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8 **STATE OF CALIFORNIA**
9 **NEW MOTOR VEHICLE BOARD**

10
11 PUTNAM MOTORS, INC., dba PUTNAM
12 LEXUS,

13 Protestant,

14 v.

15 TOYOTA MOTOR SALES, U. S. A, INC.,

16 Respondent.

17 Protest No.: PR-2428-15

**PROTESTANT’S OPPOSITION TO
RESPONDENT’S MOTION TO
DISMISS AMENDED PROTEST DUE
TO ALLEGED LACK OF SUBJECT
MATTER JURISDICTION**

Hearing: November 19, 2015
Time: 10:00 a.m.
ALJ: Anthony M. Skrocki

18 Protestant, PUTNAM AUTOMOTIVE GROUP, INC., dba PUTNAM LEXUS (“Putnam” or
19 “Protestant”) hereby opposes the Motion of Respondent, TOYOTA MOTOR SALES, U.S.A., INC.
20 (“TMS” or “Respondent”) to Dismiss Amended Protest due to alleged lack of subject matter jurisdiction,
21 as follows:

22 **INTRODUCTION**

23
24 With its Amended Protest¹, Protestant challenges the adequacy, fairness and reasonableness of
25 the compensation allowed to it for warranty labor pursuant to Respondent’s warranty reimbursement
26 schedule or formula, the determination of which is clearly within the Board’s subject matter jurisdiction
27

28 _____
¹ Any reference herein to Protestant’s Protest, refers to Protestant’s Amended Protest PR-2428-15 on file with the Board.

1 pursuant to Vehicle Code §3065(a) and (b).²

2 With its Amended Protest, Protestant further challenges Respondent's other conditions and
3 obligations and prays that the Board order Respondent to correct its failure to provide adequate, fair and
4 reasonable compensation to Putnam based upon the implementation of the training policies and
5 procedures of Respondent related to the Safety and Recall Warranty Work in a manner consistent with
6 California Law.

7
8 Sections 3050 and 3065 establish not only subject matter jurisdiction over Protestant's Amended
9 Protest, but specifically make it the duty of the New Motor Vehicle Board ("the Board") to hear such
10 Protests and Sections 3066 and 3067 establish a procedure for hearing and decision on the Protests.

11 Therefore, Protestant seeks a hearing before the Board to establish that Respondent is failing to
12 adequately and fairly compensate each of its franchisees, specifically Putnam, for warranty labor, that
13 its warranty reimbursement schedule or formula is not reasonable with respect to compensation allowed
14 to the franchisee, in this case Putnam, and that Respondent imposes unreasonable conditions on
15 Protestant in connection with its warranty reimbursement schedule or formula, contrary to Section 3065.
16

17 **RELEVANT CALIFORNIA VEHICLE CODE SECTIONS**

18 Section 3050 reads, in relevant part, as follows:

19 **Duties**

20 The board shall do all of the following:

21 ...

22 **(d)** Hear and decide, within the limitations and in accordance with the procedure
23 provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064,
24 3065, 3065.1, 3070, 3072, 3074, 3075, or 3076. A member of the board who is a new
25 motor vehicle dealer may not participate in, hear, comment, advise other members
26 upon, or decide, any matter involving a protest filed pursuant to Article 4
(commencing with Section 3060), unless all parties to the protest stipulate otherwise.

27 //

28 _____
² All statutory references herein shall be to the California Vehicle Code, unless otherwise noted.

1 Section 3065 provides, in relevant part, as follows:

2 **Warranty reimbursement**

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

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

23 ...

24 Section 3066 reads, in relevant part, as follows:

25 **Hearings on protests; Burden of proof; Participation by members who are new**
26 **motor vehicle dealers**

27 (a) Upon receiving a protest pursuant to Section 3060, 3062, 3064, 3065, 3065.1,
28 3070, 3072, 3074, 3075, or 3076, the board shall fix a time within 60 days of the
order, and place of hearing, ...

(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. ...

Section 3067 provides, in relevant part, as follows:

Decision

(a) The decision of the board shall be in writing and shall contain findings of fact and
a determination of the issues presented. The decision shall sustain, conditionally
sustain, overrule, or conditionally overrule the protest. Conditions imposed by the
board shall be for the purpose of assuring performance of binding contractual
agreements between franchisees and franchisors or otherwise serving the purposes of

1 this article or Article 5 (commencing with Section 3070). If the board fails to act
2 within 30 days after the hearing, within 30 days after the board receives a proposed
3 decision where the case is heard before an administrative law judge alone, or within
4 a period necessitated by [Section 11517 of the Government Code](#), or as may be
5 mutually agreed upon by the parties, then the proposed action shall be deemed to be
6 approved. Copies of the board's decision shall be delivered to the parties personally
7 or sent to them by registered mail, as well as to all individuals and groups that have
8 requested notification by the board of protests and decisions by the board. The board's
9 decision shall be final upon its delivery or mailing and a reconsideration or rehearing
10 is not permitted.

11 **(b)** Notwithstanding subdivision (c) of [Section 11517 of the Government Code](#), if a
12 protest is heard by an administrative law judge alone, 10 days after receipt by the
13 board of the administrative law judge's proposed decision, a copy of the proposed
14 decision shall be filed by the board as a public record and a copy shall be served by
15 the board on each party and his or her attorney.

16 ARGUMENT

17 **A. The Board has subject matter jurisdiction to hear Protests concerning 18 compensation pursuant to Section 3065.**

19 Section 3050, titled “Duties”, not only allows the Board to hear a Protest “presented by a
20 franchisee pursuant to ... 3065 ...”, but the Section goes so far as to make it the Board’s duty. (See
21 Vehicle Code Section 3050).

22 Section 3065 in turn requires a franchisor to adequately and fairly compensate each of its
23 franchisees for warranty labor and the warranty reimbursement schedule or formula has to be reasonable
24 “with the respect to the **time and compensation allowed to the franchisee**”. (See Section 3065(a),
25 emphasis added).

26 Protestant, at present, does not protest the time Respondent allows for warranty repairs
27 in the reimbursement context, which time is reimbursed as a flat rate according to Respondent,
28 i.e. Respondent allows the same flat time to all of its California dealers for the same type of
repair and “[u]nder certain circumstances, dealers are permitted to request “straight time” rather
than “flat time”. (See page 3 of Toyota’s Letter dated March 21, 2014 in response to the Board’s
request for information, on file as Exhibit B to Protestant’s Amended Protest.) In its March 21,
2014 letter, Respondent acknowledges its flat rate policy for determining how many hourly units
can be billed by a dealer for a specific warranty repair item. (Ibid.)

1 By its protest, Putnam *does* however challenge the compensation allowed to it by Respondent
2 TMS, which is allowed under Section 3065(a). (See Amended Protest PR-2428-15, pg. 4., lines 17-19;
3 see Respondent’s Motion to Dismiss, pg. 1, lines 2-3). Section 3050 and 3065 clearly and expressly
4 allow such a Protest to challenge warranty reimbursement compensation made to the franchisee, and
5 Sections 3066 and 3067 provide for the manner in which Protests are heard and decided upon.

6
7 In its same March 21, 2014 letter, Respondent states that it uses enclosed Document pages 18
8 and 19 as part of its warranty reimbursement schedule or formula in determining the labor rate
9 reimbursed to dealers for warranty work. (See March 21, 2014 letter attached as Exhibit B to Protestant’s
10 Amended Protest on file, pgs. 2 and 3 as well as bates numbered pages 18 and 19 attached thereto). The
11 adequacy, fairness and reasonableness of determining Protestant’s compensation pursuant to
12 Respondent’s warranty reimbursement schedule or formula is one of the issues properly before the
13 Board for its determination.

14 **B. Protestant has standing to protest only as it pertains to its own rights and interests - Any**
15 **order of the Board on this Amended Protest can be applied to all dealers in the State of**
16 **California pursuant to Respondent’s schedule or formula.**

17 Respondent urges this Board to dismiss Protestant’s Amended Protest because the Amended
18 Protest only seeks relief for a single dealer, namely for Protestant. (See Motion to Dismiss, page 1, lines
19 3 and 24). Respondent argues that this Board does not have subject matter jurisdiction to adjudicate this
20 Protest with respect to “a single, individual Lexus dealer known as Putnam Lexus.” (See Motion to
21 Dismiss, page 1, line 3). Respondent’s argument is incorrect for several reasons.

22 It is well settled that “a plaintiff generally must assert his own legal rights and interests...”. (See
23 *Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330,
24 1341 [9 Cal. Rptr. 3d 477]). Section 3065 reinforces this by specifically conferring the right to protest
25 upon where a dispute arises “with respect to the time and compensation allowed to the franchisee
26 [singular] for the warranty, diagnostics, repair and servicing, and all other conditions of the obligation”.
27 (See Section 3065(a)). The application of any subsequent Board order after a hearing on this Amended
28 Protest is not at issue in a jurisdictional motion. How the Board fashions any decision, and how the
franchisor applies any such decision, is an issue separate and distinct from the issue of subject matter

1 jurisdiction over the dispute.

2 Section 3065 specifically allows for Board jurisdiction “if a franchisee files a protest with the
3 board”. Section 3065 does not require that all franchisees in the State of California challenge the
4 warranty reimbursement schedule or formula. (See Section 3065(a). General standing rules as well as
5 the language of the statute in question clearly provide standing to each individual franchisee to protest
6 as it pertains to its rights and interests.

7 Any discussion regarding the ultimate corrective response by the franchisor, as a result of any
8 Board decision after hearing on such a Protest, is premature at this time and in any event does not affect
9 the subject matter jurisdiction of the Board over this Amended Protest. In fact, the first sentence of
10 3065, subsection (b) again reinforces the subject matter jurisdiction of the Board to hear this type of
11 Protest, by making specific reference to the Board’s ability to consider “the franchisee’s [singular]
12 effective retail labor rate” in determining the adequacy and fairness of the warranty compensation
13 allowed to that franchisee. (See Section 3065(b)). Nothing in Section 3065 or the schedule/formula
14 provided by TMS requires that all dealers be provided with the same labor rate, nor is true in practice.
15 As the Board knows well, the retail labor rate required to provide adequate and fair compensation for
16 dealers throughout the state varies based upon a number of factors, including the fixed costs associated
17 with running the dealership and the variable costs associated with the market rate for technicians in any
18 given area. TMS admits this is its schedule as applied by its formula, attached to the Amended Protest.
19 By way of example, a fair and adequate reimbursement compensation rate for a dealer in Ukiah may
20 indeed be significantly less than for a dealer located in Beverly Hills, simply because of the differences
21 in the land lease or acquisition costs and the hourly wages required to be paid to the technicians due to
22 the higher cost of living in the Beverly Hills area. Nothing in Section 3065 deprives the Board of subject
23 matter jurisdiction over a protest, filed by an individual dealer claiming that it is not receiving adequate
24 and fair compensation (a requirement of Section 3065(a)), simply because that schedule or formula may
25 arguably provide a dealer located in a different part of California (and obviously a different PMA) with
26 adequate compensation. An interpretation to the contrary would eviscerate Section 3065, and render it
27 meaningless. Under Respondent’s interpretation of Section 3065, either *all* dealers in California would
28 be required to file protests alleging that the schedule and/or formula does not provide adequate and fair

1 compensation (which logistically would not occur), or a *single franchisee*, presumably without standing
2 to file on the other dealer's behalf, could file a protest and then be required to prove that the schedule
3 and/or formula as implemented does not provide *all* dealer with adequate and fair compensation under
4 Section 3065(b), taking into consideration each dealer's unique costs of doing business in their
5 respective market areas. The burden of proof would be insurmountable for any protesting dealer under
6 Respondent's analysis, and the discovery alone would require production of confidential financial
7 information for each franchisee in the State, something that simply would not occur in practice. Clearly,
8 this result was not contemplated by the Legislature in enacting or amending Section 3065. Requiring a
9 protesting dealer to meet this burden at a jurisdictional level would nullify any protest rights under
10 Section 3065, and would simply nullify the requirement that the franchisor provide adequate and
11 reasonable compensation for warranty claims. If the Legislature truly intended this result, it would
12 have simply removed Section 3065 from the Vehicle Code and the rights afforded franchisees thereby.

13 Putnam recognized that Section 3065(b), provides that "...the franchisor shall correct the failure
14 by amending or replacing the warranty reimbursement schedule or formula and implementing the
15 correction as to all franchisees of that franchisor that are located in this state". However, it does not
16 follow from this sentence that the Board lacks subject matter jurisdiction to hear and decide this instant
17 Protest. This would merely leave Respondent, as franchisor, to decide how a decision from the Board
18 after hearing on the Amended Protest, if in favor of Protestant, would require to be implemented as to
19 *all* franchisees of Respondent that are located in this state. It may very well be determined that the
20 schedule (and/or formula) provides many of the TMS dealers with adequate and fair compensation, and
21 no amendments are required. There may be extensive changes required. In any event, this issue is
22 premature and does not affect the Board's jurisdiction at this juncture.

23 Respondent states that it "does not use a mathematical formula in determining the dealer's labor
24 rate." (See 3. Of Respondent's March 21, 2014 letter, attached as Exhibit B to the Amended Protest).
25 Instead, as part of its warranty reimbursement schedule or formula, Respondent states that it considers
26 each individual dealer's effective retail labor rate compared to the retail labor rate of competing dealers,
27 selling the product(s) of another manufacturer, located in their franchisee's Primary Market Area
28 ("PMA"). (Ibid; see also Document 18 attached to March 21, 2014 letter). Respondent uses this

1 information to come to a decision regarding each warranty labor increase request from its individual
2 franchisee. (See Document 18 attached to Respondent's March 21, 2014 letter).

3 TMS apparently utilizes a dealer's PMA as an element of Respondent's warranty reimbursement
4 schedule or formula, based upon its submission to the Board. Clearly, by definition, any given dealer is
5 the only franchisee of Respondent in the assigned PMA. The use by TMS of the assigned PMA in the
6 determination as to the warranty reimbursement rate only goes to establish that the formula is unique to
7 the individual dealer and subject to protest under Section 3065. However, any findings or determinations
8 by the Board regarding Respondent's warranty reimbursement schedule or formula can be applied by
9 Respondent to all dealers in the State of California in similar PMA and under similar costs structures as
10 may be determined by the Board.

11 **C. Respondent fails to provide adequate, fair and reasonable compensation to Protestant for**
12 **warranty work done by certain technicians**

13 Protestant repeats and incorporates by reference herein its arguments made above. Respondent
14 fails to provide adequate, fair and reasonable compensation to Protestant for warranty work done by
15 certain technicians, in fact, Respondent fails to provide any compensation for work done by certain
16 technicians at all, contrary to 3065. The Board clearly has jurisdiction to decide Protests related to
17 compensation pursuant to Section 3065 for the reasons already stated.

18 In addition, the Board has jurisdiction as specifically stated in Section 3065 to consider the
19 reasonableness of "all other conditions of the obligation." As alleged in the Amended Protest,
20 Respondent requires training in order to be eligible for reimbursement of certain warranty work, yet
21 Respondent fails to make such required training available to Protestant's technicians. This unavailability
22 of training is an unreasonable condition of Respondent's warranty reimbursement schedule or formula
23 and therefore subject to the Board's jurisdiction. Such a "condition" is specifically addressed in Section
24 3065(a), and allows the Board to consider evidence related to that condition. This is not a jurisdictional
25 issue. It is an issue of proof at hearing. This dispute is clearly within the Board's jurisdiction to hear
26 and decide.

1 **CONCLUSION**

2 The Board has specific statutorily conferred subject matter jurisdiction to hear this Amended
3 Protest of Protestant regarding Respondent’s warranty reimbursement schedule or formula, pursuant
4 to Section 3065. This Amended Protest, in which Protestant has standing to protest only as it pertains
5 to its own rights and interests, pertains to the issue of warranty compensation in different forms, i.e.
6 labor rate, as well as Respondent’s complete failure to pay any compensation to Protestant at all in
7 certain instances, in violation of Section 3065.

8 Any Board order regarding the labor rate, following hearing and decision on this instant
9 Protest, can be implemented by Respondent franchisor with respect to all of its franchisees in the
10 State of California, as such order will only apply to Protestant’s PMA, in which PMA Protestant is by
11 definition the only franchisee of Respondent.

12 Protestant respectfully requests that the instant Motion to Dismiss for lack of subject matter
13 jurisdiction be overruled and that the Board conduct a hearing on this matter pursuant to Vehicle Code
14 Sections 3065, 3066 and 3067.

15 DATED: November 6, 2015

16 /s/ Michael M. Sieving
17 MICHAEL M. SIEVING
18 Attorney for Protestant
19 PUTNAM MOTORS, INC., dba PUTNAM LEXUS
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2 **PROOF OF SERVICE**

3 STATE OF CALIFORNIA)
4)
5 NEW MOTOR VEHICLE BOARD)

6 I am employed in the County of Sacramento, State of California, I am over the age of 18 years and not
7 a party to the within action; my business address is 8865 La Riviera Drive, Unit B, Sacramento,
8 California 95826.

9 On this date, November 6, 2015, I served the foregoing documents described as:

10 **PROTESTANT'S OPPOSITION TO RESPONDENT'S MOTION TO**
11 **DISMISS AMENDE PROTEST DUE TO ALLEGED LACK OF**
12 **SUBJECT MATTER JURISDICTION**

13 I enclosed a true copy of said documents in a sealed envelope or package addressed to the persons noted
14 below.

15 _____ (By United States Mail) I placed the envelope for collection and mailing, following our firm's
16 ordinary business practices. I am familiar with our firm's practice for collecting and processing
17 correspondence for mailing. On the same day that correspondence is placed for collection and mailing,
18 it is deposited in the ordinary course of business with the United States Postal Service, in a sealed
19 envelope with postage fully prepaid.

20 _____ (By overnight delivery) I enclosed the documents in an envelope or package provided by an
21 overnight delivery carrier and addressed to the persons listed below. I placed the envelope or package
22 for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery
23 carrier.

24 _____ (By messenger service) I served the documents by placing them in an envelope or package
25 addressed to the persons at the addresses below and providing them to a professional messenger service
26 for service.

27 _____ (By fax transmission) Based on agreement of the parties to accept service by fax transmission,
28 I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax
machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

_____ (By electronic service) Based on a court order or an agreement of the parties to accept service
by electronic transmission, I caused the documents to be sent to the persons at the electronic notification
addresses listed below.

_____ (By personal service) I served the documents by delivering the envelope, by hand, to the persons
listed below.

_____ By ATT E-Mail I caused the above-entitled documents to be served through ATT E-Mail
addressed to all parties appearing on the ATT E-Mail electronic service list for the above-entitled case.
The file transmission was reported as completed and a copy of the ATT E-Mail pages will be maintained

1 with the original documents in our office. Service will be deemed effective as provided for in the
2 Electronic Case Management Order. I have complied with California Rules of Court, Rule 2.257(a) and
3 the original, signed Proof of Service is available for review and copying at the request of the court or
4 any party.

4 I declare under penalty of perjury under the laws of the State of California I am a member of the State
5 Bar of California and that the above is true and correct.

7 */s/ Michael M. Sieving*
8 MICHAEL M. SIEVING

11 **SERVICE LIST**

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