (Emphasis added.)

28 26. Section 3066(c) provides:

(c) Except as otherwise provided in this chapter, in a hearing on a protest alleging
a violation of, or filed pursuant to, Section 3064, 3065, 3065.1, 3074, 3075, or
3076, the franchisee shall have the burden of proof, but the franchisor has the
burden of proof to establish that a franchisee acted with intent to defraud the
franchisor where that issue is material to a protest filed pursuant to Section 3065,
3065.1, 3075, or 3076.

29 ANALYSIS

30 Reasonableness of the Warranty Reimbursement Schedule or Formula

31 27. The Board's jurisdiction per Section 3065 is limited to determining "the reasonableness of
32 the warranty reimbursement schedule or formula", and if the Board determines that the schedule or
33 formula is not reasonable, the franchisor is mandated by the statute to "correct the failure by amending or
34

35 _____
36 ⁶ There is no claim that the time allowed for the performance of the warranty service is not reasonable.

1 replacing the warranty reimbursement schedule or formula and implementing the correction as to all
2 franchisees of the franchisor that are located in this state.” (See footnote 5.)

3 28. As indicated above, the Protest and Amended Protest are not challenging the
4 reasonableness of the schedule or formula for determining its dealers’ labor rates but rather how the
5 schedule or formula is applied to Putnam. Putnam argues that if the formula were properly applied, its
6 request for an increase in its warranty labor rate should be approved by TMS. Although the Board has
7 jurisdiction to determine if the schedule or formula is reasonable, the Board does not have jurisdiction to
8 resolve a dispute between the parties as to whether the formula is being properly applied by the franchisor
9 to an individual franchisee.

10 29. Any claim of Putnam that it is not being paid what it is contractually or statutorily entitled
11 to receive as its hourly labor rate compensation from TMS for warranty repairs is best pursued in Superior
12 Court or Federal Court in a claim for damages.

13 **Reasonableness of the Condition Requiring Technician Training**

14 30. As indicated above, Section 3065(a) provides in part as follows:

15 **...The warranty reimbursement schedule or formula shall be reasonable with**
16 **respect to** the time and compensation allowed to the franchisee for the warranty
17 **diagnostics, repair, and servicing, and all other conditions of the obligation.** The
18 reasonableness of the warranty reimbursement schedule or formula shall be
19 determined by the board if a franchisee files a protest with the board. ...
(Emphasis added.)

20 31. TMS does not dispute that its Warranty Policy and Procedures contain a condition
21 requiring technician training in order for the dealer to be eligible for reimbursement for what TMS
22 describes as “certain” warranty repairs and there is no dispute that the Board has jurisdiction to determine
23 if the condition is reasonable.⁷ However, the parties have described differently what is required by the
24 condition as well as the type of work to which the condition applies. None of the documents before the
25 Board include the specific language of the condition or conditions in question.

26 32. Putnam, in its Protest and Amended Protest, states that the language of the condition

27 ⁷ Whether the condition, which both sides admit exists, is or is not expressly part of what has been filed with the Board as the
28 “warranty reimbursement schedule or formula” is irrelevant as the condition itself must be reasonable and could affect whether
the schedule or formula is reasonable.

1 requires that:

2 “... Putnam (and other dealers) are **required to have a designated number of the service**
3 **technicians attend and complete Core Technical Classes** that are administered by TMS.
4 According to the TMS policies and procedures, **Putnam (and other dealers) are not**
5 **eligible for warranty reimbursement for Safety Recall and Servicing work unless the**
6 **dealer is in full compliance with the technician training requirements imposed by**
7 **TMS.** The technician training requirements of TMS change from time to time.” (Protest,
8 p. 2, lines 15-22; Amended Protest, p. 3, lines 17-21; emphasis added)⁸

9 33. In comparison, TMS states: “[t]he ‘condition’ to **warranty reimbursement at issue** is the
10 requirement that **technicians responsible for completing repairs must be adequately trained**⁹ before
11 performing those repairs on customer vehicles.”¹⁰ (Reply, p. 5, lines 19-21; emphasis added) There is no
12 reference made by TMS to “Safety Recall and Servicing”.

13 34. The statements of Putnam indicate that Lexus dealers will not be entitled to reimbursement
14 for Safety Recall warranty repairs unless some designated (but unstated) number of the dealer’s
15 technicians have completed the TMS-mandated training whereas the statement by TMS focuses upon
16 whether the specific technician actually performing the repairs has received the required training and
17 refers only to “certain warranty work”. Putnam’s interpretation could mean, even if the specific technician
18 actually performing the Safety Recall service had completed all of the TMS-required training, the dealer
19 could not obtain reimbursement unless a certain number of all of its technicians had completed the TMS
20 training. In comparison, the statement by TMS could mean the dealer would be reimbursed for the
21 warranty work so long as the specific technician actually performing the work had received the required
22 training for that type of repair.

23 35. Both parties refer to the condition as being part of the TMS policies and procedures
24 regarding warranty reimbursement with a specific reference to a “Lexus Warranty Policy and Procedures
25
26

27 ⁸ At the hearing on the motion, when the ALJ inquired as to whether the condition of technician training applied only to
28 Safety Recall Service work or to other warranty work as well, counsel for Putnam stated: “The bulk of the claims that have
been denied were based upon this recall, safety recall work that was done. However, there are some with respect to actual
warranty work itself. (RT, p. 15, lines 1-25; p. 16, lines 1-4)

⁹ “[A]dequately trained” as required by TMS is that the technician(s) must have completed the TMS-required and TMS-
administered Classes.

¹⁰ TMS also refers to the issue as involving “...certain warranty repairs performed by certain of its technicians who have not
yet been trained to complete those repairs. ...”, also indicating that the condition applies to the individual technician rather than
some designated number of technicians required by TMS to have completed the training. (Reply, p. 5, lines 6-7) During oral
argument at the hearing on the motion, counsel for both parties indicated there were different levels of training for the work to
be done and counsel for TMS indicated that the issues related to specific classes for specific repairs. (RT, p. 17, lines 4-7)

1 Manual.” (See page 18 of Exhibit B to Amended Protest, which is Lexus’ Warranty Reimbursement
2 Schedule or Formula submitted by letter dated March 21, 2014.) This Manual is not before the Board.

3 36. It is critical that the Board have the language of the condition before it.¹¹ The parties have
4 advanced their own differing interpretations of the condition with their variations relating to which, or
5 how many, technicians must complete the training, as well as the type of warranty work to which the
6 condition applies, and the extent or level of the training needed. Pursuant to Section 3065 the Board is
7 empowered to pass on the reasonableness of the condition but cannot do so without having, as a starting
8 point, its exact language.

9 37. It is noted that Lexus claims that “... Putnam Lexus is not disputing this condition to
10 warranty reimbursement, and has expressly admitted this condition is reasonable and appropriate. (Initial
11 Protest ¶ 8).” (Reply, p. 5, lines 22-25) However, the actual statement in the Initial Protest is that “Putnam
12 does not dispute the policy of TMS to require that the dealership technicians receive adequate training.”
13 There is a difference between a statement agreeing with a policy “to require that the dealership
14 technicians receive adequate training” (that is unlikely to be disputed by anyone) and agreeing that the
15 condition imposed by TMS “is reasonable and appropriate” under the alleged circumstances. Even
16 though the exact language of the condition is unknown, there is no dispute that the condition imposed by
17 TMS does not merely state that the technicians receive “adequate training” but rather that the technicians
18 complete the TMS-established and administered Classes.

19 38. The Protest and Amended Protest make it clear that Putnam is not admitting that the
20 condition regarding technician training is reasonable and appropriate. The availability of the TMS-

21 _____
22 ¹¹ The exact wording of the condition is needed in order to determine which party’s interpretation of the condition is correct as
23 to (a) The number of technicians that must have completed the TMS Classes; (b) The type of work subject to the condition; and
24 (c) The level or type of training needed for the technician to be deemed qualified for that particular repair. In addition to these
25 determinations, the exact wording will be needed to determine if the condition is reasonable. It is alleged that at present Putnam
26 and other Lexus dealers are performing the required warranty work and, because of the condition, are being denied
27 compensation for performing what is an obligation of TMS. There is thus potential unfair hardship upon the dealers, combined
28 with possible unjust enrichment to TMS. Even more significantly, there are possible adverse effects upon the following: (1)
Present Lexus owners and potential future owners whose vehicles are serviced by technicians who had not completed the TMS-
required training; (2) Lexus owners and drivers who likely have no knowledge of the fact that their Lexus vehicles have had
Safety Recall work performed by technicians that TMS implicitly considers unqualified to perform the work; (3) Present Lexus
owners who have not been able to have the Safety Recall work performed on their vehicles due to the lack of technicians who
had completed the required Classes; and (4) Most important, members of the public (in addition to the owners/occupants of
Lexus vehicles) who may be exposed to potential risk of injury or death if the “Safety Recall Service” work is not properly
performed, or not promptly performed, or not performed at all.

1 required training courses is entirely within the control of TMS and Putnam alleges that TMS through its
2 actions or inaction is preventing the occurrence of the condition that TMS itself created. If this can be
3 established, it is possible that the Board would conclude that the condition is not reasonable. This could
4 be especially likely if it is in fact established that the public safety is at risk if the repairs required by the
5 recalls are not promptly accomplished.

6 39. Whether the condition (once its actual wording is known) is reasonable cannot be decided
7 in the abstract, especially as it is undisputed that the occurrence of the condition is largely within the
8 control of TMS. Putnam is alleging that TMS is failing to provide the technician training that TMS
9 mandates as a condition to the reimbursement of the Safety Recall (or other warranty) services thus
10 converting what may on its face appear to be a reasonable condition into a condition that is unreasonable.

11 40. An evidentiary hearing on the merits of Putnam's protest is necessary in order to determine
12 whether the condition is reasonable (under either party's interpretation). Such a determination may
13 include evaluating such facts as:

- 14 ■ The potential likelihood of risk of injury or even death to the owners/occupants of the vehicles or
15 other persons;
- 16 ■ The number of technicians statewide that must be trained;
- 17 ■ The number of classes made available by TMS at any one time;
- 18 ■ The frequency of the classes;
- 19 ■ The number of technicians that may be trained in any one class;
- 20 ■ The number of pending or anticipated warranty recall programs/campaigns;
- 21 ■ The number of Lexus vehicles subject to recall in these programs/campaigns;
- 22 ■ Whether the condition is applicable to Safety Recall service work only, or all recall work (whether
23 safety related or not), or to all warranty work even though not part of a recall;
- 24 ■ Whether TMS gives priority to classes applicable to training technicians to perform Safety Recall
25 service (however this term may be defined);
- 26 ■ If Putnam's interpretation of the terms of the condition is correct, how TMS determines the
27 number of technicians that must complete the training before a dealership is eligible for
28 reimbursement;

