

1 **NELSON MULLINS RILEY & SCARBOROUGH, LLP**

2 PATRICIA R. BRITTON (Cal. Bar No. 100375)

3 Email: patricia.britton@nelsonmullins.com

4 Atlantic Station, 201 17th St. NW, Suite 1700

5 Atlanta, GA 30363

6 Telephone: (404) 322-6000

7 Facsimile: (404) 322-6050

8 STEVEN A. MCKELVEY, JR. (*admitted pro hac vice*)

9 E-Mail: steve.mckelvey@nelsonmullins.com

10 STEVEN B. MCFARLAND (*admitted pro hac vice*)

11 E-Mail: steven.mcfarland@nelsonmullins.com

12 1320 Main Street / 17th Floor

13 Post Office Box 11070 (29211-1070)

14 Columbia, SC 29201

15 (803) 799-2000

16 Attorneys for Respondent

17 Toyota Motor Sales, U.S.A., Inc.

18 **STATE OF CALIFORNIA**
19 **NEW MOTOR VEHICLE BOARD**

20 In the Matter of the Protest of

21 PUTNAM MOTORS, INC. dba PUTNAM)
22 LEXUS,)

23)
24 Protestant,)

25)
26 v.)

27)
28 TOYOTA MOTOR SALES, U.S.A., INC.,)

29)
30 Respondent.)

31)
32)

**MOTION TO DISMISS AMENDED
PROTEST**

Protest No. PR- 2428-15

33 Pursuant to the Pre-Hearing Conference in this matter, Respondent Toyota Motor Sales
34 USA, Inc. (“TMS”) hereby files this Motion to Dismiss the Amended Protest filed by Protestant
35 Putnam Motors, Inc. dba Putnam Lexus (“Putnam Lexus”). As discussed in detail below, the
36 Amended Protest should be dismissed because the Vehicle Code does not give the New Motor
37 Vehicle Board (“Board”) subject matter jurisdiction to adjudicate this dispute.
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INTRODUCTION

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This case involves a dispute regarding the amount of warranty labor reimbursement paid by TMS to a single, individual Lexus dealer known as Putnam Lexus. On July 31, 2014, Putnam Lexus filed its initial protest pursuant to Section 3065 of the Vehicle Code asking the Board to exercise jurisdiction over this dispute and hold a hearing to determine whether it is entitled to demand an increase in its warranty labor compensation from TMS, and claiming TMS has unfairly prevented the Protestant’s technicians from receiving the training necessary to complete certain warranty repairs because its training classes are full or its technicians have been waitlisted. Contrary to these claims, however, Section 3065 does not give the Board authority or jurisdiction to resolve these types of claims.

As discussed below, Section 3065 obligates motor vehicle franchisors to file a warranty reimbursement schedule or formula with the Board setting forth its method for calculating the warranty reimbursement rates of all of its authorized dealers in the state. Section 3065 expressly limits the Board’s authority by authorizing it to hear protests challenging only the reasonableness of this schedule or formula itself, and further expressly limits the available remedies to having the franchisor correct any deficiencies in the schedule or formula as to all dealers in the entire state. Putnam Lexus, however, makes no allegation that TMS’s schedule or formula itself is unreasonable, or that its condition on training is unfair on its face. Putnam Lexus even admits it “does not dispute the policy of TMS to require that the dealership technicians receive adequate training.” Instead, this Protest seeks to challenge TMS’s warranty compensation schedule or formula (and the conditions thereto) only *as applied* to a single dealer individually: Putnam Lexus. The Legislature simply has not granted the Board jurisdiction to decide such a dispute. Putnam Lexus’s Amended Protest therefore should be dismissed.

ANALYSIS

I. The Board does not have Jurisdiction to Adjudicate Disputes over the Application of TMS’s Warranty Reimbursement Schedule or Formula to one Individual Dealer.

It is well established that the Board is a quasi-judicial agency of limited jurisdiction, and that the Board “does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee.” *See, e.g., Mazda Motor of Am., Inc. v. California New Motor Vehicle Bd.*, 110 Cal. App. 4th 1451, 1457, 2 Cal. Rptr. 3d 866, 870 (Ct. App. 2003); *Hardin Oldsmobile v. New Motor Vehicle Bd.*, 52 Cal. App. 4th 585, 589, 60 Cal. Rptr. 2d 583 (Ct. App. 1997). Instead, the Board’s jurisdiction to preside over disputes is expressly limited to those specifically committed to its jurisdiction by statute. *Mazda Motor of Am., Inc.*, 110 Cal. App. 4th at 1457, 2 Cal. Rptr. 3d at 870 (“The Board’s jurisdiction to preside over claims is limited by its statutory authorization.”); *see also* Veh. Code § 3050(a) (limiting the Board’s jurisdiction to “those matters specifically committed to its jurisdiction”).

The statutory authorization at issue in this case is set forth in Section 3065 of the Vehicle Code. Pursuant to that provision, a franchisor must file a copy of its “warranty reimbursement schedule or formula” with the Board, and the schedule or formula “must be reasonable” with respect to the time and compensation permitted for dealers to complete warranty work. Veh. Code § 3065(a). In order to ensure compliance with the Vehicle Code, Section 3065 permits dealer to file a protest challenging the reasonableness of the schedule or formula itself, and states that “[t]he reasonableness *of the warranty reimbursement schedule or formula* shall be determined by the board if a franchisee files a protest with the board.” *Id* (emphasis added). It also provides that if the Board determines that the schedule or formula is not reasonable, it has the authority to order the franchisor to “correct the failure *by amending or replacing the warranty reimbursement schedule or formula* and *implementing the correction as to all*

1 *franchisees of the franchisor that are located in this state.” Id. § 3065(b) (emphasis added).*

2 Section 3065 also provides dealers the right to protest any reduction to the fixed
3 percentage, time, or compensation permitted for warranty reimbursement under the franchisor’s
4 schedule or formula. In those situations, the statute expressly provides that the franchisor must
5 give 15 days’ notice prior to such a reduction, and that the dealer has the right to file a protest
6 challenging the reduction within 6 months of receiving notice. *Id. § 3065(a).* It also gives the
7 franchisor the burden of proof to establish the reasonableness of the reduction in the fixed
8 percentage, time, or compensation permitted for warranty reimbursement. *Id.*

10 The plain language of these provisions make clear that the protest jurisdiction of the
11 Board under Section 3065 (relating to warranty labor rates) is limited to determining the
12 reasonableness of the franchisor’s warranty schedule or formula itself, including any reduction
13 to the compensation provided under the schedule or formula. Nothing in the statute gives a
14 dealer the right to file, or authorizes the Board to adjudicate, a protest challenging the
15 application of that schedule or formula to one individual dealer. Section 3065 does not (1)
16 authorize such protests, (2) establish a procedure for such protests, or (3) set forth a deadline for
17 dealers to file such a protest. Moreover, while the statute authorizes the Board to order a
18 franchisor to amend or replace its warranty schedule or formula as to all franchisees in the state,
19 in stark contrast, Section 3065 provides no authority for the Board to require a franchisor to
20 increase an individual dealer’s warranty labor rate.¹

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25 ¹ Section 3065’s lack of express procedures and authority for the Board to adjudicate disputes regarding the
26 warranty labor rate paid to an individual dealer is distinguishable from other provisions in the Vehicle Code where
27 the Board has been granted authority to entertain protests over disputes between franchisors and dealers. *See Veh.*
28 *Code §§ 3060 and 3061 (authorizing protests for proposed terminations and establishing detailed substantive and
procedural for handling same); id. §§ 3062 and 3063 (authorizing protests for proposed add-points/relocations and
establishing detailed substantive and procedural for handling same).* These other provisions demonstrate that had
(footnote continued)

1 In this case, Putnam Lexus is not seeking an adjudication regarding either of the two
2 warranty labor rate issues expressly governed by Section 3065. The Amended Protest contains
3 no allegation that TMS’s reimbursement schedule or formula is unreasonable or otherwise
4 deficient. Likewise, there is no allegation that TMS is proposing to reduce any fixed percentage,
5 time, or compensation permitted for warranty work under the schedule or formula. The
6 Amended Protest also does not ask the Board to order TMS to amend or correct its schedule or
7 formula as to all franchised Lexus dealers in the state. Instead, the Amended Protest repeatedly
8 makes clear it is seeking to challenge the *application* of that schedule or formula to Putnam
9 Lexus individually, (Am. Protest ¶¶ 7-8) (stating it is challenging the schedule or formula “*as*
10 *applied to Putnam*” only) (emphasis added), and is asking the Board to order “an increase in its
11 warranty reimbursement labor rate.” (*Id.* at pg 4 ¶ 2). Nothing in Section 3065, however,
12 authorizes such a protest or gives the Board jurisdiction to order that type of relief.
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15 The same analysis applies to the Protestant’s claim that TMS has unreasonably denied its
16 technicians the opportunity to attend training classes on certain warranty repairs. In its
17 Amended Protest, Putnam Lexus claims that TMS requires technicians to complete training
18 before they are permitted to be reimbursed for warranty work, and that although some of its
19 technicians have sought to enroll in certain training classes, those classes are full or its
20 technicians have been waitlisted. Based on these allegations, Putnam Lexus alleges that the
21 unavailability of this training for its technicians is an “unreasonable condition” to warranty
22 reimbursement and falls within the Board’s jurisdiction under Section 3065.
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27 the Legislature intended to give the Board authority to hear protests from individual dealers seeking an increase in
28 their individual warranty labor rate, it knew how and could have done so. It did not.

1 In support of this claim, Putnam Lexus refers to the language in Section 3065 stating that
2 a franchisor’s schedule or formula shall be reasonable with respect to the time and compensation
3 allowed for warranty work “and all other conditions of the obligation.” Veh. Code § 3065(a).
4 As discussed above, however, Section 3065 expressly limits the Board’s jurisdiction to
5 determining the reasonableness of the warranty schedule or formula itself—including the
6 reasonableness of any conditions to that schedule or formula. In its original Protest, Putnam
7 Lexus expressly admitted this condition for warranty reimbursement is reasonable and
8 appropriate on its face—it expressly stated that “Putnam does not dispute *the policy of TMS* to
9 require that the dealership technicians receive adequate training.” (Initial Protest ¶ 8).² Putnam
10 Lexus therefore is not attempting to challenge this condition itself, but again is attempting to
11 challenge its application to Putnam Lexus and its technicians only. Indeed, both versions of the
12 Protest expressly state they are seeking to challenge TMS’s “implementation” of this policy “to
13 Putnam.” (*Id.*) (Am. Protests ¶ 8). Nothing in Section 3065, however, authorizes a protest
14 challenging the implementation of a condition to one individual dealer.

17 The Amended Protest challenging TMS’s application of its warranty schedule or formula
18 to Putnam Lexus individually, and the application of the conditions to compensation under that
19 schedule or formula to Putnam Lexus individually, therefore falls outside of the Board’s
20 statutory authority and jurisdiction under Section 3065 and should be dismissed.

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23 ² Although Putnam Lexus deleted this admission from its Amended Protest in an attempt to convince the Board to
24 exercise jurisdiction where none exists, it is well established that the allegations contained in prior versions of a
25 pleading may be considered in ruling on a motion to dismiss. *People ex rel. Gallegos v. Pac. Lumber Co.*, 158
26 Cal. App. 4th 950, 957, 70 Cal. Rptr. 3d 501, 507 (2008), *as modified* (Feb. 1, 2008). Moreover, a plaintiff may
27 not discard factual allegations made in a prior complaint, avoid them by omission in an amended pleading, or
28 contradict the facts or positions taken in earlier pleadings. *See id.*; *see also Cantu v. Resolution Trust Corp.*, 4 Cal.
App. 4th 857, 877, 6 Cal. Rptr. 2d 151, 162 (1992). When a party files an amendment and attempts to avoid
defects in the original pleading by omitting facts, the presiding judge may take judicial notice of the prior pleadings
and disregard any inconsistent allegations. *Colapinto v. Cnty. of Riverside*, 230 Cal. App. 3d 147, 151, 281 Cal.
Rptr. 191, 194 (Ct. App. 1991).

1 **II. Protestants’ Argument that the Board has Jurisdiction to Adjudicate this Dispute**
2 **Under Harbor City Harley.**

3 During the Pre-Hearing Conference in this case, counsel for Putnam Lexus referenced
4 the Board’s previous decision in *Harbor City Enterprises, Inc. dba Harbor City Harley v.*
5 *Harley-Davidson of Westminster, Inc.*, Protest Nos. PR-874-87 and PR-875-87 (1988), and in
6 reliance on that case urged the Board to exercise jurisdiction over this dispute.

7 *Harbor City Harley* was decided in 1988—more than 27 years ago and nearly a decade
8 before the substantial revisions to the Vehicle Code in 1997. Prior to those revisions, there was
9 a split in authority regarding the scope of the Board’s jurisdiction to entertain disputes between
10 franchisors and franchisees, and some decisions held that the Vehicle Code gave the Board
11 broad jurisdiction to hear any and all disputes arising out of the franchise relationship without
12 limitation. *See, e.g., Yamaha Motor Corp. v. Superior Court*, 195 Cal. App. 3d 652, 240 Cal.
13 Rptr. 806 (Ct. App. 1987); *Zaheri*, 17 Cal. App. 4th 288, 21 Cal. Rptr. 2d 325. *Harbor City*
14 *Harley* was decided during that time period. Since that time, however, the Vehicle Code has
15 been amended to make clear—and numerous decisions have held—that the Board does not have
16 plenary authority to resolve all disputes between a franchisor and a franchisee, and that the
17 Board’s jurisdiction is expressly limited to those specifically committed to its jurisdiction by
18 statute. *See, e.g., Veh. Code § 3050(d) and (e); Mazda Motor of Am.*, 110 Cal. App. 4th at
19 1457, 2 Cal. Rptr. 3d at 870; *Hardin*, 52 Cal. App. 4th at 589, 60 Cal. Rptr. 2d 583.

20 In addition to these changes, the Legislature enacted multiple revisions to Section 3065
21 after the *Harbor City Harley* decision to expressly make clear the Board does not have
22 jurisdiction to entertain disputes regarding the amount of warranty compensation paid by a
23 franchisor to one individual dealer. At the time *Harbor City Harley* was decided, Section 3065
24 stated that the warranty reimbursement schedule or formula shall be reasonable with respect to
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1 the time and compensation allowed the franchisee for warranty work, and provided that “the
2 *reasonableness thereof shall be determined by the board if a franchisee files a protest with the*
3 *board; provided that a franchisee files a notice of protest with the Board.*” Veh. Code §
4 3065(a) (1974) (emphasis added). The statute’s ambiguous use of the word “thereof” arguably
5 suggested dealers at that time could protest the reasonableness of the “schedule or formula” and
6 the reasonableness of the compensation paid to one individual dealer for warranty work.
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8 This ambiguity was conclusively resolved—and the *Harbor City Harley* decision was
9 expressly overruled and superseded—when the Legislature amended Section 3065(a) to make
10 clear that the Board’s jurisdiction to adjudicate protests is limited to disputes regarding the
11 reasonableness of the franchisor’s warranty schedule or formula itself. Specifically, in 1993, the
12 Legislature revised the emphasized sentence above to remove ambiguous reference to “thereof”
13 and replace it with the phrase “the warranty reimbursement schedule or formula”:
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15 The reasonableness of *the warranty reimbursement schedule or formula* shall be
16 determined by the board if a franchisee files a protest with the board if a
franchisee files a notice of protest with the Board.

17 Veh. Code § 3065(a) (1974) (emphasis added). The Legislature further clarified the scope of
18 the Board’s jurisdiction when it revised Section 3065 again in 2013 to add the following:
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20 If in a protest permitted by this section filed by any franchisee *the board*
21 *determines that the warranty reimbursement schedule or formula fails to*
22 *provide adequate and fair compensation or fails to conform with the other*
23 *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.

24 These revisions make clear that after the decision in *Harbor City Harley*, the Legislature took
25 affirmative steps to ensure that the Board’s protest jurisdiction related to warranty labor rates is
26 limited to determining the reasonableness of the franchisor’s schedule or formula, and to
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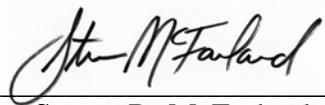
1 ordering the manufacturer to implement a corrected formula for all dealers in the state. Putnam
2 Lexus's reliance on a decision based entirely on a previous version of Section 3065 therefore
3 lacks merit, and the Board lacks jurisdiction to adjudicate this protest under the plan language of
4 that statute as it stands today. The Amended Protest therefore should be dismissed.

5 **CONCLUSION**

6 For the reasons set forth above, TMS respectfully requests that the New Motor Vehicle
7 Board enter an Order dismissing the Amended Protest filed by Putnam Lexus in its entirety for
8 lack of subject matter jurisdiction.
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11 DATED: October 22, 2015

NELSON MULLINS RILEY &
SCARBOROUGH, LLP

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14 By: 
15 Steven B. McFarland

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PROOF OF SERVICE
PUTNAM MOTORS, INC. dba PUTNAM LEXUS v.
TOYOTA MOTOR SALES USA, INC.
Protest No. PR-2428-15

STATE OF SOUTH CAROLINA, COUNTY OF RICHLAND

At the time of service, I was over 18 years of age and not a party to the action. My business address is 1320 Main Street, 17th Floor, Columbia, South Carolina 29201.

On October 22, 2015, I served the following document(s):

TOYOTA MOTOR SALES, U.S.A., INC.'S MOTION TO DISMISS AMENDED PROTEST

I served the documents on the following persons at the following addresses:

New Motor Vehicle Board
1507 – 21st Street, Suite 330
Sacramento, CA 95811
E-Mail: nmvp@nmvp.ca.gov

Michael M. Sieving, Esquire
8865 La Riveriera Drive, Unit B
Sacramento, CA 95826
msievinglaw@att.net
COUNSEL FOR PROTESTANT

The documents were served by the following means:

- BY ELECTRONIC MAIL: I caused such document to be transmitted via electronic mail pursuant to the parties listed on the Proof of Service.
- (BY U.S. MAIL) I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed above and (specify one): Deposited the sealed envelope or package with the U.S. Postal Service, with the postage fully prepaid.
- Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business VIA EXPRESS DELIVERY, in a sealed envelope of package.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2015 at Columbia, South Carolina.

/s/ Steven B. McFarland
Steven B. McFarland